

SUPREME COURT OF NIGERIA
FRIDAY 25TH APRIL, 2003. SC. 30/1999
CORAM:- S. M. A. BELGORE, S. U. ONU,
U. A. KALGO, A. O. EJIWUNMI, N. TOBI, JJSC

CAPPA & D'ALBERTO LTD APPELLANT
AND
DEJI AKINTILO RESPONDENT

EVIDENCE - Admission - Meaning - Admission is statement which is made by a party or his agent to civil proceedings - And which statement is adverse to his case (H1)

EVIDENCE - Admission - Weight - Value of admission depends on circumstances in which it was made - And court is to give due weight to the admission and circumstances (H2)

LEGAL PRACTITIONERS - Actions - Scope of service - Authority of counsel extends to an action and its incidental matters - Save where the authority is specifically limited by client (H3)

DAMAGES - Award - Loss of vehicle usage - Where vehicle is damaged beyond usage - Court is entitled to award damages for the period it is out of use (H4)

PLEADINGS - Statement of claim - Purpose - Statement of claim conveys plaintiff's claim to defendant - So that he can file defence thereto - But complaint by defence arises where the claim is vague (H5)

EVIDENCE - Admitted fact - Effect - Since appellant failed to deny respondent's claim for loss of use of vehicle - The claim is deemed admitted (H6)

APPEALS - Briefs - Binding nature of - Parties are bound by their briefs - And issues not contained therein are of no moment (H7)

APPEALS - Courts - Use of oral evidence - Correctness of - By s. 16

of Court of Appeal Act - The court rightly relied on oral evidence of respondent - While it rejected reliance of trial court on documents (H8)

FACTS

Plaintiff/respondent was residing at Adeola Odeku Street, Victoria Island-Lagos at the material point in time. He lawfully parked his car at his parking lot. However, the workmen of defendant/appellant negligently allowed flying stones to drop on the rear wind-screen of the car. The stones shattered the wind-screen and caused damage to the car. Thereafter, respondent wrote a letter through his solicitors to appellant claiming the sum of N2,000.00 daily for loss of use of the vehicle. The negotiations that later went on between the parties were not successful. Hence, respondent filed this action at the High Court of Lagos State, claiming the said N2,000.00, special and general damages that amounted to N67,000.00. Respondent tendered identifications A-A2 in evidence.

At the trial, counsel to appellant made an admission for loss of use of the vehicle of respondent. She only proposed to pay a lesser amount of money. In his judgment, the court admitted the identifications A-A2 in evidence and granted the claim of respondent of N2,000.00 loss of daily usage of the vehicle. The court also gave judgment based on the admission of appellant's counsel. Being dissatisfied, appellant appealed to the Court of Appeal. The court affirmed the decision of the trial court. The court however rejected identifications A-A2. The court rather relied on oral evidence of respondent in affirming his claim of N2,000.00 for loss of daily usage. Aggrieved further, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the appellant's offer made in the course of negotiation to settle out of court amounted to an admission of the respondent's claim.

2. Whether the Court of Appeal was right in affirming the award of N2,000.00 per day as special damages for loss of use."

HELD (Unanimously dismissing the appeal per **TOBI**

JSC)

EVIDENCE - Admission - Meaning

1. An admission is a statement, oral or written (expressed or implied) which is made by a party or his agent to a civil proceedings and which statement is adverse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement.

In civil case, admissions by a party are evidence of the facts asserted against, but not in favour of such party. Unless explanations are given which satisfy the court that admissions should not be so regarded, due weight should be given to them as such. (p. 906 H)

EVIDENCE - Admission - Weight

2. In order to found admissions on oral testimony, the evidence must be clear and unambiguous. The value of an admission depends on the circumstances in which it is made. It is however, for the trial court to decide the issue and to give due weight to the alleged admission and the explanatory facts or circumstances. (p. 907 B)

LEGAL PRACTITIONERS - Actions - Scope of service

3. The authority of counsel at the trial of a case extends to the action and all matters which are incidental to the action. Where the authority is not specifically limited by his client, as it is in this appeal, the sky, the Englishman says, becomes the limit, to the extent that he could within the Law commit the client. After all, by the brief, he is clothed with some apparent authority he can use to the best advantage of his client by the application of his expertise and professionalism. Flowing from the above relationship, counsel can, in the course of performing his professional duties, commit his client either by way of a specific undertaking or by clear admission. (p. 908 B)

DAMAGES - Award - Loss of vehicle usage

4. And that takes me to the second issued in respect of the award of N2,000.00 per day as damages for loss of use. It is elementary in the law of damages for a court to award dam-

ages for loss of use arising from damage to vehicle. Where a vehicle is damaged to the extent that the owner cannot use it, the court is entitled to award damages for the period the vehicle is in disuse. (p. 908 D)

B *PLEADINGS - Statement of claim - Purpose*

5. I do not, with the greatest respect, agree with learned counsel for the appellant that the above is not sufficient pleading. One main aim of statement of claim is to convey the claim and the accompanying case of the plaintiff concisely to the defendant so that he can file a statement of defence, if need be. The moment a statement of claim has performed that primary function, a defendant cannot complain. It is only when a statement of claim is vague, ambiguous and lacking specificity in language that a defendant can successfully attack it. (p. 909 A)

EVIDENCE - Admitted fact - Effect

6. In the instant case, while paragraph 11 told the story of the N2,000 claim for loss of use, paragraph 20(iv) in a clear language demanded the sum as a relief. In my humble view, a pleading cannot be clearer. Learned counsel for the respondent submitted in his brief that the appellant did not give any evidence to contradict the claim of loss of use. This is a strong point and I expected learned counsel for the appellant to reply. Unfortunately, he thought differently. It is trite law that a fact which is not denied is deemed to have been admitted. Apart from the evidence led by the respondent, the fact that the averment was not denied, is enough to admit it in evidence. (p. 909 B)

APPEALS - Briefs - Binding nature of

7. Learned counsel mentioned quite a number of areas which the Court of Appeal ought to have evaluated, including the fact that the respondent had two other cars. How can a court suo motu evaluate such evidence, in favour of the appellant, particularly when the respondent explained how the two vehicles were used in the family; one for taking his wife to work and the other for taking his children to school. And what is

more, the issue of the respondent having two other vehicles was not raised by the appellant in his brief and yet the appellant expected the Court of Appeal to take the issue in its favour. Parties are bound by their briefs and issues not contained in the brief, will go to no issue, unless with leave of the court. (p. 910 A) B

Courts - Use of oral evidence

8. The final issue is whether the Court of Appeal has the power to ground the award of N2,000.00 upon evidence other than the one that weighed in the mind of the trial Judge. The trial Judge made use of identifications A-A2. The Court of Appeal correctly held that the trial Judge was wrong in making use of documents marked for identification. The Court of Appeal instead made use of oral evidence of the respondent. In my view, the court is entitled to do that. The authorities of the court having power to do that are legion. Order 1 rule 20(4) of the Court of Appeal Rules is one authority. Section 16 of the Court of Appeal Act is another. The case law is in great proliferation. (p. 910 D) C D E

REPRESENTATION

Mahmud Qafar, Esq., for the Appellants
Respondent not represented F

CASES REFERRED TO

Nkweke v. Nigerian AGIP Oil Co. Ltd. (1976) NSCC 541
Nwabuoku v. Ottih (1961) All NLR 487
UBA v. Achoru (1990) 6 NWLR (Pt. 156) 254 G
Anambra State v. Onuselogu Enter. (1987) 4 NWLR (Pt. 66) 547
Okagbue v. Romaine (1982) 13 NSCC 137
Maduga v. BAI (1987) 3 NWLR (Pt. 62) 635
Bako v. Kuje Area Council (2001) 1 NWLR (Pt. 694) 380
Braithwaite v. M.S.A. Lines (1999) 13 NWLR (Pt. 636) 611 H
Emiri v. Imieyeh (1999) 4 NWLR (Pt. 599) 442
Ogunnaike v. Ojayemi (1987) 1 NWLR (Pt. 53) 760
Mohammed v. Local Govt Police (1970) NNLR 98
Adewunmi v. Plastex Nig Ltd (1986) 3 NWLR (Pt. 32) 767

Igweshi v. Atu (1993) 6 NWLR (Pt. 300) 484

A-G., Federation v. A.I.C Ltd (1995) 2 NWLR (Pt. 378) 388.

Adeyemi v. The State (1991) 1 NWLR (pt. 170) 679

STATUTES & RULES REFERRED TO

B Evidence Act 1990, s. 75

Court of Appeal Act, s. 16

Supreme Court Rules 1999 (as amended), O. 6 r. 8(7)

High Court of Lagos State (Civil Procedure) Rules 1994, O. 17 rr. 4 & 8(1)

C Court of Appeal Rules, O. 1 r. 20(4), O. 3 r. 23

LEAD JUDGMENT BY TOBI JSC

Saloon motor car Citroen XM with registration number LA
D 2202 was owned by the respondent, Deji Akintilo. He is the plaintiff. He lawfully parked the vehicle in the compound of Lagos State Development and Property Corporation Flats at Adeola Odeku Street, Victoria Island. Respondent occupied Flat No. 10D and the car was parked in the appropriate parking lot attached to his residence. On
E 19th October, 1990, the workmen of the appellant negligently allowed flying stones to drop on the rear wind-screen of the car and shattered same and caused damage to the car. The car which was imported from France was the newest and latest model.

On 22nd October, 1990, the solicitors of the respondent in
F exhibit B wrote to the appellant asking that the “damage be made good within 7 days.” The letter also claimed the sum of N2,000.00 “per day for loss of use for as long as he is prevented from making use of his car.” On 29th October, 1990, Messrs. Glanville Enthoven
G and Co. (Nigeria) United Insurance Brokers wrote a letter to the respondent asking him to forward the cost of repair of the vehicle to enable them process the claim. This was on 4th December. The following day, 5th December, 1990, the Insurance Company, by a letter offered to pay the sum of N5,000.00 as reparation for the damage to the car. On 6th December, 1990, the solicitors of the respondent wrote to the Insurance Company that the offer was not only
H grossly inadequate but was very unreasonable in view of the quoted cost of repairs.

There was no further progress. As a matter of fact, there was a

stalemate. The respondent as plaintiff sued. He claimed special damages in respect of the replacement of the broken wind-screen in front. Which amounted to N16,304.06 at the official currency exchange rate at the material time, cost of repairs of the car in Nigeria at N2,000.00 daily as loss of use of the damaged car from the 19th day of October, 1990 to the date the car was finally repaired. Plaintiff also claimed N16,304.06 general damages. In sum the plaintiff claimed N67,000.00. B

The matter suffered a couple of adjournments to pave way for settlement. That came on 9th May, 1991 in court. In reply to Mr. Idemudia, counsel to the plaintiff in respect of the amount acceptable to the plaintiff as settlement, Miss Okoroma, counsel for the defendant/appellant said: *"My Lord, we are prepared to pay N12,399.17k and for cost of repairs of N1,569.00 plus N150.00 per day from the date of the accident to the time the vehicle was finally repaired making a total of N15,000.00k for loss of use. The totality being N29,568.17kobo as full and final payment in this case we admitted."* C D

The learned trial Judge, Kessington, J. gave judgment accordingly to the admission of Miss Okoroma. He said: E

"Although when quantified the applicant is claiming N67,000.00 while the respondent admitted only N29,568.17k as added up vide the submission of the respondent's counsel. Judgment to the applicant on the admitted portion of the claim, i.e. N29,568.17k without prejudice to the applicant to go on trial and prove the difference. Parties agreed to 16th July 1991, for trial on the balance." F

The respondent gave evidence in proof of his case. The learned trial Judge gave judgment to the respondent as per his claim of N2,000.00 as loss of use. The learned trial Judge said: G

"In proving the N2,000.00 per day as loss of use of the damaged car, the defendant did not dispute the fact that the car was damaged and that the plaintiff is entitled to claim but that the N2,000.00 per day is excessive. The plaintiff brought in evidence of how he came about the disputed N2,000.00 by producing identity A-A2 and these identifications were nowhere discredited by defendant. The law is that where a relevant document is produced by whatever means even by stealing provided it is relevant it is admissible. Kuruma v. Rex H

Admitting identifications A-A2 as evidence, the learned trial Judge awarded the respondent the claimed amount of N2,000.00 loss of use per day from 19th October, 1990 to 1st February, 1991. Dissatisfied, the appellant appealed to the Court of Appeal. That court affirmed the decision of the trial Judge. The court however rejected identification A-A2. Delivering the leading judgment of the court, Musdapher, JCA (as he then was) said at page 139 of the record:

“I have exhaustively recited above what transpired in court about the disputed documents. It is manifest from the record that learned trial Judge declined to admit the documents when tendered as evidence, but rather than reject them in toto, he admitted them to be marked for identification only.”

The Court of Appeal rejected identified A-A2 but relied on oral evidence of the respondent in vindication of his claim of N2,000.00 per day as loss of use. The court accordingly affirmed the award. Dissatisfied with the judgment of the Court of Appeal, the appellant has come to this court. Briefs were filed and duly exchanged. Respondent was not represented when the appeal was argued. The court invoked Order 6, Rule 8(7) of the Supreme Court Rules as amended in 1999 and regarded the respondent’s brief as having been argued. The appellant formulated the following issues for determination:

“1. Whether the Court of Appeal was right in holding that the appellant’s offer made in the course of negotiation to settle out of court amounted to an admission of the respondent’s claim.

2. Whether the Court of Appeal was right in affirming the award of N2,000.00 per day as special damages for loss of use.”

Respondent formulated the following issues for determination:

“(a) Whether the Court of Appeal was right in upholding the interlocutory judgment entered in favour of the respondent by the trial court on 9th day of May 1991 upon the admission of the appellant.

(b) Whether there was evidence upon which the Court of Appeal could sustain the award of N2,000.00 in favour of the respondent as special damages.

(c) Whether the Court of Appeal has the power to ground the said award upon evidence other than the one that weighed in the

mind of Judge.”

Learned counsel for the appellant, Mahmud Gafar, Esq. submitted on issue No. 1 that the view expressed by the Court of Appeal on page 137 of the record in respect of admission of part of the claim, is indeed a misapprehension of the position of law as regards settlement out of court and what transpired between the parties in the trial. Citing the case of *Abey v. Alex* (1999) 14 NWLR (Pt. 637) 148, learned counsel conceded that it is within the right of parties to seek settlement out of court and that the court is enjoined to facilitate and encourage such settlement. He however contended that where settlement falls through, it is not the business of the court to convert the offer of settlement to an admission of a part of the claim and proceed to enter judgment thereupon. It is in recognition of this that the courts have always held that nothing said or written in the course of such negotiation can be given in evidence as an admission against either of the parties, learned counsel submitted. He cited *Ashibuogwu v. A-G., Bendel State* (1988) 1 NWLR (Pt. 69) 138 and *Savannah Bank Plc v. Opanubi* (1999) 13 NWLR (Pt. 634) 203.

On issue No.2, learned counsel submitted that contrary to the finding of the court below, there was no pleading or sufficient pleading to support the award and that the court did not properly evaluate the evidence led by the respondent before grounding the award on it. Looking through the entire gamut of the averments contained in the statement of claim, there is nowhere it is pleaded that the respondent as a result of the accident was not able to use the car for the business of his company, learned counsel reasoned. He also contended that nowhere is it pleaded that the respondent had to hire a car or kept same on standby for 24 hours a day as a result of the project he was doing. To counsel, paragraph 20(iv) is not sufficient pleading to attract judgment in favour of the respondent.

Relying on *Calabar East Co-op v. Ikot* (1999) 14 NWLR (Pt. 638) 225; *Obasuyi v. Business Ventures Ltd.* (2000) 5 NWLR (Pt. 658) 668 at 697; and *Sommer v. Federal Housing Authority* (1992) 1 NWLR (Pt. 219) 548 at 560, learned counsel contended that it is necessary that there be adequate pleading in support of a claim of special damages, which must be proved by credible and satisfactory evidence. Learned counsel also submitted that the court below did not evaluate the evidence against the background of other facts avail-

able. He pointed out at page 10 of his brief what he regarded as “other facts available” in the case that needed the evaluation of the Court of Appeal. It was the submission of counsel that notwithstanding the seeming non-challenge of the evidence, the court ought to have properly evaluate it and that if this exercise had been carried
 B out, it would have been quite plain that the evidence is incredible. Citing the case of *Artra Industries Ltd. v. N.B.C.I.* (1998) 4 NWLR (Pt. 546) 357, counsel submitted that it is not the law that the court must accept an otherwise incredible evidence simply because it has
 C not been challenged and that where any piece of unchallenged evidence is self-defeating and unacceptable, the court is not under any duty to act on it. To counsel, if the court had taken into account the facts outlined in his brief, which made the evidence of the respondent improbable, it would have had no difficulty in coming to the
 D conclusion that there was no credible oral evidence to use to sustain the award of N2,000.00 as special damages for loss of use with the removal of wrongly admitted exhibits A-A2. He insisted that the court should sustain the argument on this issue and hold that the claim for N2,000.00 per day was neither properly pleaded nor strictly proved.
 E He urged the court to allow the appeal.

Counsel for the respondent submitted on Issue No.1 that this is a clear case of admission and not a case of offer in the course of negotiation as the appellant argued, as the appellant’s counsel stated
 F clearly in open court the amount they were prepared to concede to the respondent. The admission therefore, was one that was made before the court and not in the process of any negotiation between the parties outside the court as wrongly alleged by the appellant, learned counsel argued.

G Counsel cited the case of *Adewunmi v. Plastex (Nig.) Ltd.* (1986) 3 NWLR (Pt. 32) 767 2 NSCC 852 on the scope of authority of counsel. On the issue of admission, counsel cited Section 75 of the Evidence Act 1990 and *Nkweke v. Nigerian AGIP Oil Co. Ltd.* (1976) NSCC 541 or (1976) 9-10 SC 101 and *Jozebson Ind. Co v. R. Lauwers*
 H *Import, Export* (1988) 3 NWLR (Pt. 83) 429 2 NSCC (Vol. 19) 87.

On issue No.2, learned counsel argued that assuming identifications A-A2 were not legal evidence, the Court of Appeal rightly came to the conclusion that the respondent led evidence to show how the negligence of the appellant made him (the respondent) to

hire a car and kept same on standby for 24 hours everyday at the cost of N2,000.00 per day. Counsel pointed out that the appellant did not give any evidence to contradict the claim. Citing the cases of *Nwabuoku v. Ottih* (1961) All NLR 487 and *UBA v. Achoru* (1990) 6 NWLR (Pt. 156) 254, counsel submitted that when oral evidence is unchallenged and is not manifestly incredible, the court is bound to accept it. B

On the issue of insufficient pleading, counsel referred to paragraph 20(iv) of the statement of claim and submitted that the subparagraph is sufficient for the claim of special damages for loss of use. He cited Order 17 Rules 4 and 8(1) of the High Court of Lagos State (Civil Procedure) Rules 1994 and the following cases in respect of rules of pleading: *G.N.I.C. Ltd. v. Ladgroups Ltd.* (1986) 4 NWLR (Pt. 33) 72; *A.-G., Anambra State v. Onuselogu Enterprises* (1987) 4 NWLR (Pt. 66) 547 at 559 and *Okagbue v. Romaine* (1982) 13 NSCC 137 at 139-140; (1982) 5 SC 133. C D

On the evaluation of the evidence by the Court of Appeal, learned counsel submitted that a party like the appellant who has produced no evidence at the trial cannot complain that the judgment is against the weight of evidence. He cited *Maduga v. BAI* (1987) 3 NWLR (Pt. 62) 635. It was the submission of counsel that there was more than sufficient evidence upon which the Court of Appeal could find as it did for the respondent, and that failure on the part of the appellant to lead contrary evidence in this matter is fatal to its case. E F

On issue No.3, learned counsel relied on Order 1, Rule 20(4), Order 3 Rule 23 of the Court of Appeal Rules, Section 16 of the Court of Appeal Act and the cases of *Bako v. Kuje Area Council* (2001) 1 NWLR (Pt. 694) 380; (2000) FWLR (Pt. 27) 1972 at 1985-1986; *Braithwaite v. M.S.A. Lines* (1999) 13 NWLR (Pt. 636) 611 at 626; and *Emiri v. Imieyeh* (1999) 4 NWLR (Pt. 599) 442 at 466 and submitted that the Court of Appeal has the power to rely on the evidence of the respondent outside the inadmissible exhibit A-A2. He urged the court to discuss the appeal. G

The case of the appellant is that the sum of N16,304.06 was an offer and subject to negotiation and therefore not binding on the appellant. The case of the respondent is that the sum was an admission of liability and therefore binding on the appellant. The two lower courts agreed with the respondent and they so held. H

The determination of whether issues in a matter are negotiated or admitted by a party is essentially a question of fact to be deduced from the circumstances of the case. So too in respect of whether an offer is made in a matter or an outright admission. While admission is a matter of law, the circumstances that lead to the admission is a matter of fact. By and large, the court will be influenced by the facts of the case in coming to the conclusion whether it was an admission on the other hand. Let me quote once again, at the expense of prolixity, what Miss Okoroma, counsel for the appellant, said in court on 9th May, 1991:

"My Lord, we are prepared to pay N12,399.17k and for cost of repairs N1,569.00 plus N150.00 per day from the date of the accident to the time the vehicle was finally repaired making a total of N15,000.00k for loss of use. The totality being N29,568.17kobo as full and final payment in the case we admitted."

It is clear to me that the above is an admission of liability in the sum of N16,304.06 and is neither an offer nor a negotiation. The language counsel used is precise. She used the word "admitted" the last word of her statement in court which I have put in italics for emphasis. It was in reaction to the statement made by counsel for the respondent, Mr. Idemudia. Perhaps, the position will be clearer if I quote what Idemudia said in court on 9th May, 1991:

"My Lord, at the last adjournment date, the defendant admitted and therefore acceded the sum of N11,246.83k out of the applicant's claim of N18,804.6k and also offer a total of N150 per day which is unacceptable to the applicant in view of the fluctuating rate of exchange ... my Lord, I would move the court to give us an interlocutory judgment as to the amount admitted by the applicant."

The statement by Miss Okoroma immediately coming after the above cannot be an offer or in the office of negotiation. The cases of Ashibuogwu v. A-G., Bendel State (supra) and Savannah Bank Plc v. Opanubi (supra) therefore do not apply and I so hold as I said earlier, it was clearly an admission.

An admission is a statement, oral or written (expressed or implied) which is made by a party or his agent to a civil proceedings and which statement is adverse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement. See Ogunnaike v. Ojayemi (1987)

1 NWLR (Pt. 53) 760; Mohammed v. Local Government Police (1970) NNLR 98; (1970) 2 All NLR 202; Seismograph Services (Nig.) Ltd. v. Eyuafe (1976) 9 and 10 SC 135. **In civil case, admissions by a party are evidence of the facts asserted against, but not in favour of such party. Unless explanations are given which satisfy the court that admissions should not be so regarded, due weight should be given to them as such.** See Tagoe v. Mantse of Akumajay (1946) 12 WACA 31; Okai Ayikai II (1946) 12 WACA 31.

In order to found admissions on oral testimony, the evidence must be clear and unambiguous. The value of an admission depends on the circumstances in which it is made. It is however, for the trial court to decide the issue and to give due weight to the alleged admission and the explanatory facts or circumstances. See Iga v. Amakiri (1976) 11 SC 1.

The statement made by Miss Okoroma clearly comes within D the definition of admission in Section 19 of the Evidence Act, 1990 as the statement suggests an inference as to a fact in issue or relevant fact. And the fact in issue or relevant fact is the claim for the damage of the car. Can counsel make an admission on behalf of his client? The answer is "yes". In the case of Adewunmi v. Plastex (Nig.) Ltd. E (1987) 3 NWLR (Pt. 32) 767, this court held as follows:

(a) the apparent authority with which a counsel is clothed when he appears to conduct a case is to do everything which in the exercise of his discretion, he may think best for the interest of his client in the conduct of his case and if within the limits of these apparent authority, he enters into agreement should be held binding. F

(b) Where counsel is in control of the conduct of a case, his authority extends, when not expressly limited to the action and all matters incidental to it and to the conduct of the trial to its finality, in G what in his opinion is in the best interest of his client.

(c) A counsel's authority at the trial of a case extends to the action and all matters which are incidental to the action. However the authority could be expressly limited by the client and where there is such limitation, the counsel's authority ceases to be pervasive. H

(d) it is within the general authority of counsel retained to conduct a case to consent to the withdrawal of the case and a compromise is within his apparent authority and binding on client notwithstanding the client may have dissented, unless the dissent was brought

to the notice of the opposite party at the time. See also Nigerian National Supply Company Ltd. v. Alhaji Hamajoda Sabana and Company Ltd. (1988) 2 NWLR (Pt. 74) 23; I.T.T (Nig.) Ltd. v. Mrs. Okpon (1989) 2 NWLR (Pt. 103) 337; Igweshi v. Atu (1993) 6 NWLR (Pt. 300) 484; A-G Fed. v. A.I.C Ltd (1995) 2 NWLR (Pt. 378) 388.

The authority of counsel at the trial of a case extends to the action and all matters which are incidental to the action. Where the authority is not specifically limited by his client, as it is in this appeal, the sky, the Englishman says, becomes the limit, to the extent that he could within the Law commit the client. After all, by the brief, he is clothed with some apparent authority he can use to the best advantage of his client by the application of his expertise and professionalism. Flowing from the above relationship, counsel can, in the course of performing his professional duties, commit his client either by way of a specific undertaking or by clear admission.

And that takes me to the second issued in respect of the award of N2,000.00 per day as damages for loss of use. It is elementary in the law of damages for a court to award damages for loss of use arising from damage to vehicle. Where a vehicle is damaged to the extent that the owner cannot use it, the court is entitled to award damages for the period the vehicle is in disuse.

Learned counsel for the appellant attacked the pleadings in respect of the N2,000.00 per day for loss of use. To counsel, the pleading is not sufficient. Let me go to the statement of claim. Paragraphs 11 and 20(iv) are relevant. They depose as follows:

"11. The plaintiff's solicitor on the instructions of the plaintiff, subsequently wrote a letter of demand to the defendant, wherein the defendant was asked to effect the necessary repairs on the vehicle and further to make reparation to the plaintiff in the sum of N2,000 (Two Thousand Naira) per day for loss of use of the car until repairs were fully completed. The plaintiff shall at the trial of this suit found upon the said letter from his solicitor dated the 22nd of October, 1990...

*20(iv) Particulars of Special Damages
N2,000 daily as loss of use of the damaged car from the 19th of October, 1990 to the date the car is finally repaired."*

I do not, with the greatest respect, agree with learned counsel for the appellant that the above is not sufficient pleading. One main aim of statement of claim is to convey the claim and the accompanying case of the plaintiff concisely to the defendant so that he can file a statement of defence, if need be. The moment a statement of claim has performed that primary function, a defendant cannot complain. It is only when a statement of claim is vague, ambiguous and lacking specificity in language that a defendant can successfully attack it. B

In the instant case, while paragraph 11 told the story of the N2,000 claim for loss of use, paragraph 20(iv) in a clear language demanded the sum as a relief. In my humble view, a pleading cannot be clearer. Learned counsel for the respondent submitted in his brief that the appellant did not give any evidence to contradict the claim of loss of use. This is a strong point and I expected learned counsel for the appellant to reply. Unfortunately, he thought differently. It is trite law that a fact which is not denied is deemed to have been admitted. Apart from the evidence led by the respondent, the fact that the averment was not denied, is enough to admit it in evidence. C
See *Okosi v. The State* (1989) 1 NWLR (Pt. 100) 642; *Ben Thomas Hotels v. Sebi Furniture* (1989) 5 NWLR (Pt. 123) 523; *Onagoruwu v. JAMB* (2001) 10 NWLR (Pt. 722) 742. D

Apart from the fact that paragraph 7 of the statement of defence in respect of the N2,000.00 is evasive, there was no evidence led by the appellant to contradict or completely drown the evidence of the respondent. Accordingly, the attack on the award of N2,000.00 per day for loss of use is rejected. F

I should now take the evaluation of the evidence by the Court of Appeal. Although a defendant who did not give evidence in defence of his pleading can question the failure of a court to evaluate the evidence adduced, he has a bigger burden in the matter. This is because where evidence in contradiction of a claim is not given, the burden of evaluation of evidence on the part of a court, trial or appellate, is less. Unless a fact is so notorious to the common knowledge and experience of the court, so much will be taken for granted in the evaluation of evidence since there is no competing evidence to evaluate. G H

Learned counsel mentioned quite a number of areas which the Court of Appeal ought to have evaluated, including the fact that the respondent had two other cars. How can a court suo motu evaluate such evidence, in favour of the appellant, particularly when the respondent explained how the two vehicles were used in the family; one for taking his wife to work and the other for taking his children to school. And what is more, the issue of the respondent having two other vehicles was not raised by the appellant in his brief and yet the appellant expected the Court of Appeal to take the issue in its favour. Parties are bound by their briefs and issues not contained in the brief, will go to no issue, unless with leave of the court. See Adeyemi v. The State (1991) 1 NWLR (pt. 170) 679; Nimanteks Associates Ltd. v. Marco Construction Co. Ltd. (1991) 2 NWLR (Pt. 174) 411.

The final issue is whether the Court of Appeal has the power to ground the award of N2,000.00 upon evidence other than the one that weighed in the mind of the trial Judge. The trial Judge made use of identifications A-A2. The Court of Appeal correctly held that the trial Judge was wrong in making use of documents marked for identification. The Court of Appeal instead made use of oral evidence of the respondent. In my view, the court is entitled to do that. The authorities of the court having power to do that are legion. Order 1 rule 20(4) of the Court of Appeal Rules is one authority. Section 16 of the Court of Appeal Act is another. The case law is in great proliferation. In *Oshoboja v. Amuda* (1992) 6 NWLR (Pt. 250) 690, Uwais, JSC (as he then was), said at page 708:

"There is no doubt that Section 16 has given the Court of Appeal amplitude of power to deal with any case before it on appeal. The power includes the jurisdiction of a court of first instance and in the present case the jurisdiction of the High Court." See *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264; *Chief Ejowhomu v. Edok-Eter Mandilas Ltd.* (1986) 5 NWLR (Pt. 39) 1; *Chief Ekpa v. Chief Utong* (1991) 6 NWLR (Pt. 197) 258.

In sum, this appeal fails and it is dismissed. I award N10,000.00 costs in favour of the respondent.

BELGORE JSC

I also dismiss this appeal for the reasons comprehensively ad-
umbrated in the judgment of my learned brother, Tobi, JSC. And I
make the same consequential orders as to costs as made in that judg-
ment.

B

ONU JSC

Having had the advantage of reading in draft the judgment of
my learned brother, Niki Tobi, JSC before now, I am in complete
agreement with him that this appeal is devoid of any merit. Accord-
ingly, I too dismiss the appeal and endorse the consequential orders
made therein inclusive of those as to costs.

D

KALGO JSC

I have read in advance the judgment just delivered by my
learned brother, Tobi JSC in this appeal, and I entirely agree with
him that there is no merit in the appeal. The decision of the trial court
which was affirmed by the Court of Appeal was in my view sup-
ported by credible evidence including the admission of the appellant's
counsel on behalf of his client. See *Akanbi v. Alao* (1989) 3 NWLR
(Pt.108) 118 at 141 & 153; *Mosheshe General Merchants Ltd. v.*
Nigeria Steel Products Ltd. (1987) 2 NWLR (Pt. 55) 110. I find ac-
cordingly and adopt the fuller reasons and conclusion as contained
in the leading judgment. There was no special circumstances advanced
by the appellant's counsel to justify upsetting the concurrent findings
of the two lower courts. See *Akeredolu v. Akinyemi* (1989) 3 NWLR
(Pt. 108) 164; *Chinwendu v. Mbamali* (1980) 3-4 SC 31; *Ogunbiyi G*
v. Adewumni (1988) 5 NWLR (Pt. 93) 215. This appeal therefore
fails and I dismiss it with costs as assessed in the leading judgment.

H

EJIWUNMI JSC

I was privileged to have read before now the draft of the judg-
ment just delivered by my learned brother, Niki Tobi, JSC. For the
reasons given in the said judgment, I fully agree with him that the
appeal is devoid of any merit.

This appeal arose from the claim of the respondent against the appellant that on Friday, the 19th of October, 1990, the respondent's saloon car, 1 citroen XM with registration No. LA 2202. As was lawfully and properly parked within the compound of the Lagos State Developments and Property Corporation's Luxury Flats, Adeola Odeku, Victoria Island and the respondent was residing in one of the said flats. The respondent's car was parked in the parking lot in the compound of the said premises allocated to him. It was while his car was so parked that it was willfully and negligently damaged by the servants and or agents of the appellant who willfully and negligently allowed a set of stones and or gravel to drop on and shatter the rear windshield of the said car.

Pleadings were ordered and filed by the order of the trial court. The particulars of the respondent's claim read thus:-

D *"(a) Cost of materials required to replace the broken windshield 5740 ffr or N11,989.20k.*

(b) Cost of air freighting the material from France 2074 ffr or N4,314.36k.

(c) Cost of repair N2,500.00

E *(d) N2,000.00 per day as loss of use of the damaged car from 19th October, 1990 until the car is finally repaired.*

(e) The plaintiff also claims the sum of N16,304.06 as general damages for the substantial inconvenience and odium he was put through as a result of defendant's negligence."

F However, on the 9th day May 1991, during the course of the trial, the following dialogue occurred before the trial court presided over by Kessington J of the Lagos High Court. And I quote:-

G *"Mr. Idemudia - My Lord at the last adjournment date the defendant admitted and therefore conceded the sum of N11,246.83k out of the applicant's claim of N18,804.6k and also offer a total of N150 per day which is unacceptable to the applicant in view of the fluctuating rate of exchange. The defendant promised to improve on these, hence we are in court today.*

H *Miss Okoroma - My Lord, we have made better progress in settling this case.*

Mr. Idemudia - My Lord, I would move the court to give us an interlocutory judgment as to the amount admitted by the applicant.

Miss Okoroma - My Lord, we are prepared to pay N12,399.17k

and for cost of repairs N1,569.00k plus N150.00 per day from the date of the accident to the time the vehicle was finally repaired making a total of N 15,600.00 for loss of use. The totality being N29,568.17k as full and final payment in this case we admitted.

Court - Although when quantified the applicant is claiming N67,000.00 while the respondent admitted only N29,568.17k as added up vide the submission of the respondent's counsel. Judgment would be given to the applicant on the admitted portion of the claim i.e. N29,568.17k without prejudice to the difference. Parties agreed to 16th July, 1991 for trial on the difference."

At the conclusion of the trial, judgment was given in favour of the respondent for the sum of N29,568.17k as costs for repairing the car. Also upheld was the claim of the respondent for N2,000.00 per day as loss of use of the damaged car from 19th October, 1990 to 1st February, 1991 as the learned trial Judge was satisfied with the evidence led by the respondent in that regard.

As the appellant was not satisfied with that judgment of the trial court, an appeal was therefore lodged in the court below. The appeal which turned mainly the award of the sum of N2,000.00 per day from 19th October, 1990 to the 1st of February, 1991, as special damages was dismissed. Hence the further appeal to this court.

The issue raised in this court, pursuant to the grounds of appeal filed by the appellant, are as follows:-

"(1) Whether the Court of Appeal was right in holding that the appellant's offer made in the course of negotiation to settle out of court amounted to an admission of the respondent's claim.

(2) Whether the Court of Appeal was right in affirming."

With regard to issue 1, it is the contention of the learned counsel for the appellant that it was erroneous for the court below to have held that the sum adjudged against it was as a result of the admission made to that effect by learned counsel for the appellant. In his view, the sum for which the appellant was adjudged liable was made in the course of negotiation to settle the matter out of court. I have before now set out the portion of the record of proceedings where the learned counsel for the appellant, in the course of the trial made the admission that the appellant would pay the sum of N29,568.17k for the costs of repairs of the respondent's vehicle.

Except words spoken in the particular context in which they

were said have lost their meaning, I fail to see how the clear statement of the appellant's counsel that his client would pay the said sum for the repairs of the respondent's car can be said to have been made in the course of negotiation between the parties for an out of court settlement of the action in court. If there was any negotiation between the parties that preceded the making of that admission, it is for the appellant to prove same. That was not done. In my view, there is no doubt that, that learned counsel for the appellant who was in control of the case for the appellant duly made the admission in the course of the trial, and it was upon that admission for the repairs of the respondent's car that the trial court awarded that sum to the respondent. Where facts are directly admitted or deemed admitted by a party, such facts need not be proved. See *Solana v. Olusanya* (1975) 6 SC 55. An admission made in the circumstances by counsel for a party is no less an admission upon which a court could act.

In the case of *Adewunmi v. Plastex (Nig.) Ltd* (1987) 3 NWLR (Pt. 32) 767, this court has laid down the principles that apply and I do think that learned counsel for the appellant in making the admission of liability in this case had acted well within the principles enunciated in the said case.

In the result, I do not see any merit in this appeal and it is dismissed by me for the above reasons and the fuller reasons given in the lead judgment of my learned brother, Niki Tobi JSC. I also abide with the other consequential orders made in the said judgment. Appeal dismissed.

G

H