

SUPREME COURT OF NIGERIA
FRIDAY 21ST JUNE, 2002. SC. 169/1997
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO, A. O. EJIWUNMI, JJSC

1. FRANCIS SHANU ... APPELLANTS/CROSS-RESPONDENTS
2. NIGER WOLF
ORGANIZATION LTD
AND
AFRIBANK NIGERIA PLC ... RESPONDENT/CROSS-APPELLANT

APPEALS - Grounds - Competence - Ground 5 being of fact is wide and vague - And since leave was not obtained to file it - It shall be deemed incompetent (H1)

COURTS - Judgments - Binding nature of - Once court gives judgment - It becomes functus officio - And cannot reverse same - Except under the very restricted slip rule (H2)

COURTS - Evidence - Admission - Court is not bound to stick to admitted piece of evidence - If it later discovers that such evidence is not legal - As it must expunge same - And decide on legally admissible evidence (H3)

COURTS - Evidence - Admission - Court is not permitted to admit and act on inadmissible evidence - But if such evidence was admitted by overruling an objection - The same must be rejected at final judgment (H4)

EVIDENCE - Previous proceeding - Admission - Conditions - Evidence Act s.34(1) - Before such evidence is admitted - There must be compliance with the statutory provision (H5)

EVIDENCE - Previous proceeding - Evidence Act s.34(1) - Intendment - The section is not used to avoid hearing de novo - But rather to secure previous evidence - That complements other evidence - Recorded in later proceeding (H6)

1978 Shanu v. AfriBank Nig Plc (2002) 6 KLR (pt. 142) 1977; (2002)

COURTS - Evidence - Adjudication - Where inquiry is commenced before one adjudicator - But completed by another - The latter cannot decide upon evidence given before the former (H7)

JUSTICE - Courts - Duty to do justice - Courts are to do substantial justice - And justice is not done - Where judgment is reached based on no facts - Due to wrong procedure adopted by court and parties (H8)

APPEALS - Issues - Determination - Court of Appeal ought to decide - Whether fresh ground sought to be raised - Was on substantial point of law - And whether no further evidence would be adduced in support (H9)

COURTS - Interlocutory applications - Determination of - Court should not delve into issues meant for the substantive suit or appeal - When considering interlocutory applications (H10)

APPEALS - Grounds of law - When material evidence was admitted - In contravention of statutory provisions - Then a substantial issue of law is raised (H11)

APPEALS - Grounds of law - Leave - Question of contravention of Evidence Act s.34(1) - Raises substantial point of law - Upon which leave ought to be given (H12)

FACTS

Plaintiffs/appellants alleged that they imported into Nigeria, the sum of US \$25,000,000 in 100 dollar bills on a tanker vessel via Warri Port on or about 29th June 1983. Appellants further stated that the money was eventually paid into defendant/respondent bank (Afribank Nigeria Plc. Warri branch) upon an agreement with the bank to pay appellants the naira equivalent of N2 per dollar, making a total of N50,000,000.00. Thereafter, appellants opened a current account into which the sum of N40,000,000.00 was credited in exchange for US \$20 Million. As a result of insufficient funds at the material time, the balance of N10,000,000.00 was deferred. However, respondent denied any knowledge of the lodgment of 25 mil-

lion dollars with them.

Consequently, appellants instituted this suit at the High Court of Bendel State (now Edo State), Benin City. Evidence was led by both sides before Obi, J. The matter had reached address stage when Obi, J, relocated to Delta State after it was created from Bendel State. The matter therefore came up de novo before Edokpayi J. Appellants therefore brought an application before the new judge, seeking for the admission of certified true copy of evidence obtained in the previous proceedings before Obi J, and for an order granting leave to appellants to amend their statement of Claim. In his ruling Edokpayi J, admitted the certified true copy of the evidence and eventually held in favour of appellants on preponderance of evidence of the previous proceedings. Being dissatisfied, respondent filed appeal at the Court of Appeal, Benin City. The court allowed the appeal and ordered that the case be heard de novo before another judge of the Edo State High Court. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal decision on admissibility of exhibit 19 in its final judgment is sustainable.

2. Whether the Court of Appeal did not err by allowing the appeal before it.”

“1. Whether the Court of Appeal failed to consider several of the complaints of the respondent relating to the evaluation of evidence and if so whether this occasioned a miscarriage of Justice?

2. Whether the Court of Appeal was correct in refusing the respondent leave to raise the issue of admissibility of the previous evidence of the 1st appellant and the defence witnesses having regard to the material before the court and the submissions made to it?

3. Whether the Court of Appeal 3 was correct in rejecting the respondent’s application to amend the record of appeal?

4. Having expunged exhibit 19 (the record of the previous evidence of the witnesses that the trial court relied upon) whether the Court of Appeal was correct to order a retrial?”

HELD

(Unanimously dismissing the appeal per lead

judgment of **UWAIFO JSC**)

APPEALS - Grounds - Competence

1. The particulars of misdirection alleged in the passage quoted from the judgment of the court below do not arise therefrom or have any bearing therewith. This makes the ground of appeal incomprehensible. As to ground 5, it is in my view worthless. It says: "The Court of Appeal erred in law when it failed to dismiss the appeal." The particulars then stated, inter alia, that there were findings of fact supported by documentary and oral evidence, that the totality of the evidence was comprehensively evaluated and that there was no basis for allowing the appeal from the judgment of the trial court. I must say, with due respect, that the ground of appeal as couched is too wide and vague. The so-called particulars in support are not helpful. Particulars of a ground of appeal are meant to elucidate and advance the reason for the complaint in that ground. Furthermore, the said ground 5 is by no means a ground of law. Even if it had not been at large and vague as it is, since no leave was obtained to file it, it would still be defective for incompetence. I therefore strike out grounds 4 and 5. At the same time, issue 2 being too wide, I strike it out as it is not issue fit for deliberation by an appellate court whose duty is to consider in what aspect and manner a court below has been in error, if at all. That should be done by taking specific issues for analysis and discussion and not by considering an issue which seems to encompass or involve every imaginable but unexpressed complaint against a judgment. This apart, the said second issue is not supported by any ground of appeal.

G (p. 1995 A)

Judgment - Binding nature of

2. It is true that as a general rule a court is not permitted to reverse itself on taking a decision on an issue in the same proceedings. Having so taken a decision, it is either that the court is said to be functus officio on that issue or is bound by it as an issue estoppel. After a court has made an order or given a judgment it becomes functus officio and cannot change or reverse the same except under the very restricted slip rule.

Such order or judgment can only be amended or reversed, if need be, by way of an appeal. The case of Lawal v. Dawodu (supra) is authority for the general rule that a court is bound by an issue it has distinctly decided even within the same cause of action. (p. 1999 F)

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Evidence - Admission

3. Issue estoppel, however, does not apply against a court which rules that a piece of oral evidence or a document is admissible but later finds that in law or procedure it is not. The duty of the court to decide on legally admissible evidence is an exception to the rule that a court is functus officio on taking a decision on a matter and cannot reverse itself on it, and is considered, I think, a stronger element of justice than issue estoppel that might have precluded it from later rejecting inadmissible evidence. The admissibility of a document or a piece of oral evidence may be contested by the parties and the trial judge will normally rule on it. If in his ruling he admits the oral or documentary evidence, he may at the stage of writing his final judgment discover that it is not legal evidence at all. It cannot be considered a valid argument that because he gave a ruling to admit the evidence, he is bound to stick with his error. He has a duty to expunge the evidence and decide on legally admissible evidence. This can be done even at the stage of judgment and this extends to the matter at the appeal stage. There are numerous decisions on this and I think they are unambiguous. (p. 2000 C)

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Evidence - Admission

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4. The principle is a strong one. It is that the court is not permitted in any event to admit and act on legally inadmissible evidence. If such evidence has been admitted even by overruling an objection to its admission, the court must reject it when giving its final judgment even if that amounts to overruling itself to do so. (p. 2001 E)

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EVIDENCE - Previous proceeding - Admission - Conditions

5. It must be understood that in order to legally admit evi-

dence given by a witness in a previous judicial proceeding when tendered in a subsequent proceeding, or at a later stage of the same proceeding for the purpose of proving the truth of the facts which it states [i.e. in the sense that it is true that those facts were stated, not that the facts represent the truth; those facts become evidence which the trial court has a duty to evaluate and it is for it to decide which fact is true and which is not], the conditions stipulated under section 34(1) of the Evidence Act must be complied with. Compliance there-with is a statutory requirement to make such evidence legally admissible. That is why it is irrelevant whether there was no objection to its admission. In other words, unless there is compliance, the evidence cannot be admitted by consent.
(p. 2001 G)

Evidence Act s.34(1) - Intendment
6. I do not understand the purpose of section 34(1) of the Evidence Act to be to permit of a package of the evidence given by all the witnesses or a good number of them in a previous proceeding on obviously contentions issues and of conflicting nature of evidence to be placed before another judge for a resolution and judgment. Section 34(1) is not to be used to avoid hearing de novo. It is, in my view, to fill in an unfortunate or unavoidable absence of a witness or two, as the case may be, who had earlier given evidence and were cross-examined, so that such evidence may be made available to complement other evidence that may be recorded in a later proceeding. It would be improper to put the integrity of a proper hearing of a case by a trial judge in doubt by flooding it with evidence of witnesses in an earlier proceeding which would place the judge at a disadvantage as to who and what to believe because of the nature of the evidence taken by another judge viva voce. (p. 2003 A)

Evidence - Adjudication
7. Where an inquiry is commenced before one adjudicator and completed by another, the second adjudicator cannot as a rule decide upon the evidence given before the first. It is the

principle that the judicial discretion which an adjudicator has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for him, generally, to act upon evidence taken before another adjudicator unless there is a statutory provision permitting that procedure. In Re Guerin (1888) 16 Cox CC 596 at p. 601, Wills, J., said:

“It is contrary to all my ideas and experience of justice for depositions taken before one magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to judge for himself of the truth of their statements.”
(p. 2004 D)

Courts - Duty to do justice

8. It has been urged on behalf of the respondent that the Court of Appeal should have dismissed the present case before us rather than order a retrial. I suppose this may be based on the fact that the plaintiffs who had the burden of proving their case when they came before Edokpayi, J., relied entirely on legally inadmissible evidence in the nature of exhibit 19. Once that evidence is expunged, as it has been done, it may be said there is no evidence to support the claim and therefore it should be dismissed. I believe that approach would stand justice on its head in view of the circumstances of the case. Courts are set up to do substantial justice and to ensure that there is a real semblance of the pursuit of it. Justice cannot be seen to have been done when a judgment is reached based on no facts whatsoever laid before the court because of a wrong procedure adopted by the parties and the court whereas there are facts ordinarily available. The parties will walk away with the feeling that they did not put their case across to the court which ought to hear them; and all because counsel and the court adopted a totally flawed procedure. That is worse than judgment by mere technicality which this court denounces. It seems to me therefore that to accept the judgment by Edokpayi, J. or to simply set it aside and close the case will in

either case in my respectful view, be a betrayal of justice.

I am clear in my mind that Edokpayi, J., who did not see and hear any of the witnesses testify did not try the case as a first instance judge is expected to do. He was not the trial judge but Obi, J. However, Obi, J. did not produce a judgment but Edokpayi, J did. What Edokpayi, J., produced in the circumstances, with due respect, was a mock-judgment delivered upon “the dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who receive it” per Coleridge, J. in R v. Bertrand (supra). Exhibit 19 should not have been admitted in evidence and relied on. When it is expunged or discountenanced, as the court below rightly did, there is no evidence upon which the judgment delivered by Edokpayi, J., can be based. I answer the appellants’ sole issue in the affirmative. I therefore see no merit in this appeal and dismiss it. (p. 2007 F/2008 F)

APPEALS - Issues - Determination

9. With profound respect to the learned Justice, he was in grave error to have reached this conclusion when the application before the court was for leave to raise a ground of appeal as to whether exhibit 19 was properly admitted in evidence. Whether it was or was not should have awaited a consideration of the appeal on the point. What was open to the court below at that stage to decide was whether the ground of appeal sought to be raised for the first time on appeal was on substantial point of law, substantive or procedural, so as to prevent an obvious miscarriage of justice, and it was such that no further evidence would be adduced in support of it. (p. 2009 D)

COURTS - Interlocutory applications - Determination of

10. But with the decision the court below reached in its interlocutory ruling, it breached the admonition given by this court on several occasions that a court should not delve into issues meant for the substantive suit or appeal when considering relevant interlocutory applications. (p. 2009 H)

APPEALS - Grounds of law

11. It follows that it is important to recognize that when material evidence which by statute can only be admitted in judicial proceedings under certain conditions was admitted in contravention of the statutory provisions, that event clearly raises a substantial issue of law. (p. 2011 E)

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APPEALS - Grounds of law - Leave

12. The position is quite clear to me that when the question is whether evidence has been admitted in contravention of the provisions of section 34(1) of the Evidence Act, as was done in this case, it is right to argue that it raises a substantial point of law upon which leave ought to be given to raise a new issue particularly if that evidence influenced the judgment being appealed from, or in fact formed the basis of it, as it happened in the present case. The court below was wrong not to have appreciated this when it refused leave to the cross-appellant to raise the issue of the admissibility of exhibit 19. I accordingly answer cross-appellant's issue 2 in the negative.

(p. 2011 H)

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NOTABLE POINT OF INTEREST

UWAIFO JSC

1. Trial judge determines the credibility of witness

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A trial judge is a peculiar adjudicator. Of all judges the heaviest burden and responsibility of deciding a case rest with him. He normally hears a case by receiving evidence both oral and documentary from witnesses who appear before him in court, are asked questions and cross-examined. In the process, he engages himself to see, listen to and watch them testify. Not only that, his feelings and impressions are tested from time to time upon one issue or another when, apart from listening, he watches: he takes mental note of the performance of witnesses, their demeanour in the witness box, in particular how they react to questioning and the manner they give answers. Quite often, it is this that helps the trial judge as to who and what to believe. The witnesses are telling him what he was not aware of before, the circumstances in which it happened and in respect of which both

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sides claim that their evidence represents the truth, and the trial judge will have to take a decision. So if the trial judge is up to the demands of his duty, he will continue to size up the witnesses in their oral testimonies. Is a particular witness lying or prevaricating or just slow in nature, or has he a peculiar idiosyncrasy? That is for the trial judge to determine. When there are relevant documents, they serve as the touchstone against which the oral testimony can be tested, and so much of the demeanour of a witness may not quite matter.
(p. 2004 H)

C REPRESENTATION

Chief M. I. Ahamba SAN with Chidi Nwuke Esq., for the appellants
B. O. Ogundipe Esq., for the respondent/cross-appellant

D CASES REFERRED TO

- Ugo v. Obieke (1989) 1 NWLR (pt. 99) 566
A-G Bendel State v. Aideyan (1989) 4 NWLR (pt. 118) 646
Nwosu v. Udeaja (1990) 1 NWLR (pt. 125) 188
Nnaji for v. Ukomu (1985) 2 NWLR (pt. 9) 686
E Ukaegbu v. Ugoji (1991) 6 NWLR (pt. 196) 127
Ogbogu v. Ndiribe (1992) 6 NWLR (pt. 245) 40
Ito v. Ekpe (2000) 3 NWLR (pt. 650) 678
Ebba v. Ogodo (2000) 10 NWLR (pt. 675) 387
Asiyanbi v. Adeniji (1967) 1 All NLR 82
F Olurotimi v. Ige (1993) 8 NWLR (pt. 311) 257
R. v. Hall (1973) 1 All ER 1
Obowale v. Williams (1996) 10 NWLR (pt. 477) 146
State v. Friday (1970/71) 1 ECSR 24
G Ezeanya v. Okeke (1995) 4 NWLR (pt. 388) 142
Lawal v. UBN (1995) 2 NWLR (pt. 378) 407

STATUTES REFERRED TO

- Evidence Act s. 34(1)
H Magistrates Courts Act 1952 s. 98(6)

LEAD JUDGMENT BY UWAIFO JSC

This is an appeal from a judgment of the Court of Appeal, Benin Division, given on 11 July 1998 [Coram: Akintan and Nsofor

JICA, Akpabio JCA dissenting] which allowed the appeal against the decision of G. E. Edokpayi, J., sitting at the High Court Benin.

The plaintiffs, now appellants, alleged as per their amended statement of claim to have imported into Nigeria, the sum of US \$25,000,000 in 100 dollar bills making 250,000 such bills, on a Tanker Vessel called MV Botony Trinity which berthed at Warri Port on or about 29 June, 1983. They said the money was eventually paid into the respondent bank [Afribank Nigeria Plc. Warri branch] upon an agreement with the bank to pay the plaintiffs the naira equivalent of N2 per dollar, making a total of N50,000,000.00. This was on 22 July, 1983 whereof, as alleged, the plaintiffs opened a current account into which the sum of N40,000,000.00 was credited in exchange for US \$20 Million. The balance of N10,000,000.00 was to be credited later "due to insufficient funds" at the time. The said balance was later said to have been credited. It turned out that the defendants denied any knowledge of the lodgement of 25 million dollars with them. The plaintiffs consequently sued them by writ of summons filed on 11 March, 1993 at the High Court, Benin jointly and severally for.

(1) N50,000,000.00

(2) Interest at commercial bank rate of 30% per annum from 22 July 1983 on the sum of N50,000,000.00 until judgment is delivered.

(3) Loss in the value of the Naira by 1000% which is equal to N500,000,000.00.

The defendants [i.e. the present respondent/cross-appellant and one Segun Ajayi as 2nd defendant] in their statements of defence denied there was ever any such transaction. They averred that no vessel known as MV Botony Trinity berthed at Warri Port as alleged, or that if it did, that it brought such or any amount of US dollars. They said further that any documents to that effect would be forgeries.

Evidence was led by both sides before Obi, J., who presided over the proceedings at the High Court, Benin. The 1st plaintiff testified and called five witnesses while the 2nd defendant testified and the 1st defendant called nine witnesses. Several documents were admitted in evidence. The case had reached address stage when Obi, J., relocated to Delta State after it was created from the erstwhile

Bendel State.

From the evidence led before Obi, J., the following questions, among other matters, had created some agitation of the mind, which he as the trial judge would have had to resolve in his primary duty, having seen and heard the witnesses testify. The first question is, did
B MV Botony Trinity berth at Warri Port? The plaintiffs claimed that the money came through the said Vessel. An Assistant Controller of Customs, Michael Arubasa, who gave evidence as d.w.5, after testifying that tanker vessels do not carry any consignment other than oil and
C that foreign currency could not be regarded as merchandise, said:

“We have since gone through our document and there is no record of Customs dealing with Botony Trinity in 1983. We checked through our arrivals and sailing register for 1983 and we could find nothing about Botony Trinity.”

D He then tendered a huge register for that purpose which was admitted as exhibit 12, and continued:

“From records available Botony Trinity never came to Warri Port on the date in question. Exhibit 12 is conclusive that Botony Trinity never came to Warri Port”.

E This is a vital evidence coming from this witness, backed by documentary evidence. Similarly, Bassey Effiong Eme, a Transport Officer in the Nigerian Ports Authority, Warri (d.w.6.) said:

“I was in Warri in June to August 1983, but not as Traffic Officer. I am on subpoena to give evidence in this case. Our record
F shows that Botony Trinity was not in our port between June to August 1983.”

The second question is, was there in fact US \$25 million dollars cargo or consignment imported and brought to the defendant
G banks Christopher Obeto, a Senior Manager, Central Bank of Nigeria (d.w.3) said:

“Using machine to count new notes of 250,000 will take between 5-6 days. Using the machine if they are old notes, they (sic) could take much longer.”

H Also Adelegun Ola Owolabi (d.w.4.), another Senior Manager, Currency Operation Department, Central Bank of Nigeria, said:

“We count notes by machine. It will take an operator 25 days to count 2 million pieces by machine. An operator counts 7 boxes a day working for 8 days (sic: hours). It is not possible to make an

operator work for 24 hours. It will take roughly few days of 8 hours to count 250,000 notes."

Yet, the 1st plaintiff said the money was counted in three hours although he said it was counted in bundles! However, a witness called by him, one Lucky Ojo Osawe (p.w.5) testified that the money was counted in notes one by one. He said: B

"The consignment was in the Captain's long room. The pilot opened the consignment with his key. I then proceeded to count the money one by one with counting machine which was already inside the vessel. Some one operated the machine while I was there. The money in dollars was counted in my presence. US dollars in 100 denominations put in bundles. The machine counted each 100 dollar notes. The counting showed 25 million dollars I cannot tell how long we remained in the Vessel. It was about 5 hours." C

But another of the plaintiffs' witnesses, who had been called to D testify as to how the money was received in the respondent bank in Warri, one Edwin Iwachukwu Iwigbunan (p.w.2), gave the following evidence.

"To the best of my knowledge the largest amount we have ever kept in that safe was N1.00 million. It was not physically possible to keep N40 million there in our bank safe. No room would accommodate that sum. To my knowledge the plaintiff did not bring the sum of 25 million U.S. dollar to the bank on 22/7/83. It was impossible for that amount to have been brought without my knowledge." F

I did not observe any body carrying trunks to the branch. I was in the bank from 22/7/83 till I left in 1984. Throughout that period we dealt with no such foreign cash transaction. If U.S. dollars 25 million was in 100 notes, that would be 250,000 notes that is 2.500 bundles of 100 units. We have no place in our safe for that large sum of money. Myself and the Cash Officer or sometimes the 2nd defendant were responsible for opening and locking up the bank safe. At the end of the day we checked what was left in the safe. We did this from 1st July to end of August, 1983." G

There is evidence given by the 2nd defendant, Segun Ajayi (a former Bank Manager of the respondent bank, Warri Branch) and by Prince Henry Ama Ugoji (d.w.9). Assistant General Manager, East Area, of the respondent bank, that there was no record of H

N40,000.000.00 having been credited to the plaintiffs' account. What was said, per the 2nd defendant was:

B *"Exhibit 6 was filled by Mr. Shanu in my office for N40.00 and not N40 million I was watching him as he filled the teller. I saw no space after N40.00 was filled. I did not bother about the space left after he filled N40.00."*

And as per d.w.9:

C *"The Bank could buy foreign currency but cannot keep it. Must be transferred to the Head Office in Lagos. There is no evidence in our book to show lodgement of N40 million on 22/7/83. The N40.00 lodgement was made with a teller The opening account on the ledger card of the customer is N40.00."*

D Thirdly, was there a likely case of impersonation by one of the witnesses for the plaintiffs? One Lucky Ojo Osawe (p.w.5) presented himself as an Assistant Inspector of Customs who claimed to have worded at Warri Port and at the time signed a currency declaration form (exhibit 4), in respect of the 25 million dollars in question. He gave his service number as 2.4357.

He testified thus:

E *"I went on board the Botony Trinity on the instruction of my superior officer late Francis Imokhai. My specific instructions were to go on board of the Vessel and verify the sum 25 million dollars consigned to one Francis Shanu sent from abroad. I was told that Captain Yassin brought the money. It was a consignment to Mr. Francis Shanu."*

F Later in his evidence he said: "Exhibit 4 is never used for a consignment. It is only used by a traveller who brings money into the country.." Still later he said:

G *"Francis Shanu (1st plaintiff) was the importer of the subject currency. Captain filled the form which I signed..... Exhibit 4 is a declaration of importation. It is the person who imports that declares that he has imported."*

H It would appear at a stage that his identity as a Customs Officer was doubted and so he was cross-examined towards that end. He said:

"My surname is Osawe but my second native name is Ojo,. I have not lied. I am an accredited customs officer. The service number I gave to Court is my correct service number."

As a follow up, d.w.5 (Asst. Compt. of Customs) testified thus:

"I have heard of Lucky Osawe Ojo in the summons of this court served on me. We have up to 600 staff in Bendel State. We received a summons that such an officer has a Service No. 24357. We have station register wherein all Customs Officer report in the area. We then do documentation whereby the officer submits his passport photographs. A file is opened for him. Going through the file we have under No.24357, against name of Osawe Lucky Omori. Register shows that he reported on 2/1/86 from Kano on transfer presently serving in Benin City. His passport photograph is there. I have the file record. I have my area Controller as the boss. I am the 2 i/c. The officer, Mr. Osawe is under me."

I have gone into the above in order to be able to discuss the implications of the turn the proceedings took before Edokpayi, J.

The plaintiffs brought a motion before Edokpayi, J., seeking the following prayers:

"1. Admitting in this suit a certified true copy of the evidence of the plaintiffs and their witnesses and the evidence of defendants and their witnesses (given) before Honourable Justice J. A. Obi in this suit."

2. An order granting leave to the plaintiffs/applicants to amend their statement of claim as per the exhibit DDM 1 attached in the manner underline thereon."

The reasons given in the affidavit sworn by the 1st plaintiff in support of the motion were that Obi, J., had relocated to Delta State before he could receive the addresses of counsel after close of evidence on both sides, and further:

"9. That Plaintiffs/Applicants' witnesses are independent workers who are on contract basis move and/or shift from place to place in the course of carrying out their duties."

10. That I have not been successful in locating my witnesses despite vigorous attempts."

11. That it is now clear beyond any shadow of doubt that my witnesses will not be able to attend Court in view of the fact that they are independent workers who have not permanent job location. Even each Civil Servants' whereabouts is unknown."

12. That it would occasion great delay, hardship and expense on the plaintiffs/applicants to bring the aforesaid witnesses each of

whom testified in this case to Court if they can be located at all."

The motion was moved before Edokpayi, J., on December 1, 1992 [not having been opposed by learned counsel for the 1st defendant, 2nd defendant being absent and not represented by counsel], and a short ruling was given in these terms:

B *"Having read through the motion papers, leave is hereby granted as prayed. The certified true copy of evidence of the plaintiffs and their witnesses and the evidence of the defendants and their witnesses before Honourable Justice J. A. Obi in this suit are hereby*
C *admitted in evidence and leave is hereby granted to the plaintiffs to amend their amended statement of claim as per the Exhibit DDM 1 attached in the manner formulated and underlined thereon.*

Dr. Mowoe tenders the certified true copy of evidence with the consent of Akhidenor, Esq. and the certified true copy of evidence is
D *admitted and marked as exhibit 19.*

Dr. Mowoe says that that is the close of the case for the plaintiffs and Akhidenor also says that is the case for the 1st defendant."

On 6 April, 1993, counsel for the plaintiffs and the 1st defendant addressed the court. The 2nd defendant personally addressed
E the court also.

In a reserved judgment given on 19 January, 1994, Edokpayi, J. held that on the preponderance of evidence, he preferred the case of the plaintiffs. He gave judgment for them for N50,000,000.00 with interest at commercial bank rate of 25% p.a. from 27th July,
F 1983 till date of judgment with costs of N2,000.00 against the defendants jointly and severally. That would be compound interest since it is at commercial bank rate. The 1st defendant appealed against the judgment. The Court of Appeal allowed the appeal by a majority
G decision and ordered the case to be heard de novo before another judge of Edo State High Court.

In the said judgment, Akintan JCA observed as follows:

"The reasons given in the affidavit for inability to make the witnesses testify before Edokpayi, J. are contained in paragraphs 9,
H *10, 11 and 12 of the affidavit, already quoted above. The reasons may be summarized as follows: (a) that the plaintiffs' witnesses were independent workers who were on contract bases the plaintiffs was unsuccessful in locating them; and (b) that it would occasion great delay, hardship and expense on the plaintiffs to bring their said wit-*

nesses who had earlier testified in the case to court if they could be located at all. No particular names were given among the 5 witnesses that had earlier testified before Obi, J. as those who were independent workers who could not be easily located by the plaintiffs or whose presence in court would be difficult to secure or whose presence in court would be difficult to secure or at great delay or expense. However, the 1st plaintiff was definitely not one of those whose previous evidence could be admitted under section 34(1) of the Evidence Act. This is because he was present in court and he deposed to the affidavit in support of the motion without giving any reason in his said affidavit as to why he could not be available to testify before Edokpayi, J. Yet he failed to give any evidence before Edokpayi, J. But the learned Judge used his earlier evidence typed along with the proceeding before Obi, J., and admitted as Exhibit 19 before Edokpayi, J.

Similarly, the 1st plaintiff did not give any reason why the 2nd defendant and the 9 witnesses who testified for 1st defendant should not be allowed to testify at the resumed hearing of the case before Edokpayi, J.”

This was supported by Nsofor JCA after reciting the provisions of section 34(1) of the Evidence Act and then observed as follows:

“There is nothing in the cold, printed record before me indicative that Francis Shanu and any of the defendants, qua appellants herein, the defendants’ witnesses are dead or, cannot be found or incapable of giving evidence or, are kept out by any adverse party. No. It seems to me that the conditions laid down in section 34(1) of the Evidence Act (supra), do not apply to Francis Shanu. They do not apply to the defendants and their witnesses in the previous proceedings before Obi, J. No. The evidence by Francis Shanu and the defendants and the defendants’ witnesses, to whom the conditions in the section 34(1) (supra) do not apply, in the hands of any person(s) is hearsay.”

The learned Justices were in no doubt that the evidence taken before Obi J., as contained in exhibit 19 was inadmissible.

Akintan JCA said:

“It is therefore definitely clear that the evidence credited to the 1st plaintiff, the 2nd defendant and all the 5 witnesses that testified for the 1st defendant (now appellant) in the record of proceeding

before Obi J. (exhibit 19) could not be admissible in the later trial before Edokpayi, J., under section 34(1) of the Evidence Act. When, therefore, the learned Judge made use of the said evidence from those people in the course of his judgment in the case, he was using evidence not properly before his Court.”

B As for Nsofor JCA, having held that section 34(1) of the Evidence Act was not complied with, it is not surprising that he also considered exhibit 19 inadmissible, and expressed it thus:

C *“Before the evidence given in a previous case can be received as substantive evidence of the truth of what it states, all the conditions laid down in the subsection [i.e. subsection (1) of section] must be complied with.”*

In the appeal to this court against the judgement of the court below, the appellants set down two issues for determination, namely:

D *“1. Whether the Court of Appeal decision on admissibility of exhibit 19 in its final judgment is sustainable.*

2. Whether the Court of Appeal did not err by allowing the appeal before it.”

E The respondent cross-appealed and set down the following issues:

“1. Whether the Court of Appeal failed to consider several of the complaints of the respondent relating to the evaluation of evidence and if so whether this occasioned a miscarriage of Justice?”

F *2. Whether the Court of Appeal was correct in refusing the respondent leave to raise the issue of admissibility of the previous evidence of the 1st appellant and the defence witnesses having regard to the material before the court and the submissions made to it?”*

G *3. Whether the Court of Appeal was correct in rejecting the respondent’s application to amend the record of appeal?”*

4. Having expunged exhibit 19 (the record of the previous evidence of the witnesses that the trial court relied upon) whether the Court of Appeal was correct to order a retrial?”

H The cross-appellant also filed a notice of preliminary objection attacking ground 4 of the appellants’ grounds of appeal, that the complaint therein does not arise from the judgment of the court below; and also ground 5, that it raises a matter of mixed law and fact for which leave should have been obtained to file it. I do not intend to set out the said grounds of appeal complained of in full in view of

the fact that the preliminary objection does not touch on the central issue in this appeal. But let me say that I agree with the objection in respect of ground 4. ***The particulars of misdirection alleged in the passage quoted from the judgment of the court below do not arise therefrom or have any bearing therewith. This makes the ground of appeal incomprehensible. As to ground 5, it is in my view worthless. It says: "The Court of Appeal erred in law when it failed to dismiss the appeal."*** The particulars then stated, *inter alia*, that there were findings of fact supported by documentary and oral evidence, that the totality of the evidence was comprehensively evaluated and that there was no basis for allowing the appeal from the judgment of the trial court. I must say, with due respect, that the ground of appeal as couched is too wide and vague. The so-called particulars in support are not helpful. Particulars of a ground of appeal are meant to elucidate and advance the reason for the complaint in that ground. Furthermore, the said ground 5 is by no means a ground of law. Even if it had not been at large and vague as it is, since no leave was obtained to file it, it would still be defective for incompetence. I therefore strike out grounds 4 and 5. At the same time, issue 2 being too wide, I strike it out as it is not issue fit for deliberation by an appellate court whose duty is to consider in what aspect and manner a court below has been in error, if at all. That should be done by taking specific issues for analysis and discussion and not by considering an issue which seems to encompass or involve every imaginable but unexpressed complaint against a judgment. This apart, the said second issue is not supported by any ground of appeal: see Ugo v. Obieke (1989) 1 NWLR (pt.99) 566; A-G Bendel State v. Aideyan (1989) 4 NWLR (pt.118) 646; Nwosu v. Udeaja (1990) 1 NWLR (Pt.125) 188.

The sole issue in the main appeal is whether the Court of Appeal decision on the admissibility of exhibit 19 in its final judgment is sustainable. This issue arose from a ruling earlier given by the court below regarding the certified copy of the proceedings before Obi, J., which was admitted by the trial court as exhibit 19. In fact it was on the evidence recorded in that exhibit that the judgment of Edokpayi, J., was entirely based. He did not hear evidence from any witness. At

the Court of Appeal the present respondent/cross-appellant prayed for an order by application inter alia-

“Pursuant to the court’s inherent jurisdiction granting is leave to raise and argue a point of law not raised in the court below, namely, the admissibility and use as evidence in the trial before Edokpayi J. of the testimonies of the 1st plaintiff and the defence witnesses taken before Obi J. in terms of ground 2 of the proposed grounds of appeal contained in the schedule hereto.”

The purpose of the application in regard to that prayer was to enable argument to be canvassed at the hearing of the appeal that exhibit 19 was no legal evidence on which the trial court could have acted.

The court below was addressed by the present cross-appellant, in the course of moving that application for leave to file appropriate grounds of appeal, on the need to revisit the admissibility of the said exhibit 19. However, in the leading ruling given by Akintan JCA, the court refused that prayer by saying inter alia:

“...as the reasons why the witnesses who gave evidence before Obi, J. could not be called to testify before Edokpayi, J. had been adequately given in the affidavit in support of the motion for the admission of the proceeding in question, this court will not assume that a substantial question of law has been raised by the applicant merely inserting in the ground of appeal that

‘when it had been shown that the said witnesses were unavailable as required by section 34(1) of the Evidence Act.’

It has been shown that the admission of the record of proceeding before Obi, J. was in accordance with the provision of section 34(1) of the Evidence Act 1990. The applicant has therefore failed to establish that the document was improperly received.”

Now, when it came to deciding the appeal itself, Akintan JCA took a different view of exhibit 19. As already shown, he held that the document was not legally admissible. It is in that regard the appellants have argued before us that on the authority of Lawal v. Dawodu (1972) NSCC (Vol.7) 515, the Court of Appeal was not entitled to alter the effect of its own ruling on an issue in the proceeding. Chief Ahamba SAN in the appellants’ brief of argument has highlighted his submission by saying:

“Incidentally the issue at stake in that judgment as in the present

appeal was the admission of evidence in a previous proceeding under section 34(1) of the Evidence Act. In that case the Supreme Court of Nigeria firmly held the view that in ruling that the transcript of evidence in a previous case which were tendered by the plaintiffs were admissible under section 34(1), the trial judge upheld the plaintiff's claim and thus was not entitled to alter the effect of his own ruling by later holding in his judgment that the previous judgment cannot be regarded as res judicata."

The learned Senior Advocate also cited *Nnajofo v. Ukonu* (1985) 2 NWLR (pt.9) 686. If I may say so here, in *Nnajofo v. Ukonu* (supra). Oputa JSC at 706 discussed the principle in *Dawodu v. Lawal* in regard to issue estoppel. I shall consider it as well.

I think it is important not to misconceive what *Lawal v. Dawodu* (supra) decided in relation to what was regarded as issue estoppel arising from the proceedings at the trial court. In that case, learned counsel for the plaintiffs applied to put in evidence the transcripts of the evidence given in previous legal proceedings in 1900 between the same parties by two witnesses who were proved to have died. Reliance was placed on the provisions of section 34(1) of the Evidence Act. Although the application was opposed, the learned trial judge overruled and admitted the transcripts as exhibits E and J as he was satisfied that the conditions for doing so had been complied with. In his ruling he said:

"The suit 1900 relates to Imuwo land which is part of the land being claimed in this present action and it is my view that the evidence of Ajimuti and Alebiosu given in the 1900 case at page 5 of Exhibit 'j' and pages 7 and 8 of Exhibit 'J'; are quite relevant to the matter now in issue in the present case."

As this court observed in that case at page 523 when it came on appeal, the said ruling of the learned trial judge upheld the claims of the plaintiffs that the judgment as contained in the said transcripts was in respect of the same land (or part of it) as was then being litigated before him. This court went further to observe that the learned trial judge in his final judgment in the case later said concerning the same judgment in the 1900 case -

"I am unable to accept that that judgment is res judicata as far as the land now being litigated between the plaintiff and the defendant is concerned." [And then at the end of his judgment he made

the point further]. “The judgment of 1900 tendered in this suit cannot be regarded as *res judicata* between the plaintiffs and the defendants in respect of the land now being claimed by the plaintiffs from the defendants.”

It was on these facts this court considered the principle which
 B says that within one cause of action, there may be several issues raised
 which are necessary for the determination of the whole case, and
 that the rule is that once an issue has been raised and distinctly deter-
 mined between the parties, then, as a general rule, neither party can
 C be allowed to fight that issue all over again. This was further rein-
 forced by what was stated in *Fidelitas Shipping Co. Ltd. v. V/O*
Exportchleb (1966) 1 Q.B. 630 at 642 by Diplock L.J., which, when
 paraphrased is that in the course of proceedings, different issues may
 arise at separate occasions for a decision with the consequences that
 D follow. These are that where the issue separately determined is not
 decisive of the suit, the judgment upon that issue is an interlocutory
 judgment and the suit continues. The parties to the suit are bound by
 the determination of the said issue. They cannot subsequently in the
 same suit advance further evidence directed to showing that the issue
 E was wrongly determined.

From the principles stated above, there is no doubt that they
 are about issue estoppel. It is quite elementary that issue estoppel
 binds the parties concerned as well as the court: see *Ukaegbu v. Ugoji*
 (1991) 6 NWLR (pt.196) 127; *Ogbogu v. Ndiribe* (1992) 6 NWLR
 F (pt.245) 40; *Ito v. Ekpe* (2000) 3 NWLR (pt.650) 678; *Ebba v. Ogodo*
 (2000) 10 NWLR (pt. 675) 387. The same applies to the principle of
 estoppel per rem judicatam in an appropriate situation. It was this
 which led this court in *Lawal v. Dawodu* (supra) to observe *inter alia*
 G at p. 524:

“We are clearly of the view that the learned trial judge was not
 entitled, as he thought he was, to alter the effect of his own ruling on
 the issue previously decided by him in the course of the same pro-
 ceedings in favour of the plaintiffs. The judgment, exhibit ‘E’, con-
 H cerns the land known as Muwo which, according to the learned trial
 judge himself, was part and parcel of the land at present in dispute
 between the parties. That judgment was against the present defen-
 dants and was in favour of the present plaintiffs...”

It is manifest from his pleadings that the defendant is in this

case still claiming Muwo village which is covered by Exhibit 'E'."

As can be seen in that case, it was not the admissibility of exhibits E and J that was in issue. It was quite clear that section 34(1) of the Evidence Act was complied with before those exhibits were admitted. No issue of the admissibility of those exhibits subsequently arose. It was the effect of the decision reached therein as to who owned the land which was already *res judicata* that was in issue. The learned trial judge having recognized the effect of *res judicata* issue in his first ruling, declined subsequently to accept its effect in his final judgment. What he did all through had nothing in connection with the issue of admissibility of the exhibits. This can be seen from that passage from his ruling which I recited earlier on. To support further the fact that it was the issue of *res judicata* which arose from the said exhibits that this court said the learned trial judge attempted later in his final judgment to give a contrary decision on, I refer to the observation at p. 523 as follows:

"Before us it was argued by learned counsel for the plaintiffs that the judge was wrong to disclaim in his judgment what he had expressly upheld by his interlocutory ruling in the course of the proceedings. Learned counsel for the defendants has no answer to this contention and we think that the failure of the learned trial judge to treat an issue that was clearly res judicata as such is a mistaken view of the law."

But I suggest nothing new if I say there is a world of difference between matters of admissibility of evidence as an issue and matters of estoppel as an issue. ***It is true that as a general rule a court is not permitted to reverse itself on taking a decision on an issue in the same proceedings. Having so taken a decision, it is either that the court is said to be functus officio on that issue or is bound by it as an issue estoppel. After a court has made an order or given a judgment it becomes functus officio and cannot change or reverse the same except under the very restricted slip rule: see Asiyanbi v. Adeniji (1967) 1 All NLR 82 at p. 86. Such order or judgment can only be amended or reversed, if need be, by way of an appeal: see Olurotimi v. Ige (1993) 8 NWLR (pt.311) 257. The case of Lawal v. Dawodu (supra) is authority for the general rule that a court is bound by an issue it has distinctly decided even within the same cause of action.***

See also Ebba v. Ogodo (2000) 10 NWLR (pt. 675) 387 where at page 406 the principle on the point as decided in Fidelitas Shipping Co. Ltd. v. V/O Exportchleb (supra) was cited with approval. At page 640 of Fidelitas case, Lord Denning M.R. said:

“But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances.”

Issue estoppel, however, does not apply against a court which rules that a piece of oral evidence or a document is admissible but later finds that in law or procedure it is not.

The duty of the court to decide on legally admissible evidence is an exception to the rule that a court is functus officio on taking a decision on a matter and cannot reverse itself on it, and is considered, I think, a stronger element of justice than issue estoppel that might have precluded it from later rejecting inadmissible evidence. The admissibility of a document or a piece of oral evidence may be contested by the parties and the trial judge will normally rule on it. If in his ruling he admits the oral or documentary evidence, he may at the stage of writing his final judgment discover that it is not legal evidence at all. It cannot be considered a valid argument that because he gave a ruling to admit the evidence, he is bound to stick with his error. He has a duty to expunge the evidence and decide on legally admissible evidence. This can be done even at the stage of judgment and this extends to the matter at the appeal stage. There are numerous decisions on this and I think they are unambiguous.

In *Ajayi v. Fisher* (1956) SCNLR 279, it was held that in a trial by a judge sitting alone, if inadmissible evidence has been received whether with or without objection, it is the duty of the judge to reject it when giving judgment, and if he has not done so, it will be rejected on appeal. Similarly, the same was held in *Owonyin v. Omotosho* (1961) 2 SCNLR 57. There, a copy of the Native Court proceedings in *Omotosho v. Onitabo* was admitted in evidence at the trial court and the findings therein were relied on to decide material

issues in the current proceedings before the court in the case between Owonyin and Omotosho. At page 61, Bairamian, F. J. observed as follows:

“I think, with respect, that it was a mistake to rely on the proceedings in the Omotosho v. Onitabo case in arriving at a decision in the present case. I bear in mind that those proceedings went in by consent, but, where a judge tries a case without a jury, as it is put in the headnote to Jacker v. The International Cable Co. (Ltd.) (1888) 5 T.L.R. 13, the rule is that:-

Where matter has been improperly received in evidence in the court below, even when no evidence in the court below, even when no objection has been raised, it is the duty of the court of appeal to reject it and to decide the case on legal evidence.”

In National Investment and Properties Co. Ltd. v. The Thompson Organization Ltd. (1969) 1 All NLR 138 at 142, this court observed; *“it is of course the duty of counsel to object to inadmissible evidence and the duty of the trial court any way to refuse to admit inadmissible evidence, but if notwithstanding this, evidence is through oversight or otherwise admitted, then it is the duty of the court when it comes to giving judgment to treat the inadmissible evidence as if it had never been admitted.”* **The principle is a strong one. It is that the court is not permitted in any event to admit and act on legally inadmissible evidence. If such evidence has been admitted even by overruling an objection to its admission, the court must reject it when giving its final judgment even if that amounts to overruling itself to do so.** See also Okulade v. Alade (1976) 1 All NLR (Pt. 1) 67; Ajanwale v. Atanda (1988) 1 NWLR (pt.68) 22; Sadinwani v. Sadinwani Nig. Ltd. (1989) 2 NWLR (pt.101) 72; Agbaje v. Adigun (1993) 1 NWLR (pt.269) 261. That was what the court below did in essence in this case as I understand it.

It must be understood that in order to legally admit evidence given by a witness in a previous judicial proceeding when tendered in a subsequent proceeding, or at a later stage of the same proceeding for the purpose of proving the truth of the facts which it states [i.e. in the sense that it is true that those facts were stated, not that the facts represent the truth; those facts become evidence with the trial court has a duty to evaluate and it is for it to decide which fact is true and which is

not], the conditions stipulated under section 34(1) of the Evidence Act must be complied with. Compliance therewith is a statutory requirement to make such evidence legally admissible. That is why it is irrelevant whether there was no objection to its admission. In other words, unless there is compliance, the evidence cannot be admitted by consent. Section 34(1) provides as follows:

“34(1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense considers unreasonable: provided:-

- (a) that the proceeding was between the same parties or their representative in interest;*
- (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and*
- (c) that the questions in issue were substantially the same in the first as in the second proceeding.”*

In the case of a witness who is not dead, apart from compliance with the conditions (a), (b) and (c), it must be clear that the court considered unreasonable the amount of delay or expense in obtaining his presence. This must, of course, be based on facts and circumstances. In the present case, none of the conditions above about any particular witness whose evidence is sought to be tendered was shown to apply to Francis Shanu who testified as 1st plaintiff in the proceedings before Obi, J., because he was the one who swore the affidavit of 23 October, 1992 in support of the motion for admitting the evidence of the plaintiffs and their witnesses and that of the defendants and their witnesses which they gave before Obi, J - i.e. exhibit 19. So he was available. There is nothing said about the nine witnesses who testified on behalf of the defendants that they were dead, or could not be found, or were incapable of giving evidence, or were kept out of the way by the adverse party, or that their presence could not be obtained without an amount of delay or expense which, in the circumstances of the case, the court considered

unreasonable. It would seem the parties chose a short-cut in order to avoid hearing de novo by Edokpayi, J.

I do not understand the purpose of section 34(1) of the Evidence Act to be to permit of a package of the evidence given by all the witnesses or a good number of them in a previous proceeding on obviously contentious issues and of conflicting nature of evidence to be placed before another judge for a resolution and judgment. Section 34(1) is not to be used to avoid hearing de novo. It is, in my view, to fill in an unfortunate or unavoidable absence of a witness or two, as the case may be, who had earlier given evidence and were cross-examined, so that such evidence may be made available to complement other evidence that may be recorded in a later proceeding. It would be improper to put the integrity of a proper hearing of a case by a trial judge in doubt by flooding it with evidence of witnesses in an earlier proceeding which would place the judge at a disadvantage as to who and what to believe because of the nature of the evidence taken by another judge viva voce.

Earlier on in this judgment I pointed out on purpose some aspects of the type of evidence given before Obi, J. The evidence was conflicting and would require a trial judge who heard and saw the witnesses testify to be able to resolve the issues involved. Indeed, a vital plaintiffs' witness, p.w.2, gave evidence completely against the plaintiffs' case which is that they took US \$25 million cash to the bank; the witness said there was nothing like that throughout that period; There was the instance of a probable impersonation by one of the plaintiffs' witnesses, p.w.5, going by official records which were admitted in evidence. I have seen the various exhibits in the case, numbering over 20. Yet, Edokpayi, J., who never saw any of the witnesses testify but read their testimony from exhibit 19 as recorded by Obi, J. said:

"I believe that exhibit 4 was signed by the 5th witness for the plaintiffs. The 7th defence witness lied when he found to the contrary..."

Upon a calm view of the totality of evidence adduced in this case, I believe and accept the evidence of the plaintiffs that by exhibits 6 and 6B in this case they lodged with the 1st defendant bank

through its agents 25 million U.S. dollars which was on oral agreement converted to N50 million. I believe the 1st plaintiff when he testified that neither the N100,000.00 on exhibit 1 (one) nor any amount was paid to any of the plaintiffs on demand by the defendants. I reject the evidence of the defence to the effect that the total
 B sum of N50 million was not paid to the defendants by the 1st plaintiff with exhibits 4, 6 and 6B and that exhibits 4, 6 and 6B were forgeries and that Mr. Ojo (5th plaintiffs' witness) who is said to have signed exhibit 4 is a fake. I do not believe the defence on those evidence.

C On the preponderance of the evidence and having weighed the evidence adduced in support of plaintiffs' case side by side with that those (sic) adduced in support of the case for the defence, I prefer the case of the plaintiffs to that of the defence on the balance of probabilities."

D These were the words that fell from a judge, in a manner of speaking, who did not hear any part of the evidence; and was not sitting to consider the case in an appellate jurisdiction. Surely, this must be an epitome of a mockery of a trial.

***Where an inquiry is commenced before one adjudicator and completed by another, the second adjudicator cannot as
 E a rule decide upon the evidence given before the first. It is the principle that the judicial discretion which an adjudicator has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for
 F him, generally, to act upon evidence taken before another adjudicator unless there is a statutory provision permitting that procedure. In Re Guerin (1888) 16 Cox CC 596 at p. 601, Wills, J., said:***

***"It is contrary to all my ideas and experience of justice
 G for depositions taken before on magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to judge for himself of the truth of their statements."***

H A trial judge is a peculiar adjudicator. Of all judges the heaviest burden and responsibility of deciding a case rest with him. He normally hears a case by receiving evidence both oral and documentary from witnesses who appear before him in court, are asked questions and cross-examined. In the process, he engages himself to see, listen

to and watch them testify. Not only that, his feelings and impressions are tested from time to time upon one issue or another when, apart from listening, he watches: he takes mental note of the performance of witnesses, their demeanour in the witness box, in particular how they react to questioning and the manner they give answers. Quite often, it is this that helps the trial judge as to who and what to believe. B The witnesses are telling him what he was not aware of before, the circumstances in which it happened and in respect of which both sides claim that their evidence represents the truth, and the trial judge will have to take a decision. So if the trial judge is up to the demands C of his duty, he will continue to size up the witnesses in their oral testimonies. Is a particular witness lying or prevaricating or just slow in nature, or has he a peculiar idiosyncrasy? That is for the trial judge to determine. When there are relevant documents, they serve as the touchstone against which the oral testimony can be tested, and so much of the demeanour of a witness may not quite matter see *Olujinle v. Adeagbo* (1988) 2 NWLR (pt. 75) 238 at p. 254. As said by Nokes in his book - *An introduction to Evidence* 4th edition, at pages 448-449, inter alia:

“The behaviour of witnesses in the box may materially affect their credit. The blush of nervousness or shame, the gape of stupidity, the gesture of annoyance, the hesitation to answer, and a dozen other manifestations of a witness’s state of mind or emotion, may affect the weight which is given to his evidence. This is primarily a matter for the tribunal which sees the witness... Further, when the credibility of a witness is the basis of a specific finding, his demeanour, so far as it can be known, may be considered and should be balanced against the rest of the evidence.” F

However, as a rule, the belief and satisfaction expressed by the G trial judge in the end would represent his reaction to, and reflection of, the facts placed before him and the manner it was done, as well as the probabilities and possibilities based on or arising from those facts and the circumstances as a whole. It is in this special position of a trial judge that he is able to make findings on the evidence placed before H him by assessing the quality of the evidence along with the facts pleaded and issues joined, giving necessary credence to or expressing doubts about witnesses by taking advantage of seeing and hearing them testify, weighing the evidence of one witness as against that of another,

where appropriate, and in the end making up his mind as revealed from the imaginary scale which side is preferred. The trial judge's performance in this regard is usually crucial to the proper determination of contentious facts. See *Ebba v. Ogodo* (1984) 3 SC 84 at 98; *Atanda v. Ajani* (1989) 3 NWLR (pt.111) 511 at 524; *Olafosoye v. Olorunfemi* (1989) 1 NWLR (pt. 95) 26 at 37; *Adeleke v. Iyanda* (2001) 13 NWLR (pt. 729) 1 at 20; (2001) Vol. 9 MJSC 171 at 185.

The need for a trial judge to take evidence himself which he is to rely on to decide a matter is unarguably very vital. This was so unmistakably expressed in *R. v. Bertrand* 16 L.T. Rep. N.S. 752; L. Rep. 1 P.C. 520, that I desire to recount it here. In that case, the jury in a trial for felony having disagreed, another jury was impaneled, and a fresh trial had. On the second trial, some of the witnesses having been sworn, the evidence given by them at the first trial was read over them from the judge's notes, and liberty was given both to the prosecution and the prisoner to examine and cross-examine. The course so adopted was vigorously and powerfully denounced by Coleridge, J. In delivering the judgment of the court on appeal to the Privy Council, the learned judge said at p. 535:

"The most careful note must often fail to convey the evidence fully in some of the most important elements - those for which the open oral examination of the witness in presence of prisoner, judge, and jury is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects, who, indeed, will not necessarily be the same on both trials; it is in short, or it may be, the dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who receive it."

In *Munday v. Munday* (1954) 2 All ER 667, a curious situation arose. The hearing of an application by a husband to vary an order for the maintenance of his wife which had previously been made against him was spread, owing to adjournments, over three separate days. Three justices were present on the first day, the same three with two additional justices on the second day, and on the third day the

first three justices were absent, and the matter was heard by the second two justices and another justice who had been present previously. The application was dismissed by the justices sitting on the third day. On appeal to a divisional court of the Probate, Divorce and Admiralty Division it was held by Lord Merriman, P. and Davies, J., that there must be a rehearing before an entirely new panel of justices and a different clerk of court, for there had been a failure to comply with the mandatory provisions of section 98(6) of the Magistrates' Courts Act. 1952. It was also held that this was pre-eminently a case in which the principle that justice must not merely be done but must be seen to be done, had been infringed. At page 670, Davies, J, observed inter alia:

"...these three justices who sat on Mar. 3, 1954, were acting in part on evidence which none of them had heard. But, to my way of thinking, the real point is broader. Every layman would believe that all three hearings were part of the same case. Indeed, the justices themselves in reason (iv) speak of the three occasions on which the complaint under review was heard' so that each is treated as a part of the hearing. It seems to me impossible that any layman could believe that justice had been done in the circumstances of the present case when three persons heard it on the first day, those three plus two others heard it on the second day, and the second two plus a third and without the original three heard and determined it finally. Any member of the public would rightly think that that was no way for any legal proceedings to be conducted, and would at once come to the conclusion that no fair or proper decision could be arrived at in proceedings conducted in such a manner."

It has been urged on behalf of the respondent that the Court of Appeal should have dismissed the present case before us rather than order a retrial. I suppose this may be based on the fact that the plaintiffs who had the burden of proving their case when they came before Edokpayi, J., relied entirely on legally inadmissible evidence in the nature of exhibit 19. Once that evidence is expunged, as it has been done, it may be said there is no evidence to support the claim and therefore it should be dismissed. I believe that approach would stand justice on its hear in view of the circumstances of the case. Courts are set up to do substantial justice and to ensure that

there is a real semblance of the pursuit of it. Justice cannot be seen to have been done when a judgment is reached based on no facts whatsoever laid before the court because of a wrong procedure adopted by the parties and the court whereas there are facts ordinarily available. The parties will walk away with the feeling that they did not put their case across to the court which ought to hear them; and all because counsel and the court adopted a totally flawed procedure. That is worse than judgment by mere technicality which this court denounces.

It is in the interest of justice that parties should be afforded a reasonable opportunity, in appropriate circumstances, for their claims to be adequately investigated and properly determined upon their merits: see *Nalso & Team Associates v. N.N.P.C.* (1991) 8 NWLR (pt. 212) 652; *Nduba v. Appio* (1993) 5 NWLR (pt. 292) 201. In *Afolabi v. Alekunle* (1863) 2 SCNLR 141 at p. 150, *Aniagolu JSC* observed.

“While recognizing that Rules of Court should be followed by parties to a suit, it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in a whirligig of technicalities, to the detriment of the determination of the substantial issues between them.”

In view of what is expected to support a judgment properly so-called, I refer to the observation of Oputa JSC in Erisi v. Idika (1987) 4 NWLR (pt. 66) 503 at p.519 that:

“...judgments in favour of one party or the other should be consequential in the sense that it should follow from the facts as found and from the operation of the law on those facts.”

It seems to me therefore that to accept the judgment by Edokpayi, J. or to simply set it aside and close the case will in either case in my respectful view, be a betrayal of justice.

I am clear in my mind that Edokpayi, J., who did not see and hear any of the witnesses testify did not try the case as a first instance judge is expected to do. He was not the trial judge but Obi, J. However, Obi., did not produce a judgment but Edokpayi, J., did. What Edokpayi, J., produced in the circumstances, with due respect, was a mock-judgment delivered upon “the dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who receive it” per Coleridge, J. in *R v. Bertrand*

(supra). Exhibit 19 should not have been admitted in evidence and relied on. When it is expunged or discountenanced, as the court below rightly did, there is no evidence upon which the judgment delivered by Edokpayi, J., can be based. I answer the appellants' sole issue in the affirmative. I therefore see no merit in this appeal and dismiss it.

There is not much left in the cross-appeal. In regard to issue I, there was no evidence to evaluate by Edokpayi, J., in the circumstances. As to issue 2, the Court of Appeal was requested for leave to raise the issue of the admissibility of exhibit 19 and was fully addressed on it by both sides. It was substantial issue of law arising from section 34(1) of the Evidence Act. Very relevant authorities were cited to the court below which it appeared to have considered. The court then observed per Akintan JCA:

"It has been shown that the admission of the record of proceeding before Obi, J. was in accordance with the provision of section 34(1) of the Evidence Act 1990. The applicant has therefore failed to establish that the document was improperly received."

With profound respect to the learned Justice, he was in grave error to have reached this conclusion when the application before the court was for leave to raise a ground of appeal as to whether exhibit 19 was properly admitted in evidence. Whether it was or was not should have awaited a consideration of the appeal on the point. What was open to the court below at that stage to decide was whether the ground of appeal sought to be raised for the first time on appeal was on substantial point of law, substantive or procedural, so as to prevent an obvious miscarriage of justice, and it was such that no further evidence would be adduced in support of it see Attorney-General Oyo State v. Fairlakes Hotel Ltd. (1988) 5 NWLR (pt.92) 1; Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 523; Ikeanyi v. African Continental Bank Ltd. (1997) 2 NWLR (pt. 489) 509. It was because of this error that the court below ran into apparent difficulty later in the course of hearing the appeal and was constrained to reject the said exhibit 19. **But with the decision the court below reached in its interlocutory ruling, it breached the admonition given by this court on several occasions that a court should not delve into issues meant for the substantive suit or appeal**

when considering relevant interlocutory applications: see Orji v. Zaria Ind. Ltd., (1992) 1 NWLR (pt. 216) 124; Akapo v. Hakeem-Habeeb (1992) 6 NWLR (pt. 247) 266; Magnusson v. Koiki (1993) 9 NWLR (pt. 317); Ikenna v. Bosah (1997) 3 NWLR (pt. 495) 503.

There can be no doubt as to whether the admissibility of exhibit 19 and whether Edokpayi, J., was entitled to rely on it were substantial issues in this case. In Nahman v. Odutola (1953) 14 WACA 381, the evidence of one Mr. Simpson, a District Officer, in a previous case was held inadmissible in a later case between the same parties because none of the conditions about the disposition or whereabouts of such a witness as stated in section 34(1) of the Evidence Act was complied with. The Court observed at p.384:

“The proceedings in the suit referred to were admitted in evidence in this suit by consent as exhibit D. The judgment in that suit is, undoubtedly, admissible and relevant, being between the plaintiff and his lessors, who the defendant-appellant also claims to be privy to. In fact the trial judge in that suit held that the evidence was inconclusive as to whether the Fadesere family was competent to grant a valid lease to the plaintiff. Learned counsel for the defendant-appellant contends, however, that it establishes the title of the Olubadan in Council. In my opinion Simpson’s evidence cannot be accepted as proving anything of the sort for the simple reason that the conditions laid down in section 34(1) of the Evidence Ordinance (Cap. 63) were not established at the time the proceedings were admitted in evidence for the reception of Simpson’s former testimony and this notwithstanding that the whole record in the former suit was admitted in evidence by consent.”

See also the case of Sanyaolu v. Coker (1983) 1 SCNLR 168 where at pages 178-179, Aniagolu JSC observed thus:

“The general rules of evidence contain the best evidence rule by which it [is] said that the best evidence must be given and that no evidence will be given in substitution of the best evidence unless strictly under some had exception. Ordinarily, the opposing party is at a disadvantage in having evidence of a witness received against him whom he cannot see and cannot question in the current proceedings even though he had the opportunity of cross-examining the witness in the earlier proceedings.

It is not, therefore asking too much for the law to require the

party who is taking the advantage of the evidence of his witness being received as true without the witness appearing physically to testify, to strictly comply with the provisions of the section of the law bestowing upon him that advantage.”

The observation in Nahman v. Odutola (supra) earlier quoted above was cited with approval by this court in Ikenyi v. Ofune (1983) 2 NWLR (pt. 5) 1. After stating the facts, Kawu JSC observed at pages 6-8 inter alia:

“In this case it is quite plain to me that both the high Court and the Court of Appeal based their respective decisions on the evidence adduced in exhibit ‘2’, which both courts treated as evidence before them without adverting their minds to the provisions of s.34(1) of the Evidence Law...”

Before the evidence given in a previous case can be received is substantive evidence of the truth of what it states, all the conditions laid down in the sub-section must be complied with.

In this case, it is clear that both the high Court and the Court of Appeal treated the evidence given in exhibit ‘2’ as evidence before them when the conditions laid down under s.34(1) of the Evidence Law had not been satisfied. In my view, both courts were in law wrong to have done so.”

It was ordered that the case be heard de novo.

It follows that it is important to recognize that when material evidence which by statute can only be admitted in judicial proceedings under certain conditions was admitted in contravention of the statutory provisions, that event clearly raises a substantial issue of law. When section 34(1) of the Evidence Act is not complied with such evidence in an earlier trial is inadmissible to support the fact that in truth such evidence was given and represents what was said by the witness in question. Unless the conditions laid down in section 34(1) are strictly complied with, the parties cannot by consent get the evidence admitted. It is a statutory provision meant to be observed in the course of the trial of a case. It cannot be compromised. The position is quite clear to me that when the question is whether evidence has been admitted in contravention of the provisions of section 34(1) of the Evidence Act, as was done in this case, it is right to argue that it raises a substantial

point of law upon which leave ought to be given to raise a new issue particularly if that evidence influenced the judgment being appealed, from, or in fact formed the basis of it, as it happened in the present case.

The court below was wrong not to have appreciated this when it refused leave to the cross-appellant to raise the issue of the admissibility of exhibit 19. I accordingly answer cross-appellant's issue 2 in the negative.

In view of what follows in the main appeal, I will refrain from discussing issue 3. Issue 4 has indeed been resolved in the main appeal. In the result only issue 2 in the cross-appeal is resolved in favour of the cross-appellant in which case the cross-appeal partially succeeds on that basis. Having dismissed the appeal award N10,000.00 costs in favour of the respondent/cross-appellant. I make no order as to costs in respect of the cross-appeal. The case is remitted to Edo State High Court to be tried by a Judge other than G. E. Edokpayi, J.

It is ordered that the exhibits in this case shall be transmitted under proper, safe and secured custody to the Edo State High Court.

OGWUEGBU JSC

The facts of this case have been fully set out in the leading judgment of my learned brother Uwaifo, J.S.C, and I do not intend to repeat them except where it is considered necessary for a better appreciation of the issue being discussed.

The proceedings leading to this appeal originated in the High Court of the former Bendel State. Benin Judicial Division where both parties testified, called witnesses and rendered documents before Obi, J. On the splitting of Bendel State into Edo and Delta States, Obi, J. moved to the latter State and the case was to start de novo before Edokpayi, J. Both parties closed their case and it was at the address stage when Obi, J. left for Delta State.

As Edokpayi, J. was about to start hearing de novo, the plaintiffs (appellants in this court) moved the court in the absence of the defendant and its counsel for the following prayers:

1. *Admitting in this suit a certified true copy of the evidence of the plaintiffs and their witnesses and the evidence of defendants and*

their witnesses (given) before Honourable Justice J. A. Obi in this suit.

2. An order granting leave to the plaintiffs/applicants to amend their statement of claim as per the exhibit DDMI attached in the manner underline thereon.”

The reasons deposed to in the affidavit in support of the motion were that Obi, J. had moved to Delta State at the close of evidence of both parties, that the plaintiffs' witnesses were independent workers who were on contract basis and moved from place to place in the course of their duties, that he could not locate them, despite vigorous efforts and that it became clear and beyond doubt that the witnesses would not be able to attend court in view of the fact that they were independent workers with no permanent job location and their whereabouts were unknown and great delay, hardship and expense would be occasioned to bring them to testify again before Edokpayi, J. The two prayers on the motion paper were granted. The certified true copy of the evidence was admitted in evidence as Exhibit “19”.

Counsel for both parties addressed the court and in a reserved judgment, the learned trial judge found for the plaintiffs as claimed and awarded interest on the judgment debt. The defendant was dissatisfied with the judgment and appealed to the Court of Appeal, Benin Division. The court below (Ige and Nsofor, JJ.C.A., Akpabio, J.C.A. dissenting) allowed the appeal on the ground that the conditions laid down in section 34(i) of the Evidence act, Cap 112 Laws of the Federation of Nigeria, 1990 were not complied with before the admission of Exhibit “19” in evidence. Nsofor, J.C.A. held as follows:

“There is nothing in the cold, printed record before me indicative that Francis Shanu and any of the defendants, qua appellants herein, the defendants' witnesses are dead or, cannot be found or incapable of giving evidence or, are kept out by any adverse party. No. It seems to me that the conditions laid down in section 34(i) of the Evidence Act (supra), do not apply to Francis Shanu in the previous proceedings before Obi, J. No. The evidence by Francis Shanu and the defendants and the defendants' witnesses, to whom the conditions in the section 34(i) (supra) do not apply, in the hands of any person(s) is hearsay”.

The plaintiffs appealed to this court and formulated the follow-

ing issues as arising for determination in the appeal.

“1. Whether the court of appeal decision on the admissibility of Exhibit 19 in its final judgment is sustainable.

2. Whether the Court of Appeal did not err by allowing the appeal before it.”

B *The defendant cross-appealed and formulated four issues in its brief and the fourth issue which is material in both appeals reads:*

“4. Having expunged exhibit 19, the record of the previous evidence of the witnesses that the trial court relied upon) whether the Court of Appeal was correct to order a retrial.”

C This issue can be considered along with the issues identified by the plaintiffs in their own appeal.

Since the decision in both appeals will revolved round the consideration of whether the court below rightly held that Exhibit “19” did not satisfy the conditions laid down in section 34(1) of the Evidence Act, I will consider the same at this stage. Before the evidence given in a previous case can be received as evidence of the truth of the facts which it states, the conditions set out in section 34(i) must be complied with. Section 34(1) of the Evidence Act provides:

E *“34(1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a late stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable: provided:-*

G *(a) that the proceeding was between the same parties or their representative in interest;*

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine: an

H *(c) that the question in issue were substantially the same in the first as in the second proceeding.”*

Evidence given in a previous proceeding is relevant and admissible under the above subsection in proof the facts asserted in that evidence:

(a) if the witness is dead:

(b) cannot be found:
(c) is incapable of giving evidence:
(d) is kept out of the way by the other party: or
(e) when his presence cannot be obtained without amount of delay or expense which, in the circumstances of the case, the court considers unreasonable. B

For the evidence of a witness in one judicial proceeding to be deemed relevant in a subsequent proceeding, the evidence must have been given on oath and will not be applicable where the witness is alive and present in court. In the present proceedings, Francis Fashanu who testified before Obi, J. in Exhibit “19” was alive and present in court before Edokpayi, J. See *Obowale & Or. v. Williams & Or.* (1996) 10 NWLR. (pt. 477) 146. The application of section 34(1) is subject to the conditions that the previous proceeding was between the same parties or their representatives’ interest, that the adverse party in the first proceeding had the right and opportunity to cross-examine the witness. In other words, the adverse party had the right and opportunity to cross-examine him and not necessarily that he did so. He should also have the mental and physical capacity to understand the proceedings, the evidence led as well as the meaning and purpose of cross-examination. See *The State v. Friday* (1970/71) 1 ECCLR 24. Finally, the issues in contention were substantially the same in both proceedings. Counsel for the defence has no right to waive any of the conditions nor consent to such proceedings being admitted in evidence as we are urged to hold in this appeal that the counsel for the defendant did not object to the admission of Exhibit “19” in evidence. The onus of proof that any of the conditions laid down in section 34(1) is satisfied is on the party who wishes to render the evidence of such a witness and in this case, the plaintiff did not prove nor name those witnesses who could not be located. C D E F G

Assuming that the evidence given by the plaintiffs’ witnesses in Exhibit “19” satisfied the conditions set out in section 34(1) which was not the case, what of the evidence of the 1st plaintiff himself who was in the court, the 1st defendant and all the nine witnesses who testified for the 1st defendant. Nothing was said about the availability of the host of witnesses who testified for the defendants before Obi, J. as to their non-availability to testify before Edokpayi, J. The evidence contained in Exhibit “19” was clearly inadmissible and the court be- H

low acted correctly when it held that it was not legally admissible in evidence.

It was contended by the learned Senior Advocate in the appellants' brief that on 21-3-96 the court below as a preliminary issue, refused the respondent's leave to appeal on the admissibility of Exhibit "19" holding that:

"It has been shown that the admission of the record of proceedings before Obi, J. was in accordance with the provisions of section 34(1) of the Evidence Act 1990";

and that the same court cannot reverse itself on the same point. This contention cannot be correct because a judge has a discretion to exclude inadmissible evidence if wrongfully admitted and in a criminal trial if he considers that it would be unfair to the accused. See *R. v. Hall* (1973) 1 All E.R. 1 at 7.

It is for the above reasons and the detailed reasons contained in the judgment of my learned brother Uwaifo, J.S.C. that I dismiss the main appeal. The cross-appeal partially succeeds. I also endorse the order for hearing de novo in the high Court of Edo State by another judge other than Edokpayi, J. and those as to costs.

MOHAMMED JSC

I have had the preview of the judgment just delivered by my learned brother Uwaifo, J.S.C., and I agree with him that the main appeal has failed and it is dismissed. The cross appeal partially succeeds and it is allowed. I award N10,000.00 to Afribank Nigeria PLC being the respondent to the main appeal.

EJIWUNMI JSC

I have had the advantage of reading before now the draft judgment of my learned brother. Uwaifo J.S.C. It is manifest that in the said judgment, the facts that led to this appeal were carefully and exhaustively set down. It is also in my view clear that all the issues canvassed in the appeal were also properly considered before the appeal was dismissed. I also this appeal.

However, having regard to certain aspects of this appeal, which in my view raise to a very high level the concept of fairness and the

duty that is fastened on all judicial officers in the administration of justice, I deem it necessary to make these few remarks.

It is not in dispute that the trial of this case was first heard by Obi J, who at the time of the trial was a judge of the former Bendel State High Court. He apparently had virtually completed the hearing of all the witnesses called by the parties to this suit but did not conclude it before he was transferred out of the jurisdiction of the Bendel State High Court. This occurred with the creation of Delta State carved out of the former Bendel State of Nigeria.

Be that as it may, the appellants went before Edokpayi J, to have their case heard. It was for this purpose that an application was made to the Court seeking the following reliefs:-

“1. Admitting in this suit a certified true copy of the evidence of the plaintiffs and their witnesses (given) before Honourable Justice J. A. Obi in this suit;

2. An order granting leave to the plaintiffs/applicants to amend their statement of claim as per the exhibit DDMI attached in the manner underline(d) thereon.”

The grounds for this application which were disclosed in the affidavit sworn to by the plaintiffs are as follows:

“9. That plaintiffs/Applicants’ witnesses are independent workers who are on contract basis move and/or shift from place to place in the course of carrying out their duties.

10. That I have not been successful in locating my witnesses despite vigorous attempts.

11. That it is now clear beyond any shadow of doubt that my witnesses will not be able to attend Court in view of the fact that they are independent workers who have not (sic) permanent job location, even each civil servants whereabouts is unknown.

12. That it would occasion great delay, hardship and expense on the plaintiffs/applicants to bring the aforesaid witnesses each of whom testified in this case to Court if they can be located at all.”

The motion, which was brought sequel to the provisions of section 34(1) of the Evidence Act, was moved before the Court by learned counsel for the plaintiffs, in the absence of the 2nd defendant who was not also represented by counsel. Learned counsel for the 1st defendant did not oppose the motion. The prayers sought were granted by Edokpayi J. in his ruling thus:

"Having read through the motion papers, leave is hereby granted as prayed: The certified true copy of evidence of the plaintiffs and their witnesses and the evidence of the defendants and their witnesses before Honourable Justice J. A. Obi in this suit are hereby admitted in evidence and leave is hereby granted to the plaintiffs to
B *amend their amended statement of claim as per the Exhibit DDMI attached in the manner formulated and underline thereon.*

Dr. Mowoe tenders the certified true copy of evidence with the consent of Akhidenor, Esq. and the certified true copy of evidence in
C *admitted and marked as Exhibit 19.*

Dr. Mowoe says that that is the close of the case for the plaintiffs and Akhidenor also says that that is the case for the 1st defendant."

The matter was then adjourned for addresses. On the adjourned
D date, learned counsel for the plaintiffs and the 1st defendant addressed the Court. The 2nd defendant also addressed the Court personally.

The learned trial judge subsequently delivered a considered judgment, wherein he said inter alia, thus:

E *"I believe that Exhibit 4 was signed by the 5th witness for the plaintiffs. The 7th defence witness lied when he found to the contrary..."*

And continued:-

F *"Upon a calm view of the totality of evidence in this case, I believe and accept the evidence of the plaintiffs that by exhibits 6 and 6B in this case they lodged with the 1st defendant bank through its agents 25 million U.S. dollars which was on oral agreement converted to N50 million. I believe the 1st plaintiff when he testified that*
G *neither the N100,000.00 on exhibit I (one) nor any amount was paid to any of the plaintiffs on demand by the defendants. I reject the evidence of the defence to the effect that the total sum of N50 million was not paid to the defendants by the 1st plaintiff with exhibits 4, 6 and that exhibits 4, 6 and 6B were forgeries and that Mr. Ojo 15th*
H *plaintiffs witness) who is said to have signed exhibit 4 is a fake. I do not believe the defence on those evidence. On the preponderance of the evidence and having weighed the evidence adduced in support of the case for the defence, I prefer the case of the plaintiffs to that of the defence on the balance of probabilities."*

Edokpayi J., then went on to give judgment for the plaintiffs for the sum of N50,000.000.00 with interest at commercial bank rate of 25% from July, 1983 till date of judgment with costs of N2,000.00 against the defendants jointly and severally.

The disturbing aspect of this appeal, which I deem it necessary to comment upon howbeit briefly, is related primarily to the judgment of Edokpayi J. With regard to his treatment of the case. It is clear from what I have said above that the case upon which he purported to deliver that judgment, came before him because Obi J. who heard the oral testimony of witnesses was transferred out of the jurisdiction. Edokpayi J. did not hear any oral evidence of any of the witnesses, as what was before him was the certified true copy of all the witnesses who testified for the plaintiffs and the defendants, which he admitted as Exhibit 19. B
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Now, where a judge has not heard any oral testimony from any witnesses in a matter before him, can that judge properly assess the demeanour and the credibility to be assigned to the evidence of a witness who did not testify before him? I think not. Yet Edokpayi J, was able to state in this against another. For him to hold that on a preponderance of evidence that the plaintiffs have established their case must suggest that he had weighed on the imaginary scaled the evidence given by one set of witnesses against the evidence of the other set of witnesses who testified before him. Except words have lost their meaning to come to a conclusion that the plaintiffs have established their case before him upon evidence which he had not heard and which he in fact had no opportunity of hearing amounts in my humble view to a travesty of justice. It is settled law that the hearing and evaluation of the evidence form the primary duties of a trial court and that principle must be followed in all cases by a trial judge. See *Ebba v. Ogoto* (1984) 1 SCNLR 372; *Ezeanya v. Okeke* (1995) 4 NWLR (pt. 388) 142; *Lawal v. UBN* (1995) 2 NWLR (pt. 378) 407. It is hoped that a case such as this would never surface in our courts in the future. Even acceptance of the certified true copy of the Evidence Act is not free from difficulties. S. 34 (I) of the Evidence Act reads thus:- D
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“It is settled law that evidence given in a previous suit involving the same subject matter cannot be received as substantive evidence of the truth of what it states unless the conditions laid down in section

34 have been complied with.”

See *Nahman v. Odutola* (1935) 14 W. A. C. A. 381; *Alade v. Aborishade* (1960) 5 F.S.C. 164; *Adeleke v. Adewusi* (1961) 1 All N.L.R. 37.

In the instant case, there is nothing to show that the witnesses who gave evidence in the earlier proceedings before Obi J, are dead or cannot be found, or are incapable of giving evidence or are kept out of the way by the adverse party. Now, all that the plaintiff deposed to in his affidavit in support of his motion related only to his own witnesses which he alleged he could not find and that it would amount undue and expensive delay to look for them. Nothing was said about the witnesses who gave evidence for the defendants. Yet it is significant to note that the learned judge in his judgment not only felt able to consider their evidences that emanated from certified true copy of proceedings to arrive at his conclusion in the case. It must be borne in mind that the use of section 34 (1) of the Evidence Act is a statutory exception to the ordinary principle in our jurisprudence, that before the resolution of a conflict or any issue in the Court, the oral evidence of the parties to the conflict or issue must be heard by the judge determining the suit. It follows therefore that a Court should not easily allow evidence of a person who has not testified before it, except it is shown that that witness has been kept away under circumstances which the Court considers unreasonable.

I have no doubt in my mind from what I have said above that Edokpayi J, did not try this case on its merits. It is also my view that leave should have been given to the respondent/cross-appellant by the Court below to raise the issue of the admissibility of Exhibit 19.

In the result, I will dismiss this appeal for the reasons given above and the fuller reasons given in the judgment of Uwaifo JSC with N10,000.00 in favour of the respondent/cross-appellant. I also abide with the other orders made in the said judgment of Uwaifo JSC.

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