OCEANIC SECURITIES INTERNATIONAL LTD

V

ALH. BASHIR OLAIDE BALOGUN AND 4 **ORS.**

COURT OF APPEAL
(ILORIN DIVISION)

TIJJANIABDULLAHIJCA *(Presided)*
JOSEPH SHAGBAORIKYEGH JCA
ITA GEORGE MB ABA JCA *(Read the Lead Judgment)*

CA/KA4/2010

MONDAY, 23 JANUARY 2012

APPEAL - Damages - Award by trial court - Appellate court - .Attitude of thereto

BANKING LAW - DAR - Meaning of –

BANKING LAW - Cheque - Person who issues having reasonable belief || that it will be honoured upon presentation within three months -Non-culpabilitx of - Dishonoured cheques (offences) Act, section 1(1) and (3) considered.

BANKING LAW - DAR - Inscription of on a cheque - Whether automatically implies to dishonour of

CRIMINAL LAW AND PROCEDURE - Commission of crime - Citizens Duty of to report - Arrest and detention based thereon - Whether liable for

DEBT RECOVERY - Business of - Police - Where engages in Impropriety of

EVIDENCE - Facts in pleadings and facts deposed to in affidavit - Distinction between - Affidavit evidence - Failure to challenge - Effect of

EVIDENCE - Presumptions - Evidence which could be produced - Failure of party to produce - Presumption raised by - Evidence Act, section 149(d) considered

STATUTE - Dishonoured Cheques (Offences) Act, section 1(1) and (3) - Cheque - Person who issues having reasonable belief that it will be honoured upon presentation within three months – Non–culpability of

POLICE - Commission of crime - Citizens - Duty of to report - Arrest and detention based thereon - Whether liable for

STATUTE - Evidence Act, section 149(d) - Evidence which could be produced - Failure of party,' to produce - Presumption raised by

Issues:

1. Whether the trial court was right in the view it took that the applicant/1st respondent was arrested based on the debt of the Bamed Printers (Nig. J Ltd to the appellant as opposed to issuance of cheques which were dishonoured upon presentation.
2. Whether the trial court was wrong in holding the appellant liable for breach of applicant's Fundamental Rights when the appellant had valid ground to lodge a complaint against the applicant and the appellant did nothing outside the laws of the land.
3. Whether the trial court was wrong in directing that the appellant shall jointly and severally pay monetary sums awarded in favour of the applicant and whether the sums awarded followed settled principles of law on award of damages.

Facts:

The applicant claimed in the High Court of Lagos Slate that the 3rd respondent on the order of 1st. 2nd. 4th and 5th respondents arrested and detained him over the non-payment of a loan obtained by one Bamed Printers (Nig.) Ltd of which he is one of shareholders and a director. He further maimed that he did not guarantee the loan which was secured with

the company's factory machines, his car was confiscated and kept in the police station for two years. He therefore obtained the leave of court to enforce his fundamental rights and prayed the court for declarator, and injunctive reliefs to the effect that his arrest, and detention based on 5th respondent's baseless and false allegation is illegal and a gross violation of his right to dignity of human person and personal liberty as guaranteed by sections 34-and 35 of 1999 Constitution. The seizure of his car is illegal, unconstitutional and a violation of his right to property, order mandating the 1st - 44 respondents jointly and/or severally to release him and his car damages for his unlawful and unconstitutional arrest and detention and loss of use of his car and perpetual injunction restraining the respondents from further: interfering with his Fundamental Rights. The 5th respondent's case was that' the applicant, had issued two cheques to it, as security in fulfillment of the loan obtained by Bamed Printers Ltd, which were dishonoured with the inscription of DAR thereon and had reported the matter to the 3rd respondent who subsequently investigated the matter and arrested the applicant. The trial court granted applicant's claims. Aggrieved, the 5th respondent appealed to the Court of Appeal.

In determination of the appeal, the Court of Appeal considered the? following statute;

Evidence Act, section 151

> "When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe thing to be true and to act upon such belief, neither he nor representative in interest shall be allowed in any proceeding between himself and such person or such person representative in interest, to deny the truth of that thing.

Held: *[Allowing the appeal in part]*

1. *Duty of citizens to report commission of crime and whet$, liable for arrest and detention based thereon –*

Every citizen has a right and in fact, a duty to reports infraction of the law or commission/suspicion of commission of crime to the police and the police to have corresponding right and duty to investigate the complaint/report, in the course of their statutory due to detect and fight crime. It is the duty of citizens of the country to report cases of commission of crime *to* police for their investigation and what happens after report is entirely the responsibility of

the police. The citizens cannot be held culpable for doing their duty, unless it is shown that it is done *mala fide.* **Where an individual has lodged the facts of his complaint to the police as in this case by way of petition, and the police have there-upon on their own proceeded to carry out arrests and detention, then the act of imprisonment is that of the police. In the instant case, where the applicant was able to establish that his arrest at the instigation of the respondents, the trial court rightly held them jointly liable.** *Duru v. Nwangwu* **(2006) 5 SCNJ 394;** *Fajemirokun v. C.B. (CL) (Nig,) Ltd* **(2002) 10 NWLR (Pt. 774) 95 referred to]** *[P. 656, paras. G - H, P. 657, paras. B - E]*

Per MBABA JCA;[P. 656, paras. D - G. Pp. 659 - 661, paras. E - B]

> **"The appellant had claimed that it made a simple complaint/petition to the police against the 1st respondent for issuing cheques (exhibit OC2 and OC3) to it, which on presentation to the bank were dishonoured, as the bank marked on the cheques 'DAR' and the value not paid to it: that they had a right and a duty to report that act by the 1st respondent (who signed the cheques) to the police for investigation; that it had earlier written exhibit OC1 to the 1st respondent's company, warning them of the consequences of the cheques being dishonoured on presentation, that apart from just lodging the complaint/petition the appellant did nothing more and the police had a discretion to investigate the complaint or refuse it and whatever the police did in the course of investigating the complaint was their own act, as there is no agency relationship between the appellant and the police, and appellant has no control over the police!**
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> **That was a beautiful argument that would excuse the action of the appellant, if the complaint/ petition it made to the police was, in truth, just a complaint of issuing dud cheques, and not motivated by mischief....The content of the appellant's letter (exhibit OC1) to the 1st respondent's company is quite revealing, as published on page 41 of the record of appeal. It was addressed to the Chairman/Managing Director Bamed Printers (Nig.)**

Ltd.

"Attention:Alh. B. O. Balogun:

Re: Outstanding Payment on WAEC LPO_ Facility……."

Paragraphs 2, 3 and 4 of the letter respectively state as follows: "As you will recall you have issued two Oceanic Bank Cheques for Nl.456,000.00 and Nl,562,253.36 respectively, to liquidate the total outstanding debt with interest as at 5 December 2004.

It is surprising that you have failed to redeem these cheques as promised.

As directed by our Auditors, please be informed that we are presenting these cheques for clearing if we do not hear from you on or before 30 January 2005, should the cheques bounce, we shall have no alternative than to inform the appropriate authorities." (Emphasis mine).

Surprisingly, after giving the company up to 30 January 2005 to liquidate the debt before presenting the cheques, appellant, acting against the understanding in that letter proceeded to present one of the cheques on the very date it wrote the letter, that is 14 January 2005, and the 2nd cheque on 28 January 2005.

By its own very admission, the appellant, in that letter, revealed that there was understanding between the 1st respondent's company and the appellant that the cheques should not be present before 30 January 2005. For the appellant to hay presented the cheques for clearing on 14 and January 2005 (before the 30 January 20' impliedly agreed upon) it was acting in breach that faith, and done in mischief, to blackmail 1st respondent and the company, and create grounds for his arrest and detention!

That means the report/petition by the appellant to the police was actuated by malice and the sole motive was to use the police to recover the outstanding debt, contrary the claims of the appellant. Thus, the presentation of the cheques before the agreed date was a set up to ground the arrest of the 1st respondent,

whose attention had been called in the exhibit OC1. That was an evil scheme! No wonder then the appellant's refusal to exhibit or disclose the content of petition it wrote to the police!

Appellant could not therefore hide under the cover of reporting the 1st respondent for issuance of dishonoured cheques to subject him to the or deal of arrest and detention and detention of his car (for two years) and escape the wrath of the law. He was pursuing the recovery of the alleged debt and resorted to the use of the police!

What was the connection of the seizure of the 1st respondent's car and keeping it for 2 years with the alleged issuance of dud cheques, if appellant's interest was devoid of recovery of debt? And how was a corporate of a limited liability company tied to its machines as security, suddenly becomes the personal debt of the 1st respondent to warrant the ordeal meted out to him?

There was no way the pretence and dishonesty of the appellant could be covered in the circumstances as the eagle eye of the law saw through its mischief and unlawful attack on the 1st respondent, when the company (Bamed Printers (Nig.) Ltd), which owed the debt was not running away from its responsibility and had understanding with the appellant up to 30 January 2005 to liquidate the debt, according to exhibit OC1.

2. *Presumption raised by failure of parts' to produce evidence which could be produced, Evidence Act, section 149(d) considered –*

By the provisions of section 149(d), Evidence Act, where a party relying on a document in an action fails to produce the document and there is no proper explanation as to his inability to produce the said document, the court may upon his failure to produce it presume that the document, if produced would have been unfavourable to that party. In the instant case, where the 5th respondent failed to produce the petition allegedly written to the police by it, the trial court rightly held that it deliberately withheld same as it

would be e unfavourable to it. *[Nigerian Advert Services Lid* v. *UBA* I*Pic* **(2005) All FWLR (Pt. 284) 275 referred to]** *[P. 652, | paras. C - E]*

3 *Distinction between averments of facts in pleadings and* it *facts deposed to in affidavit and resultant effect of failure to challenge affidavit evidence –*

Averments of facts on pleadings must be distinguished from facts deposed to in an affidavit in support of application before a court. Whereas, the former, unless admitted, constitutes no evidence, the latter are by law evidence upon which a court of law, in appropriate cases, can act. An affidavit evidence constitutes evidence and J **any deposition therein not challenged is indeed admitted. In the instant case, where the respondents failed to rebut the facts deposed to in applicant's affidavit, the trial court rightly relied thereon.** *[Ajomale v. Yadual t* **(1991) 5 SCNJ 178;** *Dogari v. Attorney-General, Taraba State* **(an unreported decision of this court) in CA/J/243/2Q10 | referred to]** *[Pp. 658 - 659, paras. G - A] :*

4 *Non-culpability of a person who issues a cheque having reasonable belief that it will be honoured upon /: presentation within 3 months. Dishonoured Cheques; (Offences) Act, section 1(1) and (3) considered –*

By the provisions of section 1(1) and (3) of the Dishonoured Cheques (Offences) Act, a person shall not be guilty of an offence under the law, if he proves to the satisfaction of the court that when he issued the cheque he has reasonable ground for believing and did believe infact, that it would be honoured if presented | for payment within the period specified which period is 8 **three (3) months. In the instant case, where the 5th respondent presented the cheque drawn by the applicant before the expiration of the time specified therein, the trial** *court* **rightly held it liable for damages for inf ringement of applicant's fundamental rights when he was arrested on allegation of dishonour of.** *[Harb v. FRN* **(2008) AH FWLR (Ft. 430) 70S referred**

to] *[P. 661. paras. B - C]*

5. Whether inscription of DAR on a cheque automatically translates into dishonour of -

Per MB ABA JCA;[P. 661, paras. D - F]

> **"Can it also be said that the inscription 'DAR written on a cheque by a bank on presentation, means that the cheque is dishonoured and that there is no money in the account of the drawer? That cannot be so, except there is concrete evidence to the effect that such inscription connotes such meaning or inference.**
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> **Ordinarily, the inscription 'DAR' is an acronym usually interpreted to mean Drawers Attention Required. Of course, the drawer's attention can be required by a bank for myriads of reasons, for example to explain some things before a cheque is cashed, mostly to protect the interest of the customer (drawer) and the Bank. It would therefore be wrong for the drawee to run to town with the evil news that the cheque has been dishonoured simply because the cashier or accountant of the bank has written 'DAR' on the cheque."**

6. Meaning of DAR -

The inscription 'DAR' is an acronym usually interpreted to mean Drawer's Attention Required. *[P. 661, para. E]*

7. Impropriety of police engaging in business of debt recovery

Per MB ABA JCA;[Pp. 661 - 662, paras. F - E]

> **"I hold that the learned trial judge was right in his findings and conclusion that appellant employed the 2nd to 5th respondents to recover a secured debt of the Bamed Printers (Nig.) Ltd from the 1st respondent, when it unleashed the police against the 1st respondent, and they arrested and detained him and his car, against the dictates of the law.**

It has been stated many times that the police has no business in enforcement of debt settlements or recovering of civil debts for banks or anybody Only recently', in the unreported decision of this court in the case of *My eye and A nor. v. Gold and Ors.* **appeal No: CA/IL/M.95/2010, delivered on 7 December 2011,1 had cause to scream thus,** *ii* **my contributory judgment:**

> **"I have to add that the resort to the policy by parties for recovery of debts outstanding under contractual relationship, has been repeatedly deprecated by the court. The police have also been condemned and rebuked, several times, for abandoning** *of* **primary duties of crime detection prevention and control to dabbling in enforcement or settlement of debts and contracts between quarrelling parties. and for using its coercive powers to bread! citizens rights and/or promote illegalities and oppression. Unfortunately, despite all decided cases on this issue, the problem persists and the unholy alliance between aggrieved contractors/creditors with the police remains at the root of mad fundamental rights breaches in our courts (Per Mbaba, JCA). See also** *Yusuf Umarg A. A. Salam and Ors.* **(2001) 1 CHR 413.; This is another sad situation and appellant must be held liable, jointly; severally for the evil.**
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> **In the case of** *Ejefor v. Okeke* **(2000) NWLR (Pt. 665) 363, held 4, the appellate said:**
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> > **"Where there is an evidence of arrests detention which were done or instigated the respondent in an action for enforcement of fundamental rights**

application, it is for the respondent to show that the arrest and detention were lawful. In other words, the onus is on the person who admits detention of another to prove that the detention was lawful." See also, *Agbakoba v. SSS* **(1994) 6 NWLR (Pt. 35 i I 475.**

I therefore resolve the 1st and 2nd issues against the appellant."

8. *Attitude of appellate court to award of damages by trial court* –

An appellate court cannot interfere in the award of damages made by the trial court, except

(a) The lower court acted under a wrong principle of law, or

(b) Acted in disregard of applicable principles of law, or

(c) Was in misapprehension of facts, or

(d) Took into consideration irrelevant matters and disregarded relevant matters whilst considering its award, or

(e) Where injustice will result if the appellate court does not act or

(f) The amount awarded is ridiculously low or ridiculously high that it must have been an erroneous estimate of the damages.

In the instant case, where the award of damages by the trial court for unlawful arrest and detention were not proved to be erroneous, the appellate court did not interfere with. *[Okeme* v. *C.S. C.* **(2001) 5 WRN 101;** *Oloio v. Agip* **(2001) 31 WRN 60;** *Kopek Construction Ltd v. Ekisola* **(2010) All FWLR (Pt. 519) 1035 referred** *to][Pp. 663 - 664, paras. H - B]*

Nigerian Cases Referred to in the Judgment:

A.I.B. Ltd v. Lee & Tee hid. Ltd (2003) **NWLR** (Pt. 819) 366

Abhubiojo v.ACB Ltd (1966) **LLR** 156

Abiola v. *FRN* (1995) 7 **NWLR** (Pt. 405) 1

Abrabambi v. A.B.I. Ltd (2005) 19 **NWLR** (Pt. 959) I
ACB Ltd v. *Apugo* (2001) 5 **NWLR** (Pt. 707) 483
Adeleke v. NBN Ltd (1978) 1 **LRN** 99
Agbakoba v. SSS (1994) 6 NWLR (Pt. 351)475
Ajoku v Attorney-General, Rivers State (2006) All FWLR (Pt 312)2147
Ajomale it *Yaduut (*1991) 5 SCNJ 178
*Baridam v. State (*1994) 1 NWLR (Pt. 320) 20
COP, Ondo Stale it *Obolo (*1989) 5 NWLR (Pt. 120) 130
Dogari v. Attorney-General, Taraba State (an unreported decision of this court) in CA/J/243/2010
Duru v. *Nwangwu* (2006) 5 SCNJ 394
Edoho it *Attorney-General, Alewa Ibom Slate* (1996) 1 NWLR (Pt. 425)488
Edokpolor & Co. Ltd v. Ohenhen (1 994) 7 NWLR (Pt. 374) 736
Ejefor it *Okeke* (2000) 7 NWLR (Pt. 665) 363
Ekpeyong it *Nyong* (1975) 2 SC 71
Fajemirokun v. *C.B. (CL) (Nig,) Ltd* (2002) 10 NWLR (Pt. 774) 95
Fawehinmi v. IGP (2002) FWLR (Pt. 108) 1355. (2002) 7 NWLR (Pt. 767)606
Federal Mortgage Finance Ltd it *Hope Ejftong Ekpo* (2005) All FWLR (Pt. 248) 1667
Gbafe it *Gbafe* (1996) 6 NWLR (Pt. 455) 417
Harb v. *FRN* (2008) All FWLR (Pt. 430) 705
I.M.B. (Nig.) Ltd v. Dabiri (1998) 1 NWLR (Pt. 533) 284
Ibiyeye v. Gold, appeal No: CA/IL/M.95/2010, delivered on 7 December 2011
Imana v. *Robison* (1979) NSCC (Vol. 12) 1
Kopek *Construction Ltd v. Ekisola* (2010) All FWLR (Pt. 519) 1035
Madiebo it *Nwankwo* (2002) 1 NWLR (Pt. 748) 426
Magnusson v. Koiki (1993) 12 SCNJ 114
Nigerian Advert Services Ltd v. UBA Pic (2005) All FWLR (Pt. 284) 275
Nunrodim v. *Ezeani* (1995) 2 NWLR (Pt. 378) 448
Nwangwu v. Duru (2002) 2 NWLR (Pt. 751) 265
Obasuyi it *Business Ventures Ltd.* (2000) FWLR (Pt.10) 1722, (2000) 12WRN112
Okeme v. *CSC.* (2001) 5 WRN 101
Ololo v. *Agip* (2001) 31 WRN 60 *Owosho* v. *HA Dada (*1984) 7 C 49
Oyeniyin v. *Ajinkigbe* (2010) 1 SCNJ 101

Principal, Government Secondary School, Ikachi v. Igbudud (2006) All FWLR (Pt. 299) 1420, (2005) 12 NWLR (Pt. 940) 543
Sewell v. National Telephone Company Ltd (1907) 1 KB 557
Soianke r.*Ajibola (*1969) 1 NMLR 45
Soleh Boneh Oversea (Nig.) Ltd it *Ayodele* (1989) 1 NWLR (Pt. 99)549
UBN v. *Odusule Book Stores Ltd* (1995) 9 NWLR (Pt. 421) 558
Udansi v. Odusote (2004) All FWLR (Pt. 215) 577
Umar v. Salam (2001) 1 CHR 413

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria. 1999. sections 34 and 35
Dishonoured Cheques (Offences) Act, Cap. D11, Laws of the Federation, 2004, sections 1 (1) and 2 [c] Evidence Act, Cap. E14 of Laws of the Federation. 2004, sections 7, 8,149(d) and 151

Counsel:

K. K. Eieja. Esq (with him. Mashood Aliyu) -*for the Appellant.* D S. A. Bamidele, Esq (with him, S. A. Shogo) -*for the Respondents.*

MBABA JCA (Delivering the Lead Judgment): This is an appeal against the judgment of H. O. Ajayi J. of the Kwara State High Court in suit No. KWS/40M/06, a Fundamental Rights Enforcement matter, delivered on 5 May 2008.

At the lower court, the 1st respondent was the applicant and had sought the following reliefs on pages 16 to 12 of the record of appeal:

(a) A declaration that the harassment, arrest and detention of the applicant, herein on Wednesday, 24 May 2006 at his residence f along University of Ilorin Road, Tipper Garage Area, Ilorin, Kwara State by 3rd respondent, acting as agent of the 1st, 2nd, 4th and 5th respondents, who directed and gave the order of arrest based on the 5th respondent's baseless and false allegation is illegal, unconstitutional and a gross violation of the applicant's right to dignity of human person and personal liberty as guaranteed under sections 34 and 35 of 1999 Constitution.

(b) A declaration that the continued detention of the applicant at

state crime branch Lagos State police command following his arrest on Wednesday, 24 May 2006 at the instance of the 5th respondent is unlawful, unconstitutional and a gross violation of his fundamental human right.

(c) A declination that the seizure of the applicant's Mitsuibish Sigma saloon car with registraiionnumberDE55 LSR by the - bid *Respondent* at the instance of the 5th respondent on 24 May 2006, illegal, unconstitutional, unlawful and a violation of the applicant's right to property.

(d) A declaration that the continued detention of the applicant's Mitsuibish Sigma saloon ear with registration number DE 55 LSR at the 4th respondent premises by the 3rd Respondent acting on behalf of the 1st, 2nd, 4th and 5th respondents and later moved to Lagos is illegal, unconstitutional, violation of applicant's right to property under section 43 and 44 of 1999 Constitution.

(e) An order mandating the 1st - 4th respondents jointly and/or severally to release forthwith the applicant who is in the custody" of 1st - 4th respondents and the applicant's Mitsuibish Sigma Saloon Car with registration number DE 55 LSR.

(f) N2,000,000.00 (two million naira) damages for unlawful and unconstitutional arrest of the applicant,

(g) N2,000,000.00 (two million naira) damages for the unlawful „' and unconstitutional detention of the applicant.

(h) The sum of N5.000.00 per day as damages for loss of use of Mitsuibish Sigma Saloon Car with registration number DE 55 LSR. from 24 May 2006 till when same is released to the f applicant.

(i) Perpetual injunction restraining all the respondents by) themselves, agents, privies or whomsoever acting through them or any police officer from further interfering with the applicant's fundamental... rights in the illegal and unconstitutional manner.

(j) Such further order or others as this honourable court may deem fit to make in the circumstances of this case.

After hearing the application and appraising, the submissions of the learned counsel on each side, in a considered ruling, the learned trial judge G held for the applicant and awarded the sum of N500.000.00 (five hundred' thousand naira) only against the 1st to 5th

defendants/respondents, jointly and severally, being damages to the applicant for his unlawful an| unconstitutional arrest. The lower court awarded another (N500,000.00) (five hundred thousand naira) to the applicant, being damages for the unlawful and unconstitutional detention of the applicant. Also, the sum of N400,000. (four hundred thousand naira) only was awarded to the applicant for loss of use of his Mitsubishi Sigma Saloon Car with registration No. DE 55 LSRs! all to be paid jointly and severally by the 1st to 5th respondents, (now appellant and 2nd to 4th respondents)

The said respondents were restrained by themselves, agents, privies or whosoever acting through them or any police officer from further interfering with the applicant's fundamental rights. (See page 194 of the record). That is the decision the appellant who was the 5th respondent at the lower court, has appealed against, as per the notice and grounds of appeal on pases 195 to 205 of the record, whereof appellant sought the following reliefs:

(i) Allow the appeal by upturning the judgment of the trial court and substituting a verdict dismissing the applicants claim in its entirety

In the alternative

(ii) An Order reducing the general damages awarded for unlawful arrest and detention considerably

(iii) An Order setting aside in its entirety the damages of (four hundred thousand naira) N400.000.00 for loss of use of the Mitsubishi Car."

A brief fact of the case shows that the 1st respondent (applicant), a businessman and one of the Shareholders/Directors of Bamed Printers Nigeria Ltd was arrested on 24 May 2096 by the 4th respondent, acting as aeent of the 2nd, 3rd and 5th respondents and the appellant. The 1st respondent was arrested and humiliated in front of iris house at Tipper Garage Area, Tanke, Ilorin, Kwara State for liability of or default of Bamed Printers Nigeria Ltd, who had a civil contract with the appellant, to settle the debt. He was detained at the State Crime Branch of Lagos State Police Command at Ikeja until 27 May 2006, when the respondents at the lower court (that is, 2nd to 5th respondent and appellant herein) became aware of applicant's application for enforcement of his fundamental rights, when they released him. His car, Mitsubishi Sigma Saloon, registration No. DE 55 LSR, was confiscated and taken to the police station where it was kept until after two (2) years when the trial judge delivered the ruling.

Applicant was subjected to torture and harassment. He had denied taking the loan or guaranteeing the loan taken by the company which was the cause of his arrest and detention, but showed that the debt of the company was secured with the company factory machines worth (Twei ve million, five hundred thousand naira) N12,500,000.00 not with his car.

The appellant had maintained that the 1st respondent was the Managing Director of the Bamed Printers Nigeria Ltd which entered into a *loan* agreement with the appellant; that the Company, through the 1st *respondent* issued two cheques as security in fulfillment of the loan conditions; *that the* cheques, upon presentation, were dishonoured with the inscription of "DAR"; that upon dishonouring the cheques, appellant reported the matter to the 2nd respondent (police) and the 2nd respondent, on the strength of the report/petition embarked on investigation which led to the arrest and detention of live applicant, thai appellant's petition had to do with the issuing of dishonoured cheques.

Appellant filed its brief of argument on 28 January 2010 within time and distilled three (3) issues (or determination as follows:

(i) Whether the trial court was right in the view it took that the applicant, 1st respondent was arrested based on the debt of the Bamed Printers (Nig.) Ltd to the appellant as opposed to issuance of cheques which were dishonoured upon presentation? (Distilled from ground 1)

(ii) Whether the trial court was wrong in holding the appellant liable for breach of applicant's Fundamental Rights when the appellant had valid ground to lodge a complaint against the applicant and the appellant did nothing outside tire laws of the land? (Distilled from grounds 2, 3,4,5,6,7,6,9 and 13).

(iv) Whether the trial court was wrong in directing that the appellant shall jointly and severally pay monetary sums awarded in favour: of the applicant and whether the sums awarded followed settled principles of law on award of damages? (Distilled from grounds 10, 11 and 12).

The 1st respondent filed his brief on 24 February 2010 and distilled three issues too, as follows, for determination:

(1) Whether from the facts and circumstances of this case, the, learned trial judge was wrong to have held that the; Fundamental Human Right of the applicant/1st respondent to dignity of human person, personal liberty and property was actually breached (Grounds 1, 4 and 5).

(2) Whether having regard to the totality of the materials placed,

before the lower court the 1 st respondent actually committer an offence of issuing a dishonoured cheque to warrant his arrest, molestation and detention (Grounds 2,3,7, and 9).

(3) Whether having regard to the whole circumstances of the case, the learned trial judge was right to have held the appellant jointly and severally responsible to pay the monetary s awarded in favour of applicant? 1st respondent and whet the sum awarded as damages need further proof. (Grounds 6, 10, 11 and 12).

On being served with the 1 st respondent's brief, the appellant filed reply brief on 7 April 2010 and the same was deemed duly filed on 19, January 2011.

The appeal was heard on 24 October 2011 when the learned counsel adopted their briefs and urged us accordingly. The 2nd to 5th respondents filed no brief in this appeal, but the appellant filed a notice of withdrawal of the appeal against the 2nd and 4th respondents on 7, February 2011 and the same was granted on 19 April 2011. The names of the 2nd ana 4th respondents were accordingly struck out.

The 3rd and 5th respondents had made attempt to file their brief by filing an application on 21 May 2010 for enlargement of time to do so, but they later applied to withdraw the application on 21 November 2010 and the same was struck out on that date.

I shall consider this appeal on the issues as distilled by the appellant, C the same being more apt.

Arguing the appeal, learned counsel for the appellant, K. K. Eleja, Esq. of Yusuf O. Ali & Co. (who settled the brief}. submitted that paragraph 3(b) of the grounds upon which the applicant's reliefs were sought (which the trial judge relied upon) did not constitute evidence upon which the trial **Q** court could legitimately rely on, to reach a decision on the matter; that the reasons for the arrest of the 1st respondent was seriously in issue and had to be established by evidence, and so it was necessary for evidence to be adduced on same. He referred us to sections 7 and 8 of the Evidence Act, Cap. E14 of Laws of the Federation, 2004.

Counsel also argued that the trial judge was wrong to rely on paragraph 5 of the appellant's counter-affidavit, as there was nothing in the paragraph to support the suggestion that the 1st respondent was arrested and detained because of the indebtedness of the company - Bamed Printers (Nig.) Ltd to the appellant. Rather, that the arrest of the 1st respondent had to do with the issuance of dishonoured cheques - exhibits OC2 and DC3.

Counsel submitted that as appellate court, this court will readily

interfere with and upturn erroneous findings of the trial court and substitute a different judgment for it, where, especially, the erroneous finding is material to the conclusion reached by the trial court and the same has occasioned a grave miscarriage of justice. He urged us to so hold in this case and relied *Q* on die case of *Gbafe* v. *Gbafe* (1996)6 NWLR (Pt. 455) 417 at 428.

Counsel added that paragraph 4 of the further affidavit of the 1st respondent was also not helpful to sustain the conclusion by die learned trial judge. Appellant relied on the counter affidavit by one ASP Godwin Yagah, paragraph 8 thereof, to say that 1 st respondent was arrested for issuing „ dishonoured cheques. He further relied on the case *Baridam* v. *The Stale* **(1994)** 1 NWLR (Pt. 320) 20 at 260; *Nunrodim v. Ezeani* (! 995) 2 NWLR **PT.378) 448** at 467.

On issue 2, counsel submitted thai the trial court was in palpable error in finding the appellant liable as it did, and also in its view that there was no justification for the appellant to report to the police about the offence of issuing dishonoured cheques against the 1st respondent. He emphasized that the 1st respondent was the sole signatory to the cheques which were dishonoured, and that was why the appellant wrote the petition to the police. He relied on paragraphs 5(v) to (ix) of their counter-affidavit and added ' that the 1st respondent did not deny issuing the cheques. Counsel also retted on the counter-affidavit of the 2nd to 4th respondents to say that the 1st respondent was arrested on allegation of commission of offences of issuing dishonoured cheques and threat to life, as shown in pages 114 - 115 of the record; he said that failure of the 1st respondent to deny or controvert the deposition in paragraph 5 of the appellants counter affidavit ('on the issuance of the cheques; leads to the irresistible conclusion that he did in fact, issue the cheques which were dishonoured upon presentation. He relied on the case of *I.M.B. (Nig.) Ltd v. Dabiri* (1998 j 1 NWLR (Pt. 533) 284 at 299; *Edokpolor &. Co. Lid v. Ohcnhen* (1994) 7 NWLR (Pt. 374) 736 at 746; 71 *L. Owosho* v. *HA Dada* (1984) 7 C 49.

Counsel also relied on section 1 and 2 of Dishonoured Cheques (Offences) Act, Cap, D11, Laws of die Federation, 2004, which makes it an offence for any person to obtain credit for himself or any other person, by means of a cheque that, when presented for payment not later than 3 months after the date of the cheque, is dishonoured to the credit of the drawer of the cheque in the bank on which the cheque is drawn, and imposes pane! sanction of imprisonment for 2 years for a natural person and a fine of not less than N5,000.00 (five thousand naira) for a corporate body; that in the

face of the said law, there was a prima facie reason to believe that an offence had been committed by both the 1st respondent and his company, ***i*** showing that the appellant had every justification to report or lodge a complaint with the police. He relied on the case *ox Sew ell v. National* J *Telephone Company Ltd* (1907) 1 KB 557. J Counsel submitted that a person would not be held liable for merely ‖reporting or writing a petition to the police fora certain act of crime to be ; investigated; that liability will only attach to such a conduct if the complainant.; did more than lodging the complaint. He relied on the case of *Nwangwu v. Dura* (2002; 2 NWLR (Pt. 751) 265 at 282 - 283, that die pol ice have the^ inherent discretion to decide on whether or not to investigate the complaint-|or not and the issue of arrest and detention is entirely the police decision.; He relied on the case of *Fawehinmi v. IGP* (2002) FWLR (Pt. 108) 1355,.-(2002) 7 NWLR (Pt. 767) 606 at 670 - 671; *Principal, Government^ Secondary School', Ikachi v. Igbudu* (2006) All FWLR (!",. 2"9) |42Q^| (2005) 12 NWLR (Pt. 940) 543 of 574.

Counsel submitted that the 1st respondent did not show that the appellant did anything more than just making a complaint to die police on the issuance of the dishonoured cheques. He referred us to the case of *faiemirokun v. C.B. (CD (Nip.)* Ltd'(2002) 10 NWLR (Pt. 774) 95 at 111-112. where it was held dtat applicant has a duty to establish instigation and causing of his arrest and detention; that the 1 st respondent did not prove this.

He submitted that the trial court was wrong to hold that the Dishonoured Cheques (exhibits OC2 and OC3) were presented for payment outside of the time; that a glance at exhibit OC3 (on page 43 of the record) would reveal that it was dated 5 December 2004 and presented for payment on 28 Januarv 2005. a period of 2 months. He also submitted that the views expressed by the court as to the meaning of the inscription 'DAR' written on the cheques. are not supported by any authority of the appellate court; that for the trial court to say that there was nothing before the court that Barned Printers (Nig.) Ltd has presented a dishonoured cheque as contained in page 190 of the record is an avoidable academic exercise, since the 1 st respondent never led evidence to show, that at all relevant times, the account on which the cheques were drawn was in funds.

On issue 3. counsel submitted that the trial court was wrong to have ordered appellant to pay any damages at all, jointly and severally with the other respondents that there is no relationship of master and servant or agency between appellant and the other respondents. Moreover, counsel

submitted that the alleged unlawful arrest and detention of 1st respondent and his car was the act of the other respondents, not of the appellant.

He also submitted that by law, damages will only be awarded where there is justification for it; that no legal justification has been shown to warrant making the Order against the appellant. He relied on the case of ***NICON*** *Hotels Ltd* v. *NDC Ltd* (2008) 12 NWLR (Pt. 1051) 237 at 268.

On the quantum of damages awarded, counsel submitted that the **award** was high and excessive to warrant the intervention of appellate court to reduce it that is if we find that the 1 st respondent was entitled to damages **at all.** He relied on the case of *Soleh Boneh Oversea (Nip.) Lid v. Ayodele* **(1989**)1 NWLR **(Pt.** 99) 549.

On the award of N400,000.00 (four hundred thousand naira; for loss **of use** of his (1st respondent) car. counsel submitted that the trial court was **in grave** error to have awarded that head of claim: that the award was not **supported** by the claim adumbrated on the motion on notice by the 1st **respondent;** that the 1st respondent had claimed N5,000.00 (five thousand **.-naira) per** day as damages for loss of use of the car, from 24 May 2006 till when same was released to him. and so the same was in form of special damages which must be proved strictly after having pleaded with particulars. He relied on the case of Ahrahambi v. A.B.I. Ltd (2005) 19 NWLR (pt 959) 1, saying that throughout the affidavit by the 1st respondent and his wife, no fact was disposed in support of the claim for N5.000.00 (five thousand naira) per day as damages for the alleged wrongful detention of the car thus, there was no evidence to support the claim ofN5**,000.00** (five thousand naira) per day; that the trial court, without stating the basis for it, merely ordered:

> "It is also hereby ordered that the 1st - 5th defendant respondents pay as damages the sum of **₦400.000.00** (four hundred thousand naira) only to the applicant for loss of use of his Mitsubishi Sigma Saloon Car with registration No 55 LSR"

Counsel submitted that there was no basis or yardstick for arriving at the said sure of N400.000.03 (four hundred thousand naira) awarded to the 1st respondent for alleged loss of use of the car; that the award was speculative and offends the principle for award of special damages. He relied on the case of *Interna v. Robison* (1979) NSCC (Vol. 12) 1 at if *Obasuyi v. Business Ventures Lid* (2000) FWLR (Pt. 10) 1722, (2000F WRN 112 at 136. Counsel added that a court is not a charitable organization and is precluded from granting that which was not sought by a party relied on *Ekpcyong v. Nyong and Ors.* (1975) 2 SC 71; *Edoho v.*

Allot General, Akwa Ibom State (1996) 1 NWLR (Pt. 425) 488 at 500; ***Ud4*** *v.* odusote (2OO4)AIIFWLR (Pt.215)577 at 387-388.

Counsel urged us to resolve the 3 issues in favour of the appelant and allow the appeal.

In his reply, the 1st respondent, though his counsel, S. A. Bamic Esq (who settled the brief), on the 1 st issue, said that going by the facts] circumstances of this case the learned trial judge was right and in order have held that the Fundamental Human Rights of the 1st respondent] actually breached; that die appellant was out to force the 1st respondent offset the debt owed by the company (Bamad Printers (Nig.) Ltd); was the belief of the appellant that since the respondent was one of directors of die company owing the debt, he should be held responsible for it, whereas an incorporated body, like the company, was a separate and distinct person from its share holders and directors and no personal liability for any debt incurred by the company is chargeable on the direct shareholder. He relied on *A.I.B. Lid* v. *Lee & Tee Ind. Ltd* (2003) (Pt. 819)366 at 395.

Counsel added that the alleged debt of the company had been by the debtor (company) with 3 of its machines worth N! 2.500.000.00 as was the finding of the trial court on page 169 of the record. Counsel relied on paragraph 3(b) of the statement of the applicant in support of the application, and submitted that in an action for enforcement of fundamental rights, it is the statement of facts incorporating the grounds upon which the reliefs are sought together with the accompanying verifying affidavit that the court will look at in arriving at its decision, and issues are fought and determined on affidavit evidence; thus paragraph 3(b) of the applicant's statement, read together with applicants verifying affidavit constituted evidence for the court to act.

Counsel added that the failure of the appellant to exhibit or disclose the petition it wrote to the police to show why it sent the police after the 1st respondent, should be presumed against the appellant pursuant to section 149(d) of the Evidence Act. He relied on the case of *Nigerian Advert Services Ltd & Anor v. NBA Pic* (2005) All FWLR (Pt. 284) 275 at 290: *Federal Mortgage Finance Ltd v. Hope Effiong Ekpo* (2005) Alt FWLR (Pt. 248) 1667 at 1684, where it was held:

> *"Where a* ***Darn'*** *relying on a document in an action fails to produce the document and there is no proper explanation as to his inability to produce t he said document the court may upon his failure to produce it presume that the document, if produced would have been unfavourable to that party by invoking section I49(d) at the Evidence Act."*

Counsel urged us to hold that the argument that appellant wrote the petition to the police on the ground of issuance of dishonoured cheques is an afterthought, and relied on paragraph 5 of the appellant's counter affidavit, which he said should not be read in isolation. Counsel also relied on paragraph **3** of the verifying affidavit by the 1st respondent's wife which said that she was told by the policemen that they came to arrest and detain the applicant (her husband) on the instruction of 1st to 5th respondents on the mortgage transaction between Earned Printers Nigeria Ltd and 5th respondent; that this averment was not denied by the police.

1st respondent also attacked the averment of the ASP Godwin Yagah (paragraph 8 thereof) on behalf of the police, saying that it was the 4th :**re**spondent, sergent Chinedu Nwaorisha, who led the investigation team from Lagos had refused or failed to say anything, about the applicant's **application;** thus, the said ASP Godwin Yagah's paragraph 8 of the counter-**affidavit** offends section 89 of the Act, as he did not disclose the source of the information he was deposing to 1st respondent's counsel also questioned the basis of detaining applicant's car for 2 years by die police, if the arrest and detention had nothing to do with the debt owed to the appellant. What had issuing of dud cheques got to do with impounding of applicant's car and keeping it for 2 years?

On the wrongful seizure or acquisition of citizens property, counsel urged us to follow the holding of Fabiyi. JCA i as he then was) in the case of *Ajoku v. Attorney-General, Rivers Stale* (2006) All FWLR (Pt. 312) 2147 at 2166-2167.

> "The right to legitimately own property as done by the appellant herein is not only backed by the Constitution it may be said; that die right which is one of tiie unalienable rights, is as old as man. If a citizen's property must be acquired, such must be with adequate and due compensation. A citizen should not be deprived of his bonafide property without following due process."

Counsel further relied on the case of *Baridam v. The Stated Nunradim v. Ezeani* to say that arresting the applicant with his car and detaining them (and the car for 2 years) was oppressive.

On the 2nd issue, counsel submitted that going by depositions in the lower court *vis-a-vis* die annexure marked exhibit OC1, the said allegation was baseless; that although appellant made a heavy whether of allegation of issuing of cheques which were dishonoured on presentation, the 2nd to 5th respondents acted excessively, assuming (without conceding) there was realty the issuance of dishonoured cheques by the

applicant; that while there is a right to lodge complaint with die police, such complaint must be genuine and not with malice.

Counsel submitted that by paragraph 5(v) and (vi) of appellant's counter affidavit, the two cheques were presented on 14 and 28 January 2005 respectively, whereas by exhibit OCR a letter written toll respondent's company notifying him of appellant's intention to present two cheques, latest by 30 January 2005, appellant by conduct had put its-, bound by the said date of 30 January 2005, and the letter was written on' January 2005: thus, appellant presented the two cheques before the agreed; that by the agreement of the parties the cheques were not to be presented before 30 January 2005; that presenting the cheques on 14, 28 January 2005 was deliberately done against the run of events to cri grounds for the arrest of the applicant, and that amounted to outright bread of agreement. Counsel submitted that by exhibit OCR appellant, by of section 151 of the Evidence Act was *estopped* from presenting cheques until 30 January 2005.

Counsel therefore submitted that exhibit OC2 and OC3 were dishonoured, rather the) were not due when they were presented 1 clearing (in view of the exhibit **OCI**): that the fact that 'DAR' was written A on the cheques does no! mlei n **iminality in** law; **that the rules of Dishonoured** Cheaues Act had not been breached, especially as the cheques were not presented for payment three months from that date **of** issue, and there was no proof that there was instil insufficient money in the account. Counsel **relied** on section 1 (1) of the Dishonoured Cheques (offence) Act, Cap. D11, Laws of the Federation of Nigeria. 2004 and on the case of *Faysal Harb & Ors v FRN* (2008) All FWLR (11.430) 705 at 730, where die Act was interpreted as follows:

> "The provisions of section 1(3) of the Act provides that a person shall not be guilty of an offence under the law, if he proves to the satisfaction of the court that when he issued the cheque he has reasonable ground for believing and did believe intact, that it would be honoured if *presented for payment within the period specified in subsection (J) and which period is three months."* (Italicize for emphasis)

Thus, counsel submitted, it would be oppressive and wrong to hold the applicant responsible for issuing dishonoured cheques in the circumstances, when from the face of it, the three months period for the presentation of the cheques had not lapsed (that is. if the applicant were to be held responsible for the cheques of the company).

Counsel further submitted that the inscription 'DAR' means "Drawer's

Attention Required' to clarify certain anomalies such as signature on the cheque, misspelling of names, wrong account number on the cheque etc; whereas RID inscriped on a cheque means "Return to Drawer" and is a complete rejection of a cheque on ground of either non availability of fund or insufficient fund in the account, and that was not the situation in this case. He relied on the case *of Abhubiojo v. ACB Ltd (*1966) LLR i 56 and *Melekev. NBN Ltd* (1978) 1 LRN 99. Thus counsel said, the writing of **'DAR'** on the cheques did not mean that the cheques were dishonoured, and that is a point of law not fact.

On issue 3, counsel for the 1st respondent submitted that having if regard to the whole circumstances **of** the case, the trial court was right to

have held the appellant with the other respondents jointly and severally **responsible** for the breach of 1st respondent's Fundamental Human Rights,

having regard **to** the arrest, harassment and detention of the 1st respondent, based on the frivolous and/or fictitious complaint/petition the appellant. **based on a** debt owed by the applicant's company**, Counsel adopted his** earlier submission under issue 2 to issue 3 and **added** not escape liability, because was no justification for the attest and detention of 1st respondent and his car.

He submitted that the issue of lack of agency relationship between the appellant and the other respondents did not arise, as what is on ground has nothing to do with such relationship; rather.it was the malicious complaint of the appellant that **caused** the 2nd to 5th respondents to go against the 1st respondents, and acted outside their statutory duties (to please the appellant).; He relied on section *35(5*)(a) and (h) of the 1999 Constitution and on the! case of *COP. Ondo Slate v. Obolo* (1989)5 NWLR (Pt. 120) 130 at 138; *Abiola v. FPJJ* (1995) 7 NWLR (Pt. 405) I; *Madiebo* v. *Nwankwo* (2002)! 1 NWLR (Pt. 748) 426 at 433.

Counsel further submitted that the court is always prepared and will| be quick to give relief inform of award of damages against any improper! use of power or any abuse of power by any member of the executive, the police or any other person which results in unlawful detention of an applicant. He relied on the case of *John Faiade* v. *Attorney-General, Lagos State & Ors* (1981) 1 NWLR (Pt.?) 778 at 784 - 785; *Isenalumhe* v. *Joyce* D *Amadin* (2001) 1 CHR 456 at 466. He also relied on section 35(6) of the 1999 Constitution which says that:

> "Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the

appropriate authority or person."

On the quantum of damage, counsel said that the amount awards was not even adequate considering the status of the 1st respondent and nature of treatment the appellant and other respondents gave to him detention and when he was arrested. He relied on paragraphs C, D, and E of the grounds upon which the reliefs were sought. He urged us not to interfere with the damages awarded by the trial judge.

On the amount awarded for loss of use of the car (four hundred thousand naira) N400.000.00, 1st respondent urged us to take cognizance of paragraph O of the grounds on which relief were sought, which he s, stated how the 1st respondent came to N5.000.00 (five thousand naira) per day as damages; that he used the car to carry his children to school, hen G he has to hire a vehicle at the cost of N5.000.00 (five thousand naira) pj day to do the same work the Mitsibushi Sigma Saloon Car ought to do for his children.

He added that the sum awarded (four hundred thousand ***jai*** N400.000.00 was even below what the 1st respondent asked for the loss; of use of the car. He prayed that we resolve all the three issues in favour the 1st respondent and dismiss the appeal.

Appellant's reply brief, in the main, is a reinforcement of his argument_ in the appellant's brief. On the counter-affidavit by ASP Godwin Yagah

counsel submitted that the deponent had stated that he was the Divisional Crime Officer (DCO) and that he was conversant with the facts of the case by virtue of his position.

On the point that the seizure of 1st respondent's car by the police also buttressed the fact that applicant's (1st respondent) arrest was in connection with the deb: by his company- Earned Printer (Nig.) Ltd and not because of issuance of dud cheques, the appellant counsel submitted that the argument cannot stand, having regards to the powers of the police under the police Act and the latitude of their imbued discretion to investigate, prevent detect and control crime.

On the 1st respondent's argument under issue 2, counsel said all the argument were mere academic exercise.

I think it will be proper to consider the issues 1 and 2 together as they are closely related. Was the trial court right to hold that the 1st respondent was arrested based on the debt of Earned Printers (Nig.) Ltd to the appellant being a company the 1st respondent had share and was director or managing director, as opposed to the claim of issuance of dud cheques?

Was the trial court right in holding the appellant liable jointly and

severally with the other respondents (police), for the breach of 1st Respondent's fundamental rights because of the complaints appellant lodged with the police against the 1st respondent?

The appellant had claimed that it made a simple complaint/petition to the police against the 1st respondent for issuing cheques (exhibit OC2 and **OC3)** to it, which on presentation to the bank were dishonoured, as the bank marked on the cheques 'D AR' and the value not paid to it; that they had a right and a duty to report that act by the 1st respondent (who signed the cheques) to the police for investigation; that it had earlier written exhibit OC1 to the 1st respondent's company, warning them of the consequences of the cheques being dishonoured on presentation, that apart from just lodging the complaint/petition the appellant did nothing more and the police had a discretion to investigate the complaint or refuse it, and whatever the police did in the course of investigating the complaint was their own act, as there is **no** agency relationship between the appellant and the police, and appellant **has no** control over the police!

That was a beautiful argument that would excuse the action of the appellant, if the cornpliant/petition it made to the police was, in truth, just a complaint of issuing dud cheques, and not motivated by mischief. Every citizen has a right and, i u fact, a duty to report any infraction of the law or commission/suspicion of commission of crime to the police and the police corresponding right and duty to investigate the complaint/report, in the course of their statutory duty to detect and fight crime.

In the case of *Principal, Government Secondary School, Ikack v. Ighudu* (2006) All FWLR (Pt. 299) 1420, 12005) 12 NWLR (Pt. 940; 543, (2005) 12 NWLR (Pi. 940) 543 at 574. it was held that any complain made or information given to those interested in investigating a matter (the police) will in the interest of the society be privileged, once there is a reasonable belief that a crime has been committed.

In the case of *Fajcmirokun v. Commercial Bank (Credia Lvonpais)* (A7g.)Ltd(2009)5NWLR(Pt. 1135) 558 at 600 it was held:

> "Generally, it is the duty of citizens of the country to report cases of commission of crime to the police for their investigation and what happens after such report is entirely the responsibility of the police. The citizens cannot **be held** culpable for doing their duty, unless i; is shown that *t h a t i t i s mala fide."*

On the legal duty of the police or investigating authority to take responsibility for their conduct and actions in the course of **their investigates** of complaints given to them by citizens, the authorities are

replete on this. In the case of *Duru* v. *Nwangwu* (2006) 5 SCNJ 394 at 402, it was held:

> "It is settled law that where an individual has lodged the facts of his complaint to the police as in this case byway of petition " and the police have there-upon on their own proceed carry out arrests and detention, then the act of imprisonment is that of the police: *Sewell v. National Telephone Co.* (1 1 KB 557; *Fajcmirokun v. Commercial Bank (Cr, Lyonnais) (Nig.) Ltd."*

Was appellant's petition against the 1st respondent in this case innocent report of commission of offence or of suspicion of s Unfortunately, appellant did not disclose the content of the petition it to the police to show the actual reason it stated to move the police ag the 1st respondent and this raises the presumption under section 149 the Evidence Act against the appellant. See also the case of N *Advert Sendees Ltd and Anor.* v. *UBA Pic,* where it was held:

> "Where a party relying on a document in an action fai produce the document and there is no proper expianatiqi to his inability to produce the said document the court upon his failure to produce it presume that the do: produced would have been unfavourable to that party invoking section 149(d) of the Evidence Act."

Applicant m his statement at the lower court had pleaded in pan 3(b) of the grounds in support of his claim that:

> "On Wednesday, 24 May 2006, three policemen led **by;** Chincdu Nwaorisha came from Lagos Stale crime branch command to arrest the applicant at his residence at University of Ilorin, Kwara State on the complaint that He did not pay the debt his company (Barred Printers (Nig.) Ltd) owed to Oceanic Securities International Limited which has fallen due for payment."

The averment therein was enforced by affidavit evidence of the wife of the 1st respondent which she made to verify the said statement. Paragraph 2 and 3 thereof state:

2. That I was at home at University Road, Tipper Garage Area, Tanke, IIorin, Kwara State on 24 May 2006 when the 3rd respondent, in company of two other policemen who claim (sic) to have come from Lagos arrested the applicant, who is my husband.
3. That as I could gather from the said policemen, they came to arrest and detain my husband on the instruction of the 1st and 5th respondents (supported with 2nd and 4th respondents) on the mortgage transaction between Bamed Printer (Nigeria) Limited and the 5th

respondent." See also applicants further affidavit of 8 December 2006 paragraphs 4 thereof, pages 120-121 of the record.

Appellant's counsel had argued that there was no evidence to support the allegation that applicant was arrested because of the debt owed by Bamed Printers (Nig.) Ltd to the appellant. He was wrong as the averment of the wife of the applicant was sufficient evidence to support and establish the fact in the statement of the applicant. That is the essence of a verifying affidavit under the Fundamental Rights Enforcement Rules, to verify the facts in the statement of applicant. And, of course, where such evidence is not denied or sufficiently countered or controverted, the court is bound to rely on it and use it.

In the case of *Magnusson v. Koiki and Ors.* (1993) 12 SCNJ 114 held 5, the apex court held that:

"Averments of facts on pleadings must be distinguished from facts deposed lo in an affidavit in support of application before a court. Whereas, the former, unless admitted, constitutes no evidence, the latter are by law evidence upon which a court of law, in appropriate cases, can act."

Also so in H.*S. Engineering Ltd v. S. A. Yakubu Ltd* (2009) 175 **LRCN** 134, held 2 it was said that "It is now settled law that an affidavit evidence constitutes evidence and any deposition therein not challenged is • - ""^admitted." See *ahoAjomale v. Yaduat* 11991) 5 SCNJ 178; Hon

Maryati Audu Dogari and Ors. v. Attorney-General Taraba State (an unreported decision of this court) in CA/J/243/2010.

Appellant did not deny the averments of the applicant on the reason for his arrest, though it (appellant) strongly advanced its own version of why the arrest was effected, being issuance of cheques which it said were dishonoured at presentation by the bank. Paragraph 5(i) to (ix) of the appellant's counter-affidavit pleaded the transaction which it had with Bamed' Printers (Nig.) Ltd and the cheques issued by the company as security for some loan transaction; paragraphs 5fi), (iv), (v) and (vii) are reproduced below:

(i) That the plaintiff/applicant is the alter ego and Managing Director Bamed Printers (Nig.) Ltd.

(iv) That the 2 (two) cheques aforementioned were issued and signed by the plaintiff/applicant on behalf of and as Managing Director and alter ego of the company.

(v) That on maturity of the loan facility granted to the company, the 5th defendant/respondent wrote a letter dated 14 January 2005 to the company informing her that the 2 (two) cheques ; would

be presented for clearing on or before 30 January 2005. A copy of the 5th defendant/respondent letter dated 14 January 2005 is annexed hereto as exhibit OCT

(vii) That this act of dishonour of the cheques by the bank, I believe constitutes an offences (sic) under section 1(1)(b) of the Dishonoured Cheques (Offences) Act, Cap. D11, Laws of the Federation of Nigeria, 2002. "(see pages 37 to 39 of the record).

The content of the appellant's letter (exhibit OC1) to the 1st respondent's company is quite revealing, as published on page 41 of the record of appeal. It was addressed to the Chairman/Managing Director Bamed Printers (Nig.) Ltd.

"Attention: Alh B. O. Balogun:

Re: Outstanding payment on WAJEC LPO Facility "

Paragraphs 2, 3 and 4 of the letter respectively state as follows:'

"As you will recall you have issued two Oceanic Bank Cheques for N1,456,000.00 and N 1,562,253.36 respectively, to liquidate the total outstanding debt with interest as at 5 December 2004. It is surprising that you have failed to redeem these cheques as promised.

As directed by our auditors, please be informed that we are^ presenting these cheques for clearing if we do not hear from you on or before 30 January 2005, should the cheques bounce,'

We shall have no alternative than to inform the appropriate authorities." (Emphasis mine).

Surmising!)', after giving the company up to 30 January 2005 to liquidate the debt before presenting the cheques, appellant, acting against the understanding in that letter proceeded to present one of the cheques on the very date it wrote the letter, that is 14 January 2005, and the 2nd cheque on 28 January 2005.

By its own very' admission, the appellant, in that letter, revealed that there was understanding between the 1st respondent's company and the appellant that the cheques should not be presented before 30 January 2005. For the appellant to have presented the cheques for clearing on 14 and 28 January 2005 (before the 30 January 2005 impliedly agreed upon) it was acting in breach of that faith, and done in mischief, to blackmail the 1st respondent and the company, and create grounds for his arrest and detention!

That means the report/petition by the appellant to the police was actuated by malice and the sole motive was to use the police to recover the outstanding debt contrary the claims of the appellant. Thus, the

presentation of the cheques before the agreed date was a set up to ground the arrest of the 1st respondent, whose attention had been called in the exhibit OCT That was an evil scheme! No wonder then the appellant's refusal to exhibit or disclose the content of petition it wrote to the police!

By section 151 of the Evidence Act, the appellant was *estopped* from presenting the cheques for clearing before 30 January 2005. That law says:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be trueand to act upon such belief, neither he nor his representative in interest shall be allowed in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing."

Appellant could not therefore hide under the cover of reporting the lst respondent for issuance of dishonoured cheques to subject him to the ordeal of arrest and detention and detention of his car (for two years) and escape the wrath of the law. He was pursuing the recovery of the alleged debt and resorted to the use of the police!

What was the connection of the seizure of the 1st respondent's car and keeping it for 2 years with the alleged issuance of dud cheques, if appellant's interest was devoid of recovery of debt? And how was a corporate of a limited liability company tied to its machines as security, suddenly becomes the personal debt of the 1st respondent to warrant the ordeal meted out to him.

There was no way the pretence and dishonesty of the appellant could be covered in the circumstances as the eagle eye of the law saw through its mischief and unlawful attack on the 1st respondent, when the company (Bamed Printers (Nig.) Ltd), which owed the debt was not running away from its responsibility and had understanding with the appellant up to 30 January 2005 to liquidate the debt according to exhibit O1!.

By the Dishonoured Cheques (Offences) Act. which the appellant sought to rely on "the provisions of section 1 (3) of the Act provides that a person shall not be guilty of an offence under the law if he proves to the satisfaction of tire court that when he issued the cheques, he had reasonable ground for believing and did believe in fact that it would be honoured, if *i* presented for payment within the period specified in sub section (1) and " which period is 3 months." See the case of *Favscl Harb* & Ors v. *FRN* (2008) All FWLR (R 430) 705 at 730.

Of course, the 2 cheques were within their 2nd months of issue when the appellant presented them for clearing against the run of the 4

agreement they had.

Can it also be said that the inscription 'DAR' written on a cheque by a bank, on presentation, means that the cheque is dishonoured and that there is no money in the account of the drawer? That cannot be so, except there is concrete evidence to the effect that such inscription connotes such meaning or inference.

Ordinarly, the inscription 'DAR' is an acronym usually interpreted to mean Drawers Attention Required. Of course, the drawer's attention, can be required by a bank for myriads of reasons, for example to explain-; some things before a cheque is cashed, mostly to protect the interest of the| customer (drawer) and the bank. It would therefore be wrong for the araweei to run to town with the evil news that the cheque has been dishonourei simply because the cashier or accountant of the bank has written 'DAR' off the cheque.

I hold that the learned trial judge was right in his findings ant conclusion, that appellant employed the 2nd to 5th respondents to recover secured debt of the Bamed Printers (Nig.) Ltd from the 1st respondent when ii unleashed the police against the 1st respondent and they arrested and detained him and his car, against lite dictates of the law.

It has been stated many times that the police has no business enforcement of debt settlements or recovering of civil debts for banks **or** anybody. Only recently, in the unreported decision of this court in the *a* of *Ibiyeye and Anon v. Gold and Ors.* appeal No: CA/IL/M.95/201B delivered on 7 December 2011,1 had cause to scream thus, in my contributory judgment:

"I have to add that the resort to the police by parties for recovery of debts outstanding under contractual relationship, has been repeatedly deprecated by the court. The police have also been condemned and rebuked, several times, for abandoning its primary duties of crime detection, prevention and control to dabbling in enforcement or settlement of debts and contracts between quarrelling parties, and for using its coercive powers to breach citizens rights and/or promote illegalities and oppression. Unfortunately, despite all the decided cases on this issue, the problem persists and the unholy alliance between aggrieved contractors/creditors with the police remains at the root of many fundamental rights breaches in our courts." (Per Mbaba. JCA). See also *Yustif Umar v. A. A. Salam and Ors.* (2001) 1 CHR 413. This is another sad situation and the appellant must be held liable, jointly and severally for the evil.

' In the case of *Ejcfor v. Okckc* (2000) 7 NWLR (Pt. 665) 363. held 4, the appellate court said:

"Where there is an evidence of arrest and detention which were done or instigated by the respondent in an action for enforcement of fundamental rights application, it is for the respondent to show that the arrest and detention were lawful. In other words, the onus is on the person who admits detention of another to prove that the detention was lawful." See also *Agbakoba* v. *SSS* (1994) 6 NWLR (Pt. 351)475. I therefore resolve the 1 st and 2nd issues against the appellant. On the 3rd issue, whether the trial court was wrong in directing that appellant shall jointly and severally pay monetary sums award in favour of applicant and whether the sums awarded followed settled principle of law on award of damages. I have already held that the trial court was right to hold the appellant liable jointly and severally (with the other respondents) to the claim. What is left to be considered is the 2nd limb of the issue, that is, whether
the sums awarded followed settled principles of law on award of damages.

On that, appellant's outstanding contention is on the quantum of damages awarded; that the award was high and excessive in respect of the ones for unlawful arrest and detention (amounting to N1,000.000.00 (one million naira) N500,000.00each). Counsel, however conceded that appellate court loathes to interfere with award of damages made by trial court, but **urged** us to interfere, to reduce the award, to what he called nominal one in **the** event of our finding that the 1st respondent was entitled to damages.

On the award of N400,000.00 (four hundred thousand naira) for loss of use of 1st respondent's car. kept by the police for 2 years, appellant said the same lacked basis, since it was pleaded by way of special damages of N5.000.00 (five thousand naira) per day from 24 May 2006 till released to the 1st respondent; that there was no evidence to prove the special damage.

The 1st respondent's answer to this was that he had pleaded N5,000.00 (five thousand naira) per day for the car, because he was denied the use of same to carry his children to school (as he often did), and so he | had to hire a vehicle to do so.

The 1st respondent did not lead any evidence on the alleged hire of vehicle to carry his children to school-how he was charged per day)' and the receipts for same, and how long the hiring lasted. The leamed trial judge did not also give any clue as to how he arrived at the N40O,0OO.OO (four hundred thousand naira) which obviously was not the sum of 5,000 (five thousand naira) per day, claimed by the applicant for 2 years! It appears the learned trial judge considered the claim therein as general damages and simply used his discretion to award the amount,

because 1st respondent's car had been unlawfully impounded and kept by the police for 2 years! He would be right | if the claim for damages for the car were in the nature of general damages. Because the 1st respondent opted to couch the claim in the nature of special damages and deposed (in the grounds (O) in the statement) that:

> "The Mitsubishi Sigma Saloon Car is the vehicle with which 1 the applicant use (sic) to carry his children to school hence he;) has to hire a vehicle at the cost of N5.000.00 (five thousands naira) per day to do the same work ... the car ought to do for his children." He had a duty to plead and prove the same, strictly. See the case of *Okcme v. CSC.* (2001) 5 WRN 101;| *Ololo v. Agip* (2001) 31 WRN 60; *Kopek Construction Ltd% v.*Ekisola (2010) All FWLR (Pt. 519) 1035.

To that extent, the award of the sum of N400.000.00 (four hundred| thousand naira) as damages for loss of use of the car for the 1st respondent was not properly founded as it was not proved as required of special damage The 2nd limb of the issue 3 is therefore resolved in favour of the appellant and that head of claim fails and the award is hereby set aside.

Of course, the setting aside of the award of N400.000.00 (four hundred thousand naira) as damages for loss of use of the 1st respondent car does not affect the competence of the other heads of awards made by the trial judge, that is, the sum of N500.000.00 (five hundred thousand r for unlawful arrest and another N500.000.00 for unlawful detention. B| aw, the appellate court cannot interfere in the award of damages made by the trial court, except:

(i) The lower court acted under a wrong principle of law, or
(ii) Acted in disregard of applicable principles of law or
(iii) Was in misapprehension of facts or
(iv) Took into consideration irrelevant matters and disregarded relevant matters whilst considering its award or
(v) Where injustice will result if the appellate court does not act or
(vi) Tne amount awarded is ridiculously low or ridiculously high that it must have been an erroneous estimate of the damages.

See the case of *Oyeniyin* v. *Ajinkigbc* (2010) 1 SCNJ 101 at fl6; see also *UBN v. Odusule Book Stores Ltd* (1995) 9 NWLR (Pt. 421) 558; *Soianke v. Ajibola* (i 969) I NMLR *45; ACE Ltd v. Apugo* **(200**1) 5 **NWLR** (Pt. 707)483.

Appellant has not established any of the above defects to defeat the damages awarded to the 1st respondent apart from the N400,000.00 (four

hundred thousand naira) already set aside.

I therefore resolve the rest of this issue against the appellant too.

On the whole this appeal fails, apart from the aspect against the award of N400,000.00 (four hundred thousand naira) for the loss of use of the car, which has been allowed and set aside. The decision of the lower court in suit No. KWS/40IvL'2096 is hereby affirmed, except the award of **N400.000.00** (four hundred thousand naira) only for loss of use of the 1st respondent's car.

Each party to bear own cost.

ABDULLAH! JCA: I have had the privilege of reading in draft the lead judgment of my learned brother, Mbaba, JCA just delivered. His lordship has adequately treated all the live issues that call for determination in this appeal.

I am in complete agreement with his reasoning and conclusions arrived thereat. I too allow the appeal in pan and abide by all tire consequential orders therein contained.

IKYEGH JCA: I agree.

Appeal allowed in part