

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2002, SC. 119/1997
CORAM: I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO, A. O EJIWUNMI, JJSC

A. O. EGHOBAMIEN APPELLANT
AND	
FEDERAL MORTGAGE BANK	
OF NIGERIA RESPONDENT

COURTS - Issues - Determination - Basis - Court determines issue on legally admissible evidence - As it has no discretion to act on evidence made inadmissible - By statutory provision (H1)

JUDGMENTS - Writing of - Basis - Judgment is written based on evidence received - And it is wrong for a judge to write judgment - On evidence Recorded by another judge (H2)

FACTS

Plaintiff/appellant commenced this action against defendant/respondent at the High Court of then Bendel State, Benin City claiming among other things, a declaration of title to a landed property. The suit was originally filed before Obi J. The learned Justice heard and took evidence from both parties in the action. However, before he could deliver his judgment, he was transferred upon creation of Delta State. The trial was thus abandoned by Obi J.

Subsequently, Edokpayi J of now Edo State High Court took over the matter. The new judge decided to make use of evidence earlier received by Obi J. Hence, in his judgment Edokpayi J ruled in favour of appellant. Consequently, respondent filed appeal at the Court of Appeal, Benin City, while appellant cross-appealed. The court allowed the main appeal and dismissed the cross-appeal. Being dissatisfied, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

“Whether consent of the parties may render evidence given in the previous judicial proceedings admissible in a case in which the conditions prescribed by section 34 of the Evidence Act do not exist.”

HELD (Unanimously ordering a trial *denovo* per **MOHAMMED JSC**)

COURTS - Issues - Determination - Basis

1. I do not have to repeat the clear provision of the law that a court of law can only determine an issue on legally admissible evidence. Courts have no discretion to act on evidence made inadmissible by the express provision of a statute, even with the consent of the parties.

The provisions of section 34(1) of the Evidence Act is mandatory and cannot be waived. If consent is given to admit evidence which is contrary to the provisions of a statute (e.g. S. 34(1) of the Evidence Act) the courts must ignore it because it is a case of giving consent to an illegality. (p. 2235 B/F)

JUDGMENTS - Writing of - Basis

2. I now consider the merits of the procedure adopted by the trial court in writing judgment on the evidence recorded by Obi J. It is clear from the record that Obi J had completed hearing of all evidence and adjourned for judgment when he abandoned the trial and left for Delta State. In a situation like this Edokpayi J should direct the case to be started *de novo*. It is palpably wrong to write a judgment on the evidence recorded by another judge. A trial is a judicial examination of evidence according to the law of the land, given before the court after hearing parties and their witnesses. A trial must be conducted by the judge himself and at the end of the hearing he will write a judgment which is the authentic decision based on the evidence he received and recorded. It is a mistrial for one judge to receive evidence and another to write judgment on it.

(p. 2236 A)

REPRESENTATION

A.O. Eghobamien (JNR.) for the appellant

Chief H. O. Ogobodu, with Marcel Eriofoch, for the Respondent

CASES REFERRED TO

Nahman v. J.A. Odutola (1953) 14 WACA 381

Kale v. Coker (1982) 12 SC 252

Menakaya v. Menakaya (2001) 16 NWLR (Pt. 738) 203

Fulker v. Fulker (1936) 3 All E.R. 636

Munday v. Munday (1954) 1 WLR 107

STATUTE REFERRED TO

Evidence Act, s. 34(1)

LEAD JUDGMENT BY MOHAMMED JSC

This is an appeal from the decision of the Court of Appeal, Benin Division. In a unanimous decision the Court of Appeal set aside the judgment of Edokpayi J. of Edo High Court which was delivered in favour of the Plaintiff, Mr. A.O. Eghobamien, against the Federal Mortgage Bank of Nigeria. The suit was originally filed before Obi J who was then a judge of the High Court of Bendel State. The claim filed by the Plaintiff is as follows:

“(a) A declaration that the plaintiff is the owner and entitled to the original document of all that property registered as No. 3 at page 3 in volume 623 at the office at Benin which has been in possession of the defendant.

(b) An order for the defendant to surrender to the plaintiff forthwith the original document of title registered as No. 3 at page 3 in Volume 623 at Benin City.

(c) The sum of N500,000.00 as general damages suffered by the plaintiff as the result of the failure and or refusal of the defendant to return the said document of title to the plaintiff despite of repeated demands.

(d) And order for defendant to execute a deed of release in the Lands Registry, Benin City in favour of the Plaintiff.”

Learned Justice Obi ordered for pleadings and they were filed and exchanged. Hearing was commenced before Obi J on 23rd July 1990. The Plaintiff called two witnesses and closed his case. The two witnesses were Mr. Joseph Aku Akinniraye, an official of Cooperative Bank, and the plaintiff who is the appellant, in this appeal. The defendant called one witness, one Mrs. Adefunke Omowunu Abiodun and closed its case. Counsel for the parties addressed the court and

the learned trial judge adjourned the case to 25th September, 1991 for the delivery of the judgment. Before the adjourned date, Delta State was created and Obi J was transferred to the newly created State. The learned judge left for the Delta State before he could deliver the judgment. The trial was therefore abandoned by Obi J.

B On 21st October, 1991 the case was mentioned before Edokpayi J. subsequently several adjournments were made until on the 21st April, 1994 when the following proceedings were recorded:

C *“A.O. Eghobamien, Esq. (G.A. Ezomo, Esq. With him) appears for the Plaintiff. Chief H.O. Ogbodu, Esq. Appears for the Defendant.*

B/515/89 in evidence by consent and the certified record of proceedings is admitted in evidence by consent of Counsel and marked as Exhibit 9. “

D On the same day learned counsel for the respective parties addressed the court. Edokpayi J reserved the judgment to 20th May, 1994. After delivering the judgment the Defendant, Federal Mortgage Bank of Nigeria, filed an appeal challenging the decision of Edokpayi J. Mr. A.O. Eghobamien also filed a cross-appeal. The Court
E of Appeal, (Coram Akpabio, Akintan and Nsofor JJCA) allowed the appeal filed by the Federal Mortgage Bank and dismissed the cross-appeal filed by Mr. A. O. Eghobamien. It is against that decision that the appellant has come before this court, armed with five grounds of
F appeal. Briefs were filed and exchanged. The appellant identified 5 issues for the determination of the appeal. The issues read as follows:

“1. Whether the Court of Appeal was right in pronouncing on the issues not canvassed before it.

2. Whether the amount of N5,000 awarded for detinue is
G *adequate.*

3. Whether in the circumstances the cost N2,000.00 awarded against the appellant by the appellate court was not excessive.

4. Whether the action was based on breach of contract or detinue.

H *5. Having regard to the totality of the evidence before the lower courts, whether the appellant is not entitled to judgment.”*

The respondent adopted the issues formulated above.

The appeal was heard on 2nd January, 2002. When we were

considering the merits and the submissions of counsel in their respective briefs an issue concerning the validity of the trial conducted by Edokpayi J. was raised. Since the issue was raised suo motu by the court we invited counsel to address us on the issue. We therefore wrote to the counsel indicating an anomaly in the proceedings at the High Court. It was pointed out that the proceedings for the full trial of the action were conducted by Obi counsel representing both parties came and addressed us on the issue. Mr. A.O. Eghobamien, Jnr. Learned counsel for the appellant, in this appeal, quite correctly, identified one single issue for the procedural anomaly we observed from the record of proceedings. The single issue reads as follows:

“Whether consent of the parties may render evidence given in the previous judicial proceedings admissible in a case in which the conditions prescribed by section 34 of the Evidence Act do not exist.”

Both Mr. A.O. Eghobamien Jnr. for the appellant and Chief H.O. Ogbodu, who appeared for the respondent, submitted that the proceedings before Obi J were admitted in evidence before Edokpayi J by consent of the parties. Both counsel also agree that the conditions for the admission of such proceedings as set out in Section 34(1) of the Evidence Act had not been established. Mr. A.O. Eghobamien Jnr. submitted that the position of the law is that inadmissible evidence falls into two categories:

- (a) Evidence which is inadmissible in any event, and
- (b) Evidence inadmissible subject to conditions.

Learned counsel further argued that where evidence falls into the later category once admitted it can never be objected to. He said that the evidence tendered in an earlier proceeding between the same parties and which was admitted by consent of the parties falls into the category of the evidence that was admitted subject to conditions. He argued that as a result, the provisions of section 34 of the Evidence Act would be by the consent of the parties waived. Counsel pointed out that he had no Nigerian Authority to support his submission, but he referred no Nigerian Authority to support his submission, but he referred to the following Indian Authority which he picked in Sarkar on Evidence, 15th Edition 1999 (revised by Sudipto Sakar and V.R. Manor) Vol. 1 at page 736.

“Waiver — Benefit of 33 may be waived. Consent of parties

may make admissible the evidence given in a previous judicial proceeding between them in a case in which the conditions prescribed by that section do not exist (*Jainab Bibi v. Hyder Ali*, 43 M 609 FB: 56 1C 957 *Nityyananda v. Binayak*, A 1995 Or 129; see *Radhakishan v. Kedar*, 80 1C 874; 46 A 815 - CONTRA *Ayyavu v. Sham*, 81 1C 235; *Abdool Gaffoor v. Govind*, A 1918 R 284; *Ghulom v. R.* 10 L 837). If by consent or without objection the court admits evidence not strictly admissible under s 33, the appellate court cannot exclude it (*Laskshman v. Amrit*, 2 B 591; *Lakshimdevamma v. Pobbsetti*, 140 1C 518; A 1927 C 1107; *Ayyavu v. Secy of S. sup*; *Modi Nathbhai v. Chhotubhai*, A 1962 G 86).

When a trial in the original side of the High Court is continued by another judge owing to the death of judge consent of parties may make evidence given before the former judge admissible before the latter judge (*Dalim v. Nandarani*, A 1970 C2921). Where there are cross cases, they should not be considered in coming to a conclusion on the other (*Garribulla v. Sardar*, 81 1C 557; A 1924 C 813; see *Sheikh Bahatar v. Nobadali*, 28 CWN 487). See also: “Waiver of objection, or Consent”, ante s 5.”

Learned counsel agrees that the Indian case is of persuasive authority. It is not correct however, that there are no Nigerian authorities on the issue of giving consent to admission of inadmissible evidence. There are many cases as can be seen later in this judgment but they are contrary to the submission of the learned counsel. Before I go further in this judgment I ought to mention that the respondent’s counsel is in full support of the submission of the appellant. Now I may mention the case of *Joseph Nahman v. J.A. Odutola* (1953) 14 WACA 381. In that case the whole record of proceedings of an earlier suit between the same parties was admitted in evidence through the consent of the parties, notwithstanding the fact that the conditions laid down in Section 34(1) of the Evidence Ordinance were not established. The West African Court of Appeal, per Coussey J.A. held;

“Learned counsel for the defendant-appellant contends, however, that this court should examine the evidence of Simpson and hold 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."

I do not have to repeat the clear provision of the law that a court of law can only determine an issue on legally admissible evidence. Courts have no discretion to act on evidence made inadmissible by the express provision of a statute, even with the consent of the parties. See *Kale v. Coker* (1982) 12 S.C. 252. Section 34(1) of the Evidence Act reads as follows:

"34. (1) Evidence given by a witness in a judicial proceeding, or before any person authorised 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 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-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceedings 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."

The provisions of section 34(1) of the Evidence Act is mandatory and cannot be waived. If consent is given to admit evidence which is contrary to the provisions of a statute (e.g. S. 34(1) of the Evidence Act) the courts must ignore it because it is a case of giving consent to an illegality. In *Menakaya v. Menakaya* (2001) 16 NWLR (Part 738) 203 at 236 and 263 which the learned counsel referred to, this court held that a mandatory statutory provision directing a procedure to be followed in the performance of any public duty is not a party's personal right to be waived. The provisions of section 34(1) of the Evidence Act is a mandatory statutory provision and it cannot be waived.

I now consider the merits of the procedure adopted by the trial court in writing judgment on the evidence recorded by Obi J. It is clear from the record that Obi J had completed hearing of all evidence and adjourned for judgment when he abandoned the trial and left for Delta State. In a situation like this Edokpayi J should direct the case to be started de novo. It is palpably wrong to write a judgment on the evidence recorded by another judge. A trial is a judicial examination of evidence according to the law of the land, given before the court after hearing parties and their witnesses. A trial must be conducted by the judge himself and at the end of the hearing he will write a judgment which is the authentic decision based on the evidence he received and recorded. It is a mistrial for one judge to receive evidence and another to write judgment on it.

D Learned Justice Nsofor JCA, commenting on the judgment of Edokpayi J had the following to say:

“Could the learned judge, who did not see the witnesses testify; and hear the witnesses testify, really, as a trial court, rely on the silent, cold and printed record (exhibit 9) to believe or disbelieve any witness.”

I agree entirely with Nsofor’s observation. It is amazing to read the analysis of the evidence made by Edokpayi J when he had no opportunity to look into the face of witnesses in order to observe their demeanour when they were giving evidence. In a recent decision of this SC.169/1997 Francis Shanu and Anor. V. Afribank Nigeria PLC, delivered on 21st June, 2002, this court, in a judgment delivered by my learned brother, Uwaifo, JSC, considered a similar situation like the procedure followed in the case in hand. Ironically the two judges, Obi J and Edokpayi J were both involved in the mistrial in the case of Francis Shanu (Supra). It has been held by this court in that case that, the decision of Edokpayi J is a nullity. I have to repeat that it is wrong to write a judgment on evidence recorded by another judge. I am bound to follow the decision in Francis Shanu’s case. I therefore declare the judgment of Edokpayi J, in the case in hand, a nullity.

Consequently, this appeal is dismissed on the ground that the judgment of Edokpayi J is a nullity. This issue which we have raised

suo motu has therefore determined this appeal. The claim filed by the appellant against the Federal Mortgage Bank is sent back to the Edo State High Court for retrial, de novo, before another judge. In view of the fact that the dismissal is based on the issue which we raised suo motu I order each party to bear own costs.

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KUTIGI JSC

I read before now the judgment just delivered by my learned brother, U. Mohammed, J.S.C. I agree with the conclusion that the judgment purportedly delivered by the High Court was a nullity. I also order that the case be tried again by another judge of the High Court, with no order as to costs.

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OGWUEGBU JSC

I have been privileged to have a preview, in draft, of the judgment just delivered by my learned brother. U. Mohammed, J.S.C.. and I am in complete agreement with him that the appeal should be dismissed. The judgment of Edokpayi, J. is a nullity. See the judgment of this court in S.C. 169/1997: Francis Shanu v. Afribank Nig. Plc., delivered on 21/6/2002 (unreported).

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I endorse the consequential orders including the order as to costs.

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UWAIFO JSC

I read in advance the judgment of my learned brother, U. Mohammed, J.S.C. I entirely agree with the reasoning and conclusion. This court recently decided similar issues in SC. 169/1997: Francis Shanu v. Afribank Nigeria Plc. Delivered on 21st June, 2002 (unreported).

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Section 34(1) of the Evidence Act stipulates conditions under which evidence of a witness in a previous proceeding may be admitted in a subsequent proceeding or in a later stage of the same proceeding for the purpose of establishing the truth of the facts which it states. That section is a statutory provision which must be observed before such evidence can be admitted. In the present case, there is an incidental issue as to the propriety of one trial judge taking all

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evidence available in a case and another (trial) judge considering such evidence to arrive at a decision. That becomes a matter of fair hearing which touches on the issue of constitutionality and natural justice, as well as public policy. It is unlawful and incompetent for one judge to decide on the evidence heard by another judge. for-
B that to happen is an infringement of the principle that justice must not only be done, but must be seen to be done See Fulker v. Fulker [1936] 3 All E.R. 636. Munday v. Munday [1954] 1 W.L.R. 107, Francis Shanu v. Afrikbank Plc. (supra).

C I too declare the judgment of Edokpayi, J a nullity and order that the case be heard de novo before another judge. I make no order as to costs.

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EJIWUNMI JSC

I have read before now the judgment just delivered by my learned brother. U. Mohammed, J.S.C. In that judgment, he has adequately covered the salient issues raised in this appeal and I agree with his reasoning thereon. This court had cause to deal with similar
E matter that arose in SC. 169/1997, Francis Shanu v. Afribank Nigeria Plc. Delivered on 21st June, 2002 (unreported).

It is evident that Edokpayi, J. dealt with this matter erroneously as he proceeded without regard to the provisions of s. 34(1) of the Evidence Act.

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I would accordingly declare the judgment of Edokpayi, J., a nullity. In the result, it is ordered that the case be heard de novo before another judge of the Edo State High Court. I make no order as to costs.

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