IN THE SUPREME COURT OF NIGERIA

Suit No: SC63/2005

Petitioner: Engineer Goodnews Agbi & Anor
And
Respondent: Chief Audu Ogbeh & 3 ors

Date Delivered: 2006-05-19

Judge(s): Salihu Modibbo Alfa Belgore , Idris Legbo Kutigi , Umaru Atu Kalgo , Dahiru Musdapher , Sunday Akinola Akintan ,

Judgment Delivered

This is an appeal against the decision of the Court of appeal, Abuja Division delivered on 21st day March 2005, wherein the Court of Appeal dismissed the appellants\' appeal and affirmed the decision of the trial High Court. The crucial issue is whether the 4th respondent herein, Governor James Onanefe Ibori of Delta State has been properly and adequately identified by the appellants, during the trial in the High Court, as the James Onanefe Ibori who was convicted by the Upper Area Court, Bwari in case No CR-81-95, C.O.P vs. James Onanefe Ibori on the 28th September, 1995 for the offences of negligent conduct and criminal breach of trust and sentenced accordingly. The matter started this way: On the 28th of September, 1995, the Upper Area Court Bwari FCT in a criminal case No CR-81-95 convicted one James Onanefe Ibori for the offences of negligent conduct and criminal breach of trust under Summary Trial Procedure under the provisions of Section 157 of the Criminal Procedure Code of the former Northern Region of Nigeria, applicable to the Federal Capital Territory, Abuja. The said convict was sentenced to a fine of N1000 or one year imprisonment on the information.

On the 3/2/2003 the appellants herein filed suit FCT/HC/CV/321/2003 by Originating Summons in the High Court of the Federal Capital Territory (hereinafter referred to as FCT) against Chief Audu Ogbe, Chief Vincent Ogbulafor, Peoples Democratic Party and Independent National Electoral Commission (later struck out as a defendant on the application of the plaintiffs) seeking a declaration that James Onanefe Ibori is by virtue of the conviction aforesaid at Bwari Upper Area Court is not qualified to contest election as the 3rd respondent\'s gubernatorial candidate for the 2003 Delta State Governorship Elections. The plaintiffs also claimed injunctive reliefs aimed at restraining the 1st to the 3rd respondents from presenting the said James Onanefe Ibori to the INEC as their candidate for the said elections. On being aware of the pending suit, the 4th respondent herein, successfully applied to be joined as the 5th defendant. At the trial after the close of pleadings, the trial judge Mukhtar J. directed counsel to formulate the issues they considered \"germane for the determination of the case.\" The court having earlier admitted with the consent of all the parties the record of proceedings of the Upper Area Court Bwari in CR/81/95 - C.O.P vs. James Onanefe Ibori as Exhibit A. The issue raised with the consent of all the parties was:-

\"Whether on the face of Exhibit A, the record of proceedings of the Upper Area Court Bwari in CR/81/95 - C.O.P. vs. James Onanefe Ibori, the accused was convicted.\"

After the addresses of counsel, in his Ruling delivered on 24/3/2003, the learned trial Judge ruled on that narrow issue that there was \"no conviction against the accused in that case\", and dismissed the claims of the plaintiffs in their Originating Summons. The plaintiffs appealed against the ruling. The Court of Appeal after criticizing the procedure adopted by the trial judge, held that on the face of Exhibit A, there was a conviction of the person therein named as the accused. The court however held that in order to determine the identity of the person convicted, made an order remitting the case to the High Court for trial de novo in order to establish the identity of the convicted person. See Agbi vs. Ogbeh (2003) 15 NWLR (Pt 844) 493.

The 4th respondent herein felt dissatisfied with the decision of the Court of Appeal and appealed to this court, the appellants also felt unhappy with the decision and also cross-appealed. In its judgment, this court on the 6th of February 2004, dismissed both the appeal and the cross-appeal and affirmed the decision of the Court of Appeal and sent the

case to the High Court for trial de novo. This court further ordered the parties to file fresh pleadings to clearly plead the issues in dispute. It should be noted that this court has unequivocally held that the issue of the conviction of one James Onanefe Ibori was settled beyond any dispute, what remains in dispute was whether the 4th respondent was in fact the person convicted in Exhibit A in CR/81/95, C.O.P. vs. James Onanefe Ibori. See Ibori vs. Agbi (2004) 6 NWLR (Pt 868)78.

The trial de novo came before Hussein Mukhtar J. who ordered pleadings as directed by the Supreme Court. The plaintiffs filed their Statement of Claim and the defendants their Statements of Defence, the 5th defendant, the 4th respondent herein also filed a Counter- Claim. On the 30th day of June the plaintiffs called their witness, (PW1) Alhaji Muhammed Awwal Yusuf, the Presiding Judge of the Upper Area Court Bwari, who along with another court member, Mr. Kuku Fajemi, on the 28/9/1995 tried and convicted one James Onanefe Ibori in case No CR/81/95. PW1 was vigorously cross-examined. After PW1, the plaintiffs closed their case. The Chief Registrar of the High Court FCT, Abuja was subpoenaed on the application of the 4th defendant only to produce documents and was in the witness box and sworn as DW1 on the 5/7/2004. The 1st to 3rd defendants did not call any evidence at the new trial. The 4th defendant called one witness Barrister Bala Ngilari, DW2. In the course of the new trial the following exhibits were tendered; A, B, C, Cl, D, Dl, E, El, F, CP-1, G, H, I, J and K.

Exhibit A. -Judgment of the Supreme Court in SC.97/2003

B. Certified Record of proceedings of the Supreme Court in Sc. 97/2003

C. Criminal Complaints Book of Upper Area Court Bwari.

D. Criminal Record Book of Bwari Upper Area Court.

E1. Statement of PW 1 to Police on 7/2/2004.

E2. Statement of PW1 to the police on 10/2/2004

F. Report of the Chief Judge, High Court FCT Abuja

CI. Certified tru e copy of Exhibit C.

D1. Certified true copy of Exhibit.D.

G. Certified true copy of statement of Shuaibu Anyabe to the police .

H. Certified true copy of the statement of Kuku Fajerni member of the Court, that convicted the accused in CR/81/95 to police

CPI. Certified true copy of police Report 14/2/2003

J. Certified true copy of 4th Defendant\'s petition to the President of the Federal Republic of Nigeria dated 27/1/2005.

I. Certified true copy of This Day Newspapers vol 9 No 2893 of Tuesday, 25/3/2003.

K. Certified true copy of the 4th defendant\'s statement to the Police.

At the end of taking evidence, written addresses were ordered to be filed by counsel. On the 29/10/2004 Learned Counsel adopted their written addresses. On the 8/11/2004 the learned trial judge delivered his judgment dismissing the plaintiffs\' claims and granted partially the claims of the 4th defendant in his counter-claim. The plaintiffs were unhappy and accordingly appealed to the Court of Appeal. After the consideration of the briefs and the arguments of counsel, the

Court of Appeal on the 21st of May 2005 delivered its judgment dismissing the plaintiffs/appellants appeal. The plaintiffs still felt unhappy with the decision of the Court of Appeal and have now appealed to this court with the leave of the Court of Appeal. The Notice of appeal contains ten grounds of appeal against the judgment of the Court of Appeal. Now in this judgment, the plaintiffs shall be referred to as the appellants, and the defendants as the respondents.

In his brief for the appellants, Chief Gani Fawehinmi SAN has identified, formulated and submitted the following issues for the determination of the appeal: -

\"1. Whether the Court of Appeal was right when it held that the trial de novo ordered by the Supreme Court in SC 97/2003 IBORI vs. AGBI and 5 others delivered on the 6th of February, 2004 means a new trial in its entirety ie on both the issues of conviction of one James Onanefe Ibori and the identity of the said convict.

2. Whether the Court of Appeal applied a wrong burden of proof in the consideration of the issue of identity of the said convict referred by the Supreme Court to the trial court by putting on the appellants a burden of proof under S. 138(1) of the Evidence Act. ie proof beyond reasonable doubt instead of putting on the appellants a burden of proof by preponderance of evidence or balance of probabilities under section 135(1) of the Evidence Act and thereby came to a wrong decision.

3. Whether the Court of Appeal was right when it held that there was no evidence on printed record to show that the learned trial Judge went outside the scope of the issue referred by the Supreme Court for trial before him by admitting Exhibit C, D, El, E2, CP-1, Cl, Dl, G, H, I, J and K since they are relevant to both conviction and identity which the Court of Appeal considered inseparable.

4. Whether the Court of Appeal was right in reopening and determining the issue of conviction which has been settled by the Supreme Court to influence their consideration of, and decision on the issue of identity.

5. Whether the Court of Appeal was right in treating the evidence of P.W., Alhaji Muhammed Awwal Yusuf as unreliable and biased and therefore not credible to establish the identity of the 4th respondent as the James Onanefe Ibori who was convicted in CR/81/95 on the 28/9/1995 for the offences of negligent conduct and criminal breach of trust and sentenced of a fine of N1000 or one year imprisonment on both counts.

6. Whether the Court of Appeal was right when it held that there were material contradictions in the evidence of P.W.1, Alhaji Mohammed Awwal Yusuf as to the identity of the James Onanefe Ibori of Delta State which he (P.W.1) convicted on the 28/9/1995 at the Upper Area Court, Bwari for the offences of negligent conduct and criminal breach of trust and sentenced to a fine of N1000.00 or one year imprisonment on both counts.

7. Whether the Court of Appeal was right in coming to the conclusion that the investigation reports of the Chief Judge of the FCT (Exhibit F) and the police final Report were irrelevant to the issue of the identity remitted by the Supreme Court to the High Court for determination and thereby refusing to accord any probative value to them.

8. Whether the relief granted to the respondent was sought in his Counter Claim.\"

The learned counsel for the, 1st to the 3rd respondents adopted the above issues while the learned counsel for the 4th respondent more or less also adopted the issues though differently worded.

I have deliberately reproduced the issues verbatim in order to demonstrate their verbosity and prolixity, having regard to the narrow focus on which this appeal and the whole case revolve. At the beginning of the judgment, I have recounted how the Court of Appeal and this Court decided that the issue of whether there was conviction of one James Onanefe Ibori was settled. It was decided that in criminal proceedings No. CR/81/95 C.O.P. vs. James Onanefe Ibori, Bwari Upper Area Court on the 28/9/1995 convicted the accused therein. This Court specifically held at pages 123 - 124 of the report in Ibori vs. Agbi (supra) thus: -

\"For the above reasons, I am satisfied that the Court below upon the evidence which I have also reviewed in this

judgment rightly came to the conclusion that Exhibit A depicted that a James Onanefe Ibori was convicted by reason of Exhibit A.\"

Further, this court concluded in the leading judgment by Ejiwunmi JSC as follows:-

\"In conclusion, I must hold that for all I have said in this judgment, there is no merit in the main appeal and the cross-appeal filed against the judgment of the court below, xxxxxxxxxxxxxxxxxxxxxxxxx For the avoidance of doubt I hereby restate them (orders of the court below) as follows:-

(1) The sole issue before the High Court was as agreed, by the parties.

(2) The sole issue being whether by Exhibit A there was conviction against any one.

(3) That the court below was right when it held that contrary to what the High Court held, Exhibit \"A\" xxxxxxxxxxxxxx showed that the defendant in that case was duly convicted for the offences for which he was charged. That the court below rightly held that it was not established by the trial court as to whether it was the 5th defendant (4th respondent herein) who was the person convicted by the Bwari Upper Area Court as per Exhibit \"A\" and the matter be remitted to the High Court of the FCT for trial de novo before another judge of that Court.

That for the purpose of that new \'trial, parties are to file fresh pleadings wherein they are to clearly plead the issue in dispute.\"

The only issue in dispute as between the parties was not the question of whether any one has been convicted but whether the 4th respondent herein was identified as the person convicted. That is the only issue for determination by the High Court as ordered by this court in the case under reference.

Issues 1, 3 and 4 .

Now, Issues 1,3, and 4 contain complaints that the lower courts reopened the issue of the conviction of one James Onanefe Ibori by the Bwari Upper Area Court. Or whether in fact, the lower Courts misunderstood the order made by this court for the trial denovo. It was also argued that the admission of the exhibits and their use by the trial court occasioned a miscarriage of justice, in that they influenced the lower courts to mix and confuse the issue of conviction and that of identification.

The trial judge, in my view, did not lose focus of the new trial as ordered by this Court. He did not derail nor did he reopen the issue of conviction, he said in his judgment see page 697 volume I of the record of appeal:-

\"From the evidence so far led before this court and the address of learned counsel in this matter and the Supreme Court Order for trial de novo, there is glaringly one single issue for the determination in this matter and that is whether or not the 4th defendant in this suit is the person convicted by Upper Area Court Bwari in case No. CR/81/95 on the 28th day of September, 1995.\"

It is, however contended by the learned counsel for the appellants that the Court of Appeal, misconceived the limited nature of the dispute between the parties and abandoned the clear evidence of identity given by P. W. 1 and concentrated on the irrelevant issue of whether there was any conviction at all.. This, in my view, is not correct, the Court of Appeal summarized the position in the lead judgment of ADEKEYE J.C.A. at page 1348 of volume 2 of the record of appeal thus;-

\"I have to chip in that the issue of conviction and the identity of the convict cannot be divorced from each other or placed in any separate watertight compartment. It is a matter of one step before the other. The same documents might be required to prove them as in this case. What is more important and significant is that these documents were tendered with the consent of all the parties. Exhibits E - El were admitted because the appellants\' counsel agreed they were relevant. Since they were properly tendered and admitted in evidence by the parties they cannot be

discountenanced or expunged from the record in as much as the decision to admit them is not null and void, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx \"There is no evidence on printed record to establish that the learned trial judge went outside the scope of the issue for trial before him.\"

In my view, what the court below did was to confine itself to the discussion on the single issue remitted to the High Court for consideration by the Supreme Court. The appellants as the plaintiffs, if they were to succeed in their action, were duty bound to plead and lead clear and credible evidence identifying the 4th respondent as the person convicted. The duty is on the appellants to prove their case and not on the respondents to disprove. In any event, the reference by the Court of Appeal to the decision in fadiora vs. Gbadebo [1978] NSCC 121 at 129, and Biri vs. Mairuwa (1996) 8 NWLR (Pt 467) 425 were merely to draw attention to the judicial definition and meaning of trial de novo and no more. It has not been shown that the Court of Appeal decided the matter at large or reopened the issue of the conviction. It is not also established that the lower courts were influenced by the documentary exhibits tendered with, the consent of the parties to reach the decision that the convict in the aforesaid criminal trial before the Bwari Upper Area Court was not identified as the 4th respondent. The duty to prove that the 4th respondent is the person convicted is a duty on the appellants, it is their responsibility to prove the case, they are the proponents of the action, although there may be an occasion when the burden of proof may shift but this can only arise when the plaintiffs have satisfactorily discharged their burden. To establish the case, the appellants as plaintiffs only called P.W 1 and of course agreed to the tendering by consent of all the documentary exhibits.

Even if the Court of Appeal has made some mistakes in its consideration of the matters brought before it, it is now elementary law, that it is not every mistake or error in a judgment that will result in an appeal being allowed. It is only where the error is so substantial in that it has occasioned a miscarriage of justice that an appellate court should interfere. See Alli vs. Alesinloye [2000] 6 NWLR (Pt 660) 177 at 213, Onajobi vs. Olanipekun [1985] 4 SC (Pt 2) 156, Oje v. Babalola [1991] 4 NWLR (Pt. 185) 267, Kraus Thompson Org LTB v.UNICAL [2004] 9 NWLR (Pt 879) 631. An error in a judgment can only be a ground for allowing an appeal if and only if it is substantial in the sense that it would have affected the judgment of the lower court one way or the other it has occasioned miscarriage of justice. In the instant case, the lower court even if it made a mistake in affirming the admission of those documentary evidence, it has not been shown or established that the admission of those documentary evidence were crucial and that they occasioned any miscarriage of justice. The fundamental issue before the lower courts is whether it is established that the 4th respondent was the person convicted by Bwari Upper Area Court on the 28/9/1995.

In attempting to prove their case, the appellants called P.W.1, Alhaji. Awwal Yusuf the presiding judge of the Upper Area Court. He gave his evidence which was not believed by the trial court and the Court of Appeal. The appellants also pleaded as per paragraphs 11, 13, 14 and 15 of the Statement of Claim as follows:-

\"11. At the time of his conviction on the 28/9/1995 James Onanefe Ibori now Governor of Delta State, was a subcontractor to Spibat Nigeria Ltd at Usama Dam near Bwari at the Federal Capital Territory Abuja.

\"13. At all material times, there was no other person other than Governor James Onanefe Ibori who was bearing James Onanefe Ibori. In this respect the plaintiffs will rely at the trial of this action on the 1991 Census conducted by the Nigeria Population Commission in Delta State.

\"14. At the time the general elections were conducted particularly the Governorship election in Delta State by INEC, there was only one person bearing James Onanefe Ibori in the register of voters compiled by INEC for Delta State. The plaintiff will rely at the trial of this action on the register of voters for Delta State compiled by INEC in 2002.

\"15. All his life, the 5th defendant has borne the name James Onanefe Ibori. As a pupil of two primary Schools, as a student of Baptist High School xxxxxx. As a student of University of Benin, 1982 - 1986, as a business man and as the Governor of Delta State. He has always been and he is still James Onanefe Ibori.\"

The appellants unfortunately led no evidence in proof of these averments. The appellants also failed to call any other witness beside P.W. 1 to establish the identity of the convict. Under the circumstances, it is obvious that issues 1, 3 and

4 are not made out. I resolve them against the appellants. Both the lower courts considered the pleadings and the evidence led by the plaintiffs and rightly came to the conclusion that they failed to prove, the identity of the convict aforesaid.

Issue 2

The appellants\' complaint under this head is about the burden of proof placed by the lower court on the appellants. A burden of proof under section 138(1) of the Evidence Act i.e proof beyond reasonable doubt was placed against the appellants. In my view, the Court of Appeal merely affirmed that the evidence led by the appellants in proving that the 4th respondent was the person convicted by Bwari Upper Area Court in CR/81/95 on the 28/9/1995 is not credible. The way the issue is written is confusing. It sounds like it was the Court of Appeal that placed a wrong burden of proof. The starting point in my view, is the judgment of the trial court. The learned trial judge in his judgment at page 724 of vol. 1 Record of Appeal held thus:-

\"With the material contradictions and serious inconsistencies especially in the evidence of P.W. 1, the irresistible conclusion must be that the 4th defendant has not been sufficiently identified as the person convicted by the Upper Area Court Bwari in case CR/81/95 between Commissioner of Police V. James Onaaefe Ibori on 28/9/1995, even on the balance of probabilities. The standard of proof being beyond reasonable doubt has not been met where there is not only a reasonable doubt, but in fact a very serious doubt raised by the material contradictions and inconsistencies in the evidence of P.W.1 and Exhibits C and. D.\"

This, although the learned trial judge seems to think that the plaintiffs/appellants were bound to prove their allegations under section 138 of the Evidence Act, the learned trial judge was of the opinion, that even proof under section 135 was not satisfied in that the evidence of P.W. 1 was unreliable and full of inconsistencies.

In its judgment the Court of Appeal after examining the scope, and definition and the application of section 138(1) and section 135 of the Evidence Act came to the conclusion that the pleadings reveal that there was a conviction and the sole issue outstanding is to determine the culprit, or the guilty party and relate or link it with the 4th respondent. \"The issue therefore is identification for the purpose of a crime and the the standard stipulated by law is one of proof beyond reasonable doubt.\" The court after quoting the opinion of the learned trial judge on the quality of the evidence led before him, full of material contradictions and serious inconsistencies, his finding that there was no proof even on the balance of probabilities is unimpeachable. This means that even though the Court of Appeal, held that the appellants were duty bound to prove the identity of the culprit beyond reasonable doubt, the quality of the evidence led by the appellants before the trial court was not even sufficient on the balance of probabilities under section 135 of the Evidence Act.

In my view, based on the evidence adduced by the appellants before the trial judge and the finding of the learned trial judge that the evidence adduced was insufficient proof even on the balance of probabilities makes the issue of proof beyond reasonable doubt irrelevant. Even if the lower courts made a mistake in supposing that the appellants were to prove the identity of the convict beyond reasonable doubt, such an opinion did not occasion any miscarriage of justice, because the proof offered and accepted by the trial court and this is clear in the record, and the Court of Appeal was insufficient even in a situation where the proof required is merely on balance of probabilities. Thus the argument and submissions of counsel are irrelevant. I accordingly resolve issue No. 2 against the appellant.

Issues 5 and 6

Issues No. 5 and 6 can conveniently be dealt with together. The issues concern the credibility or otherwise of the evidence of P.W 1 Alhaji Muhammed Awwai Yusuf on the identity of the 4th respondent as the James Onanefe Ibori who was convicted by him in CR/81/95 on 28/9/1995 for the offences of negligent conduct and criminal breach of trust and sentenced to a fine of N1000 naira or to one year imprisonment on both counts. Learned counsel for the appellants argues that both the trial court and the Court of Appeal were in gross error to have held that the evidence of P.W.1, Alhaji Mohammed Awwal Yusuf is unreliable and therefore not credible enough to establish the identity of the 4th respondent as the James Onanefe Ibori, he convicted in CR/81/95. It is submitted that the finding of the Court of Appeal was only induced by the consideration of extraneous matters as to whether or not James Onanefe Ibori was even

convicted and this prompted the consideration of issues and documents totally irrelevant to the issue of identity which was the only issue remitted for trial. It is argued that the evidence of P.W. 1 is clear as to the identity of the person he convicted in CR/81/95 on the 28/9/1995. That P.W. 1 categorically identified the 4th respondent as the convict. It is further submitted, that P.W. 1 was consistent on his identification of the 4th respondent during his cross examination and he remained unshaken. It is submitted that it was only the 4th respondent who could controvert what P.W. 1 said in identifying the 4th respondent as the person he convicted. It is argued that the 4th respondent should have given evidence see Lawan v.Yama [2094] 9 NWLR (Pt 877)117.

It is again argued that the evidence of D.W 2 Barrister Ngilari did not controvert or adversely affect the unequivocal evidence of identity given by P.W. 1. It is again added that the evidence of D.W 2 rather supported the evidence of P.W. 1. It is further submitted that the 4th respondent should have testified to controvert the evidence of P.W. 1 in relation to the accusations made by P.W. 1 against him. Learned counsel referred to the case of A.G. of Kwara State vs. Olawale [1993] 1 NWLR (Pt 272) 645 at 665 - 666. The evidence of P.W. 1 stands unchallenged vide Ezeanah Akanni vs. Makanju [1978] 11-12 SC 13; vs. Atta [2004] 7 NWLR (Pt 873) 468. It submitted that the concurrent findings of the two lower courts on the issue of unreliability of the evidence of P.W 1 is unsupportable by the evidence on record and should be reversed vide Ibahafidon vs.Igbinosun[2001] 8 NWLR (Pt 716) 653 Dogo vs. State [2001] 3 NWLR (Pt, 699) 192, Olatunde vs. Abidogun [2001] 18 NWLR (Pt 746) 712. Nziwu vs.Onuorah (2002] 4 NWLR (Pt 756) 22. Abimora vs. Ajufo [1988] 3 NWLR (Pt .80), J. Motunwase vs. Sorunge [1988] 5 NWLR (Pt 92) 90. Nwaebonyi vs. The State [1994] 5 NWLR (Pt 343) 138, Ugoh vs. Aburime (1994] 8 NWLR (Pt 360) 1, Ezeonwu vs. Onyechi [1996] 3 NWLR (Pt 438) 499. Dieli vs Iwuno [1996] 4 NWLR (Pt 445) 622 Eholor vs. Asayande [1992] 6 NWLR (Pt 249) 524. It is finally submitted that on the authority of these cases this court has the duty to interfere with the concurrent findings of fact.

On the issue of the contradictions which the learned trial judge attributed to the evidence of P.W. 1 and which the Court of Appeal agreed, it is submitted that the alleged contradictions are completely immaterial to the issue of identity. It is further submitted that the substance of the evidence of P.W. I, Alhaji Muhammed Awwal Yusuf on the identity of the 4th respondent as the person he convicted was clear and uncontradictory. That the learned trial judge without making his own findings, merely adopted the contradictions enumerated in the written address of the respondents. It is submitted that the alleged contradiction either touch on the issue of conviction or on matters clearly outside the purview of the new trial. In his brief for the appellants, Chief Fawehinmi SAN has identified and explained \"alleged\" contradictions which were relied on by the learned trial judge and affirmed by the Court of Appeal. It is submitted that the outlined contradictions were not contradictions as such, as they did not concern the relevant issue of the identification of the person convicted by the Upper Area Court aforesaid but rather the issue of whether any person has been convicted or not which issue was settled by the Supreme Court.

As shown above, the learned counsel for the appellants identified no less than 25 contradictions and inconsistencies found by the learned trial judge in the evidence of P.W. 1. There is no doubt in my mind that the learned trial judge had meticulously appraised and evaluated the evidence of P.W. 1. before he came to the conclusion he reached that the evidence was unreliable. The learned trial judge evaluated the evidence of P.W. 1 from pages 683 - 690 of the record and from pages 709 to 723, the learned trial judge reviewed and considered the submission of counsel in relation to the evidence adduced at the trial. In respect of the evidence of P.W. I the learned trial judge at page 732 of the record stated:-

\"Where the memory of P.W.I has been faulted with regard to even more recent happenings of events that occurred at virtually the same time as the conviction in question, it is difficult for one to say that the evidence of\" P.W. 1 in this case is reliable or credible enough, more so when it is full of material contradictions.\"

The law is settled that in ascribing probative value to the testimony of a witness, the court takes into consideration whether the testimony is cogent, consistent and in accord with reason and in relation to other evidence before it. In the determination of the credibility of witnesses, the demeanour, personality, reaction to question under examination are all factors to be taken into consideration. The determination of the credibility of a witness is within the province of the trial judge, where the veracity of a witness is in doubt, his evidence should carry no weight. It is trite law that the appraisal of evidence and the ascription of probative value of such evidence is the primary function of the trial court. Thus where the issue turns on the credibility of witnesses an appellate court which has not seen the witnesses must defer to the opinion

of the trial court in such cases the opinions of the trial court ought normally to be preferred. See Fashanu vs. Adekoya (1974] 6 SC 83. Sagay vs. Sajere [2000] 6 NWLR (Pt 661) 360.

The observation of the demeanour and the reaction of a witness to questions which are essential factors in the determination of the credibility of testimony and the evaluation of the weight of evidence cannot be reproduced in the printed record. About these important factors, an appellate court is only left to guesses and surmises. It is trite law, that a trial court is the best judge of his domain as it relates to believing or disbelieving a witness. An appeal court will not interfere unless it is shown that inference drawn by the trial judge was not supported by the evidence and the facts before him or was perverse. See Ebba vs. Ogodo [1984] 1 SCNLR 372 Nnorodim vs. Ezeani [2001] 5 NWLR (Pt. 706) 203.

In his judgment, the trial judge said at page 709 of vol. 1, this:-

\"The evidence led by the plaintiffs in the purported xxxxx is riddled with contradictions and speculations all creating doubts. Material contradictions and doubts created by the evidence of P.W.1 and the exhibits, all creating doubts as to, the identity of the 4th defendant as the person convicted in the proceedings of 28/9/1995.\"

Thereafter the learned trial judge proceeded to consider the contradictions and factors leading to the doubt on the credibility of the evidence of P.W. 1 from that page 709 to page 723. The learned trial judge made his finding at page 724. Thus:-

\"With the material contradiction and serious inconsistencies especially in the evidence of P.W.1, the irresistible conclusion must be that the 4th defendant has not been sufficiently identified as the person convicted by the Upper Area Court, Bwari in case No. CRI ' 8 - 95, between Commissioner of Police vs. James Onanefe Ibori on the 28/9/95, even on the balance of probabilities xxxxxxxxx.\"

The Court of Appeal in its consideration of all the above affirmed the findings of fact that the evidence of P.W. 1 was unreliable. I am of the opinion that these are concurrent findings of fact that the evidence of P.W 1 is shown to lack credibility, and I am not persuaded otherwise by the submissions of the learned counsel for the appellants.

The learned trial judge based his findings on the unreliability and lack of credibility on the evidence of P.W.1 which was the only evidence the appellants adduced out of so many avenues open to them, They could have called, (1) the second member of the trial court (2) the police prosecutor, (3) the Registrar of the Court, (4) the complainant of the alleged crime - all these persons can easily testify as to whether the respondent was the person tried and convicted or not. For very inexplicable reasons the appellants failed to call these persons to testify. The appellants also failed to lead evidence in proof of paragraphs 11, 13, 14 and 15 of the Statement of Claim. Both the learned trial judge and the Court of Appeal rightly in my view rejected the evidence of P.W. 1 as lacking in credibility. Credible evidence in this connection means the evidence worthy of belief and for evidence to be worthy of belief and credit, it must not only proceed from credible sense it must be credible in itself in the sense that it should be natural reasonable and probable in view of the entire circumstances. The testimony of P.W. 1 in the instant case casts doubts on the trial Upper Area Court Judge, and the evidence given is in my opinion rightly rejected. In the instant case, it is evident that the view of the learned trial judge on the credibility of the evidence of P.W 1 was not only based on the demeanour of the witness, but also based on the contradictions in his evidence. An appellate court has no jurisdiction to supplant its own views in place of the trial court. The Court of Appeal rightly as said above, affirmed the findings and I also find no valid legal reason to interfere. It is elementary law, that an appellate court such as the Supreme Court should not disturb the concurrent findings of fact of two lower courts unless there are very special circumstances and in my view, in the instant case, the appellants have failed to show any cogent reason for interference. In the end I also resolve issues 5 and 6 against the appellants.

Issue No 7

This issue is concerned with the relevance and the probative value of Exhibit F, the report made by the Chief Judge of the F.C.T to the Chief Justice of Nigeria and the Inspector General of Police Final Report in the matter. On these

documents, the Court of Appeal held at pages 1362 -1363 of the record of appeal thus:-

\"The report of the Chief Judge and the police final report are both before the Court. The former report was at the instance of the Chief Justice of Nigeria, and the latter at the instance of the President of the Federal Republic of Nigeria. Even if they form part of the evidence before the court proper foundation must be laid to give them probative value. The directive of the Chief Justice to the Chief Judge of the F.C.T is in the course of duty. It is meant to be an administrative investigation into the issue of tampering with the records of court. This document has nothing to do with the Order of the Supreme Court to the High Court on the single issue for determination in this case. The Chief Judge did not write his report for any judicial purpose not being tribunal set up for that purpose. The police final report was tendered dining committal proceedings relating to this act. Even if the learned trial judge had looked at it and apportioned probative value, it would not have affected the quality of the evidence of P.W. 1, and the totality of the evidence before the court to establish the case of the appellants. The evidence in this case before this court is on the printed record, this court has examined the same and has failed to see where the findings of facts and conclusion of the learned trial judge is perverse and or has occasioned a miscarriage of justice. He had no and experienced that unique advantage of seeing and hearing the witnesses and watching their demeanour in court. Even printed record gave an. impression of P.W 1 as a witness whose memory failed him as regards every other information except saying repeatedly that-

\"I don\'t doubt that I convicted James Onanefe Ibori.\"

It is not certain whether the foregoing is borne out of his conviction or is a form of a concocted evidence so that he may not derail further under cross examination or according to him to satisfy his personal interest, xxxxxxxxxxxxxxxxxx.'

Now, in his report Exhibit F the Chief Judge of the FCT opined that:-

\"From all available evidence it is clear that the Upper Area Court, Bwari tried and convicted James Onanefe Ibori for negligent conduct and criminal breach of trust on the 28/9/1995. Such evidence also points to the fact that the present Governor of Delta State was the same James Onanefe Ibori that was so tried and convicted on 28/9/95 for the offences stated.\"

It is submitted by the learned counsel for the appellants, that both lower courts were wrong not to have used this statement in the report as evidence offered in proof of the appellants\' claim that it was the 4th respondent who was convicted. It is submitted that since the report was tendered from the bar with the consent of all counsel, it is relevant and admissible and the Court of Appeal was in error to have held that no proper foundation was laid for its admission in evidence.

On the question of the police final report, it is argued to be part of the records even if not as an exhibit before the court and indeed the report was produced at the instance of the 4th respondent with reference to the police final report, the argument of counsel for the appellants is clearly misconceived. The police final report did not identify the 4th respondent as the person convicted. It merely stated that \"one James Onanefe Ibori was convicted,\" in my view it does not enhance the case of the appellants in any way.

It is argued that the court was wrong not to have given probative value to the reports vide Section 39 of the Evidence Act. Learned counsel relied and cited the cases of Ayeni vs. Dada [1978] 3 SC 35 Atanda vs. Ifelagba [20031 17 NWLR (Pt 849) 274, Adeleka vs. Iyanda (2001] 13 NWLR (Pt 729) 1 Ogbunyiya vs. Okudo [1979] 6 - 9 SC 32, Agbaisi vs..Ebikorofe (1997) 4 NWLR (Pt 502) 630. It is finally submitted that the failure of the courts to give probative value to the documents before the court has occasioned a miscarriage of justice.

Exhibit F the report of the investigation conducted by the Chief Judge Abuja, even if admissible and relevant for other purposes cannot be relevant as proof of the identity of the 4th respondent as the person convicted by Bwari Upper Area Court. From its contents with reference to the identity of the person, convicted it is a mere conjuncture, speculation or an opinion. It is trite law that opinion evidence is irrelevant and the lower courts are right to have rejected the opinion of the learned Chief Judge as contained in his report that it was the 4th respondent who was convicted. Section 39 of the Evidence Act does not apply because the Chief Judge was not acting under any statutory authority but was merely

performing an administrative duty assigned to him by the Chief Justice of Nigeria. I also agree with the views of the learned counsel for the respondents that Exhibit F offends against section 36(1) of the Constitution of the Federal Republic of Nigeria, in that the learned Chief Judge in his investigation did not hear the 4th respondent before he came to the conclusion that the 4th respondent was the person convicted. Even if Exhibit F was as the result of an Administrative Tribunal, the need to hear both sides has always been emphasized. See Adigun vs. A.G. Oyo [1987] 1 NWLR (Pt 53) 678. Without much ado, I am also of the view that Exhibit F, the Investigating Report of the Hon. Chief Judge of the FCT Abuja and the police final report have no evidential probative value and the lower courts were right in discountenancing them. It is trite law, that any piece of evidence which slips into the record without passing the test of admissibility is not legal evidence and is liable to be expunged even if admitted by consent.. See Saidu vs. State [1982] SC 41. James vs. Mid Motors [1978] 11 - 12 SC 31. Alade vs. Olukade [1976] 2 SC 183. I accordingly find no merit on the complaint on the 7th issue. I resolve the issue against the appellants.

1ssue No 8

The complaint under this head is concerned with the relief granted the 4th respondent on his counter-claim. It is submitted that the trial court and the Court of Appeal were in error to have granted the 4th respondent, the relief he did not seek in his counter-claim. In his counter-claim, the 4th respondent claimed the following reliefs:-

\"(i) A declaration that the 5th defendant never appeared nor was he convicted for the offence of negligent conduct or criminal breach of trust contrary to the provisions of section 312 and section 196 of the Penal Code or any other offence at all by the Upper Area Court, Bwari, Abuja in case .No. CR-81 - 95 on the 28/9/95 or any other date whatsoever.

(ii) A declaration that even if the said case N o. CR - 81 - 95 exists, the 5th defendant is not the person referred to in the said charge or case, as he has never appeared nor convicted by the Upper Area Court Bwari; Abuja in the said case, on the said date or any other date at all.

(iii) An Order setting aside the said judgment as same is a product of fraud, illegality a nullity and therefore void ab initio.

(iv) An Order of injunction restraining the plaintiffs their agents assigns and surrogates from linking, the 5th defendant in any manner whatsoever in connection pertaining to the Case No. CR-81-95 by the Upper Area Court, Bwari, Abuja of 28/9/1995, such a case does not exist.\"

In his judgment, the learned trial judge held at pages 727 - 728 of the record as follows:-

\"The counter-claim succeeds to the extent of the 4th defendant\'s claim for a declaration that no credible evidence has been laid before the Court linking him with the commission of the alleged offences or identifying him as the person tried by the Upper Area (Court, Bwari in Case No. CR-81-95 on 28/97(95 and convicted for the offences of negligent conduct and criminal breach of trust, the evidence laid by the plaintiffs has been so much discredited and being full of material contradictions and inconsistencies.\"

It is submitted by the learned counsel for the appellants that what was granted to the 4th respondent by the trial judge and affirmed by the Court of Appeal was not what the 4th respondent claimed. While it is true that the 4th respondent\'s claim is not identical word for word with what was granted, in my view, the effect is clearly the same. It is settled and elementary law that a court of law is not allowed to grant what is not asked for or claimed. The Court is neither a charitable institution nor father Christmas, its duty in a civil claim is only to render unto a party according to his proven claim.

I have reproduced both what the 4th respondent claimed and what was awarded. In my view the reasonable interpretation of the award is that since the appellants have failed to prove their case, that it was the 4th respondent who was convicted by the Bwari Upper Area Court, the counter - claim of the 4th respondent having regard to the pleadings and the other legal documentary evidence accepted by the learned trial judge, the counter - claim of the 4th respondent

necessarily succeeds in that he was not the one convicted by the Bwari Upper Area Court. The core issue for determination in the entire case is whether or not the 4th defendant in the suit was the- person convicted aforesaid. In my view the trial court merely granted prayers (i) and (ii) of the counter - claim and rightly in my view, refused to grant the other prayers contained in the counter-claim.

The second complaint of the appellants under this head is that the 4th respondent\'s counter-claim ought not to have been granted at all because he personally failed to lead evidence in proof of the claims. It is also elementary and trite law, that a party in a case need not appear in person to give evidence on his own behalf provided that he could otherwise present his case through other means e.g by admission, or by tendering of documents from the bar. Even the appellants did not appear to testify at the trial. Could it be said they ought to lose on that ground'

The Court of Appeal in my view, rightly affirmed the decision of the trial judge that the 4th respondent is entitled to the relief granted him in his counter-claim. This issue is also resolved against the appellants.

Although as I mentioned at the beginning of this judgment what is before us is the narrow issue of whether the appellants have been able to establish the identity of the 4th respondent as the person convicted by the Bwari Upper Area Court, yet any judicial Officer involved in this determination will notice several unusual portions of the alleged trial at Bwari Upper Area Court. Though, it cannot be over emphasised what is before us is not appeal against the decision of the Upper Area Court, the irregularities cannot be ignored. For example:

1. The first information Report with which an accused person is arraigned appears not to exist.

2. The trial was purportedly held under section 157 of the Criminal Procedure Code law of the former Northern Region of Nigeria applicable to FCT Abuja, whereby an accused admitting an offence on the First Information Report is summarily convicted. The procedure does not take half a page in the court\'s record. The accused in this case purportedly admitted the First Information Report, but the record of proceedings ran to almost 10 pages.

3. The pages of the proceedings in the record book are not continuous as would be expected of a trial not taking 10 minutes, but is found on many pages on unused lines or remnants of pages covering proceedings of several days.

4. Two Area Court Judges sat on the matter but only P.W. 1 signed the record on that day the other judge signed many days afterwards.

In the absence of the First Information Report one would normally expect the plaintiffs at the High Court, during the trial to find out whether the 4th respondent was the person convicted by bringing in:-

(a) The evidence that the 4th respondent was the sub-contractor in the construction of the Usama Darn.

(b) That he was given custody of the missing building materials.

(c) The evidence of the complainant.

(d) The evidence of the police officer who received the complaint, the Investigating Police Officer, the prosecutor etc.

(e) The evidence of the 2nd judge etc.

But on the whole the plaintiffs\' case was built round the evidence P.W. 1-, Mallam Awwal Yusuf. The evidence of this man has left much to be desired and the trial High Court Judge totally disbelieved him. The Court of Appeal similarly disbelieved him and rightly in my view, made some caustic remarks against him.

This appeal revolves round the concurrent findings of facts by both the trial court and the Court of Appeal. The appellants have Completely .failed to convince me that the findings are perverse or erroneous or that they were not a

product of the proper appraisal and evaluation of the evidence to warrant a disturbance by this Court. I accordingly dismiss this appeal and affirm the decisions of the lower courts.

Both sets of the respondents herein are entitled to costs assessed at N10,000.00 each.

Judgement delivered by
Salihu Modibbo Alfa Belgore, J.S.C

The linchpin of the appellants\' case as plaintiffs at trial High Court is contained in averments in paragraphs 11, 13, 14 and 15 of the statement of claim. No evidence was adduced on any of these averments. They are deemed to have been abandoned. Trial judge found contradictions and inconsistencies in the evidence of trial Upper Area Court judge, Awwal Yusuf (PW1) whereby he disbelieved him that it was 4th respondent that he tried. Trial judge set out his findings of these contradictions and inconsistencies in his judgment and explained them. Court of Appeal had no reason to interfere with those findings. In this Court the inconsistencies and contradictions are all pervading in the proceedings of the trial court and no magic wand is needed to find them. These contradictions and inconsistencies are for the plaintiffs to explain, failure of which create doubt, serious doubt, which vitiate the plaintiffs/appellants case. Court of Appeal\'s unanimous dismissal of the appeal cannot be faulted.

For the above reasons and detailed and analytical reasons in the judgment of my learned brother, Musdapher, JSC, which I totally adopt as mine, I dismiss this appeal as totally devoid of merit. I make the same order as to costs as in the lead judgment.

Judgement delivered by
Idris Legbo Kutigi, J.S.C.

I have had the privilege of reading in advance the judgment just rendered by my learned brother Musdapher, JSC. I agree with his reasoning and conclusions. He has meticulously dealt with all the issues canvassed before us. It is without doubt that the sole issue for determination in the High Court, the Court of Appeal and in this Court is - whether or not the 4th Respondent herein was infact the person convicted in Exhibit A in case No. CR/81/95, C.O.P. v. James Onanefe Ibori on 28th September, 1995.

In the trial High Court the Plaintiffs chose to call only one witness who was one of the two judges who tried the convict. The other judge was never called. They also chose not to call as witness or witnesses the Policeman or Policemen who investigated the case and or prosecuted the convict. They also failed to call the Chief Judge of F.C.T, Abuja who was said to have conducted an investigation in the matter. Not only that, they chose not to call as a witness the complainant or the employers of the convict. They again did not call as a witness the Court Clerk or Registrar of the Court where the convict was tried and convicted or any person at all who could have testified positively as to the identity of the convict. It is settled that the standard of proof in a criminal case is proof beyond reasonable doubt, while in a civil case it is proof on a preponderance of evidence. In either case, this does not mean that the prosecution or a plaintiff must call every available piece of evidence or witness to prove its or his case. It is enough if sufficient evidence is called to discharge the onus of proof (see for example Alonge v. Police (1959) 4 F.S.C. 203, Section 178 of the Evidence Act). The danger however is that where a Plaintiff chooses to call only one witness out of many available witnesses, he will have himself to blame if anything goes wrong with the sole witness, because his entire case will collapse. That was what happened in this case when the sole witness called by the Plaintiffs was discredited and consequently disbelieved by the trial Court. And when that happened the Plaintiffs were helpless as they had nothing on which to fall back. The decision to call only one witness in the midst of plenty was a grave error on the part of the Plaintiffs, and it had cost them their case.

It is unarguable that the Appellants have failed woefully to convince this Court that the concurrent finding of fact by both the trial Court and the Court of Appeal that the convict was not the 4th Respondent was perverse. The appeal must therefore fail. It is dismissed in its entirety. I endorse the order for costs.

Judgement delivered by
Umaru Atu Kalgo, J.S.C.

I have read before now, the leading judgment just delivered by my learned brother Musdapher JSC in this appeal. He has fully, painstakingly and clearly, in my view, considered all the substantial issues for determination raised by the appellant and I entirely agree with the reasoning and conclusions reached therein. I have nothing useful to add thereon. I therefore find no merit in the appeal and I dismiss and affirm the decision of the Court of Appeal. I abide by the order of costs made the leading judgment.

Judgement delivered by
Sunday Akinola Akintan, J.S.C.

The main question to be resolved at the trial High Court in this case was whether the 4th respondent was the person convicted by the Bwari Upper Area Court, Abuja on 28th September, 1995. The claim by his accusers was that he was the same person bearing that name that was arraigned before that Court, pleaded guilty to the charge, was convicted and sentenced to a term of imprisonment but was given an option of fine. He paid the fine and that was then the end of the matter. But the allegations resurfaced when the 4th respondent entered the contest for the office of Governor of Delta State.

An action for a declaration that the said 4th respondent should be disqualified from standing as a candidate for that office on the ground that he is an ex convict. The present appeal arose over the unresolved question of whether the 4th respondent was in fact the James Onanefe Ibori convicted by the Bwari Upper Area Court, Abuja. An appeal to this court in an earlier case in the matter resulted in this court ordering that the issue of the identity of the man convicted should be tried. This was done and the trial High Court held that there was insufficient credible evidence in support of the allegation that the 4th respondent was the man tried and convicted by that court. An appeal to the Court of Appeal from the judgment of the Abuja High Court in the case was dismissed. The present appeal is from the judgment of the Court of Appeal in the case.

The onus was definitely on the appellants to present credible evidence in support of their case that the 4th respondent was the person convicted by the Bwari Upper Area Court. They had pleaded in paragraphs 7 and 11 of their statement of claim as follows:

\"7. The plaintiffs aver that on 28th September, 1995 at the Upper Area Court Bwari in the Federal Capital Territory (FCT), Abuja, James Onanefe Ibori was convicted of negligent conduct and criminal breach of trust and sentenced to one year imprisonment or N1000 fine.

11. At the time of his conviction on the 28th September, 1995, James Onanefe Ibori, now Governor of Delta State, was a sub'contractor to Spibat Nigeria Ltd. at Usman Dam near Bwari at the FCT, Abuja. \"

The Bwari Upper Area Court where the trial took place was presided over by two judges. But only one of the two judges testified at the trial as PWI. The witness told the court that the 4th respondent was in fact the accused person at the trial which resulted in the man\'s conviction. The other Judge was not called as a witness. Similarly, none of the police officers involved in the case as well as the court registrars was called to testify as to whether the 4th respondent was in fact the man convicted at the trial.

Although it was pleaded in paragraph 11 of the plaintiffs\' statement of claim that the said James Onanefe Ibori was a sub'contractor to Spibat Nigeria Ltd at Usman Dan in Bwari, none of the staff of that company was called as a witness to confirm if the 4th respondent was in fact their said sub-contractor.

The learned trial Judge held that the plaintiffs in the case failed to prove that the 4th respondent was the James Onanefe Ibori convicted by the Bwari Upper Area Court after the said trial on 28th September, 1995. An appeal by the plaintiffs to

the Court of Appeal against that decision was dismissed. The present appeal is from the decision of the Court of Appeal dismissing the plaintiffs\' appeal.

There are so far concurrent findings of fact by both the trial court and the Court of Appeal on the point that there was insufficient credible evidence in support of the plaintiffs\' claim. It is settled law that where there are concurrent findings of both the trial court and the Court of Appeal and-there was sufficient evidence in support of such findings, this court will not normally tamper with such findings unless they are clearly shown that they were perverse or were not supported by evidence or were reached as a result of applying a wrong approach to the evidence or as a result of a wrong application of a principle of substantive law or procedure: See Abimbola v. Abatan (2001) 9 NWLR (Pt. 717) 66 at 77; Enang v Adu (1981) 11-12 SC 25 at 42; Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718; and Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561. In the instant case, the appellants as plaintiffs, were by their pleadings expected to call a number of witnesses whose evidence would clearly identify the James Onanefe Ibori, the sub'contractor to Spibat Nig. Ltd, convicted, by the Bwari Upper Area Court on 28lh September 1995. Among such expected witnesses are workers of Spibat Nig. Ltd; the police officers involved in the investigation and prosecution of the case, the court registrars and the Judges before whom the trial took place. But they chose to call only one of the two Judges before whom the trial took place and chose to keep away the others mentioned above. Their decision to withhold the evidence from those vital witnesses gave room for a situation whereby the court could invoke the provisions of section 149(d) of the Evidence Act which provide, inter alia, that the court may presume \"that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.\"

However, the general rule is that no particular number of witnesses is required for proof of any fact unless expressly prescribed by law. It follows therefore that in civil cases a plaintiff can establish his case on the evidence of a single witness without a confirmation by the testimony of another person. But where witnesses who could give credible evidence in proof of a particular matter are left out, as in the instant case, the court is entitled to invoke the provisions of section 149(d) of the Evidence Act that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. See Ogwuru v. Cooperative Bank of Eastern Nigeria Ltd. (1994) 8 NWLR (Pt 365) 685.

In the instant case, the appellants chose not to call as witnesses any of the policemen involved in the investigation and prosecution of the case, or any staff of Spibat Nig. Ltd. where the said James Onanefe Ibori was a sub-contractor, or any of the court registrars who probably had the opportunity of longer interactions with the man during the trial than the Judges since the arrangement by the man to pay the fine imposed were made with or in their presence. But instead they chose to call only one of the two Judges that presided over the trial. All these are enough to create enough doubt in the mind of any trial Judge as to the seriousness of the appellants in discharging the onus placed on them in the case. The omission was also enough to justify the trial Judge invoking the provisions of section 149(d) of the Evidence Act that the evidence withheld, if produced, would be unfavourable to the appellants\' case.

I had the privilege of reading the leading judgment written by my learned brother, Musdapher, JSC. I entirely agree with his reasoning and conclusions reached therein. For the reasons given above and the fuller reasons given in the leading judgment, which I adopt, I also dismiss the appeal and abide with the consequential orders made therein, including that on costs.

Judgement delivered by
Walter Samuel Nkanu Onnoghen, J.S.C.

I have had the benefit of reading in draft, the lead judgment of my learned brother, Musdapher, JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

Learned senior counsel for the appellant, Chief Gani Fawehinmi, SAN has submitted eight issues for the determination of the appeal out of which only issues 5 and 6 are relevant to the main issue in the case, to wit the identity of the person convicted in CR/81/95 on 28/9/1995. Both parties and the trial and lower courts agree that the primary issue referred by this court to the trial court in the trial de novo is to determine the identity of the said convict -whether it was the 4th

respondent as contended by the appellants. The issue is therefore very narrow, this court having earlier decided that the issue of conviction was beyond contention.

There is no dispute that at the trial de novo, appellants called PW 1 and tendered many exhibits. It is also not disputed that at the conclusion of the trial, the learned trial judge did not believe the evidence of PW1 who was the only star witness for the appellants due to various contradictions inherent in his testimony, which finding was duly affirmed by the Court of Appeal.

Generally speaking, it is within the discretion of learned counsel for a plaintiff to decide the number of witnesses necessary to prove his case, what is important not being quantity but quality of evidence produced at the trial. On the primary issue of identity of the convict, the appellants had the following potential witnesses to call; the complainant, the investigating police officer(s) who investigated the criminal complaint and arrested the suspect who was eventually tried and convicted; the registrar or clerk of court present at the trial and conviction of the accused and the judge or judges who tried and convicted the accused. In the instant case, appellants only called PW 1 who is one of the two judges who allegedly tried and convicted the convict whose identity is in issue; the other judge was never called. Also not called are the complainant who were the alleged employer of the convict, the clerk of court or registrar of the court in which the convict was tried etc. All these people are relevant and crucial witnesses whose testimonies could have positively identified the convict. The appellant only called PW 1 whose evidence on the issue of identity is not only relevant but crucial to the issue on trial and would under normal circumstances be sufficient to determine the issue in favour of the appellants, if his testimony were to have been believed. The general principle is that a prosecutor or plaintiff is not required to call every available piece of evidence or witness in proof of his case provided sufficient evidence is called to discharge the onus of proof placed on the prosecution or plaintiff - see section 178 of the Evidence Act.

As stated earlier in this judgment, both the trial and lower courts did not believe the evidence of the only witness (PW1) called by the appellants in attempt to discharge the burden of proof placed on them by the law. That is the foundation leading to the collapse of the case of the appellants. It is settled law that in the determination of the credibility of witnesses, the demeanour, personality, reaction to questions under cross examination are all factors to be taken into consideration and that the determination of the credibility of a witness is strictly within the province of the trial judge. Where the veracity of a witness is in doubt, as in the instant case, the law is that his evidence should carry no weight at all.

Therefore where the issue for determination turns on the credibility of a witness or witnesses, an appellate court which has not the benefit of seeing the witness testify must defer to the opinion of the trial court which makes the opinion of the trial court in such a case preferable - See Fashanu vs Adekoya (1974) 6S.C 83; Sagay vs Sayere (2000) 6 NWLR (pt 661) 360.

In the instant case, the trial judge did not believe the case of the appellants and it is settled law that once a side of a story is believed at the expense of the other, submissions before an appellate court should not be directed at showing why a disbelieved evidence should be believed or vice versa (as strenuously pursued by learned counsel for the appellants in the instant appeal) but should be based on evidence that was believed - see Balogun vs Labiran (1988) 3 NWLR (pt. 80) 66 at 84 where OPUTA, JSC stated the position thus:-

\"Most of the submissions usually made before this court are submissions which should have been properly made before the trial court in an attempt to persuade it not to believe a particular witness. Once a witness is believed or disbelieved, the issue changes. It now becomes not why was he believed or disbelieved' And it is not easy to establish that before an appellate court. Arising from this, all submissions before an appellate court should be based on evidence that was in fact believed and not on evidence that an appellant submits should have been believed but was in fact not believed.\"

I therefore hold the view that since the determination of the primary issue before the trial court revolved around credibility of a witness called by the appellants which that court resolved against the appellants which decision was affirmed by the lower court, this court, being an appellate court is incapable of interfering with such findings, the said findings being strictly within the province of the trial judge to make. The issue is not that the inference drawn by the trial judge and affirmed by the Court of Appeal was not supported by the evidence and the facts before the court or that it

was peverse - Ebba vs Ogoda (1984) 1 SCN LR 372; Nnorodim vs Ezeani (2001) 5 NWLR (Pt. 706) 203. The learned senior counsel for the appellants decided to put all the eggs in one basket by calling only PW1 and the eggs broke when PW1\'s evidence was not believed by the court. There is therefore nothing to be done about it. ;

In conclusion I too find no merit in this appeal which is accordingly dismissed with costs as assessed and fixed by my learned brother Musdapher, JSC in the lead judgment.
Appeal dismissed.

Judgement delivered by
Ikechi Francis Ogbuagu, J.S.C.

I have had the advantage of reading before now, the lead Judgment of my learned brother, Musdapher, JSC, just delivered by him. I entirely agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed. I will however, for purposes of emphasis, add few words of mine by way of contribution.

Ten (10) Grounds of Appeal were filed and therefrom, eight (8) issues which appear at pages 12, 13 & 14 have been formulated for determination. The arguments in respect thereof appear at pages ' 15 -28, 29 - 44, 45 - 94, 95 - 99, 100 - 149, 150 - 209, 210 '225 and 226 -237 of the Appellant\'s Brief of Argument of 245 (two hundred and forty-five pages). The Reply Brief is of (48) forty eight pages. These are evidence of industry.

In this appeal, there is, as eloquently admitted by the leading SAN/Counsel for the Appellants during the hearing of this appeal on 23rd February, 2006, that the lone issue in controversy and for determination, is the resolution of the IDENTITY of the person - James Onanefe Ibori convicted and sentenced by/at the Upper Area Court, Bwari in Charge No. CR - 81- 95 on 28th September, 1995. It is therefore, certainly not the issue or question of the said conviction. This is because, the fact that one James Onanefe Ibori, was so convicted, is not in dispute. What is in dispute, is that the person so convicted, is the 4th Respondent and not his namesake. I note that the coincidence in the three names ' i.e. the first, second and surname seems/appears to me, worrisome.

In spite of this seeming \"worry\", in this appeal, this Court, is certainly not dealing with sentiments, speculations and/or conjectures, but with hard facts. It is the Appellants, who assert that, that person convicted, is the 4th Respondent. But this assertion, is vehemently denied by the Respondents. The 4th Respondent, is indicted as being an ex-convict. It is a very serious indictment or charge. On the decided authorities, the burden of proof of such a serious indictment, was/is on the Appellants. In all criminal cases, the standard of proof, is beyond reasonable doubt while in civil cases, on the balance of probabilities or preponderance of evidence.

Indeed, the learned trial Judge at page 723 of the Records, referred to this coincidence in the name and stated that, it may not be sufficient to connect the 4th Respondent with the commission of the crime in question as make it safe to a reasonable tribunal, to hold that the 4th Respondent, was in fact, the person convicted.

Now, how did the Appellants go about discharging this burden of proof' I or one may ask. They called and relied heavily, on the evidence of the PW1 - Alhaji Mohammed Awwal Yusuf who presided on the date of the said conviction with another member who it is said to have signed the Records, six (6) days thereafter. I note that the PW1, was thoroughly and effectively cross-examined. Chief Fawehinmi (SAN), has, with some amount of force and emphasis, submitted both in their said Brief and orally, that a party and indeed, a trial court, can and is entitled, to rely on the evidence of one witness depending however, on the circumstances. He also referred to and relied on the case of Alhaji Lawal v. Yama (20O4) 9 NWL.R (Pt. 877) 117 C.A. and urged the Court to consider it.

There is no doubt and this is also settled firstly, that the trial of any claim, does not depend on the number of witnesses except where the law requires more than one witness when the claim will fail, without the specified number of witnesses. See Alfred Usiobaifo & anor. v. Christopher Usiobaifo & anor. (20O5) 3 NWLR (Pt. 913) 665 @ 684; (3005) 1 S.C. (Pt. II) 6O; (2OO5) 1 SCNJ. 226 @ 238. It is the probative value of the evidence, that is the guiding principle. Thus, a court can act on the evidence of one single witness. But there is a proviso or rider and that is, if the witness, can be believed

given all the surrounding circumstances of the case. In other words, a single credible witness, can establish a case beyond reasonable doubt, unless, where the law for instance, required corroboration. The evidence of one witness, accepted and believed by the court, is sufficient to justify say, a conviction in the case of a criminal case or a finding for one of the parties, in a civil litigation. See the cases of Grace A. Akpabio & 2 ors. v. The State (1994) 7-8 SCNJ. (Pt.II) 429 @ 458; Ofoke Nwamba v. The State (1995) 3 SCNJ. 77 @ 94 - 95 and Odinaka & anor. v. Moghalu (1992) 4 NWLR (Pt. 233) 1; (1992) 4 S'NJ. 43 @ 54.

Secondly, there is no rule of law or practice, which requires a plaintiff in a civil suit, to be physically present in court to testify, if he can otherwise, prove his case. There is also no such rule, which compels a defendant in a civil suit to appear before the court or to testify before he may successfully, defend an action against him. Indeed, judgment in an appropriate case, may be entered in a suit, on the pleadings only with or without the presence of the parties, so long as they are duly represented. See Kehinde v. Ogunbunmi & ors. (1967) 1 ANLR 3O6; (1968) NMLR 37; Cross River State Newspapers Corporation v. Onu & 6 ors. (1995) 1 NWLR (Pt. 371) 270; (1995) 1 SCNJ. 218 and recently, Miss Ezeamah v. Alhaji Atta (2O04) 7 NWLR (Pt. 873) 468; (2O04) 2 S.C. (Pt. II) 75; (2O04) 2 SCNJ. 2OO @ 217. I have touched on this settled law because, the Appellants say that the 4th Respondent, did not testify at the hearing. It is equally the case, that the Appellants themselves, did not testify at the said trial. See p. 110 of the Appellants Brief where the Appellants, queried why the 4th Respondent, refused to come to court and controvert what PW1 had said etc. See paragraphs 5.12 and 5.13 (iii) of the Appellants\' Brief. It is also settled that it is when the plaintiff or prosecution, \"has made out a prima facie case, that the onus may shift in a civil matter or in a criminal case, where an explanation from the accused person, may be required or expected.

I am not going into who a credible witness is. The court below took care of this at, page 1386 of vol. II of the Records where it referred to Black\'s Law Dictionary 6th Edition. But the question I or one may ask, is, what was the finding of the learned trial Judge and the court below, as to the evidence of the single witness of the Appellants' Now, after listing the material contradictions and doubts created by the evidence of PW1 at pages Nos. 709 to 711 (Nos. 3.7 to 3.13) and those highlighted by the learned counsel to the 1st to 3rd Respondents at pages 711 to 718 Nos. (6.1 to 6.29), at page 723 of the Records, the learned trial Judge, concluded as follows:

\"Where the memory of the PW1 has been faulted with regard to even more recent happenings of events that occurred at virtually the same time as the conviction in question, it is difficult for one to say that the evidence of the P.W.I in this case is reliable or credible enough, more so when it is full of material contradictions\".

See also the meticulous review by the learned trial Judge on the evidence of the P.W1 at pages 683 to 690 of the Records.

At page 724 of the Records, after reproducing the pronouncements of this Court in the case of Ukpabi v. The State (2O04) 11 NWLR. (Pt. 884) 439 @ 499 (it is also reported in (20O4) 6-7 S.C. 27 @ 31; (2004) 6 SCNJ 112), His Lordship, stated as follows:

\"With the material contradictions and serious inconsistencies especially in the evidence of P.W1, the irresistible conclusion must be that the 4th defendant has not been sufficiently identified as the person convicted by the Upper Area Court, Bwari in case No. CA-81-95 between Commissioner of Police v. James Qnanefe Ibori on the 28/9/95, even on the balance of probabilities. The standard of proof being beyond reasonable doubt has not been met where there is not only a reasonable but in fact a very serious doubt raised by the material contradictions and inconsistencies in the evidence of P.W1 and Exhibit (sic) \"C\" and \"D\".

The court below, affirmed the above findings and holding. See also at pages 1358 of Vol. II of the Records ' per Augie and page 1395 ' per Alagao.

I must confess that the said evidence of the P.W1 both in-chief and under cross-examination at the trial court, is very sickening to me to say the least. That a Judge who claimed, or asserted that he convicted the 4th Respondent, stated on oath, that at the Delta Liaison Office, he recognized the 4th Respondent who told him about a problem about his conviction and wanted the P.W1, to assist him. That he advised, the 4th Respondent, to file a suit at the same Upper

Area Court, Bwari and to invite him ' the P.W1, as the Judge that presided over the matter, the Commissioner of Police, the Prosecutor that presented the case and the Registry for the purpose of identification as to whether the 4th Respondent was the person that was convicted by that court and that the said suit, was later filed. Indeed Wonders it is said, shall never end. So, apart from the P.W1, the P.W1, knew that the Commissioner of Police, the Prosecutor and the Registrar, were vital witnesses. Chief Fawemnmi (SAN) I believe, heard this PWl\'s testimony.

I wish to state with the greatest humility and profound respect, that Chief Fawehinrni (SAN), took many things for granted. He, in my respectful view, erroneously, or shall I say, regrettably, thought that with the evidence of the P.W1, he had \"landed\" so to say and so, the need or necessity, to call any other material witness, did not or could not have arisen.

It must always be kept in focus, that the 4th Respondent, in his pleadings, had joined very material issue with the Appellants, as to the identity of the person convicted in the said Upper Area Court. That was indeed, the decision or order of this Court that the identity of the person convicted, must be ascertained by the trial court. In other words, this Court, gave what I call or regard as a Crucial Hint.

I am inclined to believe that the Appellants and their learned counsel (SAN), very conscious of the task placed on them and which must be accomplished, brilliantly, pleaded copiously, the weighty averments in paragraphs 11,12, 13, 14 and 15 of their Statement of Claim which have been reproduced in the said lead Judgment of my learned brother, Musdapher, JSC. Remarkably, there was no attempt, to talk of the Appellants actually proffering evidence in support of these said averments. To the knowledge of the learned SAN for the Appellants, it is now firmly settled, that pleadings do not constitute or tantamount to evidence. Also, that where there is no evidence in support of any pleading, that pleading or averment, is deemed to have been abandoned. There are too many decided authorities in these regard. See Raimi Olarewaju v. Amos Bamigboye & ors. (1987) 3 NWL.R (Pt. 60) 353, 359, 362; Alhaji Bala & ors. v. Mrs. Bankole (1986) 3 NWLR (Pt. 27) 141; Magnusson v. Koiki & 2 ors. (1993) 12 SCNJ. 114 @ 124 - per Kutigi, JSC; Broadline Enterprises Ltd. v. Monterey Maritime Corporation & anor. (1995) 10 SCNJ. 1 @ 25 and recently, Miss Ezeanah v. Alhaji Atta (supra) @ page 235 of the SCNJ Report ' per Onu, JSC, citing several other cases therein.

Again, there is the proposition of the law that is also firmly settled. As rightly submitted in the Brief of the 4th Respondent at page 31, the gamut of the Appellants\' pleadings, put the commission of a crime, directly in issue ' i.e. that the 4th Respondent, is an ex-convict. Therefore, the standard of proof, is that of beyond reasonable doubt. In other words, although it is true that in civil cases, the preponderance of evidence, may constitute a sufficient ground for a verdict, but this general rule, is subject to the Statutory proposition in Section 137(a) (now Section 138(i) of the Evidence Act which provides that

\"if the commission of a crime by party to any proceeding, is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt\".

This is so, because, for instance, a person who alleges that he was assaulted, might fail to prove the assault in a criminal prosecution and yet, obtain judgment in a civil proceeding. See Smith. Qkuarume v. Timothy Obabokor .(1965) 1 ANLR. 36O; (1986) NMLR 47; Nwobodo v. Qnoh (1984) 1 SCNL.R 1 @ 17 cited in Nwanguma & anor. v. Ikyaande & 5 ors. (1992) 8 NWLR, (Pt. 258) 192 @ 198; and Adelaja v. Fanoiki & anor. (199O) 2 NWLR (Pt. 131) 137; (199O) 3 SACNJ. 131 .just to mention but a few.

In the case of Nwankwere v. Adewimmi (1966) 1 ANLR 129, it -was held that \"motive\", was not a fact in issue. That a fact directly in issue, is a fact which the plaintiff must prove, in order to succeed in his claim. See also Ikoku v. Oli (1962) 1 ANLR 194; (1962) 1 SCNLR 3O7 @ 31O - 312 also cited and relied on in the 4th Respondent\'s Brief. So also Nwobodo v. Onoh (supra). Undoubtedly, the fact in issue in the case leading to this appeal, was that the 4th Respondent, was convicted and sentenced by an Upper Area Court, Bwari for the criminal offence of negligent conduct and criminal breach of trust. So, although this instant case is a civil proceeding, but on the decided authorities, the standard of proof required to prove the said allegation, was/is beyond reasonable doubt. The Appellants, having abandoned their said pleadings in those mentioned paragraphs which should have nailed effectively, the 4th Respondent, and having failed woefully, to establish their case even on the balance of probabilities to talk of beyond

reasonable doubt, the trial court, in my respectful view, was right and justified, in throwing out their suit or claim, by dismissing the same. The court below, was also right in affirming the said decision of the trial Court. I so hold.

In order to make myself clear and well understood, I wish to emphasize the fact that on the denial of the 4th Respondent that he was not the person so convicted and sentenced (he even counter-claimed and his reliefs 1 and II, were granted by the trial court and also affirmed by the court below), the Appellants, were obliged or expected and in fact bound, to do a thorough home work so to speak and to adopt no half measures in respect of the matter in controversy or in issue. There was, the Employers of the said accused person, who were the complainants. There was/is the Police Investigating Officer who investigated the complaint before charging the matter to the said court. There was/is the Clerk of that court or Registrar who must have faced the accused person and in fact, read out and/or explained the charge to that accused person before he made his plea of guilty. There was/is the Prosecutor who represented the Prosecution. All these persons, were not considered material witnesses for the Appellants and they were not called. I can easily and unhesitatingly, invoke the provisions of Section 149(d) of the Evidence Act against the Appellants. This is because, the issue, was the proper identification of the said accused person who was said to have pleaded guilty and was convicted and sentenced. There is no evidence, that the said option of fine, was paid by the said convict and the receipt issued or documentary evidence in respect thereof, produced.

Since the 4th Respondent denied that he was the person charged and convicted and joined issues with the Appellants to prove their said allegation, the need to call the other Judge who sat with the P.W1, becomes very paramount and crucial and very necessary in order to corroborate the evidence of the P.W1 more so, as it is alleged that he signed the Record of that court some days thereafter. His evidence, in my respectful view, could have effectively, put the \"bolt\" on the \"coffin\" and debunked the said denial of the 4th Respondent. The 4th Respondent, should have had an up-hill task to contend with. Why were all these material witnesses, not called' I or one may ask. There is no explanation in the Records by the Appellants as to why or the reason or reasons, why they were not called, hence my invocation of the said Section 149(d) of the Evidence Act against the Appellants.

Frankly speaking, there are certain things or evidence in the Records from the evidence of the P.W1, and some other documentary evidence therein, that raise the eye-brow, and which are intriguing or are very irritating. For example, the P.W.1, stated that he read in \"This Day\" Newspaper of 30th February, 2OO3, an article captioned \"Judge, Registrar falsified records\". This is a Judge, who should and ought to know that February, has no 30th. When it is 29th, that year, is regarded as a Leap Year in the Calendar. That the trial court did not believe him and treated him as an unreliable witness, in my respectful view, are justified and are borne out from the Records. More so, when the P.W1, did not even remember the subject of the very charge in which he convicted the said accused person. This Court and the parties, are bound by the said Records - See Texaco Panama Incorporation v. Shell Petroleum Dev. Corp. of Nig. Ltd. (2O02) 2 SGNJ. 1O2 @ 118 and Chief Fubara & ors. v. Chief Minimah & ors. (2003) 5 SCNJ. 142 @ 168.

Finally, this Court, has no reason to interfere with the concurrent findings of the two lower courts more so, as the Appellants, have not shown at all to talk of satisfactorily, that the said findings are perverse. See Leadway Assurance Co. Ltd, v. Zico Nig. Ltd. (2004) 4 SCNJ. 1 @ 10; (2004) 4 S. C. (Pt. 1) 45; (2004) 11 NWLR (Pt. 884) 316 and Iheanacho (not Ihenacho) & ors. v. Chigere & ors. (2004) 17 NWLR (Pt. 901) 130 @ 152; (2004) 7 SCNJ 272 and many others in this regard. It is not the function of this Court or any court of law for that matter, to speculate on possibilities which are not supported by any evidence. See The State v. Ibong Udo Okoko & anor. (1964) 1 ANLR 243 and Ikechi Onwe v. The State (1875) 9-11 S.C. 23 @ 31.

It is from the foregoing and the fuller lead Judgment of my learned brother, Musdapher, JSC, that I too, find no merit in this appeal which I hereby and accordingly dismiss. I too, affirm the decision of the court below affirming the Judgment of the trial court.

I abide by the consequential orders in respect of costs.