

COURT OF APPEAL  
BENIN DIVISION  
9TH MARCH, 2005. CA/B/203/2001  
CORAM:- A. A. AUGIE, N. S. NGWUTA,  
U. ABBA-AJI, JJCA

MR. NSE AKPAN UDOH ..... APPELLANT  
AND

1. OKITIPUPA OIL PALM PLC.

2. MR. AKINTADE AKINKUGBE ..... RESPONDENTS

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ACTIONS - Facts - Cause of action - Is the totality of material facts - Necessary to establish a legal right - In each particular case (H1)

ACTIONS - Reliefs - Separate and distinct stating of - O.25 r. 12(1) Ondo State HCR - Was not violated - By appellant's statement of claim (H2)

MASTER & SERVANT - Retirement benefits - Admission - Were the benefit in issue is admitted - No further proof is needed (H3)

APPEALS - Evidence - Evaluation - Master & Servant - Pension - Where trial court did not evaluate the evidence - Appellate court will do so in appropriate cases - And appellant is entitled to pension benefits (H4)

MASTER & SERVANT - Evidence - Inconvenience allowance - Claim for - Though the evidence was not challenged - The Court will not act upon incredible evidence (H5)

EVIDENCE - Master & servant - Documents - Notice to produce - Failure by a party to produce evidence - Which could be produced - Raises a presumption - That it is unfavourable to that party (H6)

EVIDENCE - Evaluation - Meaning - Master & servant - Medical allow-

ance - Where appellant was still under employment - When the illness arose - He is entitled to cost of treatment (H7)

MASTER & SERVANT - Damages - Illness - Damages claimed for illness - Where employer did not cause that illness - The damages will not be granted (H8)

### **FACTS**

Before the Okitipupa High Court of Ondo State, the plaintiff/appellant filed an action against the defendants/respondents. While under the employment of the 1st respondent as a driver, driving the Board Chairman in Lagos, appellant took ill. He was rushed to the Lagos University Teaching Hospital (LUTH). After a series of medical tests, he was given a letter of admission with a bill to undergo a surgical operation which was submitted to the respondents. The respondents served the appellant with a notice of retirement and refused to pay for the surgery because the appellant was no more in their employment.

In this suit, appellant claimed *inter alia*, an order compelling the respondents to pay the bill of N91,000.00 to LUTH for his medical treatment. Appellant also claimed various entitlements such as inconvenience allowance, Housing fund, etc., and N2 million general damages for pain suffered. The trial court dismissed the appellant's action in its entirety. The Judge felt that the statement of claim did not state clearly and distinctly the amount of money due under each head of relief. That as such O. 25 r. 12(1) of the Ondo State High Court Rules was violated. He did not evaluate the evidence nor consider the issue of admitted facts that need no further proof. Being aggrieved appellant has appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

(a) Whether the appellant lumped his claims together under one head contrary to Order 25 rule 12(1) of the Ondo State Rules of the High Court, which could warrant total dismissal of the plaintiff's claim by the learned trial Judge.

(b) Whether or not the plaintiff is entitled to the reliefs claimed.

(c) Whether or not the plaintiff was entitled to general damages.

**HELD** (Unanimously allowing the appeal in part per **AUGIE JCA**)

***Cause of action - Is the totality of material facts***

1. Essentially, the facts that the plaintiff should allege in his statement of claim must be those that can establish that he has the cause of action sued for. “*Cause of action*” has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse. As Nwadioalo explained in *Civil Procedure in Nigeria, 2nd Ed.*, a suit is aimed at the vindication of some legal rights, and such a right can only arise if certain material facts exist, for example, an action in detinue for the recovery of goods wrongfully detained presupposes the existence of the following facts, viz, that the goods were in possession of the person suing, that the person sued, without any lawful excuse or consent or permission of the former, took away the goods and that the former had demanded the return of the goods and that the latter had refused to return them. It is the totality of such material facts necessary to establish a legal right in each particular case that is connoted by the phrase “*cause of action*”, and that is what is envisaged in Order 25 rule 12(1) of the High Court Rules -

”*Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly ...*” (p. 3143 E)

***Reliefs - Separate and distinct stating of***

2. In other words, Order 25 rule 12(1) of the High Court Rules comes into play when the plaintiff seeks relief in respect of several claims or causes of action arising from separate and distinct facts. In this case, the appellant only complained that his entitlements were not paid, and the said entitlements are comprised of inconvenience allowance, pension, gratuity, etc. It is a different matter altogether whether or not he proved that he was entitled to the said claims for pension, gratuity etc., the bottom line is that each of the said claims for pension, gratuity, etc, are not causes of complaints founded upon separate and distinct facts, sufficient to invoke

Order 25 rule 12(1) of the Ondo State High Court (Civil Procedure) Rules. The appellant's statement of claim in the lower court did not offend the said Order 25 rule 12(1), and the learned trial Judge certainly erred in dismissing his action on that ground. (p. 3144 C)

B

***Retirement benefits - Admission***

3. As I stated earlier, it is the benefits the appellant is entitled to that is in issue in this appeal and not damages, so the respondents' argument on that score is of no moment. True enough, the appellant should have pleaded and proved his salary, but the fact that he failed to do so is neither here nor there and goes to no issue, because the respondents admitted in paragraph 19(b) of their statement of defence that the appellant is entitled to gratuity, and it is trite law that an admitted fact needs no further proof thereof. What is more, Mr. A. O. Akindele, a representative of the respondents who testified as DW1 said -

“... *The plaintiff is entitled to gratuity. The plaintiff had served the defendant company for about 29 years. He is entitled to five years basic salary as his gratuity. His entitlement as gratuity is N218,245.00*”.

Clearly, the appellant did not need to proffer any other evidence that he was entitled to the sum of N218,245.00 as gratuity. The respondents admitted that fact, and the learned trial Judge obviously erred in holding differently. (p. 3146 A)

***Pension - Where trial court did not evaluate the evidence***

4. The learned trial Judge did not make any findings on any issue in this case, he rather took the easy way out by dismissing the action on the ground that it offended Order 25 rule 12(1) of the High Court Rules on pleadings. As the appellant rightly submitted, the evaluation of evidence is primarily the function of the trial court, nonetheless, where the evaluation of evidence would not entail issues of credibility of witnesses and it is an issue of non-evaluation or improper evaluation or appraisal of evidence by a trial court, an appellate court is in as good a position as the trial court to do its own evaluation. In other words, the appellate court has powers to intervene in the interest of justice - see *Haruna v. Uniagric, Markurdi*

(2005) 3 NWLR (Pt. 912)233.

I agree entirely with the appellant, and must find in his favour. DW1 admitted that the 1st respondent used to deduct some amount from the appellant's salary, and conceded during cross-examination that it is the 1st respondent that "*concludes arrangement with the insurance company on behalf of the employees*". More than that, it is evident from the opening paragraph of exhibit G that the company's pension fund was just being managed by an outside firm for the 1st respondent and in my view, it is futile to argue as the respondents have done that it is the Confidence Insurance Company that is to pay the appellant and not the 1st respondent. This issue is resolved in favour of the appellant. The appellant is entitled to N55,000.00 as his pension benefits from the 1st respondent and I so hold. (p. 3148 H)

***Inconvenience allowance - Claim for***

5. It is the appellant's submission on this claim that the claim of inconvenience allowance was not denied by DW1, and was not challenged during cross-examination. The court was therefore urged to hold that the respondents have conceded the sum of N46,900.00 which the appellant is claiming for inconvenience allowance. I quite agree that the appellant was not cross-examined on his claim of N46,900.00 as inconvenience allowance, and that DW1 made no reference to it, but a court is not expected to believe and act on evidence that is manifestly incredible or unreliable, merely because the plaintiff said so, and was not cross-examined. What the law says is that where the evidence of a witness is not inadmissible in law, uncontradicted and unchallenged, a court of law can act on it and accept it as a true version of the case it seeks to support, unless the evidence is patently incredible - see *Irimi v. Erhurhobara* (supra). Incredible evidence simply means evidence that is difficult to believe in. In this case, the appellant claimed that he was on attachment in Lagos not transfer and was therefore entitled to night allowance for the three years he spent there. I find that very hard to believe. Night allowance is paid in lieu of hotel accommodation for those who do not stay in hotels when on official duty outside their station – see exhibit C. Even if, as the appellant

claimed, he was not issued with a transfer letter when he reported in Lagos, I am of the firm view that three years is sufficient to deem his stay in Lagos a transfer. It follows therefore that he is not entitled to night allowance for the three years he spent in Lagos and I so hold.

B (p. 3150 E)

***Documents - Notice to produce***

6. I however have to agree with the appellant. The appellant, who had served the respondents with notice to produce the housing fund statement of account, claimed in court that he is entitled to housing fund of N45,000.00. In addition, the appellant averred as follows in paragraph 6 of his reply to the statement of defence -

D “The plaintiff avers that the housing scheme introduced and made compulsory for the 1st defendant’s employees is one of the schemes which the plaintiff participated and the plaintiff is also entitled to the amount contributed. Notice is hereby given to the defendants to state the amount contributed by the plaintiff and pay same with other entitlements E of the plaintiff.

The respondents failed or neglected to produce the housing fund statement of account in their possession; rather DW1 testified that the appellant is only entitled to N2,881.46, without more. By the provisions of section 149(d) of the Evidence Act, a presumption is raised that evidence F which could be but is not produced, would if produced be unfavorable to the party who withholds it. If the appellant was entitled to only N2,888.46, the normal course of events would dictate that the respondents will produce the said statement of account to disprove the appellant’s claim of G N45,000.00, and since it was not produced, it can only be presumed that if it had been produced, it would have been in the appellants favour and not that of the respondents. This claim is therefore resolved in favour of the appellant. Consequently, I hold that the appellant is entitled to housing fund H of N45,000.00 as claimed by him. (p. 3151 F)

***Master & servant - Medical allowance***

7. The evaluation of evidence by a trial court is of utmost importance in

the adjudication process. A trial Judge has the primary duty to evaluate the evidence placed before the court, and evaluation or appraisal of evidence simply means the assessment or estimation of evidence so as to give credit or value to it .

I must say that the learned trial Judge in this case did a poor job of evaluating the evidence before the court. The evidence before the court showed clearly that the appellant was in the service of the 1st respondent, when the operation was scheduled to take place. Exhibits J & K were written on the 26th of August, 1999, a few days before the appellant was due to leave the services of the 1st respondent -1st September, 1999. At that time the 1st respondent was not concerned about whether the appellant was in its employment or not, and whether he was entitled to free medical treatment or not; rather its concern was the amount of money to pay for the operation. By the terms of his contract of employment, the appellant was entitled to free medical treatment, there was no ceiling placed on how much was to be paid, and in my view, it does not speak well of the management of the 1<sup>st</sup> respondent, since a company is run by human beings, that they were more concerned with how much to pay for an operation, than the health of their employee who had spent 29 (twenty nine) years of his life in their service. The lower court may have failed to properly evaluate the evidence before it, but this court has powers to intervene in the interest of justice - see *Haruna v. Uniagric, Markurdi* (supra), I will not hesitate to intervene and do justice in this case. This issue is resolved in favour of the appellant. He is entitled to the sum claimed for his medical treatment and I so hold. (p. 3155 A)

### ***Damages claimed for illness***

8. On the last issue of damages, not much need be said on that. As I stated earlier, damages are the sum of money received from a wrongdoer as compensation for the wrong. In this case, the respondents were not responsible for the appellant's illness - see C exhibit L. This issue fails. (p. 3156 C)

**REPRESENTATION**

Chief S. O. Olowu for the Respondents

**CASES REFERRED TO**

- B Ogunleye v. Oyewole (2000) 14 NWLR (Pt. 687) 290  
Nkpa v. Nkume (2001) 6 NWLR (Pt. 710) 543  
Etcheson Nsirimi v. Onuma Construction Company (Nig.) Ltd. (2001) 7 NWLR (Pt. 713) 742, (2001) FWLR (Pt. 44) 405  
P. I. & P. D. Co. Ltd. v. Ebhota (2001) 4 NWLR (Pt. 704) 475  
C Akintola v. Balogun (2000) 1 NWLR (Pt. 642) 532  
Okoebor v. Police Council (2003) 12 NWLR (Pt. 834) 444  
Iriru v. Erhurhobara (1991) 2 NWLR (Pt. 173) 252  
Asafa Foods Factory v. Alraine (Nig.) Ltd. (2002) 12 NWLR (Pt. 781) 353  
D Haruna v. Uniagric, Markurdi (2005) 3 NWLR (Pt. 912) 233  
Musa Sha (Jnr) & Anor v. Da Rap Kwan & Ors. (2000) 8 NWLR (Pt. 670) 685, (2000) 5 SCNJ 101  
EBBA v. Ogodo (1984) 1 SCNLR 372  
E Chukuwuocha v. Onuoha (1991) 4 NWLR (Pt. 184) 234  
Odumosu v. ACB (1976) 11 SC 55, (1976) 2 FNR 229  
Damian Anyanwu & Anor. v. Brandom Iwuchukwu (2000) 15 NWLR (Pt. 692) 721, (2001) FWLR (Pt. 32)  
F Olubode v. Oyesina (1975) 5 SC 79

**STATUTE & RULES REFERRED TO**

Ondo State High Court (Civil Procedure) Rules O. 25 r. 12(1)

Evidence Act s. 149(d)

G

**LEAD JUDGMENT BY AUGIE JCA**

The appellant was a driver in the employment of the 1st respondent company. On the 24th of April, 1999 while he was on duty in Lagos driving  
H the Board Chairman of the company, he fell sick and was rushed to the Lagos University Teaching Hospital (LUTH). After a series of medical tests, he was given a letter of admission with a bill to undergo a surgical operation, which was submitted to the respondents. The said operation



could not be carried out on the appellant because the respondents did not pay the bill before they served the appellant with a notice of retirement, and thereafter refused to pay for the surgery because the appellant was no more in their employment and they were not liable for his medical treatment. Distraught by the decision of the respondents, the appellant B instituted an action against the respondents at the High Court of Justice, Ondo State sitting at Okitipupa, wherein he sued the respondents for the following reliefs -

(a) A declaration that the refusal/neglect of medical treatment of the plaintiff by the defendants is a breach of fundamental term of the contract C between the plaintiff and the defendants.

(b) A order commanding and/or compelling the defendants to pay to Lagos University Teaching Hospital a sum of N91,000.00 for the medical treatment of the plaintiff as orb to contained in the bill forwarded D to the defendants dated as 21/8/99 by the hospital.

(c) An order commanding and/or compelling the defendants to pay to all the entitlements of the plaintiff, which the defendants estimated to be N381,884.60 only forthwith. E

(d) Two million Naira being general damages for pain suffered.

At the conclusion of the trial in which the appellant testified for himself and one witness testified for the respondents, and after hearing addresses from counsel, the learned trial Judge, Fagbe, J., delivered his F judgment on the 18th of May, 2000, wherein he dismissed the appellant's action in its entirety. Aggrieved by the decision, the appellant filed a notice of appeal to this court with five grounds of appeal. In line with the rules of this court, briefs of arguments were duly filed and exchanged, and in G the appellant's brief prepared by Juwon Semudara, Esq., the following issues for determination were formulated as calling for determination in this appeal -

(a) Whether the appellant lumped his claims together under one head contrary to Order 25 rule 12(1) of the Ondo State Rules of the High H Court, which could warrant total dismissal of the plaintiff's claim by the learned trial Judge.

(b) Whether or not the plaintiff is entitled to the reliefs claimed.

(c) Whether or not the plaintiff was entitled to general damages.

In the respondents' brief prepared by Chief 'Yale Olowu, the respondents formulated two issues as arising for determination in this appeal. That is -

B (1) Whether having regard to the pleadings, the plaintiff proved his case and was entitled to judgment.

(2) Whether the lower court was justified in dismissing the plaintiff's claim for general damages.

C I will adopt the appellant's issues in dealing with this appeal. To my mind, the question raised in the appellants issue (a) is crucial to the determination of this appeal, and in any case, the respondents proffered arguments on the issues formulated by the appellant and thereafter re-hashed the same arguments in their own submissions on the issues D formulated by them.

The appellant's issue (a) relates to Order 25 rule 12(1) of the Ondo State High Court (Civil Procedure) Rules which reads as follows

E *"Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. The same rule shall apply where the defendant relies upon several distinct grounds of set-off or counter-claim founded upon separate and distinct facts". (Italics mine)*

F After reproducing the above provision on page 70 of the record, the learned trial Judge proceeded to hold as follows -

*"The plaintiff in this action merely pleaded in paragraph 25(c) of his statement of claim this "An order commanding and or compelling the defendants to pay all the entitlements of the plaintiff which the defendants G estimated to be N381,884.60k only forthwith". The above quoted Order 25(1) (sic) does not give either a plaintiff or a defendant any discretion, as the order is mandatory. In so far as the statement of claim did not state clearly and distinctly the amount of money that each head of relief is due H it will be difficult for the court to make a pronouncement. For instance, the plaintiff says he is entitled to gratuity and pension, which is 20% of the salary of the plaintiff. The plaintiff did not plead how much was his salary either per month or per annum. He left this very important fact for*

*the he conjecture of the court. A thing which he cannot and does not have the power to do. This in my humble opinion constitutes a very serious lacuna and the result is that the order or relief sought under this claim fails”.*

It is the appellant’s submission that the learned trial Judge did great injustice to the appellant’s case in holding that the specific amount claimed for each entitlement was not stated in the pleading, and the court was referred to various paragraphs of the statement of claim and the evidence of the appellant, which it was argued, showed the stated amount the appellant was claiming for each head of entitlement. It was further submitted that the functions of pleadings include the following -

(1) Define with clarity and precision the issues or questions which are in dispute between the parties and fact to be decided by the court.

(2) Through pleadings each party is required to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial. A party may ask for further and better particulars of the pleadings filed by his opponent. This would only arise where the facts pleaded are vague.

(3) Pleadings inform the court what precise matters are in issue between the parties.

(4) Pleadings constitute the permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between parties and their privies.

Pointing out that these are the main functions of pleadings, the appellant argued that his statement of claim in the lower court satisfied these purposes, and the court was urged to hold that sufficient notice of the nature of the case the defendant would meet has been given, and that if the pleading was vague, the respondents ought to have asked for further particulars, which they did not do. On their own part, the respondents submitted that the various arguments of the appellant in his brief sprang from an erroneous misunderstanding of Order 25 rule 12(1) of the Ondo State High Court Rules; and that the reliefs sought by the appellant relate to special damages for separate and distinct claims or causes of complaint

for-

(a) Inconvenience Allowance

(b) Gratuity

(c) Pension

B (d) Non-Accident Bonus

(e) Housing Fund

C It was also argued that in further contravention of the said Order 25 rule 12(1), the appellant lumped together the special damages for allowances, medical treatment, pension and gratuity as N318,000 when each component claim was founded on separate and distinct facts which ought to have been pleaded separately and distinctly as to the monetary claim to be ascribed to each relief but this was not done. Furthermore, that special damages must be specifically pleaded and cannot be inferred and D no court should award a plaintiff several items of damages lumped together in an unclassified sum, citing *ACB & Anor. v. Victor Ndoma-Egba* (2000) 10 NWLR (Pt. 675) 229, (2001) FWLR (Pt. 40) 1780; consequently that the lower court was justified in not inferring what was the amount of E monetary award attributable to each of the above claims. And on damages, the court was referred to *Odulaja v. Haddad* (1973) 1 All NLR (Pt.2) 191, where the Supreme Court relied on the English cases of *Strons Bruks Aktie Bolag v. Hutchison*; & *British Transport Commission v. Gourley*.

F In arguing further on the need to plead special damages specifically, distinctly and separately, the court was referred to the following cases - *Odumosu v. ACB* (1976) 11 SC 55; *Damian Anyanwu & Anor. v. Brendam Iwuchukwu* (2000) 15 NWLR (Pt. 692) 721, (2001) FWLR (Pt. 32) 1; & *Aleruchi Etcheson Nsirim v. Onuma Construction Co. (Nig.) Ltd.* G (2001) 7 NWLR (Pt. 713) 742, (2001) FWLR (Pt. 44) 405.

I must make it clear from the onset that the question of special damages does not arise in this case. There is nowhere in the writ of summons and statement of claim that the appellant made any claim for H special damages. The reliefs claimed in paragraph 25 of the statement of claim are -

(a) a declaration that the respondents' refusal to pay for his medical treatment is a breach of a fundamental term of the contract between them;

(b) an order compelling the respondents to pay the sum of N91,000.00 for his medical treatment;

(c) an order compelling the respondents to pay all his entitlements, which was estimated by the respondents to be N381,884.60; and

(d) N2 million as general damages for pain suffered.

B

There is a clear distinction between “Damages” and “Entitlements”. “Damages” are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong - see Black’s Law Dictionary; 7th Ed. “*Entitlement*” on the other hand means “right to benefits, income, or property which may not be abridged without due process” - see Black’s Law Dictionary; 6th Ed. In this case, the appellant merely asked the lower court to compel the respondents to pay all his entitlements; he did not ask for special damages, which as rightly submitted, must be specifically pleaded.

D

Now, Order 25 rule 12(1) of the Ondo State High Court (Civil Procedure) Rules relates to pleadings. The word “Pleadings” is a generic term. All the respective statements served by the parties on each other are collectively known as pleadings, and the first one is the statement of claim, which is served by the plaintiff wherein he alleges all the material facts on which his claim against the defendant is based, and also specifies the relief or remedy he claims against that defendant.

**Essentially, the facts that the plaintiff should allege in his statement of claim must be those that can establish that he has the cause of action sued for. “Cause of action” has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse - see *Ikine v. Edjerode* (2001) 18 NWLR (Pt. 745) 446; *Mosojo v. Oyetayo* (2003) 13 NWLR (Pt. 837) 340. As Nwadialo explained in *Civil Procedure in Nigeria, 2nd Ed.*, a suit is aimed at the vindication of some legal rights, and such a right can only arise if certain material facts exist, for example, an action in detinue for the recovery of goods wrongfully detained presupposes the existence of the following facts, viz, that the goods were in possession of the person suing, that the person sued, without any**

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H

lawful excuse or consent or permission of the former, took away the goods and that the former had demanded the return of the goods and that the latter had refused to return them. It is the totality of such material facts necessary to establish a legal right in each particular case that is connoted by the phrase “cause of action”, and that is what is envisaged in Order 25 rule 12(1) of the High Court Rules -

“Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly ... ”

In other words, Order 25 rule 12(1) of the High Court Rules comes into play when the plaintiff seeks relief in respect of several claims or causes of action arising from separate and distinct facts. In this case, the appellant only complained that his entitlements were not paid, and the said entitlements are comprised of inconvenience allowance, pension, gratuity, etc. It is a different matter altogether whether or not he proved that he was entitled to the said claims for pension, gratuity etc., the bottom line is that each of the said claims for pension, gratuity, etc, are not causes of complaints founded upon separate and distinct facts, sufficient to invoke Order 25 rule 12(1) of the Ondo State High Court (Civil Procedure) Rules. The appellant’s statement of claim in the lower court did not offend the said Order 25 rule 12(1), and the learned trial Judge certainly erred in dismissing his action on that ground.

The crux of the second issue for determination is whether or not the appellant proved that he is entitled to the following benefits

- (a) Gratuity
  - (b) Pension
  - (c) Inconvenience Allowance (Night Allowance,)
  - (d) Housing Fund
  - (e) Non-Accident Bonus
  - (f) Medical Treatment
- Gratuity

It is the appellant’s submission that he is entitled to gratuity based

on his pleading and oral evidence in court. The court was referred to paragraph 22(b) of the statement of claim where he averred as follows -

*“The plaintiff is entitled to gratuity and pension which is 20% of the salary of the plaintiff. The document dated 8th April, 1992 is specifically pleaded. Confidence Insurance Company Limited card will be tendered and rely (sic) upon at the hearing of this suit. The notification of the retirement letter and the clearance letter of the defendants are specifically pleaded”.*

The appellant conceded that he did not state his salary in his pleading but argued that the statement of account which contained the specified amount payable to the plaintiff annually on monthly is in the possession of the respondents hence notice of production of the documents were filed and served on the respondents, and that the respondents admitted vide paragraph 19(b) of their statement of defence that the appellant was entitled to gratuity which the respondents’ witness estimated to be N218,245.00. Furthermore, that the question as to whether the court is left to guess the amount to be paid as stated by the learned trial Judge, is uncalled for as facts admitted need not be proved, citing *Summonu Olohunde & Anor. v. S. K. Adeyoju* (2000) 10 NWLR (Pt. 676) 562, (2000) 6 SCNJ 470; *Olubode v. Oyesina* (1975) 5 SC 79; & *Maduabuchukwu v. Umunakwe* (1990) 2 NWLR (Pt. 134) 598. However, the respondents contended that as long as the appellant failed to plead specifically his salary in his statement of claim, the court cannot make pronouncement on what the salary is made of, citing *Simon Ojiako & Anor. v. Obiawuchi Ewuru* (1995) 9 NWLR (Pt. 420) 460, (1995) 12 SCNJ 79; *Dennis Ivienagbor v. Henry Osato Bazuaye & Anor.* (1999) 9 NWLR (Pt. 620) 552, (1999) 6 SCNJ 235.

It was further argued for the respondents that their witness’s evidence that the appellant is entitled to N218,000.00 as gratuity goes to no issue as appellant could not lawfully adduce evidence on amount of money or facts in respect of special damages which were not separately and distinctly pleaded, citing *Odumosu v. ACB* (1976) 11 SC 55, (1976) 2 FNR 229; *Damian Anyanwu & Anor. v. Brandam Iwuchukwu* (2000) 15 NWLR (Pt. 692) 721, (2001) FWLR (Pt. 32) 1.

**As I stated earlier, it is the benefits the appellant is entitled to that is in issue in this appeal and not damages, so the respondents' argument on that score is of no moment. True enough, the appellant should have pleaded and proved his salary, but the fact that he failed to do so is neither here nor there and goes to no issue, because the respondents admitted in paragraph 19(b) of their statement of defence that the appellant is entitled to gratuity, and it is trite law that an admitted fact needs no further proof thereof - see *Okoebor v. Police Council* (2003) 12 NWLR (Pt. 834) 444; *Iriri v. Erhurhobara* (1991) 2 NWLR (Pt.173) 252; & *Asafa Foods Factory v. Alraine (Nig.) Ltd.* (2002) 12 NWLR (Pt. 781) 353. What is more, Mr. A. O. Akindele, a representative of the respondents who testified as DW1 said -**

***"... The plaintiff is entitled to gratuity. The plaintiff had served the defendant company for about 29 years. He is entitled to five years basic salary as his gratuity. His entitlement as gratuity is N218,245.00".***

**Clearly, the appellant did not need to proffer any other evidence that he was entitled to the sum of N218,245.00 as gratuity. The respondents admitted that fact, and the learned trial Judge obviously erred in holding differently.**

Pension

Paragraph 19(b) of the respondents' statement of defence avers as follows -

***"The defendants ... deny that part of paragraph 22(b) where the plaintiff is claiming pension. The plaintiff was not in a pensionable service with the 1st defendant company"***

The relevant portion of exhibit C (Condition of Service) reads as follow-

***"Pension Scheme***

***The company will pay 12% of your basic salary into your pension fund while 7% of your salary will be paid by you"***

The appellant's evidence on the claim for pension is as follows -

***"I am entitled to pension and I have a document to that effect (exhibit G - Staff Provident Fund). Based on exhibit G, I have contributed N55,000.00".***



Paragraphs 4 & 5 of the reply to the statement of defence reads as follows -

4. In reply to paragraph 19(b) the plaintiff avers that vide the 1st defendant's letter No. OOPC/GCPF dated 10th May, 1979 the defendants made pension scheme mandatory for every worker in the 1st defendant's B employment.

5. The plaintiff says that since 1979 some amount had been always deducted from the plaintiff's salary every month. The 1st defendant is hereby given notice to produce "Pension Statement of Account" of the C plaintiff from 1979 up to date in court at the hearing of this suit.

*The notice to produce documents, as follows* - "Take notice that the plaintiff required you to produce the following documents referred to in the reply to the statement of defence .

(a) Pension statement of account (G. S. P. F.) of Mr. Udoh Nse D Akpan from 1979 to 1999.

(b) Housing fund statement of account The evidence of DW1, the respondents' witness, as follows -

*"G. S. P. F. means Group Staff Pension Fund. The company is not E responsible for the payment of G. S. P. F. to the plaintiff. It is the Confidence Insurance Company that will pay the G. S. P. F. to the retiree through his company. An in serviced worker has a card with a number with the employer - company. The plaintiff has a card for the purposes of the F G. S. P. F."*

During cross-examination by the appellant's counsel DW1 replied follows-

*"I agree that exhibit G is the authority that empower the operation G of pension for the company's employees. It is the defendant that concludes arrangement with the Insurance Company on behalf of the employees. The company deducts some amount from the plaintiff's salary towards the G.S.P.F. and also the housing fund."*

Exhibit G is a circular dated 10th May, 1979, and it reads as follows- H

*"We have pleasure in advising you that the Board of Directors has resolved that the staff provident fund should as from April 1, 1979 be managed by a reputable firm of Insurance Brokers known as Risk*

*Consultants “The existing rate of contributions remains unaltered, Risk Consultants would improve on the existing benefits by arranging for death benefits of twice basic annual salary. An employee whose age does not exceed 55 (the retirement age) would be granted the death benefit cover.*

B *Moreover, an employee between the ages of 18 and 49 is eligible to join the retirement scheme on the anniversary date of the scheme - April 1, 1979, following his/her confirmation of appointment. Risk Consultant have therefore requested you to complete the pencil-ticked items on the attached form, which should be returned immediately on completion.”*

C It is the appellants submission that the appellant unequivocally stated that he contributed N55,000.00 to the pension fund and DW1 did not deny it; that throughout the hearing and particularly during cross-examination, the appellant was not challenged on the amount, and citing

D *Calabar East Co-operative Thrift & Credit Society Ltd. v. Etim Emmanuel Ikot* (1999) 14 NWLR (Pt. 638) 225, (1999) 12 SC 7 321, that the effect of failure to challenge evidence by cross-examination is that the adverse party is deemed to be conceding on the issue. It is also the appellant’s

E contention that the question for determination as far as pension is concerned is - who would pay? The 1st respondent as claimed by the appellant? or the Confidence Insurance Company as contended by the respondents? It was further submitted that the learned trial Judge failed to

F resolve this issue of who was to pay the appellant’s pension, pointing out that even though the evaluation and ascription of probative value of evidence are the primary functions of the trial court, where the trial court has not properly discharged its function, and the question is as to the proper inference to be drawn from proved facts, the Court of Appeal is in

G as good a position as the court of trial to do justice, citing *Musa Sha (Jnr) & Anor v. Da Rap Kwan & Ors.* (2000) 8 NWLR (Pt. 670) 685, (2000) 5 SCNJ 101; *EBBA v. Ogodo* (1984) 1 SCNLR 372; & *Chukuwuocha v. Onuoha* (1991) 4 NWLR (Pt. 184) 234.

H I agree. **The learned trial Judge did not make any findings on any issue in this case, he rather took the easy way out by dismissing the action on the ground that it offended Order 25 rule 12(1) of the High Court Rules on pleadings. As the appellant rightly submitted,**

the evaluation of evidence is primarily the function of the trial court, nonetheless, where the evaluation of evidence would not entail issues of credibility of witnesses and it is an issue of non-evaluation or improper evaluation or appraisal of evidence by a trial court, an appellate court is in as good a position as the trial court to do its own evaluation. See *P. I. & P. D. Co. Ltd. v. Ebhota* (2001) 4 NWLR (Pt. 704) 475; & *Akintola v. Balogun* (2000) 1 NWLR (Pt.642) 532. In other words, the appellate court has powers to intervene in the interest of justice - see *Haruna v. Uniagric, Markurdi* (2005) 3 NWLR (Pt. 912)233. B C

I agree entirely with the appellant, and must find in his favour. DW1 admitted that the 1st respondent used to deduct some amount from the appellant's salary, and conceded during cross-examination that it is the 1st respondent that "concludes arrangement with the insurance company on behalf of the employees". More than that, it is evident from the opening paragraph of exhibit G that the company's pension fund was just being managed by an outside firm for the 1st respondent and in my view, it is futile to argue as the respondents have done that it is the Confidence Insurance Company that is to pay the appellant and not the 1st respondent. This issue is resolved in favour of the appellant. The appellant is entitled to N55,000.00 as his pension benefits from the 1st respondent and I so hold. D E F

*Inconvenience Allowance*

The appellant averred as follows in paragraph 10 of the statement of claim

*"The plaintiff says that he spent three years in Lagos the chairman and based upon the condition of service he is entitled to N78,000.00 as night allowance which N31,500.00 had been paid thereby remaining N46,900.00 for the defendant to pay to the plaintiff as night allowance".* G

The relevant portion of exhibit C reads as follows - H

*"Night Allowance*

Where you do not stay in hotel when on official duty outside the company, a night allowance of N80,00 will be paid in lieu of hotel

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accommodation”.

In his evidence as PW1, the appellant stated as follows -

“In 1996, I was attached to the Chairman O. O. P. C. in Lagos. There is a difference between a transfer and an attachment. In the case of transfer the officer is paid transfer allowance and a letter of transfer will be issued to that effect. In the case of attachment, an officer is entitled to night allowance. In 1996 when I was transferred to Lagos I was not given any letter to that effect. I was not paid any transfer allowance. I spent three years in Lagos on attachment. The total of my night allowance was paid N78,400. I was paid only N31,500 out of the N78,400. The company is now owing me N46,900 as balance of my night allowance”.

Paragraph 9 of the respondents’ statement of defence avers as follow-

“The defendants deny paragraph 10 of the statement of claim. The defendants contend that the plaintiff was not entitled to N78,400 night allowance for the 3 years he spent in Lagos. And the defendants deny owing the plaintiff the sum of N40,900 or any money as Night allowance as falsely claimed by the plaintiff in paragraph 10 of the statement of claim”.

**It is the appellant’s submission on this claim that the claim of inconvenience allowance was not denied by DW1, and was not challenged during cross-examination. The court was therefore urged to hold that the respondents have conceded the sum of N46,900.00 which the appellant is claiming for inconvenience allowance. I quite agree that the appellant was not cross-examined on his claim of N46,900.00 as inconvenience allowance, and that DW1 made no reference to it, but a court is not expected to believe and act on evidence that is manifestly incredible or unreliable, merely because the plaintiff said so, and was not cross-examined. What the law says is that where the evidence of a witness is not inadmissible in law, uncontradicted and unchallenged, a court of law can act on it and accept it as a true version of the case it seeks to support, unless the evidence is patently incredible - see Iriri v. Erhurhobara (supra). Incredible evidence simply means evidence that is difficult to believe**

in. In this case, the appellant claimed that he was on attachment in Lagos not transfer and was therefore entitled to night allowance for the three years he spent there. I find that very hard to believe. Night allowance is paid in lieu of hotel accommodation for those who do not stay in hotels when on official duty outside their station – see exhibit B C. Even if, as the appellant claimed, he was not issued with a transfer letter when he reported in Lagos, I am of the firm view that three years is sufficient to deem his stay in Lagos a transfer. It follows therefore that he is not entitled to night allowance for the three years he spent in Lagos and I so hold. C

#### Housing Fund

As regards this fund, the appellant claimed that he was entitled to N45,000.00. The respondents were served a notice to produce the housing fund statement of account, which was not produced, however DW1 D testified that the appellant “*is entitled to housing fund of N2,881.46*”. The appellant submitted that it is the document withheld by the respondents that would shed light on whom to believe, and the court was urged to invoke the provisions of section 149(d) of the Evidence Act and hold that the E respondents knew that if it were produced it would be against them.

On their own part, the respondents argued that the appellant’s oral evidence that he was entitled to N45,000.00 goes to no issue since the appellant did not plead specifically and separately the amount of money for F Housing Fund, citing *Aleruchi Etcheson Nsirim v. Onuma Construction Company (Nig.) Ltd.* (2001) 7 NWLR (Pt. 713) 742, (2001) FWLR (Pt. 44) 405. **I however have to agree with the appellant. The appellant, who had served the respondents with notice to produce the housing fund statement of account, claimed in court that he is entitled to G housing fund of N45,000.00. In addition, the appellant averred as follows in paragraph 6 of his reply to the statement of defence -**

***“The plaintiff avers that the housing scheme introduced and made compulsory for the 1st defendant’s employees is one of the H schemes which the plaintiff participated and the plaintiff is also entitled to the amount contributed. Notice is hereby given to the defendants to state the amount contributed by the plaintiff and pay same with other***

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*entitlements of the plaintiff".*

**The respondents failed or neglected to produce the housing fund statement of account in their possession; rather DW1 testified that the appellant is only entitled to N2,881.46, without more. By the provisions of section 149(d) of the Evidence Act, a presumption is raised that evidence which could be but is not produced, would if produced be unfavorable to the party who withholds it. If the appellant was entitled to only N2,888.46, the normal course of events would dictate that the respondents will produce the said statement of account to disprove the appellant's claim of N45,000.00, and since it was not produced, it can only be presumed that if it had been produced, it would have been in the appellants favour and not that of the respondents. This claim is therefore resolved in favour of the appellant. Consequently, I hold that the appellant is entitled to housing fund of N45,000.00 as claimed by him.**

#### Non-accident Bonus

The respondents averred in paragraph 11 of their statement of defence that the appellant was not entitled to the N500.00 non-accident bonus he claimed, since the non-accident bonus is for a whole year and not part of a year and the appellant did not work for the whole of 1999 before he was retired on 1st September, 1999, and I agree with them. This claim fails.

#### Medical Treatment

As to this claim, the learned trial Judge held as follows -

*"From the totality of the evidence available it is beyond doubt that the defendant gave prompt and adequate medical treatment to the plaintiff right from the time he sick retired. It is however on record that the plaintiff has not undergone the surgical operation to cure him of his ailment even up till now, almost eight months after he had left the services of the defendant. He instituted this action after he had left the services of the defendant ... I hold that the defendant did not breach its obligations to the plaintiff with regard to medical treatment ... As regards the relief praying the defendant to pay LUTH a sum of N91,000,00 ... the plaintiff is not entitled to the relief, having left the service of the defendant. A staff is only*

*entitled to the free medical service when he is in the service of his employer. Once a staff leaves the employment he cannot enjoy the benefit again, It is immaterial that his sickness started when he was in the service of his former employer and at the time he left the service the sickness had not healed. An employer is not duty bound to continue to be responsible for the treatment of an employee when the latter has left the service. It is however in evidence that the defendant spent some money on the plaintiff when he was still in service". (Italics mine)*

The appellant urged the court to hold that it is the responsibility of the respondents to pay for the appellants medical bill, pointing out that the learned trial Judge did not consider whether or not the appellant was still in the service of the respondents as at the time the appellant was due for the surgical operation. The respondents however contended that the claim for medical treatment was properly dismissed, because it is a claim for a surgical operation that had not taken place during the pendency of the contract of employment between the appellant and the 1st respondent.

Now, there is no question as to the fact that the appellant was entitled to free medical treatment while in the employment of the 1st respondent - see exhibit C, which clearly states - "*You are entitled to free medical service for yourself, wife and a maximum (sic)*". There is also no dispute as to the fact that the appellant fell ill while in the employment of the 1st respondent, and that the 1st respondent was responsible for his medical treatment after he was rushed to Lagos University Teaching Hospital on the 24th April, 1999.

The 1st respondent however refused to pay the medical bill of N91,000.00 for the surgical operation that was to have been carried out on the appellant, claiming that the appellant was no longer in its service. But the evidence before the court proves the contrary; the appellant was still in the service of the 1st respondent when the operation was scheduled to take place on the 27th August, 1999, before he was due to retire on the 1st of September, 1999, and the 1st respondent had every intention of paying the bill but were quibbling over the amount to pay. Exhibit J is a letter from the 1st respondent to LUTH dated 26th August, 1999. It reads as follows -

*“Re: Medical Report and Bill on Mr. Nse Udoh*

We wish to express our gratitude to the Management of LUTH for the medical treatment given to our above named staff. We wish to confirm the receipt of medical report dated 20th August, 1999 signed by Prof. D. N. Osegbe and the estimated fees for operating the enlarged prostrate dated 24th August, 1999 and signed by Dr. A. E. Ukpung.

*We further wish to state that this company has been responsible for all his medical treatment since 24th April, 1999 when he was rushed to the hospital. Of interest is the fact that a sum of N40,125.00 has been expended so far, which we presumed to be part of the total cost of the treatment. We were however surprised when the bill of N91,000.00 was submitted on 25th August, 1999. This has been a source of concern to us more so that we were earlier informed by Mr. Nse Udoh that the cost will not be more than N55,500.00. We are therefore sending our Manager, Pastor Tosin Akinmulewo with a view to discussing the bill with you. We hope you will extend your hand of co-operation to him”.*

DW1 informed the court that in addition to writing exhibit J, the 1st respondent also wrote exhibit K dated 26th August, 1999 to their medical retainer, Akingbola Medical Center requesting for medical advice. It reads-

*“Mr. Nse Udoh, a staff of this company was reported to have difficulty with urination since 24th April, 1999 while on duty in Lagos and was subsequently rushed to LUTH, Yaba, Lagos. The clinical findings confirmed that he has an enlarged prostrate for which major surgery is required. The company has expended a huge sum of money on him since the date of the incident while another bill has just been received for the operation. Management viewed this report with seriousness and wondered on the cause(s) of such disease. We therefore, wish to request with minimal delay, your professional advice on what can be the root cause of the disease; whether it is traceable to the staffer can occur naturally. We shall also be glad if this can be handled at your hospital without having cause to travel to LUTH for same.”*

Dr. F. R. A. Akingbola replied the 1st respondent in a letter dated 27th August, 1999 - exhibit L, wherein he stated as follows - *“Benign enlargement of the prostrate usually occurs in ‘men over fifty years of age;*



*most often between sixty and seventy. It is a natural phenomenon. The operation can be successfully handled in my hospital at a lower ‘.cost compared with what is obtainable at the Teaching Hospital”*

**The evaluation of evidence by a trial court is of utmost importance in the adjudication process. A trial Judge has the primary duty to evaluate the evidence placed before the court, and evaluation or appraisal of evidence simply means the assessment or estimation of evidence so as to give credit or value to it - see Ogunleye v. Oyewole (2000) 14 NWLR (Pt. 687) 290, & Nkpa v. Nkume (2001) 6 NWLR (Pt. 710) 543, where this court spelled out the process involved in the assessment or evaluation of evidence, as follows -**

*“First you take a piece of evidence and consider whether in the natural order of things it is credible. If it is not «intrinsically incredible then you check it against the pleadings of the party who is relying on it. This is to ensure its relevance to the matter at hand. Parties, as we know, are bound by their pleadings and evidence given on any point not pleaded goes to no issue. After that you check in the pleadings and the testimony on behalf of the opposing party to see if the fact stated in evidence has been admitted, either expressly or impliedly. If it has, then the fact on which it was given has been proved. If there is no admission, then you check for what other contrary evidence there is from the opposing side. Then you place the two pieces of opposing evidence on the imaginary scale of justice, the piece that tilts the scale constitutes the finding of the court”.*

**I must say that the learned trial Judge in this case did a poor job of evaluating the evidence before the court. The evidence before the court showed clearly that the appellant was in the service of the 1st respondent, when the operation was scheduled to take place. Exhibits J & K were written on the 26th of August, 1999, a few days before the appellant was due to leave the services of the 1st respondent - 1st September, 1999. At that time the 1st respondent was not concerned about whether the appellant was in its employment or not, and whether he was entitled to free medical treatment or not; rather its concern was the amount of money to pay for the operation. By the terms of his contract of employment, the appellant**

was entitled to free medical treatment, there was no ceiling placed on how much was to be paid, and in my view, it does not speak well of the management of the 1<sup>st</sup> respondent, since a company is run by human beings, that they were more concerned with how much to pay for an operation, than the health of their employee who had spent 29 (twenty nine) years of his life in their service. The lower court may have failed to properly evaluate the evidence before it, but this court has powers to intervene in the interest of justice - see *Haruna v. Uniagric, Markurdi (supra)*, I will not hesitate to intervene and do justice in this case. This issue is resolved in favour of the appellant. He is entitled to the sum claimed for his medical treatment and I so hold.

On the last issue of damages, not much need be said on that. As I stated earlier, damages are the sum of money received from a wrongdoer as compensation for the wrong. In this case, the respondents were not responsible for the appellant's illness - see exhibit L. This issue fails.

In the circumstances of this case, it is obvious from the foregoing that the appeal must succeed and it is hereby allowed. The judgment of the lower court delivered on the 18<sup>th</sup> of May, 2000 is set aside, and in its place, judgment is hereby entered in favour of the appellant. The 1st respondent is hereby ordered to pay the appellant his entitlements as follows -

Gratuity	N218,245.00
Pension	N55,000.00
Housing Fund	N45,000.00
Medical Treatment	N91,000.00
The appellant is also awarded costs assessed at	N5,000.00.

NGWUTAJCA

I have had the opportunity of reading in advance the lead judgment just delivered by my learned brother, Augie, JCA, and I agree with the reasoning and conclusion reached. I also allow the appeal and adopt the orders in the lead judgment.

**UBBA-AJI JCA**

I have had the privilege of a preview of the lead judgment just delivered by my learned brother, Augie, JCA. I am in complete agreement with him that the appeal ought to be allowed for all the reasons lucidly set out in the lead judgment. I have nothing more to add. B

The appeal is meritorious and it is also allowed by me. I abide by the consequential orders made including the order as to costs.

Appeal allowed.

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