

**SUPREME COURT OF NIGERIA**  
FRIDAY 14<sup>TH</sup> DECEMBER, 2012. SC. 290/2005  
**CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI,**  
**O. ARIWOOLA, K. B. AKA'AH, S. S. ALAGOA, JJSC**

CHIEF (DR.) MICHAEL CLEMENT  
ATOWARI PETERSIDE ..... APPELLANT  
AND  
PROF. DAGOGO M. J. FUBARA ..... RESPONDENT

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APPEALS - Court - Issues - Formulation - When issues formulated by parties are not easily discernible - Appellate court may reformulate same - And such must be in conformity with grounds of appeal (H1)

TORTS - Defamation - A person may make defamatory statement about another - Where there exists a qualified privilege to make the statement - Provided the maker is not actuated by malice (H2)

APPEALS - Concurrent findings - Arowolo v. Ifabiyi - Supreme Court does not interfere - Except there is miscarriage of justice - Or violation of principles of law or procedure (H3)

**FACTS**

Plaintiff/appellant instituted this action at the High Court of Rivers State Port Harcourt, alleging that respondent/defendant printed and published letter that is defamatory of him (appellant). At the trial, respondent raised the defence of qualified privilege to the offending publication which was admitted in evidence as exhibit B. Although the court found the publication libelous of appellant, it nevertheless dismissed appellant's claim on the ground that the defence of qualified privilege availed respondent, because he (respondent) and the persons to whom it was made had interest, duty, legal, social or moral right to make and receive the publication.

Being dissatisfied, appellant filed appeal in the Court of Appeal Port Harcourt Division. The court reproduced the issues formulated by appellant. Eventually, the court dismissed the appeal and upheld the judgment of the trial court. Aggrieved, appellant appealed

to Supreme Court.

**ISSUES FOR DETERMINATION**

1. *Whether the Court below failed or omitted to hear the Appellant's appeal on the issues formulated and argued in his Brief and if so did such failure or omission not occasion a miscarriage of justice.*

2. *Whether the Court below was right in holding that there was no plea of express malice by the Appellant and did the need for such plea arise once the defence of qualified privilege was raised by the Respondent?*

3. *Whether the Court below is right in its decision that the defence of qualified privilege is available to the Respondent.*

**HELD** (Unanimously dismissing the appeal per

**ALAGOA JSC)**

*Court - Issues - Formulation*

**1. It is important that this statement of the law is properly read and understood in its proper context. It does not say that an appellate court cannot formulate issues of its own which meet the justice of the case.**

**Although this exercise of discretion should be sparingly exercised, it sometimes becomes necessary when the issues formulated by the parties are not easily discernible or do not portray the proper issues in controversy between the parties. Appellant's contention is that the lower court did not adopt the issues formulated by him (the Appellant) in his Brief and this amounted to a denial of fair hearing. Must it be the issues as formulated by the Appellant that the appellate court relies on for its consideration and determination of the appeal before it? The answer is in the negative for it is settled on the authorities that issues for determination may be as framed by the Appellant or Respondent or by the court itself which issues must be in conformity with the grounds of appeal.**

(p. )

*TORTS - Defamation*

**2. The law is clear that a person may make a defamatory statement about another under circumstances where there exists a qualified privilege to make the statement provided the maker is not actuated by malice. There is a plethora of judicial authorities on this subject matter.**

**The motives of him who makes a defamatory statement are prima facie innocent and it is open to the injured party to show by evidence that they were not so in reality. (p. )**

*APPEALS - Concurrent findings*

**3. In AROWOLO V. IFABIYI (2002) 4 NWLR (PART 757) 356, the Supreme Court per Iguh, JSC, stated the attitude of the Supreme Court to the concurrent findings of fact of the lower court thus:**

***“This Court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure.”***

**None of these special circumstances exists in this case. The Court of Appeal was therefore right in dismissing the Appellant’s appeal in the sense that malice had not been established by the Appellant and the defence of qualified privilege availed the Respondent. This issue is therefore resolved in favour of the Respondent. (p. )**

**REPRESENTATION**

Aham Eke Ejelam Esq., with F. O. Otiotio for the Appellant  
Ledun Mitee Esq., for the Respondent

**CASES REFERRED TO**

Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373

Momodu v. Momoh (1991) 1 NWLR (Pt. 169) 608

Unity Bank of Nig v. Edward Bonari (2008) 2 SCM 193

Awojugbagbe Light Industries Ltd v. Chinukwe (1995) 4 NWLR (Pt. 390) 379

Latinde v. Lajunfin (1989) 5 SC

- African Newspaper of Nig. Ltd v. Coker (1973) ANLR 479  
 Mamman v. Salaudeen (2005) 18 NWLR (Pt. 958) 478  
 Toogood v. Spyryng (1834) 1 CM  
 James v. Baird (1916) SC (H.L) 158  
 Hunt v. Great North Railway (1891) 2 Q.B 189  
 B Ologe v. Ukaeje (1998) 12 NWLR (Pt. 576) 23  
 Onyejike v. Anyasor (1992) 1 NWLR (Pt. 218) 456  
 Arowolo v. Ifabiyi (2002) 4 NWLR (Pt. 757) 356  
 Kunbi v. Opawoye (2000) 1 SCNJ 1  
 C Olapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587

### **LEAD JUDGMENT BY ALAGOA JSC**

This is an appeal against the judgment of Court of Appeal Port Harcourt Division delivered on the 31<sup>st</sup> January, 2005 which D affirmed the judgment of the High Court Port Harcourt, Rivers State delivered on the 23<sup>rd</sup> May, 2001. In the said High Court, the present Appellant as Plaintiff *had as per* paragraph 15 of his statement of claim dated 7<sup>th</sup> September, 1998 claimed against the present Respondent as Defendant as follows:-

- E i. N10,000,000.00 (Ten Million Naira) being general damages for libel.  
 ii. An injunction to restrain the Defendant from further publication of the said words or any of them or of any words to the like effect.  
 F

The facts of this case as can be gathered from the entirety of the records, placed before this court are as follows:-

The Appellant, a Consultant Ophthalmologist and Traditional Chief in Opobo Town, Rivers State of Nigeria had complained that G on or about the 27<sup>th</sup> November, 1995, the Respondent, a University lecturer resident in Port Harcourt who hails from the same Opobo town with the Appellant falsely and maliciously wrote, printed and published or caused to be written and published a letter to the Commissioner of Police Rivers State Command Port Harcourt, defamatory words concerning the Appellant. This letter, tendered in evidence H as “exhibit B” in the course of the trial in the High Court had earlier been forwarded to several public officers in Nigeria and was itself an offshoot of a letter written to the Chief Justice of Nigeria captioned ‘Corrupt Judges in Nigeria’ which castigated, maligned and black-

mailed the Rivers State Police Command, the Rivers State Judiciary, Court of Appeal Justices, the Army, the Air force and the Respondent Chief Professor D. M. J. Fubara and had been tendered in the course of proceedings at the High Court as “exhibit B<sup>1</sup>”. “Exhibit B<sup>1</sup>” had been forwarded to about the same institutions of government in Nigeria as “exhibit B” after it. The Respondent’s Vice Chancellor at the Rivers State University of Science and Technology Port Harcourt had requested the Respondent to take steps to clear his name from the lurid contents of “exhibit B<sup>1</sup>” in order to save the University from embarrassment. It was in doing so that the Respondent wrote “exhibit B” stating that the purported writer of “exhibit B<sup>1</sup>” was not John Giadom whose name appeared in “exhibit B<sup>1</sup>” as its writer but some persons who were responsible for the planting of witchcraft material at the entrance of the palace of Chief Fubara in Opobo town. “Exhibit B” had a list of fifteen names inclusive of that of the Appellant. The Appellant had stated in evidence that he neither wrote “exhibit B<sup>1</sup>” nor procured other person or persons to write same. He said he never engaged in witchcraft and that the contents of “exhibit B” were most certainly defamatory of him, for which he took out this action at the High Court. The Respondent while not denying that he wrote “exhibit B” said its writing was based on information he received which would aid the police in their investigations on the authorship of “exhibit B<sup>1</sup>” which he was emphatic was not written by John Giadom whose name appeared on “exhibit B<sup>1</sup>”. Respondent said his actions were without malice and went on to plead qualified privilege as a defence. The learned trial Judge Acho Ogbonna, J. in his judgment said “exhibit B” was defamatory but that the plea of qualified privilege availed the Respondent. Aggrieved, the Appellant proceeded to the Court of Appeal which dismissed the appeal and upheld the judgment of the trial High Court. The Appellant has lodged a further appeal to this Court. I have taken pains to explain in some detail relevant facts in the pleadings and in the evidence of the parties that have given rise to the appeal to the Court of Appeal and further appeal to the Supreme Court.

The Appellant formulated the following three issues:-

1. *Whether the Court below failed or omitted to hear the Appellant’s appeal on the issues formulated and argued in his Brief and if so did such failure or omission not occasion a miscarriage of*

justice. (Grounds 1, 2 and 3).

2. *Whether the Court below was right in holding that there was no plea of express malice by the Appellant and did the need for such plea arise once the defence of qualified privilege was raised by the Respondent?* (Grounds 4, 5 and 6).

B 3. *Whether the Court below is right in its decision that the defence of qualified privilege is available to the Respondent.* (Ground 7).

C The Respondent for his part distilled the following three issues for determination by this court:-

1. *Whether the Court below failed to hear or fairly heard the Appellant's appeal on the issues raised thereby occasioning a miscarriage of justice.*

D 2. *Whether the Court below was right in holding that malice was not established against the Respondent to defeat the defence of qualified privilege.*

3. *Whether the Court below was right in dismissing the Appellant's appeal in the face of the evidence in this case.*

E This appeal came up to be heard on the 2<sup>nd</sup> October, 2012. Appearing as Counsel for the Appellant was Mr. Aham Eke-Ejelam, with him F. O. Otioio. Mr. Eke-Ejelam adopted and relied on the Appellant's Brief of Argument earlier referred to as well as the Appellant's Reply Brief of Argument dated the 14<sup>th</sup> February, 2011, filed same day, but deemed properly filed on the 15<sup>th</sup> March, 2011 and urged us to allow the appeal and set aside the judgment of the Court below.

G Ledum Mitee, Counsel for the Respondent also adopted and relied on the Respondent's Brief of Argument earlier referred to and urged us to dismiss the appeal and affirm the judgment of the Court below.

H From a cursory examination of the issues, it will be seen that issue 1 in the Appellant's Brief of Argument is the same with issue 1 in the Respondent's Brief of Argument and both can conveniently be dealt with together. Issues 2 and 3 in the Appellant's Brief of Argument can be merged and dealt together with issues 2 and 3 in the Respondent's Brief of Argument.

Did the court below fail or omit to hear the Appellant's appeal on the issues formulated by the Appellant and if so, did such failure

or omission occasion a miscarriage of justice? This is the question issues 1 seeks to address. Appellant's contentions is that the Court of Appeal adopted the issues that had been adopted by the trial Court which issues were -

- i. *Who wrote Exhibit 'B'?*
- ii. *Are the words in exhibit 'B' defamatory?*
- iii. *Does the defence of qualified privilege avail the Defendant?*

The court below (i.e. the Court of Appeal) could have instead adopted the issues as formulated by the Appellant in his Brief of Argument and placed before the Court below for its consideration and determination which issues were -

- i. *Whether the defence of qualified privilege is available to the Respondent.*
- ii. *Whether the need to deliver a reply arises once a Defendant files a defence of qualified privilege.*
- iii. *Whether from the pleadings and the totality of the evidence led at the trial, the Appellant was not entitled to judgment in his favour.*

This failure by the Court below to adopt the issues formulated by the Appellant in his Brief of Argument and use same in the determination of the appeal placed before the Court below, according to Counsel, occasioned a miscarriage of justice worthy of that appellate court's judgment being set aside or the appeal remitted back to the Court below to reconsider the appeal based on the issues as formulated by the Appellant in the Court below. In COMMISSIONER OF WORKS BENUE STATE V. DEVCON LTD (1988) NWLR (PART 83) 407 at 420, the Supreme Court per Karibi Whyte, JSC said as follows -

*"It is an elementary and fundamental principle for the determination of disputes between parties that judgment must lie confined to the issues raised by the parties. It is clearly not competent for the judge suo motu to make a case for either or both parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him."*

***It is important that this statement of the law is properly read and understood in its proper context. It does not say that an appellate court cannot formulate issues of its own***

**which meet the justice of the case.** Indeed in the very recent case of AFRICAN INTERNATIONAL BANK LTD V/INTEGRATED DIMENSIONAL SYSTEM LTD & ORS (2012) 17 NWLR (PART 1328)1 decided on the 11<sup>th</sup> May 2012 this Court per Ariwoola JSC, said as follows -

B *“so long as it will not lead to injustice to the opposite side, appellate courts possess the power and in the interest of justice to reject, modify or re-frame any or all issues formulated by the parties”*

C **Although this exercise of discretion should be sparingly exercised, it sometimes becomes necessary when the issues formulated by the parties are not easily discernible or do not portray the proper issues in controversy between the parties.** See also YADIS NIGERIA LTD V/GREAT NIGERIA INSURANCE COMPANY LTD (2007) 14 NWLR (PART 1055) 584; (2007) D 4-5 SC 236, where the Supreme Court per Onnoghen JSC said as follows -

E *“There is no disputing the fact that an appellate court has the right, indeed duty, where appropriate to formulate issue(s) for the determination of an appeal particularly where it is of the opinion that the issue(s) as formulated by learned counsel does/do not deal with the substantive issue in controversy in the appeal provided the issue(s) is/are consistent with the ground(s) of appeal filed in the appeal....”*

F **Appellant’s contention is that the lower court did not adopt the issues formulated by him (the Appellant) in his Brief and this amounted to a denial of fair hearing. Must it be the issues as formulated by the Appellant that the appellate court**  
 G **relies on for its consideration and determination of the appeal before it? The answer is in the negative for it is settled on the authorities that issues for determination may be as framed by the Appellant or Respondent or by the court itself which issues must be in conformity with the grounds of appeal.** See

H NZEKWU V. NZEKWU (1989) 2 NWLR (PART 104) 373, 422; MOMODU V. MOMOH (1991) 1 NWLR (PART 169) 608, 621. See generally on issue formulation the following cases - UNITY BANK OF NIGERIA & ANOR V. EDWARD BONARI (2008) 2 SCM 193 at 240; AWOJUGBAEGBE LIGHT INDUSTRIES LTD V. P. N. CHINUKWE



& ANOR (1995) 4 NWLR (PART 390) 379; (1995) 4 SCNJ 1; LATINDE & ANOR V. BELLA LAJUNFIN (1989) 5 SC.

In the present appeal now before us Aderemi JCA, (as he then was) in the court below did not in his lead judgment formulate issues suo motu in stricto sensu but took into consideration the issues formulated by the parties when at page 102 of the Records he said as follows...

*"I have carefully examined the issues raised by the two sides and it is my humble view that issues Nos. 1, 2 and 3 on the Appellant's brief can be conveniently taken together with issues No. 1 and 2 on the Respondent's (brief). The third issue on the Respondent's brief shall be addressed alone."*

Let us take a critical look at the issues the learned trial Court Judge had to consider in the determination of the case before him vis a vis the issues which the Appellant formulated on appeal in the court below and it will be seen that the main question that fell for determination in the court below was whether the defence of qualified privilege availed the Appellant. This may need further explanation.

Issue (i) which the learned trial Judge considered was "who wrote "exhibit B<sup>1</sup>?" The authorship of "exhibit B<sup>1</sup>" was never in contention by the parties and never arose on appeal. Issue (ii) was "Are the words in "Exhibit B" defamatory?" Here again the trial High Court had reasoned that "Exhibit B" was defamatory and this was never made the subject matter of an appeal having gone in favour of the Appellant. Issue (iii) was "Does the defence of qualified privilege avail the defendant?" This issue is similar to issue (i) in the Appellants Brief on appeal which is "Whether the defence of qualified privilege is available to the Respondent?" That Aderemi, JCA, (as he then was) treated this issue can be seen from page 102 of the Records where he stated in his judgment in clear treatment of that issue as follows;

*"On issue No. 1 contain in the Appellant brief, after reviewing the evidence relied upon in support of his contention that the (sic) of the qualified privilege as availing him (the Respondent) the Appellant submitted that the defence of qualified privilege did not avail the Defendant/Respondent because according to him (Appellant) there is no common interest between him and the Commissioner of Police indeed, no reciprocity of interest. The defence is even*

*fair (sic) away from the reach of the Respondent in that the facts relied upon are admitted not true and correct to the knowledge of the Respondent”, he urged that this issue be resolved in favour of the Appellant”*

Aderemi JCA, (as he then was) then went on to make references to issues 2 and 3 in the Appellant’s Brief of Argument and to treat them. Will the Appellant then be right to say that issues formulated by him in his brief were not addressed by the learned Justices of the Court below? I think not. This issue is therefore resolved in favour of the Respondent.

The next proposition is to merge issues 2 and 3 in the Appellant’s Brief of Argument and have same dealt with issue 2 in the Respondent’s Brief of Argument.

Issues 2 and 3 in the Appellant’s Brief of Argument read as follows:

Issue 2 - Whether the Court below was right in holding that there was no plea of express malice by the Appellant and did the need for such plea arise once the defence of qualified privilege was raised by the Respondent? (Grounds 4, 5 & 6).

Issue 3 - Whether the Court below is right in its decision that the defence of qualified privilege is available to the Respondent? (Ground 7)

Issue 2 in the Respondent’s Brief of Argument reads as follows:-

*Whether the Court below was right in holding that malice was not established against the Respondent to defeat the defence of qualified privilege”*

What can be couched from this arrangement is a new issue 2 which to my mind should read as follows:

*“Whether the Court below was right in holding that malice was not established against the Respondent and did the defence of qualified privilege avail the Respondent?”*

***The law is clear that a person may make a defamatory statement about another under circumstances where there exists a qualified privilege to make the statement provided the maker is not actuated by malice. There is a plethora of judicial authorities on this subject matter.*** See PROPHET IFEANYI EMEAGWARA V. STAR PRINTINGS PUBLISHING CO. LTD (2000) 10 NWLR (PART 676) 489; MITCHELL RICHARDS V. HIRST, KIDD

& RENNIE (1936) 3 ALL ER 872. ***The motives of him who makes a defamatory statement are prima facie innocent and it is open to the injured party to show by evidence that they were not so in reality.*** See AFRICAN NEWSPAPERS OF NIGERIA LTD V. F. C. O. COKER (1973) ANLR 479; (1973) 5 S.C. 180.

Let us at this stage revisit so much of the facts and evidence adduced that is of assistance in this discourse. The Respondent had been maligned in “exhibit B<sup>1</sup>” along with certain key organs of government such as the judiciary, the police, army etc with corruption. The fact that John Giadom who purportedly authored that document was in fact not the maker was never denied and was never at any time in contention. DW2, Professor Augustine Ahiazu, the Respondent’s Vice Chancellor at the Rivers State University of Science and Technology had drawn the Respondent’s attention to that document and its implications for the good name of the University and danger to the Respondent’s self esteem and retention of his job as Professor in that University. This prompted the Respondent to write “exhibit B” which he said was based on information he received that the Appellant and fourteen others may well be the brains behind the authorship of “Exhibit B<sup>1</sup>” and that the police may well extend their investigation on the authorship of “exhibit B<sup>1</sup>” to these persons. The Respondent said in so doing he was not actuated by malice and did not believe that the Appellant could engage himself in witchcraft practices. Even if not in a biological sense the Appellant was his father in law which itself showed some close affinity between the Respondent’s wife and the Appellant. He regarded the Appellant as his mentor in whose honour and for whose sake he had caused a monument to be erected in their hometown at Bonny in Rivers State. Could anyone with a malicious intent have gone so far? Respondent however raised the defence of qualified privilege. In MAMMAN V. SALAUDEEN (2005) 18 NWLR (PART 958) 478; (2005) 12 S.C. (PT. 11) 46 while enunciating the principles of law on the defence of qualified privilege reliance was placed on the English case of TOOGOOD V. SPYRING (1834) 1 CM and R 181 at 193 which stated the law on qualified privilege as follows:

*“In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another and the law considers such publication as malicious, unless it is fairly*

*made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters where his interest is concerned. In such a case the occasion prevents the inference of malice which the law draws from unauthorized communications and affords qualified defence depending on the*  
 B *absence of actual malice.”*

Further light was thrown on this principle in this case thus,  
*“From the principle of law involved in the defence of qualified privilege as reproduced, the privileged occasion recognized by*  
 C *the common law can be classified into one of two classes viz:*

*a) Where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding duty to receive it or;*

*b) Where the maker of the statement is acting in a matter in*  
 D *which he has a common interest with the recipient.”* See JAMES V. BAIRD (1916) SC (H.L.) 158 at 163 - 164; HUNT V. GREAT NORTH-ERN RAILWAY (1891) 2 QB 189 AT 191; OLOGE V. UKAEJE (1998) 12 NWLR (PART 576) 23; ONYEJIKE V. ANYASOR (1992) 1 NWLR (PART 218) 456.

E It is worthy of note that “exhibit B<sup>1</sup>” captioned “Corrupt Judges in Nigeria” and which gave rise to “exhibit B” was directed to the Chief Justice of Nigeria and copies sent to various public functionaries such as the Military Administrator of Rivers State, the Commissioner of Police Rivers State, the Chief Judge of Rivers State, the  
 F Chairman of Federal Appeal Court (sic) Port Harcourt, and the Vice Chancellor of the University of Science and Technology, Port Harcourt. The Respondent having written “exhibit B” sent copies of the said  
 G “exhibit B” to virtually the same public functionaries to whom “exhibit B<sup>1</sup>” had earlier been sent. The paramount question being asked is whether these public functionaries had a corresponding duty to receive “exhibit B”. To answer this question it is necessary to examine  
 H “exhibit B<sup>1</sup>” contextually. “Exhibit B<sup>1</sup>” is a damning indictment that touches on the vexed issue of corruption in Nigeria and is undoubtedly of public interest. It is also undoubtedly a document which the various public functionaries to whom it was written and copied have a duty to act on if public confidence in these organs of the public service is to be restored. The Commissioner of Police most certainly has a duty to investigate cases of corruption in the judiciary and else-

where. The other public functionaries who received “exhibit B<sup>1</sup>” have a duty also as appointing authorities to ensure that only men and women of probity who are corrupt free are appointed to the bench in this country. Any information given on this matter of public interest by any member of society which is of assistance in stamping out this vice of corruption in Nigeria in so far as it is not malice motivated must in the light of the cases earlier cited be privileged communication. The Respondent had denied in his statement of defence and in his evidence that the Appellant is a blackmailer and practices witchcraft. Respondent said he only had information which would help the police in their investigation of the authorship of “exhibit B<sup>1</sup>”. Appellant could not adduce evidence to show that the Respondent acted out of malice to him. Respondent’s evidence was to the effect that few members of the Opofo Council of Chiefs to which he and Appellant belong knew about the existence of “exhibit B”. I think that the Court of Appeal was absolutely right in upholding the finding of the Rivers State High Court that the defence of qualified privilege availed the Respondent.

***In AROWOLO V. IFABIYI (2002) 4 NWLR (PART 757) 356, the Supreme Court per Iguh, JSC, stated the attitude of the Supreme Court to the concurrent findings of fact of the lower court thus:***

***“This Court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure.”***

See also OSHOBOJA V. AMIDA (2009) 18 NWLR (PART 1172) 188 SC; CHIKWENDU V. MBAMALI & ANOR. (1980) 3&4 SC 11; ENANG V. ADU (1981) 11/12 SC 25 AT 42; OGBU V. WOKOMA (2005) 14 NWLR (PART 944) 118; (2005) 7 SC (PART 11) 123 & 136; LAYINKA & ANOR. V. MAKINDE & 5 ORS (2002) 5 S.C. (PART 1) 109 AT 113. NWANGWU V. OKONKWO (1987) 3 NWLR (PART 60) 314 AT 321; IGWEGO V. EZEUGO H (1992) 6 NWLR (PART 249) 561 AT 574.

***None of these special circumstances exists in this case. The Court of Appeal was therefore right in dismissing the Appellant’s appeal in the sense that malice had not been es-***

***tablished by the Appellant and the defence of qualified privilege availed the Respondent. This issue is therefore resolved in favour of the Respondent.***

The Appeal has no merit and is dismissed and the delivered on the 31<sup>st</sup> January, 2005 dismissing the Appeal against the judgment of the Port Harcourt High Court Rivers

B State delivered by Acho Ogbonna, J. is hereby affirmed by me.

Parties are however to bear their own costs.

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### **MUHAMMAD JSC**

C

I was privileged by my learned brother, Alagoa, JSC, to have read before now the judgment just delivered. I am in agreement with his reasoning and conclusion. I dismiss the appeal and make no order as to costs.

D

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### **PETER-ODILI JSC**

This is an appeal from the judgment of the Court of Appeal, Port Harcourt Division, delivered on the 31<sup>st</sup> day of January, 2005  
E dismissing the appeal filed by the Plaintiff/Appellant against the judgment of the High Court of Rivers State sitting in Port Harcourt Per Hon. Justice Acho Ogbonna given on the 9<sup>th</sup> of November 2001.

The said High Court had dismissed the Appellant's libel suit  
F against the Respondent with N4,000.00 costs on the ground that the defence of qualified privilege was available to the Respondent.

The facts capturing the background of this appeal from inception at the trial Court may best be derived by quoting the Statement of Claim and Statement of Defence respectively, and these are  
G well covered in the lead judgment and need not be repeated.

On the 2<sup>nd</sup> October, 2012 date of hearing, learned counsel for the Appellant adopted their Brief filed on 25/4/06 and deemed filed on 7/2/07. Also adopted by learned counsel for the Appellant, Aham EKe-Ejelam Esq. is a Reply Brief filed on 4/2/2011 and deemed  
H filed on 15/3/12. In the Appellant's Brief were crafted three issues for determination which are as follows:-

1. Whether the court below failed or omitted to hear the Appellant's appeal on the issues formulated and argued in his brief and if so did such failure or omission not occasion a miscarriage of

justice.

2. Whether the Court below was right in holding that there was no plea of express malice by the Appellant and did the need for such plea arise once the defence of qualified privilege was raised by the Respondent.

3. Whether the Court below is right in its decision that the defence of qualified privilege is available to the Respondent. B

Mr. Ledum Mitee, learned counsel for the Respondent adopted their Brief filed on 19/3/2010 in which they formulated the following three issues for determination:-

1. Whether the court below failed to hear or fairly hear the Appellant's appeal on the issues raised thereby occasioning a miscarriage of justice. C

2. Whether the Court below was right in holding that malice was not established against the respondent to defeat the defence of qualified privilege. D

3. Whether the Court below was right in dismissing the Appellant's appeal in the face of the evidence in this case.

In a way the issues as couched by the Appellant are similar to those of the Respondent even though differently framed. I shall utilize those of the Respondent as issue one on its own and issue two and three together for there is a synergy in the two later issues E

#### ISSUE NO. 1

Whether the Court below failed to hear or fairly hear the Appellant's appeal on the issues raised thereby occasioning a miscarriage of justice. F

In arguing this issue learned counsel for the Appellant, Mr. Eke-Ejelam contended that in determining Appellant's appeal before it the Court of Appeal was in serious error to have attributed the issue already formulated and determined by the High court to the appellant as arising for determination in the court of Appeal. That the said issues formulated and determine by the high court are as follows:- G

- (i) Who wrote Exhibit "B1". H
- (ii) Are the words in Exhibit "B" defamatory?
- (iii) Does the defence of qualified privilege avail the defendant?

He stated that the lower court did in wrongly attributing to

the appellant issues not formulated by them and that the Court going ahead to utilize those issues and reached a decision was a violation of the rule of natural justice as well as appellant's right embodied in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria. He cited *Kunbi v Opawoye* (2000) 1 SCNJ 1; *Olapo v sunmonu* (1987) 2 NWLR (Pt.58) 587 at 605.

Learned counsel for the Appellant went on to submit that the fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it as happened in this case will have the effect of vitiating or nullifying the entire proceedings and a party cannot be heard to contend that the proceedings were properly conducted. That if this court comes to the conclusion that there has been a breach of fair hearing then the proceedings cannot be salvaged, the same being null and void ab initio. He referred to *Orugbo v Una* (2002) 9 SCNJ 12 at 22. He stated on, that obviously the Court of Appeal failed or neglected to consider the case set out for the Appellant in his brief of argument. That the Court of Appeal committed an error which transcended or went beyond accidental ship. He cited *Ogunsola v NICON* (1996) 1 SCNJ 67 at 76.

That justice was not done to the appellant before the Court of Appeal since the issues he raised in his brief were not considered dismissal of his appeal. He cited the case of *Onifade v Olayiwola* (1990) 7 NWLR (Pt. 161) 130 at 165.

For the Appellant was further submitted that as opposed to the obviously wrong issues ascribed to the appellant by the Court below, the issues submitted on behalf of the appellant in the said court are as follows:-

1ISSUE NO.1:

Whether the defence of qualified privilege is available to the Respondent.

ISSUE NO.2:

Whether the need to deliver a reply arises once a defendant files a defence of qualified privilege.

ISSUE NO.3:

Whether from the pleadings and the totality of the evidence led at the trial, the appellant was not entitled to judgment in his favour.

Mr. Eke-Ejem said it was implicit that an appellate court as



the court below would here and consider the arguments on all issues before it. He cited *Oke v. Nwagbuinya* (2001) 1 SCNJ 157 at 173-174.

That the court of appeal having failed to consider the appeal before it on the issue formulated on behalf of the appellant, this court has a duty to either send the case back to the same panel of court of appeal or consider the issues itself as the issues touch on the defence of qualified privilege and the plea of express malice which are clear and patent issue of law. He referred to the case of *Global Transport Oceanico S. A. v Free Enterprises Nig. Ltd* (2001) 2 SCNJ 224 AT 244. B  
C

Mr. Mitee, learned counsel for the respondent in his response said the complaint of a lack clearing on the issues raised by the Appellant in the Court below is grossly misconceived. That fair hearing is not a technical term nor is it a magic wand that once waved would automatically vitiate a process against which it is waved. That the Court to which the allegation is made must examine the complaint against the hearing complained against and see whether its main attributes are present. Mr. Mitee said the main attribute of fair hearing especially as they relate to the current appeal is whether the Court below heard both sides on all material issues in the case before reaching a decision. He referred to *Usani v Duke* (2004) 7 NWLR (Pt. 871) 116. D  
E

Learned counsel for the Respondent said even though the opening statement by the Court below in its judgment would appear to show that court below misstated the issues raised by Appellant in his Brief before the Court. He said what the Court of Appeal did was in order as it settled that issues for determination may be those framed by either one or both of the parties or even those reframed by the Court after a consideration of those set out by the parties along side the grounds of appeal filed. He said from the records it is clear that the issues considered by the Court below were substantially the issues raised by the Appellant. He cited *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt.104) 373, 422; *Momodu v Momoh* (1991) 1 NWLR H (Pt.169) 608 at 621. F  
G

Mr. Mitee said it is trite that it is not every accidental slip that will result in a reversal of the judgment on appeal. That it is only when the error is substantial in that it has occasioned a miscarriage of

justice that an appellate court is bound to interfere. He cited *Nwaeze v State* (1996) 2 NWLR (Pt. 428) 1.

The grouse of the Appellant in this issue one is that in the opening statement of the lead majority judgment in the Court below, per Aderemi JCA (as he then was) had after setting out the relevant facts of the case stated as follows as the Appellants distilled issues:-

“(1) Who wrote Exhibit B1?

(2) Are the words in Exhibit ‘B’ defamatory?

(3) Does the defence of Qualified Privilege avail the Defendant?”

Going on, Aderemi JCA (as he then was)

*“For his point, the Respondent also raised three issues for determination and as contained in his brief of argument they are as follows:-*

(1) *Whether the learned trial judge was right in holding that, the defence of Qualified Privilege avails the Defendant/Respondent.*

(2) *Whether the learned trial judge was correct in holding that malice was not established against the Defendant/Respondent by the Plaintiff/Appellant.*

(3) *Whether the learned trial judge was right in dismissing the Plaintiff/Appellant’s case in view of the evidence led in the case.”*

Learned counsel for the Appellant said the erroneous placing of those issues purportedly attributed to the Appellant was evidence of their being denied fair hearing since the proper issues formulated by them were not duly stated as the issues attributed to the Appellants therein. The implication being a nullification of the proceedings and judgment of the Court of Appeal.

Mr. Eke-Ejelam had pointed out the proper issues distilled by them at the Court of Appeal being as follows:-

1. Whether the defence of qualified privilege. Is available to the respondent?

2. Whether the need to deliver a reply arises once a defendant files a defence of qualified privilege?

3. Whether from the pleadings and the totality of the evidence led at the trial, the appellant was not entitled to judgment in his favour.

As learned counsel for the Respondent said and I go along with it, fair hearing is not a technical term nor a magic wand which

once waved automatically vitiates a trial against which it is waved. This is so since the grouse has to be inquired into in context and not in ‘vacuo. The glaring feature of fair hearing is whether the Court of Appeal heard both parties or sides on the material issues in the matter before reaching a decision. Also if there had been an error in the course of the judgment writing, how substantial is that mistake and the effect it would have. This is so because errors are mistakes B That occur because the personnel of court are human and perfection resides only with God. The important thing is whether the error is such as has effected a miscarriage of justice or that the substantiality C of the error had taken away the fairness that is a necessity in adjudication. Once that question is not positively answered, then it would be seen for what it really is, a human error that has not taken away the justice of the matter and the necessary balance between the parties not impacted. The point has to be made at the risk of repetition D that it is not every error in a judgment that would vitiate the proceeding. See; the cases of Usani v Duke (2004) 7 NWLR (Pt.871) 116; Nzekwu v Nzekwu (1989) 2 NWLR (Pt. 104) 373 at 422; Momodu v Momoh (1991) 1 NWLR (Pt. 169) 608 at 621; Nwaeze v State (1996) 1 NWLR (Pt. 428) 1. E

It is clear that the misstatement of the issues for determination credited to the Appellant’s Brief by the Court below did not detract from that Court’s full consideration of the materials before it. The error is not substantial and did not stop the court from tackling F the questions that cropped up before it on appeal from the High Court. It was an accidental slip which was nowhere near occasioning a miscarriage of justice and so cannot be taken as so serious as to vitiate the judgment of the Court of Appeal.

The answer to the issue raised here is a NO and the judgment G of the Court of Appeal valid. The issue is resolved against the Appellant.

#### ISSUES 2 &3:

2. ‘Whether Court below was right in holding’ that malice H was not established against the Respondent to defeat the defence of qualified privilege.

3. Whether the Court below was right in dismissing the Appellant’s appeal in the face of evidence in this case.

Learned counsel for the Appellant stated that the erroneous

stand of the Court of Appeal in its view that the Plaintiff/Appellant never pleaded and proved express malice by filing a reply in the trial Court can be seen in excerpts of the Lower Court's judgment. He referred to the Reply of the Plaintiff dated 24<sup>th</sup> February, 1999 and filed on the 3<sup>rd</sup> March, 1999 wherein the reaction to the plea of qualified privilege is adequately pleaded. That the contents of the Reply were supported in evidence and so the two Courts below went through wrong premises to arrive at the conclusions they made.

Mr. Eke-Ejelam stated further that notwithstanding the fact that the Appellant out of the abundance of caution filed a Reply on 3/3/99, the law is that the need to deliver a reply to plead express malice does not arise merely because the defence of qualified privilege has been raised by the defence. That the necessity to deliver a reply pleading malice or express malice arises only if the defendant had made out the defence of qualified privilege. He referred to the case of *Atoyebi v Odudu* (1990) 6 NWLR (pt.157) 384 at 405; *Bakana v Ibrahim* (1973) 6 SC 205.

He went on to contend that where as in the instant case the defamatory words were published without lawful excuse the law presumes that the respondent was motivated by malice. Then the appellant would not be required to provide particulars of the facts words complained of in Exhibit 'B' were published maliciously. He cited *Atoyebi v Odudu* (1990) 10 SCNJ 52 at 63; *Royal Acquaruum and summer and Winter Garden Society v Parkinson* (1892) 1 QBD 431 at 454; *Enahoro v Associated Newspapers of Nigeria Limited* (1960) 1 WNLR 219; *Offoboche v Ogoja L.G.* (2001) 16 NWLR (Pt.739) 458 at 485.

For the Appellant was submitted that notwithstanding the ascription or attribution of the wrong issues by the Court below to the appellant, the Court reached a decision without resolving the argument on behalf of the appellant. That for the plea of qualified privilege to be successfully raised, the facts relied upon by the maker must be true and correct. That in this instance the respondent stated in his examination in chief that he did not write the letter complained of i.e Exhibit 'B' maliciously but believing the information his informant gave him to be correct which mere belief cannot sustain the defence. He cited *Atoyebi v Odudu* (1990) 6 NWLR (Pt.157) 384 at 399; *Emeagwara v Star Printing and Publishing Co Ltd* (2000) 5

SCNJ 175 at 185.

That for the defence of qualified privilege to avail the respondent, there must be a common interest between him and the persons to whom Exhibit 'B' was addressed and copies which commonality of interest is absent in this instance.

Mr. Mitee in response contended that the only issue stemming from the grounds of appeal (4, 5, 6) is whether the Appellant was able to make out a case of actual or express malice to defeat the case of qualified privilege made out by the Respondent and against which there is no ground of appeal. That none of the seven grounds of appeal filed against the judgment of the Court below attacked the specific concurrent finding by the Courts below that the defence of qualified privilege had been made out. He said that being the case that it is wrong of the Appellant to submit in his brief that the defence of qualified privilege had not been made out. That really, there being no appeal on the point, all arguments by the Appellant against the availability of the defence of qualified privilege to the Respondent should be discountenanced.

Mr. Mitee of counsel for the Respondent went on to say that the evidence put up by the Respondent at the Court of trial showed that the motive for writing Exhibit 'B', was to enable the relevant authorities to investigate and use the legal machinery to obtain redress. That is why the finding by the Courts below of the defence of qualified privilege remained unassailable particularly in the light of the evidence tendered by the Appellant where said he did not know why the Respondent wrote about him in that manner and did not know what was worrying the defendant that he would be libeling him every time. That there is no credible evidence sufficient to displace the defence of qualified privilege found to be available to the Respondent. He referred to *Newbreed Organization Ltd v Eromosele* (2006) 5, NWLR (pt. 974) 499 at 540-541 which adopted the dictum of Diplock L. J. in *Horrocks v Lowe* (1974) 1 All ER 662 at 669 - 670; *F. B. N. Plc v Aboko* (2007) 1 NWLR (Pt.1014) 129 at 146.

Mr. Mitee said the law is settled that this Court will not interfere with the concurrent findings made by the two Courts below unless there is an error on the face of the record occasioning a miscarriage of justice. He cited *Chukwuogor v Obiora* (1987) 3 NWLR (Pt.61) 454.

On whether or not the Court below was right in dismissing the Appellant's appeal in the face of the evidence in this case. Mr. Mitee said that issue is anchored on Ground 7 of the Appellant's Grounds of Appeal being the omnibus ground. Mr. Mitee said an omnibus ground cannot be used to attack specific issues like the question  
 B whether the defence of qualified privilege availed the Respondent or not. That the Appellant filed no appeal against this most important specific finding and cannot take shelter under the omnibus ground of Ground 7 and the arguments go to no issue. He cited *Bello v Ringim* (1991) 7 NWLR (Pt.206) 668 at 678 – 679 (CA); *Bhojsons Plc v Daniel Kalio* (2006) 5 NWLR (Pt.973) 330; *Mogaji v Odofin* (1978)  
 C 4 - 7 SC (Reprint) 65 at 66.

For the Respondent was submitted that assuming the matter of the use of the omnibus ground warranting a disregard of the argu-  
 D ments made under issue 3 by the Appellant is accepted by the Court, Mr. Mitee said that the examination of the pleadings and the totality of the evidence led at the trial the Court below was right in dismissing the Appellant's appeal.

A summary of what is in dispute or forms the fulcrum to this  
 E appeal would be stated hereunder as follows:-

The Appellant as Plaintiff in his Statement of Claim averred that the Respondent as Defendant had falsely and maliciously written, printed and published or had caused to be written and published a letter to the Commissioner of Police, Rivers State Command,  
 F Port Harcourt defamatory words concerning him. I shall capture a snippet of the letter thus:-

*"Anonymous Petition captioned 'Corrupt Judges in Nigeria Blackmailing the Rivers State Police Command, The Judiciary, Court  
 G of Appeal Judges, The Nigeria Police, Army and Air Force, even a member of the Provisional Ruling council and Chief Prof. D.M.J. Fubara."*

In reaction to the letter, part of which is quoted above, the Respondent wrote the letter complained of which is the basis of this  
 H action in defamation and it is as follows:-

*"That letter was indeed not written by anybody called John Giadom. It was planned and written by the same persons who are responsible for planting witchcraft material at the entrance of the Gula (palace) of chief Agbaye Fubara in Opopo Town."*

*People should not be allowed to wantonly blackmail others and in particular the enforcement agency, the Judiciary, Air Force and Army of Nigeria. We have ail information to enable you bring to justice all those responsible for the said blackmailing letter. The people responsible for this letter are from Opobo and are as follows:-*

1. Chief (Dr.) Michael C. A. Peterside

B

2. Miepiri E. Fubara Esq.

3. Homphrey Adewari Jacobs Finebone

4. Dagogo Mac Jeputaola Fubara

5. Kalada Dappu Fubara (Rev.)

C

6. Gogo Iwobere Fubara

7. Akiesobo Theodore Jim Fubara

8. Theodore Jim Fubara

9. Gabriel Dappu Fubara

10. Dinue Dappu Fubara

D

11. Friday Gbebo Fubara

12. Doghobo Fubara

13. Friday Jeminimiema Fubara

14. Temple G. Damiari

15. Nkemakolam E. Fubara

E

*They are all involved in the various Court cases reported with false details in the said letter."*

After hearing evidence and with it certain documentary evidence including Exhibit 'B1' the letter against the Respondent which provoked Exhibit 'B' written by the Respondent to among other persons, the Commissioner of Police for full investigation of the contents of Exhibit 'B1'.

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The learned trial Judge, Acho Ogbonna J., in his judgment held as follows:-

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The next issue is whether the words are defamatory. The general statement of the law is that whether words can be capable of defamatory imputation is a question of law, but whether such words are in fact defamatory of the Plaintiff is a question of fact. See AGBANELO v. UNION BANK (2000) 4 KLR 1261 at 1264 ratio 2. The Plaintiff is said to have been greatly injured in his character, reputation, his office and occupation and has been brought into public scandal, odium and contempt.

H

Words that impute criminal offence are defamatory see WEB

v. BEAVAS (1883) 11 QBD 609 at 610. Practicing witchcraft is a criminal offence so also is blackmail. Apart from imputing crime one can also go further to consider what meaning the words would convey to the ordinary person. Everything taken together, I have no doubt in my mind that the ordinary person in the society will conclude that the words are defamatory because going to bury witchcraft material in another man's compound is condemned by society and whoever indulges in it deserves to be ostracized. I therefore hold that the words complained about by the Plaintiff are defamatory.

The third issue is whether the defence of qualified privilege avails the Defendant having raised it. For this defence to be sustained the maker of the publication and the person to whom it is made, both have interest, duty, legal, social or moral to make and to receive. See *MOSES ONYEJIKE v ADOLPHUS IBENEME ANYASOR* (1992) 1 NWLR (Pt. 218) 417 at 441 - 442 ratios 5 and 6. See also *CONCORD PRESS NIGERIA LIMITED v OLUTOLA* (1999) 9 NWLR (Pt. 620) 578 at 596 paragraphs A - C, ratio 2. The root to this action is Exhibit 'B' which gave rise to Exhibit 'B'. Exhibit 'B' was sent to the Chief Justice of Nigeria, and copies sent to the Military Administrator of Rivers State, the Commissioner of Police, Rivers State, the Chief Judge of Rivers State, the Chairman of Federal Appeal Court (sic) Port Harcourt and the Vice Chancellor, University of Science & Technology, Port Harcourt. When Defendant wrote Exhibit 'B' he also, following the footsteps of the author(s) of Exhibit 'B' sent copies to the same people but addressing it to the Commissioner of Police, Rivers State. He added Major General Balogun a member of the Provisional Ruling Council as another person whom he sent a copy of Exhibit 'B'. Can it be said that these people who received Exhibit 'B' have a reciprocal duty to receive the said Exhibit 'B'. The matter concerned corruption in the Judiciary, the Police and the Military. While the Commissioner of Police has a duty to investigate the allegation, it is my considered opinion that the Chief Justice of the Federation, the chief judge of Rivers State and the Military Administrator of Rivers State who had the duty to appoint Judges all have a duty to receive the letter Exhibit 'B'.

Major General Balogun a member of the then provisional Ruling Council had a duty to also receive the letter which touched on corruption in the Country. The Vice Chancellor of the University of



Science & Technology being the boss of the Defendant also had a duty to receive the letter. I am of this opinion because the issue of corruption is of public interest.

It is the public duty of everyone who knows or reasonably believes that a crime has been committed to assist in the discovery of the wrong doer. Any complaint made or information given for that purpose to the Police or to those interested in investigating the matter, will in the interest of society be privileged and the mere fact that Defendant volunteered the information will make no difference. This is the Statement of the Court of Appeal in *OLOGE v UKAEJE* (1998) 12 NWLR (Pt.576) 23 at 28 ratio 11. See also *EMEGWARA v GUARDIAN NEWSPAPERS LIMITED* (1999) 1 NWLR (pt.535) 610 at 613 ratio 6 where the Court of Appeal has this to say “where a person is so situated that it becomes right in the interest of society that he should tell to a 3<sup>rd</sup> party certain facts, then if he bona fide and without malice tell them, it is privilege communications.

“Corruption is a matter of public interest and not an Opobo matter.

The defence of qualified privilege is also sustained where the Defendant made the statement honestly without malice. See *UBN v. OREDEIN* (1992) 6 NWLR (Pt. 247) 355 at 365 ratio 14. Did the Defendant make the statement honestly and without malice?

The learned SAN for the Plaintiff contended that failure to prove that the statement was made honestly and without malice destroys the defence of qualified privilege. He referred to *PROFESSOR OLOGE & ORS v DR. UKAEJE* (1998) 12 NWLR (Pt.576) 23 at 12 ratio 11 and 12/ and also *MOSES ONYEJIKE v ADOLPHUS IBENEME ANYASOR* 91992) 1 NWLR (Pt.218) 417 at 441 - 442 ratio 6. The Defendant in paragraph 10 of his Statement of Defence denied the averment in paragraph 10 of the Statement of Claim that the Plaintiff is a blackmailer and that he also practices witchcraft. In his evidence Defendant confirmed that it is not to his knowledge that Plaintiff practices witchcraft. In his Exhibit ‘B’ Defendant wrote that he had information that plaintiff was among those who wrote Exhibit ‘B1’ and this made him ask the Commissioner of Police to investigate the fact. Six persons among those named are still standing trial for a criminal offence in the Magistrate’s Court in Charge No. OMC/155C/96 which was substituted for OMC/84C/96. This is Exhibit ‘D’. The six accused persons are yet to defend themselves as they purport to

appeal against the ruling of the Court in their no case submission. The conclusion of the trial will undoubtedly expose the honesty or dishonesty in the allegation.

Defendant in his evidence said he promoted the idea of erecting a monument in honour of the Plaintiff in Opobo which is not denied. He said in his evidence-in-chief that Plaintiff is his father-in-law but retracted same in cross examination. One can however draw the inference of a close affinity between Plaintiff and Defendant's wife.

Plaintiff raised the issue of malice and the burden of proving it rests solely on him. See *EMEGWARA v STAN PRINTING & PUBLISHING* (2000) 5 KLR 1711 at 1714 ratio 7. Apart from saying he has another libel case against the Defendant in Bori High Court, Plaintiff made no effort to prove that Defendant bears malice against him. In *UKO v MBARA* (2000) 4 NWLR (Pt.704) 460 at 464 ratio 5 the Court of Appeal has this to say "Actual or express malice is not restricted to personal spite and ill-will but also includes every in excusable intention to inflict injury on the person deferred. Such a situation is not assumed, evidence has to be led to prove same which is not the case here. Having said all this, and earlier concluded that the persons to whom Defendant made his publication have an interest and a duty to receive the letter, the defence of qualified privilege therefore avails the Defendant. There being no plea of express malice on the part of the plaintiff, the defence is sustained.

Having come this far, I have to conclude that the Plaintiff did not write Exhibit 'B1'; that there is publication of Exhibit 'B' and that Exhibit 'B' contains defamatory imputations.

I also make bold to say that the defence of qualified privilege which the defendant raised avails him. In the circumstances therefore the action fails and the suit is dismissed. There is a cost of ₦4,000.00 (Four Thousand Naira) to the Defendant".

The Plaintiff/Appellant appealed to the Court of Appeal which agreed with the Court of trial and stated among other things, viz:-

"...there is no averment of *MALICE* or *EXPRESS MALICE* in the pleading of the Plaintiff/Appellant, then the only evidence proffered by the Plaintiff/Appellant, which, by strained interpretation or construction, could be likened unto what is needed to counter or destroy the defence of

qualified privilege is thus:-

*“I do not know what made the defendant to write that letter except that he likes to libel me...”*

*“All the allegations in the letter are false, that I know. I do not practice (sic) witchcraft and the defendant knows that as a fact. I do not know what is worrying the defendant that he should be libeling me every time. I have nothing against the defendant.”* B

Could this piece of evidence reproduce supra tantamount to proper and credible evidence of MALICE or EXPRESS MALICE? Before I answer that question I shall like to consider what MALICE C means. I cannot do better than the definition of it given by Lord Horschell in BROWN v DUNN (1893) 6 R.67 where at page 72, he said:

*“Malice means making use of the occasion, for some indirect purpose.”* D

Again in STUART v. BELL (1891) 2 Q. B. 341 Lindley L. J. said of the term at page 351 thus:-

*“Malice, in fact is not confined to personal spite and ill-will, but it includes every unjustifiable intention to inflict injury on the person defamed.” No personal spite or ill-will nor an unjustifiable intention to inflict injury on the plaintiff/appellant can be read into Exhibit B, the substance of which was to invite the Police to investigate the allegation by bribery leveled against him and others in Exhibit ‘B1’ and set up legal machinery to have them punished. No ulterior motive can be read into it. Although, where a plaintiff wishes to raise plea of EXPRESS or ACTUAL MALICE - which is otherwise called ‘MALICE IN FACT in answer to a plea of qualified privilege, it is necessary to deliver a reply averring therein particulars of express malice. However/ failure to file such a reply does not defeat the plaintiff’s action where there is a clear evidence of privilege, if it is not characterized by gross and unreasoning prejudice, is a complete defence.”* E  
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From the summation of the trial Court, which the Court of Appeal accepted, it is seen that even though what the Respondent published in his subsequent letter would on the face of it be defamatory but that conclusion cannot be taken without more in the presence of the earlier document against the Respondent sent to his head of establishment, the Vice Chancellor who testified as DW2 and stated H

how he called the attention of the Respondent to the Petition against him, the Exhibit 'B' and the need for him to clear himself. The Respondent had in turn reacted and also sent to all the persons and various authorities that Exhibit 'B' had been sent to which subsequent petition was admitted in evidence as Exhibit 'B1'.

B The question that naturally follows is, can Exhibit 'B1' be determined as defamatory and such a position stand in the light of what happened before. My humble view is that there exists an immunity afforded the Respondent who had an obligation to clear his name from what was alleged against him, alongside others like the C Judicial officers. That protection from liability from the document which prima facie is defamatory stems from the fact that he was a man shackled by the legal and moral duty to take certain steps and he did not resort to self help but went to the properly authorized D establishment of state, the Police Command endowed with the power to investigate the grave criminal allegations against him. To remove that protective shelter from him is to establish bad faith as propelling his action in the write up, Exhibit 'B1'. This defence is otherwise known as qualified privilege, having pleaded and led evidence accordingly E the onus was on the Appellant as plaintiff to demolish that defence by providing evidence of malice, express or actual and this was not done by the Appellant, whom his testimony said he could not see or say why such a publication could be made against him by the Respondent. The position of the Appellant situated beside that of the F Respondent whose assertions in the letter concerning the persons named were established, like the various Court cases that were pending in certain jurisdictions, a matter of common ground with the parties in this appeal. It is clear that nothing from the records is available G to Court to upstage the concurrent findings of these two courts below. It is now trite or settled, that this Court will not disturb, not to talk of interfering with concurrent findings made by the two Courts below, where there is no mistake on the face of the record taken as a miscarriage of justice. I rely on the cases of Newsbreed Organisation H Ltd v Erhomosele (2006) 5 NWLR (Pt. 974) 499 at 540 – 541 per Ejiwunmi JSC; F. B. N. plc v. Asoko (2007) 1 NWLR (Pt.1014) 129 at 146; Chukwuogor v Obiora (1987) 3 NWLR (Pt. 61) 454.

In the light of the above and what the two Courts below did, it seems academic to dwell on whether without a specific appeal against

the question raised by the Appellant on whether the dismissal of their case was right in the face of the evidence in this case cannot be anchored on the omnibus ground. I say this because the pleadings and evidence as also found by the trial Court and accepted by the Court below showed emphatically that the defence of qualified privilege upon which the Respondent took shelter was neither dislodged nor shaken by the Appellant. Also to be noted is that the answer had been proffered in answer to Issue 2 and debating this same matter under Issue 3 is flogging of a dead horse. The natural conclusion arising is that the Court below was right in dismissing the Appellant's appeal in the face of the evidence in this case.

All the issues having been effectively resolved in favour of the Respondents and in the line with the fuller reasoning in the lead judgment just delivered by my learned brother, Stanley Shenko Alagoa JSC. I too dismiss the appeal and affirm the judgment of the Court of Appeal. I abide by the orders in the lead judgment.

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### **ARIWOOLA JSC**

I have had the advantage of reading in draft the lead Judgment of my learned brother ALAGOA, JSC. I agree with the reasoning and the conclusion that this appeal lacks merit and deserves to be dismissed. Accordingly, the appeal is dismissed by me too. Parties are to bear their costs of the appeal.

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### **AKA'AH'S JSC**

The complaint of the appellant who lost as plaintiff in the High Court and in the Court of Appeal before filing a further appeal to this Court is that the Court of Appeal (herein described as the lower court) failed or omitted to hear the appellant's appeal on the issues formulated and argued in his brief and such failure or omission occasioned a miscarriage of justice.

At the trial court the defendant now respondent who was defending an action for defamation raised the defence of qualified privilege to the offending publication which was admitted in evidence as *Exhibit B*. Although the trial court found the publication libellous of the plaintiff nevertheless dismissed the claim on the ground that

the defence of qualified privilege availed the defendant because he (defendant) and the persons to whom it was made had interest, duty, legal, social or moral right to make and to receive it. Not satisfied with the decision the plaintiff/appellant appealed to the lower court and raised the following issues for determination in the appellant's brief:

- B 1. Whether the defence of qualified privilege is available to the respondent.
2. Whether the need to deliver a reply arises once a defendant files a defence of qualified privilege.
- C 3. Whether from the pleadings and the totality of the evidence led at the trial the appellant was not entitled to judgment in his favour.

After the hearing of the appeal, Aderemi J.C.A. (as he then was) who wrote the lead judgment reproduced the issues formulated D by the appellant as follows:

1. Who wrote *Exhibit B1*?
2. Are the words in *Exhibit B* defamatory?
3. Does the defence of Qualified Privilege avail the defendant?

He proceeded to marry issues distilled by the appellant with those of E the respondent at page 102 thus:

*"I have carefully examined the issue raised by the two sides and it is my humble view that issues Nos. 1, 2, and 3 on the appellant's brief can be conveniently taken together with issues Nos. 1 and 2 on the respondent. The third issue on the respondent's brief shall be F addressed alone..."*

I agree with learned counsel for the appellant that the issues the lower court attributed to it as the issues arising in the appeal were the ones that the trial court formulated. Notwithstanding the error G committed by the lower court, it is necessary for this Court to critically examine the issues which the trial court dealt with in arriving at its decision and the ones which the lower court treated before deciding whether the failure or omission in treating the appellant's issues in the lower court has occasioned a miscarriage of justice.

H The central issue in this appeal is whether the defence of qualified privilege availed the respondent and if it is necessary to deliver a reply once the defence of qualified privilege is raised.

The lower court considered the defence when Aderemi J.C.A. (as he then was) said in the lead judgment at pages 105-106 of the

record of appeal:-

*"The defence of qualified privilege if it is not characterized by gross and unreasonable prejudice, is a complete defence. In effect if the occasion for making the communication is fit, the subject of the communication has reference to that occasion and the publication or communication was from right and honest motives, a defence of qualified privilege will be on a firm terra see Horrocks vs Lowe (1974) AER 662".*

He then examined the evidence adduced and concluded thus:

*"...from the evidence before the court below it admits of no doubt that the respondent wrote Exhibit B, in reaction to Exhibit B1, the letter dated 11<sup>th</sup> September, 1995 captioned "Re: CORRUPT JUDGES IN NIGERIA" linking the defendant/respondent with an alleged or perceived corruption indeed his (respondent) name was specifically mentioned in Exhibit B1".*

Apart from examining the pleadings he also considered the evidence adduced and concluded -

*"No personal spite or ill-will nor an unjustifiable intention to inflict injury on the plaintiff/appellant can be read into Exhibit B, the substance of which was to invite the Police to investigate the allegation of bribery levied against him and others in Exhibit B1 and set up legal machinery to have them punished. No ulterior motive can be read into it".*

On the question of delivering a reply the lower court held -

*"Although, where a plaintiff wishes to raise plea of EXPRESS OR ACTUAL MALICE- which is otherwise called "MALICE IN FACT" in answer to a plea of qualified privilege it is necessary to deliver a reply averring therein particulars of express malice. However, failure to file such a reply does not defeat the plaintiff's action where there is a clear evidence of malice in which the allegation of misconduct against the plaintiff is adjudged to have no foundation".*

The lower court found that the evidence adduced by the plaintiff/appellant could not tantamount to proper and credible evidence of MALICE or EXPRESS MALICE.

Contrary to the complaint by learned counsel to the appellant that the lower court failed to consider the issues raised before it which were different from the issues resolved by the learned trial

Judge, no fresh issues were raised in the Court below. The lower court made concurrent findings of fact on the evidence adduced and concluded that the learned trial judge was right to dismiss the plaintiff's claim.

The lower court painstakingly reviewed the evidence and the law on the plea of qualified privilege and it is quite obvious no miscarriage of justice was occasioned in the lower court adopting the issues considered by the trial court instead of those raised in the appellant's brief in deciding the appeal. The appeal completely lacks merit and it is accordingly dismissed. I abide by the order made on costs in the lead judgment.

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