

**SUPREME COURT OF NIGERIA**  
26TH MARCH, 2010. SC. 227/2001  
**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,**  
**F. F. TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

RABIU HAMZA ..... APPELLANT  
AND  
PETER KURE ..... RESPONDENT

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WORDS & PHRASES - Torts - Negligence - Meaning - It is the omission to do something which a reasonable man would do - Or the doing of something which a reasonable man would not do (H1)

TORTS - Actions - Negligence - Ingredients - To succeed in an action for negligence plaintiff has to show - That defendant owed him a duty of care - Which duty has been breached - Resulting in injury to plaintiff (H2)

EVIDENCE - Appeals - Reevaluation - Propriety - Where there is improper evaluation of evidence by trial court - As in the instant case - Appeal court has a right to reevaluate same - As done by Court of Appeal (H3)

ACTIONS - Negligence - Damages - Basis of award - The general principle is that award of damages - Entirely depends on whether a party has established his case or not (H4)

**FACTS**

The plaintiff/appellant sued defendant/respondent before the High Court of Kaduna State, sitting at Kaduna claiming the sum of N1,000,000 (one million naira) as damages for injury he suffered as a result of respondent's negligence. It was the case of appellant that on or about the 20th March 1995, at about 6 p.m., when he was riding his motorcycle along a dual lane near a U-turn, respondent tried to make a U-turn and negligently drove into appellant's lane with his Peugeot 505 and collided with appellant causing him grave injuries. On the other hand, while conceding that he drove into appellant's lane, respondent maintained that it was appellant who was negligent in that due to a construction work going on on respondent's lane of the road, vehicles were

diverting into appellant's lane at that point and other vehicles on appellant's lane had actually stopped for respondent to get in but appellant negligently refused to slow down or stop for respondent.

Nevertheless, after hearing, the learned trial judge found for appellant and gave judgment accordingly. Aggrieved, respondent appealed to Court of Appeal which held that trial court did not properly evaluate the evidence before it. Accordingly it reevaluated the evidence and held that appellant failed to prove negligence against respondent. Consequently it allowed the appeal and dismissed the claim of appellant. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"1. Whether the court below was right in holding that the trial court did not calmly and dispassionately evaluate the evidence before it and in holding that the appellant did not prove his case on preponderance of evidence.*

*2. Whether having held that the trial court's award of damages for pains and sufferings was proper, the court below was right when it held that the appellant's claims failed and dismissed it.*

### **HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**) ***Torts - Negligence - Meaning*****

1. As far back as 1856, Lord Alderson B., defined negligence to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Where any of the situations happens, then liability will accrue against the defendant. Before the accrual of liability, however, the basic requirement of the law is that the defendant must owe a duty of care to the plaintiff. Where there is no such notional duty to exercise, negligence will have no legs to stand and any claim premised thereon will fail. (p. 929 E/G)

### ***Actions - Negligence - Ingredients***

2. The burden of proof in negligence is on the plaintiff and the onus, as in all other civil matters which is not static, does not shift on to the defendant until the plaintiff proves defendant's negligence. What the plaintiff must prove in this case are:

[i] that the defendant owes him a duty of care, [ii] that there is a breach of that duty and, [iii] an injury to the plaintiff has occurred between which and the breach of duty a causal connection must be established. (p. 933 B)

### ***EVIDENCE - Appeals - Reevaluation - Propriety***

3. As shown by the court below, the evaluation of evidence conducted by the learned trial judge, appears to be one sided. That was why the court below resorted to its power of re-evaluation of the evidence properly placed before the trial court and as contained in the record of appeal. Our law is replete with decided authorities that where the findings of fact made by a trial judge are not supported by credible evidence, or there is improper evaluation of evidence, the appeal court is in as much good position to deal with the facts and findings as the trial court. Thus, what the court below did, in my view, is right and in consonance with our laws of adjudication. Issue one is resolved against the appellant. (p. 934 A/D)

### ***ACTIONS - Negligence - Damages - Basis of award***

4. I think the general principle of the law of liability, especially in torts of negligence is that award of damages entirely depends on whether a party has established his case or not. The court below held, with which I agree, that the plaintiff/appellant had woefully failed to establish the case of negligence against the defendant/respondent. Thus, by this principle, the court below in my view, was right in setting aside the award of damages made by the trial court. This of course was after the re-evaluation of the evidence, that the court below, came to the conclusion that the trial court was wrong to have entered judgment for the appellant as appellant's claims were not established against the respondent. (p. 934 E)

### **REPRESENTATION**

S.T. Ologunorisa Esq., for the Appellant

Mr. Samuel Librim with him Paul Goh appears for the Respondent

### **CASES REFERRED TO**

Atolagbe v. Shorun (1985) 1 NWL pt. 2 pg.360

Lawal v. Dawodu (1972) 1 AUNLR pt. 2 pg. 270

Adeosun v. Jibesin (2001) 18 NWLR pt. 724 pg. 290  
 ONWUKA V EDIALA (1989) 1 NWLR (Part 96) 182  
 IITA V. ARMANI [1994] 3 NWLR [part 332] 296, 311  
 Chigbu v. Tonimas (Nig.) Ltd. (1999) 3 NWLR pt. 593- pg. 115

**B STATUTE & RULES REFERRED TO**

Court of Appeal Act, 1976, s.16  
 Court of Appeal Rules, 1981, O. 3 r. 23

**LEAD JUDGMENT MUHAMMAD JSC**

C The plaintiff took out a specially indorsed Writ of Summons from the Kaduna State High Court of Justice, holden at Kaduna [trial court]. The defendant, who was served with the Writ of Summons, was a Commissioner in the Kaduna State Government. The plaintiff alleged that on or about the 20<sup>th</sup> day of March, 1995, about 6.00pm; he was riding his motorcycle along the Constitution Road [dual lane] heading to Kabala Costain from Ahmadu Bello Stadium. When he got to a U-turn, very close to Abubakar Kigo road, the defendant supposedly trying to make a U turn, negligently drove, managed and controlled his Peugeot 505 and caused or permitted his said vehicle to collide violently and hit down the plaintiff who claimed to be riding along his lane of the said road, thereby causing substantial and grave injuries to the plaintiff. Plaintiff particularized the alleged negligence as follows:

F (a) *the defendant failed to give the said on - coming motorcyclist [that is plaintiff] sufficient time to safely pass before making or attempting to make a U-turn;*

G *[b] the defendant failed to see or take special care at the (said U-turn before turning;*

*[c] the defendant failed to keep any proper look out or to have any sufficient regard for traffic that was or might reasonably be expected to be on the said road;*

H *[d] the defendant failed to stop, to apply or properly apply his brakes, to slow down or in any other way to manage or control the said car as to avoid the collision;*

*[e] failing to drive at a reasonable speed while making a U-turn at the U-turn spot.*

The plaintiff averred further that by reason of the violent

collision, the plaintiff's left leg was seriously crushed with loss of bone from tibia/fibula. The plaintiff was as a result, rendered unconscious and was taken to a private orthopaedic clinic in Kaduna where he was admitted. The plaintiff claimed that his crushed left leg was amputated at the said clinic and he remained under admission therein for thirty two [32] days before he was discharged. He was further required to and did attend the clinic for a period of twenty four [24] days for further medication after discharge. Plaintiff claimed that he was required on admission at the clinic to be under special diet to facilitate healing of the wounds. He claimed to have spent a total sum of N16,000.00. He also claimed to have lost a purse on the accident day containing the sum of N4,500.00. Plaintiff claimed further that the motor cycle he was riding on that fateful day used to fetch him N200.00 daily. It was badly smashed and damaged and plaintiff had to expend money to repair it. The damaged machine became roadworthy and he collected it from the Police for use on the 20<sup>th</sup> of November, 1995. In paragraph 15 of his statement of claim, the plaintiff made the following claim for special damages:

*"15 The plaintiff avers that the collision has incapacitated him and have [sic] incidentally caused him specific losses/expenses in numerous and various ways:*

**PARTICULARS FOR SPECIAL DAMAGES:**

<i>[a] Cost of walking crawls.....</i>	<i>N650.00</i>	
<i>[b] Cost of transportation at N200.00 daily from the plaintiff's residence to the clinic for 21 days after discharge for injection and dressing .....</i>	<i>N4,800.00</i>	
<i>(c) Total cost of the prescribed/special feeding for thirty-two days on admission .....</i>	<i>N16,000.00</i>	
<i>(d) Cash lost of the collision on the 20/3/95 .....</i>	<i>N4,500.00</i>	
<i>(e) Cost of panel beating, spraying and replacing of damaged parts .....</i>	<i>N7,200.00</i>	
<i>(f) Money loss for not utilizing the motor-cycle for a period of six months at N200.00 per day .....</i>	<i>N36,800.00</i>	
<b><i>TOTAL .....</i></b>	<b><i>N69,950.00"</i></b>	

Plaintiff further averred as follows:

*"16(i) The plaintiff avers the he has suffered deprivation in that:*  
*(a) he has lost forever his legs, thus making life more difficult to him to fend, carter, or and provide material and social needs for the mem-*

bers of his family.

(b) he is suffering an untold hardship and ever lasting prejudice having his life prospect rendered hopeless by reason of the defendant's negligent driving.

(c) it is permanent deformity and depravity that affects generally his capacity in life, business and social necessities.

(ii) Consequently, the plaintiff claims the sum of N903,050.00 general damages for pains and sufferings, loss of expectation of life caring and especially as in (16)(i) a, b and c above".

Plaintiff finally claimed the sum of one Million naira [N1,000,000.00] as special and general damages for negligence.

In his statement of defence the defendant denied liability. He averred, among others, that the collusion was caused by the speed and failure of the plaintiff to stop as other traffic on his lane had stopped at the material time and that the injuries, loss and damage suffered by the plaintiff [if any, which was denied] were caused or alternatively, contributed by the negligence of the plaintiff. The defendant gave particulars of the contributory negligence in paragraph 3 of his statement of defence. On all other averments, the defendant put the plaintiff to the strictest proof thereof. He asserted that it was at his insistence and expense that the plaintiff and his passenger were taken to and admitted for treatment at the said orthopaedic clinic in Kaduna which cost him the sum of N65,000.00. The defendant averred further that after their investigation, the Police arraigned the defendant before a Magistrate court, Kaduna but the case was struck out for want of diligent prosecution. He urged that the suit be dismissed.

After full hearing of the case, the learned trial judge entered judgment for the plaintiff/appellant. On appeal to the Kaduna Division of the Court of Appeal [court below], that court set aside the trial court's judgment. It is from there that the appellant appealed to this court.

Briefs were settled by the parties. The learned counsel for the appellant distilled the following issues for our determination, Viz:

"1. Whether the court below was right in holding that the trial court did not calmly and dispassionately evaluate the evidence before it and in holding that the appellant did not prove his case on preponderance of evidence. [Ground 1 of the Notice of Appeal].

*2. Whether having held that the trial court's award of damages for pains and sufferings was proper, the court below was right when it held that the appellant's claims failed and dismissed it. [Ground 2 of the Notice of Appeal]"*

Learned counsel for the respondent settled two issues as well. They are as follows:

*"1. Whether the court below was right to re-evaluate the evidence adduced by both parties before the trial court in determining the appeal before it.*

*2. Whether after accepting the award of damages by the trial court, the court below was right to have set aside the judgment of the trial court."*

Let me observe that the learned counsel for the appellant withdrew his ground of appeal NO.3. This ground is hereby struck out having been withdrawn.

In making his submissions on issue No.1, the learned counsel for the appellant stated that it was wrong of the court below to have found that the trial court failed to properly evaluate the evidence put forward by the respondent. He argued further that the learned trial judge was quite mindful of his duty in the circumstances he was faced with, in the course of the trial. He submitted that failure to evaluate evidence does not necessarily make the findings of a court perverse. He cited the case of ATTORNEY GENERAL OF THE FEDERATION V. ABUBAKAR (2007) 10 NWLR [part 1041] 1.

It was argued for the appellant that the issue of on-going road construction and road division was not in dispute. It did not require any evidence. It was wrong of the court below to have accused the appellant of failure to lead evidence on that issue. Learned counsel submitted again that the respondent was utterly reckless in entering and using the appellant's lane at the material time and did not take reasonable care to wait, keep proper look out to allow sufficient opportunity for on-coming vehicles such as the appellant's motor-cycle from the opposite direction to safely pass before crossing or turning or attempting to cross or turn to the other side of the lane. He argued that the evidence of the respondent on that issue consisted of bundle of material contradictions which cast doubt on the case presented by him. CASES OF ENAHORO V. THE STATE [1965] NSCC [Vol. 4] 98 at page 113; NWOKORO V. ONUMA

[1999] 12 NWLR [part 631] at page 355 D -E, were, among others, cited in support. The respondent was blamed of non-production and non-tendering of Police and Vehicle Inspection Officers' [VI.O] report of the accident as that would be against him. Learned counsel made further submissions that the court below was wrong in holding  
 B that the appellant recklessly and erroneously insisted on his right of way which did not exist and that he threw caution to the wind inspite of the condition he found the road and rode blindly into the appellant. He argued further that assuming that was true, though he did  
 C not concede, that would only amount to contributory negligence. Learned counsel cited the provision of section 17 of the Kaduna State torts Law cap 152, Laws of Kaduna State 1991; NBN LTD. V. TASA LTD. [1996] 8 NWLR [part 468] 511, 5243. Learned counsel urged us to resolve issue No. 1 in appellant's favour.

D Learned counsel for the respondent on issue No. 1, which is on re-evaluation of evidence by the court below, submitted that the respondent complained to the court below of the failure of the trial court to passionately evaluate the evidence adduced before it. The court below unanimously agreed with him and undertook the re-  
 E evaluation. It therefore, rightly, re-evaluated the vital evidence of the witnesses. He urged this court to so hold.

Issue No. 2 is on the award of damages for the pains and sufferings sustained by the appellant. Learned counsel for the appellant submitted that the trial court concerned itself with the item of  
 F pain and suffering by the appellant but failed to advert its mind to loss of life expectation as pleaded by the appellant. He argued further that the award of N200,000.00 to the appellant for pain and suffering as held by the court below was not complained against by  
 G the respondent as being too low or excessive and that award would not be set aside. He argued that there had been no appeal against that findings and the finding and decision of the court below on the issue in binding and subsisting. He cited several cases in support: KOYA V. UNITED BANK FOR AFRICA LTD. [1997] 1 NWLR [part  
 H 481] 251 at 266 D; SULE V. NIGERIAN COTTON BOARD [1985] 2 NWLR [part 5] 17; OMNIA (NIG.) LTD. V. DYKTRADE LTD. [2007] 15 NWLR [part 1058] 576. Learned counsel submitted that it was wrong of the court below, in view of its holding in respect of the issue of damages to somersault by allowing the appeal in toto and set aside



the decision of the trial court including award of damages which it refused to set aside. Learned counsel urged us to resolve this issue in favour of the appellant and to finally allow the appeal.

On the respondent's part, it was submitted that the award of damages to the appellant was dismissed by the court below because he was not entitled to it and the whole case was dismissed for want of evidence after the re-evaluation of evidence by the court below. Learned counsel for the respondent submitted that it is wrong for the appellant to say that the court below was wrong to have set aside the decision of the trial court together with the award of damages. If the appellant is not entitled to judgment of the trial court, he is not entitled to award of damages. Learned counsel argued further that the decision of the court below will not operate as an estoppel as the matter had not been finally determined when the court below upheld the award of damages by the trial court. He cited the case of OYEROGBA V. OLAOPA [1998] 13 NWLR [part 583] 509 at page 519. He urged this court to resolve this issue in favour of the respondent. He finally urged us to dismiss the appeal with substantial costs for lacking in merit.

This appeal is purely brought within the purview of the general law of negligence with particular reference to the principle of duty of care.

***As far back as 1856, Lord Alderson B., defined negligence to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. See: BLYTH V. BIRMINGHAM WATERWORKS COMPANY. (1856) 11 Exch. 781 at 784. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where any of the situations happens, then liability will accrue against the defendant. Before the accrual of liability, however, the basic requirement of the law is that the defendant must owe a duty of care to the plaintiff. Where there is no such notional duty to exercise, negligence will have no legs to stand and any claim premised thereon will fail.***

The scenario of what happened during the accident as sum-

marized by the trial court is as follows:

*On the 20<sup>th</sup> day of March, 1995, at about 7.pm, the plaintiff rode his motor-cycle. He was in company of one Sherriif Sha'adu. The plaintiff rode the motor-cycle and he was heading to Kabala from the Ahmadu Bello Stadium end of the Constitution road. The defendant at that material time, was driving his Peugeot 505. The defendant drove from the Kabala end of the Constitution road. Thus, both the plaintiff and the defendant were driving from opposite directions of the road. An accident then occurred on that date involving the plaintiff's motor-cycle and the vehicle of the defendant. As a result of that accident, the left leg of the plaintiff was seriously crushed. He was rushed to a medical centre. His left leg was amputated and he was on admission for thirty two [32] days.*

The defendant was responsible for settling the medical bills. He paid the sum of N55,000.00. It is on record that the accident occurred on the plaintiffs lane of the road. It is on record that the two parties parted ways as to how the accident happened and who was responsible for the accident. The plaintiff by the pleadings and as per his evidence showed that the accident occurred when the defendant was making a U-turn. That the defendant was negligent in that he entered the plaintiff's lane without waiting for the plaintiff to pass and that the defendant did not trafficate.

The defendant, on the other hand, shifted the blame on the plaintiff. His evidence was that he was not making a U-turn. That there was construction going on and traffic from his lane was diverted to the left. According to him, it was in compliance with road traffic direction that he had to be on the plaintiff's lane. He also stated that he was heading to River Kaduna end of Abubakar Kigo road. That he stopped at a certain spot. He trafficated. Other vehicles from the opposite direction though on the same lane stopped and gave him clearance so as to cross. According to him, the plaintiff was on speed. He did not stop.

After his evaluation of the evidence placed before him by the parties, the learned trial judge made the following findings:

*"I have given a serious consideration to the evidence of the PW1 and that of the defendant especially their accounts on how the accident happened. I have further considered their responses to the cross-examination by counsel. In view of the above and the fact that*

*the accident occurred on the plaintiff's lane, it is untenable to say that it was the plaintiff that was at fault. In the given circumstance of this case, it is the defendant that was negligent. There has been a failure to take reasonable care."*

The learned trial judge proceeded to hold that:

*"On the strength of the evidence before me, the plaintiff<sup>B</sup> has proved negligence. The law does not provide for a particular way of providing special damages. All that is required is for the claimant to offer credible evidence.*

*The plaintiff has established the claim set out in paragraph 15<sup>C</sup> [b] [d] of the statement of claim. They are the transportation cost of N200.00 for 21 days. There is also the claim of N4,500 which got missing as a result of the accident. He did not lead evidence on cost of walking crawls i.e. paragraph 15 [a] of the statement of claim. He also admitted that it was his friends and relations that incurred the<sup>D</sup> feeding cost for the 32 days. i.e. N16,000.00. His evidence also showed that he spent N3,230.00 to repair his motor-cycle. The plaintiff was not able to give the running cost of the motor-cycle. He only gave the daily earnings. It is on record that the motor-cycle stayed at the police station for a period of 4 months. The plaintiff stayed at the<sup>E</sup> Sovanel Clinic for 32 days. He has a duty to mitigate his loss. The claim for loss of earnings has not been established.*

*By way of summary the following claims for special damages have been proved.*

*[a] N200 daily for a period of 24 days for transportation -<sup>F</sup> N4,800.00k.*

*[b] The cash of N4,500.00 which got missing as a result of the accident.*

*[c] Cost of repairs of the motor-cycle -N3,230.00.<sup>G</sup> The total amount stood at N12,530.00*

*The plaintiff led the evidence as to the crushing of his left leg as a result of the accident. He also testified that the left leg was amputated. The PW 3 also testified to that effect. See also Exhibit<sup>H</sup> 1. There is no dispute as to the injury resulting from the accident. It is settled law that in personal injury, pain discomfort and permanent scarring, even though these are not quantified in monetary terms, the plaintiff is entitled to reasonable general damages."*

The learned trial judge then entered judgment for the plaintiff in the

following terms:

*“In no final analysis the special damages awarded stood at N12,530.00 and the general damages stood at N200,000.00. The total judgment sum is N212,530.00 in favour of the plaintiff.”*

The court below, however, in its judgment made the following findings:

*“The findings to the effect that appellant failed to take reasonable care or was negligent is perverse. The appellant pleaded relevant facts and adduced evidence in support of the relevant facts pleaded nevertheless the learned trial judge failed to consider the evidence he produced in support of the relevant facts. The testimony of the appellant to the effect that the circumstance or condition of the road, at the material time, compelled him to drive on the respondent’s lane, though traveling in opposite direction, is relevant and ought to have been considered. The implication of that piece of evidence is that the left lane, ordinarily meant for vehicles traveling from Ahmadu Bello stadium, cease to be exclusive to the traffic from the stadium. It becomes open to the commuters from Kabala end of the road as well. In the light of the evidence, which was not evaluated by the learned trial judge, it behoves both parties to exercise restraint in the control and management of their vehicle. The appellant led evidence of the precaution he took to avoid accident. But nowhere in the respondent’s evidence did he show that he was cautious. Indeed neither in his pleadings nor in the evidence he adduced did he advert to the construction [sic] work going on on the road. He was completely oblivion to the road construction. It is clear from the respondent’s case that he recklessly and erroneously in insisted on his right of way which did not exist.”*

I think the law has placed a mutual duty of care on persons driving on the highway, moving in relation to one another as to involve risk of collision, to move with due care. And this is true whether they are both in control of vehicles [including motor-cycles] or Both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. See: NANCE V. BRITISH COLUMBIA ELECTRIC COMPANY LTD. [1951] AC 601 at page 611. In the adjectival system of law in operation in this country, it is always, more often that not, the plaintiff that is required by the law to plead and support what he has pleaded by credible and convincing evidence, and that

such evidence should preponderate in civil matters before his claims can be acceded to by the courts. Where he fails to discharge such onus, then his claim must fail flatly. In the case of *KALLA V. JARMAKANI* 1961 All NLR 247, the tort of negligence had been considered to be a matter of fact and not of law. It must thus, be pleaded and proved on preponderance of evidence. See also: *IITA V. ARMANI* [1994] 3 NWLR [part 332] 296, 311. ***The burden of proof in negligence is on the plaintiff and the onus, as in all other civil matters which is not static, does not shift on to the defendant until the plaintiff proves defendant's negligence. What the plaintiff must prove in this case are:***

- [i] that the defendant owes him a duty of care,***
- [ii] that there is a breach of that duty and***
- [iii] an injury to the plaintiff has occurred between which and the breach of duty a casual connection must be established.***

The court below found that the appellant failed woefully to show that the respondent drove his car in a negligent or dangerous manner. The evidence adduced at the trial court by the appellant according to the court below,

*"Put at the highest merely showed that there was a collision on the road fell short of showing that the appellant was negligent. The evidence tend[s] to show that the respondent, a commercial motor-cyclist, threw caution to the wind In spite of the condition he found the road and rode blindly into the appellant."*

The court below, from the record, arrived at its above conclusion as a result of the re-evaluation of the evidence placed before the trial court. It is this re-evaluation of the evidence by the court below that the appellant is challenging. The appellant submitted that it was wrong for the court below to re-evaluate the evidence in which the learned trial judge had already discharged his duties. The respondent submitted otherwise, adding that where the trial court failed to properly assess the credibility of the witnesses, the appellate court has the power to do so based on the printed record.

Well, I have myself, carefully gone through the proceedings of both the trial court and the court below. It is my finding that the appellant, of all the 3 witnesses that testified for him, was the only eye witness. Much of this testimony, as found by the court below, was in

direct conflict with his pleadings. More so, his pleadings fell short of material facts which are necessary in a successful prosecution of a case which is based on negligence.

***As shown by the court below, the evaluation of evidence conducted by the learned trial judge, appears to be one sided.***  
***That was why the court below resorted to its power of re-evaluation of the evidence properly placed before the trial court and as contained in the record of appeal. Our law is replete with decided authorities that where the findings of fact made by a trial judge are not supported by credible evidence, or there is improper evaluation of evidence, the appeal court is in as much good position to deal with the facts and findings as the trial court.*** See: NNEJI V. CHUKWU [1996] 10 NWLR [part 478] 265 at 274 F - G; DAN MAINAGGE V. GWAMNA [2004] 7 SCNJ 361; OKINO V. OBANEHIRA & ORS. [1999] 12 SCNJ; 27; BUHARI V. INDEPENDENT ELECTORAL COMMISSION [2008] 12 SCNJ; 1 GARUBA V. YAHAYA [2007] 1 SCNJ 352. ***Thus, what the court below did, in my view, is right and in consonance with our laws of adjudication. Issue one is resolved against the appellant.***

Issue two is on the award of general damages to the appellant made by the trial court but set aside by the court below. ***I think the general principle of the law of liability, especially in torts of negligence is that award of damages entirely depends on whether a party has established his case or not. The court below held, with which I agree, that the plaintiff/appellant had woefully failed to establish the case of negligence against the defendant/respondent. Thus, by this principle, the court below in my view, was right in setting aside the award of damages made by the trial court. This of course was after the re-evaluation of the evidence, that the court below came to the conclusion that the trial court was wrong to have entered judgment for the appellant as appellant's claims were not established against the respondent.***

Further, our attention has been drawn by the appellant's counsel to the pronouncement of the court below that the award of N200,000.00 as damages should not have been set aside by that court. He stated that the court below, however, somersaulted at the

end when it allowed the appeal in toto and not in part. He submitted that it was wrong for the court below to allow the appeal in totality and set aside the decision of the trial court including the award of damages which it refused to set aside. I think there is need to draw the attention of learned counsel for the appellant that the court below was sitting as an appellate court. It has a responsibility to respond to all issues placed before it for consideration. The affirmation of the award of damages by the trial court does not mean that the court below agreed with the trial court that the appellant had proved his case on the balance of probability. The affirmation has no legal consequence whatsoever. B  
C

It is to be noted again, that the court below, in the exercise of powers conferred upon it by section 16 of the Court of Appeal Act of 1976 and Order 3 Rule 23 of the Court of Appeal Rules, 1981, shall have full jurisdiction and control over the whole proceedings as if the proceedings were or had been initially constituted before it as a court of first instance and may re-hear the case wholly or in part as the case may be, and could give any judgment or orders as the justice of the case may require which the trial judge had power to make, whether or not there is an appeal by any of the parties in respect thereof. See: ENMRI V. IMIEYEH [1999] 4 NWLR [part 599] 442 at page 466 – 467; FALOMO V. BANIGBE [1998] 7 NWLR [part 559] 679 at page 701. It follows therefore, that the simple reasoning in the setting aside of the award of damages granted by the trial court is that the court below is saying that if the trial court had a proper evaluation of the evidence laid before it, it could not have made that award. But since it had done so, and as it had no power to sit on appeal over its own decision, the court below had to assume jurisdiction, properly conferred upon it by Section 16 of its Act and Order 3 Rule 23 of its Rules, to do what the trial court ought to do but failed to do. There is, therefore, nothing wrong in what the court below did. This issue is determined in favour of the respondent. D  
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In the final result, I find the appeal before this court to be unmeritorious. I accordingly, dismiss the appeal and affirm the judgment of the court below. I order each party to bear his own costs in this appeal. H

**MUSDAPHER JSC**

I have read before now the judgment of my Lord Muham-  
 mad, JSC with which I entirely agree. For the same reasons con-  
 tained therein which I adopt as mine, I too find this appeal  
 unmeritorious and I accordingly dismiss it. I abide by the order for  
 B costs proposed in the judgment.

**ONNOGHEN JSC**

I have had the privilege of reading in draft, the lead judgment  
 C of my learned brother MUHAMMAD, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks  
 merit and should be dismissed. I therefore order accordingly.

I abide by the consequential orders made in the said lead  
 judgment including the order as to costs.

D Appeal dismissed.

**TABAI JSC**

I have had the benefit of reading, in advance, the lead judg-  
 ment prepared by the learned brother Tanko Muhammad, JSC, and  
 E I agree that the appeal lacks merit and ought to be dismissed.

The settled principle of law with respect to evaluation is that  
 evaluation of evidence and ascribing probative value thereto is pri-  
 marily and ordinarily the function of the trial court which alone has  
 the benefit of seeing and hearing the witnesses testifying. And be-  
 F cause an appellate court does not enjoy that benefit of seeing and  
 hearing the witness testifying, it would not ordinarily interfere with  
 findings of fact of a trial court. Where however the evaluation of the  
 evidence did not involve the assessment of the credibility of witnesses,  
 G an appellate court is in as vantage a position as the trial court to assess  
 or re-assess the evidence and where necessary interfere with the find-  
 ings of the trial court not supported by the evidence. See ONWUKA  
 V EDIALA (1989) 1 NWLR (Part 96) 182; A-G OYO STATE V  
 FAIRLAKES HOTELS LTD (NO. 2) (1989) 5 NWLR (Part 121) 255;  
 H SOLEH BONEH EVERSEAS (NIG) LTD V AYODELE (1989) 1  
 NWLR (Part 99) 549

In this case the trial court did not embark on a proper evaluation and  
 the court of Appeal was, in the circumstances, at liberty to re-evalu-  
 ate to see if the findings were properly supported by the evidence. At



page 69 of the record the trial court had this to say:

*"I have given a serious consideration to the evidence of the PW1 and that of the Defendant especially their accounts on how the accident happened. I have further considered their responses to the cross-examination by counsel. In view of the above and the fact that the accident occurred on the plaintiff's lane, it is untenable to say that it was plaintiff that was at fault. In the given circumstances of this case it is the defendant that was negligent. There has been a failure to take reasonable care"*

It is clear from the underlining above that the factor which greatly persuaded the court to its decision of the Appellant's liability was the fact that the accident occurred on the Plaintiff/Respondent's lane. That was wrong. The trial court had a duty to carefully examine the entirety of the evidence and place same on that imaginary scale of justice to determine the party in whose favour the balance tilts. That is the celebrated rule in *MOGAJI V ODOFIN*.

The trial court having failed to do proper evaluation the court below was right to re-evaluate and make findings adequately supported by the evidence.

On the whole I do not fancy any reason to interfere with the decision of the court below. The result is that this appeal lacks merit and it is accordingly dismissed by me also. I adopt the order on costs contained in the lead judgment.

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### **ADEKEYE JSC**

I had the advantage of reading in draft the judgment just delivered by my learned brother I. T. Muhammad, JSC. My lord had taken all pains to consider the issues formulated for determination by this court in this appeal. I agree with his reasoning and overall conclusion on the issues.

I agree with him that the lower court was right and had properly re-evaluated the evidence of the parties before the trial court. Ordinarily an appellate court will not interfere with a finding of fact by a trial court where such finding is supported by the pleadings and evidence adduced before the court. Where a trial court unquestionably evaluates the evidence, and dispassionately appraises the facts, it is not the business of an appellate court to substitute its own view for those of the court. It will only interfere in exceptional circumstance

where such finding is perverse, not supporter by evidence or had occasioned a miscarriage of justice.

Woluchem v. Gudi (1981) 5 SC 291, Maya v. Stocco (1968) 1 ANULR pg. 141, Akinloye v. Eyiola (1968) NMLR 92, Onasanya v. Nwoko (1974) 6 SC 69, Lawal v. Dawodu (1972) 1 AUNLR pt. 2  
 B pg. 270, Mogaji v. Odojin (1978) 4 SC 91

A finding of court will be perverse where:-

- a) It is speculative and not based on any evidence or
- b) The court took into account matters which it ought not to  
 C have taken into account or
- c) The court shut its eyes to the obvious, Atolagbe v. Shorun (1985) 1 NWL pt. 2 pg.360, Adeosun v. Jibesin (2001) 18 NWLR pt. 724 pg. 290.

The court of appeal was right when it revisited the evidence  
 D of the trial court particularly where it had overlooked the unusual condition of the road at the time of the accident. The learned trial judge failed to advert his mind to the fact that the road was under construction. All the traffic on the road were diverted to one lane which was the lane of the appellant. The accident was therefore bound  
 E to occur on the appellant's lane. In appraising the evidence of the trial court, the appellate court saw that it definitely shut its eyes to the obvious in using such evidence against the respondent.

Equally where the decision of a court is substantially based on the  
 F exercise of discretion an appellate court will not interfere with the decision unless the court failed to exercise its discretion judiciously or judicially, but exercised same frivolously or arbitrarily. Acme Builders Ltd. v. KSWB (1999) 2 NWLR pt. 590 pg. 288, Chigbu v. Tonimas (Nig.) Ltd. (1999) 3 NWLR pt. 593 pg. 115, University of Lagos v.  
 G Olaniyan (1985) 1 NWLR pt. 1 pg. 156

In view of the fact that discretion is always unfettered an appellate court cannot take steps to fetter such discretion except for the foregoing reasons. Issue of award of damages in any given case is a matter based on the discretion of the trial court.

H The award of damages by the trial court is no longer a live-issue once the judgment of the trial court was set-aside.

With fuller reasons given in the leading judgment, I agree that the appeal lacks merit and I hereby dismiss it. I adopt the consequential orders as mine.