

**SUPREME COURT OF NIGERIA**

7<sup>TH</sup> OCTOBER, 2005. SC. 89/2001

**CORAM:- U. A. KALGO, A. O. EJIWUNMI, G. A. OGUNTADE,  
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC**

LAMBERT SUNDAY IWUEKE .... APPELLANT

AND

IMO BROADCASTING CORPORATION ..... RESPONDENT

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COURTS - Orders - Nature of - Whether final or interlocutory - Is determined - By subject matter in dispute being related to the decision (H1)

JUDGMENTS - Decision - Final decision - Is one which puts an end to the action - By deciding whether plaintiff is entitled to reliefs claimed - And there will be nothing left - For further action by trial court (H2)

ACTIONS - Parties - Judgment given in default of pleadings - Being a final decision - Puts an end to the action between present parties - Though appellant's case still subsists - Against 2nd-5th defendants (H3)

CONSTITUTIONAL LAW - Appeals - As of right - Leave - Where the decision of trial court is final - Aggrieved party does not need leave of court - And it is immaterial that the grounds - Are of facts or mixed law and facts (H4)

APPEALS - Grounds of appeal - Nature of - Whether of law or facts - Is determined by examining misunderstanding of the lower court - With respect to that ground (H5)

PRACTICE & PROCEDURE - Pleadings - Judgment in default of pleadings - Is a proceeding in which defendant - Is deemed to have admitted the facts pleaded by plaintiff (H6)

APPEALS - Leave - Ground of appeal that is one of law - Makes an appeal

**2620 Iwueke v. Imo Broadcasting Corporation (2005) 10 KLR**

to be as of right - Needing no leave of court under s. 220 (1)(b) 1979 Constitution - Even if it be in respect of an interlocutory decision (H7)

**PRACTICE & PROCEDURE** - Actions - Pleadings - Default proceedings - Damages being always regarded to be in issue in any action - Is deemed traversed - So that the presumption that facts are admitted in default proceedings - Does not include averments in respect of damages (H8)

**COURTS** - Damages - Evidence - Judgment in default of pleadings - Where trial court did not receive any oral or affidavit evidence - In support of the claim - Before awarding the damages claimed - Such judgment will be set aside (H9)

**FACTS**

Before the High Court of Owerri, the plaintiff/appellant instituted an action against the defendant/respondent together with 4 others jointly and severally, claiming N500,000.00 as damages for libel and an order that the defendants retract the said publication by the agencies of Radio, Television and Newspaper. The respondent defaulted in filing its statement of defence even though it was duly served with the statement of claim and other processes. The appellant then applied for judgment in default of pleadings. The respondent was served with the motion but filed no counter affidavit nor application for extension of time within which to file its statement of defence.

The trial court entered judgment for the appellant in the sum of N500,000.00 but dismissed the second relief. The court also made orders that the 2nd-5th defendants file their statement of defence which they did. The defendant thereafter filed an application praying the trial court to set aside its judgment in default of pleadings and admit it to defend the action. The trial court dismissed the application, and this gave rise to an appeal by the respondent to the Court of Appeal, which set aside the judgment of the trial court. The appellant being dissatisfied, has now appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“Whether the Court of Appeal was right in holding that the judgment of the learned trial judge was final, having finally disposed of the rights of the Appellant and Respondent? if the answer is in the negative, whether Ground 2 of the grounds of Appeal on which the Court Of Appeal based its judgment was one of law alone.*

**IN THE ALTERNATIVE**

*2. Whether the Court of Appeal was right in holding that the learned trial judge was in error when he entered final judgment for the Respondent in respect of the claim for damages for libel without receiving evidence on that claim?”*

**HELD** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

***COURTS - Orders - Nature of***

1. From the decided authorities on the matter in Nigeria, it is clear that in order to determine whether a decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. The proper test is therefore the one that does not look at the nature of the proceedings resulting in the order in question. In other words, it is immaterial that the order made resulted from an interlocutory application or proceeding. The nature of the order made will determine whether the order has finally determined the rights of the parties in the proceedings in issue appealed against and not whether the rights of the parties in the substantive action have been fully disposed of -see **IGUNBOR vs. AFOLABI** (2001) 11 NMLR (pt. 723) 148.

(p. 2631 F)

***Final decision - Is one which puts an end to the action***

2. The law on the matter being what it is, I have no hesitation in holding that where the decision of the court under scrutiny clearly and completely disposes of all the rights of the parties to the action, that decision is final. On the other hand where the decision only disposes of an issue or issues in the case thereby leaving the parties to go back to claim other rights in the court, the decision is interlocutory. From the submission of both

counsel reproduced earlier in this judgment, it is clear that they also agree with this proposition of the law as being the applicable principles in the attempt at resolving the issue under consideration in this appeal.

In my considered opinion a final decision can be said to be one which puts an end to the action by deciding whether the plaintiff is or is not entitled to the reliefs he claims thereby leaving nothing for further action by the trial court except proceedings in respect of enforcement of that decision. Simply put, it is the application of the nature of the order test earlier enunciated in this judgment. (p. 2632 A)

***Parties - Judgment given in default of pleadings***

3. I am of the firm view that the judgment in default of pleadings reproduced supra, as far as the appellant and the respondent are concerned, has completely put an end to the action between them and therefore qualifies as a final judgment particularly as it has disposed of the rights of the parties thereto i.e. appellant and the respondent. I am also of the view that the finality of that decision is not in doubt, notwithstanding the fact that the appellant's case against the 2<sup>nd</sup> - 5<sup>th</sup> defendants still subsists at the trial court; the parties whose rights in the action were disposed of in the judgment in issue being the appellant and respondent. (p. 2633 A)

***Appeals - As of right***

4. Having come to the conclusion that the decision of the trial court in issue is a final one as opposed to an interlocutory decision as canvassed by learned counsel for that appellant, it follows that the respondent did not need the leave of either the trial court or the court of Appeal before appealing against same as it is the law that an appellant appeals as of right against the final decision of a court of first instance.

In such a situation it becomes immaterial or irrelevant that a ground of appeal against such a final decision is of law, facts or mixed law and facts, see section 220 (1) of the Constitution of the Federal Republic of Nigeria 1979 (herein after referred to as the 1979 constitution). (p. 2633 E)

***Grounds of appeal - Nature of***

5. Though the difficulty involved in distinguishing a ground of law from a ground of fact has always been present and recognized by the courts, the position of the legal authorities on the issue is for the court to examine thoroughly the grounds of appeal involved to see whether the grounds reveal a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved, or admitted in which case it could be a question of law, or one that would require questioning the evaluation of facts by the lower court before the application of the law, in which case, it would amount to a question of mixed law and fact.

Looking closely at ground 2 and the particulars of error supra, I agree with that learned counsel for the respondent that what the respondent challenged in that ground is the application of the law by the trial Judge to the facts that are not in dispute. (p. 2635 C)

***Pleadings - Judgment in default of pleadings***

6. It must be noted that the judgment involved in this case is one in default of pleadings, which by the provision of the rules of court the lower court has jurisdiction to entertain.

However it is trite law that in the proceedings leading to the entry of such a judgment, the defendant is deemed to have admitted the facts as pleaded in the statement of claim on the basis of which judgment in default of pleading is always entered where appropriate. (p. 2635 G)

***Ground that is one of law - Makes an appeal to be as of right***

7. It is very clear and I hold that the complaint of the respondent is simply that the trial judge misapplied the law to the facts already impliedly admitted. That he failed to use his knowledge of the law to note that since the claim was for unliquidated damages for libel, there was need for evidence as the basis for assessment of the quantum of damages. I therefore hold the view that the misapplication of the law by the trial judge as complained of in ground 2 of the grounds of appeal amounts to an error in Law and therefore a ground of law alone for which by the provisions of section 220 (1) (b) of the 1979 Constitution, an aggrieved party has a

right of appeal without leave of court. As stated earlier in this judgment, the sub-issue is based on the assumption that the decision of the trial court was an interlocutory one and that the ground of appeal in issue is a ground of mixed law and facts in which case the appellant would have needed to  
B appeal. However as found in this judgment the decision of the trial court involved in the appeal is a final decision for which leave to appeal is not required. Even if it were an interlocutory decision, which I do not concede, ground 2 of the grounds of appeal involves question of law alone for which  
C no leave is required by virtue of section 220 (1) (b) of the 1979 constitution. In the circumstance, issue No.1 is hereby resolved against the appellant. (p. 2636 C)

***Default proceedings - Damages - Is deemed traversed***

D 8. The law is that in an action, a claim for damages is always deemed to be in issue. That being the case any allegation in pleadings that a party has suffered damages and any allegation as to the amount of damages so suffered is deemed to be traversed unless of course, specifically admitted.  
E It follows therefore that though for the purpose of a proceeding for judgment in default of pleadings the defendant, as in this case, is deemed to have admitted the facts as pleaded in the statement of claim, such implied admission does not extend to averments in respect of damages.  
F This clearly constitutes an exception to the general rule that for the purposes of application for judgment in default of pleadings the defendant is deemed to have admitted the facts as pleaded in the statement of claim. (p. 2637 G)

***COURTS - Damages - Evidence - Judgment in default of pleadings***

H 9. From the record, though there are affidavits in support of the application for judgment in default of pleadings, no paragraph thereof deposed to any fact relating to the claim for damages. I am very sure that that is the reason  
H why learned counsel could not refer this court to any relevant paragraph. It is important to note that the issue has been raised both in the court of trial and the lower court thereby putting appellant on notice to refer this court to any such paragraph if any.

So the demonstrable and irresistible conclusion arising from the facts of this case is that the trial judge did not receive any evidence either oral or in affidavit in support of the claim for damages before making the award of #500,000.00 damages in favour of the appellant and against the respondent.

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The lower court was therefore right in coming to the conclusion that the trial judge erred in law by so awarding the damages claimed and thereby set aside the judgment. In the circumstances issue No.2 is resolved against the appellant. (p. 2639 A)

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### **REPRESENTATION**

CHIEF AMAECHI Nwaiwu, SAN for the Appellant with him is KELECHINWAIWUEsq.

CHIEF EZE DURUIHEOMA for the Respondent

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### **CASES REFERRED TO**

IGUNBOR vs. AFOLABI (2001) 11 NMLR (pt. 723) 148

Ogbechie vs. Onochie (1986) 2 NWLR (pt. 23) 484

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Orakosin vs. Mankiti (2001) 9 NWLR (pt.719) 529 at 538

Ngilari vs. Mother Cat Ltd (1999) 13 NWLR (pt. 635) 626 at 647

Osuji vs. Ishola (1989) 3 NWLR (pt. 111) 623

Produce Marketing Board vs. Adewunmi (1972) 11 B.C. III

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Nwosu vs. Imo state Environmental sanitation Authority (1990) 2 NWLR (pt.135) 688 at 718

Ebokam vs. Ekwenibe & Sons Trading Co. Ltd (1999) 10 NWLR (pt. 623) 242 at 251

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Blay vs. Solomon (1947) 12 WACA 175

Ude vs. Agu (1961) 1 SCNLR 98; (1961) All NLR 65

Chike Obi vs. DPP (No.2) (1961) All NLR 458 (1961) 2 SCNLR 164

Akinsanya vs. UBA Ltd (1986) 4 NWLR (pt.35) 273

Afuwwaoe & Ors vs. Shodipe & ors (1957) 2 FS .C. 62; (1957) SCNLR H 265

Ojora & ors vs. Odunsi (1964) NWLR 12

Falola vs. UBN PLC (2005) 7NWLR (pt. 924) 405 at 418 - 419

**STATUTE REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979 ss. 220(1) & 221 (1)(b)

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**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal sitting in Port-Harcourt Coram A.I. Katsina-Alu JCA (as he then was) and R.O. Roland, M.O. Onalaja, JJCA delivered in appeal No. CA/PH/55/88 on the 28<sup>th</sup> day of June 1994 in which it allowed the appeal of the present respondent and set aside the judgment of OJIAKO J (as he then was) delivered on the 4<sup>th</sup> day of December, 1987.

The facts of the case include the following. The appellant as plaintiff instituted an action against the respondent together with four others jointly and severally at the owerri High Court claiming the following reliefs: -

“(a) #500,000.00 as damages for libel

(a) *An order of Court that the defendants retract the said publication by the agencies of Radio, Television and Newspaper.”*

Pleadings were ordered in accordance with the applicable rules of Court and while the appellant as plaintiff had filed his pleadings, the respondent defaulted even though it was duly served with the statement of claim and other processes. The failure of the respondent to file its statement of defence resulted in the appellant presenting an application for judgment in default of pleadings in accordance with the Rules of Court. The respondent was duly served with the motion and was represented by counsel on 24<sup>th</sup> November 1986 when the application was fixed for hearing, but it filed no counter affidavit neither did it file any application for extension of time within which to file its statement of Defence. The motion for judgment was however adjourned to 15 December 1986 for argument at the instance of learned counsel for the appellant.

On the 15<sup>th</sup> day of December 1986 the motion was heard with the respondent still not taking steps to put its house in order by way of extension of time to file its statement of Defence neither did it file any



counter affidavit in opposition to the affidavit in support of the application for judgment in default of pleadings. The motion was also not opposed on points of law by learned counsel for the respondent as a result of which the learned trial judge entered judgment for the appellant. In the sum of N500,000.00 being the total amount claimed by the appellant but dismissed B the second relief which was earlier reproduced in this judgment. The trial judge went on to make orders that the 2<sup>nd</sup> to 5<sup>th</sup> defendants file their statement of defence, which orders were later complied with. However, on the 15<sup>th</sup> day of May 1987 the respondent filed an application in which C it prayed the trial Court to set aside its default judgment in default of pleadings and admit it to defend the action. The Motion was taken on 12<sup>th</sup> October 1987 and in a reserved ruling delivered on 4<sup>th</sup> December 1987, the learned trial judge dismissed the application giving rise to an appeal by the respondent to the Court of Appeal sitting at Port Harcourt, the judgment D on which resulted in the present appeal. The Court of Appeal in its judgment on 15/12/86 set aside the judgment of the trial court.

The issues for determination in this appeal, as formulated by learned counsel for the appellant, AMAECHI NWAIWU Esq., SAN in the E appellants brief of argument filed and adopted in argument of the appeal, are as follows:-

*“Whether the Court of Appeal was right in holding that the judgment of the learned trial judge was final, having finally disposed of the rights of F the Appellant and Respondent? if the answer is in the negative, whether Ground 2 of the grounds of Appeal on which the Court Of Appeal based its judgment was one of law alone.*

**IN THE ALTERNATIVE**

*2. Whether the Court of Appeal was right in holding that the learned G trial judge was in error when he entered final judgment for the Respondent in respect of the claim for damages for libel without receiving evidence on that claim.”*

On his part, learned counsel for the respondent, CHIEF EZE H DURUIHEMA in the respondent’s brief which he adopted in argument of the appeal on 12/7/05, while adopting the appellant’s issue No. 2 formulated his issue No. 1 on the following terms:-

“2.01 was the decision of the trial Court awarding the sum of #500,000.00 as damages to the plaintiff against the 1<sup>st</sup> Defendant an interlocutory decision just because the decision did not involve or affect the other defendants whose case was still pending in the lower Court and was ground 2 of the -grounds of Appeal in the Court of Appeal a Ground of Law?”

Looking at the issues as formulated by both counsel in this appeal, it is very clear that appellant’s issue one and respondent’s sole issue are substantially the same. I however do not agree with learned senior counsel for the appellant that judging from the grounds of appeal, issue No. 2 can be properly described as an alternative one to issue No. 1. It is a competent and independent issue a resolution of which cannot be said to result in the same effect as a resolution of issue No 1. That apart, I have to observe that the sub issue in issue No. 1 can only be considered, as formulated by learned counsel for the appellant, the resolution of the main issue therein stated is in the negative. In other words if the answer to the main issue in issue No. 1 is in the positive then there will be no need to waste time in considering the sub-issue therein.

In arguing the appeal with respect to issue No. 1, learned counsel for the appellant submitted that the lower court was wrong in holding that the judgment of the learned trial judge was final having finally disposed of the rights of the appellant and respondent. Learned counsel submitted further that the lower court also erred in holding that ground 2 of the grounds of appeal was one of law alone, and that the said ground 2 was of mixed law and fact. Referring to the portion of the judgment of the trial court where it is stated by that court that” the other defendants will proceed to file their statement of defence based on the plaintiff’s statement of claim”, counsel stated that the battle was still on between the appellant and the 2<sup>nd</sup> to 5<sup>th</sup> defendants in the trial Court and as such the rights of all the parties to that case have not been finally disposed of neither did the order of that court finally dispose of the matter in dispute.

Citing and relying on the case of Ezenwosu vs Ngonadi (1992) 3NWLR (pt.228) 154 at 172; Bozson vs. Alkincham U.D.C.. (1903) IKB 547; Blay vs. Solomon (1947) 12 WACA 175; Ude & Ors vs. Agu (1961)

ISCNLR 98; (1961) 1 All NLR 66 and *Akinsanya vs. UBA Ltd* (1986) 4 NWLR (pt.35) 273 at 292-295, learned counsel submitted that for the court to determine whether the decision of the lower court is final or interlocutory the court has to look at the result of the decision to be appealed against. He further argued that if the decision finally disposes of the rights of the parties then it is final, but if not, it is interlocutory. That if the said decision invariably affects the status of the parties to the decision and does not involve any further reference to the court appealed from then it is a final one. That in the present case the rights of the parties were still valid and subsisting and could be affected one way or the other by the decision of the court after the full hearing of the case. B C

Expanding the argument on sub-issue No. 1 as to whether ground 2 of the grounds of appeal is of law alone or of mixed law and fact, learned counsel submitted that the ground reveals or questions the evaluation of facts by the lower court before the application of the law thereto. That there were facts by affidavit evidence before the learned trial judge and which the judge had to evaluate and assess before exercising his discretion in refusing to set-aside the judgment. That leave of the court of first instance or of the court below was required before the respondent could file its appeal to the court below and that since no such leave was obtained, that appeal was incompetent, relying on section 221 (1) of the Constitution of the Federal Republic of Nigeria 1979; *UBA vs. GMBH* (1989) 3 NWLR (pt.10) 374 at 388-389; *Ogbechie vs. Onochie* (1986) 3 S.C. 54 at 58 -61; *NNSC vs. ESV* (1990) 7 NWLR (pt. 164) 526 at 537 and 549; *Metal Construction (W.A.) Ltd vs. Migeore* (1990) 1 NWLR (pt.126) 299 at 311 - 313, and *Ifedorah vs. Ume* (1988) 2 NWLR (pt.5) at 15 - 16. Learned counsel then urged the court to resolve the issue in favour of the appellant. D E F G

On his part, learned counsel for the respondent conceded, in the respondent's brief, that the law in determining whether a judgment is final or interlocutory is as stated by the Supreme Court in the cases cited by appellant's counsel and is to the effect that if the decision finally disposed of the rights of the parties, it is final, if not, it is interlocutory. That appellant counsel's argument that the decision was interlocutory is based on the fact that part of the action is still pending in the trial court which has nothing H

to do with the nature of the order made by that court. That when the trial court pronounced judgment in favour of the appellant and refused to set same aside upon application to that effect, the judgment became a final judgment because there was nothing left for the court to do on the matter as it affects the 1<sup>st</sup> Defendant.

Turning to the sub-issue of issue No. 1, learned counsel submitted that ground 2 of the grounds of appeal is a ground of law alone and that the lower court was right in so holding. That the ground is a challenge of the application of the law by the trial court to the facts that are not in dispute in the matter. That the undisputed facts are as stated in the particulars of error therein. That the trial court erred in applying the law to the facts thereby making the error one of Law. That since the claim was for unliquidated damages for libel there was need for evidence before it could be said that the appellant was entitled to anything. Learned counsel then urged the court to resolve the issue in favour of the respondent.

A look at decided authorities on the issue as to whether a decision of a court is final or interlocutory reveals that two distinct tests are used by the court in resolving the issue. The tests were laid down in two different cases, namely, *BOZSON vs. ALTRINCHAM U.D.C. (1903) 1 K.B 547* and *SALAMAN vs. WARNER (1891) 1 QB 734*. At page 548 of *BOZSONS* case, LORD ALVERSTONE CJ stated the test thus:-

*“It seems to me that the real test for determining this question ought to be this: Does the judgment or order made, finally dispose of the rights of the parties if it does, then I think it ought to be treated as a final order but if it does not, it is then, in my opinion, an interlocutory order.”*

In *SALAMAN vs. WARNER* (supra) at page 735, LORD ESHER, MR formulated the test in these terms:

*“Taking into consideration all the consequences that would arise from deciding in one way or the other respectively, I think the better conclusion is that the definition which I gave in standard Discount co. vs. La Grange is the right test for determining whether an order for the purpose of giving notice of appeal under the Rules is final or not. The question must depend on what would be the result of the decision of the Divisional Court; assuming it to be given in favour of either of the parties.*

*If their decision, whichever way it is given, will if it stands, finally dispose of the matter in dispute; I think that for the purpose of these rules, it is final. On the other hand, if their decision, if given in one way will finally dispose of the matter but, if given in the other will allow the action to go on, then I think it is not final, but interlocutory'.*

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It is generally agreed, and I share in that opinion, that while the test in Bozson's case takes a look at or considers the nature of the order made, the test in Salaman's case looks at the nature of the proceedings in which the order in question is made. These tests are therefore not the same.

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From decided authorities in Nigeria it is very clear that the Supreme Court has consistently preferred and applied "*the nature of the order made*" test in our courts see - OMONUWA vs. OSHODIN (1985) 2 NWLR (pt.10) 924 at 937 per KARIBI-WHYTE JSC (as he then was); Ebokam vs. Ekwenibe & Sons Trading Co. Ltd (1999) 10 NWLR (pt. 623) 242 at 251 per KALGO JSC; Blay vs. Solomon (1947) 12 WACA 175; Ude vs. Agu (1961) 1 SCNLR 98; (1961) All NLR 65; Chike Obi vs. DPP (No.2) (1961) All NLR 458 (1961) 2 SCNLR 164; Adegbenro vs. Akintola (1962) All NLR 442; Agua Ltd vs. Ondo State Sport Council (1988) 4 E NWLR (pt.91) 622; Akinsanya vs. UBA Ltd (1986) 4 NWLR (pt.35) 273; Akaniya Ogunlimehin vs. Omotoye (1956) 2 FSC 56; Afuwwa & Ors vs. Shodipe & ors (1957) 2 FS .C. 62; (1957) SCNLR 265; Alaye of Effon vs. Fasan (1958) 3 FSC 68; Ojora & ors vs. Odunsi (1964) NWLR 12; Falola vs. UBN PLC (2005) 7NWLR (pt. 924) 405 at 418 - 419 etc.

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**From the decided authorities on the matter in Nigeria, it is clear that in order to determine whether a decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. The proper test is therefore the one that does not look at the nature of the proceedings resulting in the order in question. In other words, it is immaterial that the order made resulted from an interlocutory application or proceeding. The nature of the order made will determine whether the order has finally determined the rights of the parties in the proceedings in issue appealed against and not whether the rights of the parties in the substantive action have**

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been fully disposed of -see IGUNBOR vs. AFOLABI (2001) 11 NMLR (pt. 723) 148.

**The law on the matter being what it is, I have no hesitation in holding that where the decision of the court under scrutiny clearly and completely disposes of all the rights of the parties to the action, that decision is final. On the other hand where the decision only disposes of an issue or issues in the case thereby leaving the parties to go back to claim other rights in the court, the decision is interlocutory. From the submission of both counsel reproduced earlier in this judgment, it is clear that they also agree with this proposition of the law as being the applicable principles in the attempt at resolving the issue under consideration in this appeal.**

In the instant case, the appellant claimed the sum of #500,000.00 as damages for libel against the respondent jointly and severally with the 2<sup>nd</sup> -5<sup>th</sup> defendants who are not parties to this appeal. In addition to the damages, appellant also claimed an order that the respondent and the others retract the allegedly offensive publication by the agencies of Radio, Television and Newspapers. In giving judgment in default to the appellant, the learned trial judge decided as follows: -

*“There will therefore be judgment for the plaintiff against the 1<sup>st</sup> Defendant in the sum of #500,000.00. The second arm of the Plaintiff’s prayer for an order of court that the 1<sup>st</sup> defendant retracts The said publication by the agencies of Radio, Television and Newspaper fails as the plaintiff is seeking to eat his cake and Have it.”*

It must be noted that the respondent did present an application before the trial court praying for an order, inter alia, setting aside the said judgment in default of pleadings which application was refused by that court in a reserved ruling. It must also be noted that there is evidence on record that the appellant did apply to execute the judgment in default of pleading.

**In my considered opinion a final decision can be said to be one which puts an end to the action by deciding whether the plaintiff is or is not entitled to the reliefs he claims thereby leaving nothing for further action by the trial court except proceedings in respect of**

enforcement of that decision. Simply put, it is the application of the nature of the order test earlier enunciated in this judgment.

I am of the firm view that the judgment in default of pleadings reproduced supra, as far as the appellant and the respondent are concerned, has completely put an end to the action between them and therefore qualifies as a final judgment particularly as it has disposed of the rights of the parties thereto i.e. appellant and the respondent. I am also of the view that the finality of that decision is not in doubt, notwithstanding the fact that the appellant's case against the 2<sup>nd</sup> - 5<sup>th</sup> defendants still subsists at the trial court; the parties whose rights in the action were disposed of in the judgment in issue being the appellant and respondent. These are the material and relevant parties for the purpose of the proceedings leading to the judgment in issue. So I hold the view that the trial judge, did not have to deal with all the claims including those involving the 2<sup>nd</sup> - 5<sup>th</sup> defendants before the judgment in question is regarded as a final judgment. To hold otherwise, in my considered view, is to adopt the test of the nature of the proceedings in which the order is made which as I had held earlier is contrary to the decided authorities by the Supreme Court, some of which had earlier been reproduced in this judgment.

Having come to the conclusion that the decision of the trial court in issue is a final one as opposed to an interlocutory decision as canvassed by learned counsel for that appellant, it follows that the respondent did not need the leave of either the trial court or the court of Appeal before appealing against same as it is the law that an appellant appeals as of right against the final decision of a court of first instance.

In such a situation it becomes immaterial or irrelevant that a ground of appeal against such a final decision is of law, facts or mixed law and facts, see section 220 (1) of the Constitution of the Federal Republic of Nigeria 1979 (herein after referred to as the 1979 constitution).

However since this is the final court of appeal in the land I will proceed to consider the sub issue to issue No.1 to wit: Whether Ground

2 of this ground of appeal before the Court of Appeal is a Ground of law alone or of mixed law and fact for which leave is required.

Now section 220 (1) (a) and (b) of the 1979 constitution provide as follows;-

B 220 (1) An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases:

(a) final decisions in any civil or criminal proceedings before the High Court sitting at first instance;

C (b) where the ground of appeal involves questions of law alone, decision in any civil or criminal proceedings;”

On the other hand, section 221 (1) of the said 1979 Constitution provides thus: -

D “ (1) Subject to the provisions of section 220 of this Constitution appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal.”

Ground 2 on which the sub issue is grounded complains as follows:-

GROUND 2: ERROR IN LAW

E “The learned trial judge erred in law by holding that he could enter judgment in damages claimed by the respondent although the respondent gave no evidence on which the trial Court could rely to assess the damages.

The ground went on to provide particulars of error in law as follows:-

F “PARTICULARS OF ERROR

1. The Plaintiff/Respondent claimed from the defendants jointly and severally the sum of #500,000.00 damages for libel as well as an order of court that the defendants retract their publication to the effect that the plaintiff was one of the nine persons who burnt and looted the orie Emii market.

G 2. The respondent never gave oral or even affidavit evidence Which would enable the court assess the damages the respondent should be entitled to should he succeed in his claim.

H 3. In the affidavit in support of the motion for judgment in default Sworn to on 13/11/86 and the further affidavit the respondent never or averred facts on which the court could rely to assess the damages that he would have been entitled to should he succeed. Nor did the learned trial



court consider the issue (sic) Damages due to the respondent. Rather the respondent who claimed #500,000.00 was awarded #500,000.00 Damages for libel against the appellant and the case was , then set down for hearing against the appellant and 2<sup>nd</sup> to 5<sup>th</sup> defendants. The case is now adjourned for continuation of hearing against the 2<sup>nd</sup> to 5<sup>th</sup> defendants. But in his ruling dated 4<sup>th</sup> December 1987 the learned trial Judge held.

*“One thing certain, however is that the plaintiff cannot be entitled to any amount above what he has claimed in his statement of claim whether he succeeds against all the defendants or some of them.”*

**Though the difficulty involved in distinguishing a ground of law from a ground of fact has always been present and recognized by the courts, the position of the legal authorities on the issue is for the court to examine thoroughly the grounds of appeal involved to see whether the grounds reveal a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved, or admitted in which case it could be a question of law, or one that would require questioning the evaluation of facts by the lower court before the application of the law, in which case, it would amount to a question of mixed law and fact - see Ogbechi vs. Onochie (1986) 2 NWLR (pt. 23) 484; Orakosin vs. Mankiti (2001) 9 NWLR (pt.719) 529 at 538.**

To determine the nature of the grounds of appeal in issue, in this case ground 2, it is very necessary to read the ground and particulars of error together so as to glean what the appellant’s complain about the judgment is all about.

**Looking closely at ground 2 and the particulars of error supra, I agree with that learned counsel for the respondent that what the respondent challenged in that ground is the application of the law by the trial Judge to the facts that are not in dispute. It must be noted that the judgment involved in this case is one in default of pleadings, which by the provision of the rules of court the lower court has jurisdiction to entertain.**

However it is trite law that in the proceedings leading to the entry of such a judgment, the defendant is deemed to have admitted

**the facts as pleaded in the statement of claim on the basis of which judgment in default of pleading is always entered where appropriate.**

In the present case, the undisputed facts used as particulars of error are:

-

B (a) That the plaintiff claimed the sum of #500,000.00 jointly and severally against the 1<sup>st</sup> Defendant and others for libel.”

(b) That the plaintiff did not give oral evidence in support of his claim.

C (c) That there was also no affidavit evidence in support of the claim.

(d) That inspite of these lapses, the trial court awarded the damages as claimed by the plaintiff without evidence.

**It is very clear and I hold that the complaint of the respondent is simply that the trial judge misapplied the law to the facts already**  
D **impliedly admitted. That he failed to use his knowledge of the law to**  
note that since the claim was for unliquidated damages for libel, there was need for evidence as the basis for assessment of the quantum of damages. I therefore hold the view that the misapplica-  
E tion of the law by the trial judge as complained of in ground 2 of the grounds of appeal amounts to an error in Law and therefore a ground of law alone for which by the provisions of section 220 (1) (b) of the 1979 Constitution, an aggrieved party has a right of appeal without  
F leave of court. As stated earlier in this judgment, the sub-issue is based on the assumption that the decision of the trial court was an interlocutory one and that the ground of appeal in issue is a ground of mixed law and facts in which case the appellant would have needed to appeal. However as found in this judgment the decision of the trial  
G court involved in the appeal is a final decision for which leave to appeal is not required. Even if it were an interlocutory decision, which I do not concede, ground 2 of the grounds of appeal involves question of law alone for which no leave is required by virtue of  
H section 220 (1) (b) of the 1979 constitution. In the circumstance, issue No.1 is hereby resolved against the appellant.

On issue No. 2 learned counsel for the appellant submitted that the lower court erred in holding that the trial judge was in error when he

entered final judgment for the respondent in respect of the claim for damages for libel without receiving evidence on the claim. That the respondent in this appeal admitted not having any defence to the action leading to the judgment in default of pleadings. That there was no contest between the parties and as such the lower court rightly entered judgment B in favour of the appellant.

Submitting in effect, by way of an alternative though learned counsel never said so, learned counsel for the appellant stated that there was affidavit evidence in support of the motion for judgment, which was not contested. That the legal position is that evidence given on oath by way C of affidavit evidence is a form of evidence and ought to be given weight especially as there was no counter affidavit in this case; for this learned counsel cited and relied on Nwosu vs. Imo state Environmental sanitation Authority (1990) 2 NWLR (pt.135) 688 at 718. Learned counsel then D urged the Court to resolve the issue in favour of the appellant and allow the appeal.

On his part learned counsel for the respondent submitted that though the respondent is deemed to have admitted all the facts pleaded in E the statement of claim the admission does not extend to averment on damages, which is deemed traversed, unless specifically admitted, relying on Ngilari vs. Mother Cat Ltd. (1999) 13 NWLR (pt. 635) 626 at 647.

That the learned counsel for the appellant failed to refer the court F to the relevant paragraphs of the affidavits where attempts were made to prove the damages awarded the appellant because no such evidence exists. Learned counsel then urged the court to resolve the issue against the appellant and dismiss the appeal.

I have carefully gone through the submission of both counsel and G the authorities cited and relied upon in support of their contending positions.

**The law is that in an action, a claim for damages is always deemed to be in issue. That being the case any allegation in pleadings H that a party has suffered damages and any allegation as to the amount of damages so suffered is deemed to be traversed unless of course, specifically admitted see - Osuji vs. Ishola (1989) 3 NWLR (pt.**

111) 623; Produce Marketing Board vs. Adewunmi (1972) 11 B.C. III. **It follows therefore that though for the purpose of a proceeding for judgment in default of pleadings the defendant, as in this case, is deemed to have admitted the facts as pleaded in the statement of claim, such implied admission does not extend to averments in respect of damages. This clearly constitutes an exception to the general rule that for the purposes of application for judgment in default of pleadings the defendant is deemed to have admitted the facts as pleaded in the statement of claim.**

The question then is there being a traverse by operation of law in respect of the damages has the appellant discharged the burden of proof thereby placed on him?

Both parties agree that the appellant did not give oral evidence concerning his claim for damages or at all though learned counsel for appellant has talked of affidavit evidence, which I intend to deal with presently. Apart from the exception stated supra in relation to admission of facts in a statement of claim for the purposes of proceedings for judgment in default of pleadings, there is the specific principle of law that in a claim for unliquidated damages as in this case the plaintiff must lead evidence as to the damages and the quantum suffered by him. See Oduma vs. Nnachi (1964) 1 All NLR 329; Oke vs. Aiyedun (1986) 1 NWLR (pt.23) 548. In Oke vs. Aiyedun supra the position of the law on the issue is stated by this court as follows:-

*“It is a principle of pleading that, that which is not denied is deemed to have been admitted and if a plaintiff filed a statement of claim and the defendant failed or refused to file a statement of defence in answer thereto he, clearly will be deemed to have admitted the statement of claim leaving the trial court with the authority to peremptorily enter judgment for the plaintiff without hearing evidence.*

*An exception to that would obviously be in respect of a claim for damages, for, damages are always said to be in issue requiring the plaintiff to prove them.”* Emphasis supplied by me.

Learned counsel for the appellant has argued that there was affidavit evidence in support of the claim but as rightly point out by learned

counsel for the respondent; no reference was made by learned counsel for the appellant to any specific paragraphs of the affidavits.

**From the record, though there are affidavits in support of the application for judgment in default of pleadings, no paragraph thereof deposed to any fact relating to the claim for damages. I am very sure that that is the reason why learned counsel could not refer this court to any relevant paragraph. It is important to note that the issue has been raised both in the court of trial and the lower court thereby putting appellant on notice to refer this court to any such paragraph if any.**

**So the demonstrable and irresistible conclusion arising from the facts of this case is that the trial judge did not receive any evidence either oral or in affidavit in support of the claim for damages before making the award of #500,000.00 damages in favour of the appellant and against the respondent.**

**The lower court was therefore right in coming to the conclusion that the trial judge erred in law by so awarding the damages claimed and thereby set aside the judgment. In the circumstances issue No. 2 is resolved against the appellant.**

In conclusion the appeal is devoid of any merit and is accordingly dismissed with costs, which I assess and fix at #10,000.00 in favour of the respondent and against the appellant.

Appeal dismissed.

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### KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Onnoghen JSC in this appeal. I entirely agree with him that there is no merit in the appeal, and it ought to be dismissed.

The claim by the appellant against the respondents at the trial court was joint and several, which makes every respondent distinctly and singly liable. The judgment of the learned trial judge, Ojiako J. (as he then was) was a default judgment against the 1<sup>st</sup> defendant now respondent. After

giving that judgment against the respondent, there is nothing more the trial court would do or is required to do in respect of the claim against the said respondent. Therefore to that extent, that judgment is final. See *Akinsanya V. U. B. A. Ltd* (1986) 4 NWLR (pt. 35) 273; *Akoh V. Abuh* (1988) 3 B NWLR (pt. 85) 696; *Sedipo V. Lemninkainem O. Y.* (1985) 2 NWLR (pt. 8) 547; *Aqua V. Ondo State Sports Commission* (1988) 4 NWLR (pt. 91) 622. There is therefore the right to appeal from that judgment to the Court of Appeal as of right. See S. 220 (1) (a) of the 1979 Constitution. The ground of appeal 2 which was filed by the appellant in the Court of Appeal against the judgment was clearly a ground of law simpliciter and no leave was required to file it. Therefore the appeal in the Court of Appeal was valid and competent. This now has fully answered issue 1 of the appellant in favour of the respondent. On this ground alone, this appeal can be D dismissed.

Issue 2, which the appellant wanted the court to treat as an alternative issue to issue 1 cannot be taken in the alternative, as it stands by itself and independently talked about the necessity to receive some E evidence in a claim for damages for libel. However even if issue 2 is considered, there is no where on record where any evidence was received on the claim at the trial or the attention of the Court of Appeal was drawn to any such evidence on the record. And since the N500,000.00 damages F claimed was unliquidated damages for libel, and the respondent did not specifically admit the whole amount, the judgment of the trial court for the whole amount cannot stand. See *Oke V. Oyedun* (1986) 2 NWLR (pt. 23) 548, *Ejabulor V. Osha* (1990) 5 NWLR (pt. 148) 1; *Etinosa Omoregie V. Mathew Onigie & Anr..* (1990) 2 NWLR (pt. 130) 29. Therefore the G alternative issue 2, is also resolved against the appellant in favour of the respondent.

On the whole, therefore, for the above and the more detailed reasons given by my learned brother Onnoghen JSC in the leading H judgment, I find no merit in this appeal and I accordingly dismiss it with N10,000.00 costs in favour of the respondents.

**EJIWUNMIJSC**

This appeal stems from the judgment of the Court below, which affirmed the judgment of the trial Court. Before the trial Court the appellant was the plaintiff and the respondent was the first of five defendants from whom he appellant had claimed for two reliefs from them. . B

Following the order for pleadings, the appellant being the plaintiff, duly filed his Statement of Claim. But the respondent, the first of the five defendants sued by the appellant failed to file its pleadings. The appellant thereupon in accordance with the Rules of Court therefore applied to the trial Court to have judgment against the respondent. The Court duly upheld this application and awarded judgment against the respondent in terms of the claim. Thereupon the respondent appealed to the Court below. The Court below upheld the judgment of the trial Court. But then ordered that the case be remitted to the trial Court for that Court to take evidence with regard to the claim in damages. C D

The real question that falls to be determined in this appeal is, whether the Court below was right to make that Order. That question on appeal now falls to be determined on the further question as to whether the judgment of the trial Court was final. If it is not final, then that judgment could as it were be opened up to have evidence taken to perfect the judgment. But if it adjudged as a final judgment, then it is not open to admit any evidence in respect of it. E F

Now, it is settled law that a decision between parties to an action can be regarded as final when the determination of the Court disposes of the rights of the parties in the case, and not merely the rights in issue. Where only an issue is the subject matter of an appeal, the determination of that Court which is final on the issue before it but does not finally determine the rights of the parties in the action, is an interlocutory decision. See *West Steel Workd Ltd v. Iron & Steel Workers Union* (1986) 2 N.S.C.C. 786. G

In the case on appeal, it is manifest that when the trial Court acceded to the application of the appellant then plaintiff, to enter a default judgment against the respondent, the Court in responding to that application by awarding judgment in favour of the appellant in respect of the claim before H

it. The Court therefore decided conclusively the claim before it. In other words, the Court by its decision decided the matter finally and disposed of the rights of the parties in the case.

It follows therefore, that the judgment being final, there is no room to make such orders as were made by the Court below. In the result, I will also dismiss the appeal for the above reasons and the fuller reasons in the judgment of my learned brother Onnoghen JSC and I abide with the order as to costs.

C

### OGUNTADEJSC

In suit No. HOW/158/86 at the Owerri High Court of Imo State, the appellant was the plaintiff and the respondent was the first of five defendants. The appellant had claimed for the following:

“(a) N500,000.00 as damages for libel

(b) An order of court that the defendants retract the said publication by the agencies of Radio, Television and Newspaper.”

E In accordance with the Rules of Court, pleadings were ordered. The appellant who was the plaintiff duly filed his Statement of claim.

The respondent who was the first of five defendants did not file its statement of defence. The appellant, as authorized by the Rules of court therefore applied for judgment in default of pleadings. Though served with F appellant’s application for judgment, the respondent did not react or ask for extension of time to file a defence. The trial judge, Ojiako J. on 4/12/87 accordingly gave judgment in appellant’s favour for N500,000.00 damages as claimed. Dissatisfied, the respondent brought an appeal G against the judgment of Ojiako J. On 28/06/94, the Court of Appeal, Port-Harcourt Division (hereinafter referred to as ‘the Court below’) allowed the appeal. It set aside the judgment of Ojiako J. given on 4/12/87.

H The appellant has brought before us a final appeal against the judgment of the court below. It has formulated for determination in this appeal two issues, namely:

1. “Whether the Court of Appeal was right in holding that the judgment of the learned trial judge was final, having finally disposed of



*the rights of the appellant and Respondent? If the answer is in the negative, whether Ground 2 of the grounds of Appeal on which the Court of Appeal based its judgment was one of law alone.*

IN THE ALTERNATIVE

2. *Whether the Court of Appeal was right in holding that the learned trial judge was in error when he entered final judgment for the Respondent in respect of the claim for damages for libel without receiving evidence on that claim.*

My learned brother Onnoghen JSC has in the lead judgment discussed the germane principles of law relevant to the issues raised for determination. I agree with his views on the issues. I wish however to make a few remarks as regard whether or not the judgment of the trial judge finally disposed of the rights of the parties. This Court has in numerous cases taken the position that the test to be applied in determining whether an order of court is final or not is that stated by Lord Alverstone CJ in *Bozson v. Altrincham U.D.C.* [1903] I K.B. at 548. The learned Chief Justice stated the test thus:

*“It seems to me that the real test for determining this question ought to be this: Does the judgment or order made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order but if it does not, it is then, in my opinion an interlocutory order.”*

See *Blay v. Solomon* [1947] 12 WACA 175; *Akinsanya v. U.B.A.* [1986] 4 NWLR (Pt.35) 273; and *Ebokam v. Ekwenibe & Sons Trading Co. Ltd.* [1999] 10 NWLR (Pt.623) 242 at 251.

The court below was of the view that the trial court ought to have first taken the evidence of the appellant to enable it determine the quantum of damages before awarding the whole of the N500,000.00 damages claimed by the appellant. At page 170 of the record, the court below in its judgment said:

*“In view of the authorities which I have cited I think the learned trial judge was clearly in error when he entered final judgment for the respondent in respect of the claim for damages for libel without receiving evidence on that claim. In the case of Nigeria Airways Ltd. V. Ahumadu [1991] 6 NWLR (Pt. 198) 492, this Court per Mohammed JCA, (as he then*

was) held that the court cannot enter judgment on a claim based on a relief for payment of unliquidated damages without taking evidence for the amount of damages as may be proved and assessed.”

I have no doubt that the court below in the above passage correctly stated the law and proceeding applicable in a claim for unliquidated damages where a defendant fails and or neglects to deliver a defence. Damages claimed are always to be treated as a matter in issue, which must be proved by evidence. See Oke v. Aiyedun [1986] 1 NWLR (Pt. 23) 548. In Osuji v. Isiocha [1989] 6 S. C. (Pt 11) 159; (1989) 3 NWLR (Part.III) 623 at 640, this Court per Agbaje JSC observed:

“The law is that damages are deemed to be an issue whether special or general and whether the alleged damage is part of the cause of action or not. (See Wilby v. Elston 8 C.B. 142; Foucar v. Sinclair 33 LTR 318. So any allegation as to the amount of the damage is deemed to be traversed unless specifically admitted.”

And in Atkins Court Forms, 2nd edition [1985] Vol. 32 the learned authors write:

“Any allegation that a party has suffered damage or as to the amount of damages is deemed to be traversed unless specifically admitted. In general therefore, no denial of damage is necessary. This applies whether the damage is general or special even where the alleged damage is not part of the cause of action.”

There is no doubt that the decision of the court below appears at first sight to have thrown open the question whether or not the judgment of the trial court ought to be regarded as final. In other words, if evidence ought to have been taken before the trial court awarded N500,000.00 as damages and such evidence was not taken, could the judgment be regarded as final? This appears to be the issue so strongly agitated by the appellant in his brief. But it seems to me that appellant’s counsel has overlooked the fact that the duty of the court below in determining whether or not the judgment of the trial court was final was confined to taking the decision of the trial court as the full expression of its views. There is no doubt that the trial court did intend to finally determine the rights of the parties by its judgment. The decision that it was still necessary that evidence be led in

proof of the damages claimed was that of the court below and not that of the trial court.

More importantly, however, is the fact that the trial judge had fully and in accordance with the court's rules recognized the appellant's right to seek and obtain judgment following respondent's failure to deliver a defence. It was the quantum of the damages to be awarded that remained to be ascertained from the evidence of witnesses. Plaintiff/appellant's right or entitlement to the judgment was not in issue. It seems to me therefore that the judgment of the trial court, even if it was later found to be erroneous, as a judgment that ought to have been given only after evidence had been taken, was nonetheless a final judgment, since it had disposed of the rights of the parties. In coming to this conclusion, one must look at the nature of the application, which the appellant had brought to the court as the plaintiff/applicant. It was an application for judgment in default of a statement of defence. I do not therefore agree with appellant's argument that the judgment of the trial court was not final. That a judgment was reversed on appeal cannot be taken as proof of the fact that the judgment when given was not final.

I would also dismiss this appeal as in the lead judgment of my learned brother Onnoghen JSC. I award N10,000.00 costs in favour of the respondent against the appellant.

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### OGBUAGU JSC

I have had the advantage of reading before now, the lead Judgment of my learned brother, Onnoghen, JSC, just delivered by him and I agree with him that there is no merit in the appeal. I note or observe with regret, that the learned counsel for the Appellant, may not have vetted the Brief of Argument before it was signed and filed as there are some irritating spelling, typographical and grammatical errors and a repetition therein. See his Nos. 2.5, 2.7, 2.8, 4.6, 4.7, page 10 - first sentence and 6.1. This with respect is not right.

However, by way of emphasis, I wish to make a few contribution. The Appellant in his Brief of Argument, formulated the issues thus;

“1. Whether the Court of Appeal was right in holding that the judgment of the learned trial judge was final, having , finally disposed of the rights of the Appellant and Respondent? If the answer is in the negative, whether : ground 2 of the grounds of Appeal on which the Court B of Appeal based its judgment was one of law alone?

IN THE ALTERNATIVE

2. Whether the Court of Appeal was right in holding that the learned trial judge was in error when he entered final judgment for the Respondent in respect of the claim of damages for libel without receiving evidence on C that claim?

From the said Brief, Issue 2, with respect, could not be in the alternative having regard firstly, to Grounds 3 and 4 of the Notice and Grounds of Appeal from which the said issue was distilled. Secondly, in D paragraph No. 5, of the Brief, the following appear:

“ISSUE NO. 2 UNDER GROUNDS 3 AND 4 OF THE GROUNDS OF APPEAL”.

Then, under 5.1 - *“the second issue”*, appears as formulated herein E above. Indeed or lastly, the said issue for determination, is numbered 2.

In other words, if the second issue is in the alternative, then, there is only one lone issue for determination. It is after the consideration of the lone issue, that the Court may/will, consider the alternative issue depending F on the result of the decision in the lone issue. What I am saying therefore, is that having regard to the argument proffered in paragraph 5.1 of the Brief and the inferences the Appellant wants this Court to draw under paragraph 5.6 wherein the Appellant talks about the *“arguments and submission covering the two issues for determination”*, I am not in doubt that the G Appellant has formulated two (2) Issues for determination.

The crux of the appeal to me, is the determination of the said Issue 2 of the Appellant of which the Respondent adopted. After dealing with this issue, then it will be clear what the answer to the first arm of Issue 1 will H be.

Claim (a) of the Appellant, is for the sum of half a million naira as damages for an alleged libel. For a plaintiff to succeed in libel, there must be proof by evidence, of a third party of the effect of the alleged publication

on him i.e. the reaction of a third party to the publication. Afterwards, libel consists in the publication by the respondent, by means of printing, writing, pictures, or the like signs, of a matter defamatory to the plaintiff. See *Caw v. Hood* 1808 1 Camp 355. Thus, reading out a defamatory document to a third party, is the publication of a libel. See *Farrester v Tyrell* B (1893) 9 TLR 257.

It must be stressed and this is settled, that it is not necessary for a plaintiff to prove publication. See *Economides v. Thomopulos & Co. Ltd.* (1956) 1 FSC where the defendant has admitted it. Also settled, is that averment on damages is deemed traversed unless specifically admitted. C See *Ngilarl v. Mothercat Ltd.* (1999) 13 NWLR (pt. 635) 626 at 647 cited and relied on by the learned counsel for the Respondent (it is also reported in (1999) 12 SCNJ. 101) - per Onu, JSC. (a case in Negligence) citing the case of *Produce Marketing Board v. A.O. Adewunmi* (1972) 11 S.C. 111 D at 124.

It need be pointed out and this is also settled, that a claim for damages, is always to be deemed to be in issue. See *Hon. Osuji & Anor. V. Isiocha* (1989) 3 NWLR (pt. 111) 623; (1989) 6 SCNJ. 227. This is why E as noted hereinabove, it is not necessary for a plaintiff to prove publication, where the defendant, has admitted it. See *Economides v. Thomopulos & Co. Ltd.* (Supra).

(C/F) - Compare the decision in the case of *Ajakaiye v. Okandeji & F ords.* (1973) 1 S.C. 92 where it was held that an admission in pleadings of printing and publishing, did not of itself, prove publication of libel. It is settled that what is important in a libel or defamation as I earlier stated in this judgment, is the re-action of a third party, to the publication complained of. It is not what the plaintiff thinks about himself, but rather, G what a third party thinks of the plaintiff as regards his reputation. See *Chief Nsirim v. Nsirim* (1990) 3 NWLR (pt. 138) 285 at 289; (1990) 5 SCNJ. 174 at 184 - per Belgore, JSC. Therefore, a person's reputation, is not based on the good opinion he has of himself, but the estimation in which H others hold him.

I will pause here to state, that the fact that the Respondent did not file a Statement of Defence, is of no consequence. Firstly, a plaintiff relies

on the strength of his own case. See *Kodilenye v. Odu* 2 WACA 336 at 357; *Gobblah v. Gbeke* 12 WACA 284; *Kaiye'oja v. Egunta* (1974) 12 S.C. 55 and *Alhaja Adesanya v. Otukwu & ors.* (1993) 1 NWLR (pt. 270) 414; (1993) 1 SCNJ 27 and many others.

- B I have gone this far, in order to buttress the fact, that in a libel or defamation case, there must be evidence in support of the claim for damages. This is so because and this is settled, that pleadings do not constitute evidence. See *Obimlami Brick & Stone (Nig.) Ltd. V. ACB Ltd.* (1992) 3 NWLR (pt. 229) 260 at 293; (1992) 3 SCNJ 1. *Eseiqbe v. Acholor & Anor.* (1993) 12 SCNJ. 82; *Magnusson v. Koiki & Ords* (1993) 12 SCNJ. 114 at 124 - per Kutigi, JSC. This is why, pleadings of a party not referred to in evidence, are deemed abandoned. See *Olarenwaju v. Bamigboye* (1997) 3 NWLR (Pt. 60) 358 at 359. Pleadings are mere notice
- D and can never be a substitute for evidence required in proof of the facts pleaded. See *Shell BP Petroleum Co. of Nig. Ltd. V. Abedi & 2 Ors.* (1974) 1 S.C. 2 and *Honika Sawmill (Nig.) Ltd. V. Mary Okojie Hoff* (1994) 2 SCNJ 86; (1994) 2 NWLR (pt. 326) 252 at 260 and many Others.
- E So, when the trial Judge proceeded to enter judgment for the Appellant without any evidence from him or any other witness in support of either the pleadings or the claim for damages in the Statement of Claim, the lower Court, on the decided authorities, was perfectly in order, to have
- F set aside the said judgment. I so hold. Any reference by the Appellant to evidence by affidavit and further affidavit and reliance on them by him, with respect, is completely misconceived.

- Afterwards, a claim by writ of summons followed by a Statement of Claim, is not proved or established by affidavit evidence and in any case,
- G not in the instant case. What the court looks at, is the Statement of Claim and the evidence proffered in support. Certainly not affidavit evidence. The Appellant from the particulars of Error in Ground 3 of the Grounds of Appeal, conceded that the trial Court, relied on affidavit evidence and
- H not on the Statement of Claim.

Therefore, if a plaintiff failed to prove his case as required by law in a libel case as in the instant case, his said claim or claims will fail. He is not given a second chance to have a bite at the sherry. Having set aside the

said judgment as the procedure to establish a case of libel, was not followed, the lower court, with respect, had no respect, had no option, other than to allow the appeal. Particulars 3 in Ground 4 of the Notice or Appeal,, cannot be true. Since the learned trial Judge, did not receive evidence in proof of the alleged libel, the lower court was justified and B right, in holding that the trial court was in error to have entered judgment for the Appellant. This is also because, as noted in the case of Oduma & ors. V. Nnachi & ore. (1964) 1 All NLR 324 at 328 (which was a case in trespass), Idigbe, JSC stated inter alia, thus: “..... A claim for damages C does not become one for “liquidated damages” merely because a specific amount of money is claimed.”

The learned Jurist referred to Odgers on The Common Law (1927) 3<sup>rd</sup> Ed. Vol. 2 p. 654 where the following appears:

“Whenever the amount to which the plaintiff is entitled can be D  
“ascertained by calculation or fixed by any scale or other positive data” it is said to be LIQUIDATED or ‘made clear’. But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate, the damages are E  
said to be UNLIQUIDATED”.

The claim of the Appellant,. Is for unliquidated damages. The lower Court set aside the judgment on the ground that evidence in support, was a must. See also the case of Nigerian Airways Ltd, v. Ahumadu (1991) 6 F  
NWL R (pt. 198) 492 also referred to and relied on by the lower court.

The determination of this issue, in my respectful view, puts to rest, the complaint in this appeal. But if I may, in respect of the first arm of Issue 1, certainly, the trial court, having entered judgment for the whole/entire G  
amount claimed by the Appellant as damages and refusing the second claim, and having dismissed/refused the application of the Respondent, to set aside the said judgment, with profound humility, it goes beyond any controversy, that the said judgment, is/was final. For settled Test - See Clement c. Ebokan v. Ekwenibe & Sons Trading Co. Ltd. (1999) 7 SCNJ H  
77 at 85; 86 - per Kalgo, JSC, citing several cases therein and at p. 83 - per Onu, JSC; (1999) 10 NWLR (pt. 623) 242 and Igunbor v. Mrs. Afolabi & anor (2001) 5 SCNJ 124 at 141 - per Karibi-Whyte, JSC. See also

recently, - Odutola v. Chief Oderinde & 2 ore. (2004) 5 SCNJ. 285 at 290 - 291 - Kutigi, JSC.

If this is the position or fact, what will be the usefulness of the 2<sup>nd</sup> to 5<sup>th</sup> defendants, filing their own Statement of Defence? I or one may ask.

B Surely, it would have been an exercise in futility or to say the least, an academic exercise.

This is why, the “CONCLUSION” of the Appellant under his paragraph 6.1 of the Brief, with respect appears, funny and amusing to me.

C He urges the Court to set aside the judgment of the lower court “and to restore the Ruling and Judgment of the trial court dated 4/12/87 and 15/12/86 respectively”.

But in his paragraph 7.1 of the Brief, the reason for the above conclusion is:

D “*The Judgment of the learned trial Judge was not final having not finally disposed of the rights of the parties*”.

Which parties? I or one may ask. If it means repeating myself, this is in spite of the fact that the Appellant had been granted the entire amount of half a million naira he claimed and the refusal of his other claim/claims. E The attempt by the Respondent, to have the said judgment set aside, was refused by the learned trial Judge.

F It is from the foregoing and the fuller reasoning and conclusion reached in the said lead Judgment of my learned brother, Onnoghen, JSC, that I too, dismiss the appeal.

I abide by the consequential order in respect of costs.

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