

COURT OF APPEAL
14TH JULY, 2009. CA/PH/159/2002
CORAM:- T. ABDULLAHI, K. M. O. KEKERE-EKUN,
E. EKO, JJCA

1. MR. ANDY OBIORA ONWUGHALU APPELLANTS
2. MR. ISAIAH SAMPSON
AND
1. DR. EMMANUEL O. UCHE RESPONDENTS
2. MRS. J. N. UCHE

TORTS - Negligence - Definition - It is the omission to do something
- Which a reasonable man would do - Or doing something which a
reasonable man would not do (H1)

EVIDENCE - Proof - Sufficiency of witnesses - Though respondents
were not bound to call a host of witnesses - To prove their claim - In
view of the burden on them - It would have been prudent to do so
(H2)

ACCIDENTS - Proof - Corroboration - Position of lorry - Respondents
adduced no evidence - To show that it obstructed the road - Whereas
Exhibit S corroborates appellants' evidence - That it was parked off
the road (H3)

EVIDENCE - Evaluation - Findings - Setting aside of - Though an
appellate court will not ordinarily interfere with a finding - It would set
it aside - Where it is not borne out of proper evaluation of evidence
(H4)

DAMAGES - Quantum - Award in excess of claim - Propriety - It is
patently wrong in law - As it amounts to making a different case - From
what is placed before the court by parties (H5)

FACTS

The plaintiffs/respondents sued the defendants/appellants at the
high court claiming damages for negligence in that appellants had
allegedly obstructed the road with their lorry, and without placing
necessary caution signs, thereby causing the 1st respondent to collide

with the lorry, while driving the 2nd respondent's car, and to sustain injuries to his person and to the car. Appellants denied all the material allegations.

Though respondents called four witnesses, none of them was an eye-witness of how the accident happened. Moreover, not only do appellants claim to have parked their lorry outside the road but this piece of claim was corroborated by Exhibits S, sketch map, drawn by PW 4. After trial, the learned trial judge gave judgment to respondents and even awarded damages in excess of what was claimed by them. Aggrieved, appellants have brought this appeal against the judgment of the trial court.

ISSUES FOR DETERMINATION

“(1) Whether there was sufficient evidence on which the learned trial Judge found the Defendants liable for negligence.

(2) Whether the learned trial Judge was right in the award of damages against the Defendants.

(3) Whether the failure of the learned trial Judge to make a specific finding on the time of the accident was so fatal to the Appellants' case as to occasion a miscarriage.”

HELD (Unanimously allowing the appeal per **ABDULLAHI JCA**) **TORTS - Negligence - Definition**

1. Let me say that it is elementary to define negligence as the omission to do something which a reasonable man guided upon consideration which regulates the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

I am of the considered view that a charge of negligence would arise where a breach of the duty of care owed by one person to the other is alleged. (p. 1597 A)

EVIDENCE - Proof - Sufficiency of witnesses

2. From the evidence of this witness, it was not only him that) was making trouble allegedly with the driver of the lorry because he said, other people were also asking the Appellant why he did so. Though the respondents were not bound to call a host of witnesses to prove their claim, but in view of the burden of proof that has been placed by law on them, it would have been prudent for them to have done so.

I have earlier stated in this evidence that PW3 did not know how

the accident occurred. That being the case he could not give evidence of whether the lorry being driven abruptly stopped in the middle of the road. (p. 1601 E)

Accidents - Proof - Corroboration - Position of lorry

3. DW1 also affirmatively asserted that he placed the road signs where he parked the vehicle, one at the back of the vehicle and the other in front of it. DW1 categorically stated that “the road was clear or empty as people and vehicles were passing.” The Respondents on the other side did not adduce iota of evidence to the effect that the road was obstructed by the lorry of the Appellants.

Exhibit S is the sketch map, drawn by PW4, a cursory look at the said map shows that the vehicle was not parked in the middle of road as claimed by PW1, the 1st Respondent. The lorry was cleared off the road from the sketch map. This has in a way corroborated the evidence of the Appellants that they parked off the road. (p. 1602 B)

EVIDENCE - Evaluation - Findings - Setting aside of

4. I am of the considered opinion that had the trial Judge evaluated properly the pieces of evidence highlighted above, she would have come to a different conclusion from the one she arrived at. Though an appellate Court will not ordinarily interfere with the findings and conclusions of the trial Court, it can do so when such findings and conclusion arrived at by the trial Court are not borne out of proper evaluation of the evidence. I am of the considered view in the light of all that has been said that the findings and conclusions reached by the lower Court are not borne out of the evidence adduced and are therefore perverse. I set same aside. (p. 1602 F)

DAMAGES - Quantum - Award in excess of claim

5. In paragraph 8 of their amended statement of claim, the Plaintiffs/ Respondents claimed the sum of N2,190,341.00 (Two Million, One Hundred and Ninety Thousand, Three Hundred and Forty One Naira) as cost of specialised medical treatment. See pages 10-11 of the record. Curiously, the Court awarded N3 Million which is more and above what the Respondents claimed in their pleadings. Let me say without mincing any word that what the trial Court did was improper. In fact what the trial Judge did was making out for the Respondents

a different case from the one placed before her for adjudication. This is patently wrong in law. (p. 1603 A)

NOTABLE POINT OF INTEREST

EKOJCA

B 1. *S. 149 (d) of Evidence Act applies*

The “good Samaritan” who told 1st Respondent (PW.1) that the DW.1 (2nd Defendant) did not put warning signs is a material witness whose evidence could be produced. His evidence was not produced and no explanation was given for the failure to produce him. The presumption under section 149 (d) Evidence Act therefore favours the defence: that the evidence of the good Samaritan was not produced, because if produced, it would have been unfavourable to the Respondents. (p. 1607 A)

D

REPRESENTATION

Olawale A. A. Solagbade Esq. for the Appellants
A. C. Morka Esq. for the Respondents

E **CASES REFERRED TO**

Oji v Adejobi & Ors (1975) 2 SC p. 57

Akpapuna & Ors v Obi Nzeka II & Ors (1983) 7 SC 1

Lipede v Sonekan (1995) 1 NWLR (Pt. 374) 668

Adimora v Ajufor & Ors (1982) 3 NWLR (Pt. 80) p. 1.

F Woluchem v Gudi (1981) 5 SC 292 at 295

Oluwu v Nigeria Navy (2007) All FWLR (Pt. 350) 1278

Odonukwe v Administrator-General of East-Central State (19745) 1 SC p. 25

G Balogun v Labiran (1988) 3 NWLR (Pt. 80) p. 66

Olusesi v Oyelusi (1986) 3 NWLR (Pt. 31) p. 634

Sunday Nwachukwu v Benson Egbachi (1990) 3 NWLR (Pt. 136) 485 at p. 437

Iyaro v The State (1990) 1 NWLR Pt. 69) at p. 256

H Orizu v Anyaegbunam (1978) LRN 216 at 222

Elike v Nwankwoala (1984) 13 SC, 301 at 311 - 312

Alh. Otaru & Sons Ltd v Idris (1999) 6 NWLR (Pt. 606) 330

STATUTE REFERRED TO

Evidence Act, s. 137

LEAD JUDGMENT BY ABDULLAHI JCA

This is an appeal against the decision of the High Court of Justice, Rivers State (*Coram*) *M. U. Odili (J)* (as she then was) delivered on the 20th day of December, 2001 in which she found the Defendants/Appellants liable in negligence and awarded special and general damages against them. B

The Appellants were the Defendants in the Court below were sued by Respondents who were the Plaintiffs in that Court as per their writ of summons filed on 5th day of April, 1995 and claimed as follows: C

“The Plaintiffs claim against the Defendants jointly and severally for:

The sum of 25,000,000.00 (Twenty Five Million Naira) being D damages for injuries to the 1st Plaintiffs person and damages to 2nd Plaintiffs car with registration No. RV 7018 D caused the Plaintiffs (sic) when the 2nd Defendant, a servant of the 1st Defendant so negligently drove, damaged and controlled the 1st Defendant’s vehicle with registration No. RV 7452 E by obstructing the road without any warning signals around the Rumuigbo -Nkpolu junction along the East West Road within the jurisdiction of the Honourable Court and thereby caused or permitted the 2nd Plaintiffs vehicle driven by the 1st Plaintiff to collide with it from the rear at night on the 7th day of December, 1994,” E F

The facts of the case as can be gathered from the records are that: On or about the 7th day of December, 1994, the 1st Respondent left his house to his private clinic situate at No. 32 Rumuomoi Street, Rumuigbo, Port Harcourt driving in a Peugeot car Reg. No. RV 7018 D belonging to his wife, 2nd Respondent. Whilst driving to the said destination, he ran into a motor lorry with Reg. No. RV 7452 E, property of the 2nd Respondent driven, managed and controlled by the 1st Respondent. G

1st Respondent, alleged that the Appellant negligently drove the said lorry around Rumuigbo junction obstructing the road without any warning signals or devices that caused him to collide with the rear of the 2nd Appellant lorry. The particulars of the negligence were duly itemised. H

The Appellants on their part denied being negligent and pleaded that when the said lorry developed fault at the Nkpolu/Rumuigbo junction, they parked off the road and put warning signs to warn other road users of the present of their lorry. They pleaded that it was the 1st Respondent who was negligent in the way he drove the car, leading to the collision with the lorry at the rear.

Pleadings were filed and exchanged by the parties and the trial proceeded on the Plaintiffs' amended statement of claim dated 08/07/97 and filed on 09/07/97, the Defendants' statement dated and filed on 26/08/95 and the Plaintiffs' amended reply to Defendants' statement of defence dated 13/02/2000 and filed on 22/02/2000. The matter proceeded to hearing. On the whole the Plaintiffs now Respondents called five witnesses. The 2nd Defendant now 2nd Appellant testified for the defence. Learned Counsel on the two sides exchanged written address. Thereafter, the matter proceeded to judgment.

In a reserved judgment, delivered on the 20th December, 2001, her Lordship held:

"... Therefore I have no difficulty in granting' judgment in favour of the Plaintiffs. However it must be pointed out that no amount could get the 1st Plaintiff to what he was before as shown and explained in his evidence and so while the Court sympathises with the 1st Defendant, the employer of the 2 Defendant some aspects of the damages claimed must be paid.

I hereby order:

- (1) That Defendants pay to the Plaintiffs the sum of N500,000.00 being cost of replacement of the Peugeot 305 Saloon car with registration No, RV7018D.*
- (2) N3,000,000.00 for the cost of specialised medical treatment in the Netherlands,*
- (3) 1, 5000, 000.00 as general damages."*

Dissatisfied with the decision of the lower Court, the Appellants appealed to this Court and filed a notice of appeal which initially carried two ground of appeal. With the leave of the Court, granted on the 28th April, 2005, five additional grounds of appeal were filed.

In compliance with the rules of this Court, parties duly filed and exchanged their briefs of argument. The Appellants in their brief of argument dated 9th day of June, 2005 and filed on 10/06/05 but

deemed filed and served on 05/06/06, learned Counsel distilled five issues for determination as follows: "...

"(i) Whether the Court below was right in finding for the Respondents in public nuisance.

(ii) Whether the Respondents successfully established negligence in the Court below against the Appellants in any form whatsoever i.e. obstruction/public nuisance.

(iii) Whether the failure by the Court below to make a specific finding on the time of the accident was so fatal to the Appellants case as to occasion a miscarriage of justice.

(iv) Whether the award of N5M (Five Million Naira) to the Respondents was good in law.

(v) Whether the judgment of the lower Court was not null and void for violation of fair hearing principle."

On the other hand, the Respondents, in a brief settled by A. C. D Morka which said brief was deemed filed and served on 8th September, 2008 formulated three issues for determination to wit:

"(1) Whether there was sufficient evidence on which the learned trial Judge found the Defendants liable for negligence.

(2) Whether the learned trial Judge was right in the award of damages against the Defendants.

(3) Whether the failure of the learned trial Judge to make a specific finding on the time of the accident was so fatal to the Appellants' case as to occasion a miscarriage."

On the 8th of June, 2009 when the appeal came before us for hearing, learned Counsel for the Appellants, Mr. Solagbade adopted his brief of argument as well as his Appellants reply brief on points of law and urged us to allow the appeal. He also abandoned his original grounds of appeal and placed reliance on the additional grounds of appeal. He urged us to strike out the original grounds. From the additional grounds of appeal, learned Counsel distilled five issues for determination reproduced above. (See page 4 of the brief).

For his part, learned Counsel for the respondents also adopted his brief of argument deemed filed on the 18th day of September, 2008 and urged us to dismiss the appeal for lacking in merit.

Learned Counsel for the Respondents, raised an issue pertaining to issue No. 5 contained in paragraph 2, at page 4 of the Appellants' brief to wit:

“Whether the judgment of the lower Court was not null and void for violation of fair hearing principle.”

Learned Counsel submitted that the issue is incompetent as same, according to the learned .does not arise from any of the grounds filed by the Appellants. Learned Counsel argued that there is no
B ground 9 in the additional grounds of appeal.

Learned Counsel for the Appellants in his reply brief on points of law contended that the submission of the Respondents’ Counsel is misconceived. Learned Counsel went on to contend that the confu-
C sion in the mind of the Respondents was due to the fact they (Respondents) erroneously referred to the “Proposed Additional Grounds of Appeal at pages 96 - 102 of Bundle of papers whereas the “proposed additional grounds of appeal” on which the appeal is being argued is the one granted leave to the Appellants to file and argue on
D 28/04/05 vide the motion dated and filed on 07/04/03.

A cursory look at the processes filed by the Appellants, one can easily see the motion filed and dated 7th April 2003 in which the Appellants prayed *inter-alia* for leave to file and argue additional grounds of appeal. Though some of the prayers in the said application,
E like that of stay of execution was dismissed, that of leave to argue the 9 additional grounds of appeal was granted. That being so, the fifth issue for determination distilled from ground nine of the grounds of appeal is competent and cannot be struck out.

Learned Counsel for the Appellants urged us to strike out the original grounds of appeal as he is no longer relying on them in this appeal. It is pertinent to observe at this juncture that no issues were formulated from the original grounds of appeal. Even without any application, the grounds are liable to be struck out because no issues
F were distilled from them. In law they are deemed to have been abandoned, in any event, the original grounds of appeal having been
G abandoned by the Appellants are struck out accordingly.

On the issues formulated by both Counsel for determination, a closer look at the said issues shows that the Appellants’ issue No. 2
H distilled therein is identical with issue No. 1 as formulated by the Respondents. Issue No. 3 as formulated by the Appellants is also identical with issue No. 3 as formulated by the Respondents. Issue No. 4 pertaining to whether the award of N5 million was good in law is quite identical with issue No. 2 as formulated by the Respondents’

Counsel.

In the light of the above, I am of the considered view that whichever issues one considers as formulated by both Counsel will address the real grievance of the parties in this appeal. I am however of the view that the issues as formulated by the Respondents are more apt and precise as such I adopt them as the issues calling for determination in this appeal. B

Learned Counsel for the Appellants indicated his intention to argue issues 1 and 2 together. According to the learned Counsel, the two issues relate to grounds 1 - 4 of the additional grounds of appeal. They dovetailed into the other and would therefore be taken together learned Counsel further contended. C

In arguing these two issues (1 and 2), learned Counsel began by submitting that the law is trite that parties are bound by their pleadings and the issues joined therein. The Court, he further submitted must be on its guard so that it will not deviate from the case made by each party in the pleadings, otherwise it will unwittingly be making for the parties an entirely new case. He relied on the cases of *Oji v Adejobi & Ors* (1975) 2 SC p. 57; *Akpapuna & Ors v Obi Nzeka II & Ors* (1983) 7 SC 1; *Lipede v Sonekan* (1995) 1 NWLR (Pt. 374) 668. Consequently, parties are bound by the issues raised in their pleadings. He cited and relied on the case of *Adimorav Ajufor & Ors* (1982) 3 NWLR (Pt. 80) p. 1. D

Learned Counsel contended that it is in the light of the above legal propositions that, the respondents' case and issues Nos. 1 and 2 would be discussed. In order to appreciate the gravamen of the Appellants' complaint against the judgment of the Court below, it is necessary to know what the Respondents' case is all about. F

In order to appreciate the Respondents' case, learned Counsel set out in full, paragraphs 5, 6 and 7 of the amended statement of claim together with their particulars and contended that from the tenor of the said paragraphs (5, 6 and 7) of the amended statement of claim, one thing is apparent; the Respondent's claim is based in 'the toil of negligence. According to the pleadings, learned Counsel went on, the alleged obstruction of the public highway by the vehicle of the 2nd Defendant and the resultant nuisance thereof, were occasioned, by the negligent manner the 2nd Defendant drove, G

H

managed and controlled the vehicle along the East-West Road on that fateful day.

Learned Counsel copiously reproduced the evidence of PW1 both in chief and cross-examination, evidence of PW2, PW3 both in chief and cross-examination and the evidence of PW4 who investigated the accident wherein he testified thus:

"Investigated this matter. One of my findings is that 1st Plaintiff was at fault. This is based on accident law to the effect that whichever vehicle hit the other from behind is at fault.

There are exceptions.

1. The vehicle at the front may have stopped abruptly.

2. There must be a triangular reflector to indicate.

'If all these are not observed, it means that the vehicle behind has no case to answer. After investigation, I make a recommendation; I recommended that the 1st Plaintiff be charged to Court. The DTO did not recommend that 1st Plaintiff be charged to Court.'" See page 38 of the records.

Learned Counsel contended that the above, is the evidence in Support of negligence, nuisance and obstruction pleaded in paragraphs 5, 6 and 7 of the amended statement of claim. Then learned Counsel posed this question; what is the Appellants' reaction to the plea of negligence, obstruction and public nuisance alleged against them by the Respondents? For accurate answers, as learned Counsel put it, he referred to paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the statement of defence which he reproduced copiously. Also reproduced copiously is the evidence of DW1 both in chief and under cross-examination, wherein DW1 under cross-examination said *inter-alia* thus:

"The front of the Plaintiffs' vehicle was damaged. After the accident I did not see the 1st Plaintiff there again ... My vehicle engine had a strange noise that is why I parked and cleared from the road to check it out. My engine did not knock. I cleared the vehicle completely out of the road. No part of the vehicle was on the road at all. I placed the road signs since I was (sic) parked. I put the signs at the back of the vehicle and the front of the vehicle. It was at the side of the road that I kept the road signs. The 1st Plaintiffs vehicle hit the first signs, scattered them before it hit my vehicle. 1st Plaintiff hit me outside the road. He left the main road where he is supposed to drive and came

outside to hit me. The road was clear or empty as people and vehicles were passing. I remember that Police came there and made a sketch. I signed the sketch. The sketch showed the resultant position of the vehicles after the accident. I was carrying crates of mineral drinks inside my vehicle. I sent the conductor to go and make a report at the police station. I do not know if my conductor made any statement to the Police.” B

Learned Counsel then submitted that in view of the foregoing circumstances and the evidence X-rayed above, the findings and conclusions reached by the learned trial Judge could not be supported by the evidence as adumbrated above. The findings and the conclusions, of the trial High Court were not borne out of the evidence. Neither PW1, PW2, PW3 nor PW4 witnessed the accident. None of them could describe how the accident happened. We were urged to resolve these issues in favour of the Appellants. D

For, their part, learned Counsel for the respondents did not see it the way of the Appellants’ Counsel. He submitted that there was sufficient evidence on which the learned trial Judge found the Appellants liable in negligence. Learned Counsel copiously referred to the evidence of PW1, PW3 and PW4 and submitted that it was against the background of the said evidence of both parties that the learned trial Judge considered the issue of liability for negligence. E

Learned Counsel submitted that the law is elementary that an appellate Court will not ordinarily interfere with findings of facts made by the trial Court which are supported by evidence, except incircumstances such where the trial Court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence or findings of fact which are perverse. He relied on the cases of *Woluchem v Gudi* (1981) 5 SC 292 at 295 and *Oluwu v Nigeria Navy* (2007) All FWLR (Pt. 350) 1278 at 1309 paras B - F. G

Learned Counsel further submitted that in the case in hand, the finding of liability for negligence against the Defendants/ Appellants is amply supported by evidence. We were urged to resolve this issue in favour of the Respondents. H

Now, my first port of call in determining these issues is Section 136 of the Evidence Act which provides thus:

"136 The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

Needless to say, in the case in hand, it is the Respondents who would fail if no evidence at all were given on either side. I now proceed to examine Section 137 (1) and (2) of the said Act, they are hereunder reproduced.

"137(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."

(2) If such a party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the I pleadings have been dealt with."

The provisions of the Evidence Act reproduced (supra) are unambiguous and self-explanatory and do not need any aid for their interpretation. In a nutshell, all what the provisions are saying is that in civil cases, the burden of proof is on the party who asserts a fact to prove same. For he who asserts must prove. See *Imana v Robinson* (1979) 3 - 4 SC 1; *Odunukwe v Administrator-General of East-Central State* (19745) 1 SC p. 25; *Balogun v Labiran* (1988) 3 NWLR (Pt. 80) p. 66 and *Olusesi v Oyelusi* (1986) 3 NWLR (Pt. 31) p. 634.

Again, the burden of proof of negligence falls upon the Plaintiff who alleges negligence. This is because negligence is a question of fact, not law, and it is the duty on he who asserts to prove it Failure to prove particulars of negligence pleaded is fatal to the Plaintiffs' case. See *Imana v Robinson* (supra) p. 342 para D, para F; 356, para H.

Having stated the law and all that, it is noteworthy to observe that in the case in hand, the Respondents as Plaintiffs at the lower Court, were parties who were alleging that the Appellants were negligent in obstructing the road with out putting any warning signs as a result of which the 1st Respondent hit their stationary lorry from the rear, which said accident caused injuries to his person as well as substantial damage to the car he was driving in. Needless to say, the burden of proof is on them to prove that the Appellants were negligent.

The question to be asked at this stage is this, did the Respondent prove what they claimed in the lower Court? To answer this question recourse had to be made to the evidence adduced by both parties for and against the issues at stake. However before I answer this question, **let me say that it is elementary to define negligence as the omission to do something which a reasonable man guided upon consideration which regulates the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.**

I am of the considered view that a charge of negligence would arise where a breach of the duty of care owed by one person to the other is alleged. The burden of proof of the breach, at the risk of repeating myself of the duty of care lies on the Plaintiffs.

The Respondents, as Plaintiffs in the lower Court called five witnesses in an attempt to prove their claim. The 1st Respondent testified as PW1 and stated *inter alia* as follows:

"I remember the 7th December 1974. It is a day that will not be forgotten in my life. That was the day at 6.30 p.m. I left my house at the University of Port Harcourt to my clinic at 30 Psychometric (sic) Road Rumuomasi Street. I was using the East-West Road. It is a highway, I was driving my wife's car with Reg. No. RV 7018 D, a 305 Peugeot saloon car. I was driving in my usual way keeping to my right lane, observing all traffic regulations as I had been driving in Europe since 1972. As I was driving and keeping all the regulations, it was misty dark night when around Nkpolu/Rumuigbo junction along the East-West major road and without any warning signs and without any rear light and without stones or leaves as usually placed on the road in Nigeria to warn the drivers of a broken down vehicle parked on the road when in front of me, my car collided with a stationary lorry. Leyland RV 7452 PE. The lorry was stationary and on the right lane. I was driving at 50 km/h and it was misty and dark. It is not true that the vehicle was parked way out of the road. They are telling lies. It is not correct that they placed any warning items at the back and the front. It is also not correct that I ran through these warning signs. There was no warning light and nor warning sign on the road. As a result of the accident, I sustained multiple cuts and lacerations on my scalp, right upper eyebrow, my lower jaw, tongue and shoulder and elbow, moving restriction injury. I also as a result of the accident was rendered invalid

in the sense that I lost the vision of my eye. ... See pages 18 - 19 of the record."

Under cross-examination by the learned defence Counsel, PW1 stated thus:

B *"... I was aware of the accident. I am not telling the Court what other persons tell (sic) me of the accident. The Police came to my house at the time I was unconscious and took my statement. I told the Police how the accident happened and what the Samaritans also told. I did not tell the Police in my statement that I did not know how the accident occurred. I made this statement that I did not know how the accident occurred. I made this statement to the Police ... As I said I know about the accident until I lost conscious (sic). It was that good Samaritan who told me that 2nd Defendant did not put warning sign. As a result of the accident the Defendant was charged to Elingbu Magistrate Court. ... I am not at fault in respect to the accident. The Police report stated that I was at fault. The Divisional Traffic Office did not recommend that I be charged to Court. (The witness reads out the report of the Division Traffic Officer (DTO) which shows that the DTO said he being the driver in charge with the Reg. No. RV 7018 D was at fault and should be charged to Court). No. sketch map was brought to me and so I did not sign any."* See pages 25 - 27 of the record.

PW2 was the 2nd Plaintiff in the suit. She was not an eye witness. In her testimony before the lower Court, she stated as follows:

F *"It was the taxi driver who told me that my husband ran into this parked vehicle ... It was this taxi driver who took my husband to the medical centre. The taxi driver did not tell me he witnessed the accident. I did not see any other person who witnessed the accident."* ... See page 31 of the record.

G PW3 was the taxi driver who informed PW2 of the accident involving PW1. In his evidence in-chief he testified thus:

H *"On the 7th December, 1994, as I was returning from Rumuokoro and getting to opposite the Secondary School, Rumuigbo, I saw a parked vehicle on one lane and it was about 7.30 p.m. Getting closer to the lorry I saw under it. As the 305 vehicle was known to me I cleared my vehicle. I thought it was the 2nd Plaintiff who used to drive but on getting closer, I saw the 1st Plaintiff inside. So many people were there. So all of us joined hand (sic) to pull the 305 out in order to bring the Plaintiff out of the vehicle. As we pushed him out and got 1st*

Plaintiff out I asked the driver of the lorry is ...” See page 33 of the record.

Under cross-examination by the defence Counsel PW3 had this to say:

“I was not at the scene at the time the accident occurred. I arrived immediately after the accident because I helped in removing Dr. Uche from under the lorry. I cannot say how the accident occurred since I did not witness the accident. By the time I arrived, other persons were present ...”

As to the time of the accident, PW3 said: “I cannot say with exactitude when the accident happened” On the position of the two vehicles when PW3 arrived the scene of the accident, he said “At the time I arrived the scene, I saw the 305 Peugeot car inside the lorry from behind. I am a professional driver. The 305 Peugeot car ran inside the parked vehicle.”

PW4 was the Police Officer who investigated the accident when the matter was reported to them. He testified as follows:

“I investigated this matter. One of my findings is that 1st Plaintiff was at fault. This is based on accident law to the effect that which ever vehicle hits the other from behind is at fault.”

In response to the evidence of the Respondents as Plaintiffs in the lower Court, the Appellants, copiously in their pleadings denied the claim of the Plaintiffs/Respondents. (See paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13 14, 15, 16, 17 and 18. They also called evidence in support of the pleaded facts.

DWI testified in defence of the paragraphs of the statement of defence. The relevant part of his evidence in proof of those paragraphs are as herein reproduced below:

“... I remember the 7 December, 1994. On that day, I returned where I went to supply and on reaching Nkpolu by Rumuigbo about 5 pm my vehicle had a problem. I slowed down then I cleared out of the road and parked. I told my conductor to put road signs front and back. He did so. He put two road signs at the back and two at the front. The tailboard also had two triangular signs. After putting the road signs, myself and the conductor stepped outside and wandering what we were going to do and vehicles were passing. The next thing we heard was ‘GBOAYAI, I’. My conductor and me went to look and saw that 1st Plaintiff with his car had scattered our road signs and hit our

vehicle at the back. The weather was bright. His hitting the road signs completely destroyed them. It was 1st Plaintiff who was at fault. I want the Court to dismiss this case of the Plaintiffs who was at fault. I want the Court to dismiss this case of the Plaintiffs because it was 1st Plaintiff who scattered my road signs and hit my vehicle at the back. I placed
 B the road signs, but (sic) the signs tailboard carried. I did not park my vehicle in the middle of the road. I cleared my vehicle. The time this incident happened was very bright about 5 pm. My vehicle did not cause any obstruction. Other vehicles were passing. We Defendants
 C are not at fault and so the Plaintiffs are not entitled to their claims. I am the one who send the conductor to make a report to the Police. When the Police came they realised I was not the cause and the DTO said I should come and carry my vehicle. When I came to carry my vehicle, the DPO said I should be charged to Court. I was discharged. -The time
 D of the accident was not 6.30 pm. 6.30 pm was when the Police arrived the scene," See pages 42 - 43 of the record.

Under cross-examination by the learned Counsel for the Plaintiffs/Respondents, DW1 further stated:

"The front of the 1st Plaintiffs vehicle was damaged. After the
 E accident I did not see the 1st Plaintiff there again ... My vehicle engine had a strange noise that is why I parked and cleared from the road to check it out. My engine did not knock. I cleared the vehicle completely out of the road. No part of the vehicle was on the road at all. I placed
 F the road signs since I was parked. I put the signs at the back of the vehicle and the front of the vehicle. It was at the side of the road that I kept the road signs. The 1st Plaintiff hit me outside the road. He left the main road where he is supposed to drive and came outside to hit me. The road was clear or empty as people and vehicles were passing.
 G I remember that Police came there and made a sketch. I signed the sketch. The sketch showed the resultant position of the vehicles after the accident. I was carrying crates of mineral drinks inside my vehicle. I sent the conductor to go and make a report at the Police station. I do not know if my conductor made any statement to the Police."

H Now, let me state at this juncture that a trial Judge who heard and saw a witness give evidence in Court is best suited to ascribe probative value to the evidence of such a witness and it is also trite that an appellate Court will not interfere with the trial Court's windings of facts where the findings are borne out of the evidence before the trial

Court. An Appellate Court will interfere with the findings of a trial Court only when such findings have been made on legally inadmissible evidence or they are perverse or are not based on any evidence before the Court. See *Sunday Nwachukwu v Benson Egbachi* (1990) 3 NWLR (Ft. 136) 485 at p. 437 and *Iyaro v The State* (1990) 1 NWLR Pt. 69) at p. 256. B

The next question to be asked is this: what were the findings and conclusions of the lower Court in the light of the evidence adumbrated above? Can it be said that the trial Judge properly evaluated the evidence adduced by both sides before arriving at her verdict that the Appellants were negligent? C

To answer the two questions posed above, let me start with the evidence of PW3 whose evidence the learned trial Judge heavily relied in finding for the respondents. PW3 testified *inter alia* thus:

"... I asked him why he placed a vehicle on the road without any indications including grass to show that there was a vehicle blocking the road. Other people who were there were making trouble with the driver and asking him why he did not place even grass to show the circumstance. He did not say anything.." Let me quickly say that this witness was not an eye witness to the accident for he said under cross-examination thus: E

"I cannot say how the accident occurred since I did not witness the accident. By the time I arrived other persons were present."

That aside, **from the evidence of this witness, it was not only him that was making trouble allegedly with the driver of the lorry because he said, other people were also asking the Appellant why he did so. Though the respondents were not bound to call a host of witnesses to prove their claim, but in view of the burden of proof that has been placed by law on them, it would have been prudent for them to have done so.** F G

I have earlier stated in this evidence that PW3 did not know how the accident occurred. That being the case he could not give evidence of whether the lorry being driven abruptly stopped in the middle of the road. This evidence becomes crucial in the light of the evidence of PW4 wherein he said: H

"... One of my findings is that 1st Plaintiff" was at fault. This is based on accident law to the effect that whichever vehicle hits the other from behind is at fault.

There are exceptions:

(1) The vehicle at the front may have stopped abruptly.

(2)

The Respondents as can be gleaned from the records did not adduce evidence that the lorry stopped abruptly in the middle of the road but on the other hand the Appellants testified *inter alia*:

“... My engine had a strange noise that is why I parked and cleared from the road. ... I cleared completely out of the road.”

DW1 also affirmatively asserted that he placed the road signs where he parked the vehicle, one at the back of the vehicle and the other in front of it. DW1 categorically stated that “the road was clear or empty as people and vehicles were passing.” The Respondents on the other side did not adduce iota of evidence to the effect that the road was obstructed by the lorry of the Appellants. ,

Exhibit S is the sketch map, drawn by PW4, a cursory look at the said map shows that the vehicle was not parked in the middle of road as claimed by PW1, the 1st Respondent. The lorry was cleared off the road from the sketch map. This has in a way corroborated the evidence of the Appellants that they parked off the road.

Again, the Appellants staled in their evidence that the tailboard of the lorry had two triangular signs which are reflective. The accident according to the Appellants happened in the evening 5.00 to 5.30 pm and the weather was bright.

I am of the considered opinion that had the trial Judge evaluated properly the pieces of evidence highlighted above, she would have come to a different conclusion from the one she arrived at. Though an appellate Court will not ordinarily interfere with the findings and conclusions of the trial Court, it can do so when such findings and conclusion arrived at by the trial Court are not borne out of proper evaluation of the evidence. I am of the considered view in the light of all that has been said that the findings and conclusions reached by the lower Court are not borne out of the evidence adduced and are therefore perverse. I set same aside.

Having arrived at this conclusion, I am minded to say that no

useful purpose would be achieved by giving consideration to the remaining issues formulated by learned Counsel but our Court being a penultimate one, let me briefly say something on the award of damages dished out by the learned trial Judge to the Respondents.

In paragraph 8 of their amended statement of claim, the Plaintiffs/Respondents claimed the sum of N2,190,341.00 (Two Million, One Hundred and Ninety Thousand, Three Hundred and Forty One Naira) as cost of specialised medical treatment. See pages 10-11 of the record. Curiously, the Court awarded N3 Million which is more and above what the Respondents claimed in their pleadings. Let me say without mincing any word that what the trial Court did was improper. In fact what the trial Judge did was making out for the Respondents a different case from the one placed before her for adjudication. This is patently wrong in law. See *Orizu v Anyaegbunam* (1978) LRN 216 at 222; *Elike v Nwankwoala* (1984) 13 SC, 301 at 311 - 312 and *Alh. Otaru & Sons Ltd v Idris* (1999) 6 NWLR (Pt. 606) 330. The Court is neither a Father Christmas nor a charitable institution. It cannot give a party what that party is not asking for - *Ekpenyong & Ors v Nyong & Ors* (supra). It is not open to a trial Judge to make his own individual assessment of special damages, but he must act strictly on the evidence adduced before him establishing the amount to be awarded. See the case of *Nigeria Airways Ltd v Abe* (1988) 4 NWLR (Pt. 90) C. A. 524 at 536 paras E - F. The Court is not entitled to use its own conceived parameters in place of evidence. See *Badmus v Abegunde* (1999) 11 NWLR (Pt. 627) SC 493 at 502 paras C - D.

Again, a cursory look at the evidence adduced before the learned trial Judge shows that there was no basis for the award of N500, 000.00 as a replacement of the damaged car of the respondents. In fact there was no iota of evidence as to the condition of the vehicle before and after the accident. Similarly the award of N1.5 Million Naira general damages cannot be justified in the light of the evidence adduced by both parties as adumbrated (supra). All the awards made by the learned trial Judge for special and general damages are hereby set aside.

In the result, in the light of all that has been said, this appeal is pregnant with a lot of merit and ought to be allowed and it is

accordingly allowed by me. The judgment of the lower Court and the award of damages both special and general made to the Respondents are set aside. I award 50,000.00 cost in favour of the Appellants and against the Respondents.

B

KEKERE-EKUN JCA

C “I have had the privilege of reading in draft the judgment of my learned brother, Tijjani Abdullahi, JCA just delivered. He has considered and resolved the salient issues in contention in this appeal. I agree with his reasoning and conclusion.

D The respondents’ claim before the court below was founded on the tort of negligence. The law is settled that negligence is a question of fact. Each case must be determined on its own merits. See: Kalla vs. Jarmakani Transport Ltd (1961) All NLR 747 @ 785; Nqilari vs. Mothercat Ltd. (1999) 13 NWLR (636) 628; Osigwe vs. Unipetrol (2005) 5 NWLR (918) 261 @ 283 F.

E In a claim for damages for negligence, the onus is on the claimant to prove that the defendant owed him a duty of care; that he failed to exercise that duty of care; and that damage resulted as a result of the defendant’s failure to exercise due care. See: Ngilari Vs. Mothercat Ltd, (supra); Osigwe Vs. Unipetrol (supra); Umudje Vs. Shell Petroleum Co. (Nig) Ltd. (1975) 11 SC. 155.

F From the evidence adduced before the lower court, the respondents duly established that as fellow road users the appellants owed them a duty of care to adequately indicate to other road users the fact that their vehicle had broken down by parking it safely off the road and placing the regulatory warning signs at strategic locations to warn on G coming traffic.

H The respondents had the further duty to prove by credible evidence that the appellants breached that duty of care. In paragraph 5 of their statement of claim the respondents pleaded the particulars of negligence which included failure to park the vehicle off the road to avoid obstruction, failure to display warning devices around the vehicle and failure to switch on the rear lights of the vehicle. The appellants denied these averments in their statement of defence thus joining issue in respect thereof.

None of the witnesses called by the respondents was an eye

witness to the incident. The 1st respondent who testified as PW1 stated under cross examination at page 27 of the record that he was unconscious after the accident. Although he stated that he knew what happened before he lost consciousness, he stated that it was a good Samaritan who told him that the appellants did not place warning signs on the road. PW2, his wife was not an eye witness. She relied on what she was told by PW3, a taxi driver, who also arrived at the scene after the accident had taken place. PW4, the investigating police officer was also not at the scene but gave his professional opinion based on the resultant positions of the vehicles as he found them when he arrived at the scene and as represented in the sketch map which he subsequently drew. His professional opinion was that the 1st respondent who hit the vehicle from the rear was at fault and ought to be charged to court.

In the absence of the evidence of an eye witness, the evidence of the appellants that they parked the vehicle off the road (which was corroborated by Exhibit S the sketch map) and that they placed cautionary warning signs around the vehicle which were scattered by the 1st respondent as he ran into their vehicle, remains unchallenged and uncontroverted the 1st respondent as he ran into their vehicle, remains unchallenged and uncontroverted.

It would appear that the learned trial Judge, with due respect to His Lordship, was perhaps swayed by sentiment having regard to the extent of the 1st respondent's injuries. The finding of the learned trial Judge is not borne out by the evidence before the court, In such circumstances this court is entitled to interfere therewith. See: Bunge Vs. Gov. Rivers State (2006) 12 NWLR (995) 573 @ 629 E-H; Saleh Vs. B.O.N. Ltd (2006) 6 NWLR (976) 316 (5) 329-330 H-C.

Having failed to prove a breach of the duty of care, the question of assessment of damages did not arise.

It is for these and the more detailed reasons in the lead judgment that I also allow the appeal. I also set aside the judgment of the lower court delivered on 20th December 2001. Costs are assessed at N50, 000 in favour of the Appellants.

EKO JCA

I read in draft the judgment just delivered by my learned brother, TIJJANI ABDULLAHI, JCA. I am in complete agreement with the terms of the judgment.

I will add just a few comments with a preface that by virtue of sections 135 and 136 of the Evidence Act the burden is heavily on the Respondents, as the Plaintiffs, to prove their assertion that it was as a result of the negligence of the 2nd Appellant (DW.I) that the 1st Respondent (PW.I) drove his vehicle and crashed into the tail of the truck driven and managed by the DW.I on the fateful day, and that the Respondents would fail in the suit if no evidence at all were given on either side. This is the basis of the principle that a party, particularly the plaintiff, as the Respondents were, is only entitled to his proven claim. It is on this basis also that the courts have consistently stated that sentiments and sympathy command no place in judicial deliberations: *EZEUGO v. OHANYERE* (1978) 6 SC 171; *IDRISSU v. OBAFEMI* (2004) 11 NWLR [pt. 884] 396 at 409.

The case of the Respondents is anchored on their assertion that the weather was “misty and dark” at the material time and that the DW.I parked his truck on the main road without warning signs. It was not their case that the 1st Respondent (PW.I) was following the truck driven by DW.I and the latter stopped abruptly without warning. The PW.I. did not say that he put on his head lamps in this “misty and dark” evening. He is enjoined by Road Traffic Regulations to put on the headlamps of the vehicle he was driving in this “misty and dark” weather, or when visibility is impaired.

The DW.I was not discredited in his evidence that he placed warning signs at the front and back of his truck, that the tailboard of his truck had two reflectors and that two additional reflectors were placed on the ground behind the truck he had parked. The prevarication of PW.I on this material issue is not enough to discredit the DW.I. In evidence in-chief PW.I was categorical that there was no “warning sign on the road.” Under cross-examination he admitted that he did not see the warning signs and that it was a good Samaritan, who was not brought from “Samaria” to testify in court, who told him that the DW.I, the 2nd Defendant, “did not put warning sign.” A witness who prevaricates is not entitled to credibility or to be believed on the issue over which he blows hot and cold at the same time: see *EZENWA v.*

EKONG (1999) 11 NWLR [pt. 625] 55 and ESSIONG v. IKPEME (1999) 6 NWLR [pt. 606]

The question of the DW.1 failing to put warning signs behind his stationary truck is the pivot of the Respondents, as Plaintiffs; claim that the DW.1 was negligent. It is very material to their case. That assertion is not proved by inadmissible hearsay. The “good Samaritan” who told 1st Respondent (PW.1) that the DW.1 (2nd Defendant) did not put warning signs is a material witness whose evidence could be produced. His evidence was not produced and no explanation was given for the failure to produce him. The presumption under section 149 (d) Evidence Act therefore favours the defence: that the evidence of the good Samaritan was not produced, because if produced, it would have been unfavourable to the Respondents.

The police blamed the PW.1 for the accident. This much the PW.1 himself admitted under cross-examination to wit -

I am not at fault in respect to the accident. The police report stated that I was at fault. The Divisional Traffic Office did not recommend that I be charged to court. [The witness reads out the report of the Division Traffic Officer (DTP) which shows that the DTP said he being the driver in charge with Reg. No RV 7018 D was at fault and should be charged to court].

The PW.4, the police officer who investigated the accident, confirms under cross-examination at page 38 of the Record that -

After investigation I made recommendation. I recommended that 1st Plaintiff (1st Respondent/PW.1) be charged to court.

However it was not the PW.1, but the DW.1, who was prosecuted and discharged. Thus the law which ordinarily is no respecter of any person was made to respect or defer to the PW.1,

The PW.4 is a witness called by the Respondents, as Plaintiffs, themselves. His evidence and Exhibit ‘S’, the sketch map he made upon his investigation, are all part of the case of the Plaintiffs/Respondents. Exhibit ‘S’ and PW.4’s evidence completely exonerate the defence, particularly 2nd Defendant/DW.1 in the Plaintiffs assertion that the DW.1 was negligent in the manner he parked his truck and the eventual collision the PW.1 had with the truck. The evidence corroborates the defence of the Appellants. Thus tilting in their favour the weight of the balance of probabilities. The learned trial Judge gave no reason for discountenancing this evidence in favour of the Appellants.

The totality of the evidence of the Respondents is in tatters with the evidence of PW.4 and Exhibit 'S' materially dislodging the main plank of their case. The law is settled that where there are material contradictions in the evidence of witnesses called by a party that the court will not pick and choose which set of witnesses to believe and which set to disbelieve: *AJUDUA v. NWOGU* (No. 2) (2004) 16 NWLR [pt.898] 79 at 88 -89. The Plaintiff or a party must succeed on the totality of his evidence, unless there are admissions or aspects of the adversary's case that support his case. Finally on this issue; it is my view and it is trite too, that a judgment of a trial court is defective where the trial judge fails to examine the totality of evidence in detail. See *OBADARA v. THE PRESIDENT, IBADAN WEST DISTRICT GRADE 'B' CUSTOMARY COURT* (1964) ALL NLR 336 at 344.

My learned brother found that the award of damages by the learned trial Judge is perverse. I agree completely. In award of damages the trial court is duty bound to act judicially and judiciously. The facts of the case as pleaded and the evidence establishing the pleaded facts, are the usual determinants or guides as to how the discretion is exercised, and not the whims and caprices of the trial " Judge.

In view of the foregoing and the fuller reasons in the lead judgment, which I hereby adopt, I also allow the appeal. The judgment of the Rivers State High Court in suit no. PHC/286/95 delivered on 20th December, 2001 is hereby set aside. In its place an order dismissing the suit is hereby entered in favour of the Appellants who were the Defendants. I also award N50/000.00 as costs in favour of the Appellants against the Respondents.

G

H