IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON TUESDAY, THE 7TH DAY OF JULY, 2009

BEFORE THEIR LORDSHIPS

JOSEPH OTABOR OLUBOR	-	PRESIDENT
MARY NEKPEN ASEMOTA (MRS)	-	JUDGE
PETER AKHIMIE AKHIHIERO	-	JUDGE

APPEAL NO. CCA/22A/2006

BETWEEN

MISS HELEN AMASIHE ï OHU é é é APPELLANT

AND

MR. RICHARD ERHABOR é é é é RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Orhionmwon Area Customary Court, Abudu, delivered on the 28th day of October, 2004, in Suit No. 0ACC/18/2003.

In the said suit, the respondent (as plaintiff) claimed against the appellant (as defendant), the sum of ₦200,000.00 (two hundred thousand naira), as damages for slander and perpetual injunction restraining the

defendant, her servants, agents and privies from further publishing the said slander .

The respondentôs case at the trial court was that sometime in the month of November, 2003, while he was in his house at No. 1 Maternity road, Ugo, he heard the appellant abusing his children, Itohan and Imuetinyan. He immediately intervened and told his children not to insult the appellant.

At that point, the appellant said the following words in Bini language ñgaimwen azen agbon azenerhinmwin uwimaren azen uhin. Ewhe no tie ebo ogede na sonò, meaning ñKeep quiet you witch of the world and witch of the spirit do you think we do not know you. Where you not the person who flew on the plantain leaf last night?ò The said words were uttered in the presence of one Vincent and the wife of the respondent.

The following day, the appellantôs mother came with her children to fight the respondent in his house. He was summoned to the palace of the Enogie where he was told to swear on oath that he was not a wizard. He refused to take the oath because of his Christian belief and he was sanctioned by the community.

The wife of the respondent, Veronica Erhabor, testified as a witness and substantially corroborated the evidence of the respondent.

At the trial court, the appellant did not lead any evidence to defend the claim. Rather, her counsel rested his case on that of the respondent. Thereafter, the respondentôs counsel addressed the court and the matter was adjourned for judgment.

On the 28th day of October, 2004, the court gave judgment in favour of the respondent for damages suffered by him for the words uttered by the appellant. The sum of ₦150,000.00 (one hundred and fifty thousand naira) was awarded as damages against the appellant and the court made an order of perpetual injunction, restraining the appellant, her servants, agents and privies from further publishing the said words. Costs was assessed at ₦800.00 (eight hundred naira) in favour of the respondent.

Dissatisfied with the verdict of the court, the appellant appealed against the judgment and filed a Notice of Appeal with the omnibus ground of appeal. Subsequently, with leave of this Court, the appellant amended the Notice of Appeal to incorporate additional grounds of appeal. All the grounds of appeal are reproduced verbatim as follows:

ñGROUND I

The court below erred in law when it held that the Plaintiff/Respondent was entitled to damages against the Defendant/Appellant for defamation of the Plaintiff/Respondentôs character.

PARTICULARS OF ERROR:

(a) There was no evidence before the court below to show that the Appellant/Defendant uttered the alleged defamatory words aside the Plaintiffôs evidence, which was controverted by the Defendant/Appellant.

(b) There was no evidence before the court to show that there was publication of the alleged defamatory words.

2. GROUND II

The trial court erred in law in awarding excessive damages against the Appellant without specifying the type of damages and without regard to the Appellantôs social and economic status.

PARTICULARS OF ERROR

(a) The trial court did not specify the type of damages awarded against the Appellant.

(b) There is evidence that both the Appellant and the Respondent are rural dwellers.

3. GROUND III

The judgment is against the weight of evidence.ò

Both parties filed and exchanged their briefs of arguments in accordance with the rules of this Court.

In his brief of argument, the learned counsel for the appellant, óBayo Ehinmosan Esq., of the Law firm of R. O. Isenalumhe & Co., identified two issues for determination as follows:

ñ1. Whether having regard to the evidence led at trial, the court below was right in holding that the Appellant was liable for defamation of character of the Respondent (Grounds 1 and 2)

2..Whether the court below was right in awarding excessive damages against the Appellant, without specifying the type of damages and without regard to the social and economic status of the Appellant.ò

The learned counsel for the respondent, M. K. Agienoji Esq., in the respondentôs brief of argument, adopted the issues as formulated by the appellantôs counsel.

We adopt the said two issues as formulated and tie them to the grounds of appeal as follows:

1. Whether having regard to the evidence led at trial, the court below was right in holding that the appellant was liable for defamation of character of the respondent. (Grounds 1 and 3)
2. Whether the court below was right in awarding excessive damages against the appellant, without specifying the type of damages and without regard to the social and economic status of the appellant. (Ground 2)

Arguing Issue one, the learned counsel for the appellant submitted that the respondent called his wife as a witness, but failed to call one Vincent who he maintained was a vital witness. He submitted further that the wife of the respondent was a tainted witness whose purpose was to serve the interest of her husband.

Arguing further, he submitted that the failure to call a vital witness is tantamount to an admission that if the witness had been called, his evidence would have been unfavourable to the respondent. He relied on the

provisions of section 149(d) of the Evidence Act, Laws of the Federation of Nigeria, 2004.

He posited that in order to succeed in an action for defamation, the respondent must prove the following six coterminous ingredients:

(i) Publication of the offending words;

(ii) That the words complained of refer to the plaintiff;

(iii) That the words are defamatory;

(iv) Publication to a third party;

(v) Falsity or lack of accuracy of the words complained of; and

(vi) That there is no justifiable ground for the publication of the words.

He cited in support, the following cases:

Alawiye v Ogunsanya (2003) FWLR Pt. (182) 1873 ratio 4; and Anate v Sanusi (2002) FWLR (Pt. 93) 1902, ratio 6.

Learned counsel submitted that there was no clear evidence of publication and time of publication. He argued that while the respondent told the court that ñone Vincent and my wife were there on the said day away from home on the 15/11/2003ò, the respondentôs wife testified that ñour visitors were there when the defamatory statement was made ï Mr.

Ogieva, a lady and a young girl were there.ò He maintained that the trial court should have dismissed the claim in the face of this contradiction.

Furthermore, counsel submitted that the trial court contradicted itself when it held in one breathe that Vincent was the person who heard the said words, and in another breathe that ñthere were more than one person, his wife, a young girl and a lady and one other man (Ogieva) who could not testify due to intimidation of the witness by the defendant.ò

Concluding, the learned counsel maintained that by his failure to call an independent and vital witness, the respondent failed to establish the publication of the alleged defamation. He submitted that the onus of proof was on the respondent and failure to discharge same was fatal to his case. He referred to the case of Anate v Sanusi (supra) rr 5 and 8 at page 1904 ï 1905.

Replying on Issue one, the learned counsel for the respondent, M. K. Agienoji Esq., submitted that the trial court rightly held that the appellant was liable for defamation of character. According to him, the respondent proved his case on the preponderance of evidence and established the ingredients of the tort of slander as required by law.

He submitted that the standard of proof of defamation was enunciated in the celebrated case of Rotimi Akinbola & Awolowo v West African Pilot

(1991) 1 All NLR 868. Furthermore, he cited the case of Alawiyi v Ogunsanya (2003) 39 WRN 1440 at 1442- 1443, rr 2 where the court stated as follows:

> ñThe rule is applicable whether in libel or slander, it is this, would the words used tend to lower the plaintiff in the opinion of, or the estimation of right thinking members of the society.ò

Counsel submitted that slander is actionable per se, without proof of damages when the words uttered about the plaintiff/respondent injure him in his

profession, trade, calling, office or impute a crime punishable with imprisonment or impute certain disease or unfitness for his calling. In support, he relied on the cases of Bashorun v Ogunlewe (2001) 1 NWLR (Pt. 400) at 221 & 228 ratio 11, and Alawiye v Ogunsanya (supra) at 143, rr 3 & 7.

The learned counsel maintained that once a defamatory utterance is made to any other person other than the respondent himself, it amounts to publication.

For this proposition, he relied on the case of Bashorun v Ogunlewe (supra) at p.

223, ratio 2.

The learned counsel referred to the evidence led by the respondent at the trial and submitted that the respondent led evidence in proof of his claim. He

posited that the respondent established the ingredients of the tort of slander.

Furthermore, counsel maintained that the P.W. 1 was not a tainted witness, and that relationship by blood per se is not sufficient to disqualify the evidence of a witness. He cited the cases of Akpan v The State (2001) 53 LRCN III at 6, ratio 7 (sic); and Okoro v The State (1998) 14 NWLR (Pt. 584) 181 at 197.

Counsel submitted that the tort of defamation does not require corroboration under the Evidence Act. He added that the respondent proved his case on the minimal proof as required by law because the appellant did not contradict or challenge the evidence adduced by the respondent.

Finally, on the powers of the appellate court to interfere with the findings of a trial court, he contended that as a general principle of law, the evaluation and ascription of probative value to evidence are the primary functions of the trial court which saw, heard and assessed the witnesses. He further submitted that it is not the duty of the appellate court to substitute its own views for those of the trial court. For this proposition, he cited the case of Gaji v Paye (2003) 12 MJSC 76 at 79 ratio 13.

We have carefully considered the arguments of both counsel on this issue.

The learned counsel for the appellant has correctly enumerated the six essential elements to establish the tort of defamation. The question is whether the evidence adduced at the trial and accepted by the trial court was sufficient to establish the six elements as enumerated. The appellantôs counsel has vigorously contended that all the elements were not proved at the trial.

He vehemently challenged the reliance of the trial court on the evidence of the wife of the respondent. According to him, the respondentôs wife was a tainted witness whose purpose was to serve the interest of her husband and that the only independent witness was one Vincent who the respondent failed to call.

It is settled law that a plaintiff in a civil suit has a discretion in the choice of his witnesses. He is not bound to call a host of witnesses to prove his case.

A plaintiff can succeed on the evidence of a single witness who may be the plaintiff himself, or some other person, without any other confirmation of the evidence of the witness by the testimony of another witness, or by any other circumstance.

See: AGUDA: LAW AND PRACTICE RELATING TO EVIDENCE IN NIGERIA, 2nd Edition par. 25.04.

See also the cases of: Chief Tawaliu Bello v N.M. Kassim (1969) 1 N.M.L.R. 148 at 152; and Okoronkwo V Chukweke (1992) 1 N.W.L.R. (Pt. 216) 175 at 193. We are of the view that failure to call Vincent was not fatal to the respondentôs case.

On the issue of whether the wife of the respondent was a tainted witness, we refer to the case of Ishola V The State (1978) 9-10 SC 81 at 100, where Idigbe JSC cautioned that:

> ñit is proper to confine this category of witness (i.e. ótainted witnessô) to one who is either an óaccompliceô or by the evidence he gives, may and could be regarded as having some purpose of his own to serveò (underlining supplied).

The mere fact that the witness is the wife of the respondent does not make her a tainted witness. The appellant has not shown that she had a purpose of her own to serve.

On the alleged contradiction between the evidence of the respondent and that of his wife on those who were present when the defamatory statement was made, we are unable to see any contradiction in their evidence. The mere fact that the respondent mentioned the presence of Vincent, while his wife mentioned one Mr. Ogieva, a lady and a young girl as those who were present, does not constitute a contradiction. It is quite

possible that all these witnesses were present. It would have amounted to a contradiction if the respondent stated that the said Mr. Ogieva, the lady and the young girl were not present or if the respondentôs wife stated that the said Vincent was not there.

In the circumstance, we uphold the finding of the trial court that the element of publication was established at the trial.

It is settled law that any imputation which may tend to lower the reputation of the plaintiff in the estimation of right thinking members of the society and expose him to hatred, contempt or ridicule is defamatory. See the cases of: Ciroma v Alli (1999) 2 N.W.L.R. (Pt. 590) 317 at 350; and F.M.B. v Adesokan (2000) 3 W.R.N. 17 at 29.

We hold that the trial court was right when it found the appellant liable for defamation of the respondentôs character. In most African communities, witches are hated and despised. The allegation of witchcraft was sufficient to expose the respondent to hatred, contempt and ridicule in his community.

In the event, we resolve Issue one in favour of the respondent.

On Issue two, the learned counsel for the appellant submitted that the trial court was wrong when it did not specify the type of damages it awarded and the principles used to arrive at the amount awarded. He maintained that

the court proceeded on wrong principles of law and that the amount awarded was manifestly and extremely high. He relied on the case of Chief F.R.A. Williams v Daily Times of Nigeria Ltd. (1990) All NLR. 1, ratio 9.

Counsel further submitted, that assuming but without conceding that the appellant called the respondent a witch, the trial court failed to appreciate the sociological fact that rural dwellers commonly use the words ñwitchò, ñdevilò ñogbanjeò, ñdemonò, etc, without meaning or intending harm. He maintained that the trial court would have imposed a minimal amount as damages if it had appreciated the way of life of village communities.

Finally, counsel urged this Court to re-assess the damages and award a minimal and affordable sum, taking into consideration the economic circumstances of the appellant in the village. He further urged this Court to apply the principle which was applied in the sister case of CCA/6A/2007. Helen Amasihe ï Ohu and Anor v Veronica Erhabor (Unreported), wherein this Court re-assessed the damages and awarded a lesser sum.

Replying to Issue two, the learned counsel for the respondent submitted that since the tort of slander is actionable per se, the trial court need not specify the type of damages awarded. He submitted that the award of damages is at the discretion of the trial court. He relied on the case of Alawiye v Ogunsanya (supra) at p. 144, ratio 6, and submitted that the

amount awarded by the trial court as damages was not above the amount claimed nor too high in view of the economic losses, and the humiliation suffered by the respondent.

Counsel argued that the case of Williams v Daily Times (supra), cited by the appellant is not applicable because the said case is on libel, which involves publication in newspapers where there is opportunity for retraction, whereas the present case is on slander. He referred severally to the evidence adduced by the

respondent to show the damages to his reputation and business as a result of the slander.

We have considered the submissions of both counsel. On the award of damages, the general rule is that an appellate court will not interfere with the award of damages made by the trial court, but where there is a clear failure on the part of the lower court to follow settled principles of law for the award of damages, an appellate court can properly interfere with the award of damages made by the trial court.

See the cases of Zik Enterprises Ltd. V Awolowo (1955) 14 WACA 696 at 704; Shodipo & Co. Ltd V Daily Times (1972) 1 All N.L.R. 406; and Eze V Lawal (1997) 2 N.W.L.R. (Pt. 487) 333.

Furthermore, an appellate court will interfere with the assessment of damages, when the damages awarded are manifestly too high or too low. See the case of Okafor V Okitiakpe (1973) 8 N.S.C.C. 70 at 73.

Upon a careful perusal of the record of proceedings at the trial court, we observed that the court did not explain how it arrived at the award of ₦150,000.00 (one hundred and fifty thousand naira), in favour of the respondent. The court did not follow any discernible principle in the award. Since no reason was given for the sum awarded, the award can be faulted on this ground.

Moreover, from the evidence adduced at the trial, the parties are rural dwellers. The award of the sum of ₦150,000.00 (one hundred and fifty thousand naira) appears to be on the high side. In the sister case cited, based on very similar facts, this court re-assessed the damages and awarded the lesser sum of ₦50,000.00 (fifty thousand naira)

We shall apply the same principle in this appeal. We hold that the sum of ₦50,000.00 (fifty thousand naira) will be adequate compensation for the respondent.

Accordingly, we resolve Issue two in favour of the appellant and set aside the award of the sum of ₦150,000.00 (one hundred and fifty thousand

naira) and substitute same with the sum of N50,000.00 (fifty thousand naira) as damages in favour of the respondent for slander.

Having resolved Issue one in favour of the respondent and Issue two in favour of the appellant, this appeal succeeds in part. Accordingly, we affirm the judgment of the Orhionmwon Area Customary Court, Abudu, delivered on the 28th day of October, 2004 in this case, except as regards the quantum of damages for slander.

There shall be no order as to costs in this appeal, and in the court below:

HON. JUSTICE JOSEPH OTABOR OLUBOR

HON. JUSTICE MARY NEKPEN ASEMOTA (MRS)

HON. JUSTICE PETER AKHIMIE AKHIHIERO

R.O. Isenalumhe Esq. ... é Counsel for the Appellant

M. K. Agienoji Esq. é é Counsel for the Respondent.