

SUPREME COURT OF NIGERIA
5TH MARCH, 2010. SC. 396/2002
CORAM:- G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

CHIEF E. A. OSHE S.A.N. APPELLANT
AND
1. OKIN BISCUITS LIMITED RESPONDENTS
2. JIMOH ADENIYI

APPEALS - Issues - Issue on Exhibit D1 - Whether raised *suo motu* - Where an exhibit was in evidence before trial court - And an appellate court made its findings from its contents - It cannot be said it raised the issue *suo motu* (H1)

ACCIDENTS - Speed of appellant - Measured from Exhibit D1 - Propriety - It was not proper - As there was no evidence as to the condition of the road - Which is a factor in such measurement from skid marks (H2)

ACCIDENTS - Contributory negligence - Whether proved against appellant - It is the failure of 2nd respondent to see appellant's vehicle - That was the sole cause of the accident - Appellant was not in any way negligent (H3)

FACTS

The plaintiff/appellant sued defendants/respondents before the High Court of Justice, Kwara State sitting at Ilorin. Appellant's claim was for N900,000.00 (nine hundred thousand naira) special damages and N50,000.00 (fifty thousand naira) general damages for negligence of 2nd respondent in driving the tipper lorry belonging to 1st respondent as a result of which it collided with and damaged appellant's car. It was undisputed that the accident happened on appellant's lane when the tipper lorry driven by 2nd respondent turned into that lane, in a bid to turn into 1st respondent's factory. It was appellant's case that 2nd respondent failed to take note of appellant's oncoming car to give it right of way before making the

turn. 2nd respondent on his part put the blame on appellant whom he said was driving at excess speed at the time of the accident and failed to stop as appropriate when he saw 2nd respondent's lorry. Appellant denied driving at excess speed.

At trial, a sketch map of the scene of accident drawn up by the police was received in evidence as Exhibit D1. After hearing, the learned trial judge found for appellant and granted all his claims. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal in part by reducing the amount of damages awarded by trial court by 30% on account of finding appellant liable for contributory negligence. In making the finding, Court of Appeal relied on the contents of Exhibits D1, particularly the skid marks of appellant's tyres from which the court purported to estimate appellant's speed. Dissatisfied, appellant has now appealed against the judgment of Court of Appeal.

ISSUE FOR DETERMINATION

Whether or not the Court of Appeal was justified in law in disturbing the judgment of the trial Court in the present case.

HELD (Unanimously allowing the appeal per **MOHAMMED JSC**) ***Issue on Exhibit D1 - Whether raised suo motu***

1. From the above findings of the Court below from the contents of Exhibit D1 which was in evidence before the trial Court, the accusation of the Appellant that the issue on Exhibit D1 was raised *suo-motu* by that Court and that the parties did not place it before the Court for determination in the appeal, is totally baseless as the contents of Exhibit D1 was in evidence and the Respondents in their Appellants' brief at the Court below, had clearly placed the issue before that Court for determination in their issue number three.

The Court below was indeed well on course in looking into the documentary evidence in arriving at its decision finding the Appellant liable in contributory negligence. (p. 1146 C/G)

Speed of appellant - Measured from Exhibit D1 - Propriety

2. It must be observed that the most important factor in measuring the speed of any vehicle from the skid marks left behind on the road before finally stopping after the application of brakes, is the condition of the road.

From both oral and documentary evidence adduced before the trial Court, particularly the sketch map Exhibit D1, the surface of the road being dry or wet or slippery or muddy, was not stated anywhere in the report, Exhibit D1 itself or in the oral evidence. The condition of the road being dry is a condition precedent to the application of the formula used by the Court below in measuring the speed of PW1 the Appellant before agreeing with the submission of the Respondents' Counsel that PW1 the Appellant was driving at an excessive speed at the time of the accident. In the absence of this precondition, it is not difficult to see that the decision of the Court below that the Appellant was driving at an excessive speed is not supported by evidence at all. (p. 1147 A)

Contributory negligence - Whether proved against appellant

3. The learned trial Judge said-

"However, the driver of the tipper lorry has made it abundantly clear that he did not see the Acurra Legend car even though the road was straight and he could not have given the right of way to a car he did not see. If as he claimed the road was no busier that day, I am at a loss to fathom what he was spending 5 minutes to observe in the middle of the road before turning to left which is PW1's lane. I find it difficult to believe and accept that ridiculous evidence that he stopped for five minutes in the middle of the road to observe non-existent flow of motor traffic on that straight road before turning."

I entirely agree with the learned trial Judge that the failure of DW2 the 2nd Respondent to see the oncoming vehicle of PW1 the Appellant to give it its right of way to pass along its lane on the highway before turning to cross the lane of Appellant in order to enter the 1st Respondent's factory, was the sole cause of the accident thereby absolving PW1 the Appellant from any liability in contributory negligence. This is so when the evidence given by the 2nd Respondent as DW2 in chief and under cross-examination is scrutinised, the picture is quite clear. (p. 1147 H)

REPRESENTATION

Ola Olanipekun with Maureen Ohaica (Mrs.) for the Appellant
C. N. Okali for the Respondents.

CASES REFERRED TO

- Amusa v. Kossai (1986) 4 N.W.L.R. (pt. 35) 57
 OBI v. OWOLABI (1990) 5 N.W.L.R. (Part 153) 363
 Omoroge v. Lawani (1990) W.S.L.C. page 164 at 165
 U.B.A. v. Ogbob (1995) 2 N.W.L.R. (Pt. 380) 647 at 654
 B ADEGOKE v. ADIBI (1992) 5 NWLR (Part 242) 410 at 427
 SANUS1 v. AMEYOGUN (1992) 4 N.W.L.R. (Part 237) 527
 Nelson Gbafé v. Prince Frank Gbafé (1996) 6 S.C.N.J. 167 at 181
 Adebayo Bashorun v. Johnson Olorunfemi (1989) 1 S.C.N.J 23 at 31
 C Insurance Brokers v. Atlantic Textiles (1996) 9 -10 S.C.N.J. 171 at 184
 OBMIAMI BRICK & STONE (NIG) LTD v. A.C.B. LTD (1992) 3 NWLR (Part 229) 260 at 310
 D HIGHGRADE MARITIME SERVICES LTD v. FIRST BANK OF NIGERIA LTD (1991) 1 N.W.L.R. (Part 167) 290 at 310

LEAD JUDGMENT BY MOHAMMED JSC

- E The Appellant in this appeal was the Plaintiff at the trial High Court of Justice of Kwara State sitting at Ilorin where he instituted his action against the Respondents in this appeal who were the Defendants at the trial Court and claimed in the Writ of Summons and the statement of claim the following reliefs.

- F “(i.) N900,000 (Nine Hundred Thousand Naira) special damages and -

(ii.) N50,000 (Fifty Thousand Naira) general damages.

Particulars of special damages:

- G N900,000 being money lost on the resale of the Plaintiff's car which loss was occasioned by the damage caused to the car by the Defendants.”

- H The case was heard on pleadings duly filed and exchanged between the parties with the Plaintiff/Appellant filing a reply to the Defendants/Respondents' statement of defence. The cases of the parties on their pleadings is straight forward. While the Appellant who was the Plaintiff put the blame for the accident that caused the damage to his car entirely on the 2nd Respondent/Defendant was the driver of the tipper lorry belonging to the 1st

Respondent/Defendant for failing to drive with due care and attention by observing the Traffic Regulations, the 2nd Respondent/Defendant on his part put the blame on the Appellant/Plaintiff as being solely responsible for the accident that caused damage to his car as the result of flouting the Speed limit by driving at excessive speed in a built up area where there was a school and the Respondents factory. The Respondents accused the Appellant of driving his car with excessive speed so much so that he failed to notice the 2nd Respondent's tipper lorry on the road where the accident occurred. In a reply to the Respondents statement of defence, the Appellant joined issue with the Respondents by denying that he was driving at an excessive speed at the time of the accident. B C

At the hearing of the Appellant's claims at the trial High Court, the Appellant testified and called one other witness who also testified in support of the Appellant's case. Two witnesses also testified on the side of the Respondents with the 2nd Respondent as DW2 while a Manager of an Insurance Company gave evidence as DW1 through whom the sketch map of the scene of the accident drawn up by the Police, was tendered and received in evidence as Exhibit D1. At the end of the hearing in the matter, the learned trial Judge in a well considered judgment found for the Plaintiff/Appellant and granted all his claims against the Defendants/Respondents. However, on appeal by the Defendants/Respondents to the Court of Appeal Ilorin, their appeal was/allowed in part resulting in the reduction of the amount of damages awarded by the trial Court by 30% on account of finding the Plaintiff/Appellant liable for contributory negligence in causing the accident that resulted in the damage caused to his car. E F

The present appeal therefore is against that judgment of the Court of Appeal delivered on 24th June, 2002. G

At the hearing of this appeal, the learned Counsel to the Appellant filed the Appellants brief as well as the Appellant's Reply brief on which he relied and urged the Court to allow the appeal. After adopting and relying on the Respondents brief of argument, learned Counsel for the Respondents urged this Court to dismiss the appeal. H The three issues identified in the Appellant's brief of argument are:

"1. Whether the Court of Appeal was right in holding that PW1 contributed to the accident by driving at an excessive speed in a built up area - Grounds 2, 3 and 4.

2. *Whether the Court of Appeal was right in holding that Exhibit D1 was not an admission against the interest of the Defendants (the Respondents herein) Ground 5.*

3. *Whether the Court of Appeal was right in excluding from the entitlement due to the Appellant the interest that had accrued on the judgment -money ordered to be placed on an interest yielding account –Ground 1".*

In the Respondents' brief of argument however, only two issues for determination were framed. They are-

(i.) *Whether the Court of Appeal was right in holding that Exhibit D1 was not an admission against the interest of the Defendants/ Respondents and that PW1 contributed to the accident by driving at an excessive speed in build up area.*

(ii.) *Whether the Court of Appeal was right in excluding from the entitlement due Appellant had accrued in the judgment money ordered to be placed in the interest yielding account".*

The facts of this case are simple. On 18th December, 1998, PW1 the Appellant was driving his car along Ajasse-Ipo-Offa Road in Kwara State. On getting to Ijagbo on the said road, a tipper lorry driven by DW2 the 2nd Respondent coming from the opposite direction from Offa, suddenly come into the lane of PW1 the Appellant attempting to enter the premises of the 1st Respondent's company and there was a collision between the two vehicles resulting in the damage to the two vehicles with the Appellant sustaining injuries. Taking into consideration the reasons given upon which the court below allowed the Respondents' appeal in part leading to the reduction by 30% of the amount of damages awarded to the appellant by the trial Court on the ground that the appellant was driving at excessive speed at the time of the accident, I am of the view that in addition to the minor issue of the failure of the Court below to include the interest that accrued on the judgment amount in the Court of Appeal judgment reducing the award by the trial Court, the main issue for determination in this appeal is whether the Court of Appeal was right on the evidence on record adduced by the parties and the findings of the trial Court on that evidence, to rely on the skid marks found on the sketch map Exhibit D1, to find PW1 the Appellant liable in contributory negligence in causing the accident. To say it differently, is the Court of Appeal right in reappraising the evidence

to arrive at a different findings from that of the trial Court?

Learned counsel to the appellant in his argument in support of the issue quoted the finding of the court below at page 229 where that court said:

“From all I have said, I agree entirely with the submission of the learned counsel for the appellants that PW1 contributed to the accident by driving at an excessive speed in a built up area” B
and submitted that the court below erred in relying on the skid marks when neither the Appellants nor the Respondents in that Court placed the issue in the Appellants’ brief of argument or in the Respondent’s brief of argument; that the issue of skid marks was raised suo-motu C
by the court without affording the parties a hearing as no such issue was raised by the parties at the trial court; that on the authority of Lawani Alii & Ors. vs. Gbadamosi Alesinloye & Ors (2000) 4 SCNJ 264 at 295, the court below was wrong in relying or raising the issue D
in its judgment, to disturb the judgment of the trial Court. It was also the contention of the Appellant’s Counsel that having regard to the cases of Yekini Abbas & Ors. v. Olatunji Solomon & Ors. (2001) 7 S.C.N.J. 546 at 564 and Okohonma v. Unosi (1965) N.M.L.R. 321 at 323, the issue of the skid marks not being part of the case of the parties placed before the Court below for determination, that Court E
had no business to look into it and having done so, the result was a breach of the Appellant’s right of fair hearing. Learned Counsel then observed that it was only DW2 the 2nd Respondent that testified at the trial that the Appellant was driving at excessive speed and that the F
learned trial Judge examined that evidence in his judgment but rejected it on the face of the evidence of the same DW2 the 2nd Respondent that he did not see the car of DW1 the Appellant, before that car collided with his own tipper lorry; that as DW2 the 2nd Respondent’s evidence was that the Appellant was driving at excessive speed while the evidence of the Appellant was that he was not G
driving at excessive speed, the task of resolving who of the two witnesses was telling the truth is that of the learned trial Judge after determining the credibility of the evidence which was not the function of the Court of Appeal; that the finding of the trial Court on the H
issue of speed not being perverse, the Court of Appeal was wrong to have interfered with it if cases such as Adebayo Bashorun v. Johnson Olorunfemi (1989) 1 S.C.N.J 23 at 31; Insurance Brokers v. Atlantic

Textiles (1996) 9 -10 S.C.N.J. 171 at 184 and Nelson Gbafé v. Prince Frank Gbafé (1996) 6 S.C.N.J. 167 at 181, are taken into consideration. On the evidential value the sketch map Exhibit D1, the learned Appellant's Counsel maintained that the document had not contradicted itself and that it neither lacked clarity nor is it ambiguous but B squarely placed the cause of the accident on DW2 the 2nd Respondent, thought it was the Respondents that put in the document in evidence as part of their case.

The Respondents, in their brief of argument quoted the C contents of paragraph 5 of Exhibit D1 and argued that the document is in support of their plea of contributory negligence on the part of the Plaintiff/Appellant in support, of their Amended Statement of Defence in paragraphs 7.1 to 7.4. Learned Counsel to the Respondents therefore agreed with the findings of the Court of Appeal that PW1 D the Appellant contributed to the cause of the accident by driving at an excessive speed in a built up area; that had the learned trial Judge considered and evaluated the evidence in Exhibit D1 and Exhibit D2, the letter of undertaking given by PW1 the Appellant and tendered in evidence by the Respondents, he would have arrived at the same E decision as the Court of Appeal since PW1 the Appellant had admitted liability for the accident in Exhibit D2. The cases of Omoroge v. Lawani (1990) W.S.L.C. page 164 at 165 and U.B.A. v. Ogboh (1995) 2 N.W.L.R. (Pt. 380) 647 at 654, were relied upon in support of this stand of the Respondents. The same argument was advanced by the F Respondents in support of Exhibit D1 as part of their case; that the statement in Exhibit D1 showing that the Appellant was driving at a speed considered to be above normal when approaching a built up area, being a school and factory, shows that PW1 the Appellant had G contributed to the cause of the accident.

There is no doubt whatsoever that having regard to the circumstances of this case regarding how the accident involving the tipper lorry driven by DW2 the 2nd Respondent and the car driven by PW1 the Appellant and the issues for determination formulated by H the parties in their respective briefs of argument which I have earlier set out in this judgment, the determination of this appeal is entirely hinged upon the evidence adduced by the parties in the course of the hearing of the matter at the trial Court. In other words it is an appeal against the findings of facts by the trial High Court disturbed

on appeal by the Court of Appeal. The question therefore is whether or not the Court of Appeal was justified in law in disturbing the judgment of the trial Court in the present case.

The state of the law guiding the issue in question is indeed well settled because it has been stated times without number in several decisions of this Court that it is not the function of an appellate Court to substitute its own views of the evidence for those found by the trial Court. However, an appellate Court would only interfere with the finding of fact by the trial Court when it becomes very clear that the finding is perverse or it is not supported by evidence or is not the result of a proper exercise of judicial discretion. See *Okoye v. Ejiofo* (1934) 3 W.A.C.A. 130; *Kuma v. Kuma* (1936) 5 W.A.C.A. 4; *Akinloye v. Eyiola* (1968) N.M.L.R. 92; *Onowan & Anor. v. Iserhien* (1976) 1 N.M.L.R. 263; *Odofin v. Ayoola* (1984) 11 S.C. 72 and *Amusa v. Kossai* (1986) 4 N.W.L.R. (pt. 35) 57. From the judgment of the Court of Appeal in the instant case, it is quite clear that the Court clearly identified the above requirement of the law before interfering with the judgment and findings of the trial Court on the cause of the accident. The Court blamed the trial Court for relying on the oral evidence adduced by the parties alone without looking into the documentary evidence also put in by the parties in the course of the hearing. In particular, the Court below mentioned the sketch map of the scene of the accident drawn up by the Police which was received in evidence as Exhibit D1. It is quite clear that the Court below relied heavily on Exhibit 'D1' to interfere with the finding of the trial Court from what was said by that Court at page 228 of the record in its judgment where after agreeing with the trial Court that it was right in finding DW2 the 2nd Respondent guilty of negligence, in the Same vain proceeded to say

"A look at Bingham's Motor claims cases Eighth Edition by J.A. Taylor page 112, shows that a vehicle that is driven at 60 miles (100 km) per hour on a dry road when brake is applied will stop at a distance of 172 feet. If it is on dry concrete it will stop at 134 feet. In the present case, PW1's car left a skid mark of 176 feet. It was waged by the tipper. The evidence before the lower Court is that the area where the accident occurred is built up. It has a school and factory.

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In view of the provision of Section 22 of the Kwara State Road Traffic

Law CAP 142 it amounts to negligence if there is evidence that the manner of a persons driving portrays potential danger to traffic Which might reasonably be expected to be on the road, it being Unneces- sary to establish actual danger to any road user. xxxxxxxxxxxxxxxxx

From all I have said, agree with the submission of the learned
 B *counsel for the Appellant that PW1 contributed to the accident by driving at an excessive speed in a built up area. The learned trial judge in my respectful view did not adequately evaluate the evidence before him before arriving at his judgment. PW1, from evidence con-*
 C *tributed to the accident. I attribute 70% of the negligence to the 2nd Appellant and 30% to PW1.*

From the above findings of the Court below from the contents of Exhibit D1 which was in evidence before the trial Court, the accusation of the Appellant that the issue on Ex-
 D ***hibit D1 was raised suo-motu by that Court and that the parties did not place it before the Court for determination in the appeal, is totally baseless as the contents of Exhibit D1 was in evidence and the Respondents in their Appellants' brief at the Court below, had clearly placed the issue before that Court***
 E ***for determination in their issue number three*** which reads-

"Whether on the oral evidence and documentary evidence led at the trial of the action by the defence witnesses DW1 and DW2, it was established that the PW1 the Plaintiff's son and Driver of the Plaintiff's car was (sic) contributory negligent such as to warrant a
 F *reduction or whether it was significant enough to bar the Plaintiff from recovering special and general damages."*

The arguments of the Appellants tending to show that the issue of the evidence of the skid marks was not placed by the parties
 G before the Court below for determination and that the issue was raised suo motu by that Court, is therefore completely off the point.
The Court below was indeed well on course in looking into the documentary evidence in arriving at its decision finding the Appellant liable in contributory negligence. 'What has to be
 H determined however is whether the Court below correctly assessed the documentary evidence in Exhibit D1 given the contents thereof being the skid marks left behind by PW1 the Appellant's car on the road, before colliding with the Respondent's tipper lorry.

Having regard to the theory outlined in Bingham's Motor claims

relied upon by the Court below, a vehicle that is driven at 60 miles (100 kilometers) per hour on a dry road when break is applied will stop at a distance of 172 feet. However if it is on dry concrete road, it will stop at 134 feet. ***It must be observed that the most important factor in measuring the speed of any vehicle from the skid marks left behind on the road before finally stopping after the application of brakes, is the condition of the road.*** In the present formular applied by the Court below in measuring the speed of PW1 the Appellant from the skid marks left behind on a dry road surface or on dry or concrete surface. ***From both oral and documentary evidence adduced before the trial Court, particularly the sketch map Exhibit D1, the surface of the road being dry or wet or slippery or muddy, was not stated any where in the report Exhibit D1 itself or in the oral evidence. The condition of the road being dry is a condition precedent to the application of the formular used by the Court below in measuring the speed of PW1 the Appellant before agreeing with the submission of the Respondents' Counsel that PW1 the Appellant was driving at an excessive speed at the time of the accident. In the absence of this precondition, it is not difficult to see that the decision of the Court below that the Appellant was driving at an excessive speed is not supported by evidence at all.*** Since it was on that basis alone that the Court below view it necessary to interfere with the findings of the trial Court as to who was really responsible for causing the accident between the PW1 the Appellant and DW2 the 2nd Respondent, the necessity for the interference with the findings of the trial Court, has been, completely removed by the absence of evidence on the condition of the road at the time of the accident.

Taking into consideration that the collision between the vehicles driven by PW1 the Appellant and DW2 the 2nd Respondent occurred in PW1 the Appellant's part of the lane, the evidence of the Appellant who testified as PW1 that it was DW2 the 2nd Respondent who drove without due care and attention by crossing suddenly into the Appellant's lane that caused the accident, was rightly accepted and believed by the trial Court in its judgment at page 71 of the record where ***the learned trial Judge said-***

"However, the driver of the tipper lorry has made it abun-

dantly clear that he did not see the Acurra Legend car even though the road was straight and he could not have given the right of way to a car he did not see. If as he claimed the road was no busy that day, I am at a loss to fathom what he was spending 5 minutes to observe in the middle of the road before turning to left which is PW1's lane. I find it difficult to believe and accept that ridiculous evidence that he stopped for five minutes in the middle of the road to observe non-existent flow of motor traffic on that straight road before turning."

I entirely agree with the learned trial Judge that the failure of DW2 the 2nd Respondent to see the oncoming vehicle of PW1 the Appellant to give it its right of way to pass along its lane on the highway before turning to cross the lane of Appellant in order to enter the 1st Respondent's factory, was the sole cause of the accident thereby absolving PW1 the Appellant from any liability in contributory negligence. This is so when the evidence given by the 2nd Respondent as DW2 in chief and under cross-examination is scrutinised, the picture is quite clear. In his evidence in chief, DW2 the 2nd Respondent said at page 46 as follows -

"On that day, I was driving a tipper lorry. When I got to Oken Biscuits Factory gate, I stopped in the middle of the Road and trafficated signaling my intention to go into the factory. Vehicles were coming behind me and by-passing me and also vehicles were coming from the opposite direction. I was to turn left into the factory. I was about completing the turning but for a pit at the entrance (gate) when the Accura (Plaintiff's vehicle) ran into my vehicle."

Under cross-examination at page 47 of the record the same witness agreed that

"I want to turn into Okin Biscuits Factory that day when the accident occurred. I did not see the Accura Legend car when I started to turn from my lane to the lane of the car (i.e the other side). The car was coming from the opposite direction when the accident happened. I did not see the car before the accident. xxxxxxxx I stayed in the middle of the road for about 5 minutes for other vehicles to pass while trafficking."

From this evidence of DW2 the 2nd Respondent, which was

considered and accepted by the trial Court, the cause of the accident is quite clear. It was the failure of DW2 the 2nd Respondent to have seen and observed that among the vehicles he allegedly stopped in the middle of the road for about 5 minutes to allow to pass before turning into the factory, was also PW1 the Appellant's vehicle as found by the learned trial Judge. In other words the resolution of the question as to who was really responsible for causing the collision between the two vehicles of PW1 the Appellant and DW2 the 2nd Respondent rested principally on the question of credibility of the respective evidence put in place before the trial Court by the parties. This is an area which by law, the Court below is not expected to venture into if the decision of this Court in many cases including *Adebayo Bashorun v. Johnson Olorunfemi* (1989) 1 S.C.N.J. 23 at 31 is taken into account.

For the foregoing reasons, I am of the firm view that the Court below ought not to have interfered with the findings of the trial Court as to the cause of the accident resulting in the damage to the Appellant's vehicle. The appeal therefore deserves to succeed on this issue alone. The appeal is accordingly hereby allowed, the judgment of the Court below of 24th June, 2002 is hereby set aside. The judgment of trial Court delivered on 24th February, 2000 in favour of the Appellant is restored and affirmed. With this conclusion, there is no longer any need for me to consider and resolve the common issue number two regarding the failure of the Court below to include the accrued interest in the judgment amount ordered to be placed in the interest yielding account. For the avoidance of doubt, the Appellant is now entitled to reap the fruits of the entire judgment of the trial Court including the interest that accrued thereon. There shall be N50,000.00 costs to the Appellant against the Respondents.

OGUNTADE JSC

I have read in draft a copy of the lead judgment by my learned brother Mohammed JSC. I agree with his reasoning and conclusion. I would also allow this appeal with costs as ordered in the lead judgment.

TABAI JSC

I was privileged to read, in advance, the lead judgment prepared by my learned brother, Mahmud Mohammed JSC and I agree entirely with him that the appeal be allowed.

- B The question is whether there was evidence in support of contributory negligence as found by the Court of Appeal. The settled principle of law is that evaluation of evidence and ascription of probative value thereto is pre-eminently that of the trial court which alone has the advantage of seeing and hearing Witnesses as they testify. And an appellate court, because of its disadvantage of not seeing and hearing witness, would not therefore, ordinarily interfere with findings of fact of a trial court. See OBMAMI BRICK & STONE (NIG) LTD v. A.C.B. LTD (1992) 3 NWLR (Part 229) 260 at 310; C CHUKWU v. NNEJI (1990) 6 N.W.L.R. (Part 156) 363; OBI v. OWOLABI (1990) 5 N.W.L.R. (Part 153) 363; SOLEH BONEH (NIG) LTD v. AYODELE (1989) 1 N.W.L.R. (Part 99) 549.

- Where however the findings of facts made by the trial court are not supported by the evidence and therefore did not appear to have arisen from a proper use of its opportunity of seeing and hearing the witnesses, then an appellate court is at liberty to interfere by evaluating or re-evaluating the evidence and make its own finding properly supported by the evidence. See HIGHGRADE MARITIME SERVICES LTD v. FIRST BANK OF NIGERIA LTD (1991) 1 N.W.L.R. F (Part 167) 290 at 310 EBBA v. OGODO (1984) 1 SCNLR 372; WOLUCHEM v. GUDI (1981) 5 SC 291 SANUS1 v. AMEYOGUN (1992) 4 N.W.L.R. (Part 237) 527; ADEGOKE v. ADIBI (1992) 5 NWLR (Part 242) 410 at 427;

- G There is nothing from both the oral and documentary evidence particularly the sketch; Exhibit D1 that lend support to the finding of the Appellant being in excessive speed and therefore liable in contributory negligence. The trial court did not make any finding of the Appellant's contributory negligence there being no evidence in support thereof and in my view there was no basis therefore for the interference by the Court below.

H For the foregoing reasons and the fuller reasons comprehensively set out in the lead judgment I also allow the appeal. I abide by the order on costs contained in the lead judgment.

CHUKWUMA-ENEH JSC

I have read before now the judgment prepared by my learned brother, Mohammed JSC just delivered and I agree with him that the appeal has merit and should be allowed.

I must, all the same, add that in my respectful view the findings of acts of negligence as firmly established by the trial court from the evidence adduced before it should not have been disturbed at all by the court below. This court has admonished that the findings of a trial Court as in this case should not be disturbed excepting where on the preponderance of evidence they are otherwise preserve or have occasioned a miscarriage of justice. The Court below has no tangible evidence to base its finding on contributory negligence thus diminishing the award of damages to the appellant by 30%.

Accordingly, there is merit in the appeal and I also allow the appeal and endorse the orders in the lead judgment.

MUNTAKA-COOMASSIE JSC

I have had the privilege of reading in advance the lead judgment of my learned brother, Mahmud Mohammed, JSC just delivered. For the reasons his Lordship relied upon to allow this appeal, I too found that there is merit in the appeal of the appellant, same is hereby allowed by me. I abide by all the consequential orders made in the lead judgment including that of costs.

Appeal allowed.

G

H