

SUPREME COURT OF NIGERIA
13TH MAY, 2011. SC.47/2005
CORAM:- D. MUSDAPHER, M. MOHAMMED,
M. S. MUNTAKA-COOMASSIE, J. A. FABIYI,
B. RHODES-VIVOUR, JJSC

NACENN NIGERIA LIMITED APPELLANT
AND
BEWAC AUTOMATIVE
PRODUCERS LIMITED RESPONDENT

TORTS - Detinue - Successful plaintiff in action for detinue - Is entitled to an order of specific restitution of the chattel - And also damages for its detention up to the date of judgment (H1)

EVIDENCE - Unchallenged evidence - Admissibility - Court to rely on and accept as true - Evidence that was neither challenged nor cross examined by the other party (H2)

COURTS - Findings - Appeals - Retrial - Where trial court failed to make finding on issues joined by parties in pleadings - Appellate Court will order a retrial - When the evidence is of a nature that it cannot make its own finding (H3)

COURTS - Duty to do justice - Court of law is to do justice according to the law - And not according to sentiments (H4)

FACTS

Respondent is an automobile sales and services company with appellant as one of its customers. Both parties have been doing business together for many years. However, prior to the institution of this suit, respondent sued appellant in suit No. E/179/86 and got judgment in the sum of N73,639.94 representing an outstanding debt of previous services rendered to appellant. Appellant paid the judgment debt accordingly. In the meantime, two tippers with registration No. AN 6619 EB and AN 7322 EB were in possession of respondent for repairs. Those vehicles were bought by appellant from respondent as brand new vehicles. The job orders were tendered as

Exhibits D1 and D4. After appellant has complied with the judgment in suit NO. E/179/86, he sent its staff to go and collect the vehicles and it was discovered that the engine of the vehicle with registration No. AN 7322 EB has been replaced with a strange engine, and as such respondent was no longer in a position to deliver the vehicles. As a result of this, appellant in its further amended statement of claim filed at the High Court of Enugu State Holden at Enugu claimed inter alia against respondent, replacement of engines for the tipper vehicles.

Appellant made enquiries about the cost of equivalent engine and he received quotations which were tendered as Exhibit F, and got the naira equivalent from the Cooperative and Commerce Bank Plc. which was tendered as Exhibit F1. Appellant also obtained the insurance quotation which was tendered as Exhibit F2, the import duty quotation was also tendered as Exhibit F3. According to appellant's witnesses the tippers were used for civil engineering construction, and were also hired to other users. The costs of the hiring were stated. Appellant claimed in totality from respondent the sum of N1,319,464.94 (One Million Three Hundred and Nineteen Thousand, Four Hundred and Sixty Four) naira. Respondent contends that the two tipper vehicles are "accidented" and "knocking". Hence, they are unusable. Pleadings were exchanged between the parties. The trial court granted the claims of appellant. Aggrieved, respondent appealed to Court of Appeal, Enugu Division. The court set aside the judgment of the trial court on the ground that there was no evidence in respect of the value of 'accidented' and 'knocking' vehicle and that there could be no damages for loss of use of unusable vehicles. The court ordered a re-trial de-novo before another judge of the High Court. Appellant being dissatisfied has appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right to have set aside the award made by the High Court to the appellant of the sum of N1,319,644.94 being the replacement value of the two engines on the basis that the High Court did not apply the correct principle of law relating to assessment of damages in an action in detinue and lack of consideration of the worn out state and depreciation value of the engines in making the award.

2. Whether the Court of Appeal was right to have interfered and reversed the finding of the High Court that the respondent failed to prove that the vehicles were unserviceable and in setting aside the award of damages for loss of use made by the High Court on the ground that the tipper vehicles were unserviceable.

3. Whether the Court of Appeal was right to have made an order for trial de novo of the suit in the circumstances of the case..

HELD (Unanimously dismissing the appeal per ***MUNTAKA-COOMASSIE JSC***)

TORTS - Detinue - Entitlement of a successful plaintiff

1. Thus, a successful plaintiff in a case of detinue is entitled to an order of specific restitution of the chattel or in default, its value and also damages for its detention up to the date of judgment.

Detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and this continues until delivery up of the goods or judgment in the action for detinue. The action is in the nature of an action in rem in which the plaintiff may sue (1) for the value of the chattel as assessed and also damages for its detention, or (2) for the return of the chattel or recovery of its value as assessed and also damages for its detention, or (3) for the return of the chattel and damages for its detention.

The position of the law was also clearly stated in the case of *Oshevinre limited V Tripoli motors supra* at P.263 per Onu JSC as follows:-

“...In other words, by definition, the gravamen of the tort of detinue is the wrongful retention of the chattel, mere retention is enough to ground a case of action in detinue but a successful plaintiff will only be entitled to nominal damages.

A successful plaintiff in a case of detinue is entitled to an order of specific restitution of the chattel, or in default its value and also damages for its detention up to date of judgment”. (pp. 1346 B/1347 G)

EVIDENCE - Unchallenged evidence - Admissibility

2. Even though this witness was thoroughly cross examined, he was not examined on this evidence bordering on the financial loss suffered as a result of the detention of the two tippers. It is trite that a court

ought to rely and accept as true, evidence that was neither challenged nor cross examined by the other party. (p. 1349 E)

COURTS - Findings - Appeals - Retrial

3. On the third issue, which borders on the order of retrial made by the lower Court, it is apparent that the order is unnecessary and uncalled for as all the issues joined by the parties were resolved by the trial High Court. Where a trial judge failed to make finding of facts on issues duly joined by the parties in their pleadings, an appellate Court will order a retrial when the evidence is of such a nature that it cannot make its own finding not having seen or heard the witnesses. (p. 1349 F)

Court of law is to do justice according to the law

4. It has to be noted that the duty of a court of law is always to do justice according to the law and not according to the sentiments. In view of the fact that I am dismissing this appeal, I will not comment much in view of the order I will soon make. The appeal therefore lacks merit same is hereby dismissed. The judgment of the lower court allowing the appeal before it and remitting same to the trial court is imminently in order. Same is therefore restored and affirmed. Fifty thousand naira (N50,000.00) cost is awarded in favour of the respondent. (p. 1350 A)

REPRESENTATION

A. C. Anaenugwu; for the Appellant
V.I. P. Ozumba; for the Respondent

CASES REFERRED TO

Okpiri V. Jonah (1961) All NLR 102
Okonkwo V. Migliore (1979) 11 SC 138
Osolu V. Osolu (2003) 11 NWLR (Pt. 832) 608
Adeyemo V. Arokepo (1988) 2 NWLR (Pt. 79) 703
Okomali Vs. Akinbode (2006) All FWLR (Pt. 314)
Odumosu V. ACB Limited (1976) N.S.C.C 635 at 639
Omoregie Vs. Idugiewanye (1985) 2 NWLR (Pt.5) 41
Rosenlal V. Alder Hon & Son (1946) K.B. 371 at 374
Mafimisebi V. Ehuwa (2007) 2 NWLR (Pt.1018) 385

Kosile V. Folarum (1989) 3 NWLR (Pt. 107) 371 at 574

Armedes Transport Limited V. Martinees (1970) All NLR 27

Oluwo Glass Company V. Emulawo (1990) 7 NWLR (Pt. 160) 14

J. E. Oshevire Limited V. Tripoli Motors (1997) 5NWLR (Pt. 503)p.1

Ordia V. Piedmont (Nig.) Ltd (1995) 2 NWLR (Pt. 379) 516 at 527

B - C

B

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The appellant as plaintiff in its further amended Statement of Claim dated 1/2/96 claimed against the respondent as the defendant as follows:- C

“WHEREFORE the plaintiff claims from the defendant as follows:-

*i. Replacement Engine for AN 7322 EB
N590,241.21*

D

*ii. Replacement Engine for AN 6619 EB
N590,241.21*

*iii. Insurance costs for AN 6619 EB
N1,457.77*

*iv. Insurance costs for AN 6619 EB
N1,457.77*

E

*v. Freight duty and clearing charges for replacement Engine
for AN 7322 EB N68,033.49*

*vi. Freight duty and clearing charges for AN 6619 EB
N68,033.49*

F

N1,319,464.94

*B. Loss of use/earnings at the rate of N1,600.00 for two tippers, counting from 23/4/1 up to and including 31st March, 1992; N2,600 per day from 1st day of April, 1992 up to and including 31st G
day of December, 1994 and from the 1st of January, 1995, at the
rate of N9,000.00 per day until the judgment is delivered in this suit
and until the judgment debt is liquidated by the Defendant, the two
tippers in question in this suit”.*

Pleadings were duly filed and exchanged after which the parties called their respective witnesses. The trial Judge in its decision entered judgment for the plaintiff in the following terms:-

“i. There shall therefore be judgment for the plaintiff as follows:-

a. *N1,319,464.94 being the costs of replacing the plaintiff's two engines.*

b. *Loss of income commencing from 23/4/91, a day after full payment of the judgment debt in E/179/86 as follows:-*

i. *N1,000.00 per day from 23/4/91 to 23/3/92.*

B ii. *N2,600.00 per day from 1st April, 1992 until 31st December, 1994..."*

C The defendant was dissatisfied with the above judgment of the trial court and has as a result successfully appealed to the Court of Appeal Enugu Division hereinafter called court below. The court below on 29/11/04 unanimously allowed the appeal and set aside the judgment of the trial court and its orders. The matter was remitted to the Chief Judge Enugu State to be tried de novo by another Judge. See pages 219 - 230 of the record.

D The plaintiff was dissatisfied with the decision of the court below and has appealed to the Supreme Court.

E Before us and in accordance with the rules of this court, both parties through their respective counsel filed and exchanged their briefs of argument. The appellant in its brief of argument dated 5/5/10 formulated three issues for determination as follows:-

F 1. Whether the Court of Appeal was right to have set aside the award made by the High Court to the appellant of the sum of N1,319,644.94 being the replacement value of the two engines on the basis that the High Court did not apply the correct principle of law relating to assessment of damages in an action in detinue and lack of consideration of the worn out state and depreciation value of the engines in making the award (ground 1, 3 and 5)

G 2. Whether the Court of Appeal was right to have interfered and reversed the finding of the High Court that the respondent failed to prove that the vehicles were unserviceable and in setting aside the award of damages for loss of use made by the High Court on the ground that the tipper vehicles were unserviceable (Ground 2).

H 3. Whether the Court of Appeal was right to have made an order for trial de novo of the suit in the circumstances of the case. (Ground 4)

Whilst the respondent herein also formulated three issues for determination thus:-

"1. Whether the Court of Appeal was right to have set aside

the award made by the High court which is based on the costs of importing new engines in lieu of the costs of accidented and “knocked” old Engines”.

2. *“Was the Court of Appeal right in setting aside the award of damages for loss of use made by the High court on the ground that the tipper vehicles were unserviceable and abandoned”.* B

3. *“Whether the Court of Appeal was right to have made an order for trial de novo in this suit”.*

The respondent is an automobile sales and service company with the appellant as one of its customers. Both parties have being (sic) doing business together for many years. However, prior to the institution of the present suit, the respondent sued the appellant in suit No. E/179/86 and got judgment in the sum of N73,639.94 representing an outstanding debt of previous services rendered to the appellant. This judgment was paid by the appellant. In the meantime, two tippers with registration No. AN 6619 EB and AN 7322 EB were in possession of the respondent for repairs. Those vehicles were bought by the appellant from the respondent as “brand new vehicles”. The job orders were tendered as Exhibits D1 and D4. After the appellant has complied with the judgment in suit NO. E/179/86, he sent its staff to go and collect the vehicles and it was discovered that the engine of the vehicle with registration No. AN 7322 EB has been replaced with strange engine, and as such the respondent was no longer in a position to deliver the vehicles. The appellant made enquiries at the cost of equivalent engine he received quotations which were tendered as Exhibit F, and got the naira equivalent from the Cooperative and Commerce Bank Plc. which was tendered as Exhibit F1. C D E F

Appellant also obtained the insurance quotation which was tendered as Exhibit F2, the import duty quotation was also tendered as Exhibit F3. G

According to the appellant’s witnesses the tippers were being used for civil engineering construction, and they also hired them to other users, the costs of the hiring were stated. (underline mine). H

At the hearing of this appeal, learned counsel to the appellant adopted his brief of argument and urged this court to allow this appeal. His arguments and submissions covered pages 4 - 19 of his brief dated 5/5/2010 and filed on 10/5/2010.

On issue No. 1, learned counsel to the appellant submitted that cause of action of the appellant was primarily the failure of the respondent to comply with the part of the consent judgment in suit No. E/179/86 directing the respondent to return to the appellant the tipper vehicles in the custody of the respondent as the respondent has tempered with the vehicle engines. It was this contention that the reliefs sought by the appellant for the replacement of the engines were the current cost of the engines and not the cost at the time of default by the respondent in returning the tipper vehicles. Thus, the sum of N1,819,464.94 awarded by the High Court was the current cost for the replacement of the engines. Learned counsel submitted that the lower court was in grave error when it set aside the “said award”. It was his contention that the lower court misconceived the law relating to assessment and award of damages in detinue, and that the decision in the case of *Ade Olenle V. Royal Exchange Assurance* (1958) WNLR relied on by the lower court were decisions based on action in negligence and not in detinue.

Learned counsel therefore submitted that the correct principle of law in the assessment of the value of a chattel unlawfully detained in an action in detinue is the value of the chattel at the judgment. The case of *Ordia V. Piedmont (Nig.) Ltd* (1995) 2 NWLR (Pt. 379) 516 at 527 - B - C, were cited.

On the 2nd issue, it was the submission of the learned counsel that the award of damages for loss of use is in accord with the pleadings and evidence in the case as well as principles guiding the award of damages in an action in detinue, he referred to the evidence of the sole witness to the appellant that the said vehicle were delivered to the respondent for servicing and were to be returned in serviceable conditions. He therefore submitted further that the trial court having accepted the evidence of the appellant that the vehicles were to be serviced and returned in good condition, the Court of Appeal ought not to have interfered to re-evaluate the evidence. The evidence in these issues, without it being shown that the finding of the trial court was perverse, or not supported by the evidence before it. He further submitted that the Court of Appeal did not re-evaluate the evidence on those grounds rather it erroneously proceeded to retry the case based on the record of evidence and from which it came to a different conclusion. The lower court, it was submitted committed, a grave

error of law by substituting the finding of the trial court with its finding reversed the award of damages for loss of use made by the trial court. Counsel cited, in support, the case of *Omorieg Vs. Idugiewanye* (1985) 2 NWLR (Pt.5) 41. Learned counsel finally on this issue, submitted that it is settled law that in an action in detinue, in addition to being entitled to the return of the detained chattel or its value at the time of judgment, the plaintiff is also entitled to be awarded damages for its detention up to the date of judgment. B

On the 3rd issue, learned counsel submitted that the lower court lacks the jurisdiction to award to a party a relief not sought for. See *Ojah V. Ogboni* (1996) 6 NWLR (Pt. 454) 272. In the instant case, it was the case of the appellant that the respondent did not seek order for trial of the case de novo. On the other hand, counsel submits, that even if the order for trial de novo can be made, the order as made by the lower court has no foundation in law in the circumstances of this case. An order for trial de novo can only be made where a trial court failed in its primary duty of making findings of facts on the material issues joined on the pleadings and the evidence is such that an appellate court cannot make finding and come to a decision on all the relevant issues. The following cases were cited in support:- C D E

a) *Osolu V. Osolu* (2003) 11 NWLR (Pt. 832) 608.

b) *Mafimisebi V. Ehuwa* (2007) 2 NWLR (Pt.1018) 385.

In the case at hand, no such omission was committed by the trial court. F

The trial High Court resolved all the material issues necessary for the determination of the case. He continued and submitted that the appellant established his case at the trial court and there is therefore no basis for an order of trial de novo. (*Italics mine*) G

Learned counsel to the respondent also adopted his brief of argument at the hearing of this appeal and urged this Honourable court to dismiss the appeal in its entirety. On his issue No. 1, learned counsel contended that it is clear from the pleading and evidence that engine No. AN 7322 EB which came into the respondent's workshop was knocked, while that of engine No. AN 6519 EB had an accident. It is his submission that it was therefore erroneous for the trial court to give judgment for the appellant based on cost of replacement of "two brand new engines" where in fact the engines H

were worthless. It was contended that an action for detainee resembles an action for restitution, he relied on the following cases:-

i. Strand Electric and Engineering Company Ltd V. Brisford Entertainment Limited (1952) 2 W.B. 246;

ii. Odumosu V. ACB Limited (1976) N.S.C.C 635.639.

B iii. J. E. Oshevire Limited V. Tripoli Motors (1997) 5 NWLR (Pt. 503) p. 1. - on return or restoration of some specific things to its rightful owner.

Thus, a successful plaintiff in a case of detainee is entitled to an order of specific restitution of the chattel or in default, its value and also damages for its detention up to the date of judgment;
 C (see Abed Brothers Limited V. Niger Insurance Company Limited (1976) NNLR.) But in the instant case where the subject - matter is not profiteering, it is extremely difficult to assess the damages to the plaintiff. It is for this reason, counsel continues, that the lower court was right in setting aside the award granted the appellant by the trial court, when in actual fact the engines of the two vehicles were “knocked” the appellant’s claim is for a new brand engine.

In actual fact, the only amount recoverable by the Appellant is
 E the loss of the knocked engine and not that of new ones. He refers to the case of Margaret Chinyere Stitch V. A - G Federation (1986) 2 N.S.C.C 1389.

On the 2nd issue, learned respondent’s counsel submitted that
 F the lower Court was right in setting aside the award of damages in spite of the pleadings and the evidence given on loss of use. That in an action in detainee as well as contract, there must be strict proof of special damages at least by credible evidence. In the instant case, the appellant pleaded and led evidence as to a brand new engine im-
 G ported from England plus cost of freight and insurance, while in actual fact, he ought to have pleaded and led evidence as to the condition of the “knocked and accidented engines”.

On the third issue, learned counsel to the respondent referred
 H to section 15 of the Court of Appeal Act and submitted that the order for retrial de novo made by the lower Court was valid and competent as it was made by the lower Court in the exercise of its general powers as provided in the Court of Appeal Act. He then referred to the case of Okomali Vs. Akinbode (2006) All FWLR (Pt. 314) P. Learned counsel then listed the conditions under which an order for trial de

novo may be made and submitted that the lower Court was right in ordering a retrial where there is insufficient material before the Court for the resolution of the matter as in this case.

In this appeal my Lords, issues 1 and 2 of each of the parties' briefs of argument can be taken together as they relate to assessment of damages in an action for detainue. Interestingly, both parties agreed that the appellant is entitled to damages. The only area of dispute or conflict is the extent of damages accruable to the appellant. B

While the appellant strongly argued that he is entitled to the value of the detained chattel as at the date of judgment in addition to damages for its detention, the respondent argued that the appellant is only entitled to the value of the chattel as at the time of detention and not damages for its detention. On this issue the lower Court held at P225 of the record as follows:- C

..... *"I agree with the learned counsel for the appellant, that damages in detainue or conversion are calculated as at the date of conversion and not as at the date of judgment. On 12/2/92, when the respondent instituted this suit is claim (sic) N289,140.02 as the market value of the engines, inclusive of freight and other charges. But in paragraph 19 of its statement of claim filed on 4/6/92, respondent increased the C.I.F. value of the same engines to N429,190.06. E*

Again in paragraph 19 of its further amended statement of claim filed on 1/2/96 it claimed N1,319,464.94 as the cost of equivalent engines of the two vehicles C.I.F. Ex-United Kingdom. It is this latest figure that the learned judge awarded in his judgment delivered on 22/10/90". F

However, on (sic) examination of the decisions of this court on this point would determine whether this pronouncement of the lower Court was correct. G

In the case of Julius Berger limited Vs Omogui (2001) 6 SCNJ, 214 at 229 - 230, His Lordship Uwaifo JSC held as follows:-

"Detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and this continues until delivery up of the goods or judgment in the action for detainue. The action is in the nature of an action in rem in which the plaintiff may sue (1) for the value of the chattel as assessed and also damages for its detention, or (2) for the return of the chattel or recovery of its value as as- H

essed and also damages for its detention, or (3) for the return of the chattel and damages for its detention.

The position of the law was also clearly stated in the case of Oshevinre limited V Tripoli motors supra at P.263 per Onu JSC as follows:-

B ***“...In other words, by definition, the gravamen of the tort of detinue is the wrongful retention of the chattel, mere retention is enough to ground a case of action in detinue but a successful plaintiff will only be entitled to nominal damages.***

C ***See Abed Brothers Limited V. Niger Insurance Company limited (Supra) at pages 8 and 9. A successful plaintiff in a case of detinue is entitled to an order of specific restitution of the chattel, or in default its value and also damages for its detention up to date of judgment”. (Italics mine for clarity)***

D On the distinction between the torts of detinue and conversion, his Lordship Onu JSC, held as follows in the same case:-

E ***“...Unlike an action for conversion which is purely a personal action and judgment is for a single sum which is the value of the chattel at the date of conversion, detinue is in the form of an action in rem whereby the plaintiff seeks specific restitution of his chattel resulting in judgment for the delivery up of the chattel or payment of its value as assessed at the time of judgment and damages for its detention”.***

F Similarly in the case of Ordia Vs Predmont supra at 184 this Court per Belgore JSC (as he then was) stated the law briefly thus:-

G ***“In an action like this, where chattel is withheld by the defendant from the plaintiff, the action in detinue is for either the return of the chattel plus damages for its retention. Thus the defendant even cannot deprive the plaintiff of his right to damages for detention of the chattel simply because he was not earning anything from its use”.***

H (See also the following cases, Oluwo Glass Company V. Emulawo (1990) 7 NWLR (Pt. 160) 14; Kosile V. Folarum (1989) 3 NWLR (Pt. 107) 371 at 574. And Rosenlal V. Alder Hon & Son H (1946) K.B. 371 at 374.)

In the instant case, the appellant stated that the two vehicles were bought from the respondent as brand new engines and that they were only taken to the respondent for servicing. On the other hand, the Respondent, said one of the engines had knocked while

the other was involved in an accident, as a result of which the appellant could not claim the value of new engines. (Underline mine for emphasis).

At the hearing, the Appellant herein tendered the JOB ORDERS, issued by the respondent which stated the nature of job orders revealed that the engine were taken to the respondent for service. The respondent did not deny issuing the job orders and neither did they deny that they relate to the engines in question. B

On the second aspect that is damages for detention as at the time of judgment, the respondent had argued that the appellant has not proved any loss of use. But the appellant's evidence at the trial High Court is clear. PW1, in his evidence at the hearing said:- C

"I did tell the Court that these vehicles are commercial vehicles. We are using them for civil engineering construction. We are also hiring them out to other users. From 31st April, 1991 the hiring was N800 a tipper a day up to 31st March, 1992. From 1st April, 1992 the rate went up to N1,300 for tipper per day up to 31st December, 1994. From 1st January, 1995 to date the rate is N4,500.00 a tipper a day. As a result of the continued withholding of these two tipper we have suffered tremendous financial losses on daily basis". E

Even though this witness was thoroughly cross examined, he was not examined on this evidence bordering on the financial loss suffered as a result of the detention of the two tippers. It is trite that a court ought to rely and accept as true, evidence that was neither challenged nor cross examined by the other party. F

On the third issue, which borders on the order of retrial made by the lower Court, it is apparent that the order is unnecessary and uncalled for as all the issues joined by the parties were resolved by the trial High Court. Where a trial judge failed to make finding of facts on issues duly joined by the parties in their pleadings, an appellate Court will order a retrial when the evidence is of such a nature that it cannot make its own finding not having seen or heard the witnesses. See H
Adeyemo V Arokepo (1988) 2 NWLR (Pt. 79) 703, Okpiri V Jonah (1961) All NLR 102, Armedes Transport Limited V. Martinees (1970) All NLR 27, Okonkwo V. Migliore (1979) 11 SC 138, Odi Vs Iyala (2004) 4 SCNJ 35, Per Niki Tobi JSC, and Okomali Vs Akinbode

Supra.

It has to be noted that the duty of a court of law is always to do justice according to the law and not according to the sentiments. In view of the fact that I am dismissing this appeal, I will not comment much in view of the order I will soon make. The appeal therefore lacks merit same is hereby dismissed. The judgment of the lower court allowing the appeal before it and remitting same to the trial court is imminently in order same is therefore restored and affirmed. Fifty thousand naira (N50,000.00) costs is awarded in favour of the respondent.

Appeal is dismissed.

D

MUSDAPHER JSC

I have read before now the judgment of my lord Muntaka-Coomassie, JSC just delivered in the matter. I entirely agree with the conclusion arrived at. I, too, dismiss the appeal and affirm the decision of the court below. I award the respondent costs assessed at N50,000.00 against the appellant.

MOHAMMED JSC

The judgment of my learned brother Coomassie JSC which has just been delivered was read by me before today. I entirely agree with him that there is no merit in this appeal which deserves to be dismissed. The law is indeed well settled that where a trial Court failed in its primary duty of making findings of fact on issues joined on the pleadings of the parties and the evidence is such that an appellate Court cannot make its findings and come to a decision on all the relevant issues, an order of retrial is the proper order the appellate Court should make. (See *Kareem v. U.B.A. Ltd.* (1996) 5 N.W.L.R. (Pt. 51) 634; *Adeyemo v. Arokopo* (1988) 2 N.W.L.R. (Pt. 79) 703; *Awote v. Owodunmi* (No. 2) (1987) 2 N.W.L.R. (Pt. 52) 366; *Bakare v. Apena* (1986) 4 N.W.L.R. (Pt. 33) 1 and *Okeowo v. Migliore* (1979) 11 S.C. 138.)

In the present case, on the issues joined between the parties on pleadings, the evidence on record which does not show how old

the vehicles being detained by the Respondent were and their state of repairs when they were brought to the Respondent's workshop for service, is such that the Court below was right to have found that it was not in a position to make findings and come to a decision on all the relevant issues on the Plaintiff's/Appellant's claims against the Respondent. The order for hearing the matter de-novo, was therefore correctly made by the Court below. Accordingly, I also dismiss this appeal and abide by the orders made in the lead judgment including the order on costs.

C

FABIYI JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division ("the court below" for short) delivered on 29th November, 2004.

D

The suit filed by the appellant herein as plaintiff at the trial court has the semblance of a detinue action. It took two tipper vehicles; one 'accidented' and the other 'knocking' to the respondent for repairs. After a while it sued and finally claimed N1,319,464.94 for brand new vehicles insurance and freight duty and clearing charges and also loss of use over a period of time. The trial court granted same. The court below set it aside on the ground that there was no evidence in respect of the value of 'accidented' and 'knocking' vehicle and that there could be no damages for loss of use of unusable vehicles. The court below ordered a re-trial de-novo before another judge of the High Court.

E

F

The appellant felt aggrieved and appealed to this court. Briefs of argument were filed and exchanged by the parties herein. The three (3) issues formulated for the determination of this appeal by the appellant read as follows:-

"1. Whether the Court of Appeal was right to have set aside the award made by the High Court to the appellant of the sum of N1,319,464.94 being the replacement value of the two engines on the basis that the High Court did not apply the correct principles of law relating to assessment of damages in an action in detinue and lack of consideration of the worn out state and depreciation value of the engines in making the award.

2. Whether the Court of Appeal was right to have interfered

and reversed the finding of the High Court that the respondent failed to prove that the vehicles were unserviceable and in setting aside the award of damages for loss of use made by the High Court on the ground that the tipper vehicles were unserviceable.

3. *Whether the Court of Appeal was right to have made an order for trial de novo of the suit in the circumstance of the case.*”

The respondent also formulated three (3) similar issues which I do not need to set out so as to conserve space and much needed energy.

An action in detinue has the semblance of one for restitution. See: *Odumosu v. A.C.B Ltd. (1976) N.S.C.C. 635*. It is a return of a specific chattel to its rightful owner subject to damages, if any for its detention up to the date of judgment.

It is extant in the record of appeal that P.W.1, the appellant’s Managing Director affirmed that the two vehicles were ‘accidentied’ and ‘knocking’ ones. They were not in use for a period of between eight (8) and nine (9) years. The appellant did not lead any evidence in respect of the values of the unusable vehicles. The appellant would only be entitled to the amount that would buy a used ‘knocked’ engine and ‘accidentied’ engine less depreciation. See: *Margaret Chinyere Stitch v. Attorney-General Federation & Ors. (1986) 2 N.S.C.C. 1389*.

It is clear that the two vehicles were not roadworthy or capable of generating income having been abandoned at the respondent’s workshop. It is inconceivable that the trial court awarded the appellant the value of brand new vehicles plus insurance and freight charges and capped same with award for loss of use. It was like dishing out gold to the appellant for no justifiable cause as same was not rooted in any form of evidence.

The court below was right in setting aside the decision and stance posed by the trial court. The court below was right when it held that:-

“In the instant case, the trial court below was faced with the difficulty of evidence of ascertaining the market value of the used engines. In the absence of such evidence, the court could not be right in law in awarding the cost of importing new engines including freight and insurance as compensation for the loss of the engines of the two vehicles.”

The court below made an order of retrial by another judge of the High court in the interest of justice. The order was clearly warranted in the prevailing circumstance of the matter.

For the above reasons, I agree with the conclusion of my learned brother Muntaka-Coomassie, JSC that the appeal is devoid of merit and should be dismissed. I order accordingly. I affirm the judgment of the court below and endorse the order on costs contained in the lead judgment.

RHODES-VIVOUR JSC

I read in draft the leading judgment delivered by my learned brother Muntaka-Coomassie, JSC. I am in complete agreement with his Lordship that this case should be tried all over again as directed by the court of Appeal. The reason for this finding is that the learned trial judge failed to evaluate evidence and the evidence is such that an appellate court cannot make its findings, and come to a decision on all the issues. The Law is very well crystallized that it is the primary duty of the trial judge to receive all relevant evidence. That is perception. The next task for the judge is to weigh the evidence in the case. That is evaluation. A finding of fact involves both perception and evaluation.

In a well considered judgment there must be:

1. Findings of fact based on credibility of witnesses.
2. Findings based on evaluation of evidence.

It is only the latter case that an Appeal court is in as good a position as the trial court to make findings, but where the former was not done or both were not satisfactorily done as in this case the proper order to make is a retrial.

(See *Ukaegbu v. Nwololo* 2009 3 NWLR Pt.1127 p.194
S.P.M. Ltd. v. Adetunji 2009 13 NWLR Pt. 1159 p. 647.)

For this and the much fuller reasoning in the leading judgment. I, too would dismiss the appeal with costs of N50,000.00 to the respondent.