

SUPREME COURT OF NIGERIA
10TH FEBRUARY, 2006. SC. 212/2001
CORAM:- S. M. A. BELGORE, A. O. EJIWUNMI, I. C. PATS -
ACHOLONU, A. M. MUKHTAR, I. F. OGBUAGU, JJSC

NEWBREED ORGANISATION

LTD. APPELLANT/RESPONDENT

AND

J. E. ERHOMOSELE RESPONDENT/CROSS-APPELLANT

TORTS - Injurious falsehood - Truthfulness of the words - Absence of evidence from the defendant - Trial court should act on the material before it (H1)

TORTS - Injurious falsehood - Truthfulness - Of the published injurious words - Oral and documentary evidence - Presented by plaintiff - Proved that the words were not true (H2)

TORTS - Injurious falsehood - Chat - Definition - Allegation that the words published - Came from a chat with the plaintiff - Is not correct (H3)

TORTS - Injurious falsehood - Malice - Whether a publication is done maliciously - Can be deduced from the circumstances - And facts of the case (H4)

TORTS - Injurious falsehood - Damages - Evidence of - Is substantiated - Where plaintiff showed - That the published falsehood led to the loss of his job (H5)

TORTS - Injurious or malicious falsehood - Ingredients of the claim - Which include falsehood, malice and damages - Are established by plaintiff (H6)

ACTIONS - Proof - Failure of defendant to adduce evidence - Minimum

evidence adduced by plaintiff - Will be taken as sufficient proof of the case (H7)

ACTIONS - Damages - Evidence of - Sufficiency - Where the evidence of damages is not sufficient - Court of Appeal rightly reduced - The trial court's award (H8)

APPEALS - Briefs - Allegation of going beyond the brief - Made against Court of Appeal - Is not substantiated (H9)

FACTS

Before the Lagos High Court, the plaintiff/respondent filed an action against the defendant/appellant. Plaintiff claimed N500,000.00 as damages for libel published in the President Magazine volume 1, No. 27 of November, 1989, widely circulated by the defendant within and outside Nigeria. In the alternative, plaintiff claimed same amount against defendant for innocently negligently or deliberately and falsely crediting to the plaintiff statements which he never uttered and by reason of which the plaintiff has suffered untold damages. The publication alleged that there was a chat during which plaintiff uttered the words in question. Plaintiff demanded a retraction seeing that he did not grant the alleged chat, but the defendant refused to publish any retraction. The plaintiff's employment was terminated as a result of the said publication and he has suffered untold hardship. Plaintiff did not lead evidence to prove the damages incurred by him. The defendant denied the claim, did not adduce evidence but rested its case on that of the plaintiff.

The trial court found in the plaintiff's favour, awarding him the sum of N300,000.00 as damages. Defendant's appeal to the Court of Appeal was allowed in part, as it reduced the damages to N150,000.00 plaintiff's case was upheld on the alternative claim of malicious or injurious falsehood as his claim for libel was not substantiated. Still aggrieved, the defendant has further appealed to the Supreme Court and the plaintiff also cross appealed.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in affirming the decision of the Trial court in favour of the respondent in his alternative claim when there was no evidence of malicious falsehood.

2. Whether the Court of Appeal was right in not dismissing in entirety the award of N300,000.00 (Three hundred thousand Naira) to the respondent by the trial court especially when the Court of Appeal came to the conclusion that the respondent’s probable money loss is not supported by evidence.”

HELD (Unanimously dismissing the appeal and cross appeal per **MUKHTAR JSC**)

Injurious falsehood - Truthfulness of the words

1. Against the backdrop of pieces of evidence reproduced above, the answer to the point on the meeting of the essential elements, which I have already raised earlier in the judgment, can be seen. Now, as to whether the words complained of were untrue, it is instructive to note that even though in the course of cross examination the petition Exhibit F signed by the respondent was tendered through him, he did say that he did not say the things in Exhibit “A” credited to him. The appellant on the other hand did not offer evidence to challenge or disprove the respondent’s case on the authenticity of the content of Exhibit ‘A’ or its source. In the absence of such evidence the trial judge could only determine the case before him on the basis of the material before him. (p. 830 G)

Truthfulness - Of the published injurious words

2. As for ingredient (a) above I think the plaintiff/respondent has by both his oral and documentary evidence proved that the words complained of were untrue. The pieces of evidence have already been reproduced above. The refusal of the defendant/appellant to cause its staff to appear in the plaintiff/respondent’s office to identify him as is contained in Exhibit D is a pointer to this, for I believe if he had had the chat with the respondent, the appellant would have taken up the offer, most especially in the face of threat to institute legal action against the defendant/appellant. It is instruc-

tive to note that the evidence of the plaintiff/respondent in this respect was not challenged in the course of cross-examination. (p. 831 B)

Injurious falsehood - Chat - Definition

B 3. Exhibit F was a petition addressed to the Chief of Staff but copied to some top Government functionaries and is even marked confidential. The content of Exhibit F may have spread to various establishments but it is not the same as saying these allegations were conveyed to a Mr. Fayemiwo directly by the plaintiff/respondent on a one to one basis vide a chat/
C interview or whatever. ‘Chat’ in the shorter Oxford English Dictionary is defined as ‘familiar and easy talk or conversation’, and to talk in a light and informal manner to converse familiarly’.

D It is obvious from the evidence of the respondent and the content of Exhibit D that no such chat took place, going by the definition of the word ‘chat’ above. The impression any reasonable man will have after reading the content of Exhibit A particularly complained about is that the plaintiff/respondent was responsible for divulging whatever information
E the defendant/appellant used in the article. (p. 831 H)

Malice - Whether a publication is done maliciously

4. On ingredient (b) supra, it is always very difficult to conceive whether
F a publication is done maliciously or not. I can only deduce that it was so done when even after writing the defendant/appellant Exhibit D, and demanding a retraction of the article, it refused to do so, even at the threat of imminent legal action. As a matter of fact there is nothing in their
G statement of defence to dissuade anyone that the publication was not malicious. (p. 832 E)

Injurious falsehood - Damages - Evidence of

5. As for ingredient (c), there is ample evidence of damage caused to the
H plaintiff/respondent.

The plaintiff/respondent testified that he got a query memo the very next day after the publication of Exhibit A. The content of the memo, Exhibit B has already been reproduced above. One can clearly see from the

said Exhibit B that the respondent's employers did not hide its displeasure of the publication in Exhibit A, which involved the respondent. The reason for the query was patently clear, as it referred to the publication in the 'President Magazine' specifically and pointed to a violation of the collective agreement, which frowns at such action. Then on the same day, Exhibit C was written suspending the respondent from work and putting him on half of his basic salary, (which to my mind must have caused the respondent some damage). Barely 18 days after Exhibit C, the respondent's appointment was terminated vide Exhibit E, which finally nailed the coffin, and made him unemployed and stopped all the financial advantages accruable to him. If that has not caused damage to the respondent, I don't know what can, for in my view the publication that can be linked to the termination of the respondent's appointment can be translated to damage. (p. 832 G) D

Injurious or malicious falsehood - Ingredients of the claim

6. The termination of appointment can definitely be linked to the publication in Exhibit A, as it was the cause of the query and suspension. All the above factors put together constitute and make up the ingredients to be met in satisfying the tort of injurious or malicious falsehood. In Clerk and Lindsel on torts 14th Edition at paragraph 1859, the Authors discussed the ingredient of defamation as follows:- E

"The plaintiff must in the first place strictly set out and prove the words complained of as in an action for defamation. He must prove that they are false and he must prove that they are malicious. There may be something analogous to claim of privilege on the defendant's part; he may say, for example that he only slandered the plaintiff's title in defence of his own. In such a case it will be for the plaintiff to prove lack of good faith. Even, however should there be no duty or interest on the defendant's part, the matter will not necessarily be concluded against him. Malice must still be found as a fact. That he had no good ground or reasonable occasion for the publication in question may be strong evidence of that fact, but it is nothing more. And mere knowledge of the falsehood of the statement at the time of uttering it, though strong evidence of actual malice is not F G H

conclusive. Finally except in cases within section 3 of the Defamation Act 1952 actual damage must be proved”.

The above discussion was definitely in the lower court’s mind when it affirmed the judgment of the trial court. (p. 833 D)

B

ACTIONS - Proof - Failure of defendant to adduce evidence

7. The only evidence available for the learned trial judge to adjudicate on, was that of the plaintiff/respondent alone, and once the evidence was cogent and credible the learned trial judge had no option, but to rely on it and base his findings thereon. In all civil suits, the onus to prove a particular fact or a case in general is on the party who asserts, and since civil suits are determined on balance of probability and preponderance of evidence, a party who proves his case will obtain judgment based on such preponderance of evidence and balance of probability in his favour. In the instant case, the plaintiff/respondent satisfied these principles of law.

When a defendant refuses to adduce evidence in his defence, and rests his case on the evidence of the plaintiff, then he has himself to blame if the trial court finds for the plaintiff based on his evidence, as was done in the instant case. The position of the law is that where an adversary fails to adduce evidence to put on the other side of the imaginary scale of justice, a minimum evidence adduced by the other side would suffice to prove its case. (p. 834 D)

F

Damages - Evidence of - Sufficiency

8. A party claiming a relief should put all its cards on the table vide cogent evidence, as absence of such is bound to affect the award of damages where there is monetary relief. I am not unmindful of the fact that the piece of evidence was not discredited, and that the appellant did not call evidence to debunk the respondent’s evidence, but the fact still remains that the respondent did not give sufficient evidence to warrant the first award, and so the interference of the court below is in order. (p. 838 D)

H

Briefs - Allegation of going beyond the brief

9. I disagree with learned counsel that the Court of Appeal went beyond

their brief, as no where in the defendant /appellant written brief before that court did they argue that the cross-appellant was not entitled to the award he got in the trial court. A careful perusal of pages 95 and 96 of the records , which contain the defendant/appellant brief of argument in the Court of Appeal negates this stance by learned counsel, for I am of the view that those pages were all about that i.e. the propriety of the award by the learned trial judge. (p. 838 F)

NOTABLE POINT OF INTEREST

OGBUAGUJSC

1. When alternative claim will be considered

Coming back to the claim, it is now settled, it is proper for a party in an action, to include in his pleading, two or more inconsistent sets of material facts and claim reliefs thereunder, in the alternative. An alternative defence may also be pleaded.

Therefore, and this is also settled, where a claim, is in the alternative, the trial court, will first of all consider whether the principal or main claim ought to have succeeded. It is only after the court may have found, that it could not, for any reason, grant the principal or main claim, that it would only consider the alternative claim. This is what happened in the instant case leading to this appeal. So, the trial Judge, was right in entering judgment in favour of the Respondent in respect of his alternative claim. (p. 851 E)

REPRESENTATION

Appellant not represented.

Mr. Fred Agbaje for the Respondent/Cross-Appellant.

CASES REFERRED TO

Broadline Enterprises Ltd. V. Monterey Maritime Corp. 1995 9 NWLR part 417 page 1

Edosomwan v. Ogbeufu 1996 4 NWLR part 442 page 226

Awojugbagbe light Industries v. Chinukwe 1995 4 NWLR part 390 page 319

822 Newbreed Org. Ltd v. Erhomosele (2006) 2 KLR Mukhtar JSC

- Elebute v. Odekilekun 1969 1 All NLR 449
Elias v. Omo-Bare 1982 5 SC. 25
Arase v. Arase 1981 5 SC. 33
Buraimoh v. Bamgbose 1989 3 NWLR part 109 page 352
B Nwubuoku v. Ottih 1961 2 SC NLR page 232
Anaeze v. Anyaso 1993 5 NWLR part 291 page 1
Nkado v. Obiano 1997 5 NWLR part page 31
Lawal v. Daudu 1972 1 All NLR page 707
C Patrick Ogbu and Ors v. Fidelis Ani 1994 7 NWLR part 355, page 128
Coker v. Oguntola 1985 2 NWLR part 5 page 87
Allied Bank of Nig. Limited vs. Akabueze (1997) 6 NWLR (part 509) page 784 at page 383
Imah vs. Okogbe (1993) 9 NWLR (part 316) page 159
D Akintola v. Anyiam (1961) ANLR. 588

BOOKS REFERRED TO

- Harry Street - Law of Torts 12th Ed. p.359
E Clerk and Lindsell on Torts 14th Ed. para. 1859

LEAD JUDGMENT BY MUKHTAR JSC

- In the High Court of Lagos State, the plaintiff who is the respondent
F in this appeal claimed the following reliefs against the defendant/appellant.
(a) “N500,000.00 (five hundred thousand Naira) being damages for libel contained in the ‘President Magazine’ Volume 1, No. 27 (of November 20, 1989) published and widely circulated by the defendant within and outside Nigeria. ALTERNATIVELY
G (b) N500,000.00 (five hundred thousand Naira) damages against the defendant for innocently Negligently or deliberately and falsely misrepresenting (sic) or crediting to the plaintiff statements which the plaintiff never uttered and by reason of which the plaintiff has suffered
H untold damages.”

The plaintiffs claim is predicated upon the publication involving the plaintiff carried by the President magazine published and widely circulated by the defendant who are the publishers. This publication led

to the termination of the appointment of the plaintiff by his employer, American International Insurance company (Nigeria) Limited. According to the plaintiff, the most damaging portion of the publication reads:-

“However in a CHAT with the President, Mr. J. E. Erhomosele, one of the brains behind the deportation “ of Ritter and Chairman ASSBIFI, AIICO chapter, the company is now under a new management that is poised to slot out the legacies of the Ritter Days. There is a NEW DISPENSATION HERE NOW. RITTER HAS BEEN SENT PACKING. INFACIT, HE LEFT THE COUNTRY UNANNOUNCED. GOVERNMENT ACTED ON OUR PETITION SO THERE IS NO PROBLEM ANY MORE.”

The plaintiff immediately and thereafter demanded a retraction, but the defendant refused to do so, in spite of the fact that he did not grant the alleged ‘chat’. The plaintiff has suffered untold hardship as a result of his termination of employment and he has been exposed to ridicule, odium and contempt. The defendant denied the allegations above, and stated that even if it authorized, issued or furnished the said publication, the words complained of are not defamatory, and cannot bear the meaning ascribed to them. .

The plaintiff gave evidence and tendered many documentary evidence. The defendant however, did not adduce evidence, but his counsel addressed the court. The learned trial judge evaluated the evidence before him, considered the addresses, found the case of the plaintiff proved, and found in his favour, awarding him the sum of N300,000.00 as damages.

Dissatisfied with the judgment the defendant appealed to the Court of Appeal on four grounds of appeal. The Court of Appeal allowed the appeal in part, thus:-

“In the final analysis, this appeal to the extent to which it challenges the right to enter judgment in favour of the plaintiff/respondent for damages suffered as a result of published malicious falsehood is hereby dismissed. But it succeeds in part, as to the sum of N300,000.00 awarded by the trial court as damages. That award is thus reduced to N150,000.00 (One hundred and fifty thousand Naira).”

Learned counsel exchanged briefs of argument. The appellant was not represented but learned counsel for the respondent was present and adopted his brief at the hearing of the appeal. In its brief of argument the appellant raised the following issues for determination:-

B *“1. Whether the Court of Appeal was right in affirming the decision of the Trial court in favour of the respondent in his alternative claim when there was no evidence of malicious falsehood.*

C *2. Whether the Court of Appeal was right in not dismissing in entirety the award of N300.000.00 (Three hundred thousand Naira) to the respondent by the trial court especially when the Court of Appeal came to the conclusion that the respondent’s probable money loss is not supported by evidence.”*

D The respondent in his brief of argument formulated only one issue for determination, which reads :-

"Has the plaintiff/respondent established ‘malice’ against the defendant/appellant in this case?"

E I will adopt the two issues in the appellant’s brief of argument for the treatment of this appeal. Learned counsel for the appellant in canvassing argument under issue (1) submitted that the learned justices of the Court of Appeal erred in law in affirming the decision of the trial court that the published statement complained of certain malicious falsehood against the defendant/respondent. Learned counsel submitted that the published words do not contain malicious or injurious falsehood against the respondent, and cited the case of Ratcliffe v. Evans 1892 2 Q. B. 524 at 527 on the law governing tortious claim of injurious falsehood, where the court stated the following:-

G *“That an action will lie for written or oral falsehoods not actionable per se nor even defamatory, where they are maliciously published..... where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage.”*

H Again, learned counsel referred to Harry Street’s book, ‘law of Torts’, 12th Edition at page 359, where he stated thus:-

"Originally, this tort protected persons against unwarranted attacks on their title to land by virtue of which they might be hampered in

the disposal of that land hence it was called slander of title. Later it was equally applicable to chattel in which case the tort was usually called "slander of goods". By 1874 it was established that disparagement of the quality of property as well as aspersions on title to it were tortious. Before the end of the century, Ratcliffe v. Evans had decided that the tort could be committed whenever damaging lies about a business were uttered; since then, the tort has become comprehensively styled "injurious falsehood". B

It is also submitted that the essence of this tort is to guard against any form of disparagement of either the plaintiffs proprietary interest or the person of the plaintiff in respect of any trade, profession, or calling carried on by him at the time of the publication. Another submission, still by learned counsel for the appellant is that the respondent can not claim under injurious falsehood, because it is only when the publication is calculated to cause pecuniary damage to the plaintiff that he can recover under this head of claim, and that the test that should guide the courts, is whether a reasonable man who read the said publication would say that the said publication was calculated to disparage either the respondent or his propriety interest and infact likely to cause him pecuniary damage. Reliance was placed on the case of De Beers Abrasive Products Ltd and anor. V. International General Electric Co. of New York 1975 2 All E.R page 599. Reliance was also placed on the case of K.J. Reuter Co. Ltd. V. Mullues 1954 CH 50 at 74 for the essential elements of the tort of injurious or malicious falsehood which are: C D E F

- (a) That the words complained of were untrue
- (b) That they were published maliciously.
- (c) That the plaintiff has thereby been caused damage.

Learned counsel for the respondent has replied that the principle in Renter's case supra has been misplaced by the appellant, as the case does not help the appellant's case, rather it is supportive of the entire respondent's case. G

I will at this juncture look at and possibly reproduce the material averment in the plaintiff/respondent's statement of claim, and the evidence in support to determine whether the above essential elements have been established. The material averments are:- H

“5. The facts of this case which subsequently led to the termination of the plaintiff by his employers arose from a publication carried by the PRESIDENT magazine published and widely circulated by the defendant.

6. In the said PRESIDENT magazine of 14th November, 1989, volume 1 Number 27 of (November 20, 1989) the defendant carried a publication at page 12 in respect of a PETITION dated 17th March 1989 jointly written by ASSBIFI and NUBIFIE (senior and junior workers Unions of AIICO respectively) to the Chief of General Staff concerning some wrong doings in AIICO against the corporate interest of Nigeria. Of particular interest and directly relevant to this suit is the last three paragraphs of the said publication which gave a ‘false impression’ that the President Magazine’ recently had a “chat” with the chairman (i.e. the plaintiff herein) of ASSBIFI AIICO’s chapter, when in actual fact there was no such ‘chat’ as falsely alleged by the defendant. The plaintiff will rely on his own copy of this PETITION dated 17/3/89 at the hearing of this suit.

7. The most damaging of all the paragraphs upon which the plaintiffs employers (AIICO) relied on to terminate the plaintiffs services was the third penultimate paragraph of the said publication in President Magazine wherein the defendant falsely stated :-The words have already been reproduced in the earlier part of this judgment.

“8. As a result of the above false and malicious publications by the defendants, the management of AIICO, who are the immediate employers of the plaintiff issued the plaintiff a query in respect of the ‘publication’. The plaintiff will rely on the said query and his reply in which the plaintiff specifically deny ever granting the said press statement at the hearing of the suit.

9. That on the date of the publication by the President Magazine the AIICO unit and its president in person of Mr Erhomosele in utter dismay, sent a letter immediately to the Editor/Publishers of the President Magazine demanding a retraction of the said paragraph of their story.....

10. Barely two hours after the plaintiffs reply to his query his employers (AIICO) handed him with a letter suspending him from duty.

The plaintiff will rely on this letter at the hearing of this suit.

15. As a result of the recalcitrant attitude of the defendant in publishing a retraction, the management of AIICO, the employers of the plaintiff proceeded to terminate the services of the plaintiff who was then a senior staff on a basic salary of with other benefit has been left unemployed thereby resulting in an untold hardship to him and his family. The plaintiff will rely on his termination letter at the hearing of this suit.” B

In its statement of defence the defendant denied the above averments thus:-

“2. The defendant denies paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the statement of claim. C

3. The defendant denies issuing, furnishing, authorizing or being responsible for the publication alleged to have been made in paragraph 5 of the statement of claim. D

4. If the defendant issued, furnished or authorized the said publication (which is denied) the defendant avers that the words complained of are not defamatory of the plaintiff and could not bear the meaning ascribed to them in paragraph 7 of the statement of claim.” E

In his evidence in chief the plaintiff/respondent gave the following evidence in support of his pleadings :-

"..... I bought and read the President Vol.1 No. 27 of November 20, 1989..... I never granted an interview F as regards the last paragraph of Exhibit A. When I read Exhibit A, I as President of AIICO Senior Staff Association we wrote a protest letter to the Editor of the President Magazine stating the obvious that I never granted an interview or that as alleged in Exhibit A and I requested a retraction of the said publication. My employer AIICO queried me in G respect of the publication in Exhibit A. This is the query given to me by my employer..... I answered the query and I was then suspended from duty. This is the letter suspending me from duty.....When I sent a protest letter to the defendant, I made a H photo-copy of the protest letter which we keep in the file. We do not use carbon copy in that it can fade. This is the photo copy.....There was no retraction of Exhibit A. My

protest letter as in Exhibit D was not replied to my employer then terminated my appointment in connection with Exhibit A. This is a copy of the letter of termination.

As at 2nd January, 1990, I was a Senior Staff manager Grade III with AIICO my annual income was then about N31,260.00. As a result of the termination of my employment, I have been suffering untold hardship including the loss of an opportunity for a one year course abroad that had already (sic) being arranged for me by my employer. The President Magazine is widely read both in Nigeria and outside Nigeria”.

In the course of cross examination the plaintiff said inter alia thus:-

“It is true that I wrote a petition to the then Chief of Staff complaining of sabotage against Mr. Ritter the then Managing Director of AIICO, my petition made allegation of financial unpropriety against the said Mr. Ritter. This is the copy of the Petition I wrote to the then Chief of General Staff.....Exhibit C was copied to the News Agency of Nigeria on behalf of the Press. Exhibit C was copied to the Press in 1982 and as such the press knew about the on goings in the company. This is the reply of the Chairman, Board of Directors of AIICO.....This is the document we wrote to some people which document is referred to in Exhibit F.....Exhibit I which is dated 12/1/83 is copied to the News Agency of Nigeria. I cannot remember that immediately after Exhibit F. AIICO planned a retrenchment.

I cannot remember writing to our national Body in respect of the planned retrenchment in AIICO. I see this document. I am aware that AIICO planned a rationalization or retrenchment. This was before Exhibit F. I am aware that AIICO effected the retrenchment. This was done before Exhibit F was written. Exhibit E did not refer to the offensive publication.”

As can be seen from Exhibit B the employers of the plaintiff/respondent did not at all waste time in issuing a query to him in respect of the publication complained of in Exhibit ‘A’. The memo, Exhibit B reads inter alia as follows :-

“We refer to the publication in “The President Magazine” of 20th

November, 1989, No. 28, page 12, where you had a chat with one Moshood Fayemiwo on the company's affairs without express clearance from the Management. Management view this action of yours as a violation of the provisions of a Collective Agreement, Article 4 and the provision of Employee Handbook titled Employment and Condition of Service Page 16 (36). Will you show cause before the close of business today why disciplinary action should not be taken against you. By copy of this memo, your General Secretary is being informed of your action." B

There seems to be a discrepancy in the above reproduced memo, for although it bears the date of 15th November, 1989, the content referred to the 'publication of 20th November, 1989. The question to ask here, is, did the plaintiffs employer write Exhibit B before the publication of 20th November, 1989, that is in controversy? I cannot see a date in Exhibit 'A' but perhaps one can reconcile the date on Exhibit B with the averment in paragraph (6) of the statement of claim which referred to the magazine of 14th November, 1989. If one does that, then one can easily and confidently say the memo was written a day after the said president magazine came out on the news stand. At any rate, that AIICO took immediate action on the publication the very next day after, shows the gravity of the matter as far as it is concerned. On the same date the plaintiffs employers also sent a memo to him suspending him from work. The memo contains the following, inter alia :- C D E

"Further to my letter of 15 November, 1989, you are hereby placed on suspension with immediate effect to enable management carry out necessary investigation. In line with the provision of the Collective Agreement, Article 4(ii)(a), you will be entitled to half of your basic salary plus your full transport and housing allowances during the period of suspension." F G

The above again reflects the gravity with which AIICO took the publication.

Exhibit D shows that the very day the publication came out, the plaintiff/respondent wrote the Editor of the 'President' seeking a retraction of the publication after denying the 'chat' thus:-

".....While it is correct that the "Unions" mentioned

in the story wrote to the Chief of General Staff on March 17, 1989, we want to state categorically that it is ABSOLUTELY embarrassing and incorrect that our Unit President, Mr. J. E. Erhomosele granted audience of any manner or description to either “The President” or Moshood Fayemiyo either recently or since the existence of the said letter to the CGS. It is in this light that we see the last two or three paragraphs of your story as mischievous, unprofessional, unintelligible and misinforming, as Mr. J. E. Erhomosele has never met Moshood Fayemiwo or any member of staff of “The President” for that matter, in his life. In this connection, we challenge Moshood Fayemiwo or any member of your staff to call at our offices any time between 8.00 a.m. and 5.00 p.m. on or before Thursday, November 16, 1989 to identify Mr. Erhomosele with whom you claimed to have had a chat. Your failure to come around for this identification and to PUBLISH THIS REFUTAL or RETRACTION of the last two or three paragraphs of your said story will mean a go-ahead for us to institute legal proceedings against you on this damaging and mischievous publication which is very much embarrassing not only to the Government of this country (which has already acted on our letter to it), American International Insurance Company (Nigeria) Limited (which has already re-organized its management) but also to our Union that neither sent a copy of the said petition to you nor granted you audience on same.

We await anxiously the publication of the required refutal in your next edition as well as seeing you in our offices as required for the purpose of identifying the man with whom you had a chat.”

Obviously, the defendant/appellant did neither of what was requested in Exhibit D, as is reflected in paragraph (15) of the statement of claim and the plaintiff/respondent’s evidence.

On 2nd January, 1990 the plaintiff/respondent’s employers terminated his appointment vide Exhibit E.

Against the backdrop of pieces of evidence reproduced above, the answer to the point on the meeting of the essential elements, which I have already raised earlier in the judgment, can be seen. Now, as to whether the words complained of were untrue, it is

instructive to note that even though in the course of cross examination the petition Exhibit F signed by the respondent was tendered through him, he did say that he did not say the things in Exhibit “A” credited to him. The appellant on the other hand did not offer evidence to challenge or disprove the respondent’s case on the authenticity of the content of Exhibit ‘A’ or its source. In the absence of such evidence the trial judge could only determine the case before him on the basis of the material before him. B

As for ingredient (a) above I think the plaintiff/respondent has by both his oral and documentary evidence proved that the words complained of were untrue. The pieces of evidence have already been reproduced above. The refusal of the defendant/appellant to cause its staff to appear in the plaintiff/respondent’s office to identify him as is contained in Exhibit D is a pointer to this, for I believe if he had had the chat with the respondent, the appellant would have taken up the offer, most especially in the face of threat to institute legal action against the defendant/appellant. It is instructive to note that the evidence of the plaintiff/respondent in this respect was not challenged in the course of cross-examination. The only fact that came out was the petition to the then Chief of General Staff which was admitted as Exhibit F. It is a fact that the plaintiff/respondent was one of the signatories of Exhibit F and a vital portion of the content of Exhibit F reads :- E

“We have in AIICO’s board of management, one Mr. H.R. Ritter (Managing Director), an American citizen. Since assuming office eleven (11) years ago, he has caused distortion in Nigerian economy and has completely undermined the Nigerian nation/government and the law of the land. He has persistently boasted that he understands and knows more about the Nigerian government and her people better than any Nigerian does. He is the only American Managing Director that has stayed in service in ALLCO Nigeria for up to eleven (11) years, having been brought in since 1978.....” F

Truly, there was a petition alleging many improprieties against a Mr. Ritter, and the consequence of the allegations may have resulted in the sack of the said Mr. Ritter but then that is not to say that the allegations were G H

passed on directly to the staff of the appellant company. **Exhibit F** was a petition addressed to the Chief of Staff but copied to some top Government functionaries and is even marked confidential. The content of Exhibit F. may have spread to various establishments but
 B it is not the same as saying these allegations were conveyed to a Mr. Fayemiwo directly by the plaintiff/respondent on a one to one basis vide a chat/interview or whatever. ‘Chat’ in the shorter Oxford English Dictionary is defined as ‘familiar and easy talk or conversation’, and to talk in a light and informal manner to converse
 C familiarly’.

It is obvious from the evidence of the respondent and the content of Exhibit D that no such chat took place, going by the definition of the word ‘chat’ above. The impression any reasonable
 D man will have after reading the content of Exhibit A particularly complained about is that the plaintiff/respondent was responsible for divulging whatever information the defendant/appellant used in the article. One must however not lose sight of the fact that Exhibit F was co-
 E authored and signed by three other officials of AIICO, and not the plaintiff/respondent only.

On ingredient (b) supra, it is always very difficult to conceive whether a publication is done maliciously or not. I can only deduce
 F that it was so done when even after writing the defendant/appellant Exhibit D, and demanding a retraction of the article, it refused to do so, even at the threat of imminent legal action. As a matter of fact there is nothing in their statement of defence to dissuade anyone
 G that the publication was not malicious. It only contained an outright denial for the responsibility of the publication.

As for ingredient (c), there is ample evidence of damage caused to the plaintiff/respondent.

The plaintiff/respondent testified that he got a query memo
 H the very next day after the publication of Exhibit A. The content of the memo, Exhibit B has already been reproduced above. One can clearly see from the said Exhibit B that the respondent’s employers did not hide its displeasure of the publication in Exhibit A, which

involved the respondent. The reason for the query was patently clear, as it referred to the publication in the ‘*President Magazine*’ specifically and pointed to a violation of the collective agreement, which frowns at such action. Then on the same day, Exhibit C was written suspending the respondent from work and putting him on B half of his basic salary, (which to my mind must have caused the respondent some damage). Barely 18 days after Exhibit C, the respondent’s appointment was terminated vide Exhibit E, which finally nailed the coffin, and made him unemployed and stopped all C the financial advantages accruable to him. If that has not caused damage to the respondent, I don’t know what can, for in my view the publication that can be linked to the termination of the respondent’s appointment can be translated to damage. If the appellant had taken the trouble of retracting the publication as demanded by the respondent, it is D possible that the respondent would still be in gainful employment under his employer, as it probably wouldn’t have taken the drastic step it took in throwing the respondent into the unemployment market. The termina- E tion of appointment can definitely be linked to the publication in Exhibit A, as it was the cause of the query and suspension. All the above factors put together constitute and make up the ingredients to be met in satisfying the tort of injurious or malicious falsehood. In Clerk and Linsell on torts 14th Edition at paragraph 1859, the F Authors discussed the ingredient of defamation as follows:-

“The plaintiff must in the first place strictly set out and prove the words complained of as in an action for defamation. He must prove that they are false and he must prove that they are malicious. There may be G something analogous to claim of privilege on the defendant’s part; he may say, for example that he only slandered the plaintiffs title in defence of his own. In such a case it will be for the plaintiff to prove lack of good faith. Even, however should there be no duty or interest on the defendant’s part, the matter will not necessarily be concluded against H him. Malice must still be found as a fact. That he had no good ground or reasonable occasion for the publication in question may be strong evidence of that fact, but it is nothing more. And mere knowledge of the

falsehood of the statement at the time of uttering it, though strong evidence of actual malice is not conclusive. Finally except in cases within section 3 of the Defamation Act 1952 actual damage must be proved”.

B The above discussion was definitely in the lower court’s mind when it affirmed the judgment of the trial court.

Another aspect of the case I would like to point out is the fact that the defendant/appellant did not adduce evidence in its defence at the trial court. Learned counsel for the respondent has argued that the implication in law of an unproven defence is that the defence is deemed abandoned. **C** He placed reliance on the cases of Broadline Enterprises Ltd. V. Monterey Maritime Corp. 1995 9 NWLR part 417 page 1, Edosomwan v. Ogbeufu 1996 4 NWLR part 442 page 226, and Awojugbagbe light Industries v. **D** Chinukwe 1995 4 NWLR part 390 page 319.

The only evidence available for the learned trial judge to adjudicate on, was that of the plaintiff/respondent alone, and once the evidence was cogent and credible the learned trial judge had no **E option, but to rely on it and base his findings thereon. In all civil suits, the onus to prove a particular fact or a case in general is on the party who asserts, and since civil suits are determined on balance of probability and preponderance of evidence, a party who proves his **F** case will obtain judgment based on such preponderance of evidence and balance of probability in his favour. See Elebute v. Odekilekun 1969 1 All NLR 449, Elias v. Omo-Bare 1982 5 SC. 25, and Arase v. Arase 1981 5 SC. 33. In the instant case, the plaintiff/respondent satisfied these principles of law.**

G When a defendant refuses to adduce evidence in his defence, and rests his case on the evidence of the plaintiff, then he has himself to blame if the trial court finds for the plaintiff based on his evidence, as was done in the instant case. The position of the law is **H that where an adversary fails to adduce evidence to put on the other side of the imaginary scale of justice, a minimum evidence adduced by the other side would suffice to prove its case. See Buraimoh v. Bamgbose 1989 3 NWLR part 109 page 352, and Nwubuoku v. Ottih 1961**

2 SC NLR page 232.

In affirming the findings of the trial court, the court below in its judgment stated thus :-

“For all I have said above it is without hesitation that I say that the words complained of was untrue and they were published with malice. It was intended to inflict injury on the plaintiff/respondent and it did infact inflict it. The plaintiff/respondent lost his job as a result of the publication. That is a pecuniary loss.”

I endorse the above finding.

Learned counsel for the appellant has urged this court to reverse the concurrent findings of both the trial court and the court below that the non retraction of the publication by the appellant was the evidence of malice required to ground an action of malicious falsehood. This court will do nothing of the sort, for the law is settled that findings that are based on credible evidence will not be disturbed, unless the findings are wrong perverse and not supported by evidence. More so when they are concurrent findings of fact. See *Anaeze v. Anyaso* 1993 5 NWLR part 291 page 1, *Nkado v. Obiano* 1997 5 NWLR part page 31, and *Lawal v. Daudu* 1972 1 All NLR page 707 cited by learned counsel for the respondent in his brief of argument. See also *Patrick Ogbu and Ors v. Fidelis Ani* 1994 7 NWLR part 355, page 128, and *Coker v. Oguntola* 1985 2 NWLR part 5 page 87.

For the foregoing reasoning I answer the above issue (1) in the affirmative, and grounds of appeal nos (1), (2) and (3) to which they are related fail.

On issue (2) supra, learned counsel for the appellant has submitted that the court below was perfectly right in interfering with the award of N300,000.00 awarded to the respondent by the trial court. He placed reliance on the case of *College of Education Warri v. Odede* 1999 1 NWLR part 586 page 253. It was further submitted that the court below though perfectly justified when it interferred with the award, fell into a grave error in not dismissing the award in its entirety especially when it has come to the conclusion (and rightly in my view) that there was no evidence of the respondent’s probable money loss. The case of *Fielding and anor. v. Variety Incorporated* 1967 2 Q. B. 841 cited by learned counsel for the

appellant is relevant.

In treating this issue I will refer/reproduce the salient averments in the statement of claim which reads :-

“20. *That as a result of the defendant’s malicious and mischievous publications, the plaintiff has been exposed to ridicule, odium contempt and above all the plaintiff had been prematurely thrown into the world of unemployment as a result of the defendant false publications.*”

In his evidence in support of the pleading the plaintiff/respondent said he suffered untold hardship as a result of the termination of his employment. Everybody knows that loss of employment leads to loss of earnings which translates to monetary loss. The very fact that he did not say the amount he has lost does not retract from the fact that he has lost the salary and allowances he was earning every month at the time he was enjoying full employment. Surely, any one who loses his monetary earnings suffer untold hardship, for it becomes difficult for him to keep body and soul together. In this wise, I agree with the learned justice of the Court of Appeal when he said :-

“*That the plaintiff/respondent has suffered some money loss as a result of the published malicious falsehood is not in doubt. But what that probable monetary loss is has not been supported by evidence. The circumstances of this case, in my respectful view, impose a duty on this court to interfere with the award of N300,000.00.....*”

To completely dismiss the award to the respondent will constitute a glaring injustice to him. For the foregoing reasoning the answer to this issue is in the affirmative, and so ground (4) of appeal to which it is married fails.

In the final analysis the appeal fails in its entirety as it lacks merit and substance. The judgment of the lower court is affirmed. I assess costs at N10,000.00 in favour of the respondent against the appellant.

The plaintiff was dissatisfied with the reduction of the award made to him by the learned trial court by the Court of Appeal and so it cross-appealed on the following sole ground of appeal, which reads as follows.

“*The learned justices of the Court of Appeal misdirected themselves in law when they held per Aderemi J.C.A., while relying on the legal*

principles in His Highness Uyo vs. Nigerian National Press Limited (1974) 6 S.C.103 to reduce the trial court award in damages in the following manner

"....."

Particulars.....". B

(a) Specifically, the Court of Appeal failed to follow the current principles of law relating to the reviewing of damages as held in Allied Bank of Nig. Limited vs. Akabueze (1997) 6 NWLR (part 509) page 784 at page 383; (sic) Uyo vs. Nigerian National Press Limited (1994) S. C. page 103 and Imah vs. Okogbe (1993) 9 NWLR (part 316) page 159 amongst others. C

(b) The Court of Appeal with due respect misapplied the principles of law relating to it (appellate court) power to interfering with the award of damages made by trial court. D

(c) The Court of Appeal usurped the jurisdictional and powers of the trial court that heard the evidence and V made correct award."

Learned counsel for the cross-appellant filed a brief of argument, which was not responded to by the cross-respondent. The brief of E argument was adopted at the hearing of the appeal. A single issue for determination was raised by the cross appellant and the issue is :-

"Was the Court of Appeal justified either in law or Equity to have reduced the awards of damages from N300,000.00 (three hundred F thousand Naira only) to N150,000.00 (One hundred and fifty thousand Naira only) when no circumstances exist to so warrant?"

In canvassing argument in support of this issue, learned counsel did not quarrel with the power of the Court of Appeal to review the award of damages, but his quarrel is with the fact that the review by way of G reduction by the court below was not exercised in accordance with the settled principles of law. These principles were re-echoed in the case of Allied Bank of Nigeria Ltd. Vs Akubueze supra and they are :-

"(a) the Court below acted upon some wrong principle of law; or H
(a) the amount of damages awarded was so extremely high or very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled"

Then there is the case of His Highness of Uyo v. Nigerian National Press Ltd. 1974 6 S.C.I03 which referred to the case of Zik's Press Ltd. V. Alvan Ikoku 1951 13 WACA 188, which reiterated these principles of law. Learned counsel has argued that the circumstances to warrant the reduction of the award of N300,000.00 made by the trial court to N150,000.00 did not exist. The excerpt of the respondent's evidence reproduced in the cross-appellant's brief has already been reproduced in the earlier part of this judgment. It is on record that the annual income of the respondent was N31,260.00, but then there was no evidence on how many more years he had expected to enjoy the salary before his retirement. There are many missing gaps, like the respondent's age, his retirement age and his expectant retirement benefit. The loss of an opportunity for a year course abroad was not buttressed with either oral or documentary evidence to show that the opportunity did actually exist. In a situation like this there is usually correspondence from the institution the party planned to attend, like offer and acceptance of a place etc.

A party claiming a relief should put all its cards on the table vide cogent evidence, as absence of such is bound to affect the award of damages where there is monetary relief. I am not unmindful of the fact that the piece of evidence was not discredited, and that the appellant did not call evidence to debunk the respondent's evidence, but the fact still remains that the respondent did not give sufficient evidence to warrant the first award, and so the interference of the court below is in order. I disagree with learned counsel that the Court of Appeal went beyond their brief, as no where in the defendant /appellant written brief before that court did they argue that the cross-appellant was not entitled to the award he got in the trial court. A careful perusal of pages 95 and 96 of the records , which contain the defendant/appellant brief of argument in the Court of Appeal negates this stance by learned counsel, for I am of the view that those pages were all about that i.e. the propriety of the award by the learned trial judge.

For the foregoing reasoning, I resolve this issue in favour of the cross-respondent, and so dismiss the sole ground of appeal to which it is

married. The cross-appeal fails and it is hereby dismissed. I make no order as to costs. Appellant not represented. Mr. Fred Agbaje for the respondent/Cross-appellant.

BELGORE JSC

This appeal is totally devoid of any merit and for the reasons clearly set out in the judgment of my learned colleague, Mukhtar JSC I also dismiss it with N10,000.00 costs to respondent.

EJIWUNMI JSC

I have had the opportunity of reading the draft of the judgment just delivered by my learned brother Mukhtar JSC, for the reasons given in the said judgment for dismissing the appeal and the cross-appeal.

The appeal to the Court below stems from the judgment of the trial Court where the plaintiff, now respondent, laid against the defendant, now appellant, the following claims: -

“(a) N500,000 (Five Hundred Thousand Naira) being damages for libel contained in the ‘President Magazine’ Volume 1 No. 27 (of November 20, 1989) published and widely circulated by the defendant within and outside Nigeria.

Alternatively

(b) N500,000.00 (Five Hundred Thousand Naira) damages against defendant for innocently, negligently or deliberately and falsely misrepresenting or crediting to the plaintiff statements which the plaintiff never uttered and by reason of which the plaintiff has suffered untold damages.”

Pleadings were therefore filed and exchanged, and the case was tried by Oduneye J. of the High Court of Lagos State sitting at Ikeja. Now, before considering the issues raised in this appeal, it is desirable to briefly refer to the facts germane thereto which could be stated briefly thus: - At the time when this story began, the respondent/cross appellant was an employee of an Insurance Company known as American International Insurance Company, (otherwise known as AIICO) and was also an active

and loyal member of the Association of Banks, Insurance and Financial Institutions (otherwise known as ASSBIFI). The respondent apart from being the former President/Chairman of the AIICO's domestic branch of ASSBIFI was a member of the National Body of ASSBIFI.

B The defendant/appellant on the other hand, is a limited liability company duly incorporated in this Country and the publishers of a magazine known as and called "*The President Magazine*." The allegation made against the defendant/appellant was that by their publication of 14th November 1989, Vol.1 Number 27 of 20th November 1989, the respondent/cross-appellant, alleged that the appellant carried a publication at page C 12 in respect of a Petition dated 17th March 1989 jointly written by ASSBIFI and NUBIFIE (Senior and Junior Workers Union of AIICO respectively) to the Chief of General Staff concerning some wrong doings D in AIICO against the corporate interest of Nigeria. The relevant part of this publication -and the events that followed are specifically pleaded in paragraphs 7,8,9 and 10 thus: -

E "7. *The most damaging of all the paragraphs upon which the plaintiffs employers (AIICO) relied on to terminate the plaintiffs services was the third penultimate paragraph of the said publication in President Magazine wherein the defendant falsely stated: -*

F *However in a CHAT with the President, Mr. J.E. Erhomosele, one of the brains behind the "deportation of Ritter and chairman ASSBIFI, ALLCO Chapter, the company is now under a new management that is poised to slot out the legacies of the Ritter Days. THERE IS A NEW DISPENSATION HERE NOW. RITTER HAS BEEN SENT PACKING. INFACT, HE LEFT THE COUNTRY UNANNOUNCED. GOVERNMENT ACTED ON OUR PETITION SO THERE IS NO PROBLEM ANY MORE.*

H 8. *As a result of the above false and malicious publications by the defendants, the management of AIICO, who are the immediate employers of the plaintiff issued the plaintiff a query in respect of the 'publication'. The plaintiff will rely on the said query and his reply in which the plaintiff specifically deny ever granting the said press statement at the hearing of this suit.*

9. *That on the date of the publication by the President Magazine the AIICO Unit and its president in person of Mr. Erhomosele in utter dismay, sent a letter immediately to Editor/Publishers of the President Magazine, demanding a retraction of the said paragraph of their story. A copy of this letter of protest was also copied the AIICO's Managing Director. The said letter will be relied on at the hearing of the suit.* B

10. *Barely two hours after the plaintiffs reply to his query his employers (AIICO) handed him with a letter suspending him from duty. The plaintiff will rely on this letter at the hearing of this suit."*

Though, the AIICO unit of ASSBIFI and its national body intervened in the matter with a view of convincing the Management as to the non-involvement of either their AIICO unit or President on the said purported chat with the "President Magazine", the services of the Respondent/Cross-appellant was terminated by his employers (i.e. the Management Board of AIICO). It must also be noted that the respondent/cross-appellant specifically denied in his pleadings that he granted the alleged "chat" interview to the appellant. D

Against the several allegations made against it by the respondent/cross-appellant. The appellant/respondent filed a six paragraphed Statement of Defence which read: - E

" 1. *SAVE and EXCEPT as is hereinafter expressly admitted the Defendant denies each and every allegation of fact contained in the statement of claim as if the same were set out seriatim and specifically traversed.* F

2. *The Defendant denies paragraph 1,2,3,4,5,6,7,8,9,10,11, 12,13,14,15,16,17,18,19,20,21 and 22 of the statement of claim.*

3. *The Defendant denies issuing, furnishing, authorizing or being responsible for the publication alleged to have been made in paragraph 5 of the statement of claim.* G

4. *If the Defendant issued, furnished or authorized the said publication (which is denied) the Defendant avers that the words complained of are not defamatory of the Plaintiff and could not bear the meaning ascribed to them in paragraph 7 of the statement of claim.* H

5. *The Defendant will at the trial of this suit also say that the*

Plaintiff has no cause of action and that the action be dismissed.

6. *Whereof the Defendant avers that the Plaintiffs action is speculative, frivolous, vexatious, a gold-digging venture and an abuse of the processes of the Court.”*

B At the trial, the respondent/cross-appellant gave evidence in support of his claim in the course of which he tendered the following Exhibits:

Exhibit “A” - President Magazine Vol. 1, No. 27 of 20/11/89.

Exhibit “B” - Query given to respondent/cross-appellant (PW1) by his employer.

C Exhibit “C” - Letter dated 15/1 1/89-suspending PW1 from duty.

Exhibit “D” - Protest letter by PW1.

Exhibit “E” - Letter of termination of the employment of PW1.

Exhibit “G” - A document attached to Exhibit “F”.

D Exhibit “H” —Reply of the Chairman Board of Directors of AIICO, Exhibit “I” -Letter dated 12/1/83.

With the conclusion of the hearing of evidence, the learned trial judge was addressed by learned counsel appearing for the parties before E he delivered a considered judgment. In the course of that judgment, he had considered and adopted the dictum of Lord Atkin in *Sim v. Stretch* (1936) 2 ALL E.R. 1237 at 1240 which he said thus: -

F “Using the above definition of Lord Atkin, could I say that the publication as contained in Exh. ‘A’ is defamatory? I will answer in the negative. I am of the view that the words do not tend to lower the plaintiff in the estimation of right thinking members of society. I am therefore of the view that the offending publication is not defamatory and as such an action for libel will fail.

G The alternate claim of the plaintiff is for N500,000 for damages for malicious misrepresentation or put in another form “Malicious falsehood”

H In order to succeed in this claim, the plaintiff must prove

(a) that the words complained of were untrue.

(b) that they were published maliciously and

(c) that the plaintiff has thereby been caused damage.

As regards (a) above, the plaintiff testified that he never had a chat

with Fayemiwo of the President Magazine and that what was published in Exh. 'A' concerning him was untrue. I therefore hold that Exh. 'A' is false, more so when the defendant is at liberty to call the writer Mr. Fayemiwo to say whether or not he had an interview with the plaintiff. As regards (b) above, the mere fact that there was no chat between Fayemiwo and the plaintiff makes the publication malicious. Apart from this the Defendant refused to retract the story after the plaintiff wrote him about the malicious falsehood. B

I am therefore of the view that the publication is malicious. As regards (c) above, there is no doubt that the plaintiff suffered as a result of the publication. The plaintiff by the said publication was queried, suspended from work and 'finally his appointment was terminated.' C

As the appellant/respondent was not satisfied with that judgment of the trial Court, he appealed to the Court below. That appeal succeeded in part, as the Court upheld the judgment of the trial Court in which the respondent/cross-appellant was entitled to judgment for damages suffered as a result of published falsehood. But the sum of N300,000.00 awarded to him was reduced to N150,000.00. As both parties felt aggrieved with the above decision of that Court, they then appealed to this Court. From the briefs filed in furtherance of their respective appeals, the issues raised for the determination of this appeal are as follows: - D E

"1. Whether the Court of Appeal was right in affirming the decision of the trial Court in favour of the respondent in his alternative claim when there was no evidence of malicious falsehood. F

2. Whether the Court of Appeal was right in not dismissing in entirety the award of N300,000.00 (Three Hundred Thousand Naira) to the respondent by the trial Court especially when the Court of Appeal came to the conclusion that the respondent's probable money loss ; is not supported by evidence." G

For the respondent the only issue identified for the determination of the appeal is whether plaintiff/respondent established "malice" against the defendant/appellant. And the respondent for his cross-appeal raised in the cross-appellant's brief, one issue which reads: - H

"Was the Court of Appeal justified either in Law or Equity to have

reduced the awards of damages from N300,000.00 (Three Hundred Thousand Naira only) to N150,000.00 (One Hundred and Fifty Thousand Naira only) when no circumstances exist to so warrant?"

I will first consider the arguments set out in the briefs of counsel B with regard to the issues raised in the main appeal. With regard to the first issue, the question raised there is, whether the Court of Appeal was right in affirming the decision of the trial Court that there was evidence of malicious falsehood before the Court by reason of the publication in the C “*President Magazine*”. In arguing that the Court below was wrong to have affirmed the decision of the trial Court, the appellant referred properly to the cases of *Ratcliffe v. Evans* (1892) 2 Q.B. 524 at 527; *Halsey v. Brotherhood* (1881) 1 CHD 386 at 388; *K.J. Reuter Co. Ltd. v. Mulhens* (1954) Ch. 50 at 74; *Balden v. Shorter* (1933) Ch.427 at 430. Reference D was made to the 12th Edition of *Harry Street on the Law of Torts*; and to the 12th Edition of *Clark & Lindsell on ‘forts*. However, from the argument of learned counsel for the appellant, in spite of the several authorities referred to above, his attention appears to be that the Court below was E wrong to have upheld the trial Court that evidence established the tort of injurious falsehood.

For the respondent, the contention made for him by his learned counsel in support of the judgment of the Court below are two fold, F namely; that as the appeal is against the concurrent findings of the Courts below, and for the appeal to succeed, the appellant has the burden of showing that the findings are erroneous. The learned counsel has argued that the respondent has failed to discharge that burden. The other leg of G contention of learned counsel for the respondent is that the learned counsel for the appellant misconceived the decision in *K.J. Renter & Co. Ltd, v. Mulhens* (supra).

For the resolution of this question and having regard to the argument of the counsel, it is desirable to refer to the judgment of the Court H below. On the point, *Aderemi JCA* in the course of the lead judgment in the case under appeal, referred to the submission of the appellant that the refusal to tender apology or to retract the offending publication is no evidence of malice but rather is a factor that could be taken into

consideration (in so far as it increased the injury to the plaintiffs feelings) in the assessment of damages: that argument was again canvassed in this appeal. For this submission, reference was made to *Fielding & Anor v. Variety Incorporated* (1967) 2 Q.B. 841. But Aderemi JCA, however observed that the decision in *Fielding's* case (*supra*) does not support the submission of the appellant. He then quoted a portion of the judgment of Lord Salman which reads: -

“In the old days before the decision of the House of Lords in Rookes vs Barnard, the fact that the defendants had not apologized or withdrawn could legitimately have been taken into account so as to increase the damages. The plaintiff might have been awarded what are called exemplary damages. The jury might have considered the desirability of marking their disapproval of the defendants conduct and perhaps deterring them and others from repeating it by awarding heavy damages. We now know, however, that the fact that the defendants did not apologize or withdraw cannot be taken into account in those respects, but it is material only in so far as it increased the injury to Mr. Fielding's feelings.”

And applying the principles set out above and with the facts which showed quite clearly that the appellant failed to come forward to identify the person with whom he had a ‘chat’ upon the receipt of Exhibit D, and did not also at any time retract the story set up concerning the respondent the Court below, per Aderemi JCA, held thus: -

“If this conduct of the defendant/appellant is no means of reading its mind I wonder what else one would have to resort to in determining the motive. For all I have said above, it is without hesitation that I say that the words complained of were untrue and they were published with malice. It was intended to inflict injury on the plaintiff/respondent and it did in fact inflict it.”

Before he held as above, reference had quite properly been made to *Shepherd v. Wareman* (1662) 1 S.I.D. 79, where the defendant was found to have falsely and maliciously alleged that the plaintiff (a lady) was already warned and who consequently lost her marriage had a good cause of action against the defendant. It was similarly held in *Riding v. Smith* (1876) 1 Fix. D. 91 that the plaintiff, a shopkeeper lost customers through a false

malicious allegation that his wife, who assisted in the business had misconducted herself on the premises. See also *Ratcliffe v. Evans* (1892) 2 Q.B. 524, at page 527/528 where Bowen LJ, said:

“That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage is established in law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred.”

Reverting to the instant appeal, it is manifest that the publication concerning the respondent/cross-appellant was false and maliciously published and there is no evidence that the defendant believed in its truth. In any event, no effort was made by them to prove its truth.

But what the appellant has agitated in this appeal is that, the Court below was wrong to have held that malice was established as a result of the said publication. On this point, may I refer to what was said by the Court below at p. 134 “that malice in legal parlance means a wrongful act intentionally done without just cause.”? The Advanced Learner’s Dictionary of Current English defines it as “*active ill will or desire to harm others.*” It is a very difficult task to read the mind of an individual with a view to finding out his motive or his intention for doing a particular act. Surrounding circumstances, in my considered view,, will be a veritable guide to finding out the motive of doing a particular act.

Now, our attention was drawn by the appellant to the case of *R.J. Reuter Co. Ltd v. Mulhens* (supra) for the submission that malice was not established to justify the finding that the appellant was liable to the respondent. That submission, argued learned counsel for the respondent, should be regarded as a misconception of the decision of the English Court in that case. I think it is desirable in that case to refer and in extenso, the dictum of Evershed M.R. at pp.73/74. It reads: -

“*Mr. Tookey and Mr. Aldous did not challenge the correctness of*

the judge's statement of the law as to trade slander, taken from Lord Davey's speech in Royal Baking Powder Co. v. Wright, Crossley & Co., namely: "To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously, that is to say, without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby." The judge expressed the opinion that, if the first two requirements could be found satisfied, the plaintiff company would be entitled to an injunction; but he found against the plaintiff company on both the first two requirements. He was satisfied that there was no evidence of malice, and he construed the references in the letters to the plaintiff company's goods as "non-genuine" as being substantially true, that is, as implying in 'their context no more than that these products were not made from the German essences and in accordance with the secret formulae in the possession of Mulhens, and were, therefore, of a different quality from that of the Mulhens products, and not as involving that the plaintiff company's goods were spurious in any opprobrious sense.'

It does not require extensive consideration to appreciate that briefly what the Court determined in that case was that the parties were dealing with two different and competing products. It follows, does it not, that in such circumstances, the question as to malicious publication cannot arise. That surely is not the position in the instant appeal. I must, and with due respect agree with the submission that the respondent was right that the appellant misconceived the decision in the Reuter's case (supra).

Before concluding, it is I think germane and on this question of the proof of malice in the context of the claim in the instant appeal to refer to the speech of Lord Diplock in Horrocks v. Lowe (1974) 1 ALL E.R. 662 at 669-670; (1975) A.C. 135 at 150. That was an appeal arising out of an action for slander during the course of a meeting of a local council. The defence was qualified privilege to which the plaintiff replied that the defendant was actuated by malice. The speech of Lord Diplock reads in part, thus:

"..... what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he

published or, as it is generally though tautologously termed, “honest belief. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference
 B to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording to them immunity
 C from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of
 D its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which
 E might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be “honest”, i.e. a positive belief that the conclusions they reached are true. The law demands no more.

F Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which
 G the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable
 H the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage

unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true. Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity." [underlining mine] B

While in this case it is manifest that the defendant has not pleaded qualified privilege, the principle no doubt applies that in order for the respondent to establish his case against the appellant, malice must be proved. From the dictum above, it is no doubt clear that a judge in the determination of the proof of this ingredient of malice would, quite properly put into consideration circumstances which surrounded the publication to form the view that the appellant is honest i.e. positive belief in what was published concerning the appellant. D

For all the reasons given above, I uphold the conclusion reached by the Court below that having regard to all the circumstances of the case, and also on the aphorism that there is no way of knowing the construction of the mind of any person in his face, it is only right to resort to his action or inaction to determine whether he acted maliciously as was found in this case. In the result, I uphold the judgment of the Court below in respect of Issue I. On Issue 2, it is my view that the Court below was right in not dismissing in its entirety the award of N300,000.00. F

The respondent in his cross-appeal has argued that the Court below erred by reducing the damages awarded to him. I have read the arguments of counsel in respect of this cross-appeal in the cross-appellant's brief filed by his learned counsel on his behalf. It is however my considered view that the cross-appeal lacks merit, and it is dismissed accordingly. G

In the result, for the above reasons and the fuller reasons given in the appeal, the main appeal fails and it is dismissed. The cross-appeal having failed is also dismissed. The respondent is awarded costs in the sum of N10,000.00. H

PATS-ACHOLONU JSC

I have read in draft the judgment of my learned brother Mukhtar
B JSC and I agree with her. I have nothing to more to add.

OGBUAGU JSC

C Both in the Writ of Summons at page 2 and in paragraph 22 of
the Plaintiff s/Appellant’s Statement of Claim at pages 3 to 5 of the
Records, the Plaintiff/Appellant, claimed as follows:

“(a) N500,000 (*Five Hundred Thousand Naira*) being damages for
libel contained in the “PRESIDENT MAGAZINE” Volume 1. No. 27 (of
D November 20, 1989) published and widely circulated by the defendant
within and outside Nigeria.

ALTERNATIVELY

(b) N500,000.00 (*Five Hundred Thousand Naira*) damages against
E the defendant for Innocently Negligently or deliberately and falsely
misrepresentating or crediting to the Plaintiff statements which the
plaintiff never uttered and by reason of which the Plaintiff has suffered
untold damages”

F It is noted by me, that the action succeeded on the alternative claim
after the main claim was rejected. It is also noted by me, that the word or
i.e the claim against the Defendant/Respondent, was for innocently,
negligently or deliberately making the publication. My first reaction, is that
if the said publication, was made by the Defendant/Respondent “*innocently*”,
G could he be held liable by the trial court? This is because or is,
among other definitions/interpretation, used to introduce another possi-
bility or something used when one is not exactly sure about say, a thing.
See the Oxford Advanced Learner’s Dictionary, 6th Edt. at page 821.

H In respect of my poser, my answer, is in the affirmative. This is
because and this is settled, that in a defamation, there is no need to prove
malice. From the mere publication of a defamatory matter, malice is
implied, unless the publication, was on what is termed “*a privileged*

occasion". See the case of Adam v. Ward (1917) A.C. 348 - per Lord Finlay, L.C.

As a matter of fact, the state of the mind or mere, belief, is immaterial, except of course in a privileged occasion, in which case, the plaintiff, has to prove actual malice in the popular sense of the term. This is because, the law looks at the consequence of a publication and not the motive or intention of the publishers. See Akintola v. Anyiam (1961) ANLR. 588 and Atoyebi v. Odudu (1990) 10 SCNJ. 52. Thus, even a bona fide belief that the words are true, it will afford no defence in the absence of privilege, though such belief, may be urged in mitigation of damages. A statement *ex facie* innocent, may be defamatory by reason of extraneous facts, even though such facts are unknown to the person making or publishing the statement. See Cassidy v. Daily Mirror (1929) 2 K.B. 331 considered in the case of Hush v. London Express Newspaper Ltd. (1940) 2 K.B. 507. This is why, where a publication is imprecise, the editor, cannot complain, if he is reasonably understood as having said something that he did not mean. See Kuye v. Nigerian National Press Ltd. & anor. (1963) Lagos High Court Report p. 58 .

Coming back to the claim, it is now settled, it is proper for a party in an action, to include in his pleading, two or more inconsistent sets of material facts and claim reliefs thereunder, in the alternative. See S.C.E.I. v. Odenewu & anor. (1965) 2 ANLR 135 and Metal Construction (W.A.) Ltd. v. Chief Aboderin (1998) 6 SCNJ. 161 @ 170. An alternative defence may also be pleaded.

Therefore, and this is also settled, where a claim, is in the alternative, the trial court, will first of all consider whether the principal or main claim ought to have succeeded. It is only after the court may have found, that it could not, for any reason, grant the principal or main claim, that it would only consider the alternative claim. This is what happened in the instant case leading to this appeal. See Mercantile Bank of Nigeria Ltd. v. Adalma Tanker Bunkering Services Ltd. (1990) 5 NWLR (Pt.153) 747 and William Agidigbi v. Danaha Agidigbi & 2 ors (1996) 6 NWLR (Pt.454) 303 @ 313; (1996) 6 SCNJ. 105, So, the trial Judge, was right in entering judgment in favour of the Respondent in respect of his alternative claim.

The next question I or one may ask is, was the learned trial Judge, right in giving judgment in favour of the Plaintiff/Respondent after evaluating, only the lone evidence of the Plaintiff/Respondent on the ground, that his evidence, was not controverted by the Appellant? I think
 B so. This is because (and this settled in a line of decided authorities), that where a plaintiff adduces oral evidence, which established his claim against the defendant in terms of the writ or statement of claim, and that evidence, is not rebutted by the defence either by challenging the same
 C under cross-examination or by controverting the same in evidence, the plaintiff is entitled to judgment. See *Nwabuoku v. Ottih* (1961) ANLR 487: (1961) 2 SCNLR 232; *Isaac Omeregbe v. Daniel Lawani* (1980) 3- 4 S.C. 108 @ 117; *Onwuka v. Omogun* (1992) 3 SCNJ. 98 @ 127 and recently, *Olohunde & anor v. Prof. Adeyoju* (2000) 6 SCNJ. 470 @ 495: *Tsokwa*
 D *Oil Marketing Co. Nig. Ltd, v. Bank of the North Ltd.* (2002) 5 SCNJ. 176 @ 194 and *Okoebor v. Police Council & 2 ors.* (2003) 5 SCNJ. 52 @ 66 and many others. This is because, in the words of Onu, JSC. in the case of *Eseigbe v. Acholor & anor.* (1993) 12 SCNJ. 82 @ 105, the defendant
 E is deemed to have accepted the pleadings and evidence or case of the Plaintiff “lock, stock and barrel”.

In such a situation, the onus or standard of proof, is minimal. See the cases of *Oguma Associated Companies (Nig.) Ltd, v. IBWA Ltd.*
 F (1988) 1 NWLR (Pt.73) 658 @ 682: (1988) 3 SCNJ. 13: *Balogun v. U.BA. Ltd.* (1992) 6 NWLR (Pt.247) 336 (% 354: (1992) 7 SCNJ. 61; *Ogunjumo & ors. v. Ademolu & ors.* (1995) 4 NWLR (pt.389) 254: (1995) 4 SCNJ. 45 and *Nwabuoku v. Ottih* (supra).

It is noted by me, that although the Appellant filed a Statement of
 G Defence, it did not adduce evidence in support thereof. It is now settled, that pleadings do not constitute evidence and therefore, where such pleading is not supported by evidence - oral or documentary, it is deemed
 H by the court as having been abandoned. There are too many decided authorities in this regard. But if I must cite one, see recently, *Miss Ezeanah v. Alhaji Atta* (2004) 2 SCNJ. 200 @ 235 where several other cases were cited or referred to.

I also note that at the close of the Plaintiffs/Respondent’s case, the

learned counsel for the Appellant, proceeded to address the court. In other words, he rested the Appellant's case, on the case/evidence of the Respondent. Such a stance, has been described or regarded as a legal strategy and not a mistake. See the case of Aguocha v. Aguocha (2005) 1 NWLR (Pt.906) 165 @ 184 - per Salami, JCA, citing the case of Akanbi & ors. v. Alao & anor. (1989) 3 NWLR (Pt.108) 118 which is also reported in (1989) 5 SCN 1. B

As a matter of fact, in the case of NEPA v. Olasunju & anor. (2005) 3 NWLR (Pt 913) 603 @ 632 C.A, it was stated that the implication where a defendant rests his case on that of the plaintiff, may mean: C

(a) that the defendant, is stating that the plaintiff has not made out any case for the defendant to respond to;

or

(b) that he admits the facts of the case as stated by the plaintiff. D

or

(c) that he has a complete defence in answer to the plaintiffs case.

The case of Akanbi & ors v. Alao & anor (supra), was also therein referred to. E

The court below, at pages 131 and 132 of the Records, noted also that the respondent led evidence in support of "*all the averments in his pleadings while the defendant/appellant called no evidence*" and further stated as follows: F

"..... *The result, in law, is that the appellant is deemed to have accepted as true and correct the evidence led in proof of the contents of the plaintiff/respondent's pleadings as there is nothing on the other side of the scale*".

I also note as the court below did, that there was no retraction of the offensive publication or an apology in respect thereof in spite of demand. The court below, then stated at pages 135 and 136 of the records, as follows: G

".....*If this conduct of the defendant/appellant is no means of H reading its mind (sic) I wonder what else one would have to resort to in determining the motive. For all I have said above it is without hesitation that I say that the words complained of were untrue and they were*

published with malice. It was intended to inflict injury on the plaintiff/respondent and it did in fact inflict it. The plaintiff/respondent lost his job as a result of the publication. That is a pecuniary loss. The law does not impose on him a duty to allege or prove special damage.....”.

B It further held that there is evidence of malicious falsehood which was established by the respondent. I agree to all the above. I therefore, render my answers to Issue 1 of the Appellant and the lone issue of the respondent respectively, in the Affirmative/Positive.

C One may wonder why in spite of the above findings of fact, the court below, reduced the amount of damages awarded in favour of the Respondent in respect of the said libel. It gave its reasons why it took that decision at pages 138 and 139 of the Records. One crucial or fundamental reason as appears at page 138 of the Records, is stated as follows:

D “..... .There is no evidence that since his appointment was put to an end, the plaintiff/respondent made efforts to secure another employment. Suffice it to say that the plaintiff/respondent has a duty in law, “to mitigate loss” - i.e. his loss.

E (the underlining mine)

I agree. My learned brother, Mukhtar, JSC, in his/her lead Judgment, with candor, also dealt with this issue and rightly in my respectful view, concluded thus,

F *“To completely dismiss the award to the respondent will constitute a glaring injustice to him.....”.*

In any case and this is settled, that an Appellate court, has the power to amend, an award given by a trial court. See His Highness Uyo 1 v. Nigerian National Press Ltd. & 2 ors- In Re: Felix Egware (1974) 1 All NLR (Pt.1) 293; (1974) 6 S.C. 103 @ 105 - 106; cited and relied on by the court below. (It is also reported in (1974) 1 All NLR 264 @ 266. 267; and (1972) 6 S.C.. 90 @ 92, 94 (by Lawbreed Ltd.) It can so amend, as and when the justice of the case so dictates. The attitude of an Appellate Court to an award of damages by a trial court, was also stated in the case of Nigeria Bank PLC. v. Alhaji Musa Abubakar & 8 ors. (2004) 17 NWLR (Pt. 901) 66 @ 87 C.A. That is to say, that ordinarily, an Appellate court, will not disturb the award of damages, except it is established that in assessing and

awarding the damages, the court below, proceeded on, and applied a wrong principle of law See *Shodipo & Co. Ltd. v. The Daily Times Nigeria Ltd.* (1972) 11 S.C. 69; (1972) 11 S.C. (Reprint P.45 - by Lawbreed Ltd).

It is also settled, that in order to justify reversing the trial Judge on the question of the amount of damages awarded, it will generally be necessary, that the Appellate Court, should be convinced that;

1. the court below acted upon some wrong principle of law or
2. the amount awarded, was so extremely high or so very small as to make it an entirely erroneous estimate of the damage the plaintiff is entitled to.

See the cases of *Khanwam & Co. v. Chellaram & Sons (Nig.) Ltd.* (1964) 1 WLR 711 @ 714 - per Lord Guest; *Idahosa v. Oronsaye* (1959) 4 FSC 166; *Bala v. Bankola* (1986) 3 NWLR (Pt. 27) 141 and *Ijebu-Ode Local Government v. Balogun & Co. Ltd.* (1991) 1 NWLR (Pt 166) 136: (1991) 1 SCNJ. 1. Just to mention but a few.

It must always be borne in mind and this is also settled, that it is not sufficient that the Appellate Court would itself, have awarded a different sum if it had been sitting as the court of first instance. See *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) 2 All E.R. 448 P.C. But if the Appellate Court thinks that the damages are radically wrong, it ought to interfere even though the error, cannot be pinpointed. See *Radburn v. Kemp* (1971) 1 WLR 1502 C.A. (England).

However, an Appellate Court, may interfere when it is also shown, that the award, was an entirely erroneous estimate. There are no set and fixed criteria or parametre, for an Appellate Court, to determine what is excessively high or unreasonably low. See also *Zik's Press Ltd, v. Alvan Ikoku* (1951) 13 WACA 188 @ 189. I, find nothing wrong, in the court below, interfering with the said award by the trial court. It had the power to do so. The complaint in respect thereof, with respect, is misconceived and it is rejected by me. I therefore, answer the lone issue of the Cross-Appellant, in the Affirmative.

In the end result, it is from the foregoing and the fuller Judgment of my learned brother, Mukhtar, JSC, of which I am in agreement with the reasoning and conclusions, that I too, dismiss, both the main appeal and

the Cross-Appeal for lacking in merits. I too, affirm the judgment of the court below in its entirety. I abide by the consequential orders in respect of costs in the main and Cross-Appeals.

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