

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH FEBRUARY, 2016. SC. 148/2010  
**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA,**  
**O. ARIWOOLA, M. D. MUHAMMAD,**  
**K. M. O. KEKERE-EKUN, JJSC**

1. MAINSTREET BANK LTD  
2. S. I. GAGUH ..... APPELLANTS  
AND  
DOMINIC BINNA ..... RESPONDENT

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COURTS - Issues - Suo motu raising of - Court is not entitled to raise issue and decide on it without hearing the parties - Otherwise it would be seen as making case for one of the parties (H1)

APPEALS - Issue - Determination of - Issue of malice was not raised suo motu and resolved without hearing the parties - As it was argued by parties and considered by the court (H2)

TORTS - Defamation - Technical malice - Arises where it is pleaded that words were printed falsely - And it is shown that the defamatory words were published without lawful excuse (H3)

TORTS - Defamation - Defence of qualified privilege - Once the plea is made out - Inference of malice is rebutted - And burden is upon plaintiff to prove express malice against defendant (H4)

TORTS - Defamation - Motive - Where plea of qualified privilege is raised - Defendant's belief only becomes relevant in mitigation of damages - Where plaintiff served a reply alleging express malice (H5)

TORTS - Defamation - Defence - Malice could not be inferred - Having regard to defence of qualified privilege properly made out by appellants - Which respondent failed to rebut (H6)

**FACTS**

This action was instituted at the High Court of the Federal Capital Territory Abuja, by plaintiff/respondent against defendants/

**1434 Mainstreet Bank Ltd. v. Binna (2016) 2 KLR (pt. 381) 1433;**

appellants. The subject matter of the suit was defamation allegedly published by appellants against respondent. Respondent had sometime in 1999, applied for a short loan of N20,000.00 from 1<sup>st</sup> appellant. Respondent's employer - Federal Ministry of Industries guaranteed the loan. He paid back the loan through monthly deductions from his salary account with 1<sup>st</sup> appellant. Sometime in the year 2000, due to a large increase in its customer base, 1<sup>st</sup> appellant directed its customers, including those from respondent's office to move their banking transactions to its new branch at Area 7 Garki, Abuja. Respondent opened a new salary account at the said Area 7 branch. According to him, customers were advised to continue using their cheque books from the main branch until new ones were issued. Respondent's salary thenceforth was paid into the new branch at Area 7. The old account was still in operation.

Sometime in 2002 respondent presented a cheque for N9,000.00 to the Jos branch of the bank drawn on his old account at the Abuja Main Branch. The cheque was sent by the Jos branch to the Abuja Main Branch and lodged into respondent's account. Respondent was given value for the cheque after it was verified. However, the bank treated it as an overdraft. About two years later, 2<sup>nd</sup> appellant who had just resumed as a new credit officer in the bank carried out a review of all accounts in his portfolio and observed inter alia that 1<sup>st</sup> appellant granted respondent an overdraft facility of N20,000.00 sometime in 1999. Following this observation, 2<sup>nd</sup> appellant wrote a letter to respondent's employer, notifying them of his alleged indebtedness and seeking their cooperation in recovering same. Respondent's case is that his employers queried him over the letter. He therefore alleged that the letter was defamatory of him. At the trial, appellants raised the defence of qualified privilege and counterclaim for the over-draft with interest thereon. In its judgment, the Court entered judgment in favour of respondent and awarded N5 million damages in his favour. It dismissed appellants' counter claim. Appellants were dissatisfied and appealed to the Court of Appeal. The appeal was dismissed. Hence, the further appeal to the Supreme Court.

**ISSUES FOR DETERMINATION**

1. Was the court below not wrong to have held that the publisher of the letter complained of was actuated by malice when there

was nothing in the record to support that finding and without reviewing the facts of the case in relation to the applicable law?

2. From all the circumstances of the case, should the appellants' plea of qualified privilege not have succeeded?

3. Was it not wrong for the court below to have based its decision on an issue that was not raised by the parties before it without first hearing them on that issue?

4. Was the decision of the court below affirming the award of damages by the trial court justifiable in the circumstances?

**HELD** (Unanimously allowing the appeal per **KEKERE-EKUN JSC**)

*COURTS - Issues - Suo motu raising of*

**1. As rightly submitted on behalf of the appellants, the position of the law is that a court is not entitled to raise an issue and decide on it without affording the parties an opportunity to be heard. This is because in doing so the court is seen to leave its exalted position as impartial arbiter and ascend into the arena of conflict. An appellate court is also not entitled to raise an issue not raised by either of the parties at the trial court or on appeal and base its decision thereon without affording the parties an opportunity to be heard. The court, being an impartial arbiter, must never be seen to be making a case for one of the parties. Where it is established that the issue raised suo motu is fundamental and has occasioned a miscarriage of justice, the parties' right to fair hearing would have been breached and the proceedings are liable to be set aside.** (p. 1444 C)

*APPEALS - Issue - Determination of*

**2. A careful perusal of the record of appeal shows that at paragraphs 4.15, 4.18, 4.19 and 4.2 of the appellants' brief at pages 257 and 259 the issue of malice was comprehensively argued to convince the court that in the absence a malice, the defence of qualified privilege ought to avail them. The respondent by way of reply in paragraph 4.12 of his brief at pages 290 - 291 of the record, contended that the fact that a**

**plaintiff pleads that the publication was malicious does not mean that he must establish actual malice; that it is the usual way in which malice is pleaded as required by law.**

**From the above facts gleaned from the record of appeal, it would not be correct, as urged upon us by learned counsel for the appellants, to say that the lower court raised the issue of malice suo motu and resolved same without affording the parties a hearing. The issue of malice was argued by the parties and considered by the court as being intrinsic to an action for defamation where the defence of qualified privilege is raised. This issue is accordingly resolved against the appellants.**  
(p. 1445 F)

*TORTS - Defamation - Technical malice*

**3. In the course of resolving issue 3, I referred to the case of Bakare Vs Ibrahim wherein the concepts of ‘technical malice’ and ‘malice in fact or express malice’ in an action for defamation were explained. As held by this court, technical malice arises where malice is inferred by operation of law i.e. where it is pleaded that the words were printed and published “falsely and maliciously” and it is shown that the defamatory words were published without lawful excuse the law presumes that the defendant is motivated by malice. In such a situation the plaintiff is not required to give particulars of the facts on which he seeks to rely in support of the allegation that the words were published “maliciously”. (p. 1451 G)**

*TORTS - Defamation - Defence of qualified privilege*

**4. A different consideration arises where the defendant raises the defence of qualified privilege.**

**In the instant case, even though the publication turned out to be untrue, it is not in dispute that the appellants who granted the loan to the respondent had an official duty to inform the respondent’s employer of the current position of the facility and the said employer, having guaranteed the loan, had a corresponding interest to receive the information. In other words the occasion was privileged.**

**The position of the law is that once the plea of qualified**

**privilege is made out, the inference of malice is rebutted and the burden is thrown upon the plaintiff to show and prove 'express malice' against the defendants. To discharge this onus, the plaintiff must deliver a reply alleging express malice and give particulars of the facts from which such malice is to be inferred. It is important to note that the duty to file a reply alleging express malice only arises where the defence of qualified privilege is made out.** (p. 1452 A/E)

*TORTS - Defamation - Motive*

**5. Learned counsel for the appellants went to great lengths to show that the 2nd appellant and the respondent had never met before the defamatory letter was written and argued that this fact rebutted the inference of actual malice. He further asserted that the publication was made in the honest belief of the truth of the contents. However, from the authorities referred to above, where the plea of qualified privilege is raised, the defendant's motive or his belief or non-belief only becomes relevant in mitigation of damages where the plaintiff has put his intention in issue by serving a reply alleging express malice. A defendant's belief in the truth of the allegation cannot be a ground for exculpating him where there is an issue of express malice, which can only be raised in a reply.** (p. 1453 B)

*TORTS - Defamation - Defence*

**6. As noted earlier in the judgment, the appellants made out the defence of qualified privilege by showing the corresponding interest between the parties to give and receive the information contained in the letter in issue. The burden then shifted to the respondent to rebut the inference of malice by delivering a reply alleging express malice and pleading and proving the particulars from which such malice is to be inferred. For purposes of emphasis, I again reproduce paragraph 1(j) of the respondent's reply to the appellants' statement of defence and defence to counter claim found at page 68 of the record, where he pleaded thus:**

**"1 (j) The defendants acted maliciously when they wrote**

*the letter pretending that the initial sum of N20 000.00 has (sic) not paid, whereas the salaries for the month of May, June and July 1999 cleared the debt.”*

*The pleading clearly falls short of the requirement that a reply to a defence of qualified privilege must “resonate with facts and particulars to show the malicious intention of the publisher of the statement,” as stated by the court below in its judgment at pages 348 - 349 of the record. Contrary to the submission of learned counsel for the respondent, malice could not be inferred in the circumstances of this case having regard to the defence of qualified privilege properly made out by the appellants, which he failed to rebut. As rightly submitted by learned counsel for the appellants, although the lower court correctly stated the legal principles applicable to a defence of qualified privilege, it failed to apply them to the facts of the case. The finding of the court below that the appellants were actuated by malice is therefore, with due respect to their Lordships, quite erroneous.* (p. 1453 E)

## E NOTABLE POINT OF INTEREST

### **KEKERE-EKUN JSC**

#### ***1. Appeals – Reply brief – Purpose of***

In reaction to the respondent’s submissions on this issue, learned counsel for the appellants went on a voyage of discovery and re-argued the issue, which he had fully addressed in the appellants amended brief of argument. As rightly pointed out by learned counsel for the respondent, the filing of a reply brief is not ‘open-sesame’, allowing the appellant to re-marshal his arguments or to have another bite at the cherry. The purpose of a reply brief is to afford the appellant an opportunity to address new issues raised in the respondent’s brief, which were not dealt with in the appellants’ main brief. In the instant case, learned counsel has tried to improve upon the arguments already advanced in his main brief. Where this occurs the submissions will be discountenanced. (p. 1443 H)

### **REPRESENTATION**

Olanrewaju Osinaike with Muiyiwa Alatise for the appellants

Sonny O. Wogu with O. M. Jubril, G. O. Iyogun and L. A. Binna (Miss) for the respondent

**CASES REFERRED TO**

- Abbas v. Solomon (2001) 36 WRN 73
- IMB Securities Plc. v. Tinubu (2001) 45 WRN 1 B
- Edokpolo & Co. Ltd. v. Ohenhen 1994 7 NWLR (pt. 358) 511
- Ojo-Osajie v. Adonri (1994) 6 NWLR (pt. 349) 131
- Ajileye v. Fakayode (1998) 4 NWLR (pt. 545) 184
- Agwasim v. Ejivumerwerhaye (2001) 9 NWLR (pt. 718) 395
- Kuti v. Balogun (1978) 1 SC 53 C
- Obawole v. Williams (1996) 10 NWLR (pt. 477) 146
- Omokuwajo v. FRN (2013) 9 NWLR (pt. 1359) 300
- Ominiya v. Alabi (2005) 2 SCNJ 494
- Okoye v. COP (2015) 4 – 5 SC (Pt. 1) 101 D
- Nobis-Elendu v. INEC (2015) 6-7 SC (pt. iv) 1
- Madu v. Madu (2008) 6 NWLR (pt. 1083) 296

**LEAD JUDGMENT BY KEKERE-EKUN JSC**

This is an appeal against concurrent judgments of the High Court of the Federal Capital Territory delivered on 5/3/2008 and the Court of Appeal, Abuja delivered on 24/11/2009 respectively.

The subject matter of the suit before the trial court was defamation allegedly published by the defendants (now appellants) against the plaintiff (now respondent). Sometime in 1999, the respondent herein, who was a customer of the 1st appellant (then Afribank Nig, Plc) applied for a short-term loan of N20,000.00 from the bank to pay his children's school fees. His employer, the Federal Ministry of Industries, guaranteed the facility. He paid back the loan through monthly deductions from his salary account with 1<sup>st</sup> appellant. Sometime in the year 2000, due to a large increase in its customer base, 1st appellant directed its customers, including those from respondent's office to move their banking transactions to its new branch at Area 7 Garki, Abuja. The respondent opened a new salary account at the said Area 7 branch. According to him, customers were advised to continue using their cheque books from the main branch until new ones were issued. The respondent's salary thenceforth was paid into the new branch at Area 7. The old account was still in operation.

Sometime in 2002 the respondent presented a cheque for N9,000.00 to the Jos branch of the bank drawn on his old account at the Abuja Main Branch. The cheque was sent by the Jos branch to the Abuja Main Branch and lodged into the respondent's account. The respondent was given value for the cheque after it was verified.

B However, the bank treated it as an overdraft. About two years later, the 2nd appellant who had just resumed as a new credit officer in the bank carried out a review of all accounts in his portfolio and made the following observations:

C 1. That respondent's account was overdrawn in excess of N20, 000.00.

D 2. That the 1st appellant granted the respondent an overdraft facility of N20, 000.00 sometime in 1999 which facility was guaranteed by the respondent's employer, the Federal Ministry of Industries.

3. That the guarantee was continuous until discharged;

4. That the guarantee had not been discharged.

E As a follow up to the above findings, the 2nd appellant and one Mahmood Yusuf (now deceased), who was also a new branch manager at the Abuja Main Branch, wrote a letter to the Federal Ministry of Industries on behalf of the 1st appellant notifying them of the respondent's alleged indebtedness and seeking their cooperation in recovering same.

F It was the respondent's case at the trial that his employers queried him over the letter and that the said letter which was received by the Director of Personnel Management, was subsequently forwarded to the Principal Executive Officer in the Personnel Management Department (PW2) and ended up in the Registry of the Ministry. That based on the said letter, his official and private life were thoroughly investigated and his promotions were suspended. He also contended that he demanded for his statements of account, which the 1st appellant refused/failed to produce.

H The alleged defamatory letter pleaded in paragraph 9 of the statement of claim and tendered in evidence as Exhibit D, reads thus:

*"RE: INTRODUCTION: A LOAN OF N20, 000. 00. FOR MR. DOMINIC B. BINNA AC NO. 0350076-2*

*We refer to the above captioned letter of yours with Ref. No. Pn/9081/1/64 dated 14h January, 1999 and signed by one Mr. A.I.*



*Tanko and wish to inform you that based on the letter and guarantee of Amos Ibrahim Tanko, we obliged your above named staff's request.*

*Mr. Dominic B. Binna however abandoned his account shortly after the loan was granted. The outstanding debit balance on his account presently is #23,430.41. We therefore urge you to re-direct his salary through his above quoted account so as to enable us recover our money. If he is no longer in your service, please pay his terminal benefits through the account. This will also encourage us to favourable consider such letters and guarantees from your Ministry and others in future. Photocopy of your letter and guarantee signed by Mr. Amos Ibrahim Tanko are attached for ease of reference."*

The respondent alleged that the letter was defamatory. He therefore instituted a suit against the appellants (including Mahmood Yusuf now deceased) for damages and injunction.

The appellants raised the defence of qualified privilege and counter claimed against the respondent for the purported overdraft of N9, 000.00 with interest thereon.

The trial court entered judgment in favour of the respondent and awarded N5 million damages in his favour. It dismissed the appellants' counter claim. The appellants were dissatisfied with this decision and appealed against it to the lower court, which dismissed the appeal, hence the further appeal to this court. The notice of appeal filed on 8/12/09 contains six grounds of appeal. The appellants with leave of this court subsequently filed an Amended Notice of Appeal also containing six grounds of appeal.

At the hearing of the appeal on 16/11/2015, OLANREWAJU OSINAKE ESQ. leading MUYIWA ALATISE ESQ. adopted and relied on appellants' amended brief of argument filed on 17/2/2013 and their Reply brief filed on 24/4/2015. He urged the court to allow the appeal and set aside the judgment of the court below. He urged further that in the event that the court finds otherwise, it should drastically reduce the 5million damages awarded in respondent's favour.

SONNY O. WOGU ESQ., learned counsel for the respondent, leading Messrs O.M. JUBRIL, G.O. IYOGUN and Miss L.A. BINNA, adopted and relied on the respondent's amended reply brief, which was deemed filed on 13/4/2015. He urged the court to discountenance the appellants' reply brief on the ground that certain facts stated

therein are incorrect and that issues 3 and 4 were re-argued, which is not consistent with the function of a reply brief. He also contended that the appellants relied on the grounds of appeal contained in their original notice of appeal instead of the amended notice of appeal. He urged the court to dismiss the appeal.

B In reply to the oral submission, Mr. Osinaike maintained that the Amended brief of argument is based squarely on the .amended notice of appeal. He referred the court to the amended notice of appeal contained in the supplementary record, which was filed pursuant to an application filed on 8/10/2010 for amendment of the  
C notice of appeal and for leave to appeal on grounds of mixed law and facts.

For the resolution of the appeal, the appellants distilled four issues as follows:

D 1. Was the court below not wrong to have held that the publisher of the letter complained of was actuated by malice when there was nothing in the record to support that finding and without reviewing the facts of the case in relation to the applicable law?

2. From all the circumstances of the case, should the appellants' Plea of qualified privilege not have succeeded?

3. Was it not wrong for the court below to have based its decision on an issue that was not raised by the parties before it without first hearing them on that issue?

F 4. Was the decision of the court below affirming the award of damages by the trial court justifiable in the circumstances?

The respondent on the other hand, formulated two issues for determination:

G 1. Whether having regard to the evidence on record and the case presented by the appellants, the Court of Appeal was not right in upholding the judgment of the trial court.

2. Whether the court below based its decision on an issue that was not raised by the parties before it.

H Having carefully examined the issues formulated by both parties, I shall adopt the issues formulated by the appellants in resolving the appeal. I shall resolve issue 3 first, as it borders on the parties' fundamental right to fair hearing. Issues 1 and 2 will be taken together and thereafter Issue 4.

### ISSUE 3

It is the contention of learned counsel for appellants that the trial court did not make a finding of malice against appellants nor did either of the parties make the issue of malice one of the issues for determination before the court below. He noted that notwithstanding this fact, the court below held that the writer of the letter was actuated by malice and on that basis dismissed appellants' defence of qualified privilege. He contended that the issue was raised *suo motu* by the court and that the court ought to have afforded the parties a hearing before determining that the defence of qualified privilege did not avail appellants. On the need for the court to hear the parties before deciding on an issue it raised *suo motu*, learned counsel relied on: *Abbas v. Solomon* (2001) 36 WRN 73 @ 91 lines 20-30; *IMB Securities Plc. v. Tinubu* (2001) 45 WRN 1 @ 20 lines 19-29; *Edokpolo & CO. Ltd. v. Ohenhen* 1994 7 NWLR (Pt. 358) 511 H; *Ojo-Osajie v. Adonri* (1994) 6 NWLR (Pt.349) 131 @ 154 H-155 B.

Learned counsel conceded that it is not in all cases where a court takes a point *suo motu* that it will result in the reversal of the decision.

Relying on the case of *Alhaji Isiyaku Yakubu Enterprises Ltd. Vs Omolaboje* 2006 3 NWLR Pt.966 195 203 H, he submitted that for the decision to be reversed, the appellant must convince the court that the point taken *suo motu* is substantial and, has led to a miscarriage of justice. He argued that the issue of malice raised and resolved *suo motu* by the court is substantial and has occasioned a miscarriage of justice, as the appellants were denied the opportunity of submitting compelling arguments to persuade the court that the respondent failed to establish express malice against them. He urged the court to set aside the decision of the lower court on this ground. In response to the above submissions, learned counsel for the respondent submitted that the contention that the court below raised the issue of malice *suo motu* is erroneous and misleading. He referred to pages 349 - 350, 353 and 354 of the record of appeal and submitted that the issue of malice arose from the court's analysis of the appellants' defence of qualified privilege.

In reaction to the respondent's submissions on this issue, learned counsel for the appellants went on a voyage of discovery and re- argued the issue, which he had fully addressed in the appellants amended brief of argument. As rightly pointed out by learned

counsel for the respondent, the filing of a reply brief is not ‘open-sesame’, allowing the appellant to re-marshal his arguments or to have another bite at the cherry. The purpose of a reply brief is to afford the appellant an opportunity to address new issues raised in the respondent’s brief, which were not dealt with in the appellants’  
 B main brief. See: *Basinco Motors Ltd. Vs Woermann-Line* (2009) 13 NWLR (Pt. 1157) 149; *Ajileye Vs Fakayode* (1998) 4 NWLR (Pt.545) 184, *Agwasim Vs Ejivumerwerhay*e (2001) 9 NWLR (Pt.718) 395. In the instant case, learned counsel has tried to improve upon the arguments already advanced in his main brief. Where this occurs the  
 C submissions will be discountenanced.

***As rightly submitted on behalf of the appellants, the position of the law is that a court is not entitled to raise an issue and decide on it without affording the parties an opportunity  
 D to be heard. This is because in doing so the court is seen to leave its exalted position as impartial arbiter and ascend into the arena of conflict.*** See: *Kuti Vs Balogun* (1978) 1 SC 53 @ 60; *Obawole Vs Williams* (1996) 10 NWLR (Pt.477) 146 *Stirling Civil Eng. Nig. Ltd. Vs Yahaya* (2005) 11 NWLR (Pt 935) 181; *Omokuwajo  
 E Vs. FRN* (2013) 9 NWLR (Pt 1359) 300; *Ominiya Vs. Alabi* (2005) 2 SCNJ 494 @ 512; (2015) LPELR – SC. 41/2004. ***An appellate court is also not entitled to raise an issue not raised by either of the parties at the trial court or on appeal and base its decision thereon without affording the parties an opportunity to  
 F be heard. The court, being an impartial arbiter, must never be seen to be making a case for one of the parties.*** See *Ebele Okoye & Ors. Vs. COP* (2015) 4 – 5 SC (Pt 1) 101 @ 155 – 156; *Nobis-Elendu Vs. INEC & Ors.* (2015) 6-7 SC (Pt. iv) 1 @ 58; (2015)  
 G LPELR-251217 (SC). ***Where it is established that the issue raised suo motu is fundamental and has occasioned a miscarriage of justice, the parties’ right to fair hearing would have been breached and the proceedings are liable to be set aside.***

In resolving this issue, I am of the view that it is necessary to  
 H state briefly what an action for defamation and a defence of qualified privilege entails. This as explained quite lucidly by this court in the case of: *Chief S.B. Bakare & Anor. Vs Alhaji Ado Ibrahim* 6 SC147 52 - 153 thus:

*“In an action for defamation it is usual to allege in the state-*

*ment of claim that the words were printed and “falsely and maliciously”. If the publication is shown to be false, malice is inferred by operation of law; it is enough to show that the words complained of; are completely false... Where defamatory words are published without lawful excuse, the law conclusively presumes that the defendant is motivated by what is often described as malice in law; accordingly the plaintiff is usually not required to give particulars of the facts on which he seeks to rely in support of the allegation that the words were published “maliciously”. ...It should always be borne in mind that once the plea of fair comment or qualified privilege is made out ... the inference of malice is rebutted and the burden is thrown upon the plaintiff of showing and proving ‘express malice’ against the defendants. This is generally known as “malice in fact,” and to be able to discharge the onus at the trial it is important that the plaintiff should deliver a reply, alleging express malice and giving particulars of the facts from which such malice is to be inferred.*

Now, in the instant appeal, in response to the defence of qualified privilege put up by the appellants, the respondent filed a reply and defence to counter claim, where in paragraph 1 (j) he pleaded as follows:

*“1 (j) The defendants acted maliciously when they wrote the letter pretending that the initial sum of N20, 000 00 has not been paid whereas the salaries for the months of May, June and July 1999 cleared the debt”*

**A careful perusal of the record of appeal shows that at paragraphs 4.15, 4.18, 4.19 and 4.2 of the appellants’ brief at pages 257 and 259 the issue of malice was comprehensively argued to convince the court that in the absence a malice, the defence of qualified privilege ought to avail them. The respondent by way of reply in paragraph 4.12 of his brief at pages 290 - 291 of the record, contended that the fact that a plaintiff pleads that the publication was malicious does not mean that he must establish actual malice; that it is the usual way in which malice is pleaded as required by law.**

The first issue for determination at the court below was: *whether the fact that the defamatory statement is not true defeats the defence of qualified privilege.* In resolving this issue, the lower court, after considering the submissions of learned counsel as contained in their

respective briefs of argument, stated as follows at pages 348 - 349 of the record:

*"In order to destroy or neutralize the defence of privilege or qualified privilege, it is incumbent on the plaintiff to prove malice. A reply to a defence of qualified privilege should resonate with facts and particulars that show the malicious intention of the publisher of the statement. It is to say that implicit in such a publication would readily depict a mind poisoned or jaundiced by the prejudice and evil disposition bent on destructive calumny against the plaintiff."*

**From the above facts gleaned from the record of appeal, it would not be correct, as urged upon us by learned counsel for the appellants, to say that the lower court raised the issue of malice suo motu and resolved same without affording the parties a hearing. The issue of malice was argued by the parties and considered by the court as being intrinsic to an action for defamation where the defence of qualified privilege is raised. This issue is accordingly resolved against the appellants.**

Issues 1 and 2

The gravamen of issues 1 and 2 is whether the court below was right to have held that the defence of qualified privilege did not avail appellants. The offending part of the judgment appealed against is at page 355 of the record, wherein the court concluded thus:

*"In the determination of the proof of the ingredients of malice in an action for malicious falsehood, the court would put into consideration circumstances which surrounded the publication to form the view that the defendant had honest belief in what was published by the plaintiff. ...Considering these guides of the apex court it is clear that the defence put up by the appellants hanging to qualified privilege would not avail them."*

*They broke the rules that would have accorded them the defence they now seek.*

*I resolve this issue in favour of the respondent and against the appellant in that the defence of qualified privilege is defeated by the falsehood of the publication in this instance since the publisher did so actuated by malice."* (Emphasis mine)

Learned counsel for the appellants submitted that the finding that the publication was actuated by malice is not borne out by the record. He submitted that the record of appeal binds the appellate

court in the same manner as pleadings bind the trial court and that where the court's findings are not based on facts established on the record, this court has a duty to interfere with the findings. He referred to: *Okpoko Vs Uko* 1997 11 WLR Pt.527 94 @ 115 B – C; *Madu Vs Madu* (2008) 6 NWLR (Pt. 1083) 296 @ 326 E-F.

He submitted further that in the law of defamation, there are two categories of malice: 'technical malice', which is presumed in favour of the plaintiff, and 'actual' or 'express malice', which must be specifically pleaded and proved. He noted that actual malice was neither pleaded nor proved at the trial court and that the issue of whether or not there was malice was not raised at the court below. Relying on the case of 716- 717 H - A, also found in (2005) 5 SC (Pt. II) 149. He submitted that where the defence of qualified privilege is raised in an action for defamation, the plaintiff must plead and prove detailed facts showing that the defendant had an indirect, wrongful or corrupt motive. He referred to paragraph 1 (j) of the respondent's reply to the appellants' statement of defence and counter claim (reproduced earlier) and submitted that the respondent failed to supply any particulars of the alleged malice. He noted that under cross-examination, he conceded that he had never met the 2nd and 3rd defendants prior to the publication of the defamatory letter. He submitted that the appellants, on the other hand, stated clearly in their pleadings that the letter complained of was written in the honest belief that the respondent was indebted to the appellants and that he had abandoned his account. He also contended that the appellants had a duty to write the letter to the respondent's employer, who guaranteed the loan and that the said employer had a corresponding interest to receive it. He submitted that the Court below failed to apply the applicable law to the facts of the case and also failed to explain how it arrived at its good judgment, learned Counsel referred to: *Ciroma Vs. Ali* (1999)2 NWLR (Pt.590) 317 @ 328-329 H-A; *Imoghiemhe Vs Alokwe* (1995) 7 NWLR (Pt 409) 581 @ 593 E - F.

Expatriating further on the case of *Iloabachie Vs Iloabachie* (supra) and what the defence of qualified privilege entails, learned H counsel submitted that it is a defence to an untrue statement. That there are occasions here, on grounds of public policy and convenience, a person may, without incurring liability, make statements about another, which are defamatory and in fact untrue. That on

such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. He submitted that the protection, which the law affords; on grounds of public policy, is not absolute, but depends on the honesty of purpose with which  
 B the defamatory statement is made. See: *Ojeme Vs Momodu* 1994 1 NWLR (Pt.323) 685 @ 700 F-H Gatley on Libel and Slander 10th edition page 379 para. 14.1. He reiterated the fact that the letter was written in an honest belief in the truth of its contents and that it was  
 C written in the course of the 2<sup>nd</sup> appellant's official duties. He submitted that the existence of an interest or duty in the maker of the publication, whether legal, social or moral, to make it to a person who has a corresponding interest or duty to receive it, destroys the inference of malice, which the law makes in cases of defamation and al-  
 D lows for the occasion to be privileged, unless there is evidence of actual malice. He referred to: *Ojeme Vs Momodu* (supra) MTS Vs Akinwunmi (2009) 16 NWLR (Pt.1168) 633 @ 652 - 653 D - B· Clark Vs Molyneux (1877) 3 QB 237; Winfield & Jolowicz on Tort 11<sup>th</sup> edition page 450.

E He submitted that while the appellants established by their pleadings and evidence at the trial that the publication complained of was made on an occasion of qualified privilege, the respondent failed to rebut the defence by pleading and proving the particulars of the alleged malice. He submitted that in the circumstances the defence  
 F ought to have succeeded. He urged the court to resolve these issues in the appellants' favour.

In reply, learned counsel for the respondent argued that the appellants cannot be heard to challenge the findings of the lower  
 G court on proof of malice on the ground that the appellants failed to seek and obtain the leave of the lower court or of this court to raise and argue grounds of appeal which are on facts or on mixed law and facts. He cited relevant authorities.

I have examined the record with regard to the issue raised by  
 H learned counsel for the respondent. My findings reveal that having regard to the fact that no leave was sought to argue Grounds 2, 3 and 6 of the original notice of appeal, being grounds of mixed law and facts, the appellants filed an application on 8/10/2010 for leave to amend the notice of appeal by withdrawing the said grounds 2, 3



and 6; for extension of time within which to seek leave to appeal on grounds of mixed law and facts; and for leave to file and argue grounds of mixed law and facts in their notice of appeal and brief of argument respectively. The application was granted on 8/1/2013.

The appellants were given seven days to file their Amended Notice of Appeal. The said Amended Notice of Appeal dated 8/1/2013 and filed on 9/1/2013 is contained at pages 1 - 6 of the supplementary record filed on 14/1/2013. The six grounds of appeal are *in pari materia* with the original grounds of appeal. I have examined the grounds of appeal, shorn of particulars set out at page 3 paragraphs 3.1 to 3.7 of the amended appellants' brief and find that they correspond with the amended grounds of appeal as contained in the supplementary record.

The contention that the amended appellants' brief is based on the original grounds of appeal is incorrect. Furthermore, the complaint of learned counsel for the respondent that the appellants failed to obtain leave to argue ground of mixed law and facts is also misconceived, as the said leave was granted on 8/1/2013.

In response to the substantive arguments under issues 1 and 2, learned counsel referred to the lower court's analysis of the defence of qualified privilege at page 355 of the record and submitted that in determining whether or not the publication was actuated by malice, the court would consider the circumstances surrounding it. He submitted that at pages 242 to 245 of the record, the trial court made certain findings of fact against which the appellants did not appeal.

The findings, which are set out in paragraph 2.15 at page 13 of the respondent's brief are as follows:

"1. *At the time the appellants made the publication about the respondent, the respondent was not owing the 1<sup>st</sup> appellant any money and as such the allegation made by the appellants was untrue. (Page 42 paragraph 5 of the record of appeal)*

2. *The appellants withheld the respondent's statement of account because if the said statement of account was released it would be unfavourable to the appellants. (Page 242 paragraph 4 of the record of appeal)*

3. *The publication contains serious criminal allegations against the plaintiff who is a senior staff (Assistant Director) in the Federal*

*Service. (Page 244 paragraph 8 of the record of appeal)*

4. *The publication was false and malicious. (Page 245 paragraph 2 of the record of appeal)* (Emphasis supplied by learned counsel)

He concluded that the appellants were clearly actuated by malice in writing the letter. In addition to the facts enumerated above he referred to the evidence of DW1 (the 2nd appellant) to the effect that he carried out an investigation that revealed that there was a debit in the respondent's account at Area 7 and that he also maintained a new account with them, through which his salaries had been paid. He was of the view that in light of the said investigation, DW1 ought to have informed the respondent's employer at the outset of the state of both accounts and the fact that the respondent's transfer to a new branch was on the 1st appellant's instructions.

Relying on the dictum of Olatawura, JSC in *Atoyebi Vs Odudu* (1990) 6 NWLR (Pt.157) 384 @ 400, he submitted that an attack on the character of the respondent generally, is a case of criminal imputation with clear malicious intention. He argued further that the fact that a plaintiff in a libel suit pleads that the publication is malicious does not mean that he must establish malice. He contended that it is merely the legally established manner in which malice should be pleaded. He referred to: *Bakare Vs Ibrahim* (1973) 6 SC 205 @ 211 - 213. He asserted that the submissions of learned counsel on proof of express malice are not relevant to this case. He submitted that when appellants failed to prove the truth of the publication, malice was presumed. He contended further that in the circumstances respondent was not under any obligation to file a reply alleging express malice. He submitted that the filing of a defence alleging express malice presupposes a successful defence put forward by defendant.

Referring to the textbook, *Gatley on Libel and Slander*, 7th edition at paragraph 766, learned counsel submitted that the appellants' contention that the absence of a personal relationship between the respondent and the 2nd appellant was proof that the letter was written without malice and in the performance of an official duty, is erroneous, as actual malice does not necessarily mean personal spite or ill will. He therefore submitted that the lower court rightly dismissed the appeal.

He argued further that material inaccuracy destroys the de-

fence of qualified privilege. He submitted that it was established by the evidence on record that at the time the appellants wrote the defamatory letter and published same to the respondent's employer, he was not indebted to the 1st appellant. He noted that the appellants refused to produce the respondent's statements of account in spite of written demands by the respondent and his employer and in spite of notice to produce same at the trial. He submitted that the legal implication of this refusal or neglect to produce the statements of account is that under section 149 (d) of the Evidence Act, 2004 (now Section 167 of the Evidence Act 2011), the court is entitled to presume that the said statements of account, if produced, would have been unfavourable to the appellants. Relying on the case of Ezenowo Vs Ukpong (1999) 6 NWLR (Pt. 608) 611 @ 620 he submitted that where, as in this case, the defamatory statement is false and malicious, defendant is not entitled to the defence of qualified privilege. D

In reply to the respondent's submissions that the falsehood of the publication defeats the defence of qualified privilege, learned counsel for the appellants submitted that the success of a defence of qualified privilege does not rest on the truth or otherwise of the publication. He submitted that the authority of Iloabachie Vs Iloabachie (supra) is more apposite to the facts of this case than the case of Bakare Vs Ibrahim supra relied upon by the respondent, which was decided over two decades earlier. He also relied on: Peterside Vs Fubara 174 B – D & 192 E. He submitted further that since there is a consensus that a privileged occasion existed between the makers of the publication and the receiver, the mere fact that the statement is untrue does not deprive the appellants of the benefit of the defence of qualified privilege. He urged the court to resolve both issues in the appellants' favour. F

***In the course of resolving issue 3, I referred to the case of Bakare Vs Ibrahim wherein the concepts of 'technical malice' and 'malice in fact or express malice' in an action for defamation were explained. As held by this court, technical malice arises where malice is inferred by operation of law i.e. where it is pleaded that the words were printed and published "falsely and maliciously" and it is shown that the defamatory words were published without lawful excuse the law presumes that the defendant is motivated by malice. In such a situation*** G

**the plaintiff is not required to give particulars of the facts on which he seeks to rely in support of the allegation that the words were published “maliciously”.** See: Atoyebi Vs Odudu 1990 6 NWLR Pt.157 384 @ 401 B- D.

**A different consideration arises where the defendant raises the defence of qualified privilege.** In Iloabachie vs Iloabachie (2005) 5 SC (Pt 11) 149 @ 153 line 1-8, this court quoted with approval the dictum of Uwaifo JCA (as he then was) in NTA vs. Babatope (1996) 4 NWLR (Pt 440) 75 @ 96 F-G where he said

*“Qualified privilege is a defence to an untrue publication. It can only be claimed however when the occasion of the publication is privileged.”*

In the same case from page 153 lines 39 - 44 to page 154 lines 1 - 4, this court also referred to the dictum of Lord Esher, MR in Pullmon Vs Hill Ltd. (1891) 1 QB where he said:

*“An association is privileged when the person who makes the documentation has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it, Both these conditions must exist in order that the occasion may be privilege.”* See also: Atoyebi Vs Odudu supra 399 H.

**In the instant case, even though the publication turned out to be untrue, it is not in dispute that the appellants who granted the loan to the respondent had an official duty to inform the respondent’s employer of the current position of the facility and the said employer, having guaranteed the loan, had a corresponding interest to receive the information. In other words the occasion was privileged.**

**The position of the law is that once the plea of qualified privilege is made out, the inference of malice is rebutted and the burden is thrown upon the plaintiff to show and prove ‘express malice’ against the defendants. To discharge this onus, the plaintiff must deliver a reply alleging express malice and give particulars of the facts from which such malice is to be inferred.** See: Bakare Vs Ibrahim (supra) at 153 lines 15 - 22. **It is important to note that the duty to file a reply alleging express malice only arises where the defence of qualified privilege is made out.** In the case of Atoyebi Vs Odudu (supra) 404 B - C, Nnaemeka-Agu, JSC explained thus:

*“...the need to deliver a reply to plead express malice arises, not merely because a defendant has fled a defence of qualified privilege or fair comment. Rather it arises because he has made out the defence. To put it in another way it is a duty which is cast on him by the shifting of the burden of proof in the civil case, and not merely as a rule of pleading.”* B

***Learned counsel for the appellants went to great lengths to show that the 2nd appellant and the respondent had never met before the defamatory letter was written and argued that this fact rebutted the inference of actual malice. He further asserted that the publication was made in the honest belief of the truth of the contents. However, from the authorities referred to above, where the plea of qualified privilege is raised, the defendant’s motive or his belief or non-belief only becomes relevant in mitigation of damages where the plaintiff has put his intention in issue by serving a reply alleging express malice. A defendant’s belief in the truth of the allegation cannot be a ground for exculpating him where there is an issue of express malice, which can only be raised in a reply.*** See: Atoyebi Vs Odudu (Supra) @ 404 - 405 G - B; Ezekwe Vs Otomewo (1957) W.N.L.R. 130; Dr. Lewis Nthrenda Vs Paul Alade & Anor. (1957) N.N.L.R. 94; Plymouth Mutual Co-Operative and Industrial Societe Ltd. Vs Traders Publishing Association Ltd (1906) 1 KB 403 @ 418. D

***As noted earlier in the judgment, the appellants made out the defence of qualified privilege by showing the corresponding interest between the parties to give and receive the information contained in the letter in issue. The burden then shifted to the respondent to rebut the inference of malice by delivering a reply alleging express malice and pleading and proving the particulars from which such malice is to be inferred. For purposes of emphasis, I again reproduce paragraph 1(j) of the respondent’s reply to the appellants’ statement of defence and defence to counter claim found at page 68 of the record, where he pleaded thus:*** F

***“1 (j) The defendants acted maliciously when they wrote the letter pretending that the initial sum of N20 000.00 has (sic) not paid, whereas the salaries for the month of May, June and July 1999 cleared the debt.”*** G H

***The pleading clearly falls short of the requirement that a reply to a defence of qualified privilege must “resonate with facts and particulars to show the malicious intention of the publisher of the statement,” as stated by the court below in its judgment at pages 348 - 349 of the record. Contrary to the submission of learned counsel for the respondent, malice could not be inferred in the circumstances of this case having regard to the defence of qualified privilege properly made out by the appellants, which he failed to rebut. As rightly submitted by learned counsel for the appellants, although the lower court correctly stated the legal principles applicable to a defence of qualified privilege, it failed to apply them to the facts of the case. The finding of the court below that the appellants were actuated by malice is therefore, with due respect to their Lordships, quite erroneous.***

Notwithstanding the concurrent findings of the two lower courts, where it is shown that the findings are not supported by the evidence on record, this court has a duty to interfere in the interest of justice. See: Ibrahim Vs Osunde (2009) 1-2 SC; (2009)6 NWLR 382; Yusuf Vs Adegoke (2007) 11 NWLR (Pt. 1045) 332; Okewu Vs FRN (2012) 9 NWLR (Pt. 1305) 327. I am of the view that this is a proper case in which this court ought to interfere. The two issues are accordingly resolved in the appellants’ favour.

Issue 4 concerns the decision of the court below which affirmed the award of damages made by the trial court. Having resolved issues 1 and 2 in the appellant’s favour, it follows that there was no basis for the award of damages on the respondents’ favour. This issue, which challenges the quantum of damages awarded has therefore become otiose.

In conclusion therefore, notwithstanding the resolution of issue 3 against the appellants, the appeal is meritorious. It is hereby allowed. The judgment of the lower court affirming the decision of the trial court in respect of the respondent’s claim is hereby set aside. The plaintiff’s claims as per the writ of summons and statement of claim are accordingly dismissed. As there is no appeal against the dismissal of the appellants’ counter claim by the trial Court, that aspect of the judgment stands. The parties shall bear their respective costs in this appeal.

**ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, KEKERE-EKUN, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merit and should be allowed. B

My learned brother has exhaustively dealt with the issues for determination leaving me with nothing much to add.

From the facts of this case as stated in detail in the said lead Judgment, it is not in any doubt that the defence of qualified privilege availed the appellants contrary to the holding by the lower courts. C

It is settled law that an occasion of qualified privilege is one in which the maker of a publication has an interest or duty, whether legal, social or moral, to make it to a person who has a corresponding interest or duty to receive it. It is the existence of such an interest or duty that destroys the inference that the maker of the publication as actuated by another, which the law usually makes in areas of defamation, and allows for the occasion to be privileged, except there is evidence of actual or express malice. See *Ojeme Vs Momodu* (1994) 1 NWLR - 653, etc. D E

At the time of writing the letter alleged to be libelous, the appellant honestly believed that the respondent had failed to redeem his indebtedness to the 1st appellant and that this account had been abandoned. The letter was also written pursuant to a general review of the status of some accounts which was carried out by the 2nd appellant in his official capacity or in the course of his official duties. The information contained in the alleged offensive letter was gathered in the course of the said review exercise. It is also on record that none of the signatories to the letter in question knew the respondent in person at the time of writing the letter in question. The letter was addressed to the employers of the respondent who were the guarantors of the loan extended by 1<sup>st</sup> appellant to the respondent and therefore had the interest, or duty to receive the information conveyed in the letter. F G H

So, you have a situation in which the appellants had both an interest in recovering, and a duty to recover, the loan facility granted the respondent, which they honestly believed was yet to be repaid in full at the time of the publication by them. The recipient of the letter

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(publication) complained of being the guarantor of the credit facility,  
had both an interest in knowing the state of affairs of the facility and  
a duty to make the necessary redress.

It is in the above circumstances that we hold that the defence  
of qualified privilege availed the appellants for the publication in is-  
B sue.

It is also for the above and the more detailed reasons con-  
tained in the well written lead Judgment of my learned brother that I  
too find merit in this appeal and consequently allow same.

I abide by the consequential orders made in the said lead Judg-  
C ment including the order as to costs.

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**NGWUTA JSC**

D I have read in draft the lead judgment just delivered by my  
learned brother, Kekere-Ekun, JSC. I agree that the resolution of  
issues 1 and 2 in favour of the appellants left no room for the award  
of damages made in favour of the respondent.

For the reasons adumbrated in the lead judgment I agree that  
E notwithstanding the resolution of issue 3 against the appellants, the  
appeal is meritorious. I also allow the appeal, set aside the judgment  
of the Court below which had affirmed the judgment of the trial  
Court.

I strike out the claim in the trial Court. The order of the trial  
F Court dismissing the counter-claim stands as there was no appeal  
against it. Parties to bear their respective costs.

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**MUHAMMAD JSC**

G Based on my preview of the lead judgment of my learned  
brother Kekere-Ekun JSC, I hereby allow the appeal and abide by  
the consequent orders made in the lead judgment including the or-  
der on costs.

H