IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT AUCHI

ON TUESDAY, THE 29TH DAY OF MARCH, 2011

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR	-	JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA	-	JUDGE
TIMOTHY UKPEBOR OBOH	-	JUDGE
PETER AKHIMIE AKHIHIERO	-	JUDGE
OHIMAI OVBIAGELE	-	JUDGE

APPEAL NO: CCA/19A/2009

B E T W E E N:

ALIU JAPAN IGBADUMHE é . é . é . APPELLANT

A N D

MRS. PAULINA AGBONA é . é . é . . RESPONDENT

MAJORITY JUDGMENT
DELIVERED BY MARY NEKPEN ASEMOTA (JCCA)

This is an appeal against the judgment of the Jattu District Customary Court, Jattu in suit No. JDCC/5/2008 delivered on the 4th day of June, 2009.

The appellant (as plaintiff) claimed against the respondent (as defendant) the sum of ₦50,000.00 (fifty thousand naira) being special and general damages for defamation, in that the respondent spoke of and concerning the appellant in Etsako dialect that he is a thief, a layabout, an impotent man, as well as a bastard.

The sum claimed is to be used by the appellant for purification in order to be acceptable to the entire Jattu community and in accordance with Uzairue customary law.

The appellantôs case as put forward by him and his lone witness was that on the 10th day of April 2008 at about 12 noon, he was sitting in his house with five of his friends who came to visit him, when the respondent came to him and asked whether it was her husband who dissuaded the appellantôs father from writing a Will. The appellant answered in the affirmative, as there was no previous quarrel between them. Whereupon the respondent started to shout and uttered the following words in Etsako dialect ñAliu Umoakayen umiegboa bovba elo gu a unutsetse nure tue me egwe ogiato ukila. Umatisanokpotso ulekhi Japani ne rame ovbiame lolo emeze khivba ge khunu ipalour natsolor avbo. Nidetor vbor.ò

The words translated into English mean that the appellant is a thief who has no work and is an impotent man as well. That if indeed Japan is his father he should have been occupying Japanôs palour which is at present under lock and key. The appellant was then taken away from the scene with a motorcycle by one of his friends.

The respondentôs case on the other hand was that she did not utter any of the slanderous words. The respondent and the appellant are neighbours. On the 14th day of April, 2008, early in the morning, there was a noise of some persons quarreling in the appellantôs house. The respondentôs husband intervened and

prevailed on the appellantôs elder brother to leave for his home.

After the respondentôs husband had left home for work, the appellant came to her and accused her husband of being responsible for the quarrel between him and his brother because as a close friend to his late father he refused to take the said father to a lawyer to write a Will. The appellant used his late father to curse the respondentôs husband and there was an exchange of words between them. The appellant left on a motorcycle, with a threat that he would kill the respondentôs husband.

Thereafter, the respondent was summoned before the Ogieneni, the traditional ruler of the place. The respondent admitted that she was one of those who accompanied the appellant when he went to Elele to take a wife and that the appellant has a daughter as well. There is a suit at the High Court Auchi, between the respondentôs husband and appellant.

The trial court in its judgment, found in favour of the respondent and dismissed the appellantôs case in its entirety.

Dissatisfied with the decision of the trial court, the appellant filed a notice of appeal containing an omnibus ground of appeal and one other ground of appeal.

With leave of this Court, the appellant filed two additional grounds of appeal. The four grounds of appeal without their particulars are as follows:

ñ1. That the judgment of the trial Jattu District Customary Court, Jattu is unreasonable and cannot be supported having regard to the weight of

evidence.

2. That the trial Jattu District Customary Court, Jattu erred in law when it failed to evaluate the evidence of the parties placed before it as required by the native law and custom of Uzairue before it dismissed the claim of the plaintiff/appellant.

3. The trial Jattu District Customary Court, Jattu failed in accordance with the Uzairue or Jattu customary law and tradition to give proper consideration or consideration to the evidence of the plaintiff together with that of his witness before arriving at its decision, dismissing the suit of the plaintiff and thereby occasioning a miscarriage of justice.

4. The trial Jattu District Customary Court fails (sic) to apply the customary law and tradition of defamation of Uzairue or Jattu to the facts or evidence placed before it in this suit of defamation and thereby arrived at a wrong decision.ò

The parties in consonance with the rules of this Court filed and exchanged their briefs of argument.

The appellantôs counsel M. D. Oshomah Esq., formulated three issues from the four grounds of appeal for determination as follows:

ñ1. Whether considering the state of the law, the claim of the plaintiff and the evidence adduced by the parties before the trial customary court, was the Jattu District Customary Court Jattu justified in

making its order of dismissal of the claim.

2. Whether the findings of the trial Jattu District Customary Court, Jattu which are not supported by evidence did not occasion a miscarriage of justice sufficient in law to vitiate the judgment.

3. Whether the trial Jattu District Customary Court, Jattu properly considers (sic) or evaluates (sic) the evidence of the parties before coming to a decision of the dismissal of the suit.ò

On his part, learned counsel for the respondent S.K. Mokidi Esq., formulated two issues for determination as follows:

ñ1) Whether the trial court did not give a proper consideration to the evidence before it dismissed the appellantôs case. Grounds 1, 2 and 3.

2) Whether the appellant adduced any evidence of Jattu or Uzairue customary law on defamation which the trial court failed to apply before dismissing his case. Ground 4.ò

We have critically examined the issues as formulated by both counsel. We prefer the two issues as formulated by the respondentôs counsel. They are more encompassing and we adopt same with some slight modifications as follows:

1. Whether from the case of both parties, it can be said that the trial court properly assessed and evaluated the evidence placed before it in arriving at a conclusion dismissing the appellantôs case (Grounds 1, 2

and 3)

2. Whether the trial court failed to apply the customary law of defamation of Uzairue or Jattu to the case before it. (Ground 4).

Arguing issue one, learned counsel for the appellant submitted that the trial Jattu District Customary Court failed woefully to evaluate the evidence of the parties. He contended that the trial court in its judgment merely summarized the evidence of the parties and witnesses without evaluating same before it arrived at its decision.

It was his submission that in civil causes or matters, courtsô decisions are arrived at on a preponderance of evidence or balance of probability. Counsel argued that the trial court did not consider the case put forward by the respondent ***vis-à-vis*** that of the appellant before arriving at its decision.

Furthermore, counsel submitted that the failure of the trial court to consider all the facts and issues placed before it by both parties, occasioned a miscarriage of justice. He added that the omission constitutes a denial of fair hearing as enshrined in the constitution. He cited the case of Opuiyo v. Omamiwor (2007) All FWLR (Part 378) 1093 in support of the proposition.

Counsel submitted that the trial court erred when it merely recited part of the evidence of the appellantôs lone witness and stated that this witness contradicted the evidence of the appellant without more.

It was counselôs further submission that the trial court acted on a wrong

premise when it inferred that the words were not spoken since the appellant did not react when he spoke the words complained of. According to counsel, the holding contradicts the earlier holding of the trial court at page 28 that the words uttered were defamatory and uttered without a reply from the appellant.

He contended that if the appellant had replied the respondent when the words were uttered there would have been an altercation and the words would have been a vulgar abuse. Counsel cited in support the cases of Benson v. West African Pilot Ltd. (1965) LLR 175 and Yinusa Bakare v. Rasaki Ishola (1961) WNLR 106.

Counsel submitted that what a party requires to prove his case is the quality of the evidence led, rather than the number of witnesses called. It was counselôs argument that the parties evidence particularly that of the respondent and her witness were never considered by the trial court.

He contended that where a trial court fails in its duty to evaluate evidence before it and to ascribe probative value to it in order to arrive at a correct decision, an appellate court is in a position to correct the error and re-evaluate such evidence. He added that the appellate court in the circumstance would enter judgment in favour of a party with the preponderance of evidence. Counsel cited the following cases in support:

1) Akinsegun Babalola & ors v. Adumo Rufus (2010) All FWLR (Part 515) 309,

2) General Mahammadu Buhari v. INEC & ors (2009) 167 LRCN 1 at pp. 153 ï 156,

3) Joseph Oyewole v. Karimu Akande & anor (2009) 177 LRCN 76 at 104,

4) Olalomi Industries Ltd v. Nigeria Industrial Development Bank Ltd. (2010) 178 LRCN 50 at 84 ï 85.

Finally on this issue, it was counselôs submission that the trial court failed to make any finding on the issues placed before it by the parties, the inference drawn by it was wrong, one sided and based on wrong principles of law which occasioned a miscarriage of justice.

Replying on issue one, learned counsel for the respondent submitted ***inter alia*** that evaluation of evidence is a matter for the trial court which had the opportunity to see and hear the witnesses. He submitted that the appellate court will only disturb findings of fact of a trial court where such findings are perverse. He contended that the trial courtôs findings in the instant appeal were not perverse but based on evidence adduced before it.

It was counselôs submission that the trial court was right when it held that the testimony of the appellantôs witness materially contradicted the appellantôs claim and his evidence with respect to the words uttered by the respondent. He added that the words as contained in the claim are different from the P.W.1ôs testimony of the words alleged to have been uttered by the respondent.

Furthermore, counsel submitted that the trial court was also right when it held that it is doubtful if the alleged defamatory words were uttered because the appellant failed to react instantly in accordance with the natural course of events. He added that the trial court had the opportunity to hear and observe the witnesses and their demeanour and came to the conclusion that P.W.1ôs evidence contradicted the appellantôs claim and his evidence.

He submitted that P.W.1 was not one of the three persons specifically mentioned by the appellant as being present when the incident took place. He contended that while the appellant claimed he was sitting down with five of his friends, the P.W.1 said he met the appellant with another boy sitting in front of his house. Counsel argued that the trial court was right in the circumstance to have disbelieved the appellant and accepted the respondentôs evidence that she did not utter the alleged defamatory words.

On the issue whether the trial court failed to consider the respondentôs evidence, counsel submitted that a plaintiff must succeed on the strength of his case. He contended that the trial court after disbelieving the appellantôs case, it was not open to the appellant to query why the respondentôs case was not considered.

Counsel submitted that the failure to translate into English the evidence of P.W.1 with regard to the alleged defamatory words was fatal to the appellantôs case. He urged this Court to discountenance the piece of evidence and expunge it

from the records as it is inadmissible. He cited the following cases in support of this proposition:

1. Ali v. Audu (2005) 3 FWLR (Part 270) 151 at 167
2. Lawson v. Afani Continental (2001) 2 NWLR (Part 752) 585.

In his reply brief of argument, the appellantôs counsel further submitted that the respondentôs counselôs analysis of the judgment of the trial court and his supply of the missing items, were merely academic as they were not a part of the judgment.

We have carefully considered the submissions of learned counsel on this issue which borders on evaluation of evidence. Evaluation of evidence involves a review of the evidence given by the parties, assessing same by the court by placing them together on an imaginary scale to determine in whose favour the balance tilts. See the ***locus classicus*** of Mogaji v. Odofin (1978) 4 S.C 91.

In weighing the evidence adduced by the parties, what should be paramount to the court is not the number of witnesses, oral or documentary but the quality of the evidence adduced. It is principally the duty of a trial court after hearing evidence from witnesses and watching their demeanour to evaluate evidence adduced and ascribe probative value to them. It is trite that an appeal court will not interfere with such a duty unless for some compelling reasons which include improper or non-evaluation of evidence and wrong application of the law to the facts resulting in a perverse judgment. See the case of Ogbechie v. Onochie

(1988) 1 NWLR (Part 70) 370.

Counsel for the appellant had contended that in its considerations of this matter, the trial court reviewed the evidence led by the appellant and his lone witness and said nothing whatsoever about the evidence led by the respondent and her witness.

We have examined the trial courtôs judgment which essentially was a restatement of the evidence adduced and the submissions of the appellantôs counsel. At page 28 of the record of appeal, it made some ñfindingsò which included the reasons for the judgment. It stated at page 28 lines 27 ï 31 as follows:

> ñEven when these words were spoken plaintiff did not utter a word but went away. P.W.1 by this evidence contradicts plaintiffôs claim and his evidence. For such defamatory words to be spoken of a person and such a person failing to react on the spot to such words lives (sic) much to be desiredé .ò

The trial court then concluded that the words were not spoken. The court further stated that the appellantôs failure to call other witnesses who were present apart from P.W.1 was fatal to his case. The trial court also referred to the authority of Alphonsus Chuks Ogo v. Caroline Adiba Ogo (1964) 8 NMLR 17 cited by the appellantôs counsel and concluded that unlike the instant appeal, two witnesses rather than one testified to hearing the alleged words out of the crowd said to be present at the scene. The foregoing were the ***ratio decidendi*** of the case.

Can the trial court be said to have property evaluated the evidence adduced according to law? We agree with learned counsel for the appellant that the trial court made reference only to the evidence of the appellant without making any reference whatsoever to that of the respondent and her lone witness. The evaluation to our mind was one sided. The trial court failed to place the evidence adduced by both parties on an imaginary scale, as enunciated in Mogaji v. Odofin (supra). This certainly resulted in a miscarriage of justice. Whatever it was worth, the trial court ought to have considered the respondentôs case and drawn its conclusion by giving reasons why it preferred the respondentôs case to that of the appellant. This, the trial court failed to do.

We are mindful of the fact that the trial court is a district customary court. It is an elementary principle of law that a trial court has a duty to evaluate evidence placed before it and give reasons why it prefers one side to the other. It may not do so with the skill of a court manned by persons learned in law, but that does not discharge it of the primary duty of evaluating the evidence adduced before it by the parties. Furthermore, the trial court did not even specify the contradiction in the evidence of the appellant and his witness. One is left to hazard a guess whether the contradiction referred is with regard to the words uttered, the number of persons who were present at the scene, or the non reaction of the appellant when the words were uttered.

Assuming, without conceding that there was such a contradiction, based on

the authority of Mogaji v. Odofin (supra) and Woluchem v. Gudi (1981) 5 S.C. 291, the trial court was not relieved of its duty to fully consider the evidence on both sides before reaching its decision.

A trial court in its primary duty of evaluating evidence must show how and why it came to its findings of fact leading to a resolution of the issue(s) brought before it. See the case of Oyewole v. Akande & anor. (2009) 15 N.W.L.R (Part 1163) 119 at 125 ratio 7.

In the instant appeal, the trial court merely restated the evidence presented by the parties without evaluating same. It has been held in a long line of cases that such restatement of evidence is not the same as evaluation of evidence. See the following cases:

1) Chukwu v. Nneji (1999) 6 NWLR (Part 156) 363
2) Imah v. Okogbe (1993) 9 NWLR (Part 316) 159.
3) Akintola v. Balogun (2000) 1 NWLR (Part 642) 532 at 536 ratio 6.
4) Anyanwu v. Uzowuaka (2009) 13 NWLR (Part 1159) 445 at 456 ratio 14.

Furthermore, with the failure of the trial court to properly appraise the evidence before it, the key issue whether the defamatory words were said or not remains unresolved. The trial court referred to the case of Alphonsus Chike Ogo v. Caroline Adiba Ogo (supra) cited by learned counsel for the appellant. It drew an analogy that because two persons testified to have heard the alleged defamatory

words out of the crowd and the appellant in the instant appeal called only one witness out of a gathering of five friends, the appellantôs case cannot stand. To our mind, this was based on a wrong premise. As stated earlier in the course of this judgment, it is trite that it is the quality of evidence adduced rather than the number of witnesses called that is of paramount importance.

Having held that the trial court failed to properly evaluate the evidence adduced before it, what then is the course open to this Court as an appellate court to take? It must be reiterated that the role of evaluating evidence is that of the trial court which had the opportunity to hear and see the witnesses. An appellate court would ordinarily not interfere with the findings and conclusions of a trial court. It would interfere and re-evaluate the evidence by making its own findings in the following circumstances:

a) where the findings of the trial court are perverse;

b) where the findings reached are not as a result of proper exercise of judicial discretion;

c) where the trial court did not make proper use of the opportunity of seeing and hearing the witnesses at the trial;

d) where the findings were reached as a result of the wrong application of the law.

See the following cases:

1) Woluchem v. Gudi (1981) 5 SC 91

2) Anyanwu v. Uzowuaka (2009) 13 NWLR (Part 1159) 445 at 458 ratio 17.

However, an appellate courtôs role of evaluation and re-evaluation of evidence can only be exercised if it would not involve the assessment of the credibility of the witnesses. It will be confined to making findings and drawing inferences and conclusions from proved or established facts. See the case of Woluchem v. Gudi (supra).

In the instant appeal, the trial court failed to determine the vital and crucial issue of whether the words were uttered by appraising and evaluating the evidence before it. It further exercised its discretion on wrong principles resulting in a miscarriage of justice. The exercise to determine whether the words were said would invariably involve the credibility or otherwise of the witnesses in this appeal.

In the circumstance, an order for a retrial will be the appropriate order to be made by this Court rather than a re-evaluation of the evidence. This is because where a re-evaluation would involve the assessment or credibility of witnesses, an appeal court is bereft of such powers as it did not see or hear the witnesses testify.

See the following cases:

1) Total (Nig.) Ltd. v. Nwako (1978) 5 SC 1

2) Ezeoke & 5 ors. v. Nwagbo & anor. (1988) 1 NWLR (Part 72) 616 at 629 ï 630.

3) Ogunleye v. Oni (1990) 2 NWLR (Part 135) 745.

Issue one is therefore resolved in the negative.

Having held that the trial court did not properly assess and evaluate the evidence adduced, which occasioned a miscarriage of justice for which a retrial is most appropriate, it becomes unnecessary to consider issue two. To do so would be futile and a mere academic exercise, which will serve no useful purpose.

Accordingly, it is hereby ordered that suit No. JDCC/5/2008 be remitted to Etsako West Area Customary Court, Auchi for a hearing and determination ***de novo***.

We make no order as to costs.

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HON. JUSTICE M. N. ASEMOTA

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HON. JUSTICE T. U. OBOH

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HON. JUSTICE P. A. AKHIHIERO

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HON. JUSTICE O. OVBIAGELE

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