

COURT OF APPEAL
LAGOS DIVISION
14TH JULY, 2005. CA/L/355/2001
CORAM:- K. B. AKAAHS, M. D. MUHAMMAD,
M. L. GARBA, JJCA

1. CHIEF CHRIS OKOLIE

2. NEW BREED ORGANISATION LTD. APPELLANTS
AND

CHIEF F.R.A. MARINHO RESPONDENT

TORTS - Defamation - Libelous publication - Pleadings - Duty of plaintiff - Is to set out the exact defamatory words - But he can take advantage of the defendant's pleadings (H1)

TORTS - Libel - Pleadings - Burden on plaintiff to set out the exact defamatory words - Being for court to determine existence of cause of action - It does not matter which party sets it out - Since a plaintiff can lead evidence - On a point raised in defendant's pleadings (H2)

TORTS - Libel - Defamatory publication - Definition - Includes lowering of integrity - Applicable test - Mitigation - Publishing plaintiff's interview alongside the libelous publication - May only mitigate the damages (H3)

TORTS - Libel - Defences - Reasonable man's test - Applying the principle in this case - The publication against plaintiff is libelous - As rightly found by trial court - Justification or qualified privilege - Is not proved (H4)

TORTS - Libel - Fair comment defence - Where published facts - Are not true, privileged or justified - But prompted by spite and malice - Fair comment will not avail (H5)

TORTS - Libel - Mitigation - Reading the libelous article as a whole -

There is nothing to take away the sting - Not even respondent's interview published alongside (H6)

FACTS

An anti sabotage Tribunal was set up by the Federal Government to try the erstwhile Minister of Petroleum, Professor Tam David-West. The Justice Gusau Tribunal convicted him for enriching Stinnes Interoil Corporation, a company based in the United States of America. The defendants/appellants decided to do a story on the trial of the Minister. They came across a copy of a security report which the Minister had earlier forwarded to the President, tendered by the Minister in his defence. The appellants sought the reactions of all those mentioned in the security document including the plaintiff/respondent. Respondent gave detailed reactions to the issues raised in the security document in an interview he granted to appellants' reporter. Appellants then published the story, and the respondent's interview in their Newbreed Magazine issue of 7th January, 1991.

Aggrieved by the publication, respondent filed an action against appellants before the Lagos High Court, claiming the sum of N5 million as damages for libel. Respondent testified and called two witnesses while appellants called no witness. Only respondent's Counsel addressed the court before the matter was adjourned for judgment. The trial court found that the words complained of defamed the respondent and awarded him N100,000.00 as damages for libel. Being dissatisfied, appellants have now appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether in a libel action, the plaintiff is required by law to set out verbatim the particular passage(s) of a publication which he complains to be defamatory of him.

2. Whether the publication when read as a whole is capable of having a defamatory meaning.

HELD (Unanimously dismissing the appeal per **AKAAHS JCA**)

Defamation - Libelous publication - Pleadings

1. The issue whether the plaintiff is required by law to set out verbatim the particular passage or passages of a publication which he complains to be defamatory of him was dealt with in the case of *Ningi v. First Bank of Nigeria Plc (supra)*. In the judgment of Mohammed JCA (as he then was) he stated the position on page 235 as follows:-

“The law requires that in an action for libel, a plaintiff must set out in his statement of claim the exact words which he alleges to be defamatory of him to enable the court to determine whether the words constitute a ground of action. However if the action is in respect of certain libelous passages in a letter the plaintiff is not required to set out the whole letter, it is sufficient to set out the passages complained of only provided their meaning is clear. See Okafor v. Ikeanyi & Ors (1979) 3-4 S.C. 99,

The paragraphs in the pleadings of the plaintiff and defendants reproduced above have satisfied the requirement of the law that it is sufficient to set out the passage complained of and the meaning should be quite clear. What is more the passage which the plaintiff complained of as being libelous was also produced verbatim in the statement of defence. The plaintiff/respondent is entitled to take advantage of the defendants/appellants’ pleadings to cure any defect in his statement of claim and to proceed to lead evidence thereon where issues are joined or in denial of what is contained in the statement of defence without necessarily amending the statement of claim. (pp. 3914 A/3917 F)

Libel - Pleadings - Burden on plaintiff

2. In allowing the appeal he stated the position of the law when he said at pages 664-665:-

“..... a plaintiff is entitled to lead evidence on any point raised in the defendant’s pleading. Thus as this court had occasion to decide in Amos Bamboye & Ors v. Raimi Olarewaju (1991) 4 NWLR (Pt. 184) 155, following Emgokwe v. Okadigbo (Supra), although the rule is that a party may not be allowed to lead evidence outside his pleadings, a plaintiff will be entitled to lead evidence on a point raised in the defendant’s pleadings.”

By analogy since the sole purpose of setting out the exact words which the plaintiff alleges to be defamatory of him is to enable the court determine whether the words constitute a ground of action for libel or not, it does not matter which of the parties sets out the words or passage which the plaintiff claims to be defamatory. The situation however is different if nobody sets out the words or passage being complained of as defamatory. In that case the burden is on the plaintiff to set them out. The appellants had no duty to set out the words but since they set them out the trial Judge was duty bound to award damages for the libel. Moreover the very words on which the respondent founded his claim were clearly set out in paragraph 5(a)-(e) of the amended statement of claim. (p. 3918 H)

Libel - Defamatory publication - Definition

3. A defamatory publication is one that is calculated to lower the person in the estimation of right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.

The test to be applied in determining whether or not the words complained of are defamatory in their natural and ordinary meaning which is objective is whether under the circumstances a reasonable man to whom the publication was made would likely understand it in a libelous sense. The words must disparage or lower the integrity of the complainant in the estimation of right-thinking members of the society.

The fact that the respondent's interview was published alongside the publication being complained of does not remove it from being a libelous publication. If anything it will only operate in mitigation of damages. It has the same *effect* as the publication apology and retraction of the libel. (p. 3921 E/3922 B)

Libel - Defences - Reasonable man's test

4. Whether under the circumstances, a reasonable man to whom the publication is made would be likely to understand them in a libelous sense.

I have no doubt in my mind that the reasonable man would consider them libelous. Since people have become rather cynical of public office holders, it is not likely that the plaintiff's denial that he had anything to do with *Codec* would be believed nor the fact that he did not receive any commission from Stinnes. The article no doubt disparaged or lowered B the integrity of the plaintiff in the estimation of right thinking members of the society as represented by PW3 and other friends who discussed the article in exhibit P1.

Since there is a finding that the words complained of are capable C of having a defamatory meaning. I have no difficulty in concluding that they are defamatory of the respondent who was directly linked with the infamous conduct of using his office to hide under *Codec* to front for Stinnes and in return collect a commission. No evidence has been ad- D duced by the appellants to prove justification or qualified privilege. (pp. 3923 E/3925 B)

Libel - Fair comment defence

5. Fair comment is available only in respect of expressions of opinions E which are based on facts which are proved true and on statements of fact not proved true but which were made on a privileged occasion. In this appeal, the appellants cannot succeed in fair comment because the facts have been shown to be untrue by the respondent who testified on F oath and denied all the allegations but the appellants did not lead evidence to prove their averments. The learned trial Judge found that the plaintiff's evidence was unchallenged and uncontradicted. The appellants had no justification whatsoever in portraying the respondent as a reckless and G unpatriotic officer and a person who compromised his official position by hiding behind *Codec* to front for Stinnes for which he received a commission if they were prompted by spite and malice to publish the security briefing which turned out to be false. (p. 3924 A)

Libel - Mitigation

6. To have stated categorically in the said security briefing that
"The god-father of Codec international and chairman is retired

General Akinrinade and he is understood to be assisted by Festus Marinho and Sam Akpe, two officials at the NNPC” and proceeding further with these remarks-

B “There is absolutely no excuse for Nigeria to allow a group of NNPC officials to work profitably in conjunction with a company that is known to have defrauded the government of \$150,000,000.00. You are best advised to conduct business with groups who are well known and established and not letter box companies who can only be fronts.”

C is highly libelous of the respondent. Reading the article as a whole including a consideration of the caption, the subtitles and the interview given by the respondent will not alter the position concerning the fact that the publication directly libeled the respondent. There is nothing to take away the sting of the libel which the respondent complained of. (p. 3924 D)

D

NOTABLE POINTS OF INTEREST

AKAAS JCA

1. Need for court to assist a party that has problem with representation

E I cannot but observe that it is rather strange for the learned trial Judge to have made a case for the appellants’ inability to adduce evidence on account of the difficulty they encountered with the counsel they engaged for the defence. Since this has not been made a ground of appeal, I do not intend to comment further but suffice it to say that it is incumbent on F a trial court to assist a party who has problem of representation by way of granting such a party reasonable adjournment to enable that party engage legal representation that will effectively put across its case to the trial Judge for proper consideration. It is to be presumed that this was G done considering the long period of adjournment between the 27/3/96 when the plaintiff closed his case and it was adjourned for defence and the 25/11/98 (a period of over two years) when plaintiff’s counsel addressed the court. (p. 3925 C)

H

GARBA JCA

2. Failure to lead evidence - Implications

From the record of appeal before us though the appellants did file a

statement of defence to the claims against them by the respondent, they did not call evidence to support the averments contained therein. The position of the law is that pleadings are the body and soul of any case in a skeleton form and are built and solidified by the evidence in support thereof. They are never regarded as evidence by themselves and if not B supported by evidence, they are deemed abandoned.

The further legal effect of the appellants' failure to call evidence in defence of the claim against them at the trial is that they are assumed to have accepted the evidence adduced by the respondent in support of his C claims.

In addition, where only one party called evidence, here the respondent in this appeal and plaintiff in the court below, minimum proof is required by law in order for the claims to succeed. (p. 3926 C/F/G)

D

REPRESENTATION

Chief Mike Okoye with Vincent Obianoyi, Chima Adiele and Miss Nkem Umeh for appellants.

Pekun Sowole with Mrs. Ngozi Okechukwu and Miss Ginika Udeh for E respondent.

CASES REFERRED TO

Ningi v. FBN Plc (1996) 3 NWLR (Pt. 435)220

F

Okafor v. Ikeanyi Ors (1979) 3-4 S.C 99

Onyejike v. Anyason (1992) 1 NWLR (Pt. 218) 437

Olaifa v. Aina (1993) 4 NWLR (Pt. 286)192

Hill Station Hotel Limited v. Adeyi (1996) 4 NWLR (Pt. 442) 294

G

Dokubo v. Omoni (1999) 8 NWLR (Pt. 616) 647

Communications Limited v. Miss Stanch NWLR(pt. 549)197

Alataha v. Asin (1999) 5 NWLR (Pt.601) 32

Garba v. Lobi Bank (2003) FVVL R (Pt. 173) 106

H

Ezeannah v. Atta (2002)17 WRN 1; (2004) 2 S.C (pt.11)

NEPA v. Alii (1992) 8 NWLR (Pt.259) 279

Buraimoh v. Bamgboye (1989) 3 MWLR (Pt.109) 352 at 363

Mogaji v. Odofin (78) 4 S.C 91

USA v. Balogun (1992) 6 NWLR (Pt.247) 266

Akibu v. Oduntan (2000) 10 WRN 48; (2001) 13 NWLR (Pt.685) 446

LEAD JUDGMENT BY AKAHHS JCA

B The Federal Government of Nigeria constituted the Anti Sabotage Tribunal to try the erstwhile Minister of Petroleum, Professor Tam David West for various offences bordering on economic sabotage. The said Anti Sabotage Tribunal presided over by honourable Justice Gusau tried and convicted Professor Tam David West for enriching Stinnes InterOil Corporation, a company based in the United States of America.

D The defendants now appellants decided to do a story on the trial of the Minister. They carried out some investigation before writing the story and they came across a copy of a security report which the Minister had earlier forwarded to General Ibrahim Babangida who was then President of the Federal Republic of Nigeria. During his trial, the Minister tendered a copy of the document in his defence. The appellants sought the reactions of all those mentioned in the security document including the respondent. The respondent gave detailed reactions to the issues raised in the security document in an interview he granted to the reporter of the appellants. The appellants then published the story in their New breed Magazine issue of January 7th 1991 under the cover story titled "Tam David West: The Real Story." The interview granted by the Respondent was also published under the caption "I am a Little more than a Christian."

G The respondent as plaintiff took out a writ of summons dated 14th March, 1999 claiming the sum of N5,000,000.00, (five million naira) as damages for libelous publication against him in the appellants' president magazine issue of January 7th 1991. Pleadings were filed and the case went to trial with the respondent testifying and calling two other witnesses. The appellants did not call any witness but relied on the evidence called by the respondent. Only the respondent's counsel addressed the court before the matter was adjourned for judgment. The learned trial Judge entered judgment in favour of the respondent as plaintiff holding

that the words complained of were capable of having defamatory meaning and did defame the plaintiff and awarded him N100,000.00 as damages for libel. Being dissatisfied with the said judgment the appellants appealed against it in the notice of appeal dated 12th February, 2001.

Two issues were formulated in the appellants' brief as follows:-

1. Whether in a libel action, the plaintiff is required by law to set out verbatim the particular passage(s) of a publication which he complains to be defamatory of him.

2. Whether the publication when read as a whole is capable of having a defamatory meaning.

The respondent also formulated two issues for determination thus:

"2.1 Whether the writ of summons which based its claim for libel on pages 3, 5, 6, 7 and 8 of a published magazine (which was intended to be tendered and was indeed tendered) needed to quote verbatim the wording of the pages of the magazine to show the libel, which however were detailed in paragraphs 5, 5(a) - (c) and 9 of the statement of claim constitute a cause of action."

2.2 Whether the words complained of are defamatory."

Issue No. 1

Learned counsel for the appellants argued that it is not enough to set out the substance or effect of the libel for in an action for libel, a plaintiff must of necessity rely on the precise words alleged to be defamatory and therefore, they must be set out *verbatim* in the statement of claim. Reliance for this submission was placed on the following cases.

Okafor v. Ikeanyi (1979) 3-4 S.C. 99, *Ningi v. FBN Plc* (1996) 3 NWLR (Pt. 435) 220. It is submitted that paragraphs 5 (a) - (e) and 9 failed this test in its entirety.

It was submitted on behalf of the respondent that where the writ of summons specified the pages of the magazine containing the libelous words and the magazine is tendered the requirements of the law is satisfied. As the statement of claim supersedes the writ of summons, in paragraphs 5, 5(a) - (c) and 9 of the statement of claim the exact words complained of as libelous are stated and therefore satisfied the requirement of the law.

Learned counsel further contended that this point was not raised in the High Court and so urged the Court of Appeal to dismiss the appeal.

The issue whether the plaintiff is required by law to set out verbatim the particular passage or passages of a publication which he complains to be defamatory of him was dealt with in the case of *Ningi v. First Bank of Nigeria Plc (supra)*. In the judgment of Mohammed JCA (as he then was) he stated the position on page 235 as follows:-

*“The law requires that in an action for libel, a plaintiff must set out in his statement of claim the exact words which he alleges to be defamatory of him to enable the court to determine whether the words constitute a ground of action. However if the action is in respect of certain libelous passages in a letter the plaintiff is not required to set out the whole letter, it is sufficient to set out the passages complained of only provided their meaning is clear. See *Okafor v. Ikeanyi & Ors (1979) 3-4 S.C. 99*, *Onyejike v. Anyason (1992) 1 NWLR (Pt. 218) 437* and *Olaifa v. Aina (1993) 4 NWLR (Pt. 286)192.*”*

In paragraphs 5, 5(a) - (e) and 9 of the amended statement of claim the plaintiff averred as follows:-

“5. By their publication of January, 1991, the defendants published a libelous article of the plaintiff on pages 3, 5, 6, 7 and 8 alleging that he is one of the 3 persons behind the company named “Codec” which is fronting for Stinnes Interoil in Nigeria, the company involved in the case for which Professor Tam David West was prosecuted and convicted.

5(a) The plaintiff avers that the said article goes further that the plaintiff and 2 others were “implicated by a security briefing which David West turned over to President Ibrahim Babangida but which was not disclosed until this report.”

5(b) The article goes on page 5 that the country's resources particularly petroleum being the main stay of the Nigeria economy, very careless attention was paid to its operations at least before and during David West's tenure (when the plaintiff was the managing director).

5(c) The article at page 6 states that for fronting for Stinnes Codec

was receiving a commission of N5.00 (five naira) per ton of gas.

5(d) At the same page 6, the article states categorically that the god-father of Codec (the fronting company and chairman) is General Akinrinmade and “he is understood to be assisted by Festus Marinho.....”

5(e) Further on page 6, the article states that there is NO excuse for Nigeria to allow a group of NNPC officials to work profitably in conjunction with a company that is known to have defrauded the government of \$150,000,000.00.

9. The plaintiff further avers that well before the said publication, the defendants through their correspondents went to the plaintiff and were granted long and exhaustive interviews during which the plaintiff not only denied any knowledge of the company Codec or being associated with it, but gave full explanations as to his position and role during his tenure in the NNPC.”

The defendants joined issue with the plaintiff on whether the passages being complained about were defamatory or not when they pleaded in paragraphs 5 and 6 of the statement of defence as follows:-

“5. The defendants confirm that the words complained of constitute and are a fair and accurate report of proceedings in a tribunal of justice open to the public namely the trial of the former Minister of Petroleum, Professor Tam David- West, tried before the honourable Justice Gusau at the Anti Sabotage Tribunal in Lagos, a Tribunal exercising judicial authority and the said words were published without any malice towards the plaintiff, but bonafide for the information of the public.

6. In so far as the words consist of allegations of fact, they are a fair and accurate report and in so far as they consist of expressions of opinion they are fair and impartial comments published in good faith and without malice to the plaintiff on a matter in which the public was legitimately concerned, namely a security briefing to the said Professor Tam David-West on the Stinnes/Codec scandal in the Nigerian oil industry which the said briefing formed:-

(a) The subject of briefing by the said Professor Tam David-West to the Head of State, particularly the documents sent by the former to the

latter via letter dated 7/3/85.

(b) part of the documents sent by the said Professor Tam David West to both the State Security Service and the Co-ordinator on National Security, and

B *(c) Parts of the exhibits in the judicial proceedings mentioned in paragraph 4 above.*

Particulars:

Full text of the said security briefing

To: Professor Tam David West, F.A.S.

C *The Honourable Minister of Petroleum and Energy,
Nigerian National Petroleum Corporation,
Falomo Office Complex*

Ikoyi

D *Lagos.*

Security Briefing Codec International

(b) This company is a front for Stinnes InterOil. Stinnes is currently owing the Federal Government \$150,000,000.00. 'For part of 1984 Stinnes was obtaining petroleum products from Gulf oil which itself has a fuel oil contract with the Nigerian National Petroleum Corporation. Gulf oil however has increasingly cut back on delivering to Stinnes in order to avoid embarrassment of being seen to deal with a blacklisted group.

F *Stinnes therefore organized a new method of obtaining petroleum products through a group called Codec. Codec currently has a gas oil contract with NNPC. Codec International is a totally unknown actor in the oil industry precisely because it is a front company. Its office address: Wellington Road, St. John's Wood, London NW8 is a private residence of*

G *a Nigerian citizen. The letter of credit by which Codec pays for the petroleum products is opened for them by Stinnes acting through United Overseas Bank (UOB) in Geneva. International Merchant Bank (IMB) is the local bank involved at the Nigerian end but are probably unaware of the*
H *link-up. Codec had considerable problems opening the letter of credit in December 1984 and January 1985 precisely because of the problems of organizing the letter of credit without their name appearing. The desk officials who oversee Codec business are Mr. Robert Goldman; the Nige-*

ria contact men are Dr. Caxton Fatanmi and Mr. Adegbite. The bank official who is handling the Stinnes/Codec deception at the UOB and who knows fully well that Codec is not the real opener of the letter of credit is Mr. Faessler. Lawyer for Codec International is Mr. Jeffery Tesleb who is a well known lawyer representing middle east and African clients in commission deals. Stinnes man handling this deal is Mr. Heino Clements. Stinnes is paying a commission of \$55.00 per ton of gas oil to Codec for acting as front in this transaction. Funds are being paid to General Marketing Corporation which has an account at the Trade Development Bank in Geneva, Switzerland.

This corporation is then to transfer funds to Codec at Standard Chartered Bank in Zurich, Switzerland. The godfather of Codec International and Chairman is retired General Akinrinade and he is understood to be assisted by Festus Marinho and Sam Akpe, two officials at the NNPC. Documentary evidence is available but we are trying to find a way of relaying this information without betraying the identity of our informant. It is however, obvious that with this document alone, the Minister has more than enough evidence to work on.

There is absolutely no excuse in Nigeria to allow a group of NNPC officials to work profitably in conjunction with a company that is known to have defrauded the government of \$ 150,000.00. You are best advised to conduct business with groups who are well known and established and not letter box companies who can only be fronts. Stinnes are now openly laughing at us."

The paragraphs in the pleadings of the plaintiff and defendants reproduced above have satisfied the requirement of the law that it is sufficient to set out the passage complained of and the meaning should be quite clear. What is more the passage which the plaintiff complained of as being libelous was also produced verbatim in the statement of defence. The plaintiff/respondent is entitled to take advantage of the defendants/appellants' pleadings to cure any defect in his statement of claim and to proceed to lead evidence thereon where issues are joined or in denial of what is contained in the statement of defence without necessarily amending the state-

ment of claim. See: Hill Station Hotel Limited v. Adeyi (1996) 4 NWLR (Pt. 442) 294, Dokubo v. Omoni (1999) 8 NWLR (Pt. 616) 647. In Dokubo v. Omoni supra the appellants as plaintiffs sought for the following reliefs:-

B "(i) A declaration of plaintiffs' right of occupancy over the piece and parcel of land known as 'Igi-Piri' and the Iga Creek situate at Abalama.

C (ii) A perpetual injunction restraining the defendants and their servants from committing any trespass on the said land and creek and claiming compensation due on the land and creek from (Guffanti Nigeria Limited, West-Minster Dredging Company Limited, or from any other company or persons; or the Degema Local Government Council; and

D (iii) N50, 000.00 general damages for trespass committed thereon."

After pleadings were filed and exchanged, the parties testified and judgment was entered in the plaintiffs' favour which was later reversed by the Court of Appeal. The plaintiffs/appellants then appealed to the Supreme Court and the decision turned on the pleadings where they had alleged that they were the first to settle on the disputed land and (Iga-giri) King Amachree was informed so that no other group will be granted right of occupancy over the same land and this led the Court of Appeal to hold that the appellants failed to prove a grant. In his judgment Onu JSC distinguished the case from the decisions in *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 and *Kadumi Ajeja v. Ezekiel Ajayi* (1969) 1 All NLR 72. He referred to paragraph 4 of the respondents' statement of defence where they denied that the appellants ever settled on the land in dispute or that they traditionally informed King Amachree of their settlement thereon. They went on to plead that they also obtained the permission of the same Amachree IV. He then found that whether the appellants or the respondents or both took permission of King Amachree was clearly an issue in respect of which both parties were free to lead evidence. **In allowing the appeal he stated the position of the law when he said at pages 664-665:-**

“..... a plaintiff is entitled to lead evidence on any point raised in the defendant’s pleading. Thus as this court had occasion to decide in Amos Bamboye & Ors v. Raimi Olarewaju (1991) 4 NWLR (Pt. 184) 155, following Emgokwe v. Okadigbo (Supra), although the rule is that a party may not be allowed to lead evidence outside his pleadings, a plaintiff will be entitled to lead evidence on a point raised in the defendant’s pleadings.”

By analogy since the sole purpose of setting out the exact words which the plaintiff alleges to be defamatory of him is to enable the court determine whether the words constitute a ground of action for libel or not, it does not matter which of the parties sets out the words or passage which the plaintiff claims to be defamatory. The situation however is different if nobody sets out the words or passage being complained of as defamatory. In that case the burden is on the plaintiff to set them out. The appellants had no duty to set out the words but since they set them out the trial Judge was duty bound to award damages for the libel. Moreover the very words on which the respondent founded his claim were clearly set out in paragraph 5(a)-(e) of the amended statement of claim. See: *Okpozo v. Bendel Newspaper Corporation* (1990) 5 NWLR (Pt.153) 652 where Ogundare JCA (as he then was) applied the reasoning of Denning M.R. in *Collins Jones* (1955) 1QB 564. Issue No. 1 is therefore resolved against the appellants.

Turning to the second issue, learned counsel for the appellants adopted the arguments in respect of the first issue and submitted that the test to be applied in determining whether or not the words complained of are defamatory in their natural and ordinary meaning is whether under the circumstances, a reasonable man to whom the publication is made would be likely to understand them in a libelous sense and the test is an objective one citing (in aid) the case of *Complete Communications Limited v. Miss Bianca Onoh* (1998) 5 NWLR (pt. H 549)197. It was argued that even if the appellants' publication of the security briefing was uncomplimentary of the person of the respondent, it is on record that the respondent granted an extensive and detailed inter-

view to the representatives of the appellants, wherein he was opportuned to deny any involvement with *Codec* and the interview was published side by side with the security briefing and this removed the damaging sting in the security briefing placing reliance on *Mshelia v. Barde* (1978) NNLR 29; (1978) 9 FCA 7. Learned counsel further contended that a libel published in a newspaper should be construed not only with regards to the content of the actual paragraphs but the whole passage including the headlines and subtitles and this position of the law was confirmed by the Supreme Court in *Katto v. CBN* (2000) 18 WRN 108; (1999) 6 NWLR (Pt. 607) 390 at 408 where it was stated that:-

“In an action ‘or defamation, published words complained of must be read as a whole.”

Learned counsel then posed the question whether a reasonable man reading the publication of the security briefing and the interview of the respondent would come to a conclusion that the entire publication in the Newbreed Magazine of January 7th, 1991 was capable of having a defamatory meaning against the respondent and answered the question in the negative. He submitted that the learned trial Judge erred in his duty of applying the “reasonable man’s test” to determine whether the words were defamatory, as he paid no attention to other contents of the publication apart from pages 3, 5, 6, 7 and 8 especially the respondent’s interview at pages 44-49 of the record. The Court thereby failed to examine the ingredients of defamation and make findings thereon placing reliance on *Salawal Motor House Limited v. Lawal* (1999) 9 NWLR (Pt. 620) 692 at 704. Referring to portions of the evidence given by the respondent and his witnesses, it was contended that had the trial Judge read the whole sides of the publication, he would not have made the findings that the words complained of were defamatory of the respondent. He finally submitted that reading the publication as a whole and bearing in mind the circumstances under which it was written (i.e. concerning the issues in which Professor Tam David-West was tried and convicted) the publication in the eye of an ordinary reasonable person is not defamatory of the respondent. He therefore urged us to resolve this issue in favour of the appellants and dismiss the respondent’s claim on this ground.

The reply by learned counsel for the respondent on this issue is quite brief. Learned counsel contended that once a publication is proved to be false, libel is established and the article was shown to be false by the respondent's evidence. Since the appellants admitted the publication in which the respondent's name was referred to in the article a number of B times and the respondent denied all the allegations on oath coupled with the fact that the learned trial Judge considered the plaintiff's evidence and held that his evidence was unchallenged and uncontradicted, he was therefore right in finding libel against the defendants after reading and considering the ordinary meaning of the words complained of. It was further C submitted that although the appellants joined issues in their defence, they rendered their pleadings useless and irrelevant when they failed to call any evidence in their defence. It was submitted that the actual words D used in the publication which referred to the respondent were malicious, false and highly defamatory by their ordinary meaning which were intended to damage the Respondent's hard earned reputation and to bring him into ridicule in the mind of ordinary reasonable people.

Is the publication defamatory? E

A defamatory publication is one that is calculated to lower the person in the estimation of right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to F him in his office, profession, calling, trade or business. See: *The Sketch Publishing Company Limited and Others v. Alhaji Ajagbemokeferi* (1989) 1 NWLR (Pt.100) 678, *Benue -Printing and Publishing Corporation v. Alhaji Gwagwada* (1989) 4 NWLR (Pt.116) 439, *Complete G Communications Ltd v. Onoh* (1998) 5 NWLR (Pt.547) 197 at 218. **The test to be applied in determining whether or not the words complained of are defamatory in their natural and ordinary meaning which is objective is whether under the circumstances a reasonable H man to whom the publication was made would likely understand it in a libelous sense.** See: *Okafor v. Ikeanyi* (1979) 3-4 S.C 99, *Dumbo v. Idugboe* (1983) 1 SCNLR 29. **The words must disparage or lower the integrity of the complainant in the estimation of**

right-thinking members of the society; See: *Egbuna v. Amalgamated Press* (1967) 1 All NLR 25. Learned counsel for the appellants has argued that since the respondent granted an extensive and detailed interview to the representatives of the appellant wherein he was opportuned to clarify his role in the trial of Professor Tam David-West and denied his involvement with *Codec* which was published side by side with the security briefing (the alleged libelous publication) this removed the damaging sting from the publication. **The fact that the respondent's interview was published alongside the publication being complained of does not remove it from being a libelous publication. If anything it will only operate in mitigation of damages. It has the same effect as the publication apology and retraction of the libel.** See *Complete Communications Ltd v. Onoh supra* at page 222.

In paragraphs 9, 10, 11, 12 and 13 of the amended statement of claim, the plaintiff averred as follows:-

"The plaintiff further avers that well before the said publication, the defendants through their correspondents went to the plaintiff and were granted long and exhaustive interviews during which the plaintiff not only denied any knowledge of the company Codec or being associated with it, but gave full explanations as to his position/role during his tenure in the NNPC.

The plaintiff states that it was after the interviews that the plaintiff (sic) published its articles on the impression that even after the interview it "unmasked" all the sordid details they gave in their article.

The plaintiff therefore states that the publication is not only malicious and reckless, it was a deliberate attempt to link the plaintiff with the scandals of Stinnes and to bring him and his family down in the public estimation and ruin him.

The plaintiff will show at the trial, that the article horrified many well meaning people who have known the plaintiff for many years and cast a serious aspersion and doubt about his reputation and integrity in their minds.

The article in its ordinary meaning is very clear in representing the plaintiff as careless official, an official who will work in conjunction with

foreigners to defraud his country, a person who is prepared to be part of a company which is fronting for another company owing Nigeria, and at the same time earning commission at the expense of his country.”

The plaintiff gave evidence and called two other witnesses namely his wife ‘who testified as PW2 and Mr. Basil Abiodun Lawson who gave evidence as PW3. In his evidence in-chief PW3 stated:-

“I have always known Chief Marinho as an honest, God fearing, efficient officer. So these comments created doubts in my mind..... I later found that quite a number of our friends saw and discussed this article and like me they had doubt about Chief Marinho based on the contents of the article. I have always known Chief Marinho since our school days and ever since we have been Church (*sic*). We attend Church at the Catholic Church at Falomo and we belong to the same Catholic Society in Lagos. The article created doubt in my mind about the pious honest Chief Marinho I knew. I felt that unless the impression created by the article is corrected somehow and is made public one would feel that the contents of the article are correct.

Learned counsel for the appellants stated the law correctly when they argued in paragraph 5.01 of their brief at page 7 that the test to be applied in determining whether or not the word complained of are defamatory in their natural and ordinary meaning is **whether under the circumstances, a reasonable man to whom the publication is made would be likely to understand them in a libelous sense. I have no doubt in my mind that the reasonable man would consider them libelous. Since people have become rather cynical of public office holders, it is not likely that the plaintiff's denial that he had anything to do with Codec would be believed nor the fact that he did not receive any commission from Stinnes. The article no doubt disparaged or lowered the integrity of the plaintiff in the estimation of right thinking members of the society as represented by PW3 and other friends who discussed the article in exhibit P1.**

The appellants as defendants raised the issue of fair and accurate reporting of proceedings in a tribunal of justice which was open to the public which should give them absolute privilege and therefore not

render them liable but the evidence given by the respondent shows that the publication was done long after the trial of Professor Tam David-West had taken place. They also pleaded fair comment and that there was no malice in the publication. **Fair comment is available only in respect of expressions of opinions which are based on facts which are proved true and on statements of fact not proved true but which were made on a privileged occasion. In this appeal, the appellants cannot succeed in fair comment because the facts have been shown to be untrue by the respondent who testified on oath and denied all the allegations but the appellants did not lead evidence to prove their averments. The learned trial Judge found that the plaintiff's evidence was unchallenged and uncontradicted. The appellants had no justification whatsoever in portraying the respondent as a reckless and unpatriotic officer and a person who compromised his official position by hiding behind *Codec* to front for Stinnes for which he received a commission if they were prompted by spite and malice to publish the security briefing which turned out to be false. To have stated categorically in the said security briefing that**

“The god-father of Codec international and chairman is retired General Akinrinade and he is understood to be assisted by Festus Marinho and Sam Akpe, two officials at the NNPC” and proceeding further with these remarks-

“There is absolutely no excuse for Nigeria to allow a group of NNPC officials to work profitably in conjunction with a company that is known to have defrauded the government of \$150,000,000.00. You are best advised to conduct business with groups who are well known and established and not letter box companies who can only be fronts.”

is highly libelous of the respondent. Reading the article as a whole including a consideration of the caption, the subtitles and the interview given by the respondent will not alter the position concerning the fact that the publication directly libeled the respondent. There is nothing to take away the sting of the libel which the respondent complained of. I therefore cannot see the error committed by the learned trial Judge when he concluded in his judgment at page 55 of the record:-

By the statement of claim as amended the words complained of are on pages 3, 5, 6, 7 and 8 and reading the contents of those pages in exhibit PI. 1 have no difficulty in arriving at the conclusion that the words complained of were undoubted (*sic*) capable of having a defamatory meaning. I hold that they are capable of having a defamatory meaning.” B

Since there is a finding that the words complained of are capable of having a defamatory meaning. I have no difficulty in concluding that they are defamatory of the respondent who was directly linked with the infamous conduct of using his office to hide under *Codec* to front for Stinnes and in return collect a commission. No evidence has been adduced by the appellants to prove justification or qualified privilege. C

I cannot but observe that it is rather strange for the learned trial Judge to have made a case for the appellants’ inability to adduce evidence on account of the difficulty they encountered with the counsel they engaged for the defence. Since this has not been made a ground of appeal, I do not intend to comment further but suffice it to say that it is incumbent on a trial court to assist a party who has problem of representation by way of granting such a party reasonable adjournment to enable that party engage legal representation that will effectively put across its case to the trial Judge for proper consideration. It is to be presumed that this was done considering the long period of adjournment between the 27/3/96 when the plaintiff closed his case and it was adjourned for defence and the 25/11/98 (a period of over two years) when plaintiff’s counsel addressed the court. D E F

In conclusion I find that there is no merit in appeal and it is accordingly dismissed. I affirm the judgment of Sahid J. delivered on 16/11/2000. I assess costs of N10,000 against the appellants in favour of the respondent. G

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MUHAMMAD JCA

I have a preview of the lead judgment of my learned brother Akaahs JCA. I entirely agree with his Lordship that the appeal lacks merit and I

also, relying on the reasonings and conclusions in the lead judgment, dismiss the appeal. I abide by all consequential orders including the order on costs contained in the lead judgment.

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GARBA JCA

I have read the draft of the lead judgment prepared by my learned brother Akaahs, JCA.

C

The appellants' appeal appears to have been rather based or built on a shaky ground and foundation from the lower court.

D

From the record of appeal before us though the appellants did file a statement of defence to the claims against them by the respondent, they did not call evidence to support the averments contained therein. The position of the law is that pleadings are the body and soul of any case in a skeleton form and are built and solidified by the evidence in support thereof. They are never regarded as evidence by themselves and if not supported by evidence, they are deemed abandoned. See *Ekeretsu v. Oyobebere* (1992) 11 and 12 SCNJ 189; (1992) 9 NWLR (Pt. 166) 438, *Egbunike v. A.C.B* (1995) 2 NWLR (Pt.375) 34, *Shell . Ambah* (1999) 3 NWLR (Pt.593) 1 at 14, *Chime v. Chime* (2001) 9 WRN 113; (2001) 3 NWLR (Pt.701) 527 at 556, *Garba v. Lobi Bank* (2003) FWLR (Pt. 173) 106 and *Ezeannah v. Atta* (2002)17 WRN 1; (2004) 2 S.C (pt.11)

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The further legal effect of the appellants' failure to call evidence in defence of the claim against them at the trial is that they are assumed to have accepted the evidence adduced by the respondent in support of his claims. See *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt.110) 417, *University of Calabar v. Ephraim* (1993) 1 NWLR (Pt.271) 551 and *Nigerian Housing Development Association v. Mumuni* (1977) 2 S.C 57.

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In addition, where only one party called evidence, here the respondent in this appeal and plaintiff in the court below, minimum proof is required by law in order for the claims to succeed. See *Ajero v. Ugorji* (1999) 7 S.C (Pt. 1) 58 at 76; (1999) 9 NWLR (Pt. 621) 13, *NEPA v. Alli* (1992) 8 NWLR (Pt.259) 279, *Buraimoh v. Bamgboye* (1989) 3 NWLR (Pt.109) 352 at 363, *Mogaji v. Odofin* (78) 4 S.C 91 and *UBA v. Balogun*

(1992) 6 NWLR (Pt.247) 266.

By resting their case on that of the respondent at the trial, the appellants had with their eyes wide opened taken the enormous risk of blowing a muted trumpet when the situation called for the beating of justification or fair comment drums they claimed to possess. The lower court had little or no choice but accept the unchallenged and uncontroverted evidence placed before it by the respondent since from the record of appeal, it was not discredited by the appellants during cross examination. See *Omoregbe v. Lawani* (1980) 3-4 S.C 108, *American Cynamid v. Vitality Pharmaceuticals* (1991) 2 SCNJ 42 at 50, *Alfontin v. Attorney General of the Federation* (1996) 12 SCNJ 236 and *Otuedon v .Olughor* (1997) 7 SCNJ 411 at 434. C

Now in their issue No. 1, the appellants are challenging the averments of the respondent in paragraphs 5, 5(a), 5(b), 5(c), 5(d), 5(e) and 9 of the statement of claim. The appellants did not challenge these averments of facts at the trial by choosing not to call evidence in support of their statement of defence. Even in the address of the counsel for the appellants at the end of evidence adduced by the respondent, the issue was not mentioned or raised before the lower court. D E

The issue was therefore not raised in the trial court and that court did not make a pronouncement on the issue. In the circumstances, there is no decision of the lower court on the issue from which an appeal could be filed in this court in respect thereof. The established principle of law is that a ground of appeal must be predicated on the decision appealed against otherwise it would be incompetent. See *Coker v UBA* (1997) 2 NWLR (Pt.490) 641, *Alataha v. Asin* (1999) 5 NWLR (Pt.601) 32, *Akibu v. Oduntan* (2000) 10 WRN 48; (2001) 13 NWLR (Pt.685) 446, *Alake v. Abalaka* (2003) 6 NWLR (Pt.815) 124 and *Kano Text Printers v. Gloede and Hoff* (2005) 30 WRN 73; (2005) 5 S.C 140 at 144. For that reason, I agree that appellants' ground No. 1 on their notice of appeal and issue No.1 formulated therefrom are both incompetent and liable to be discounted in this appeal. F G H

The appellants' issue No.2 is plainly challenging the evaluation of the evidence by the lower court in respect of the libelous words com-

plained of by the respondent.

The circumstances in which this court would interfere with the findings of fact by trial courts have been sufficiently set out in the lead judgment and I need not over flog them.

B I do agree that none of such circumstances or situations have been demonstrated by the appellants to warrant the interference by this court with the decision of the lower court on the defamatory nature of the words complained of by the respondent. I join my brother in the lead
C judgement to dismiss the appeal in the terms set out therein.

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