

SUPREME COURT OF NIGERIA
FRIDAY 20TH SEPTEMBER, 2002. SC. 73/1998
CORAM:- M. E. OGUNDARE, U. MOHAMMED,
A. I. KATSINA-ALU, E. O. AYOOLA, N. TOBI, JJSC

DR. ROM OKEKEARU

(Trading under the Name and Style APPELLANT
"Peoples Clinic Karu, Abuja")

AND

DANJUMA TANKO

(Suing by his next friend) RESPONDENT
Mrs. Keziah Ibrahim)

TORTS - Battery - Basis - An act does not amount to battery - Unless it is done either intentionally or negligently (H1)

APPEALS - Concurrent findings - Supreme Court does not interfere - Unless such findings are perverse - Or an error of substantive or procedural law was perpetrated (H2)

FACTS

The case for plaintiff/respondent is that he injured his left centre finger in the course of removing zinc from his mother's residence. He stated that the wound was not deep. He was however taken to defendant's/appellant's clinic, who without due care negligently amputated the said finger. Respondent further stated that appellant refused to surrender the amputated finger. The matter was therefore reported to the Police. In claiming damages for the permanent incapacitation, respondent instituted this action at the High Court of the Federal Capital Territory, Abuja.

At the trial, appellant denied the respondent's claims and stated that the said finger was badly damaged. According to appellant, the only medical option open to him is to amputate the affected finger. In a counter-claim, appellant claimed for an outstanding medical fees of N125,000.00 and general damages for injurious falsehood. After the trial, the court gave judgment in favour of respondent by awarding a N100,000.00 general damages for permanent incapacity. The counter-claim was thus dismissed. Not satisfied, appellant appealed

to the Court of Appeal, Abuja. The appeal was allowed in part by a reduction of the N100,000.00 general damages to N50,000.00 being damages for battery alone. Still dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

(1) Was the Court of Appeal right after holding that the appellant is not liable for negligence, to hold the appellant is liable for battery?

(2) Was the Court of Appeal right to have awarded the sum of N50,000,00 when a case of battery was not made out?

HELD (Unanimously dismissing the appeal per

KATSINA-ALU JSC)

Battery - Basis

1. The law in this regard is settled. An act does not amount to battery, unless it is done either intentionally or negligently. So, did the Defendant intentionally amputate the plaintiff's finger? There is no question about this. This is brought out more clearly by the evidence of the defendant himself.

The evidence of the Defendant established beyond argument that he intentionally trimmed off the Plaintiff's finger.

(p. 2933 F/2934 C)

APPEALS - Concurrent findings

2. This Court has held in a plethora of cases that, when there are concurrent findings of fact by the two courts below, same will not be ordinarily disturbed unless such findings are perverse, or an error of substantive or procedural law was perpetrated. (p. 2935 G)

REPRESENTATION

Nnaemeka Ngige, for the Appellant

Respondents not represented

CASES REFERRED TO

Letang v. Cooper (1965) 1 O. B 426

Chief Ray Eriyo v. R. I. Obi (1993) 9 NWLR (Pt. 315) 60
Ndukwe v. Acha (1998) 5 S.C. 28
Mogo Chinwendu v. Nwanegbo (1980) 3 S.C. 31
Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3
NWLR (Pt. 13) 407

BOOK REFERRED TO

Clerk & Lindsell on Tort 15 Ed. p. 429

LEAD JUDGMENT BY KATSINA-ALU JSC

This appeal is from a judgment of the Court of Appeal, (Abuja Division), delivered on the 24th day of April, 1997. The lower court reduced the amount of N100,000.00 general damages awarded against the Appellant to N50,000.00 for battery resulting from the amputation of the left centre finger of the respondent.

The facts that led to the institution of this case are as follows. The Plaintiff by his 18 paragraph Amended Statement of Claim averred that on or about August 1991, in the course of removing some zinc from his mother's residence, he injured his left centre finger. He said the wound was not deep. Notwithstanding the Plaintiff's neighbours took him to the Defendant's clinic. The Defendant without due care and skill negligently amputated that finger, an exercise that permanently disfigured and incapacitated the Plaintiff in handling objects. The Plaintiff further averred that the defendant refused to surrender the amputated part of the affected finger. He said he reported the matter to the police at Nyanya Police Station.

The Defendant, Dr. Rom. Okekearu, denied the claim. In a 22 paragraph Amended Statement of Defence he averred that the Plaintiff sustained an injury whilst he and other boys were carrying a poultry pen which fell and crushed the Plaintiff's middle finger. He averred further that when the Plaintiff accompanied by neighbours was brought to his clinic, he had the middle finger tied with a piece of cloth which was badly stained with blood. On removal of the cloth, blood gushed out of the finger and he discovered that the distal portion of the finger was almost completely severed from the rest of the finger except for a strip of skin which held same together. The bone in the said distal part was broken and the reasonable medical option open to him was to trim off the said strip of skin and stitch the wound. The

Defendant denied negligence. He averred that there was no need for an X-Ray of the said finger, the same having been traumatically amputated partially at the time of the injury. Further that the distal part of the Plaintiff's finger was disposed of in accordance with standard medical practice. The Defendant counter-claimed for the outstanding
 B medical fees of IS! 125,000.00 and general damages for injurious falsehood. After hearing evidence Kolajo, J., gave judgment in favour of the Plaintiff, awarding him the sum of N100,000.00 general damages for permanent incapacity, negligence and battery resulting
 C from the amputation of the left centre finger of the Plaintiff. The learned trial Judge dismissed the counter-claim.

Aggrieved by the said judgment the Defendant appealed to the Court of Appeal. The Court of Appeal on 24th April, 1997 allowed the appeal in part, reduced the award of N100,000.00 to
 D N50,000.00, being damages for battery only. Still aggrieved, the Defendant has further appealed to this court.

In his brief of argument, the Defendant as appellant set down two issues for determination in this appeal. They read as follows:

(1) Was the Court of Appeal right after holding that appellant
 E is not liable for negligence, to hold appellant is liable for battery?

(2) Was the Court of Appeal right to have awarded the sum of N50,000.00 when a case of battery was not made out?

The Plaintiff, for his part, has adopted the two issues for
 F determination as formulated by the defendant

ISSUE 1 - Under this issue the Defendant states in his brief of argument -

*"Battery is the intentional not direct application of force to another. See Winfield and Joloweiz on Tort (12th ed.) 54. Furthermore
 G in battery it is not necessary that there should be any bodily contact between the Defendant and the Plaintiff. This is sufficient if the Defendant directly brings some material object into contact with the Plaintiff's person."* The learned authors of Clerk & Lindsell on Torts 1969 (13th ed.) para. 672 at p. 340 had this to say:

H *"An act does not amount to a battery unless it is done either intentionally or negligently"* (Underlining mine).

Learned counsel for the defendant also relied on the cases of Letang v. Cooper (1965) 1 O.B. 426 and Chief Ray Eriyo v. R. I. Obi (1993) 9 NWLR (Part 315) 60 to buttress the submission that if the

defendant intentionally applies force to the Plaintiff, then the Plaintiff has a cause of action in assault and battery. If, however, he does not inflict injury intentionally but unintentionally, then the Plaintiff has no cause of action in trespass. It was concluded on behalf of the Defendant that the act of trimming off the Plaintiff's centre finger of the left hand is not an intentional act of the Defendant. It is unintentional. B That being so, it was submitted that the tort of battery which is an action in trespass was not made out against the Defendant.

In his reply the Plaintiff submitted that the treatment carried out, that is, the amputation of the Plaintiffs left centre finger was an intentional act which the Defendant is liable for in battery. It was C pointed out that the type of battery in question is a special one which can be committed only by medical men. Reliance was placed on Clerk & Lindsell on Tort 15 Ed. p. 429. It was said that all that was needed to be proved in this class of battery is, the fact that the doctor D failed to obtain consent from the patient before carrying out the operation. Whether consent was obtained or not is a question of fact. It was further pointed out that the two courts below found as a fact that the Defendant did not obtain the consent of the Plaintiff or his guardian before amputating his finger. E

I would like to state from the onset that I find no merit whatsoever in this submissions of the defendant under the first issue. First, it has been submitted for the Defendant that the act of trimming off the Plaintiff's finger was not an intentional act. So was the Defendant sleep-walking when he amputated the Plaintiff's finger? F Or did he do it in a state of complete automatism? These have not been pleaded as defences to this action.

The law in this regard is settled. An act does not amount to battery, unless it is done either intentionally or negligently. So, did the Defendant intentionally amputate the plaintiff's finger? There is no question about this. This is brought out more clearly by the evidence of the defendant himself. In his evidence-in-chief he testified inter alia:

"I too Tanko Danjuma inside the theater. I untied the piece of cloth on his finger. On examination, I found that Tanko Danjuma lacerations on the affected finger. It was distal 1/3, that is 1/3 up of the left middle finger. There was a fracture - compound fracture of the finger. Only the skin and underline tissues held thee distal 1/3 to

the bottom left muddle finger. The finger bled profusely. A head tie was used to tie the hand. Some people later came. I asked for the closest relative of Tanko Dan junta. P.W.2 came forward. She said she was Tanko's aunt. I took P.W.3 inside the theatre. I showed her Tanko's finger. She asked me to carry on with whatever treatment was necessary. A nurse, Victoria Olu Ajadi, was with me in the theatre. I trimmed off the affected crushed area. I stopped the bleeding of the finger. I gave local anesthetics at the base of the finger. I then applied stitches. Nobody held the plaintiff while he was being treated, only myself, Tanko and a nurse were in the theatre where to treated Tanko. I did not block the view of the plaintiff while he was being treated applied iodine gauze and bandage on the finger. Thereafter we left the theatre..."

The evidence of the Defendant established beyond argument that he intentionally trimmed off the Plaintiff's finger.

The next question to be resolved is whether the Defendant had the plaintiff's consent or that of his guardian to amputate the finger. The law allows a man to consent to the use of a reasonable degree of force on his person in certain circumstances recognised as lawful justification, e.g. in lawful games or sports, or for a surgical operation. In all these cases consent will be a bar to an action of trespass. The learned trial Judge found as a fact that the Defendant did not obtain the consent of the plaintiff nor that of his guardian before carrying out the amputation of the Plaintiff's finger. In the course of his judgment he held thus:

"The fact that the plaintiff submitted himself for treatment by the defendant did not absolve the defendant of battery. To absolve the defendant he must have told the plaintiff or his auntie (P.W.2) that he would amputate the finger of the plaintiff. The defendant himself never said he explained this either to the plaintiff or P.W.2. All he said is that he showed her Tanko's finger and "she asked me to carry on with whatever treatment was necessary: Although I do not believe that the defendant sought and got the consent of P.W.2 to amputate the plaintiff's finger, the consent he allegedly got is in law insufficient. It amounts to no consent. In an action for battery, for consent to be valid and real, the doctor must explain to the patient or his proxy the actual treatment he proposes to give to the patient. The learned authors of Clerk and Lindsell on Torts said at paragraph

14-09 at page 662 that, *"In all other cases the patient must be given sufficient information about the proposed treatment to enable him to give an informed consent to the procedure."*

In effect, since the plaintiff or his auntie (PW.2) did not consent to the amputation of the plaintiff's finger, the defendant is no doubt liable in battery to the plaintiff. The Court of Appeal in this connection, also held as follows:

"On the issue of battery, the appellant still I maintained that he had the consent of PW.2 to act as he did on the respondent's finger. There is however no evidence to show that the appellant had fully explained the nature of the treatment he was giving to the respondent nor did he explain the ill-effects of such treatment. Failure to do any of those would make him liable in negligence."

Again in Clerk & Lindsell on Tort, 15th Edition, p. 429, the learned author had this to say about battery:-

"In another case where a doctor was sued for battery it was held that if he & had failed to explain the general Mature of the treatment, the patient's consent would be invalid/ but that there is no obligation to explain the effects that might result from negligence. The duty is to warn of all-effects inherent in the treatment"

By this treatment, the appellant trimmed off the centre finger of the respondent. He did not, according to PW.2, explain anything to her either before or after the treatment. This made her consent, even if she gave any, invalid. The appellant also testified that even though the centre finger was crushed and the bone broken and almost cut off, he could put back the bone together and need not have cut off the finger. But yet, he proceeded to trim off the finger. If he had explained this position to the respondent or PW.2, before-hand, the situation might have been different.

This Court has held in a plethora of cases that, when there are concurrent findings of fact by the two courts below, same will not be ordinarily disturbed unless such findings are perverse, or an error of substantive or procedural law was perpetrated.

See Ndukwe v. Acha (1998) 5 S.C. 28; 6 NWLR (Pt. 552) 41; Mogo Chinwendu v. Nwanegbo (1980) 3 S.C. 31; Overseas Construction Ltd. v. Creek enterprises Ltd. (1985) 3 NWLR (Pt. 13) 407) No evidence has been adduced to justify any interference by this Court. The result is this. The amputation of the plaintiff's finger

was done intentionally and without the consent of the Plaintiff or his guardian. This means that the defendant is guilty of battery.

ISSUE 2 - Defendant contends under issue 2 that a case of battery has not been made out against him and the award of N50,000.00 must therefore be set aside. It was said that an appellate court will not lightly interfere with an award of damages. It was argued that on no basis in law could the award of N50,000.00 damages be justified.

For the Plaintiff it was contended that the Court of Appeal did not act on a wrong principle of law, and the amount of N50,000.00 awarded is not so high to make it an entirely erroneous estimate of the damages to warrant interference of this court. Besides, the Defendant did not give any reason in his brief to show that N50,000.00 awarded is too high. In reducing the amount of N100,000.00 damages awarded by the learned trial Judge to N50,000.00, the Court of Appeal said:

“There cannot be any dispute also that the trimming off of the respondent’s center finger of his hand, is a permanent disability caused as a result of such injury. Although the respondent is still young, (about 80 years of age now), the permanent finger injury is not a very serious disability which would adversely affect his enjoyment pleasure of life- I have also found that for battery only, for this reason I am of this opinion that the award of N100,000.00 as general damages made by the learned trial judge in this case is very much on the high side. I accordingly reduce it from N100,000.00 to N50,000.00 in favor of the respondent.”

I could not agree more. There is no merit in this Issue 2 fails. The two courts below have held that a case of battery has been made out against the Defendant. This is amply supported by the evidence given at the trial. The amputation of the Plaintiffs finger was an intentional act done without the consent of either the Plaintiff or his guardian. I agree with the courts below that the Defendant is liable in battery. In the result this appeal fails and I dismiss it The Plaintiff is entitled to costs assessed at N10,000.00.

OGUNDARE JSC

I agree entirety with the judgment just delivered by my learned

brother, Katsina-Alu, JSC., a preview of which I had before now. I have nothing more to add. I too dismiss this appeal with costs as assessed by him.

MOHAMMED JSC

B

I entirely agree. I have had the preview of the judgment just delivered by my learned brother, Katsina-Alu, JSC., in draft, and for the reasons given in the judgment I shall also dismiss the appeal and affirm the decision of the Court of Appeal. The appeal is dismissed. I award N10,000.00 in favour of the respondent.

AYOOLA JSC

I agree that this appeal should be dismissed with N10,000 costs to the respondent for the reasons given in the judgment just delivered by my learned brother, Katsina-Alu, JSC.

TOBI JSC

E

I agree with the judgment of my learned brother, Katsina-Alu, JSC., that this appeal fails and should be dismissed.

The main issue is whether the appellant had the consent of Tanko Danjuma before the finger was amputated. Consent, which is the act of giving approval or acceptance of something done or proposed to be done, is an exact conduct flowing from the person giving the consent. While consent could be implied in certain situations, it is my view that consent to amputate a part of the body should be exact and unequivocal. There should be no doubt that Tanko Danjuma, the amputee, gave his consent that his finger be amputated.

The appellant in his evidence-in-chief said on the issue of consent:

“I asked for the closest relative of Tanko Danjuma. PW.2 came forward. She said she was Tanko’s aunt. I took PW.2 inside the theatre. I showed her Tanko’s finger. She asked me to carry on with whatever treatment was necessary. A nurse, Victoria Olu Ajadi, was with me in the theatre. I trimmed off the affected crushed area.”

It is clear from the above that Tanko’s consent was not sought.

It was the consent of Tanko's aunt which was sought. Did Tanko lack legal capacity to give his consent? Was Tanko in a state of coma that he was not in a position to give his consent? Why was consent not directly procured from Tanko?

Tanko was born on 3rd December, 1977. He was therefore
 B fourteen years when his finger was amputated, hi the absence of any medical evidence that Tanko lacked the capacity to give his consent to the amputation of his finger, I cannot see the justification of ignoring him to obtain the consent of P.W.2, his aunt.

C The appellant did not tell the trial court why he ignored Tanko, a young man who gave lucid evidence as plaintiff at pages 57-61 of the Record. There is also no evidence that Tanko was in a state of coma, a state which should have made it impossible for the young man to give his consent. The point I am struggling to make is that
 D there is no evidence on the Record why effort was not made to obtain the consent of Tanko, a rational human being of fourteen years.

And that takes me to the dialogue between P.W.2 and the appellant. Did the dialogue constitute consent in law? The appellant said in evidence that he showed P.W.2 Tanko's finger and she asked
 E him to carry on with whatever treatment was necessary/ The word "treatment", which, in the context, means substance or method of treating illness by medical means, is omnibus and vague. In my humble view, it can hardly accommodate the specific significant act of amputation of apart of the body. All that the appellant said is that he
 F showed P.W.2 the finger of Tanko. He did not tell her that there was need to amputate the finger and so P.W.2 cannot be said to have given her consent for the amputation of Tanko's finger.

In whatever way and from whatever angle one looks at the
 G matter, it is clear that no consent was sought and obtained to amputate Tanko's finger, a duty which clearly rested on the appellant. He was negligent. In my humble view, the appellant intentionally amputated the finger of Tanko, an act which amounted to battery.

It is the above reasons and the fuller reasons given by my
 H learned brother, Katsina-Alu, JSC., that I also dismiss the appeal. I also award the respondent N10,000.00 costs.