UAC (NIG.) PLC

V

EUNICE AKINYELE

COURT OF APPEAL
(AKURE DIVISION)

KUDIRAT MOTOMMORI O. KEKERE-EKUN JCA (*Presided)*
CHIN WE EUGENIA IYIZOB A JCA
MOORE A.A. ADUMEIN JCA *(Read the Lead Judgment)*

C A/1/36/2O08

FRIDAY, 13 JANUARY 2012

ACTION - Counterclaim-Nature of

APPEAL - Evaluation of evidence and ascription of probative value to Trial court - Primary duty of therefor - Appellate court - When may undertake, - Attitude of appeal court to findings based on finding by trial court

EVIDENCE - Evaluation of evidence and ascription of probative value to - Trial court - Primary duty of therefor - Appellate court -When may undertake - Attitude of appeal court to findings based on findings by trial court

DAMAGES - Claimant for - Duty on to mitigate his losses

JUDGMENT AND ORDERS - Judgment - Writing of- Prescribed format for - Non-existence of - Mandatory contents of

PRACTICE AND PROCEDURE - Counterclaim - Nature of

TORT - Detinue - Ingredients of

Issues:

1. Whether the trail court properly or at all evaluated the evidence adduced before it and whether the failure has not occasioned a grave miscarriage of justice which should lead to the setting aside of its judgment having regard to all materials at its disposal.
2. Whether the trial court was in error in finding the tort of detinue proved by the respondent against the appellant to justify the damages awarded on its footing;
3. Whether the trial court was in error having regard to the pleadings and evidence adduced to have awarded the various heads of special and general damages against the appellant and whether the awards ought not to be set aside.
4. Whether the trial court was correct in refusing to award the counterclaim of the appellant.

Facts:

The plaintiff claimed against the defendant in the High Court of Osun State, the return of her vehicle with crates of empty bottles of various drinks being wrongfully detained by the defendant at its Oshogbo branch, since December 1997; special and general damages, and the market value of the vehicle and the crates of empty bottles. The defendant counterclaimed for the sum of ₦1,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira) being the value of assorted drinks supplied to the plaintiff on credit with pre and post-judgment interest. The trial court allowed plaintiff's claims and dismissed the counterclaim.

Aggrieved, the defendant appealed to the Court of Appeal.

Held: *(Allowing the appeal)*

1. *Primary duty of trial court to evaluate evidence and ascribe probative value to and when appellate court may undertake*

Evaluation of evidence and ascription of probative value to evidence adduced in a trial court is primarily the duty of that court. Where, however,

the trial court abdicates its, primary duty by failing to-evaluate or by not properly evaluating the evidence before it, an appellate court can take that exercise if the assessment of the evidence would not involve the credibility of the

Witnesses who testified. In the instant case, where the trial court failed to properly evaluate the evidence before it, the appellate court re-evaluated same and set its decision aside. [Okoro v. Ezeka (1958) 4 SC 77 referred to] **[P. 1847, paras. E - F]**

2. *Primary duty of trial court to evaluate evidence and ascribe probative value to and attitude of appellate court to findings of fact based on -*

The primary duty of evaluating and ascribing probative value to evidence in a cause or matter and making findings of fact thereon is that of the trial court who had the opportunity of seeing and hearing the witnesses. An appellate court would not interfere with such findings unless it is shown that the trial court failed to carry out this duty in accordance with well laid principles of law or where he failed to take proper advantage of having heard and seen the witnesses testify. In the instant case, where the findings of the appellate court was perverse; the appellate court set same aside. [Mogaji **v.** Odofin **(1979) 4 SC 91;** Ebba v. Ogodo **(1984) 1 SCNLR 372, (2000) FWLR (Pt. 27) 2094;** Gbadamosi v. Dairo **(2007) All FWLR (Pt. 357) 812, (2007) 3 NWLR (Pt. 1021) 28? referred to**] **[P. 1858, paras. E - G]**

3. Non-existence of prescribed format for judgment writing and mandatory contents of –

Although, there is no prescribed format for judgment writing, a good judgment must contain certain features:

(a) The issues or questions to be decided in the case.

(b) The essential facts of the case of each party and the evidence led in support.

(c) The resolution of the issues of fact and law in the case.

(d) Conclusion or general inference drawn from the facts and the law as resolved.

(e) The verdict and orders made by the court.

A judgment will not be set aside because or more of the elements is missing unless it is shown that such omission resulted in total miscarriage of justice. [Attorney-General, Federation v. Abubakar **(2007) All FWLR (Pt. 389) 1264, (2007) 10 NWLR (Pt. 1041) 1 referred to**] **[Pp. 1858 - 1859, paras. G - B]**

4. *Ingredients of tort of detinue -*

For a plaintiff to succeed in detinue, he must adduce credible, admissible and sufficient evidence to establish the following facts:

(a) He is the owner of the chattel or property in question.

(b) He has an immediate right to possession of the property/chattel.

(c) That defendant is in actual possession of the property/chattel.

(d) He has made proper demand on the defendant to deliver up the property/chattel to him.

(e) The defendant, without lawful excuse, has refused or failed to deliver up the property/chattel to him.

In the instant case, where the plaintiff was unable to prove the above ingredients, therefore, the trial court erred by allowing plaintiff's claims. [Owena Bank v. Olatunji **(2002) 12 NWLR (Pt. 36) 987;** W.A. Oil Fields v. U.A.C. **(2000) 13 NWLR (Pt. 683)...;** U.B.N, v. Osezuah **(1997) 2 NWLR (Pt. 485) 28;** Kosile v. Folarin **(1989) 3 NWLR (Pt. 107) 1;** *Lufthansa-German Airline v. Odiese* **(2006) 7 NWLR (Pt. 978) 34 referred to**] **[Pp. 1851 -1852, paras. F - A]**

5. *Duty on claimant for damages to minimize his loss -*

A claimant for damages is under an obligation - a duty to minimize the damages and mitigate the loss that he suffers. In the instant case, the plaintiff failed to mitigate her losses, the trial court erred by granting her special damages not proved. [Momodu **v.** University of Benin **(1997) 7 NWLR (Pt. 512) 325 referred to**] **[P. 1856, para. A]**

6. *Nature of a counterclaim –*

A counterclaim is akin to a separate suit. [P. 1857, para. G]

Nigerian Cases Referred to in the Judgment:

Agbi v. Ogbeh (2006) All FWLR (Pt. 329) 941, (2006) 11 NWLR (Pt. 990) 65

Atolagbe v. Shorun (1 9 S 5) 1 NWLR(Pt. 2) 360

Attorney-General, Federation v. *Abubakar* (2007) All FWLR (Pt. 389) 1264, (2007) 10 NWLR (Pt. 1041) 1

Cardosov. Daniel (1986) 2 NWLR (Pi. 20) I

Ebba v. Ogodo (1984) 1 SCNI.R 372, (2000) FWLR (Pt. 27) 2094

Egba v. Appah (2005) 10 NWLR (Pt. 934) 464

Gbadamosi v. Dairo (2007) All FWLR (Pt. 357) 812, (2007) 3 NWLR (Pt. 1021) 282 *George* v. *Dominion Flour Mills* (1963) NSCC 54

Kosile v. *Folarin* (1989) 3 NWLR (Pt. 107) 1

Lufthansa-German Airline v. Odiese (2006) 7 NWLR (Pt. 978) 34

Mabogunje v. *Adewunmi* (2007) All FWLR (Pt. 347) 770

Maduabukwu v. Umunakwe (1990) 2 NWLR (Pt. 134) 598

Mogaji v. Odofin (1979) 4 SC 91

MomoduWUniversityi)fBeninU997) 7 NWLR (Pt. 512) 325

Neka R E. Manufacturing Co. Ltd v. A. C.R. Ltd (2004) All FWLR ' (PL 198) 1175, (2004) I SC (Pt. 1) 32

Nkpa v. Nkume (2001) 6 NWLR (Pt. 710) 543

Nnorodim v. Ez.eani(1995) 2 NWLR (Pt. 378) 488

Ogba v. *Onwuzu* (2005) 14 NWLR (Pt. 945) 331

Ogbeide v. Osijo (2007) All FWLR (Pt. 365) 548; (2007) 3 NWLR (Pt. 1022)423

Ogunleye v.Oni (1990) 2 NWLR (Pt. 135) 745

Okoro u *Ezeka* (1958) 4 SC 77
Onwuka v. Omogui (1992) 2 NWLR (Pt. 230) 393
Owena Bank v. Olatunji (2002) 12 NWLR (Pt. 36) 987
Sagay v. *Sajere* (2000) FWLR (Pt. 7) 1 111, (2000) 6 NWLR (Pt.661)360
U.B.N: v. Osezuah (1997) 2 NWLR (Pt. 485) 28
W.A Oil Fields v. U.A. C. (2000) 13 NWLR (Pt. 683)

Foreign Cases Referred to in the Judgment:

Ron Makers Ltd v. *Barnet Instructions Ltd* (1945) KB 65
British Westing House Electric and Manufacturing Company Ltd v. Underground Electric Railways Co. of London Ltd (1912) AC 673
Owner of Dredger Liesbosch v. *Owners of Steam Ship Edison* (I'11 1) AC449

Nigerian Statute Referred to in the Judgment:

Evidence Act, section 149(d)

Counsel:

Yakubu Dauda, Esq. (with him, Miss O.O. Apata) - *for the Appellant.*
Oluwagbemiga Olatunji, Esq. - *for the Respondent.*

ADUMEIN JCA (Delivering the Lead Judgment): In the High Court, Osun State sitting **at** Osogbo, the plaintiff, who is the respondent in this court claimed against the appellant (the defendant) as follows:

"Whereof the plaintiff claim against the defendant -

(i) Return of the plaintiff's vehicle No. AE 267 MNA, 350 crates of maltonic empty bottles, 100 cartons of big stout empty bottles, 150 cartons of small stout empty bottles and 150 crates of tusk empty bottles being wrongfully detained by the defendant at its Osogbo branch since December 1997.

(ii) The sum of N9,875,000.00 (nine million, eight hundred and seventy-five thousand naira) representing special damages for loss of use for the wrongful detention of the truck and

(iii) The sum of N1,440,000.00 (one million, four hundred and forty thousand naira) for loss of use of the bottles

wrongfully detained from 11 December 1997 till 28 May 1999;

(iv) General damages of N 1,000,000.00 (one million naira) against the defendant. In the event of the F inability of the defendant to return the items, the plaintiff claims the following from the defendant, as additional to reliefs (ii) (iii) and (iv) above.

(v) The sum of N1,200,000.00 (one million, two hundred thousand naira) representing the market value of the G vehicle and the sum of N445,500.00 (four hundred and forty thousand, five hundred naira) representing the value of the cartons and crates of empty bottles."

The appellant, as defendant in the lower court, counterclaimed thus:

"Whereof the defendant claims against the plaintiff as follows:

(i) The sum of one million, five hundred and twenty- one thousand, five hundred naira (N 1,521,500.00) being value of assorted drinks supplied to the plaintiff by the defendant on credit which the plaintiff has refused to pay for despite repeated unfulfilled promises

(j) 21% interest per annum on the said sum of one million, five hundred and twenty-one thousand, five hundred naira (N1.521,500.00) from 27 February 1998 until the 7 January 2000 and thereafter 11 % interest on the sum till date of judgment.

(k) 11% interest on the judgment sum from the date of judgment until final liquidation."

The case was heard and determined by the learned Chief Judge of Osun State. The respondent's claim was allowed while the appellant's counterclaim was dismissed.

This is an appeal against the judgment of Osun State High Court delivered by Ogunsola C.J. on 1 December 2006. The grounds of the appeal, weeded of their particulars are as follows:

1. The learned Trial judge erred in law when he held in this judgment thus:

"Having regard to the circumstances of this case, particularly the premise from which the plaintiff acted,

she could not be said to have failed to mitigate the loss."

2. The learned trial judge erred in law in accepting and treating the plaintiff case as proved without considering the defence of the defendant and this led to a miscarriage of justice on the defendant.
3. The learned trial judge erred inlaw in the way and manner he wrote his judgment thereby violating established principles on the writing of judgment thereby occasioning a grave miscarriage of justice on the defendant in that he had believed, accepted and acted on the case of the plaintiff before perfunctionarily attempting to consider the case of the defendant.
4. The learned trial judge erred in law by ordering the payment of the sum of N9,875,000.00 (nine million, eight hundred and seventy-five thousand naira) representing special damages for the alleged wrongful detention of the truck in

   total violation of principles settled in the law for the award of damages.
5. The learned trial judge, erred in law in awarding general damages of N 1,000,000.00 (one million naira) against the A defendant when such was contrary of legal principles and totally unsupported by the fact and circumstance of the case.
6. The learned trial judge erred in law in awarding the sum of N 1,440,000.00 (one million, four hundred and forty thousand naira) for loss of use of the bottles alleged g wrongfully detained from 11 December 1997 till 28 May 1999 when the award was speculative, unsupportable and contrary to law.
7. The learned trial judge erred in law in awarding the sum of N 1,200,000.00 (one million, two hundred thousand naira) as the market value of the vehicle and the sum of N445,500.00 (four hundred and forty-five thousand, five hundred naira) as the value of the cartons and crates of empty bottles in total violation of the principles that guide the award of damages.
8. The learned trial judge erred in law in holding that: "furthermore, the defendant's counter-claim bothers on

fraud which falls within the realms of criminal law. It cannot be conveniently tried with this case. It is accordingly struck out".

9. The learned trial judge erred in law in failing to award the g counter-claim of the defendant when same was properly raised and proved as required by law especially in view of exhibit 'B and C, the cheque issued by the plaintiff but which was returned unpaid when presented.
10. The learned trial judge erred in law in holding that: "from the evidence before the court, two trucks were initially seized namely: 3 $^{1/2}$ tons truck and 7 tons truck. It was in evidence that plaintiff brought the empty crates, empty cartons and two trucks and gave them to the defendant's branch manager who detained all the items including the vehicles. Plaintiff gave evidence to the effect that only the 3 $^{1}/_{2}$ tons vehicle was released to her by the defendant's manager on the intervention of her counsel and her pastor, all the other items were "not released".
11. The learned trial judge erred in law when he held that: "plaintiff's two trucks with their contents of empty crates were detained by the defendant's company and this was done ostensibly in furtherance of investigation activities bothering on financial irregularity on the defendant's agent namely:

    The branch manager of the defendant's company. One of the vehicles, the *3½* tons was released by the defendant's company to the plaintiff after much pressure. The defendant or the two vehicles was alleged to be based as security for the alleged financial irregularities. The question that arises in this having regard to the piecemeal release of vehicle, can one say that the defendant's possession of the two vehicles was not adverse? We would find answer in the following instances. Until plaintiff's counsel wrote exhibit A1 coupled with the intervention of the plaintiff's pastor, the $3^{1/2}$ tons vehicle would not have been released. The 7 tons truck remained defendant will let go the 7 tons truck which it held on to as- a "collateral" for the financial irregularities including exhibit B.

    I therefore find as a fact that plaintiff ran into trouble as a result of despicable activities of defendant's dismissed

former branch manager who was neck deep in fraudulent activities."

I also find as a fact that plaintiff's two trucks and empty males and cartons were unlawfully detained by the defendant. I find as a fact that the trading activities between the plaintiff and the defendant were informally carried out. I find as a fact that the mode of payment could be by cheque, cash or draft."

12. The learned trial judge erred in law in finding detinue proved against the defendant when same was not proved as required by law.
13. The learned trial judge erred in law in failing to evaluate properly or at all the evidence adduced at the trial especially by the defendant and in failing to accord necessary weight to same thereby coming to the erroneous decision to grant the main claims and dismiss the counterclaim contrary to the rule of fair hearing.
14. The judgment of the trial court is against the weight of evidence."

Out of the 14 (fourteen) grounds of appeal, the appellant framed four issues as arising for determination, namely:

1. Whether the learned trial Chief judge properly or at all evaluated the evidence adduced before him and whether the failure has not occasioned a grave miscarriage of justice which should lead to the setting aside of his judgment having regard to all the materials at his disposal?
2. Whether the learned trial Chief judge was in error in finding the tort of detinue proved by the respondent against the appellant to, justify the damages awarded on its footing?
3. Whether the learned trial Chief judge was in error having regard to the pleadings and evidence adduced to have awarded the various heads of special and general damages against the appellant and whether the awards ought not to be set aside.
4. Whether the learned trial Chief judge was correct in refusing to award the counterclaim of the appellant."

The respondent also distilled 4 (four) issues for determination, which are basically the same as the four issues refined by the appellant. It will serve no useful purpose to reproduce the issues framed by the respondent.

At the hearing of the appeal, learned counsel for the appellant

adopted and relied on the appellant's brief dated 11 February 2009 but filed on 10 March 2009 and deemed properly filed on 21 April 2009 and the appellant's reply brief dated and filed on 31 January 2011. The learned counsel for the appellant urged the court to allow the appeal and set aside the judgment of the trial court and grant the appellant's counterclaim in the court below. The respondent's learned counsel on the other hand, adopted and relied on her brief of argument dated and filed on 9 June 2009 and urged the court to dismiss the appeal and affirm the judgment of the lower court.

The issues formulated by the appellant are substantially the same, as stated earlier, although couched differently, as those formulated by the respondent and the issues will be treated seriatim.

Issue No. 1

Whether the learned trial Chief Judge properly or at all evaluated the evidence adduced before him and whether the failure has not occasioned a grave miscarriage of justice which should lead to the setting aside of his judgment having regard to all the materials at his disposal?

The appellant argued that the trial court abdicated its responsibility and failed to evaluate, or improperly evaluated the evidence before it. The appellant referred to the evidence adduced by the parties and argued that the trial court failed to evaluate the evidence as required by law and that this failure occasioned a miscarriage of justice on the appellant. The appellant referred to the cases of *Nkpa Vs Nkume (2001) 6 NWLR (Pt. 710) 510* 558 - 559 and *Sagay v. Sajere* (2000) FWLR (Pt. 7) 1111, (2000) 6 NWLR (Pt. 661) 360 at 370 and argued that "a finding of fact would only be said to have been properly made when a trial court has reviewed the testimonies at its disposal or has ascribed probative value to the testimonies proffered, reason(s) for the probative value so attached and relate such testimony to the pleadings of the parties."

Relying on the cases of *Ogunleye v. Oni* (1990) 2 NWLR (Pt. 135) 745 at 785 and *Mabogunje v. Adewunmi* (2007) All FWLR (Pt. 347) 770 at 789, the appellant submitted that this court could in the circumstances of this case evaluate the evidence adduced by the parties and make appropriate findings in order to obviate the miscarriage of justice.

In her brief of argument, the respondent contended that the appellant ought to have shown that if the evidence had been properly evaluated, the conclusion of the learned trial judge would have been different. The respondent argued that the evidence before the trial court was properly evaluated.

The allegation in the respondent's amended statement of claim is that her 7 ton truck was wrongly detained by the appellant on or about 10 December 1997 and was not released to her notwithstanding a proper demand for its release. On the other hand, the appellant claimed that the truck was voluntarily surrendered because of the respondent's indebtedness to the appellant.

The question that" arises from this issue is whether or not the trial court properly evaluated the evidence before it in arriving at its decision to uphold the respondent's, claim.

It is trite law that evaluation of evidence and ascription of probative value to evidence adduced in a trial court is primarily the duty of that court. Where however, the trial court abdicates its primary duty by failing to evaluate or by not properly evaluating the evidence before it, an appellate court can undertake that exercise *if* the assessment of the evidence would not involve the credibility of the witnesses who testified: *Okoro v.* Eze (1958)4 SC77.

In the present case, it is very obvious from the judgment appealed against that the lower court, having regard to the evidence before it, did not effectively or properly carry out its primary function of evaluating evidence and ascribing probative value to it. For example, the learned trial Chief Judge, without evaluating the evidence before him, held at page 94 of the record of appeal, *inter alia,* as follows:

> "I also find as a fact that plaintiff's two trucks and empty crates and cartons were unlawfully detained by the defendant.

In reaching the above conclusion, the trial court did not evaluate the conclusion, the trial court did not evaluate evidence on how the respondent's two trucks got to the appellant's premises / and/or how (hey were detained. The respondent pleaded in paragraphs 8.9 and 10 of her amended statement of claim thus*:*

8. On or about 10 December 1997, the plaintiff dispatched from llorin to Osogbo her 7 ton truck with registration number AE 267 MNA and $3^{1}/_{2}$ ton drinks from the defendant's.
9. The 2 trucks dispatched by this plaintiff from llorin to purchase drinks from the defendant's division carried with them the following number of crates/cartons of empty bottles:
   (a) Maltonic 350 crates
   (b) Big Stout - 100 crates
   (c) Small Stout- 150 crates
   (d) Tusk - 150 crates

10. The defendant's divisional manager at Osogbo ordered the detention of the plaintiff's 2 trucks and the crates and cartons they brought itemized in paragraph 9 above.

In exhibit A1, in the pre-action correspondence dated 6 March 1999 by the respondent's solicitors to the appellant's manager, the respondent through her solicitors wrote in paragraph 3 thus:

> "On'or about 10 December 1997,our client sent from llorin her two trucks to your Osogbo branch with the following number of crates/cartoons of empty bottles for the purposes of buying drinks:
>
> (i) Maltonic - 350 crates
> (ii) Big Stout - 100 crates
> (iii) Small Stout - 150 crates
> (iv) Tusk - 150 crates"

From the respondent's pleading and evidence reproduced above, the case of the respondent was that she sent or dispatched from llorin, her two trucks to the appellant's depot/branch at Osogbo. This means that she did not go with or accompany the two trucks to Osogbo. However, the relevant part of her oral testimony at pages 23 - 24 of the record is as follows:

> "About 10 December 1997, I went to GB.O. at Osogbo to buy brewed products. I had with N1,000,000.00 (one million naira). I gave it to Yinka, G.B.O. Manager. I bought (sic) empty crates into trucks auf (sic) gave it to Yinka, the G.B.O. manager. I bought (sic) the empty bottles (sic) in crates in 2 trucks to G.B.O. Osogbo ..."

The evidence of the respondent, who testified as PW1, reproduced above, creates the impression "that she personally took her two trucks from ilorin to Osogbo on 10 December 1997 and not that she "sent" or "dispatched" the said trucks from florin to Osogbo. The respondent's oral testimony is clearly at variance with her pleadings and it is trite that such evidence goes to no issue.

In the determination of the case before him, the learned trial Chief Judge failed to advert his mind to the fact that the respondent's oral evidence as to how her two trucks got to be in the appellant's premises at Osogbo went to no issue for being at variance with the respondent's pleadings and without evaluating the remaining evidence or even all the evidence before him, jumped to the conclusion that the respondent's trucks were unlawfully detained by the appellant.

I am inclined to agreeing with the appellant that the evidence of the driver(s) who drove the respondent's trucks to the appellant's premises at Osogbo was crucial or even vital to the respondent's case. In the present case, no reason or explanation was given by the

respondent why the person(s) who drove the trucks from Ilorin to Osogbo were not called as witnesses to explain the circumstances of the alleged detention of the two trucks in issue. Worse still, the appellant's manager, who allegedly detained the respondent's trucks was also not called as a witness for either the respondent or the appellant to assist the trial court in unraveling the circumstances leading to the 'detention' of the respondent's trucks. In P circumstance such as this, the trial court ought not to have speculated on the lawfulness or otherwise of the detention or retention by the appellant of the respondent's trucks.

In this case, where by her pleading and her solicitors' pre-action correspondence – exhibit A1, it was represented that the two trucks were "sent" or "dispatched" by the respondent from Ilorin to Osogbo, evidence by the respondent on the way and manner her trucks were detained by the appellant's manager at best should be treated as *ex auditu*. Such hearsay evidence, even if not at variance with a party's pleadings ought not to be quickly relied upon, as the trial court did in arriving at a vital judicial decision especially in view of the appellant's averment in paragraph 15 of its statement of defence and counterclaim that "the vehicle was voluntarily surrendered by the plaintiff to the defendant".

As can be seen from the judgment of the lower court, which spans from pages 77-97 of the record of appeal, apart from summarizing the fact of the case, the evidence of the witnesses who testified and the addresses of learned counsel for the parties, the learned trial Chief Judge without any proper evaluation of the evidence before him was very fast in making findings which, as demonstrated above and will be demonstrated later, are perverse and unreasonable having regard to rather scanty nature of the evidence adduced by the respondent. A To be brief, this issue is hereby resolved in favour of the appellant.

Issue No. 2

Whether the learned trial Chief Judge was in error in finding the tort of detinue proved by the respondent against the appellant to justify the damages awarded on its footing?

The appellant submitted that the grounds upon which the trial court relied to find detinue proved were clearly unsupported by the parties' pleadings. For example, the appellant argued, it was not the case of the parties that the respondent's trucks together with their content were detained in furtherance of any investigation of financial

irregularities as wrongly stated in the judgment. The appellant further contended that it was fallacious for the lower court to have held that "the $3^{1/2}$ ton truck was released only after the writing of exhibit A1" by the respondent's solicitor when tire vehicle was released before exhibit A1 was sent to the appellant. Further, the appellant argued that it was not the case of the parties based on their pleadings, that "the 7 ton truck was not released because it was used as "collateral for the financial irregularity". The appellant stated also that the finding of the trial court that the respondent ran into trouble with the appellant because of the despicable activities of the appellant's former manager had no support in the pleadings. The appellant referred to the case of *George v. Dominion Flour Mills* (1963) NSCC 54 g on the necessity for a court to confine itself to the issues joined on the pleadings and not to set up a new case for the parties.

On the authority of the case of *Nnorodim v. Ezeani* (1995) 2 NWLR (Pt. 378) 488 at 467 the appellant urged the court to set aside the conclusion/finding of the lower court on the issue of detinue as it is perverse. Referring to the ingredients of detinue, as laid down by this F court, in the case of *Lufthansa-German Airline v. Odiese* (2006) 7 NWLR (Pt. 978) 34 at 76, the appellant contended that the respondent failed to establish the tort of detinue against the appellant. It was further contended that the respondent "through her unnamed driver drove the said vehicle which he voluntarily parked at the appellant's premises." The appellant submitted, relying on the case of *Aghi v. Ogbeh* (2006) All FWLR (Pt. 329)941,(2006) 11 NWLR (Pt. 990)65 at 125, paragraph, per Akintan JSC and section 149(d) of the Evidence Act, that the failure by the respondent to call her said driver was fatal to her case.

The appellant referred to exhibits A2 and E and the evidence of DW1 and contended that there was clear evidence that the appellant did not at any time prevent the respondent from removing her vehicle. On the authorities of *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) 360 and *Egba v. Appah* (2005) 10 NWLR (Pt. 934) 464 at 480 - 481, the appellant urged the court to reverse the findings of the lower court on the issue of detinue for being perverse.

In response to the appellant's argument, the respondent analyzed the evidence before the lower court and submitted' that the respondent successfully established the ingredients of detinue, as set out in the case of *Lufthansa-German Airline v. Odiese*. On the first, second and third ingredients of detinue, as specified in

Odiese's case, the respondent, relying on the cases of *Cardoso v. Daniel* (1986) 2 NWLR (Pt. 20) 1 at 43 and *Maduabuchitkwu v. Umunakwe* (1990) 2 NWLR (Pt. 134) 598 at 17 607, argued that the parties by their pleadings and evidence agreed on facts establishing these ingredients and there was no need for further proof. The dispute seemed to be on only two ingredients, namely.

"(1) Whether the respondent herein had made a proper demand on the defendant (appellant) to deliver up the chattel to her.

(2) Whether the defendant without lawful excuse, refused or failed to deliver the said chattel to her."

The respondent stated that she made a proper demand for the return of the truck and the empty bottles as evidenced by exhibit D. Referring to the cases of Kosile v. Folarin (1989) 3 NWLR (Pt. 107) 1 and Bon Makers Ltd v. Barnet Instructions Ltd (1545) KB 65, the respondent contended that the appellant wrongfully detained her truck and bottles after a proper demand for their return was made. The court was urged to resolve this issue in favour of the respondent.

The ingredients of the tort of detinue were correctly stated by, my learned brother, Garba, JCA in *Lufthansa-German Airline v. Odiese* (2006) 7 NWLR (Pt. 978) 34 at 76 as follows:

> "For a plaintiff to succeed in detinue, he must adduce credible, admissible and sufficient evidence to establish the following facts:
>
> (a) He is the owner of the chattel or property in question,
>
> (b) He has an immediate right to possession of the property/chattel,
>
> (c) That defendant is in actual possession of the property or chattel,
>
> (d) He has made proper demand on the defendant to deliver up the property/chattel to him,
>
> (e) The defendant without lawful excuse, has refused or failed to deliver up the property/chattel to him.
>
> *Owena Bank v. Olatunji* (2002) 12 NWLR (Pt. 36) 987;
> *W.A. Oil Fields v. U.A.C.* (2000) 13 NWLR (Pt. 683)
> *U.B.N, v. Osezuah(*1991) 2 NWLR (Pi. 485) 28 and *Kosile A v. Folarin*."

Taking the last ingredient identified in *Lufthansa-German Airline v. Odiese* into consideration, can it be said that, having regard to the facts and circumstances of this case, the appellant

"without lawful excuse" refused or failed to deliver up the truck to the respondent?

I have earlier held that there was no direct or credible evidence by the respondent showing how her two trucks were detained by the appellant. There was, however, evidence by the appellant that the respondent was owing some money for which some dud cheques were issued. One of such cheques was exhibit B issued on 28 February 1998. The appellant pleaded in its statement of defence and counterclaim that C the respondent voluntarily surrendered her vehicle because of her indebtedness to the appellant. The respondent claimed that her truck was unlawfully detained on or about 10 December 1997. Does it appear logical to a reasonable tribunal or court for the respondent to have issued a cheque - exhibit B - for the sum of N1,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira only) to the appellant more than 2 (two) months after the appellant was said to have been unlawfully detaining the respondent's truck? If the appellant were unlawfully detaining the respondent's truck, it would be unreasonable, and even unwise, for the respondent to issue such a cheque to the appellant while the appellant continued with its unlawful detention of the respondent's truck.

The trial court found that the respondent (plaintiff) "ran into trouble as a result of despicable activities of the defendant's dismissed former branch manager who was neck-deep in fraudulent activity." The respondent did not appeal or cross-appeal against this finding of the trial court. This means that this finding has been accepted by the respondent and it is binding on her.

In the appellant's undated letter (admitted in the lower court as exhibit E) in reply to the respondent's solicitors' letter - exhibit AI, the appellant wrote, inter alia, as follows:

> "Sometime in November 1998, a large scale fraud involving about N11,000,000.00 (eleven million naira) only was discovered at our Osogbo Branch consequent upon a routine audit check. Upon a closer investigation, we were able to uncover the scheme which led to the fraud. In substance, the scheme involved collusion and conspiracy between our former Osogbo Branch Manager and a number of our customers whereby the former repeatedly released stocks to the latter in exchange for dud cheques.
>
> *It would interest you to know that your client was deeply involved in the scheme. She issued dud cheques in exchange*

> *for goods bought by her with reckless abandon.* Copies of some of the cheques are attached herewith for your information. One therefore wonders how your client could claim ignorance of the value of her indebtedness to our company. And up till this moment, your client has made no effect to liquidate the debt or even a part thereof."

There was no reply by the respondent to the damaging allegation in the underlined portion of the letter reproduced above.

The trial court also fond thus:

> "I find as a fact that the trading activities between the plaintiff and the defendant were informally carried out. I find as a fact that the mode of payment could be by cheque, cash or draft."

The foregoing findings were also not challenged by the respondent, who is deemed to have accepted same.

Under the circumstances of this case, there was no way a reasonable tribunal or court could have validly held that the respondent successfully established her claim in respect of the tort of detinue. The respondent got herself "deeply involved" with the "fraudulent activity" of the appellant's dismissed branch manager and in the process got her truck trapped and she should not even be heard to talk of the appellant unlawfully detaining her truck, or any chattel for that matter. If it were to be a matter of simple contract, the respondent's claim ought to be dismissed for *ex turpi causa non oritur actio.*

This is a very clear case whereby a trader abandoned the decent rules of that trade and got entrenched in aiding and abetting the fraudulent and clearly unlawful activities of the appellant's manager and In the process deposited her truck with the said manager only to 'wake up' and complain of unlawful detention more than one year and half thereafter! A court of equity has no sympathy for a person, such as the respondent in this case.

In the present case, there is no evidence that the appellant failed or refused to release the truck to the respondent after the demand by the respondent's solicitors. The evidence and the pleadings before the court below shows that the respondent through her agents/drivers drove the truck to the appellant's premises where it was parked on or about 10 December 1997. Tin- evidence further shows (as per exhibit 8) that even more than 2 (two) months after the truck was allegedly detained by the appellant, the respondent still issued a cheque valued over one million naira to the appellant. A Further, after writing through her solicitors, for the release of the truck, the respondent made no further effort to ensure its release. At page 26 of the record, the respondent confirmed this when she testified under cross-examination thus:

> "After I handed over the matter to my solicitors, I did not go g to the defendants again to inquire about the 7 ton truck." Without more, this issue is resolved against the respondent. *Issue No. 3*

Whether the learned trial Chief Judge was in error having regard to the pleadings and evidence adduced to have awarded the various heads of special and general damages against the appellant and whether the awards ought not to be set aside.

The appellant argued that the trial court erred in granting the special and general damages claimed by the respondent. The appellant referred to the respondent's pleadings, particularly paragraph 26 of the amended statement of claim and submitted that special damages must be specifically pleaded and proved strictly on

the authority of *Ogbeide. v. Osijo* (2007) All FWLR (Pt. 365) 548, (2007) 3 NWLR (Pt. 1022) 423 at 444. It was submitted that the claim for loss of the respondent's vehicle put at N9,875,000.00 (nine million, eighty hundred and seventy-five thousand naira) was erroneous. The appellant analyzed the evidence g before the lower court and argued that there was no sufficient evidence to warrant the award of the special damages - *Momodu v. University of Benin* (1997) 7 NWLR (PtT512) 325 at 350. The appellant contended that the *ipsi dixit* of the respondent, as PW1, even if unchallenged was not sufficient to ground the award of the special damages claimed. It was argue further that the respondent ought to have supplied documents to prove the said special damages - *Neka B.B. Manufacturing Co. Ltd v. A.C.B. Ltd* (2004) All FWLR (Pt. 198) 1175, (2004) 1 SC (Pt. 1) 32 at 39-40, per Pats-Acholonu JSC, was cited and relied on by the appellant.

The appellant, relying on the case of *Onwuka v. Omogui* (1992) 2 NWLR (Pt. 230) 393 at 422, argued that the respondent was under an obligation to mitigate her loss. In this case, the appellant contended that the respondent unreasonably "waited and was inactive for the period of 10 December 1997 up to 6 March 1999" before instituting her suit on 7 July 1999.

In respect of the other monetary awards, the appellant analyzed the facts of the case, relied' on some judicial authorities and urged the court to set aside the awards and resolve this issue in favour of the appellant.

The respondent, on the other hand, comprehensively analyzed the evidence adduced before the trial court and reviewed the judgment of the lower court and contended that she sufficiently proved the special damages claimed and awarded. The respondent urged the court to resolve this issue in her favour.

I entirely agree with the appellant that the special damages claimed by the respondent, although particularly pleaded, ought to have been strictly proved by credible and reliable evidence.

In the instant case, apart from the *ipsi dixit* figures doled out by the respondent and her witnesses, there was nothing upon which the said figures could be authenticated or verified. The respondent who testified as PW1 merely churned out monetary figures without any receipt to back up her claim. Worse still, none of the drivers of the truck was tailed as a witness to confirm the cost of daily, weekly or monthly hire of the respondent's truck and the regularity of the hires.

PW2 - Ayoola Daniel, who gave evidence as to the value of the truck and the cost of repairs, was not helpful in this case. The evidence of PW2 spans pages 28 - 30 of the record. The evidence of PW2 is very speculative, because as he admitted, under cross-examination, he had not seen nor examined the disputed truck and so he "would not know the life span of the vehicle and the condition of the engine."

In similar vein, the evidence of PW3 - Mr. Sunday Oni – the respondent's last witness was not useful because his evidence related to the cost of hiring out his 7-ton lorry and not specifically on the amount for which the respondent hired out' her own truck.

I agree with the appellant that having regard to the facts of this case, the respondent did not strictly prove the special damages claimed by her as required by law: *Momodu v. University of Benin* (1997) 7 NWLR (Pt. 512) 325 at 350, per Ige, JCA (of blessed memory).

Further, - I agree that the respondent failed in her obligation to

minimize her damages and mitigate the losses which she claimed to have suffered. In this case, the respondent proceeded to do business, as usual, with the appellant even more than 2 months after the appellant was alleged to be unlawfully detaining her business truck. Exhibit B -the Afribank Nigeria Limited cheque dated 28 February 1998 for the sum of N1,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira) issued in favour of the appellant is relevant and instructive in this respect. Thereafter, the respondent waited for more than 1 (one) year after writing exhibit Al demanding the release of her truck, allegedly unlawfully detained since on or about 10 December 1997.

The law as rightly pointed out by the appellant is that a claimant for damages is under an obligation - a duty to minimize the damages and mitigate the loss that he suffers: *Onwuka* v. *Omogui* (1992) 2 NWLR (Pt. 230) 393 at 422 where Nnaemeka-Agu JSC state the law thus:

> "In law a plaintiff is under an obligation to minimize damages. See cases of *British Westing House Electric and* g *Manufacturing Company Ltd v. Underground Electric Railways Co. of London Ltd* (1912) AC 673 and *Owner of Dredger Liesbosch* v. *Owners of Steam Ship Edison* (1933) AC 449. The evidence is that the plaintiff/respondent uses the vehicle for conveyance of kerosene daily. It is therefore unreasonable for him to leave this vehicle idle, in the C defendants/appellant's yard from 6 August 1981 till 6 September 1983."

Also the case of *Elijah Oladeji Kosile v. Amuba Olaniyi Kosile* (1989) 3 NWLR (Pt. 107) 1 where the Supreme Court held that a plaintiff is required to take reasonable steps to mitigate the loss resulting from a defendant's wrong.

This issue is also resolved in favour of the appellant and against the respondent.

Issue No. 4

Whether the learned trial Chief judge was correct in refusing to award £ the counterclaim of the appellant.

The appellant's argument on this issue is from pages 39 - 46 (paragraphs 9.00 - 9.21) of its brief. The appellant contended that its counterclaim was for the recovery of debt owed by the respondent. The appellant argued that exhibit B - the dud cheque is shed by the respondent confirmed the respondent's indebtedness to the appellant.

After comprehensively analyzing the evidence before the trial court, the appellant argued that the lower court erred in not granting its counterclaim. The appellant finally urged the court to resolve this issue in its favour.

The respondent's response is at pages 25 - 31 (paragraphs 7.01 - 7.25). The summary of the respondent's argument is that, based on the parties' pleadings and evidence, the appellant's counterclaim was rightly dismissed by the trial court.

The appellant averred in paragraph 23 of its statement of claim and counterclaim thus:

> "The defendant avers that as at 28 February 1998 the plaintiff's indebtedness stood at one million, five hundred

> and twenty-one thousand, five hundred naira (N 1,521,500.00) representing the cost of assorted drinks supplied to the plaintiff on credit by the defendant which the plaintiff has refused, failed and neglected to pay for. The defendant shall found on the plaintiff's Afribank Limited cheque dated 29 February 1988 for the sum which was returned unpaid upon presentation.

At page 37 of the record the appellant's first witness -.Akeem Bamidele Ogunniran (DW1) testified, *inter alia,* thus;

> "The plaintiff issued a cheque to us and when we presented the cheque it was returned unpaid."

That cheque was admitted in evidence by the lower court as exhibit C B. DW1 - Akeem Bamidele Ogunniran 'testified further at page 38 of the record of appeal as follows:

> "I see exhibit E the amount on the cheque is Nl,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira). The plaintiff has not paid the sum on the dishonoured cheque."

There was no evidence from the respondent to discredit or dismiss the evidence adduced by the appellant, as summarized or reproduced ° above. Exhibit B is the dishonoured or dud cheque issued by the respondent in favour of the appellant. It was issued and signed by the respondent - Mrs. E.A. Akinyele. From the bank stamps on exhibit B, it was presented for clearing on 3 March 1998 and it was returned dishonoured or unpaid on 9 March 1998. In the absence of any evidence by the respondent, the only reasonable presumption and conclusion is that the said cheque was issued in favour of the appellant in settlement of the respondent's alleged indebtedness to the appellant. This clearly agrees with the appellant's pleading and evidence. The trial court ought not to have shut its judicial eyes to such a vital piece of evidence.

The learned trial Chief Judge of Osun State ought to have asked himself many questions, including the following. Why did the plaintiff (the respondent in this court) issue exhibit B in favour of the appellant G and for what purpose, especially after the appellant had allegedly unlawfully detained the respondent's truck for over 2 (two) months?

While I agree with the respondent that a counterclaim is akin to a separate suit or claim, there is no evidence to counter or dislodge the evidence of the appellant in respect of its counterclaim. The appellant's counterclaim ought to have been accepted by the trial court as having been proved on the balance of probabilities. The appellant's counterclaim was, therefore wrongly, disallowed by the lower court. The appellant's appeal on this ground succeeds and this issue is, accordingly, resolved in favour of the appellant against the respondent.

Conclusion

Having resolved all the issues in favour of the appellant, this appeal succeeds and it is hereby allowed. The judgment of the lower court delivered on 1 December 2006 is hereby set aside. The

respondent's claim in the court below is hereby dismissed in its entirety. The appellant's first relief in its counterclaim is hereby granted as prayed. However, there is no credible evidence to support the appellant's claim that it is entitled to the interests on the sum of N 1,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira) at the rates claimed in its counterclaim. To avoid a retrial on this trivial issue, I order that the respondent shall pay to the appellant, interests on the sum of N1,521,500.00 (one million, five hundred and twenty-one thousand, five hundred naira) at the rates of the Central Bank of Nigeria from 27 February 1998 until the judgment sum of Nl,521,500.00 (one million, five hundred and twenty-one thousand and five hundred only) is liquidated by the respondent.

The sum of N100,000.00 (one hundred thousand naira only) is hereby awarded as costs in favour of the appellant against the respondent.

KEKERE-EKUN JCA: I have had the privilege of reading in draft the judgment just delivered by my learned brother, Adumein, JCA. He has succinctly but meticulously considered and resolved all the issues submitted to us in this appeal. I agree with his reasoning and conclusions.

The law is settled that the primary duty of evaluating and ascribing probative value to evidence in a cause or matter and making findings of fact thereon is that of the learned trial judge who had the opportunity of seeing and hearing the witnesses. An appellate court would not interfere with such findings unless it is shown that the learned trial judge failed to carry out this duty in accordance with well laid principles of law or where he failed to take proper advantage of having heard and seen the witnesses testify: *Mogaji* v. *Odofin* (1979) 4 SC 91; *Ebba* u *Ogodo* (1984) 1 SCNLR G 372, (2000) FWLR (Pt. 27) 2094; *Gbadamosi v. Dairo* (2007) All FWLR (Pt. 357) 812, (2007) 3 NWLR (Pt. 1021) 282 at 302, paragraphs D - G.

Although, there is no prescribed format for judgment writing, a good judgment must contain certain features:

(a) The issues or questions to be decided in the case;
(b) The essential facts of the case of each party and the evidence led in support;
(c) The resolution of the issues of fact and law in the case;
(d) The conclusion or general interference drawn from the facts and the law as resolved:
(e) The verdict and orders made by the court.

A judgment will not be set aside because one or more of the elements is missing unless it is shown that such omission resulted in total miscarriage of justice: *Attorney-General, Federation v. Abubakar* (2007) All FWLR (Pt. 389) 1264, (2007) 10NWLR(Pt. 1041) 1 at 77, paragraphs A - G; *Ogba v. Onwuzu* (2005) 14 NWLR (Pt. 945) 331.

A critical examination of the judgment appealed against shows that after reproducing the evidence of the parties and a brief reference to the addresses of counsel (at pages 78-91 of the record) the learned C trial Chief Judge immediately made findings of fact based on evidence led by the respondent without placing the evidence of both parties on an imaginary scale to determine on which side it preponderates.

One of the main issues in contention between the parties was whether the respondent voluntarily surrendered her trucks as collateral for the debt she owed or whether the appellant forcefully detained them. His lordship held at page 91, lines 479 - page 92, lines 486 - 492 of the record thus:

> "From the record of proceedings produced above it is crystal clear that there is a trading/business relationship between the plaintiff and the defendant. The relationship had been cordial. This cordial relationship was however brought to an abrupt end by the apparent detention and seizure of plaintiff's; two trucks and brewed products by the erstwhile dismissed branch manager of the defendant's company.
>
> *From the evidence before the court, two trucks were seized* namely: 3½ tons truck and 7 tons truck. It was in evidence that plaintiff bought the empty crates, empty cartons and the two trucks and gave them to the defendant's branch Manager who detained all the trucks including the vehicles. (Emphasis mine).

This finding does not take into account the evidence led on behalf of the appellant that the trucks were brought and left at their premises by the respondent's drivers voluntarily. The failure of the respondent to call the driver of the trucks to explain the circumstances of the alleged detention and the appellant's contention that the respondent was indebted to it for 11 more than N1,000,000.00 (one million naira) and deposited her trucks as collateral for the debt.

His lordship also held that from evidence led by the respondent and her witnesses, she had proved all her claims for special and general damages for detinue.

After making these far reaching findings, his lordship at page 96, lines 637 - 647 of the record proceeded thus:

> "I now turn to the case of the defendant. Evidence of DW1 was to the effect that the plaintiff surrendered the vehicle voluntarily following her inability to settle her debt. The ^ two vehicles came to the premises with empty bottles. He was emphatic that every transaction with' the defendant's company was formal.
>
> Evidence 2nd DW corroborated that of 1st DW. They in essence, bothered (sic) on financial irregularities by the

> dismissed manager. C On the whole, plaintiff's claim succeeds and I therefore give judgment on plaintiff against the defendant as follows …"

No reasons were given for disbelieving the evidence of DW1 or DW2. Indeed, the court had already determined the issues in the plaintiff's favour before considering the defense.

I am therefore of the view that the failure of the learned trial judge to evaluate the evidence before him and ascribe probative value thereto resulted in a miscarriage of justice. I hold that this is a proper case for this court to interfere with the decision appealed against and do justice to the parties.

I also agree with my learned brother in the lead judgment that the respondent failed woefully to prove her claims for special damages. Even if she were entitled to special damages, she had a duty to mitigate her loss, which she failed to do by waiting for almost 2 years after the alleged detention of her trucks to file her action in court.

For these and the more comprehensive reasons ably advanced in the lead judgment, I also find merit in this appeal. I allow it in the terms stated in the lead judgment; I also abide by the order for costs.

IYIZOBA JCA: I read before now the judgment just delivered by my learned brother, Moore A. A. Adumein, JCA. I agree with his reasoning and conclusions. I agree that the appeal is meritorious and ought to be allowed. I also allow the appeal. I abide by the consequential orders including the order as to costs.

Appeal allowed