

COURT OF APPEAL CALABAR DIVISION
18TH APRIL, 2011. CA/C/163/2009
CORAM:- K. B. AKAHS, J. MIKA'ILU, I. O. AKEJU, JJCA

PETER SAMUEL UDOAPPELLANT
AND
JACKSON DEVOS LTD RESPONDENT

EVIDENCE - Unchallenged evidence - Admissibility - Mere production of such evidence by party - Does not mean that judgment will be in his favour - As such evidence is not synonymous with proof by credible evidence (H1)

APPEALS - Unchallenged finding - Supreme Court does not disturb clear finding of trial court - That was not challenged in appeal (H2)

APPEALS - Issues - Basis - Issue not predicated on ground of appeal is incompetent - And court is bound to discountenance same (H3)

FACTS

Plaintiff's/appellant's case is that while in the employ of respondent, he sustained an eye injury which permanently impaired his sight. He alleged that he suffered severe burns in his eye as a result of dust that flew from a cigarette which Mr. Patrick (Belgian expatriate staff of the company) was smoking at the material time. Thereafter, appellant was taken to hospital, where he received treatment without recovery. Subsequently, his appointment was terminated without compensation. Consequently, appellant consulted lawyers who wrote series of letters to defendant/respondent demanding compensation on appellant's behalf.

Throughout their exchange of correspondence, respondent did not deny liability. However in a sudden twist, respondent wrote to appellant's lawyer contesting liability and feigning ignorance of the incident. It was the latest stand of respondent that made appellant to institute this suit at the High Court of Akwa Ibom State. At the end of hearing, the court dismissed his claims. Aggrieved, appellant appealed to the Court of Appeal, Calabar Division.

ISSUES FOR DETERMINATION

1. Whether from the totality of credible evidence adduced of (sic, at) the trial, the learned trial Judge was not right when he dismissed the plaintiff's/appellant's case as manifestly unreliable, unbelievable and complete fabrication.

2. Whether the issue of limitation of time was not raised by the Defendant/Respondent in their statement of Defence and which Defence the Plaintiff/Appellant conceded to by not filing a reply thereto.

HELD (Unanimously dismissing the appeal per MIKA'ILU JCA)

Unchallenged evidence - Admissibility

1. The main complain of the appellant in this appeal is to the effect that since evidence given by the appellant in the lower court was not controverted by the Respondent, the trial court ought to have given judgment in favour of this appellant. This argument cannot stand considering the position of the law as spelt out in many decided cases. Thus in MAIDARA V. HALILU (2000) FWLR (pt 19) 433; 436 - 437 this court held that the mere fact that a party produces unchallenged and uncontroverted evidence does not mean that judgment will be entered in his favour. This is because the unchallenged and uncontroverted evidence might be worthless or might fall for short of tilting the imaginary scale in favour of a party tendering the unchallenged and uncontroverted evidence. It is not synonymous with proof by credible evidence.

Thus the plaintiff's/Appellant's unchallenged evidence failed the test of credibility and reliability and the trial Judge was correct to have dismissed his case as unreliable and mere fabrication. Of greater importance is the finding of the trial court which reads as follows:-

"...the fundamental problem with the plaintiff's case is that it is manifestly unreliable, unbelievable and untrue. Indeed it appears to be completely fabricated and poorly so..."
(p. 2483 D)

APPEALS - Unchallenged finding

2. The Supreme Court has made it clear in the case of OSHODI V. EYIFUNMI (2000) FWLR (pt 8) 127: 1305 that if a finding or decision of a trial court on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision rightly or wrongly must not be disturbed for the Purposes of the appeal in question. This court will not disturb the clear findings of the trial court in this case. So this issue is decided in favour of the respondent. (p. 2484 E)

APPEALS - Issues - Basis

3. From the record, the issue of lack of jurisdiction was not raised by the trial court suo motu but by the defendant in their statement of defence to which plaintiff/appellant conceded. It is clear that appellant's issues two and three have not been distilled from any ground of appeal and therefore ought to be struck out. It is trite law that any issue for determination which is not predicated on any of the appellant's (or cross-appellant's) grounds of appeal is incompetent and the court is bound to discountenance it. Refer also to OGUNYADE v. OSHUNKERE (2007) 12 MJSC 157: 165 where the apex court held that on (sic, an) issue for determination in on (sic, an) appeal must not only be derived from a legitimate ground of appeal, but must also be related to the decision of the court below. It is not every observation and passing remark of the court below that is appealable. To be appealable, complain must be related to the decision appealed. Where an issue for determination does not relate to any ground of appeal, the appellate court has no option other than to discountenance it as it is incompetent. (p. 2484 G)

REPRESENTATION

NEJI T. OJONG ESQ. For the Appellant
E. E. ETUK ESQ. For the Respondent

CASES REFERRED TO

Oshodi v. Eyifunmi (2000) FWLR (Pt. 8) 127
Ogunyade v. Oshunkere (2007) 12 MJSC 157

LEAD JUDGMENT BY MIKA'ILU JCA

The appellant's case is that while in the employment of the Respondent, a limited liability company mainly in the business of manufacturing own (sic) Carpets, he sustained an eye injury which permanently impaired his sight. Employed as a fork lift operator, the appellant in the course of his employment in the company of a Belgian expatriate staff by name Mr. Patrick suffered severe burns in his eye from the dust that flew from a cigarette which Mr. Patrick was smoking. Thereafter the appellant was taken to Mercy Hospital Abak, Akwa Ibom State where he received treatment without recovery. This incidence is said to have occurred in 1986.

Soon after his appointment was terminated without compensation. The appellant consulted lawyers who wrote series of letters to the respondent demanding compensation on appellants' behalf. Throughout their exchange of correspondence, Respondent did not deny liability. For instance on 7th October, 2004, respondent wrote to the appellant's lawyer, then requesting for time to sort out appellant's case. Suddenly the respondent in 2006 (wrongly dated as 2007) wrote to the appellant's present counsel contesting liability and feigning ignorance and denying knowledge of everything. Thus the appellant instituted the suit that resulted in this appeal. There are four grounds of appeal which read as follows:-

1. The Judgment of the trial Judge is against the weight of evidence.
2. The learned trial Judge erred in law when he raised the issue of limitation of time under the limitation law, sustained and declared that the action was time barred without giving counsel opportunity to address it on the point raised suo motu.
3. The learned trial Judge erred in law when he held that the cause of action having arisen in 1986, the action which commenced in 2006 was time barred.

It is to be noted ground four in the notice of appeal filed 2nd January, 2008 had been abandoned. From the above the issues formulated for determination in the appellant's brief read as follows:-

1. Whether the totality of evidence adduced by the appellant

in the lower court did not meet the requisite standard of Proof in civil cases.

2. Whether the learned trial Judge was not wrong in law to have raised the issue of limitation of time under the limitation suo motu and held that the action was time barred, without giving counsel opportunity to address court. B

3. Whether suit No HC/223/06 commenced on 14th August, 2006 was time barred in view of respondent's letter of 3rd July, 2006 (erroneously dated 3rd July, 2007) exhibit 6.

On the other hand the issues formulated for determination of the appeal in the respondent's brief of argument read as follows:- C

1. Whether from the totality of credible evidence adduced of (sic, at) the trial, the learned trial Judge was not right when he dismissed the plaintiff's/appellant's case as manifestly unreliable, unbelievable and complete fabrication. D

2. Whether the issue of limitation of time was not raised by the Defendant/Respondent in their statement of Defence and which Defence the Plaintiff/Appellant conceded to by not filing a reply thereto.

The main complain of the appellant in this appeal is to the effect that since evidence given by the appellant in the lower court was not controverted by the Respondent, the trial court ought to have given judgment in favour of this appellant. This argument can not stand considering the position of the law as spelt out in many decided cases. Thus in MAIDARA V. HALILU (2000) FWLR (pt 19) 433; 436 - 437 this court held that the mere fact that a party produces unchallenged and uncontroverted evidence does not mean that judgment will be entered in his favour. This is because the unchallenged and uncontroverted evidence might be worthless or might fall for short of tilting the imaginary scale in favour of a party tendering the unchallenged and uncontroverted evidence. It is not synonymous with proof by credible evidence. E F G

It is to be noted that the trial Judge in this case carefully evaluated the plaintiff's unchallenged evidence and correctly ascribed probative value to the said evidence and held as follows:- H

"In the instant case, the fundamental problem with the plaintiff's case is that it is manifestly unreliable, unbelievable and untrue. Indeed it appears to be completely fabricated and poorly so. While he

stated on oath that the ash incident occurred in 1986 and he was taken to the Mercy Hospital Abak, the Hospital document exhibit 7 clearly shows the history of his eye problem he gave of the hospital was that it started in 1983 i.e. three years before 1986, and that the (sic, he) attended the hospital on 11/12/96 i.e. 10 years after the alleged ash incident in the defendant's service. I think the plaintiff clearly perjured himself and I find and hold that the plaintiff's claim (sic, is a) complete fabrication."

Thus the plaintiff/Appellant's unchallenged evidence foiled (sic, failed) the test of credibility and reliability and the trial Judge was correct to have dismissed his case as unreliable and mere fabrication. Of greater importance is the finding of the trial court which reads as follows:-

"...the fundamental problem with the plaintiff's case is that it is manifestly unreliable, unbelievable and untrue. Indeed it appears to be completely fabricated and poorly so..."

"I think the plaintiff clearly perjured himself and I find and hold that the plaintiff's case is complete fabrication" (sic) have not been appealed against. These clear findings of the trial court have not been challenged by the Appellant"

The Supreme Court has made it clear in the case of OSHODI V. EYIFUNMI (2000) FWLR (pt 8) 127: 1305 that if a finding or decision of a trial court on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision rightly or wrongly must not be disturbed for the Purposes of the appeal in question. This court will not disturb the clear findings of the trial court in this case. So this issue is decided in favour of the respondent.

From the record, the issue of lack of jurisdiction was not raised by the trial court suo motu but by the defendant in their statement of defence to which plaintiff/appellant conceded. It is clear that appellant's issues two and three have not been distilled from any ground of appeal and therefore ought to be struck out. It is trite law that any issue for determination which is not predicated on any of the appellant's (or cross-appellant's) grounds of appeal is incompetent and the court is bound to discountenance it. Refer also to OGUNYADE v. OSHUNKERE (2007) 12 MJSC 157: 165 where the apex

court held that on (sic, an) issue for determination in on (sic, an) appeal must not only be derived from a legitimate ground of appeal, but must also be related to the decision of the court below. It is not every observation and passing remark of the court below that is appealable. To be appealable, complain must be related to the decision appealed. Where an issue for determination does not relate to any ground of appeal, the appellate court has no option other than to discountenance it as it is incompetent. In the final conclusion, this appeal lacks merit and it is dismissed.

B

C

AKAAHS JCA

I had a preview of the judgment just delivered by my learned brother Mika'ilu, JCA. I agree with his reasoning and conclusion that the appeal lacks merit. The appellant failed to appeal against a crucial finding to the effect that the evidence he adduced in support of his claim was a fabrication. And if that was the case, how could a trial court be expected to enter judgment in favour of a party who did not adduce any credible evidence?

E

The appeal lacks merit and I too will dismiss it.

AKEJU JCA

I read before now the judgment delivered by my learned brother, Mika'ilu. I agree with him that the appeal lacks merit. I therefore dismiss the appeal with no order as to costs.

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