

SUPREME COURT OF NIGERIA
3RD JULY, 2009. SC. 174/2002
CORAM:- D. MUSDAPHER, F. F. TABAI,
I. T. MUHAMMAD, M. S. M. COOMASSIE,
O. O. ADEKEYE, JJSC

1. ANAMBRA STATE ENVIRONMENTAL SANITATION AUTHORITY	DEFENDANTS/ APPELLANTS/
2. IGNATIUS NJOKU	RESPONDENTS
AND	
RAYMOND EKWENEM PLAINTIFF/RESPONDENT/APPLICANT	

PRACTICE & PROCEDURE - Crime - Civil Actions - Whether crime is in issue - How determined - Crime is in issue when commission of crime - Alleged in the pleadings - Is the basis of the claim or defence (H1)

ACTIONS - Plaintiff's case - How ascertained - It is the entire pleadings of parties that are looked into - To determine plaintiff's case - Paragraphs of pleadings cannot be relied on in isolation for this purpose (H2)

PLEADINGS - Issues - Status - Main and ancillary - There are deducible from pleadings - The principal or main issues and the ancillary issues (H3)

EVIDENCE - Proof - Crime - Allegation of in civil proceedings - Standard of proof required - The main claim being for compensation for loss - Crime not being directly in issue - Proof beyond reasonable doubt is inapplicable (H4)

DAMAGES - Meaning - It is the pecuniary compensation obtainable by successful party - In an action for wrong - Which is either a tort or a breach of contract (H5)

DAMAGES - Award - Purpose - It is awarded to compensate plaintiff for loss suffered - The guiding principle is restitution in integrum (H6)

PLEADINGS - Amendments - Amended pleading - Status - Though such pleading no longer defines the issue to be tried - It does not cease to exist for all purposes - It is still part of the record (H7)

DAMAGES - Quantum - Claim for totally destroyed property - The measure of damages for such claim- Is the value of the property at the time of its destruction (H8)

DAMAGES - Quantum - Repairs of damaged property - The cost of repairs cannot be confined to the time damage occurred - It must take into consideration the current market situation (H9)

DAMAGES - Award - Basis - It is not awarded as a matter of course - Nor based on sentiment - It is based on legal evidence of probative value - Adduced for establishment of actionable wrong (H10)

FACTS

The plaintiff/respondent/applicant doing business under the name of Rainbow Petroleum and Engineering Company sued the defendants/appellants/respondents claiming special and general damages for trespass, malicious damage to Rainbow filling station and Rainbow Engineering heavy duty equipment assessed at N2,000,000 (Two Million Naira). In the alternative, respondent claimed for an order that appellants repair and reinstate the damaged property. Among the particulars of losses for which respondent claims special damages is the sum of N23,049.31 being cash allegedly stolen from his office during the act of alleged trespass. The case of the respondent was that while employees of 1st appellant, including the 2nd appellant, were trying to forcefully stop a commercial bus along On-itsha-Owerri Road, where he did his business, they struggled for the steering with the driver. This caused the bus to veer off the road into respondent's petroleum station, damaging one of the pumping machines. A confrontation ensued between the pursuers on the one hand and the passengers of the bus and workers of respondent on the other hand.

Following a call for reinforcement made by the pursuers, more employees of 1st appellant arrived the scene armed with sundry weapons. Upon their arrival, they went on rampage at the petroleum sta-

tion, vandalizing everything in sight. The zonal controller of 1st appellant subsequently accepted responsibility and offered to reimburse respondent for the damage but failed to make good his offer. So respondent brought this action. After trial, judgment was given to respondent against appellants jointly and severally in the total sum of N3,325,187.60. The difference between this sum and that originally claimed by respondent resulted from a subsequent amendment to his statement of claim to take consideration of increases in general price index during the years of trial. Aggrieved, appellants appealed to Court of Appeal which partially allowed the appeal, by reducing the quantum of damages to a total of N1,437,227.60. Still dissatisfied, appellants have come on a final appeal to Supreme Court.

ISSUES FOR DETERMINATION

(1) *Whether in view of the Respondent's claims and the concessions in his brief of argument, the standard of proof required of the Respondent is not one beyond reasonable doubt.*

(2) *Whether the awards of the sum of N83,295.31 and N23,049 made by the Trial Court and upheld by the lower court are proper.*

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

Civil Actions - Whether crime is in issue - How determined

1. The Court of Appeal took the interpretation a step further to make it more explicit by saying that:-

"It is trite that issue of crime in any civil action must arise on the pleading. Thus section 138 (1) of the Evidence Act only applies where there is a specific allegation of crime in the pleadings so that the commission of a crime can properly be said to be a basis or foundation of the claim or defence as the case may be. Therefore, the application, of section 138 (1) of the Evidence Act depends on the averments in the pleadings. Whether specific allegation of crime can be properly be said to be a basis or foundation of the claim or defence depends on the facts and circumstance of each case."

"Where a Plaintiff makes an allegation of crime in his pleadings but nevertheless can succeed in his claim without proving the crime, it cannot be said that the commission of the crime was a fact directly in issue". (p. 1815 D)

ACTIONS - Plaintiff's case - How ascertained

2. The claim of a litigant either the plaintiff or defendant depends on the averments in his pleadings. In our adversary system of the administration of justice, it is the entire pleadings of the parties that are looked into to determine the plaintiff's case, the reliefs claimed vis-a-vis the jurisdiction of the court and the defence. Paragraphs of pleadings cannot be relied on in isolation for this purpose. (p. 1816 A)

PLEADINGS - Issues - Status - Main & ancillary

3. There are deducible from the pleadings principal or main issues and ancillary issues.

In the instant case, an in-depth look into the averments in the Further Amended Statement of claim of the plaintiff/Respondent paragraphs 1-5 indicate that the dispute between the parties was premised on the wrong of trespass to the petrol filling station in possession of the Respondent where wanton destruction of property was effected. A sum of N23,049.31 was removed in the process. Though the loss of this N23,049.31 was an item of claim under the particulars of claim of the Plaintiff/Respondent, and an allegation of crime, it is only incidental to the main claims of trespass and destruction of property of the Respondent. (p. 1816 C)

EVIDENCE - Proof - Crime - Allegation of in civil proceedings

4. The main claim of the Respondent on which evidence was had at the trial court was for compensation for the loss of his property by the act of the intruders in his premises and the fact that the loss included physical cash with the insinuation of its being stolen cannot transform the standard of proof of the reliefs which is essentially civil into criminal that would require proof beyond reasonable doubt. The respondent was able to succeed in his claims without proving the commission of crime which was not directly in issue as decided by the trial court and the Court of Appeal. (p. 1816 H)

Damages - Meaning

5. Damages mean the pecuniary compensation obtainable by a successful party in an action for a wrong which is either a tort or a breach of a contract. (p. 1819 D)

DAMAGES - Award - Purpose

6. The purpose of an award of damages is to compensate the plaintiff for damage, injury or loss suffered. The guiding principle is restitution in intergrum, where a court is called upon to assess that a party which has been damnified by the act which is in issue must be put in the position in which he would have been if he had not suffered the damage for which is in issue must be put in the position he is being compensated. (p. 1819 D) B

Amended pleading - Status

7. This poses the question whether pleading later amended ceases to exist for the purpose of the proceedings. The Supreme Court aptly considered this intricate question in the case of Agbaa Homovo V Eduyegbe (1999) 3 NWLR pt 593 pg 170 at 186 - 187 paragraphs H.C C

where it concluded that:- D

"Although once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issue to be tried before the court, this, however, is as far as that proposition of the law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings." E

In short an amended process does not become otiose; it still forms part of the Record before the court in any proceeding. (pp. 1820 F / 1821 C) F

DAMAGES - Quantum - Claim for totally destroyed property G

8. The court applied the decision of the Supreme Court in the case of Shell Petroleum Development Company of Nigeria Ltd V Ambah (1999) 2 SCNJ pg 152 at pg 164 that:

"Where there is a claim for total destruction of property the measure of damage will be the value of the property at time of its destruction." The foregoing was followed and confirmed in other cases that where a chattel or property is damaged, the damages will be the value at the time it was destroyed subject to the principle of restoring the plaintiff as far as it is possible to the position he was before the H

1808 Anambra State Environ. Sani. Auth. v. Ekwenem (2009) 7 KLR
injury. (p. 1821 E)

DAMAGES - Quantum - Repairs of damaged property

9. Computation of damages is not however uniform. It varies between total loss calling for replacement of a damaged property and repairs. While replacement is static. Repairs are subject to vagaries of unpredictable market forces. Cost of repairs not to be unjust to the one who suffered legal injury cannot be confined to the time when the damage occurred. For this reason it was emphasised in court decisions that assessment of damages must take into consideration the current market situation. The courts must take into consideration the economic strength or decline of the Naira, and its purchasing power. (p. 1822 G)

D DAMAGES - Award - Basis

10. I have to confirm that an award of damages either special or general, are not awarded as a matter of course but on sound and solid legal principles and not on speculations or sentiment. Neither is it awarded at large or out of sympathy born out of extraneous considerations but rather on legal evidence of probative value adduced for the establishment of an actionable wrong or injury. (p. 1824 A)

REPRESENTATION

Mr. E.D. Chukwuma Hon. Attorney-General Anambra State with him C.N. Nwoye PSC {Min. of Justice}.
Mr. A.O. Amene with him Ikechukwu Amene Esq. Appears for the Respondent.

G CASES REFERRED TO

NEPA v. Alii (1992) 8 NWLR pt 259 pg 279
Salami V Oke (1987) 5 NWLR pt 63 pg 1
Bala V Bankole (1986) 3 NWLR pt 27 pg 141
NDIC v. SBN LTD. (2003) 1 NWLR pt 801 pg 311
H Oruboko v. Oruene (1996) 7 NWLR pt 462 pg. 573
Agboisi V Ebikorefe (1997) 4 NWLR pt 502 pg 630
Usman v. Abubakar (2001) 12 NWLR pt 728 pg 685
Onagoruwa v. IGP (1991) 5 NWLR, pt 193 pg. 593
Nwankere v. Adewunmi (1967) NMLR, pt 45 at pg 48

Allied Bank V Akubueze 1997 6 NWLR pt 509 pg 374
Omorhirhi v. Enetevwere (1988)1 NWLR, pt 73 pg 746
Ikoku v. Obi (1962)1 All NWLR Vol.1 pt.1 194 at pg 199
S.P.D.C (Nig) Ltd V Tiebo VII (1996) 4 NWLR pt 445 pg 657
Tukur v. Govt. Of Gongola State (1989) 4 NWLR pt 117 pg 517J
Tsokwa V Motors (Nig) Ltd V Awoniyi (1999) NWLR pt 587 pg 423 B
Shell Petroleum Development Company of Nigeria Ltd V Ambah
(1999) 2 SCNJ pg 152 at pg 164

STATUTE REFERRED TO

Evidence Act, s. 138

C

LEAD JUDGMENT BY ADEKEYE JSC

The Respondent in this appeal, Raymond Ekwenem, doing business under the name and style, Rainbow Petroleum And Engineering Company, as Plaintiff sued the Appellants, Anambra State Environmental Sanitation Authority (hereafter to be referred to as ASESA) Ignatius Njoku and Martin Ohaguluke both employees of ASESA, as Defendants before the High Court of Anambra State, Onitsha Judicial Division. The claim of the plaintiff against the defendants according to pages 1-2 of the Records as follows: -
Wherefore the plaintiffs claim against the Defendants jointly and severally as follows:-

a) Special and general damages for trespass, malicious damage to the Rainbow filling station and Rainbow Engineering heavy duty equipments assessed to (sic) N2,000,000 (Two Million Naira)

b) OR IN THE ALTERNATIVE

An order of court that the Defendants are ordered to repair and reinstate at their expense:-

(i) The rainbow filling station and its damaged equipments, office furniture, pumps and building, four cranes and G.M.C. Truck.

(ii) To pay back to the plaintiff N19,500 paid to him by one Stephen Onyekwelu that day of incident and removed by the defendants, their servants and agents during their raid

(iii) To repay to the Plaintiff the sum of N3,549 being money realized from sales the said day and removed by the Defendants and their gang.

(iv) To pay to the plaintiff the sum of N500.00 daily from 23/

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11/87 till the determination (sic) as loss of earnings. In the penultimate paragraph of his further Amended Statement of claim, at page 41 of the Record the claim reads:-

Paragraph 25

Whereof the plaintiff claims against the defendants jointly and severally general damages and special damages for trespass, malicious damages;

(a) PARTICULARS OF SPECIAL DAMAGES

	(i) 3 damaged pumps to be changed	
C	W149, 215, 00 each	447,645.00
	(ii) 3 pumps to be serviced with spare parts	N212,415.00
	(iii) 4 cranes to be serviced with spare parts	N1,092,387.29
	(iv) 1 autocar low-loader servicing and parts	N49, 130.00
	(v) 4 office door glasses at N112.50 each	N450.00
D	(vi) 1 office table drawer at	N90.00
	(vii) 2 empty crates of mineral	N21.00
	(viii) Cash removed from office	N23,049.31
		N1,825,187.60
	(b) General Damages for Trespass	N65,000
E	(ii) General Damages for Malicious. Damage	N10,864.00
	Total	N1,901,051.60
	(c) Loss of earning from sales from 23/11/87 at the rate of N500 a day till judgment is given	
F	(d) Interest at the rate of 10% on the judgment debt until judgment is fully settled.	

The case of the plaintiff at the High Court was that he ran a Petrol Filling Station at Kilometre 7 Onitsha Owerri Road, under a licence granted by the Nigerian National Petroleum Company (NNPC). Within the premises of the filling station, he carried on other business such as fabrication of storage tanks, plant equipment hire and maintenance. On 23/11/87, the employees of the 1st defendant including the 2nd and 3rd defendants had an encounter with the driver of a commercial bus along Onitsha-Owerri Road. In an attempt to stop the bus, they struggled for the steering with the driver.

The bus careered off the road in the process and ended up inside the Plaintiffs petrol station damaging of one the of pumping machines. This sparked off a confrontation between the employees of the 1st Defendant, ASESA, and the passengers of the commercial

bus. In response to a call for reinforcement made by the employees of ASESA to their office, three lorry loads of employees of ASESA and a Towing Van reported at the premises of the petrol filling station. The employees of ASESA armed with offensive weapons like iron rods, clubs, cudgels, chanting war songs went on the rampage of the petrol station and vandalised everything in sight. The commotion was extended to the properties in the neighbourhood of the filling station. All efforts made by the plaintiff to invite the police to instil sanity within his premises were frustrated by the unbecoming behaviour of the employees of ASESA.

In taking stock of his losses after the act of vandalism, the plaintiff itemised as follows:-

(i) Damage to the office and furniture therein, door glasses, office tables and empty crates of minerals

(ii) Damage to six out of his eight dispensing pumps

(iii) Plants and equipments:-

a) 6 Avery Hardoll dispensing pumps

b) 4 cranes, one Autocar low-loader

(iv) cash stolen by the defendants from the drawers in the office of the company was in the sum of N23, 049.31 (Twenty three thousand forty nine naira thirty one kobo)

At a discussion between the Zonal Controller of ASESA and the Plaintiff after he had paid a visit to the petrol station, he accepted responsibility for the destruction and offered to reimburse the Plaintiff for the properties damaged by the employees of ASESA. A letter to that effect was tendered and admitted in evidence as Exhibit G. As the office of the defendants/appellants failed to give prompt attention to the matter the Plaintiff/Respondent in an effort to minimise his lost took steps to repair the damaged pumps at his filling station. At the trial court the defendants/appellants denied knowledge of the incident at the Plaintiff/Respondents petrol station, and the entire claim on the day of the incident. The 3rd defendant/appellant claimed to be away on casual leave on the particular date. They tendered two receipts to establish that they called at the Plaintiff/Respondent's filling station on the day of the incident only for the purpose of purchasing fuel. The 1st Defendant/Respondent ASESA denied being vicariously liable for any wrongs committed by the 2nd and 3rd defendants/appellants. At the conclusion of trial, the learned trial judge in his consid-

ered judgment dismissed the action against the 3rd defendant while judgment was entered against the 1st and 2nd defendants/appellants jointly and severally for a total sum of N3, 325187.60 with interest on the judgement debt as 3% per annum with effect from 2/12/96 until the amount is fully paid. Dissatisfied with the foregoing decision
 B the Defendants/Appellants appealed to the lower court. At the hearing of the appeal the appellants formulated five issues. The Respondents adopted and relied on the issues formulated by the appellants in the appeal. The lower court gave an exhaustive and detailed consideration to the issues canvassed by the counsel to the parties in the
 C appeal. In the judgment of the lower court delivered on 11/12/2000 the appeal was partially allowed and award of damages was made as follows:-

(a) *The award of special damages of N1,825,187.00 for the
 D replacement and repairs of equipment/property of the Respondent destroyed and damaged is set aside and the sum of N1,437,227.60 substituted for the two arms of the injury. The award of N1, 500,000 for loss of earnings is misconceived and it is hereby set aside.*”

*In sum, the sum of N1, 437, 227.60 special damages is awarded
 E to the Respondent with the interest of 3% per annum on the judgment debt affirmed.”*

The appellants were aggrieved by this judgment and consequently made a further appeal to this court. The parties exchanged briefs of argument. When this appeal was heard on 9/4/09 the appellants
 F adopted and relied on their joint brief filed on 5/4/07. In this brief the appellants distilled three issues from their four grounds of appeal as follows:-

(1) *“Whether the non-joinder of Enugu State and /or Enugu
 G State Environmental Sanitation Authority robbed the trial court and the court of Appeal of jurisdiction in this case. (Ground One)*

(2) *Whether in view of the Respondent's claims and the concessions in his brief of argument, the standard of proof required of the Respondent is not one beyond reasonable
 H doubt. (Ground 2)*

(3) *Whether the awards of the sum of N83,295.31 and N23,049 made by the Trial Court and upheld by the lower court are proper (Grounds Three and Four).*

The Honourable, the Attorney General of Anambra at the hear-

ing of this appeal applied to withdraw issue one formulated by the appellants in their brief. With the consent of parties, the request was granted by this court and the issue was accordingly struck out. The Respondent accepted the issues as formulated by the appellants, I shall be guided by the issues formulated by the appellants for the purpose of this appeal. B

ISSUE No 2

Whether in view of the Respondents claims and the concessions in his Brief of Argument, the standard of proof required of the Respondent is not one beyond reasonable doubt. C

The Honourable, the Attorney General for Anambra State, learned counsel for the Appellants submitted that the Respondent in his Further Amended Statement of claim made specific allegations of crime against the appellants in paragraphs 7(i) 7(v) 11, 12(i) 12(iii) 12(iv) and 14. The Respondent particularly engaged the words denoting crime in the averments like stealing, wilful and malicious damage and that the appellants stole at the Filling Station of the Respondent while armed. Regardless of the use of the words denoting crime, by the Respondent, the learned trial judge and the court below concluded that the dispute was founded on civil wrong of trespass to the premises in possession of the Respondent. There was a clear pleading of premeditated robbery. D E

The learned counsel persuaded this court to hold that the consequence of these criminal acts is the basis of the claim of the Respondents in the suit. It would be wrong to hold that the criminal acts were incidental to the act of trespass. The court below was therefore wrong to have held that crime was not in issue in the pleadings of the parties. F

The learned counsel for the Respondent Mr, A.O Amene replied that the entire pleadings of the parties and not isolated paragraphs are looked into to determine the plaintiffs case vis-a-vis the jurisdiction of the court and the reliefs and the defence. There are principal issues and ancillary issues. A court must have jurisdiction to adjudicate on both. The learned counsel restated paragraphs 7 - 14 of the further Amended Statement of claim and concluded that the claim of the Plaintiff/Respondent was predicated on civil wrong of trespass to his premises where a widespread destruction was inflicted on the property of the Respondent. The loss of N23, 049.31, though G H

it had criminal undertone is only incidental to the main claims for trespass.

The learned counsel considered the case of *Oruboko v. Oruene* (1996)7 NWLR pt 462 pg. 573 where the Supreme Court extensively considered the scope of section 138 (i) of the evidence Act and concluded that where a plaintiff makes an allegation of crime in his pleadings but nevertheless succeeded in establishing his claims without proving the crime, the commission of crime cannot be said to be a fact directly in issue.

I have considered the argument and submission of the learned counsel for the parties. The core issue for determination is whether the standard of proof required to establish the claims of the plaintiff/Respondent before the trial court was that beyond reasonable doubt or preponderance of evidence as decided by the learned trial judge in the evaluation of the evidence before him. The issue of the standard of proof hovered around paragraphs 7 - 14 of the further Amended Statement of claim where the Plaintiff/Respondent pleaded the level of destruction to his property and included among the losses he suffered the sum of N23,049.31 that was removed from the Respondent's office during the pandemonium in his petrol filling station. The Respondent in the averments in his pleadings engaged certain words to capture the activities of the appellants which was pervaded with chaos and disorder. He described the event as want only destroying his property and the removal of the money in his office/ as stealing. The question follows whether the claims of the respondents are about commission of crime to require invocation of section 138(1) of the Evidence Act- and establishing proof beyond reasonable doubt or a civil claim based on the balance of probabilities according to the decision of the trial and lower courts.

Section 138(1) of the evidence Act Stipulates that:-

“(1) if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person had been guilty of a crime or wrongful act is subject to the provisions of section 141 of this Act, on the person who asserts it whether the commission of such act is or is not directly in issue in the action.

(3) If the prosecution prove that commission of a crime be-

yond reasonable doubt, the burden of proving reasonable doubt is shifted on the accused.”

The emphasis in the section going by the opening phrase is the standard of proof in a civil case with element of criminal wrong doing which reads:-

“If the commission of a crime by a party to any proceeding is directly in issue in any proceeding”. B

The courts had in the interpretation of section 138(1) made it applicable to where there is specific allegation of a crime so that its commission can properly be said to be a basis or foundation of the claim or defence as the case may be. C

Nwobodo v. Onoh (1984) 1 (SC) 1

Ikoku v. Obi (1962)1 All NWLR Vol.1 pt.1 194 at pg 199 Jules v. Ajani (1980) 5-7 SC. 116

Omoboriwo v. Ajasin (1984) 1 SCNLR 108. D

In the case of Oruboko v. Oruene 1996 7 NWLR 462 pg 555 at pg 573, paragraph H, pg 575 paras C-D, pg 576 paras B-C

The Court of Appeal took the interpretation a step further to make it more explicit by saying that:-

“It is trite that issue of crime in any civil action must arise on the pleading. Thus section 138 (1) of the Evidence Act only applies where there is a specific allegation of crime in the pleadings so that the commission of a crime can properly be said to be a basis or foundation of the claim or defence as the case may be. Therefore, the application, of section 138(1) of the evidence Act depends on the averments in the pleadings. Whether specific allegation of crime can be properly be said to be a basis or foundation of the claim or defence depends on the facts and circumstance of each case.” E
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“Where a Plaintiff makes an allegation of crime in his pleadings but nevertheless can succeed in his claim without proving the crime, it cannot be said that the commission of the crime was a fact directly in issue”.

Furthermore, where in a civil claim a person can succeed without proving criminal motive the motive cannot be regarded as a fact in issue in order to apply the provision of section 138(1) of the Evidence Act”. H

Omorhirhi v. Enetevwere (1988)1 NWLR, pt 73 pg 746 Nwankere v.

Adewunmi (1967) NMLR, pg 45 at pg 48. Okuanime v. Obabokor (1966) NMLR 47

Chief G. Tewogbade v. Mrs. Obadina (1994)4 NWLR pt 338 pg. 161

The claim of a litigant either the plaintiff or defendant depends on the averments in his pleadings. In our adversary system of the administration of justice, it is the entire pleadings of the parties that are looked into to determine the plaintiff's case, the reliefs claimed vis-a-vis the jurisdiction of the court and the defence. Paragraphs of pleadings cannot be relied on in isolation for this purpose.

There are deducible from the pleadings principal or main issues and ancillary issues.

NDIC v. SBN LTD. (2003) 1 NWLR pt 801 pg 311

Tukur v. Govt. Of Gongola State (1989) 4 NWLR pt 117 pg 517J

In the instant case, an in-depth look into the averments in the Further Amended Statement of claim of the plaintiff/ Respondent paragraphs 1-5 indicate that the dispute between the parties was premised on the wrong of trespass to the petrol filling station in possession of the Respondent where wanton destruction of property was effected. A sum of N23,049.31 was removed in the process. Though the loss of this N23,049.31 was an item of claim under the particulars of claim of the Plaintiff/Respondent, and an allegation of crime, it is only incidental to the main claims of trespass and destruction of property of the Respondent.

The appellants denied this allegation in paragraph 10 of their further Amended statement of defence.

The Respondent's case was that while the staff of the 1st Appellant were struggling to apprehend a bus on the high way the vehicle veered off the road into the respondents premises and violently knocked down one of the gasoline pumps. A fight ensued between the 1st appellant's staff, on the one hand, and the station staff, the drivers and the passengers of the bus, on the other hand, which escalated into a pandemonium leading to the widespread destruction of the respondent's property including the loss of money.

The main claim of the Respondent on which evidence was had at the trial court was for compensation for the loss of his property by the act of the intruders in his premises and the

fact that the loss included physical cash with the insinuation of its being stolen cannot transform the standard of proof of the reliefs which is essentially civil into criminal that would require proof beyond reasonable doubt. The respondent was able to succeed in his claims without proving the commission of crime which was not directly in issue as decided by the trial court and the Court of Appeal. The learned counsel derailed in his submission where upon he elevated the allegation of stealing to the aggravated offence of robbery in view of the fact that the staff of the 1st appellant besieged the premises of the Petrol Station of the Respondent with weapons like bottle, sticks etc, in their possession. There was no basis for the analogy or comparison as according to the account of the incident they were not at the premises of the Respondent to rob the passengers of the bus. The learned counsel for the appellants had orchestrated the removal of the sum of N23,049.31.

I also hold in unison with the trial court and the lower court that the claim of the Respondent was in the main, civil, in contrast with a criminal cause, consequently section 138(1) of the Evidence Act is inapplicable. Issue Two is hereby resolved in favour of the Respondent.

ISSUE THREE

Whether the awards of the sums of N83,295.31 and N23,049.31 made by the trial court and upheld by the lower court are proper.

The Honourable Attorney-General argued and submitted for the appellants on this issue that the Amended statement of claim filed on 4/5/89, and the original Statement of claim filed on 15/11/88 were no longer the pleading of the Respondent. The Respondent joined issues in the trial court with the Appellants on the further Amended Statement of claim filed on 12/10/93 and Further Amended Statement of defence filed on 30/3/94. The Further Amended Statement of claim not only superceded the Amended Statement of claim-paragraph 24 is not identical with the Amended statement of claim or the original Statement of claim. In the further Amended statement of claim the value of the 3 damaged pumps to be changed is pleaded as - N149,215.00 each = N447,645.00

In view of the further Amended Statement of claim- there was no pleading of the market value of 3 damaged pumps at the time

they were destroyed. There was nothing upon which the court below could have based the award of the sum of N59,685 as the value of the 3 damaged pumps as at the date that they were destroyed. The court of Appeal relied on the Amended Statement of claim which has been superceded by the further amended Statement of claim. This is erroneous in law. Moreover the Court of Appeal awarded to the respondent the sum of N23,049.31 as an item removed from the petrol Station of the Respondent. But the respondent at page 8 of the brief of argument before the lower court conceded as follows:-

"I however concede that the stolen money in the sum of N32,049.31 (Twenty three thousand forty nine naira, thirty kobo) could be deducted from the sum of N1,825,187.60 awarded"

Regardless of the foregoing the court of Appeal proceeded to award same to the respondent as item of property that must be replaced at the market value at the time the money was removed. The duty of the court in the circumstance is to confine itself to the case as presented by the Respondent by giving effect to the concession that is deducting the sum from the amount awarded by the trial court. The learned Attorney General concluded his argument and submission that the Supreme Court will interfere with an award of damages made or upheld by the Court of Appeal when it is improperly made. This Court is urged to resolve this issue against the Respondent.

The learned counsel for the Respondent- Mr. Amene submitted by citing the Court of Appeal in the case of Balonwu v. Obi. (2007)5 NWLR pt 1025 pg. 488 Ratio 15 at pg. 536 paragraphs (C-D) where it is stated that:-

"When a process is amended, the original process does not become otiose. The Court cannot shut its eyes against such old process, it still forms part of the processes it is entitled to look."

The learned counsel for the Respondent referred to the portion of the judgment of the lower court - particularly paragraph 25 of the further amended statement of claim which set out to amend the revised prices based on the 1993 cost. The value of the items as at 23/11/89 when the damages occurred was before court. As it became relevant to the claim of the Respondent – the court could not have closed its eyes to it. The learned Justices of the lower court considered exhaustively the cost of repairs and the cost of replacement of the damaged equipment rightly came to the conclusion, and

finally awarded a sum of N1,437,227.60 for both arms of the claims. He urged this court to resolve this issue in favour of the Respondent and finally dismissed the appeal for lacking merit.

The appellants disagreed with two areas of the damages awarded to the Respondent as follows:

(1) The award of N59,685.00 as the value of the 3 damaged pumps as at the date they were destroyed as this claim was not pleaded in the further Amended Statement relevant to the case of the Respondent at the time the matter proceeded to trial. B

(2) The award of N23,049.31 affirmed by the lower court whereas the respondent conceded that this amount could be deducted from the award made by the trial court. C

The Honourable Attorney-General persuaded this court; to interfere with the above-mentioned heads of award made by the lower court as they were improperly made. D

Damages mean the pecuniary compensation obtainable by a successful party in an action for a wrong which is either a tort or a breach of a contract.

The purpose of an award of damages is to compensate the plaintiff for damage, injury or loss suffered. The guiding principle is restitutio in intergrum, where a court is called upon to assess that a party which has been damnified by the act which is in issue must be put in the position in which he would have been if he had not suffered the damage for which is in issue must be put in the position he is being compensated. E
F

The two claims attacked by the appellants are items of special damages. They must be specially pleaded and strictly proved by credible evidence.

The Honourable, Attorney-General argued that the value of the 3 damaged pumps to be changed is pleaded as N149,215 each - and N447,645 for the 3 pumps in the Further Amended Statement of claim. The Court of Appeal relied on the Amended Statement of claim to make an award of N59,685.00 as the value of the 3 damaged pumps as at the date they were destroyed, when there was no pleading or evidence to support same. As the amended Statement of claim had been superceded by the Further Amended Statement of claim the award was erroneous in law. The award of damages is at the discretion of the trial court. An appellate court will not interfere G
H

with an award of damages by a trial court surely because it is inclined to award a different amount. In order to justify reversing the decision of a court on the question of the amount of damages, it will generally be necessary that the appellate court be convinced either that:-

- a) The court acted upon some wrong principle of law or under a mistake of law.
- b) The award is arbitrary or perverse
- c) There has been an element of wrong exercise of discretion in the award
- d) Injustice would result if the appeal court does not interfere
- e) The amount awarded by the court is either ridiculously high or ridiculously low that it must have turned out to be wholly erroneous estimate of the damages.

Ziks Press Ltd V Ikoku (1951) 13 WACA 188

Bala V Bankole (1986) 3 NWLR pt 27 pg 141

Tsokwa V Motors (Nig) Ltd V Awoniyi (1999) NWLR pt 587 pg 423

Onwa V Nka (1996) NWLR pt 458 pg 1 Ijebu-Ode L.G V Adedeji

Balogun Company Ltd (1991) NWLR pt 166 pg 135.

S.P.D.C (Nig) Ltd V Tiebo VII (1996) 4 NWLR pt 445 pg 657 Allied

Bank V Akubueze 1997 6 NWLR pt 509 pg 374

This takes me to the issue of the averment of the amount awarded in pleadings of the Respondent either in the Amended Statement of claim or in the further Amended Statement of claim. It is trite that in the pleadings of the plaintiff before commencement of trial, a further amended statement of claim supersedes an Amended Statement of claim. ***This poses the question whether pleading later amended ceases to exist for the purpose of the proceedings.***

The Supreme Court aptly considered this intricate question in the case of Agbaa homovo V Eduyegbe (1999) 3 NWLR pt 593 pg 170 at 186 - 187 paragraphs H.C

where it concluded that:-

“Although once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issue to be tried before the court, this, however, is as far as that proposition of the law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all pur-

poses and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law, established is that such original pleading which has been duly amended is no longer material before the court in the sense that it no longer determines or defines the live issues to be tried before the court. It is however totally immaterial in the determination of issues to be tried in the proceedings. Thus it cannot be considered as the basis of one's case in any action. Nor may a court of law rely on any such original pleading which has been duly amended as the basis for the judgement in the suit, the issues to be tried will depend on the state of the final or amended pleadings"

Salami V Oke (1987) 5 NWLR pt 63 pg 1

Agboisi V Ebikorefe (1997) 4 NWLR pt 502 pg 630

In short an amended process does not become otiose; it still forms part of the Record before the court in any proceeding.

Balonwu v. Obi (2007) 5 NWLR pt 1025 pg 488 Ratio 15 at pg. 536 paras C-D.

In the judgment of the Lower Court, the question of the assessment of damages was considered. Particularly under review was the question of assessment of damages as regards what should be the proper value on which to base the cost of replacement of a destroyed piece of property on the one hand, and the repair of the damaged one on the other hand. ***The court applied the decision of the Supreme Court in the case of Shell Petroleum Development Company of Nigeria Ltd V Ambah (1999) 2 SCNJ pg 152 at pg 164 that:***

"Where there is a claim for total destruction of property the measure of damage will be the value of the property at time of its destruction." The foregoing was followed and confirmed in other cases that where a chattel or property is damaged, the damages will be the value at the time it was destroyed subject to the principle of restoring the plaintiff as far as it is possible to the position he was before the injury.

Usman v. Abubakar (2001) 12 NWLR pt 728 pg 685

Kerewi v. Odugbesan (1965) 1 All NLR 95

Mehr v. Nigerian Investment and Industrial co. Ltd. (1966) 2 ALL LR Comm. 531 at pg . 359

Soetan v. Ogunwo (1975) 6 SC. 67

The claims of the Respondent in his original statement of claim filed on 15/11/88 and the Further Amended statement of claim filed on 4/5/89; are identical and they represent the value of those items at the time they were destroyed or removed. Five items of property of the Respondent destroyed and removed and which must be replaced at their market value on the date they were destroyed and removed were pleaded in paragraph 24 of the Amended Statement of claim as follows:-

- (1) 3 damaged pumps to be charged at N19,895 each = N59,685.00 changed at N19,895 each
- (2) 4 office door glasses at - N450 = N112.50
- (3) 1 office Table Drawer at
- (4) 2 empty crates of Mineral at 21
- (5) Cash removed from the office - 23,049.31
- Total = N83,295.31

The Respondent in the amended Statement of claim filed on 4/5/89 pleaded also the estimated cost of repairs at the time they were damaged as follows:-

- (1) 3 pumps to be serviced with spare parts- N24,990.00
- (2) 4 cranes to be serviced with spare parts - N363,852.69
- (3) 1 auto car lowloader servicing and parts- N14,000.00
- Total - N402,843.69

In the Further Amended Statement of claim filed on 12/10/93 revised reliefs based on 1993 costs of repairs were pleaded in paragraph 25 of the further amended statement of claim as follows:-

- (1) Two pumps to be serviced with spare parts - N212,415.00
- (2) 4 cranes to be serviced N1,092,387.29
- (3) 1 autocar lowloader 49,130.00

Computation of damages is not however uniform. It varies between total loss calling for replacement of a damaged property and repairs. While replacement is static. Repairs are subject to vagaries of unpredictable market forces. Cost of repairs not to be unjust to the one who suffered legal injury cannot be confined to the time when the damage occurred. For this reason it was emphasised in court decisions that assessment of damages must take into consideration the current market situation. The courts must take into consideration

the economic strength or decline of the Naira, and its purchasing power.

NEPA v. Alii (1992) 8 NWLR pt 259 pg 279

Onagoruwa v. IGP (1991) 5 NWLR, pt 193 pg. 593.

Allied Bank v. Akubueze (1997) 6 NWLR pt 509 pg 374

The lower court affirmed the award of the trial court for the repairs of the 3 sets of equipment set out in sub-paragraphs 25 (a) (ii) - iv of the further Amended Statement of claim filed on 12/10/93 totalling N1,353,932.29. B

On the plethora of authorities cited above the lower court affirmed the award of damages for the repairs of the pumps, cranes and auto car based on the correct principle of law. This court has no reason to offset the award. C

The Honourable Attorney General expressed dissatisfaction with the award of N23, 049.31 made to the Respondent by the lower court. D

The learned counsel made reference to page 8 of the Respondents brief before the lower court where the learned counsel for the respondent made the under mention concession:-

"I however concede that the stolen money in the sum of N23,049.31 (Twenty three thousand forty nine naira thirty kobo) could be deducted from the sum of N1,825,187.60 awarded"

The learned counsel concluded that the lower court by not effecting this concession made a case different from the case of the parties which a court ought not to make. F

This concession referred to above is on page 229 of the record of Appeal, which is page 8 of the Respondents brief of argument at the lower court. The issue of the award of damages is at the discretion of the trial court. The learned counsel for the respondent did not lay proper foundation for the concession before the lower court and why that item of claim had to be reviewed by an appellate court. It would have necessitated asking for leave to adduce fresh evidence which was not made by the learned counsel before the lower court. The lower court had rightly ignored such concession. This Concession was not pleaded by the Respondent in the further amended statement of claim. A court is duty bound to confine its decisions to issues raised by the parties. The court has no power to formulate cases for the parties or to speculate on the evidence parties ought to H

proffer otherwise it might find itself covered by the dust of conflict. Oshatoba v. Olujitan (2000) 5 NWLR, pt 655 pg 159 NDIC v. SBN Plc. (2003) 1 NWLR pt 801 pg 311

I have to confirm that an award of damages either special or general, are not awarded as a matter of course but on sound and solid legal principles and not on speculations or sentiment. Neither is it awarded at large or out of sympathy born out of extraneous considerations but rather on legal evidence of probative value adduced for the establishment of an actionable wrong or injury.

I cannot end this judgment without condemning the show of power which turned out to be a show of shame by the staff of the Anambra State Environmental Sanitation Agency, on the day of that incident.

This State Government Agency ignored the fact that it was set up by the State Government for a particular purpose - with terms of reference in the performance of its statutory duties. If the driver of the commercial vehicle had committed any wrong the Sanitation Authority could have apprehended him in a civil manner rather than endangering the life of the driver and the innocent passengers in the vehicle. The staff of the Sanitation Authority in an unguided moment thereafter unleashed a reign of terror on the property of an innocent citizen carrying out his lawful routine business in his filling station.

This kind of arbitrary show of power which is very rampant in our society must be discouraged. The event of that day was a misguided exercise of power and taking law into their hands by the staff of the Sanitation Authority. It cannot be over emphasised that every citizen of this country has a right to go about his or her lawful business unmolested and unhampered by anyone else, be it a Government Functionary or a private individual. The law of this country and particularly the courts must punish for any manifestation of arbitrary power assumed by anyone over the life or property of another. The Anambra State Environmental Sanitation Authority and other similar governmental agencies must continuously give their staff orientation and enlightenment workshops that will enable them to perform their duties without violating the rights of citizens.

This appeal is dismissed for lacking in merit. The judgment of the lower court which allows in part, the judgment of the trial court is

affirmed as follows:-

“(a) The award of special damages of N1,825,187.00 for the replacement and repairs of equipment/property of the respondent destroyed and damaged is set aside and the sum of N1,437,227.60 substituted for the two arms of the injury and.

(b) The award of N1, 500,000 for loss of earnings is miscon- B
ceived and hereby set aside.

In sum, the sum of N1,437,227.60 special damages awarded to the Respondent with the interest of 3% per annum on the judgment debt is affirmed.”

N50,000 costs of this appeal is awarded in favour of the Respon- C
dent against the Appellants.

MUSDAPHER JSC

I have read before now the judgment of my Lord Adekeye, D
JSC just delivered with which I entirely agree. In the aforesaid judgment all the issues submitted for the determination of the appeal have been thoroughly discussed. I respectfully adopt the reasoning as mine and I consequently find no merit in this appeal and I accordingly dismiss it and I abide by the orders for costs proposed therein. E

TABAI JSC

I have read, in draft, the lead judgment of my learned brother ADEKEYE, JSC and I agree that the appeal lacks merit and is liable F
to be dismissed and is accordingly dismissed by me also. I also assess the costs of this appeal at N50,000.00 in favour of the Respondent.

MUHAMMAD JSC

I have had the advantage of reading in draft the judgment just G
delivered by my learned brother, Adekeye, JSC. I am in full agreement with her that the appeal is devoid of any merit. I, too, dismiss the appeal. I affirm the court below's judgment and abide by all orders made in the lead judgment of my lord, Adekeye, JSC, including H
order as to costs.

MUNTAKA-COOMASSIE JSC

This appeal is against the judgment of the Court of Appeal Enugu Division which held that the appeal before it is partially suc-

cessful. The appeal was against the decision of Chidozie Olike J of the High Court of Onitsha in Anambra State. His Lordship held on pages 173-174 of the Record as follows: -

“After careful consideration of the facts and circumstances of the case an award of N1,500,000.00 (One million, five hundred thousand Naira) only is made under the claim for loss of earning. In the final result judgment is entered for the plaintiff against the 1st and 2nd defendants jointly and severally in the sum of N1,325,187.60 (One million, eight hundred and twenty five thousand one hundred and eighty seven naira sixty kobo) only, special damages and N1,500,000.00 (One million, five hundred thousand naira) only, representing loss of sales/earning from 23/11/87 to date 26/11/96 For the avoidance of doubt the total award is N3,325,187.60 (Three million, three hundred and twenty - five thousand, one hundred and eighty - seven naira, sixty kobo) only, made up of special damages and loss of earning.

Interest on the judgment debt at the rate of 5% per annum with effect from 2nd December, 1996 until the amount is fully paid”.

The Defendants appealed against the above decision to the court of appeal. In a unanimous decision the Court of Appeal Enugu Division held that the appeal partially succeeds. The assessments by the trial court were found to be defective not in line with well known principles governing quantum of damages and judicial guidance thereon. The defendants, now appellants before us, appealed against the unanimous decision of the court below. Notice of appeal containing four grounds of appeal was filed. Briefs were filed and exchanged. Issues were formulated and argued.

My learned brother Adekeye JSC, allowed me to read in draft the judgment just delivered. The assessment of the damages and awards articulated by my learned brother in the lead judgment is faultless and un-assailable. Having taken into consideration the principles enunciated by the following authorities made me to entirely agree with his lordship that the position taken by the court below cannot be faulted. The authorities are:-

1. Biliyaminu Alao & Anor vs. Trans Continental Transport (Nig) Limited (1990) 7 NWLR (pt 160) p 36 at 52 - 54.

2. Incar Nigeria Ltd vs. Benson Transport Ltd (1975) 3 S.C. 117 at 121;

3. West African Examination Council vs. Koroye (1977) 2 SC 45 at 54.

4. Shell B - Petroleum Development Company of Nigeria Limited vs. His Highness Per Cole, (1978) 3 SC. 183,192.

The law has since been trite that where precise evidence is obtainable the court naturally expects to have it but where it is not, the court must do the best it can. Where the award was made there must be evidence to support the evaluation. B

Consequently, for the actual loss the right measure of damages is the value of the property at the time of the destruction plus such further sum as would compensate the owner of the properties destroyed for loss of earnings and the inconvenience. In the case at hand the learned trial judge applied the wrong principle in his assessment of the damages recoverable by the respondent. Also he awarded general damages and for continues loss of earnings while in fact there was no evidence before him to support the said award. C

FERRIS GEORGE V. KALIM KHOURY (1965) 1 All NLR p 99.

It Is not in dispute that where a trial court, as in the appeal at hand, made his own assessment which the respondent failed to prove, the assessment cannot be justified and the court below is free to interfere with and make the correct assessment and evaluation, We should not loose sight of the guiding principle in this type of award is restitutio in integrum. The principle portrays that a party which has been damnified by the act which is in issue must be put in the position in which he would have been if he had not suffered the damage for which he is being compensated. F

It goes without saying and it is a good law that the yardstick for evaluation or assessing compensation for destruction of the properties, as in this matter, is the sum of money that will put the party who has suffered (Victim of the destruction) in the same position as he would have been in if he had not sustained the wrong for which he gets his compensation or reparation - Kusfa vs. UBC Limited (1994) 4 NWLR (pt 336) 1. H

Iguh JSC, on proof of special damages has this to say on p 140 paras D - G of Nzeribe vs. Dave Eng. Co. Ltd. (1994) 8 NWLR (pt 360) 124/140 thus: -

"In the first place, I entirely agree with learned appellant's coun-

sel that a claim in special damages must, to succeed, be proved strictly and that the court is not entitled to make its own estimate on such an issue. See Dumez (Nig.) Ltd v. Ogboli (1972) 1 All NLR 241 and jabber v. Basma 14 WACA 140. The rule that special damages, unlike general damages, must be strictly proved is well founded in law
 B *and has been repeatedly emphasized by this court. What this rule requires, in effect, is that any one making a claim in special damages must prove strictly that he did suffer such special damages claimed, This, however, does not mean that the law requires an extra-ordinary measures of evidence or that the law less than or requires a*
 C *special category of evidence to establish entitlement to special damages. It does not mean either that an award in special damages cannot be made unless such damages are established beyond reasonable doubt as is the position in criminal cases. All that the rule re-*
 D *quires is that person making a claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head, otherwise the general law of evidence as to proof on the balance of probabilities or by preponder-*
 E *ance or weight of evidence which ordinarily applies in civil cases operates. See Oshinjirin and ors v. Alhaji Elias and ors (1970) 1 All NLR 153 at 156. See too Dumez (Nig) Ltd v. Patrick Ogboli (1972) 1 All NLR (pt. 1)241".*

F I agree as held generally in the lead judgment that award of damages either special damages or general, is not awarded as a matter of course and not on speculation or sentiment. The stance taken by the court below, with respect, was based on sound and solid legal principles. That being the case there is no reason why the judgment
 G of the court below shall be interfered with. For the foregoing reasons and fuller reasons rendered by my learned brother, Adekeye JSC, in his leading judgment, I entirely agree with him that the court below was right. The appeal before us therefore fails. Same is dismissed. I endorse the order as to costs.

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