

SUPREME COURT OF NIGERIA
29TH JANUARY, 2010. SC. 16/2004
CORAM:- A. I. KATSINA-ALU, M. MOHAMMED,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

1. MRS. EVA ANIKE AKOMOLAFE
 2. CHIEF AGBOOLA AKOMOLAFE APPELLANTS
AND
 1. GUARDIAN PRESS LIMITED
(PRINTERS)
 2. GUARDIAN NEWSPAPER LIMITED
(PUBLISHERS) RESPONDENTS
 3. JOSEPH NAKPODIA
 4. ADEWALE GBELEYI
-

APPEALS - Issues - Essence of - An issue is properly so called- When its resolution in favour of appellant - Should result in setting aside of the judgment appealed against (H1)

JUDGMENTS - Mistakes - Appeals - Setting aside - Effect of mistakes - A mistake must have led to miscarriage of justice - Before it can result in the setting aside - Of a judgment appealed against (H2)

EVIDENCE - Cross examination - Elicited facts - Evidence for adverse party - Such facts may be relied on by an adverse party - Provided they were pleaded by the party concerned (H3)

COURTS - Erroneous finding - That both parties called evidence - Effect - Even if the finding was in error - It did not occasion miscarriage of justice (H4)

JUDGMENTS - Missing word - Held to be "fair" - Correctness - In view of the recorded findings by the trial judge - Court of Appeal was right - To have held that the missing word was "fair" (H5)

TORTS - Defamation - Issues - Relevancy - The finding that the publications were not defamatory - Made the issue as to whether they

referred to appellant irrelevant (H6)

TORTS - Defamation - Qualified privilege - Meaning - It means that public convenience must be preferred to private convenience - In dissemination of information of interest to the public (H7)

FACTS

The plaintiffs/appellants sued defendants/respondents at the Lagos State High Court claiming damages for libel and injunction. The appellants are husband and wife - 1st appellant being the wife of 2nd appellant. It is undisputed that the alleged libel was published in the Guardian Newspapers of 2nd September and 6th October 1985, respectively. At the material time, 1st appellant was the Registrar of the Companies Registry while 2nd appellant was in private legal practice. The alleged libellous publications were to the effect that inefficiency, corruption, graft and nepotism pervaded the affairs of the Companies Registry under the charge of 1st appellant.

Although respondents did not call any witnesses to testify in support of the facts in their statement of defence, the evidence adduced in support of appellants' claims taken together with that elicited by defence counsel under cross-examination from appellants' witnesses adequately justified the publications. Accordingly, the trial court upheld the defences of fair comments, qualified privilege and constitutional right relied on by respondents. Aggrieved, appellants appealed to Court of Appeal against the judgment but the appeal was dismissed as Court of Appeal held, *inter alia* that respondents had proved the truth of the facts published. Dissatisfied, appellants have brought this further appeal to Supreme Court contending that respondents could not have proved the truth of those facts when they did not call any witness.

ISSUES FOR DETERMINATION

“6.01 Whether the Court of Appeal was right in finding that the Respondents “pleaded truth “ and in concluding that the fair comment was founded on true facts and that the Defendants had satisfied the demand of the law which requires a Defendant to prove the truth of a defamatory statement rather than the plaintiff its untruth.

6.02 Whether the Court of Appeal applied the correct stan-

dard of proof required to prove the alleged criminal offences of nepotism, corruption, graft, malpractices, fraudulent practices, illegal business, "bare-faced nepotism and utter insensitivity in high quarters", incompetence and inefficiency, particularly when the Respondents did not call evidence.

6.03 Whether the Court of Appeal was right in affirming the trial courts conclusion on Nepotism in the light of the uncontroverted evidence of the Appellants and their witness and the criminal nature of the charge.

6.04 Whether the Court of Appeal misdirected itself on the facts and whether substantial miscarriage of justice was thereby occasioned.

6.05 Whether the Court of Appeal justly and adequately considered the issue of the unpleaded defence that the articles did not refer to the Plaintiffs/Appellants but to the Company's Registry and whether this should have been properly considered first before the question of whether or not the articles are libelous.

6.06 Whether there was no evidence before the Court of Appeal that the publications were actuated by express malice.

6.07 Whether the decision was against the weight of evidence.

6.08 Whether the Court of Appeal was right in concluding that the Defendants/Respondents had proved the truth of the defamatory allegations when the material facts relating to the Appellants' answers to the cross-examination were not pleaded by the Respondents and when the Court of Appeal adversely misquoted the appellants' answers which the Court of Appeal considered and based their judgment upon.

6.09 Whether the Court of Appeal misdirected itself by failings to set aside the finding of the learned trial court that the articles complained of a fair comment on the shortcomings and inadequacies of the Companies Registry, when the attacks were largely directed at the two Appellants.

6.10 Whether the Court of Appeal was right in confirming the trial court's decision and upholding the unproven defences pleaded by the Respondents.

6.11 Whether the Court of Appeal was right in recasting, re-constructing, substituting and interpreting the trial judge's findings and conclusion on the criminal charge of Nepotism particularly when

the Court of Appeal observed that “it does not make sense.”

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)
APPEALS - Issues - Essence of

1. Obviously, there is nothing to be gained from multiple issues Particularly when what one calls an issue does not really touch on the reason for the decision of the lower court to make it relevant to the determination of the appeal in favour of the appellant. An issue is properly so called when, if resolved in favour of the appellant, should result in the setting aside of the judgment or decision appealed against as it is generally accepted that it is not every mistake or error of the court that would result in the setting aside of the decision of the lower court. (p. 72 C)

JUDGMENTS - Mistakes - Appeals - Setting aside

2. It is settled law that it is not every mistake or error of a court that would result in the setting aside of the decision reached; that for an error to have that effect, it must be substantial so as to lead to a miscarriage of justice. The question is whether the substitution of the word “since” by the lower court for the word “before” 1985 resulted in a miscarriage of justice so as to result in the setting aside of that decision.

At page 320 of the record, during the cross examination of PW2, the witness had these to say:-

“At the time my wife took over and up till now the Registry still has a bad reputation.”

The above is a clear evidence in support of the fact that the Registry had a bad reputation “before” and “since” the 1st appellant assumed duty at the Companies Registry and as such I hold the considered view that neither the substitution of the word “since” for “before” by the lower court, nor the omission of the word “before” 1985 as contained in the evidence of PW2 by the trial court has, in any way, resulted in a miscarriage of justice particularly in view of the evidence under cross examination of PW2 reproduced supra. (pp. 74 H/75 C)

Cross-examinations - Elicited facts - Evidence for adverse party

3. It is settled law that evidence elicited from a party or his witness(es)

under cross examination which goes to support the case of the party cross examining , constitute evidence in support of the case or defence of that party. If at the end of the day the party cross examining decides not to call any witness, he can rely on the evidence elicited from cross examination in establishing his case or defence. There is however a catch to this principle. The exception is that the evidence so elicited under cross examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties. (p. 75 F/H) B

Erroneous finding - That both parties called evidence - Effect C

4. The lower court was correct in saying that both parties called evidence in support of their pleadings. Even if the lower court is in error in so holding, I hold the view that having regard to the fact that the relevant evidence elicited from the appellants relate to the facts pleaded by way of defence to the action they form part of the respondents case and can be relied upon by the respondents in establishing their defence to the action, without calling witnesses to further establish the said defence. That being the case, it is clear that the holding of lower court has not occasioned any miscarriage of justice to necessitate this court's intervention. (p. 77 H) D
E

Missing word - Held to be "fair" - Correctness

5. The court thus supplied the word "*fair*" as the missing word to make the passage not only complete but sensible. I hold the considered opinion that the lower court is right in so holding particularly as the trial judge found at page 376 of the record, in its judgment, thus: F

"The words in all the Articles complained of are fair comment on the shortcomings and inadequacies of the Companies Registry....." G

In the circumstance it is clear that the act of the lower court in supplying the missing word and inserting it where it did has not occasioned any miscarriage of justice. May be if the lower court had agreed with the submission of the appellants on the matter it would have been acceptable to the appellants but that would not be correct judgment from the specific findings by the trial court on the matter in question. I therefore resolve the issues against the appellants. (p. 80 F) H

TORTS - Defamation - Issues - Relevancy

6. It is important to note that both courts found and held that the publications complained of are not defamatory, let alone defamatory of the appellants. It would have been different if they had found the publications defamatory but held that the publications did not refer to the appellants. Such a finding, in my view, would have made the issue as to whether the publications referred to the appellants contrary to the findings of the courts very relevant. The finding that the publications are not defamatory makes the issue as to whether the articles referred to the appellants or not very irrelevant. In any event, I had earlier held that it is not every error committed by a court that will result in the setting aside of the decision by an appellate court. (p. 82 G)

TORTS - Defamation - Qualified privilege - Meaning

7. It is settled law that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral; to make it to the person to whom it was made, and the person to whom it was made has a corresponding interest or duty to receive it. Having upheld the defence of qualified privilege, it means simply that public convenience or interest must be preferred to private convenience or interest in the dissemination of information which is of great interest and benefit to the public particularly having regards to the sorry state of affairs at the Companies Registry in the instant case. I therefore resolve the issue against the appellants. (p. 83 E)

REPRESENTATION

Akomolafe Esq. for the appellants with him is A. A. Williams Esq. T. E. Williams Esq.; SAN for the 1st - 3rd respondents with him Mohammed Sallau Esq. and S. Osunbade Esq.
No appearance for the 4th respondent.

CASES REFERRED TO

Kale vs Coker (1982) 12 S. C 252
Adam vs Ward (1917) AC 309 at 334
Shaibu vs Bakare (1984) 12 S. C 187 at 226
Adisa vs Ladokun (1973) All N. L. R. 679 at 790

Aniemeka - Emekogwu vs Okadigbo (1973) 4 S. C 113 at 117

LEAD JUDGMENT BY ONNOGHEN JSC

This appeal is against the judgment of the Court of Appeal Holden at Lagos in appeal NO. CA/L/495/2001 delivered on the 18th day of June, 2003 in which the court dismissed the appeal of the appellants against the judgment of the Lagos State High Court in suit NO. LD/256/86 delivered on the 7th day of October, 1999 dismissing the suit of the appellants, who were the plaintiffs before that court.

The appellants, as plaintiffs in the trial court, claimed, in paragraph 18 of their Amended Statement of Claim, particularly at page 254 of the record as follows:

“18

(i) *N8 Million being damages for libel published of and concerning the 1st plaintiff*

(ii) *N3,105,000.00 being damages for libel published of and concerning the 2nd plaintiff.*

(iii) *An injunction restraining the Defendants, their servants and/or agents from further publishing the said and or similar words of the plaintiffs.”*

In a judgment delivered on the 7th day of October, 1999, the learned trial judge upheld the defences pleaded by the defendants and accordingly dismissed the case of the plaintiffs resulting in an appeal to the Court of Appeal which was also dismissed. The instant appeal is against the judgment of the Court of Appeal.

The alleged libel said to have been falsely and maliciously published of and concerning the appellants by the respondents is said to be contained in the issue of “*THE GUARDIAN*” Newspaper dated the 2nd day of September, 1985 at pages 1 & 12 under the heading: “*COMPANIES REGISTRY IN SHAMBLES*”. The publication is said to be in the way of the profession and office of the appellants and their conduct therein. The write up is as follows:-

“The Guardian discovered that agents, touts and clerical staff and sometimes highly placed officials of the registry have been doing brisk illegal business at the Registry and Nepotism has also featured in the list of Companies (sic) being leveled at the Registry. It is common knowledge at the Registry that the husband of one of the topmost

officials at the Registry is a lawyer with an office in the business centre of Lagos Island. It is said that the husband also registers companies for clients and the fact of his wife being a top official at the Registry could be an exploitable coincidence. The Guardian saw a complimentary which the lawyer-husband had minuted to his wife requesting that a client be helped to register a company.”

Again in the issue of “*THE GUARDIAN*” Newspaper of the 6th day of October, 1985, the respondents were said to have falsely and maliciously written, printed and published of and concerning the 1st appellant in the way of her profession and office and of her conduct therein the following words, that is to say:-

“Indeed as rightly pointed out in your report, the situation has been further compounded by bare-faced nepotism and utter insensitivity in high quarters “and,

“As a first step, the inept leadership at the Registry must be changed forthwith in order to give office a fresh lease of life. Secondly a thorough investigation must be set in motion to probe the allegations of corruption, graft and nepotism said to pervade the place.”

The respondents are also alleged to have falsely and maliciously printed and published of the 1st appellants and of her profession and office and conduct therein in the issue of “*THE GUARDIAN*” Newspaper of the 9th day of December, 1985 the following words:-

“The Registry was closed down a day after the Guardian on Sunday carried a front page report detailing the graft, corruption, nepotism and the storage cum retrieval (sic) problems said to be hampering efficiency and fair-play at the Registry. One of the immediate steps taken to re-organise it was the retirement of the former Registrar, Mrs. A.E. Akomolafe.”

Learned Counsel for the appellants, CHIEF AGBOOLA AKOMOLAFE, in the amended appellants’ brief of argument filed on 11th April, 2006 and adopted in argument of the appeal on the 3rd day of November, 2009, formulated the following eleven issues for the determination of the appeal:-

“6.01 Whether the Court of Appeal was right in finding that the Respondents “pleaded truth “ and in concluding that the fair comment was founded on true facts and that the Defendants had satisfied the demand of the law which requires a Defendant to prove

the truth of a defamatory statement rather than the plaintiff its untruth.

6.02 Whether the Court of Appeal applied the correct standard of proof required to prove the alleged criminal offences of nepotism, corruption, graft, malpractices, fraudulent practices, illegal business, “bare-faced nepotism and utter insensitivity in high quarters”, incompetence and inefficiency, particularly when the Respondents did not call evidence. B

6.03 Whether the Court of Appeal was right in affirming the trial courts conclusion on Nepotism in the light of the uncontroverted evidence of the Appellants and their witness and the criminal nature of the charge. C

6.04 Whether the Court of Appeal misdirected itself on the facts and whether substantial miscarriage of justice was thereby occasioned. D

6.05 Whether the Court of Appeal justly and adequately considered the issue of the unpleaded defence that the articles did not refer to the Plaintiffs/Appellants but to the Company’s Registry and whether this should have been properly considered first before the question of whether or not the articles are libelous. E

6.06 Whether there was no evidence before the Court of Appeal that the publications were actuated by express malice.

6.07 Whether the decision was against the weight of evidence.

6.08 Whether the Court of Appeal was right in concluding that the Defendants/Respondents had proved the truth of the defamatory allegations when the material facts relating to the Appellants’ answers to the cross-examination were not pleaded by the Respondents and when the Court of Appeal adversely misquoted the appellants’ answers which the Court of Appeal considered and based their judgment upon. F G

6.09 Whether the Court of Appeal misdirected itself by failings to set aside the finding of the learned trial court that the articles complained of a fair comment on the shortcomings and inadequacies of the Companies Registry, when the attacks were largely directed at the two Appellants. H

6.10 Whether the Court of Appeal was right in confirming the trial court’s decision and upholding the unproven defences pleaded

by the Respondents.

6.11 *Whether the Court of Appeal was right in recasting, re-constructing, substituting and interpreting the trial judge's findings and conclusion on the criminal charge of Nepotism particularly when the Court of Appeal observed that "it does not make sense."*

B It should be noted that the above eleven issues for determination are aid to have arisen from the lower court's resolution of the only two issues submitted to it by the appellants!! The issues are as follows:-

C *"(1) Was the learned trial judge not in error in failing to hold that the charge of nepotism leveled against the plaintiffs was defamatory of the plaintiffs?"*

(2) Was the learned trial judge right in holding that the publications complained of did not refer to the plaintiffs?"

Obviously, there is nothing to be gained from multiple
D ***issues Particularly when what one calls an issue does not really touch on the reason for the decision of the lower court to make it relevant to the determination of the appeal in favour of the appellant. An issue is properly so called when, if resolved in favour of the appellant, should result in the setting***
E ***aside of the judgment or decision appealed against as it is generally accepted that it is not every mistake or error of the court that would result in the setting aside of the decision of the lower court.*** In the instant case as has been demonstrated supra, appellants submitted only two issues to the lower court for determination which issues were resolved against the appellants, but on appeal against the decision on the two issues, the appellants have submitted eleven issues to this court for determination. Obviously
F some of them cannot be relevant or may be repetition of others,
G either of which will result in the waste of the time of the court, and should be discouraged.

However, in arguing the appeal, learned counsel for the appellants argued issues, 1,4,8 and 10 together, while issues 2,3,9 and 11 were also argued together. Finally, issues 5,6 and 7 were argued
H separately.

On issues, 1,4,8 and 10, Learned Counsel for the appellants submitted that the lower court, *suo motu*, added the defence of "*pleaded Truth*" to the list of defences of the respondents and based its decision on the erroneous inferential findings that the respondents

called evidence when in fact the respondents did not call any evidence in defence of the claims of the appellants; that the lower court was in error introducing the defence of truth contrary to the case pleaded by the parties, relying on the case of *Adisa vs Ladokun* (1973) All N.L.R. 679 at 790; that the lower courts admitted or employed the material facts of exhibit G - the Star Newspaper of Enugu, “as a platform for proving the defences pleaded by the respondents’ *Guardian newspapers*” when the respondents did not plead exhibit G as being the basis of their plea of fair comment and when the appellants pleaded the said exhibit G to prove the extent of publication of the alleged libel; that the lower court wrongly stated that PW2 stated that exhibit G contains the truth of the long bad record of the Companies Registry since 1985 whereas the true position is that instead of “since”, PW2 said “before” 1985 thereby resulting in a miscarriage of justice; that since the respondents called no evidence, their defence as pleaded is deemed abandoned by operation of law; that the respondents’ extracted evidence under cross examination on facts not pleaded in support of their defence which therefore ground to no issue; that the concurrent findings of facts by the lower courts are perverse as they are based on misquotations of the actual evidence given by the witnesses and as such this court should not rely on them but should set aside the said findings, relying on *Kale vs Coker* (1982) 12 S.C 252. Finally that the evidence of the appellants were uncontroverted as the respondents are deemed to have abandoned their pleadings and urged the court to resolve the issues in favour of the appellants. On the other hand, Learned Senior Counsel for the 1st - 3rd Respondents, T.E. WILLIAMS ESQ, SAN, in their brief of argument filed on 23/3/09 submitted that the lower court did not base its judgment upon the fact that truth was pleaded by the defendants but that the “defences ;;;; are fair comment, qualified privilege and constitutional right...”; that the conclusion of the court on the matter, after a review of some of the evidence on record, is that the defence of fair comment availed the defendants as the article was founded on true facts and is equally fair. On the issue of substitution of the word “since” for “before” 1985 as done by the lower court, Learned Senior Counsel submitted that the argument of his learned friend overlooks the evidence of PW2 elicited under cross examination at page 320 of the record where he stated that at the time 1st appellant took over the

Companies Registry up till the time of testifying in the court, the Registry still had a bad reputation; that having regards to the state of affairs existing at the Registry as recorded by PW1 under cross examination at page 299 of the record, the defence of fair comment, qualified privilege and constitutional right operated in favour of the defendants; that answers elicited from a plaintiff when under cross-examination reinforce the defendants' case; that the defences of fair comment, qualified privilege and constitutional right operate in favour of the defendants especially when viewed in the light of the captions to the alleged libelous articles, notwithstanding the fact that the defendants called no witnesses; that the three witnesses of the appellants gave evidence in support of the defence -that 1st appellant admitted that the lawyers stampeded; 2nd appellant admitted that exhibit G *"contains the truth of the long bad record of the Companies Registry"* and Mr. Shokoya admitted that 2nd appellant's card was to enable him gain entrance into the Companies Registry, and urged the court to resolve the issues against the appellants.

The 4th respondent filed no brief neither was he represented by counsel through duly served with all the processes in this appeal. In the Reply Brief filed on 16th April, 2009, learned counsel for the appellants, in effect, reargued the appeal in a nine paged brief in 'reply' to a ten paged respondents' brief!!

It is true that the word *"since"* was substituted for the word *"before"* 1985 in the testimony of PW2. Equally true is the fact that whereas the trial court found that only the appellants called witnesses in support of their case the lower court held that both parties called evidence in support of their respective cases. The issue to be resolved has to do with the legal consequences or effects of the said errors on the final decision of the lower court having regard to the case of the parties and the evidence on record. Whereas the appellants contend that the errors resulted in a miscarriage of justice, the respondents have submitted that they do not, having regards to the fact that they were, in substance correct, in view of the evidence on record.

It is settled law that it is not every mistake or error of a court that would result in the setting aside of the decision reached; that for an error to have that effect, it must be substantial so as to lead to a miscarriage of justice. The question is whether the substitution of the word "since" by the lower

court for the word “before” 1985 resulted in a miscarriage of justice so as to result in the setting aside of that decision. The effect of the argument of learned counsel for the appellants on the substitution of the word “since” for “before” on the reported bad reputation of the Companies Registry is that the substitution is not only perverse but tendered to say that the said bad reputation has its genesis in the assumption of office of the Registrar by the 1st appellant, where as the word “before” shows that the bad reputation had been there before the tenure of the said 1st appellant. The above position would have been tenable if there is no evidence in support of the statement by the lower court or the substitution. However, **at page 320 of the record, during the cross examination of PW2, the witness had these to say:-**

“At the time my wife took over and up till now the Registry still has a bad reputation.”

The above is a clear evidence in support of the fact that the Registry had a bad reputation “before” and “since” the 1st appellant assumed duty at the Companies Registry and as such I hold the considered view that neither the substitution of the word “since” for “before” by the lower court, nor the omission of the word “before” 1985 as contained in the evidence of PW2 by the trial court has, in any way, resulted in a miscarriage of justice particularly in view of the evidence under cross examination of PW2 reproduced supra.

On the issue as to whether both parties called evidence in support of their pleadings as held by the lower court, ***it is settled law that evidence elicited from a party or his witness(es) under cross examination which goes to support the case of the party cross examining, constitute evidence in support of the case or defence of that party. If at the end of the day the party cross examining decides not to call any witness, he can rely on the evidence elicited from cross examination in establishing his case or defence.*** In such a case you cannot say that the party calls no evidence in support of his case or defence. One may however say that the party called no witness in support of his case or defence, not evidence, as the evidence elicited from his opponent under cross examination which are in support of his case or defence constitute his evidence in the case. ***There is however a catch to this principle.***

The exception is that the evidence so elicited under cross examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties.

B In the instant case, it is not disputed that the respondents pleaded the defence of fair comment, qualified privilege and constitutional right in respect of the claim for libel in relation to the articles complained of. I had earlier reproduced the extract of the cross examination of PW2 at page 320 of the record on the bad reputation of the Registry.

C At page 299 of the record, PW1, also under cross examination, stated inter alia, as follows:-

“During my tenure as Registrar of Companies, applicants did not need to tip anyone because the reason for tipping, was because D the proforma letter was not available before I came there, file jackets, tags were not again available. Immediately I became Registrar no lawyer needed to bribe anybody to get these things. I made the available file to all lawyers and members of the public. I did not offend any lawyer. There was a stampede by lawyers this was as a result of E applications for import licence in August, 1985. We were on vacation then; lawyers came because of import licence which had expired (sic) period of 6th September. This was because business names were not allowed to apply for import licence (for the 1st time) only limited liability companies were allowed for the 1st time. The stampede was F due to a change in Government Policy.”

PW2 admitted under cross examination that exhibit G “..... contains the truth of the long bad record of the Companies Registry.”

One of the publications complained of is that published on the G 22nd of September, 1985 issue of the Guardian newspaper captioned “Companies Registry in shambles” as follows:-

“The Guardian discovered that agents, touts, and clerical staff and sometimes highly placed officials of the Registry have been doing brisk illegal business at the Registry” and,

H *“Nepotism has also featured in the list of companies (sic) being leveled at the Registry. It is common knowledge at the Registry that the husband of one of the top-most-officials at the Registry..... It is said that husband also registers companies for clients and the fact of his wife being a top official at the Registry could be an exploitable*

coincidence. *The Guardian saw a complimentary card which the lawyer-husband had minuted to his wife requesting that a client be helped register to register a company.*"

In their defence, the 1st - 3rd respondents pleaded, inter alia, thus:-

"7. Further or alternatively, the said publications were published on an occasion of qualified privilege. B

PARTICULARS

(a) At all material times to this action, it was publicly debated that the companies registry was in a state of disorganization.

(b) The Nigerian Bar Association at its well attended annual general meeting in Port Harcourt in 1985, heard many of its members company (sic) against the organization and operations of the companies registry. C

(c) The companies registry is a public institution -which registers limited liability companies. D

(d) The Federal Military Government at all material times precluded companies other than limited liability companies from applying for import licences.

(e) At all times material to this action, to successfully apply for import licence amounted to securing a gold mine. E

In the premises, the defendants and members of the public had a common and corresponding interest in the subject matter and the publication of the said words.

Alternatively, the defendants -were under a legal and/or social and/or moral duty to publish the said words to members of the public who had a likely duty and/or interest to receive them. F

8. Alternatively, in so far as the said publication consist of statements of fact they are true in substance and in fact and, in so far as they consist of expressions of opinion, they are fair comment made without malice on the said facts which are a matter of public interest. G

It is clear from the reproduced pleadings of the respondents that the evidence elicited from the cross examination of the appellants and reproduced earlier in this judgment are on facts pleaded by the respondents by way of defence to the action. It is therefore clear that the respondents can legally rely on such evidence to establish their defence without the need to call witnesses and that ***the lower court was correct in saying that both parties called evidence*** H

in support of their pleadings. Even if the lower court is in error in so holding, I hold the view that having regard to the fact that the relevant evidence elicited from the appellants relate to the facts pleaded by way of defence to the action they form part of the respondents case and can be relied upon by the respondents in establishing their defence to the action, without calling witnesses to further establish the said defence. That being the case, it is clear that the holding of lower court has not occasioned any miscarriage of justice to necessitate this court's intervention.

On the issue of the raising of the defence of truth *suo motu*, it is very clear from the judgment of the lower court that the said judgment was never based on that issue at all. I am saying that the said judgment was not based on the alleged defence of truth at all. At page 482 of the record, the lower court clearly and emphatically found thus:-

"As I have said the defences put up by the defendants are fair comment, qualified privilege and constitutional right to publish such words..."

The court then concluded at page 486, inter alia, thus:

"..... It is my view that the comment therein contained is founded on true facts and it is equally fair."

In the circumstance I have no hesitation in resolving the issues under consideration against the appellants.

On issues 2,3,9 and 11, learned counsel for the appellants argued that the respondents published allegations of the crime of nepotism and other crimes against the appellants, which are distinct and severable from the civil allegations of inadequacies of the Companies Registry but the lower court failed to make the required distinction; that the allegation of nepotism was never proved by the respondents; that the allegation cannot be regarded as comments; that there is evidence that what 2nd appellant wrote on the complimentary card was *"Bearer is a colleague"* and that 2nd appellant never incorporated any of the companies mentioned in the publications; that the card never got to 1st appellant etc; that the allegations were therefore false.

Learned Counsel further submitted that the lower court was in error when, after finding that the findings and conclusion of the trial

court on the issue of nepotism did not make sense to have proceeded to substitute the word “fair” into the sentence and interpreting same to the disadvantage of the appellants, thereby resulting in a miscarriage of justice; that to avoid such an injustice being done to the appellants, the lower court ought to have ordered a retrial or called for the trial court’s case file and urged the court to resolve the issues in favour of the appellants. B

On his part, Learned Senior Counsel -for the 1st, 2nd and 3rd respondents submitted that the evidence on record justified the lower courts’ conclusion and that there was no need for the defendants to call their own witnesses particularly as the appellants admitted the terrible state of affairs at the Registry; that it does not matter whether it was “colleague” and not “client” that was written on PW2’s complimentary card neither is it material that the said card was never given to 1st appellant having regard to the holding of the lower court at page 487 of the record. On the construction of the portion of the judgment of the trial court where a word is missing, counsel submitted that the reasoning and conclusion of the lower court on the matter cannot be faulted as that court held that words in a publication alleged to be defamatory must be construed as a whole; that both parties and the lower court agreed that a word was missing from the portion of the judgment of the trial court and preferred their solutions and concluded that the lower court was right in its conclusion on the issue and urged the court to resolved the issues against the appellants. C D E F

I had earlier reproduced the portion of the publication dealing with nepotism resulting from the endorsement on the 2nd appellant’s complimentary card meant for the 1st appellant at her office in the Companies Registry. I agree with the lower courts that what was stated in the publication was a comment on the issue of nepotism and particularly the conclusion of the lower court at page 487 of the record thus: G

“The second Appellant’s endorsement of his complementary card intended for onward transmission to the first appellant, by its contents, was to influence a public officer (the first appellant) to show favour on someone, and when put against the background of what was prevailing in the Registry then no case of libel could be founded against the respondents.” H

It is not in dispute that there were serious shortcomings and inadequacies in the Companies Registry at the relevant point in time and that the 2nd appellant endorsed his complimentary card to PW3 for onward transmission to 1st appellant so as to enable the PW3 to be attended to by the 1st appellant. When all the facts surrounding the allegation in the publication are taken together, one cannot but agree with the conclusion of the lower court in the passage quoted supra.

On the issue of incomplete statement in the passage in the judgment of the trial court, at pages 373 and 374 of the record thus:-

“Going by the definition of nepotism the article where nepotism is mentioned and the comment are thus in the circumstance. It is a trite law that words in the publication complained of in a libel case must be construed as a whole.”

It is clear, and both counsel agreed before the lower court that something was missing in the first part of the passage reproduced above that is why the lower court held that the said part of the passage makes no sense. It was the contention of the appellants that the word “thus” ought to be “true” while the respondents argued that there was a missing word after the word “thus” which they submitted is the word “fair”.

In deciding between the submissions of the parties the lower court went through the whole judgment of the trial court and came to the conclusion that the learned trial judge meant to say that:-

“Going by the definition of nepotism the article where nepotism is mentioned and the comment are thus in the circumstances fair”.

The court thus supplied the word “fair” as the missing word to make the passage not only complete but sensible. I hold the considered opinion that the lower court is right in so holding particularly as the trial judge found at page 376 of the record, in its judgment, thus:

“The words in all the Articles complained of are fair comment on the shortcomings and inadequacies of the Companies Registry....”

In the circumstance it is clear that the act of the lower court in supplying the missing word and inserting it where it did has not occasioned any miscarriage of justice. May be if

the lower court had agreed with the submission of the appellants on the matter it would have been acceptable to the appellants but that would not be correct judgment from the specific findings by the trial court on the matter in question. I therefore resolve the issues against the appellants.

On issue 5, Learned Counsel submitted that a judge cannot depart from the case pleaded by the parties; that in the instant case, the lower court did not justly and adequately consider the issue of the unpleaded defence that the articles did not refer to the appellants, relying on *Shaibu vs Bakare* (1984) 12 S.C 187 at 226; *Aniemeka - Emekogwu vs Okadigbo* (1973) 4 S.C 113 at 117.

On the other hand, Learned Counsel for the respondents submitted that it is not every wrong statement in a judgment that will lead to its being reverted on appeal, relying on *Agbabiaka vs Saibu* (1998) 10 NWLR (pt. 568) 549; that the statement credited to the trial court was made in passing after reading the entire exhibit A which did not mention the name of the ^{1st} appellant; that in any event, both courts did not base their decision on that point and that it was the defence of qualified privilege, fair comment and constitutional right that the lower court upheld and urged the court to resolve the issue against the appellants.

The passage in the judgment of the trial court complained of is at page 376 of the record where the court stated as follows:-

“The articles complained of was not defamatory of the plaintiffs since they do not refer directly to her husband but to the Companies Registry, -which the plaintiffs admit was in a hopeless state. The defendants in exercising their constitutional right to publish, published information on a matter of public interest. The defences pleaded by the Defendants are hereby upheld. Plaintiffs’ claim is accordingly dismissed.”

The complaint of the appellants against that passage in the lower court is that the trial court was wrong to have raised a defence *suo motu* and basing its decision thereon.

The reaction of the lower court to the issue is that it cannot be correct to say that the learned judge held that the words complained of did not refer to the appellants. The contention of the appellants on the issue under consideration is that the lower court “*did not justly and adequately consider the issue of unpleaded defence that the*

articles did not refer to the plaintiffs/Appellants.”

I agree with the submission of Learned Senior Counsel for the respondents that it is not every error committed by a lower court that will result in the setting aside of the decision in which the errors are contained. For an error to result in the setting aside of the decision, it must result in a miscarriage of justice. The holding that the articles did not refer to the appellants is partly correct particularly as the publication in exhibit A did not mention the name of the 1st appellant but concentrated on the Companies Registry which it describes as being in shambles.

However going through the record and the judgment of both courts, it is very clear that the decision of the courts were not based on the finding that the articles did not refer to the appellants but on the pleaded defence of qualified privilege, fair comment and constitutional right. In particular, at page 488 of the record, the lower court held inter alia, thus:-

“Apart from the defence of fair comment put up by the defendants/respondents they have also raised the defence of qualified privilege. While not denying that they made the comment, they further say that the comment was made on an occasion that was privileged. By the defence of qualified privilege, a defendant is saying no more than that even though the publication complained of by the plaintiff may be defamatory of him however, since it was published to the generality of the public who, the law recognizes as having a corresponding interest to receive it from the defendant that has a standing duty to publish it on account of public policy, such a defendant cannot incur any legal liability so long as the publication has not been actuated by malice.”

It is important to note that both courts found and held that the publications complained of are not defamatory, let alone defamatory of the appellants. It would have been different if they had found the publications defamatory but held that the publications did not refer to the appellants. Such a finding, in my view, would have made the issue as to whether the publications referred to the appellants contrary to the findings of the courts very relevant. The finding that the publications are not defamatory makes the issue as to whether the articles referred to the appellants or not very irrelevant. In

any event, I had earlier held that it is not every error committed by a court that will result in the setting aside of the decision by an appellate court. In the instant case it has not been shown that the error resulted in any miscarriage of justice. I therefore resolve issue 5 against the appellants.

On issue 6, it is the submission of learned counsel for the appellants that there is abundant evidence of malice on record as made clear by a comparison of appellants' exhibit K with the respondents' Exhibit E, published in response to appellants' request; that exhibit E is full of distortions, omissions, mutilations, reversals and malevolence for the appellants; that though the offensive publications exhibit A, C and D were given undue prominence in front and back pages, exhibits B and E were published on the pages of "*letters to the editors*". It is the further submission of Learned Counsel that the respondents did not believe the truth of their publications hence their failure to call evidence; that the respondents refused to publish any retractions despite a demand by the appellants for same and urged the court to resolve the issue against the respondents.

On his part, Learned Senior Counsel for the respondents submitted that the argument of Counsel for the appellants on the issue is misconstrued as the defence of qualified privilege nullifies the entire argument on the point, and urged the court to resolve the issue against the appellants.

It is settled law that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral; to make it to the person to whom it was made, and the person to whom it was made has a corresponding interest or duty to receive it - see Adam vs Ward (1917) AC 309 at 334.

The articles complained of in the instant case were published on the state of affairs at the Companies Registry which have, concurrently been found by the lower courts to be covered by the defence of qualified privilege and has been affirmed in this judgment. What that means is simply that the issue as to whether the publications were actuated by malice becomes, in the circumstance, irrelevant. ***Having upheld the defence of qualified privilege, it means simply that public convenience or interest must be preferred to private convenience or interest in the dissemination of infor-***

mation which is of great interest and benefit to the public particularly having regards to the sorry state of affairs at the Companies Registry in the instant case. I therefore resolve the issue against the appellants.

B Issue seven is simply whether the decision of the lower court was against the weight of evidence which I do not intend to go into having regards to the resolution of all the other issues against the appellants and as no useful purpose would be served in the process. The issue is consequently discountenanced.

C In conclusion it is my considered view that the appeal is without merit and is consequently dismissed. The judgment of the lower court delivered on the 18th day of June, 2003 is hereby affirmed. There shall be costs of (450,000.00 in favour of the 1st - 3rd respondents against the appellants.

D Appeal dismissed

KATSINA-ALU JSC

E I have had the advantage of reading in draft the judgment of my learned brother Onnoghen JSC in this appeal. I agree with it and, for the reasons given therein I also dismiss the appeal with N50,000.00 costs in favour of the 1st - 3rd Respondents.

F

MOHAMMED JSC

G I have been privileged before today of reading the judgment of my learned brother Onnoghen, JSC, which has just been delivered. The appeal is by a couple who are members of the legal profession against the decision of the Court of Appeal Lagos Division upholding the decision of the High Court of Justice of Lagos State dismissing the Appellants/Plaintiffs' claims for damages for the alleged defamation of their character by the Respondents. In the judgment H of the trial Lagos High Court, the defences of fair comments, qualified privilege and Constitutional Right to write and publish the deplorable conditions of the operation of the then Companies Registry of which the 1st Appellant was the Registrar, were upheld by the learned trial Judge. Although the Respondents who were the Defen-

dants in the action at the trial Court did not testify in their defence nor called witnesses to give evidence in support of the facts averred in their statements of defence, the evidence adduced in support of the Appellants claims taken together with the evidence elicited by the learned to the Defendants now Respondents under cross-examination of the witnesses that testified at the hearing, had clearly revealed that the publications complained of were not defamatory at all. Therefore the claim that the publications were defamatory of the Plaintiffs/Appellants did not arise. In this respect the decision of the trial Court dismissing the Plaintiffs/Appellants claims was quite in order. Equally right, in my view, is the decision of the Court of Appeal affirming the decision of the trial Court. In the absence cogent reasons to disturb the concurrent findings of fact by the two lower Courts, I am fully with my learned brother Onnoghen, JSC, in his decision in the lead judgment dismissing this appeal which I also hereby dismiss with 50,000.00 costs in favour of 1st, 2nd and 3rd Respondents.

CHUKWUMA-ENEH JSC

I have read the judgment in this matter in draft prepared by my learned brother Onnoghen JSC and I couldn't agree more with him having satisfactorily dealt with all the issues raised in the appeal that the appeal is unmeritorious and should be dismissed. I too dismiss the appeal and endorse the order on costs.

MUNTAKA-COOMASSIE

I have had the privilege of reading in draft the lead Judgment as rendered by my learned brother, Walter Onnoghen, JSC. I must admit, after careful consideration of the lead judgment that, his Lordship had clearly considered the issues filed before this court. He has also exhaustively thrashed out all the relevant and live issues in this appeal. With respect, his conclusion, no doubt is correct and I too could not lay my hand on any merit in the appeal. I therefore dismiss the appeal. I endorse the order as to costs.