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

ON TUESDAY, THE 31st DAY OF MARCH, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA (MRS) - JUDGE
PETER AKHIMIE AKHIHIERO - JUDGE

APPEAL NO. CCA/4A/2006

B E T W E E N:

MRS. NENE AMONI é é é é é é APPELLANT

A N D

MR. SMART AMONI é é ... é é é RESPONDENT

J U D G M E N T
DELIVERED BY MARY NEKPEN ASEMOTA (MRS) JCCA

At the Owan West Area Customary Court, Sabongidda-Ora the respondent (as plaintiff) claimed against the appellant (as defendant) the sum of ₦30,000,000.00 (thirty million) being special and general damages for slander in that the appellant spoke of and concerning the respondent in the presence of some persons the following words in pidgin English:

ñYou Smart we no know in Papa.ò

ñNobi Amoni born you.ò

ñYou bi bastard.ò

The words translated into English mean that the respondent is a bastard who does not know his father.

The respondent has therefore been humiliated, ridiculed, exposed to contempt and his reputation lowered in the eyes of members of Uhonmora-Ora community and the general public.

The respondentôs case at the trial court was that on the 10th day of December, 2000, he went to the house which he inherited from his father, J.W. Amoni, at No. 20 Eme Road, Uhonmora. He noticed that the doors were locked and inquired from the appellant as to who locked the door. He demanded that the door be opened. When the appellant refused to do so, he broke the key and forced the door open in order to gain access into the building and his room. The appellant threatened to have him arrested and a quarrel ensued. The appellant uttered concerning the respondent the words ñSmart you wey no know your papa. No be Amoni born you. Oh! You be bastard.ò These words were uttered in the presence of Oyinobi Amoni, P.W.1 Monday Adeola and P.W.3 Amoni Isiudokho. The statement made by the appellant has made Uhonmora people as well as his colleagues and mates to look down on him.

The appellantôs case, on the other hand, was that she never called the respondent a bastard. On the 10th day of December, 2000, the respondent came to her late husbandôs house and forced the door open. He claimed that

the house had been shared to him. The respondent abused the appellant and there was a quarrel between them. The matter was reported to the police.

There is a paternity suit at the High Court, Afuze between Amonió children and the respondent.

The trial court after a review of the evidence adduced by the parties, found in favour of the respondent. It dismissed the claim for special damages and awarded the sum of ₦5,000.00 (five thousand naira) as general damages against the appellant.

Dissatisfied with the decision of the trial court, the appellant filed a Notice of appeal with one original ground of appeal. With leave of this Court, the appellant filed four additional grounds of appeal. The original ground of appeal and the four additional grounds of appeal without their particulars are reproduced as follows:

ñ1. The trial court erred in law and thereby came to a wrong conclusion when it held that the claim of the plaintiff was proved against the defendant when the essential legal elements or ingredients for the proof of defamation of character by slander (which was the claim before the court) was not proved as required by law.

2. That the decision or judgment of the trial court is against the weight of evidence adduced at the trial.

3. That the trial court erred in law and thereby came to a wrong conclusion when it failed to properly assess and properly evaluate the evidence of the parties and their witnesses.

4. The trial court erred in law when it failed to fully consider the defence of the appellant.

5. The trial court erred in law when it held the appellant liable for slander without regard to the fact that the alleged spoken words were mere vulgar abuse allegedly said during the heat of a quarrel.ò

The parties filed and exchanged their briefs of argument.

The appellantôs counsel, O.D. Ejere Esq., formulated two issues for determination as follows:

ñ1. Whether the trial court was not in error when he (sic) held that the claim is proved against the appellant despite the fact that the essential ingredient or legal element of slander as required by law were not proved in view of the fact that such has been negative (sic) by the fact that what was allegedly said was said during the heat of a quarrel. This issue is distilled from the original ground and additional ground 4.

2. Whether from the case of both parties, it can be said that the trial court has properly assessed and properly evaluated the evidence

before it and whether it gave full consideration to the case of the parties (particularly the defendant) before arriving at the conclusion that (sic) appellant is liable. This ground is distilled from additional grounds 1 to 3.ò

On his part, learned counsel for the respondent, O. Oseije Esq., filed a Notice of Preliminary Objection as well as an amended respondentôs brief of argument in the alternative in case his preliminary objection is not upheld. In the respondentôs brief, he adopted the issues as formulated by the appellantôs counsel. The preliminary objection is predicated on the ground that the original ground of appeal as contained in the notice of appeal ñis incurably defective, incompetent and invalid in law as it contravenes the provisions of S. 282(1) of the Constitution of the Federal Republic of Nigeria, 1999.ò

The preliminary objection touches on the competence of this Court to entertain this appeal. This is a fundamental issue and it is appropriate to deal with it first.

On the preliminary objection, counsel for the respondent submitted that the notice of appeal filed at the lower court with a lone ground of appeal complaining of errors of law are not issues of customary law which are cognizable in this Court.

He contended that by virtue of section 282(1) of the 1999 Constitution and section 247 (1) of the 1979 Constitution which are in ***pari materia***, an

appeal can only lie to the Customary Court of Appeal from the decision of the Area Customary Court only with respect to any questions of customary law.

He added that the original ground of appeal not having raised a question of customary law is incompetent and liable to be dismissed. He relied on the following cases in support of his submission.

1) Ohai v. Akpoemonye (1999) 65 LRCN 77 at 79

2) Golok v. Diyalpwan (1990) 3 NWLR (part 159) 411 at 418

3) Lohli Wuyep v. Garba Wuyep (1997) 10 NWLR (part 523) headnotes 2, 4, 5 and 6 at 158 ï 159

4) Haruna Mushuwareng v. Yakubu Abdu (2003) 11 NWLR (part 831) page 403

Counsel further submitted that the additional grounds of appeal cannot stand since the original or main ground of appeal is incompetent because one cannot place something on nothing and expect it to stand.

It was his contention that the four additional grounds of appeal are incompetent, as they do not also raise issues of customary law.

Finally, he urged this Court to dismiss the grounds of appeal as incompetent and incurably defective.

We have observed that the appellantôs counsel did not proffer any argument in reply to the preliminary objection by way of a reply brief.

We have carefully considered the submissions of the respondentôs counsel on the preliminary objection. The main thrust of his submission is that the original ground of appeal which is a complaint based on an error of law is not an issue involving customary law.

It must be stated here without equivocation that slander is known to customary law. This Court has in a number of its decisions stated and restated that customary law is a matter of fact to be proved by evidence. Therefore customary law and the procedure for establishing the facts are interwoven. It is not practicable to formulate an issue of customary law without having regard to the facts that are necessary to prove the customary law in question. Section 282(1) of the Constitution of the Federal Republic of Nigeria, 1999 cannot be construed otherwise. See Appeal No. CCA/25A/2006 Obotokhai Oratokhai & anor v. Mrs. D.O. Imiere & anor (unreported), a judgment of this Court delivered on the 25th day of February, 2008 at page 11.

The original ground of appeal and the other grounds of appeal in this appeal are complaints against the application of the law to the evidence adduced before the trial court. Evaluation of evidence is known to all courts, including Customary Courts. We therefore hold that the grounds of appeal are competent before this Court.. The preliminary objection fails and is accordingly dismissed.

Having disposed of the preliminary objection, we shall now consider the substantive appeal.

As stated earlier in the course of this judgment, the respondentôs counsel did not formulate separate issues but merely adopted the issues as formulated by the appellantôs counsel.

On our part, we also adopt the two issues formulated by the appellantôs counsel and slightly reword them as follows:

1. Whether the trial court was not in error when it held that the claim is proved against the appellant, despite the fact that the essential ingredient or legal elements of slander as required by law was not proved in view of the fact that such has been rendered negative by the fact that what was allegedly said was said during the heat of a quarrel. (Grounds 1 and 5)

2. Whether from the case of both parties, it can be said that the trial court properly assessed and properly evaluated the evidence before it and whether it gave full consideration to the case of the parties (particularly the defendant) before arriving at the conclusion that the appellant is liable (Grounds 2, 3 and 4)

Arguing issue one, learned counsel for the appellant submitted that the publication to a third party of the exact offensive words which is an essential requirement for proof of defamatory statements were not proved. He

contended that neither the respondent nor his witnesses could prove the exact words as contained in the claim to wit:

ñYou Smart we not know in Papa.ò

ñNobi Amoni born you.ò

ñYou bi bastard.ò

Counsel argued that while P.W.1 who claimed to be an eye witness merely stated that he saw the two parties quarrelling when the appellant shouted that Amoni is not the respondentôs father the P.W.2 gave inadmissible hearsay evidence that the respondent came to his house to tell him that he had a quarrel with the appellant in the public. Furthermore he contended that the P.W.3 who is a son of the respondent stated that the appellant ran after them along Eme Road, shouting that the respondent is a bastard and that the house does not belong to him.

Counselôs contention is that even the respondent in his evidence could not state the exact words as his statement at page 15 lines 14 ï 17 of the Record of Appeal was ñSmart <u>you</u> we no know <u>your</u> papa no be Amoni born you <u>oh</u>! You be bastardò, while under cross examination at page 16 lines 27 ï 29 he stated ñThe exact word is ôbastardô. She exactly said ñSmart we no know in papa. Nobi Amoni born you. You be bastardò.

He submitted that since the exact words could not be proved by the respondent and his witnesses, the only reasonable conclusion that can be

drawn is that the said offensive words were not published to them and indeed there was no publication. He relied on the case of Issa Bia v.A.H Murray 14 WACA 499.

Counsel contended that assuming (but without conceding) that the court holds that there was a publication, the said publication is not libellous or scandalous merely because it causes some discomfort to the aggrieved party. There must be evidence of those to whom his reputation has been lowered in their estimation. For this proposition, counsel cited the case of Stephen Aburime v. Berger Paints Nigeria Ltd & anor (1974) 4 UILR (part IV) 458.

He submitted that as long as the witnesses who were alleged to have heard the offensive words could not prove the said defamatory words as allegedly published, there was no publication or defamation of the respondentôs character.

Furthermore, counsel submitted that there was a common ground between the respondent and the appellant from the evidence adduced that they were engaged in a quarrel when the alleged defamatory words were uttered.

He submitted that one of the recognized defences to defamation is that words uttered or spoken in the heat of anger or quarrel is not actionable except the maker proceeds to particularize such abusive words with a view to disparaging the character of the person against whom the statement is made.

He added that the trial court erred in law when it failed to consider the defence that words spoken in the heat of passion or anger do not amount to defamation. This is because the use of abusive words are common features among various communities (Uhonmora-Ora community inclusive). He relied on the case of Bakare v. Ishola (1959) WNLR 106.

He submitted that this principle of law is available under the common law as well as under customary law. He cited the case of Ogbede v. Omugbe (1975) 5 UILR (part 2) 199.

Finally on this issue, counsel submitted that the trial court was wrong when it came to a conclusion that the principle does not apply to customary law.

Replying on this issue, learned counsel for the respondent submitted that in an action for defamation in customary courts it is not mandatory that the exact defamatory words be given in evidence. According to him, this borders on technicalities and what is important is whether it can reasonably be inferred from the circumstances of the case that a party has been defamed. He referred to the case of Obogu Uwajeyan v. Chief O. O. Onabedje (1970) MSNLR page 258.

He contended that the respondentôs witnesses could not be expected to remember the exact words spoken with pinpoint accuracy in the course of their testimony in court. He added that technicalities are not to supersede

substantial justice. He relied on the case of Shuaibu v. Nigeria Arab Bank Ltd (1998) 5 NWLR (part 551) 582 at 586 rr. 4 & 5.

He submitted that assuming but without conceding that the slanderous words uttered in the heat of passion during a quarrel were mere vituperations or vulgar abuse, the appellant would then be seen to be admitting that the words were true and cannot at the same time rely on the defence of vulgar abuse.

He argued that the trial court was right when it held that it is a taboo under Ora customary law to call anyone a bastard even during a quarrel and that the defence of vulgar abuse cannot avail the appellant.

Counsel further submitted that from the evidence adduced and the circumstances of the case, there was sufficient time lag from the time of the initial exchange of words, to the time when the slanderous words were uttered for tempers to have cooled. The respondent entered his house and later came out before the words were uttered in ñcold bloodò after tempers had cooled. He contended that if abuses were spoken first before the subsequent quarrel, it amounts to slander and not vulgar abuse. He relied on the case of: Ibeanu v. Uba (1972) 2 ECSLR 194 which he contended is distinguishable from the case of Bakare v. Ishola (1959) WRNLR 106 relied upon by the appellantôs counsel and the book Nigeria Law of Torts by Gilbert Kodilinye (1990 Edition) at pages 140 ï 141.

We have carefully considered the submissions of both counsel on this issue. The appellantôs counselôs submission under this issue is that neither the respondent nor his witnesses could prove the exact words which were uttered and that there was no publication of the slanderous words to a third party. Furthermore, that even if the words were uttered, it was a mere vulgar abuse.

One of the essential elements of slander is that there must be publication of the slanderous words to a third party. We agree with the appellantôs counsel that none of the respondentôs witnesses could say with exactitude the alleged slanderous words. The respondent on the other hand was unable to repeat verbatim the alleged slanderous words.

Learned counsel for the appellant had argued that since the exact words could not be proved by the respondent and his witnesses, the only reasonable inference that can be drawn is that there was no publication of the offensive words to them.

It is an established principle of the law of defamation that the actual words complained of must be proved. See Bakare v. Ishola 1959) WRNLR 106 and Daniel Ibeanu v. Josiah Uba (supra).

Furthermore, publication to a third party or parties is an essential element of slander. The persons to whom the words were published must be able to state the actual words in the language it was spoken.

It would appear that the position is slightly different in an action for defamation in a Customary Court. In the case of Obogu Uwajeyan v. Chief O. O. Onabedje (supra) cited by learned counsel for the respondent, a case which originated at the Customary Court, Agbarho in Eastern Urhobo Division, the contention was whether the respondent was entitled to special damages when there was no proof that the slanderous words were sufficient to lower his reputation in the eyes of the public. On appeal by the High Court, it was held that a plaintiff in an action for defamation in a Customary Court applying purely customary Law is not saddled with the responsibility of proving the ingredients of an action for slander as he would be required to do in a court of law applying English principles of law of libel and slander. It added that what is important is that there should be evidence by the plaintiff which is accepted by the court that the alleged statement is likely to throw the plaintiff open to public ridicule and odium.

In the circumstance, the respondent and his witnesses could not have been expected to repeat the words allegedly uttered with exactitude before his claim succeeds.

It has been argued before us that even if the defendantôs words were uttered, they were spoken in the heat of anger or quarrel and were mere vulgar abuse.

From the evidence adduced by the parties, it is common ground that the respondent and the appellant were engaged in a quarrel before the offensive words were spoken. One of the known defences to slander is that the words uttered in the heat of a quarrel are mere vituperations or vulgar abuse and no action can be founded on it. See the case of Bakare v. Rasaki Ishola (supra) where there was a fight between the parties and thereafter they started to quarrel and in the heat of anger the appellant in the presence of other persons spoke the defamatory words. In an action for slander, it was held that the words uttered were mere vulgar abuse and was not actionable.

Counsel for the respondent had contended that tempers had cooled before the words were spoken. We have critically examined the evidence adduced and we are unable to see how learned counsel came to that conclusion. The case of Ibeanu v. Uba (supra) relied upon by him is clearly distinguishable from this present case in the sense that in the Ibeanuôs case there was no quarrel at all before the offensive words were used. Moreover there is nothing to show from the Record of Appeal that there was time lag between the quarrel and the use of the offensive language. It has been established from the evidence adduced that there was a quarrel between the appellant and the respondent when the offensive words were spoken in the heat of anger. The defence of vulgar abuse certainly avails the appellant in this appeal.

It is pertinent at this stage to comment briefly on the findings of the trial court that this defence is not known to customary law because the word bastard is a taboo under Ora customary law. Slander and its associated defences are well known under customary law. See the cases of:

1) Eyidondegba v. Egbe (1961) WNLR 182

2) Ogo v. Ogo (1964) NMLR 77.

3) Alhaji Amodu and John Holt v. Idah N.R.N.L.R 81

4) Abasi v. Williams 16 NLR 72

5) Ogbede v. Omugbe (supra)

The trial court erred in law when it failed to consider the defence of the appellant that the words even if uttered were mere vulgar abuse said in the course of a quarrel.

Issue one is therefore answered in the affirmative.

Issue two is whether from the case of both parties, it can be said that the trial court properly assessed and evaluated the evidence before it and whether it gave full consideration to the case of the parties (particularly the defendant) before arriving at its conclusion that the appellant was liable.

The appellantôs counsel submitted that the trial court failed to properly assess or evaluate the evidence of the parties. He argued that the trial court failed to fully consider the defence of the appellant.

He contended that the trial court in order to help the respondentôs case ***suo motu*** imported the evidence that P.W.3 said he cried when he heard that his father was called a bastard when there was no such evidence.

He submitted that the trial court failed to comprehend and correctly assess the effect of the proven fact that 10/12/2000 was a Sunday contrary to the assertion by P.W.1 who claimed to be an eye witness that he was taking his child to school when he heard the appellant utter the slanderous words.

Counsel contended that contrary to the trial courtôs opinion, this was material in determining whether P.W.1 was a witness of truth. More especially when this witness who claimed to be an eye witness could not state or recount the exact words the appellant allegedly spoke concerning the respondent.

He argued that the trial court failed to consider or mention the evidence of D.W.1, Elakhe Amoni, but rather relied heavily on the evidence of P.W.1 and P.W.3 to reach a decision. He submitted that the failure of the trial court to assess or evaluate the evidence of D.W.1 was fatal to the respondentôs case because it is settled law that a defence no matter how stupid it may appear must be considered.

He submitted that the respondent did not discharge the onus placed on him because he failed to call a witness to attest to the effect the said offensive words had on him. He referred to Sections 135, 136, 137 and 139 of the

Evidence Act and submitted that it is an elementary principle of law that he who asserts must prove.

Finally, he submitted that from the totality of the evidence adduced, the case of the appellant ought to have been preferred by the trial court. He urged this Court to allow this appeal.

Replying on issue two, learned counsel for the respondent submitted that the trial court carried out an unbiased and balanced evaluation of the evidence of the parties. He argued that the errors or shortcoming pointed out by the appellantôs counsel are not substantial and did not occasion a miscarriage of justice.

He submitted that where a trial court has properly appraised the evidence adduced, an appellate court ought not to embark on a fresh appraisal of the same evidence merely to arrive at a different conclusion from that reached by the trial court. He relied on the case of Akinloye v. Eyiyola (1968) NMLR 92

It was counselôs submission that an appellate court cannot interfere with the findings of a trial court except where such findings are perverse. He cited in support the case of Ajuwa v. Odili (1985) 2 NWLR (part 9) 710 and the dictum of Niki Tobi JSC in the case of Owie v. Ighiwi (2005) 3 M.J.S.C. 82 at 114 para A ï B

On the appellantôs counselôs contention that the respondent did not prove the effect of the defamatory words, he submitted that the evidence of the respondent and his witnesses suffices. He contended that in a Customary Court a party need not prove damages or the effect of the words of slander. He relied on the case of Obogu Uwajeyan v. Chief O. O. Onabedje (supra).

We have carefully considered the submissions of both counsel on this issue which borders on the evaluation of evidence by the trial court. We have observed that this issue is closely related to issue one and the appellantôs counsel in the course of his submission on issue one even stated that he was adopting his submission on issue one in respect of issue two.

It is trite law that the appraisal of evidence adduced in a case is principally the function of the trial court unless such findings are clearly wrong and perverse. See the following cases:

1. Dibie Ajuwa & ors v. Sebastian Benjamin Odili (1985) 2 N.W.L.R. (part 9) 710 ratio 7 at 712.
2. Ilokson & Co. (Nig.) Ltd v. UBNPLC (2009) 1 NWLR (part 1122) 276 at 282 ratio 8.

However, an appellate court will interfere with findings of fact by the trial court where the conclusion arrived at by a trial court is not borne out of the evidence led or the decision is a result of the courtôs consideration of

irrelevant factors or wrong application of law. The appellate court is duty bound to interfere to ensure that the correct decision based on the evidence led, consideration of relevant facts and correct application of the law is arrived at. See the following cases:

1. Sha(Jnr) v. Kwan (2000) 8 NWLR (part 670) 685.
2. Banyan v. Akingboye (1999) 7 NWLR (part 609) 31
3. Iwuoha v. NIPOST Ltd (2003) 8 NWLR (part 822) 308.
4. Ojeleye v. Regt. T.O.I.M.C & S.C.N. (2008) 15 NWLR (part 1111) 520 at 524 ratio 4.

We had earlier held while considering issue one that the trial court wrongly applied the law when it failed to consider the defence of the appellant that the alleged defamatory words were spoken during a quarrel and therefore was not actionable. This is a proper case in which this Court can interfere with the findings of the trial court.

For reasons already adduced while considering Issue one, we hereby resolve Issue two in the negative.

Having resolved the two issues in favour of the appellant, we hold that this appeal succeeds.

Consequently, the judgment of the Owan West Area Customary Court, Sabongidda-Ora delivered on the 29th day of December 2004 is hereby set aside together with its consequential orders. The respondent is to pay ₦3,000 costs to the appellant.

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HON. JUSTICE P. O. ISIBOR

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HON. JUSTICE M. N. ASEMOTA

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HON. JUSTICE P. A. AKHIHIERO

O.D. Ejere Esq. é é é é é é é Counsel for the Appellant
O. Oseije Esq. é é é é é é é Counsel for the Respondent