

**SUPREME COURT OF NIGERIA**  
FRIDAY 27TH JUNE, 2003. SC. 123/1999  
**CORAM:- S. M.A. BELGORE, S. U. ONU, A. I. KATSINA-  
ALU, U. A. KALGO, S. O. UWAIFO, JJSC**

- |                                      |                   |
|--------------------------------------|-------------------|
| 1. MAJOR I. Z. UMORU (RTD)           |                   |
| 2. USMAN MOHAMMED                    | ..... APPELLANTS  |
| (For themselves and on behalf of     |                   |
| Ivbiokhulator Ruling House, Ivbiaro) |                   |
| AND                                  |                   |
| 1. ALHAJI ABUBAKAR ZIBIRI            |                   |
| 2. GOVERNOR OF EDO STATE             |                   |
| 3. COMMISSIONER FOR LOCAL            |                   |
| GOVERNMENT & CHIEFTAINCY             |                   |
| AFFAIRS EDO STATE                    | ..... RESPONDENTS |
| 4. ATTORNEY-GENERAL, EDO STATE       |                   |
| 5. OWAN TRADITIONAL COUNCIL          |                   |

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APPEALS - Grounds - Supreme Court Rules - Compliance to -  
Ground 3 did not comply with the rules - As it merely alleged error  
of facts - Based on evidence in Exhibits F, G & J (H1)

CHIEFTAINCY MATTERS - Custom - Evidence - Eldest quarter -  
Findings - Where appellants did not challenge the special privileges  
given to Ebese - Court of Appeal rightly accepted the inference of  
trial court (H2)

EVIDENCE - Admissibility - Where the testimony given by DW3 &  
1<sup>st</sup> respondent was not challenged - In cross examination by appel-  
lants - The same shall be deemed as more credible (H3)

APPEALS - Courts - Evidence - Evaluation - Trial court assesses de-  
meanor of witnesses - And it is not for appeal court to interfere -  
More so when credibility of the witnesses is involved (H4)

**FACTS**

Plaintiffs/appellants sued defendants/respondents in the High  
Court of Bendel State holden at Afuze contesting the appointment

of 1<sup>st</sup> respondent as the village Head of Ivbiaro in Ivbi Ada-Obi clan in Owan Local Government Area. The case of appellants was that the headship of the village was exclusively reserved for Ivbio khulotor quarter as descendants of Okhulotor, the eldest son of Aro the wife of Ada-Obi, the founder of Ivbi Ada-Obi clan. Accordingly, as 1<sup>st</sup> respondent was not from Ivbiokhulotor, his purported appointment was in breach of the tradition. On their own part, respondents denied that Okhulotor was the eldest son of Aro. Respondents contended that it was Ebese that was the eldest son of Aro and it was from the descendants of Ebese that village heads of Ivbiaro was appointed. Hence, 1<sup>st</sup> respondent who hails from Ebese is entitled to be so appointed.

After hearing, the learned trial judge held that Ebese was the eldest son of Aro and that the appointment of 1<sup>st</sup> respondent was in accordance with the tradition. Accordingly, he dismissed the case of appellants. Aggrieved, appellants appealed against the judgment to Court of Appeal, Benin City Division. The appeal was dismissed. Still dissatisfied, appellants have come on a further and final appeal to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal was right in holding that, the learned trial Judge was right in rejecting the evidence led by the appellants that Okhulotor was the eldest son of Aro..... That there was an agreement among the Quarters that the Village Head of Ivbiaro should always be selected from the descendants of Okhulotor.*

*2. Whether the Court of Appeal was right when it affirmed the judgment of the trial Judge that the traditional evidence led by the 1st respondent was preferable to that of the Appellants.*

*3. Whether the Court of Appeal was right to have held the appointment of the 1st Respondent as the Village Head of Ivbiaro and Clan Head of Ivbiadaobi Clan was based on the recommendation of the appropriate authority.*

*4. Whether the Court of Appeal was right to have held that it was not necessary to institute a public inquiry into the Headship of Ivbiaro Headship before 1st Respondent was appointed.”*

# **HELD** (Unanimously dismissing the appeal per **KALGO**

**JSC)**

*APPEALS - Grounds - Supreme Court Rules - Compliance to*

**1. A misdirection is itself an error as it entails following a “wrong direction.” It can also be of law or fact. It is also common ground that you almost always apply the law to a certain sets of facts. In this case, the appellants have given particulars; some containing issues of facts and some containing issues of law each in an attempt to satisfy the requirements of Order 8 r. 2 (ibid). I have carefully examined the 3 grounds of appeal and find that grounds 1 and 2 are in compliance with O. 8 r. 2 but ground 3 did not because it merely alleged error of facts based on evidence contained in Exhibits “F”, “G” and “J”. There was no question of law raised therein at all and the fact of calling it an error of law does not ipso facto make it so. (p. 2052 A)**

*CHIEFTAINCY MATTERS - Custom - Evidence*

**2. In this court, learned counsel for the appellants submitted in his brief that the question whether Okhulotor or Ebese is senior or not is a question of fact which should be determined on the evidence at the trial. I entirely agree with this. He also submitted that the fact that by Ivbiano custom Ebese starts Aro Festival before any other quarters and has the responsibility of giving names to new age groups does not necessarily make Ebese the eldest quarter in Ivbiano. I do not agree with this submission having regard to the evidence of D.W. 3 and the 1st respondent denying that Okhulotor was the eldest and showing that by Ivbiano custom Ebese was given special privileges over and above the other 3 quarters of Ivbiano. This fact was not challenged by the appellants and I find that the Court of Appeal was right in accepting the inference of the learned trial Judge on this point. (p. 2057 C)**

*EVIDENCE - Admissibility*

**3. In paragraph 13 of the Statement of Defence, the 1st de-**

**fendant/appellant pleaded all the Village Heads who ruled Iubiaro including himself, and he set them out fully in his testimony before the trial court. The list agreed in substance with the one given by D.W. 3 in his testimony, and both of them said that all the Village Heads listed except Chief Emokpaire came from Afimosi family of Ebese. This evidence was not challenged in Cross-examination by the appellants, so that even if the detail of the dates of reign of the Village Heads was disregarded for not being pleaded, this evidence still stands. In the case of the plaintiffs/appellants, the list of village heads given by P.W. 2 when compared with those given by P.W. 3 in their testimonies are different and contradictory. On the whole therefore the testimony given by D.W. 3 and the 1st respondent is more credible.** (p. 2058 A)

**D** Courts - Evidence - Evaluation

**4. It is well settled that a trial Judge who sees and hears the witnesses giving evidence before him, has the exclusive right to assess their demeanour so as to determine whether they are telling the truth or not. He can, in this way, determine the credibility or otherwise of the testimony of every witness who testifies before him. If this is done properly, it is not for the appeal court to interfere in any way possible. In the instant appeal, I am of the view that the trial Judge exercised his powers correctly and I agree with the Court of Appeal that the findings of the learned trial Judge are fully in accord with the evidence adduced before him.** (p. 2058 D)

**G REPRESENTATION**

No appearances for the Appellants  
Philip Umeadi Jr., Esq., with J.M.E. Onyeakazi, Esq., for 1st respondent  
2nd - 6th Respondents unrepresented

**H CASES REFERRED TO**

Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5  
Amafulé v. State (1988) 2 NWLR (Pt. 75) 156  
Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484

Sule v. Nigerian Cotton Board (1985) 2 NWLR (Pt 5) 17

Bakare v. A.G. Federation (1990) 5 NWLR (Pt.152) 516

Nwadike v. Ibekwe (1987) 11-12 SCNJ 72

Ivienagbor v. Bazuaye (1999) 6 S.C. (Pt. I), (1999) 9 NWLR (Pt. 620) 552

Agu v. Nnadi (2002) 12 S.C. (Pt. I) 173

B

Agbaka v. Amadi (1998) 7 S.C. (Pt. II) 18

Metal Construction (W.A.) Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299

### **STATUTE & RULES REFERRED TO**

C

Traditional Rulers and Chiefs Edict, 1979 of Bendel State, S. 27  
Supreme Court Rules, O. 8 r. 2(2)

### **LEAD JUDGMENT BY KALGO JSC**

D

This action was filed on the 3rd of December, 1986, by the Plaintiffs/Appellants against the Defendants/Respondents in the High Court of Bendel State in the Owan Judicial Division holden at Afuze. In the amended Statement of Claim, the appellants claimed against the respondents the following reliefs:-

E

*“1. A declaration that the purported appointment of the 1st defendant as the Village Head of Ivbiaro in Ivbi-Ada-Obi Clan in the Owan Local Government Area is null and void in that the said appointment was contrary to Ivbiaro custom.*

*2. A declaration that the purported appointment of the 1st Defendant as the Village Head of Ivbiaro and Clan Head of Ivbi-Ada-Obi and the approval thereto by the 2nd, 3rd and 4th Defendants on the purported recommendations of the 5th Defendant is null and void in that the purported appointment is contrary to Ivbiaro custom.*

F

*3. A declaration that the purported investigation by the 5th Defendant of the disputed claim to the Village Headship of Ivbiaro/Clan headship of Ivbi-Ada-Obi and the recommendations of the 5th Defendant which resulted in the approval of the 1st Defendant’s appointment as the Village Head of Ivbiaro and Clan Head of Ivbi-Ada-Obi is illegal, null and void and that the 5th Defendant has no power in law to carry out such investigations.*

H

*4. A declaration that the 1st Plaintiff, Chief Audu Momodu of*

*Ivbiokhulotor Ruling House, Ivbiaro is the person entitled by custom to be the Village Head of Ivbiaro having been so appointed by Ivbiokhulotor Ruling House entitled to do so by custom; and therefore entitled to be call head of Ivbi-Ada-Obi.*

5. *Perpetual Injunction restraining the 1st Defendant from parading himself as the Village Head of Ivbiaro and Clan Head of Ivbi-Ada-Obi and the 2nd, 3rd, 4th and 5th Defendants by themselves, their servants and agents from installing/coronating or dealing with the 1st Defendant in any manner whatsoever as the Village Head of Ivbiaro and the Clan Head of Ivbi-Ada-Obi.”*

At the trial pleadings were filed and exchanged and both parties called witnesses who testified and tendered documents in support of their respective pleadings. At the end of the case, learned counsel for the parties addressed the court and in a reserved judgment, Dugbo, J., dismissed the appellants’ claim in its entirety after he said:-

*“Having held that the 1st Defendant is the head of the appropriate Ruling House, he automatically succeeds as the clan Head of IVBI-ADA-Obi. Thus the validity of his appointment as contained in BSLN 77 of 1986 cannot be questioned.”*

The appellants were dissatisfied with this and appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the decision of the trial court. The appellants appealed to this court.

In the brief of argument filed on behalf of the appellants in this court, they raised 4 issues to be determined by the court in this appeal. They read:-

*“1. Whether the Court of Appeal was right in holding that, the learned trial Judge was right in rejecting the evidence led by the appellants that Okhulotor was the eldest son of Aro..... That there was an agreement among the Quarters that the Village Head of Ivbiaro should always be selected from the descendants of Okhulotor.*

*2. Whether the Court of Appeal was right when it affirmed the judgment of the trial Judge that the traditional evidence led by the 1st respondent was preferable to that of the Appellants.*

*3. Whether the Court of Appeal was right to have held the appointment of the 1st Respondent as the Village Head of Ivbiaro and Clan Head of Ivbiadaobi Clan was based on the recommenda-*

tion of the appropriate authority.

4. *Whether the Court of Appeal was right to have held that it was not necessary to institute a public inquiry into the Headship of Ivbiaro Headship before 1st Respondent was appointed.*

For the respondents, only the 1st respondent filed his brief on his own behalf and in it he identified the following issues:-

“1. *Whether the Court of Appeal was right in affirming the trial court’s evaluation of evidence of traditional history as it relates to the selection, appointment and recognition of the Village Head of Ivbiaro and clan head of Ivbi-Ada-Obi Clan.*

2. *Whether the selection and appointment of the Village Head of Ivbiaro and Clan Head of Ivbi-Ada-Obi Clan is based on the recommendation of the appropriate authority.*

3. *Whether the Court of Appeal was right in affirming the decision of the trial court that it is not necessary to institute a public commission of inquiry into the headship of Ivbiaro, before the 1st Respondent was appointed.*”

The learned counsel for the 1st respondent also raised in his brief a preliminary objection to grounds of appeal 1, 2 and 3 in the appellants’ notice of appeal. His ground of objection is that these grounds complained of misdirection in law and on facts at the same time. To that extent, he submitted, the grounds are incompetent and should be struck out together with arguments on issues 1, 2 and 3 in the brief of the appellants. He cited in support the cases of Nwadike & Ors. v. Ibekwe & Ors. (1987) 11-12 SCNJ 72 at 99-100; Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Agbaka v. Amadi (1998) 7 S.C. (Pt. II) 18; (1998) 11 NWLR (Pt. 572) 16 at 24.

The appellants’ counsel did not file a reply brief in which he could answer the objection and he was absent when the appeal was heard on 30th March, 2003. This court still has the power to consider the objection on merit in the interest of justice before arriving at any decision on it.

Grounds of appeal 1, 2 and 3 in the appellant’s notice of appeal complained of “misdirection in law and on facts”, and in each ground particulars were given of the alleged misdirection in both issues of law and facts. Order 8 r. 2(2) of the rules of this court provides:-

“If the grounds of appeal allege misdirection or error in law the

*particulars and nature of the misdirection or error shall be clearly stated."*

***A misdirection is itself an error as it entails following a "wrong direction." It can also be of law or fact. It is also common ground that you almost always apply the law to a certain sets of facts. In this case, the appellants have given particulars; some containing issues of facts and some containing issues of law each in an attempt to satisfy the requirements of Order 8 r. 2 (ibid). I have carefully examined the 3 grounds of appeal and find that grounds 1 and 2 are in compliance with O. 8 r. 2 but ground 3 did not because it merely alleged error of facts based on evidence contained in Exhibits "F", "G" and "J". There was no question of law raised therein at all and the fact of calling it an error of law does not ipso facto make it so.***

D See Metal Construction (W.A.) Ltd. v. Migliore & Ors. (1990) 1 NWLR (Pt. 126) 299. No leave was shown to have been obtained from the court below or this court before filing the ground. See Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5.

E I accordingly strike out ground of appeal 3 and issue 3 which was distilled from it, including the arguments thereon in the appellants' brief. I however hold that grounds of appeal 1 and 2 are valid and properly filed in accordance with the rules of this court. The objection is partially successful.

F The dispute in this case concerned the village headship of Ivbiaro village in Owan Local Government Area of Bendel State. The Ivbiaro village consists of four quarters namely - Ivbiokhulator, Usun, Ivbioshogun and Ebese quarters each of the four quarters is subdivided into four kindred namely, Ivbiokhulator into Agogbe, Ikpokhumi; Afakporegbe and Igiomila; Usun into Abogwa, Ewobogho, Umovia and Ugbele; Ivbioshogun into Ikpoto, Uchadi, Iyiezolo and Irofia, Ebese into Afashoto, Evborue, Ubua and Evborokhai. Afimosi comes from Evborue kindred.

H Ivbiaro village was founded by the four sons of Aro, one of the wives of Ada Obi. The four sons were Okhulotor, Osun, Oshogben and Ese (not in any particular order). Originally, the four villages of Ivbiaro, Warrake, Ihievbe and Erra formed the Ivbi-Ada-Obi clan. Later on Ihievbe formed its own clan leaving Warrake, Erra and Ivbiaro



as Ivbi-Ada-Obi clan. The 1st defendant/respondent was appointed by the Bendel State Government as village head of Ivbiaro and clan head of Ivbi-Ada-Obi. See Exhibit "J". He comes from the Afimosi family which was of Evborue kindred under Ebese family quarters of Ivbiaro. The plaintiffs/appellants are from the Ivbiokhulotor family quarters one of the four quarters in Ivbiaro village. B

I now come back to consider the remaining issues 1, 2 and 4 of the appellants. I will take issues 1 and 2 together. The two issues together dealing with the traditional evidence adduced by the parties in respect of who the eldest son of Aro was for the selection of headship of Ivbiaro and the village head thereof. In this respect, the plaintiffs/appellants pleaded in paragraphs 10-15 as follows:- C

*"10. The plaintiffs aver that according to traditional history handed down by their fore-fathers, Ivbiaro village was founded by the descendants of the four sons of Aro who was one of the wives of Ada-Obi, who migrated from Benin and was believed to be a supernatural being.*

*11. Ada-Obi after whom the present Ivbi-Ada-Obi clan was named, had four wives, namely - ARO, WARREN, ERRA and IBIE. The children of Aro and their descendants founded Ivbiaro Village, meaning the children of Aro; the children of Warren and their descendants founded Warrake Village; the children of Erra and their descendants founded Era Village, whilst the children of Ibie and their descendants founded Ihievbe Village, now a Clan of its own.* E

*12. Aro had four sons, namely - Okhulotor (the eldest son) Oshogben, Usun and Ese. These four sons and their descendants founded the four quarters named after them and which constitute the present Ivbiaro Village. They are Ivbiokhulotor, Ivbioshogun, Usun and Ebese. Ivbiokhulotor and Ivbioshogun are jointly called Ubuneke while Usun and Ebese are jointly called Ewhogo.* F G

*13. As the eldest son of Aro, the said Okhulotor was by tradition regarded by all the children of Aro and their descendants as Aro's representative on earth. As such he became entitled by custom to summon and preside over meetings of all the children of Aro and their descendants, which will hereinafter be described simply as the Ivbiaro people.* H

*14. The said meetings, which were held regularly by the Ivbiaro people to discuss matters such as the annual traditional worshipping*

and offering of sacrifices to the spirits of their ancestors, age-grade and title ceremonies, trial of offenders, the settlement of disputes and general administration of the affairs of the family were held regularly at a traditional centre called “Ughele Arumaila” and presided over by Okhulotor. It was true that Headship of Ivbiaro was evolved from the time of Okhulotor.

15. After Okhulotor’s death, Ogbini, his eldest son, and who was also the eldest man in Aro’s family that time, the people agreed that the Village Headship of Ivbiaro be confined to Ivbiokhulotor Quarter as descendants of Okhulotor the eldest son of Aro.”

And the 1st defendant/respondent pleaded in his statement of defence, paragraphs 3 to 7 thus:-

“3. The 1st Defendant admits paragraphs 3 to 10 of the plaintiffs’ statement of claim. In further answer to paragraph 9, the 1st defendant avers that Ebese and Usun are jointly called EWOGHO while Ivbiosogben pronounced Iyesogben and Ivbiokhulotor pronounced Iyokhulotor are jointly called EBUNEKE.

4. The 1st Defendant denies paragraph 11 of the plaintiffs’ statement of claim. In answer to paragraph 11 of the statement of claim, the 1st defendant avers that ADA-Obi had only one wife ARO who begot the following 4 children in order of seniority:- (a) Ebese (b) Usun (c) Okhulotor (d) Ogben.

These children founded Ivbiaro. The 1st defendant avers that ARO, a woman delivered the four children to ADA-Obi. The 1st defendant shall lead oral evidence at the trial to the effect that Warrake, Ihievbe and Erra were never direct children of Ada-Obi. Ivbi-Ada-Obi is just a group name.

5. The 1st defendant admits paragraph 12 to the extent that ARO had four sons. The 1st defendant in further answer to paragraph 12 of the statement of claim avers that the eldest child of ARO was Ebese followed in order of seniority as stated below:-

Usun, Okhulotor and Ogben. These four sons founded Ebese, Usun, Iyokhulotor and Iyesogben quarters of Ivbiaro village.

6. The 1st defendant denies paragraphs 13 and 14 of the Plaintiffs’ statement of claim. In answer to paragraph 13, the 1st defendant avers that Okhulotor was never the eldest son of ARO and did not at anytime summon the meeting of Ivbiaro as the eldest son of ARO. The 1st defendant avers that Ebese was the eldest son of Aro.

*In answer to paragraph 14, the 1st defendant avers that the entire Ivbiaro community formerly met at UGHELLI to discuss matters affecting the entire community of Ivbiaro. The 1st defendant avers that when Akhilolo from Ebese Quarters of Ivbiaro became the Village Head of Ivbiaro, Ivbiaro community through communal labour expanded Akhilolo's palace where they were holding public meetings of the entire Ivbiaro community. The (UKPEDOR), that is palace of Akhilolo was regarded as the meeting place.* B

*7. The 1st defendant denies paragraph 15 of the plaintiffs' statement of claim. In answer to paragraph 15, the 1st defendant avers that Ogbo was never the Village Head of Ivbiaro. The 1st defendant avers that Ogbo was the 1st Iyokhulator member to become the oldest man (OWIOLISE) in Ivbiaro. The 1st defendant avers that while Ogbo was (Owiolise) oldest man in Ivbi-aro Chief Emokpe Imosi was the village head of Ivbiaro. The 1st defendant avers that Chief Emokpe Imosi was from Afimosi Ruling House of Ebese quarters."* C D

While the 2nd-5th defendants/respondents in paragraph 5 of their joint Statement of Defence pleaded that:-

*"5. The Defendants deny paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43 of the plaintiffs' Statement of Claim."* E

I will now examine the evidence adduced by the parties in support of their pleadings set out above.

From the pleadings of the parties, it is evidently clear that the parties have joined issue on which of the children of Aro, between Okhulotor and Ebese was the most senior and whose descendants were entitled to be appointed as the village head of Ivbiaro. F

The plaintiffs/appellants called four witnesses, P.W.s 1, 2, 3 and the 3rd plaintiff/appellant. P.W.1 did not offer any evidence as he was called to tender two documents, Exhibits "F" and "G". But P.W. 2 and 3 both testified that Okhulotor was the eldest son of Aro and that Ivbiokhulator quarters and its kindreds produced all the village heads of Ivbiaro and no body from the other three quarters of Ivbiaro could claim the village headship. The 3rd plaintiff/appellant also supported their evidence confirming that Ivbiokhulator is the only ruling house of Ivbiaro village. In the course of his testimony, he gave a list of the past village heads of Ivbiaro who came from the Ivbiokhulator kin- G H

dred but gave no details of the period of their respective reigns nor did he explain the traditional method of appointing the village head of Ivbiaro.

For the defendants/respondents, four witnesses also testified. D.W.s 1 and 2 only tendered documents, Exhibits “H” and “K” in their custody. D.W.3 testified that Ebese quarters is the most senior quarters in Ivbiaro and not Ivbiokhulator and that all the village heads of Ivbiaro in the past came from the Afimosi ruling house of Evborue kindred of Ebese except one Emokpaire who hailed from Ivbiokhulator. He gave reason why Emokpaire came to be appointed due to the influence of his own son. D.W.3 gave a list of the village heads appointed in Ivbiaro up to the 1st dependant/respondent. He however, gave no period of their reigns either. The 1st defendant/respondent denied in his testimony that Okhulotor was the most senior. He said that Ebese was the most senior as it gave names to age groups in Ivbiaro. He also listed the past village heads of Ivbiaro up to himself but in addition to the list of village heads given by D.W. 3, he gave the period of reigns in respect of most of them from 1908 to his own appointment in 1982, and explained in detail the procedure, by tradition and custom, for the appointment of the village head of Ivbiaro. No evidence was called by the 2nd - 5th defendants/respondents.

The learned trial Judge reviewed the evidence of the parties’ witnesses and the relevant exhibits tendered and admitted before him and found thus:-

“*The basis of the claim to seniority appears to arise from the most senior son of Aro from the evidence in this court. This court has earlier remarked that the basis for the two traditional privileges accorded to Ebese, one of the sons of Aro has not been explained by the plaintiffs who claim that Okhulotor is the senior son of Aro. This court believe (sic) and accept (sic) the evidence of the defendants that Ebese is the senior son of Aro, hence these Traditional Privileges, and that is the view of this court.*”

The learned trial Judge also gave his reasons for accepting the evidence of the defendants/respondents when he proceeded to say:-

“*To this extent, the Traditional History of the past Village Heads of Ivbiaro given by the 1st defendant is preferred. The plaintiffs merely gave a catalogue of past Village Heads without reference to the period they reigned. But the Defendants did not merely list the names*

*of the past Village Heads but specified the periods they reigned, and the evidence of the 1st defendant on this remains uncontradicted, unchallenged and therefore cogent. This court believes and accept (sic) the evidence of the 1st Defendant for the reasons given above."*

The Court of Appeal in considering this issue on the evidence at the trial, found that the learned trial Judge was perfectly entitled to evaluate the evidence led in support of both versions to determine which of them he would accept as true. After carefully examining the evidence itself, it concluded that the findings of fact made by the learned trial Judge was fully supported by the evidence before him and that he drew the correct inferences from them.

***In this court, learned counsel for the appellants submitted in his brief that the question whether Okhulotor or Ebese is senior or not is a question of fact which should be determined on the evidence at the trial. I entirely agree with this.*** He pointed out that in support of paragraphs 13 and 14 of the 1st Amended Statement of Claim of the 1st appellant, evidence of P.W.s 1, 2 and 3 and the 3rd plaintiff proved that Okhulotor was the eldest son of Aro, but the learned trial Judge disregarded this evidence and accepted that of the 1st respondent. ***He also submitted that the fact that by Ivbiaro custom Ebese starts Aro Festival before any other quarters and has the responsibility of giving names to new age groups does not necessarily make Ebese the eldest quarter in Ivbiaro. I do not agree with this submission having regard to the evidence of D.W. 3 and the 1st respondent denying that Okhulotor was the eldest and showing that by Ivbiaro custom Ebese was given special privileges over and above the other 3 quarters of Ivbiaro. This fact was not challenged by the appellants and I find that the Court of Appeal was right in accepting the inference of the learned trial Judge on this point.*** I am therefore perfectly of the view, having regard to the evidence adduced by D.W. 3 and the 1st defendant/respondent particularly on the list of the past Village Heads of Ivbiaro, the dates of their reigns, and the traditional customary procedure for the appointment of the village head, given at the trial, the learned trial Judge was perfectly entitled to prefer the evidence of the 1st respondent to that of the appellants as being more probable. Neither D.W. 3 nor the 1st respondent changed his evidence on cross-examination and

on the dates of reign of the Village Heads given by 1st respondent even though not pleaded, no suggestion was made in cross examination that any of the dates was wrong.

***In paragraph 13 of the Statement of Defence, the 1st defendant/appellant pleaded all the Village Heads who ruled Iubiario including himself, and he set them out fully in his testimony before the trial court. The list agreed in substance with the one given by D.W. 3 in his testimony, and both of them said that all the Village Heads listed except Chief Emokpaire came from Afimosi family of Ebese. This evidence was not challenged in Cross-examination by the appellants, so that even if the detail of the dates of reign of the Village Heads was disregarded for not being pleaded, this evidence still stands. In the case of the plaintiffs/ appellants, the list of village heads given by P.W. 2 when compared with those given by P.W. 3 in their testimonies are different and contradictory. On the whole therefore the testimony given by D.W. 3 and the 1st respondent is more credible.***

***It is well settled that a trial Judge who sees and hears the witnesses giving evidence before him, has the exclusive right to assess their demeanour so as to determine whether they are telling the truth or not. He can, in this way, determine the credibility or otherwise of the testimony of every witness who testifies before him. If this is done properly, it is not for the appeal court to interfere in any way possible. In the instant appeal, I am of the view that the trial Judge exercised his powers correctly and I agree with the Court of Appeal that the findings of the learned trial Judge are fully in accord with the evidence adduced before him.***

From the evidence of the 1st respondent and his witness, it is very clear that his appointment and selection as the Iubiario village head was regulated by the custom and tradition of the area. Exhibit 'F' which was the minutes of the meeting of the Traditional Rulers of Owan Local Government did not resolve any issues; it merely advised the parties concerned to settle their differences amicably. It adjourned to 7th December, 1982, for the parties to bring their nomination for the appointment of the village head to the meeting for onward transmission to the Ministry of Local Government and Chief-

taincy Affairs, Benin City. At the resumed meeting of the Traditional Rulers on 7th December, 1982, the traditional rulers considered the matter again and unanimously selected the 1st respondent as the Village Head of Ivbiaro and the Clan Head of Ivbi-Ada-Obi. See Exhibit "G". They also recommended that in order to restore peace in Ivbiaro, ascendancy to the throne of the village head shall be as follows:-

1. Ebese- Afimosi Ruling House
2. Iyokholator
3. Usun
4. Iyioshogben

The 1st respondent is from Afimosi Ruling House and apart from other good qualities which supported his nomination, he had obtained the necessary traditional/chieftaincy titles of Daudu, Zaiki and Ugbemu as the most senior Chief of the area. See Exhibit "J". This nomination was accepted by the Bendel State Government and the appointment as the village Head of Ivbiaro and the Clan Head of Ivbi-Ada-Obi was gazetted vide Bendel State Legal Notice (BSLN) No. 77 of 1986. I answer issues 1 and 2 in the affirmative.

The last issue to be considered now is whether it was necessary in this case to institute a public inquiry to resolve the claims of the contestants to the chieftaincy dispute over the Village Headship of Ivbiaro before the appointment of the 1st respondent. The learned counsel for the appellants submitted that this was essential in view of the provisions of S. 27 (1) of the Traditional Rulers and Chiefs Edict, 1979 of Bendel State. Learned counsel for the respondents also submitted that since the appointment and selection of the 1st respondent as the Village Head of Ivbiaro was largely dependant on the custom and tradition of the area concerned and ample evidence to that effect was accepted unchallenged at the trial, it was not necessary to resort to the provisions of S. 27 (1) of the said Edict. I entirely agree with him on this particularly as the operative word used in S. 22 (3), 22(1) and 22(7) of the Edict is "may" which makes it discretionary and not mandatory. See *Bakare v. A.G. Federation & Ors.* (1990) 5 NWLR (Pt.152) 516; *Amafule v. State* (1988) 2 NWLR (Pt. 75) 156; *Sule v. Nigerian Cotton Board* (1985) 2 NWLR (Pt 5) 17. I also agree with the Court of Appeal when it held that:-

*"The question whether where there are two or more contes-*

*tants the appropriate authority should cause an inquiry to be held depends on the circumstances of each case. The purpose of causing an inquiry to be held is to obtain further information or more evidence in addition to the evidence before the appropriate authority for the purpose of resolving the dispute or contest. Therefore, if in*  
 B *any particular case, the appropriate authority has sufficient evidence or materials before him that can enable him fairly to resolve the dispute or contest, then there will be no need to resort to the provisions of S. 27 (1) of the Edict to cause any inquiry."*

C Also as found by the learned trial Judge and agreed to by the Court of Appeal, there was no formal declaration in respect of the village headship of Ivbiaro and so the custom and tradition of Ivbiaro people must be strictly adhered to. And since there was ample evidence of the custom and tradition from the testimonies of the 1st  
 D respondent and his witnesses, which was accepted by the trial Judge, Exhibits "A" and "O" are of no consequence.

Therefore, in the circumstances of this case, I hold that it was not necessary to invoke the provisions of S. 27 (1) of the Edict to determine the chieftaincy dispute between the parties.  
 E The answer to this issue is also in the negative.

Finally, this appeal is against the concurrent findings of the trial court and the Court of Appeal. This court will not ordinarily interfere with such findings unless special circumstances are shown to justify such interference. These circumstances have been explained in various  
 F decisions of this court and I need not repeat them here. Suffice it to say however that no such circumstances exist here.

In sum, I find no merit in this appeal. It is accordingly dismissed. I affirm the judgment of the Court of Appeal delivered on  
 G 26th of March, 1993. I award N10,000.00 in favour of the 1st Respondent against the appellants.

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### **BELGORE JSC**

H I read in advance the judgment of my learned brother, Kalgo, JSC., with which I am in full agreement. The plaintiffs pleaded the order of seniority but offered no proof thereof. Learned trial Judge made adequate findings of fact from the evidence before it, based upon the pleadings and no reason has been proffered by the appel-



lants for this court to interfere with these findings. I also dismiss this as totally lacking in merit. I award N10,000.00 costs to respondents, against the appellants.

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### **ONU JSC**

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For the reasons for judgment delivered by my learned brother, Kalgo, JSC., a preview of which I had before now, I too dismiss this appeal and make similar orders for costs as therein contained.

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### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother, Kalgo, JSC. I agree with it and for the reasons he gives, I also dismiss the appeal with N10,000.00 costs to the respondents.

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### **UWAIFO JSC**

I read in advance the judgment of my learned brother, Kalgo, JSC., and fully agree that the appeal lacks merit for the reasons he gives.

The real issue in the case is whether Okhulotor was the senior son of Aro as claimed by the plaintiffs (appellants) or Ebese was the senior as claimed by the 1st defendant (1st respondent). The court below, accepting the finding of the learned trial Judge on the point, observed:

*“After rejecting the evidence led by the appellants on the point, and accepting the evidence supporting the version put forward by the 1st respondent, the learned trial Judge considered the question of why such privileges should be vested in Ebese quarter under customary law and came to the conclusion that it was because Ebese was the senior son of Aro, which was an inference which could reasonably and properly be drawn from the evidence on record which he had accepted. After all in a traditional African society or community like Ivbiaro, generally, respect, deference and pre-eminence are given or accorded to seniority in age, hierarchy and status.”*

Both courts below were justified in accepting that Ebese was

the senior. The plaintiffs pleaded in para. 12 of their Statement of Claim thus:

12. Aro had four sons, namely - Okhulotor (the eldest son), Oshogben, Usun and Ese. These four sons and their descendants founded the four quarters named after them and which constitute the present Ivbiaro Village. They are Ivbiokhulotor, Ivbioshogben, Usun and Ebese. Ivbiokhulotor and Ivbioshogben are jointly called Ubuneke while Usun and Ebese are jointly called Ewhogo.”

The 1st defendant in his Statement of Defence, para. 5, denied the order of seniority as follows:-

“5. The 1st defendant admits paragraph 12 to the extent that ARO had four sons. The 1st defendant in further answer to paragraph 12 of the statement of claim avers that the eldest child of ARO was Ebese followed in order of seniority as stated below:- Usun, Okhulotor and Ogben. These four sons founded Ebese, Usun, Iyokhulotor and Iyosogben quarters of Ivbiaro village.

Evidence was led on the point by both sides. The 3rd plaintiff said in cross-examination that -

“It is our custom that the eldest man in Ebese gives name to a new group. It is our custom that Ebese starts Aro festival before any other quarters in Ivbiaro because it was bestowed on him by custom.”

He did not stop there. He went on to give another primacy to Ebese when he said:

“Ebese was pronounced before Usun was pronounced before Okhulotor was pronounced before Ikulator. sic.”

Whereas, as will be recalled in the averment in para. 12 of the Statement of Claim, the order of seniority was Okhulotor, Oshogen, Usun and Ebese. The question therefore is why is it that during Aro festival, Ebese quarters are allowed to start first and their name is pronounced before others they were supposed to be junior to?

The learned trial Judge resolved the issue of seniority in his findings as follows:

“Of the four children of Aro, Ebese has priority in two basic traditional functions, namely:-

(a) Giving new name to a new age group.

(b) Performing festivals before any other quarters in Ivbiaro.

The 3rd plaintiff admitted under cross-examination that it is

*the eldest man in Ebese that gives the name. However, no reason had been offered for this priority treatment or preference.*

*The basis of the claim to seniority appears to arise from the most senior son of Aro from the evidence in this court. This court has earlier remarked that the basis for the two traditional privileges accorded to Ebese, one of the sons of Aro has not been explained by the plaintiffs who claim that Okhulotor is the senior son of Aro. This court believes and accept the evidence of the defendant that Ebese is the senior son of Aro, hence these traditional privileges, and that is the view of this court.”*

This finding which was affirmed by the court below is not perverse but is reasonably supported by the available evidence. It amounts to a justified concurrent finding which this court is not entitled to interfere with: see *Ivienagbor v. Bazuaye* (1999) 6 S.C. (Pt. I), (1999) 9 NWLR (Pt. 620) 552; *Agu v. Nnadi* (2002) 12 S.C. (Pt. I) 173, (2002) 18 NWLR (Pt. 778) 223. The plaintiffs had the burden to prove the order of seniority they pleaded but failed to discharge that burden.

It is for the above reasons and those more fully stated by my learned brother, Kalgo, JSC., that I too, find no merit in this appeal. I accordingly dismiss it with N10,000.00 costs to the 1st respondent against the appellants.

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