IN THE SUPREME COURT OF NIGERIA

Suit No: SC140/2002

Petitioner: A.G. Leventis Nigeria PLC
And
Respondent: Chief Christian Akpu

Date Delivered: 2007-06-15

Judge(s): Sylvester Umaru Onu, Dahiru Musdapher, Sunday Akinola Akintan, Mahmud Mohammed, Ikechi Francis Ogbuagu

Judgment Delivered

This is an appeal against the decision of the court of appeal, Enugu division (hereinafter called \"the court below\") delivered on 3rd July, 2001 allowing in part, the decision of the trial High Court, Onitsha in Onitsha judicial division presided over by Nwankwo, J., delivered on the 18th May, 1998 in favour of the plaintiff/respondent.

Dissatisfied with the said decision, the appellant has further appealed to this court on four (4) grounds of appeal. Without their particulars, they read as follows:

Ground one

\"The learned Justices of the court of appeal erred in law in failing to consider or adjudicate upon a ground of appeal and issue for determination raised by the: defendant/appellant, viz that the plaintiff/respondent failed to plead particulars of negligence and that consequent upon this failure any evidence of negligence went to no issue.\"

Ground two

\"The learned justices of the court of appeal erred in law when after striking out the major piece of evidence upon which the learned trial judge depended upon for his finding of negligence, they proceeded to re-evaluate the evidence before the court of trial without considering or evaluating any of the evidence proffered at the court of trial by the defendant /appellant.'

Ground three

\"The learned justices of the court of appeal erred in law in proceeding to
evaluate the evidence of the parties before the trial court by themselves after striking out the piece of evidence upon which the trial court based her finding of negligence on.\"

Ground four

\"The learned justices of the court of appeal erred in law and on the facts in awarding the sum of N2.0m to the respondent as damages that will restore the respondent \"monetarily to the position he would have been if the breach of contract had not occurred\", when the trial Judge disbelieved that this N2.0m actually represents what will restore the respondent monetarily to the position he was in before the alleged breach of contract.'

I note that grounds two and three are substantially, the same although differently couched. When this appeal came up for hearing on 20th March, 2007, the appellant and his counsel, were absent although there was evidence of sending of hearing notice on counsel. Pursuant to the appeal, was deemed argued.

The facts of this case leading to this appeal briefly stated are that the respondent as plaintiff, at the high court, Onitsha, took out a writ of summons against the appellant, claiming as follows:

\"(a) Two million N2, 000.000.00 being the cost of replacement of the engine of the plaintiff\'s said 500 SEL Mercedes Benz car destroyed by the defendant.

(b) Five hundred naira (N500) per day from 28th January, 1993 till the date of judgment being the cost of chartering vehicle for his movement/business.

(c) One Million naira (N1, 000.000.00) being general damages for emotional distress, financial and social disability caused the plaintiff since the said 28th January, 1993.\"

I note that the above claims are the same as those claimed by the respondent in paragraph 18 of his statement of claim at page 8 of the records.

The plaintiffs/respondent\'s case is that on 19th October, 1992, he took his Mercedes Benz 500 SEL car to the appellant\'s workshop at Onitsha \"with the ordinary complaint of replacing the car\'s exhaust manifold gasket\" -See paragraph 4 of the statement of claim. I note that in the respondent\'s brief both in the court below and in this court, he stated or described it as \"for a minor repair\". A job card was opened - exhibit E - which I note detailed other faults/repairs including \"tapping noise from engine\". It is the respondent\'s case that this \"ordinary\" job, took the appellant some weeks and when the car was returned to the respondent, \"it developed more faults and became worse than the ordinary problem of exhaust manifold gasket\". That he complained bitterly about the state of the car to the appellant who collected back the car, That he was later told by the appellant about other problems or faults that it had detected from the car. He was later told that the engine had been taken to Lagos from where, at the instance of the appellant, he towed away the body of the car to avoid its being vandalized. After about one year, the Respondent initiated the said action in the said High Court. The respondent testified and called one (1) witness in support of his case.

On its part, the appellant\'s case is that in good faith, it embarked on the repairs but on further investigation of the source of the tapping noise, the engine of the car, was dismantled and it was then, it was discovered that the short blocks of the engine, were worn-out. It had pleaded in paragraph 5 of its statement of defence that the respondent did not bring the said car for the change of the exhaust manifold gasket, but for several faults and/or repairs twelve (12) in number (a) to (1). The appellant called two (2) witnesses in support of its defence. At the end of the trial, the learned trial judge, found in favour of the respondent. He relied heavily on exhibit CA 57.

Dissatisfied with the said decision, the appellant, appealed to the court below, which expunged from the records, exhibit CA 57 and allowed the appeal in part, by awarding two million Naira (N2 m) for his \"first head of the claim\" and twenty five thousand, five hundred naira (N25,500.00) \"for his 2nd head of claim.\"

Aggrieved by the said decision, the appellant has further appealed to this court. There is no cross-appeal by the respondent.

The appellant, has formulated three (3) issues for determination, namely,

'1. Whether the court of appeal adjudicated upon the issue for determination complaining about the respondents (sic) failure to plead particulars of negligence and if not, whether this honourable court should effectively determine this case by pronouncing upon the failure to plead particulars of negligence by the respondent and its effect'

2. Whether the court of appeal ought to have re- evaluated the evidence before the trial court and whether in re-evaluation, any weight ought to have been given to the evidence in rebuttal of negligence lead (sic) (meaning led) by the appellant\'s witnesses'

3. Whether in the absence of a cross-appeal, the court of appeal ought to have increased the award of damages reflecting the value of the engine of the respondent\'s car from N1.5m to N2.0m''

On his part, the respondent has formulated also three (3) issues for determination, namely:

\"3.01 Whether the omission, if any, by the court below to pronounce on the issue of pleading the particulars of negligence occasions a miscarriage of justice ,so as to warrant the reversal of the lower court\'s decision.

3.02 Whether there was any counter evidence to warrant the court of appeal disturbance of the trial court\'s finding that the appellant was negligent (sic).

3.03 Whether the court of appeal is justified in its decision that the evidence of PWl and PW2 were uncontroversial, and if so, whether the upward review of the value of the respondent\'s car is justified in law.\"

In my respectful view, the issues of the parties are substantially, the same although differently worded/couched. I will therefore, deal with them in that regard.

Issue 1 of the appellant and Issue 3.01 of the respondent

I note that in the notice and grounds of appeal filed by the appellant in the court below, in ground three (3) thereof, the appellant, complained about the respondent\'s failure, to plead the particulars of negligence, thus:

\"The learned trial judge erred in law and on the facts when he held that the plaintiff was not bound to plead particulars of negligence.

Issue 3 for determination in the appellant\'s brief in that court at page 129 of the records, reads as follows:

\"Whether the learned trial judge was correct when he held that the plaintiff/respondent was not bound to plead particulars of negligence and that merely indicating what your case is all about suffice as particulars of negligence'\"

Issue 3 of the respondent at page 149 of the records for determination in the court below, read as follows:

\"Whether the facts and various acts of omission and commission as contained in the plaintiffs statement of claim particularly paragraphs 5,7,8,9, 13, 15 and 17 constitute particulars of negligence on the part of the defendant\".

I note that paragraph 15 of the respondent\'s statement of claim at page 7 of the records, read thus:

\"The plaintiff will at hearing adduce evidence to prove that, ordinarily the change of exhaust gasket has nothing to do with the stiffness of the engine is due to the defendant's recklessness, gross negligence and incompetence.\"

I am aware that most of the decided authorities on this issue, relate to road or motor accident or electric wiring cases. However, it is firmly established that a party who alleges negligence, should not only plead the act or acts of negligence, but should also give specific particulars. See the case of Aku Nmecha Transport Services (Nig.) Ltd. & Anor. v. Atoloye (1993) 6 NWLR (Pt.298) 233 @ 248 C.A. Again settled, is that where there is failure to furnish further and better particulars, no evidence, will be led on the facts of which further particulars, is required. See the case of Chief Alien C. Nwachukwu & anor, v. Chief Emeka Eneogwo & 2 Ors. (1999) 4 NWLR (pt.600) 529@635 CA

As rightly submitted in the appellant\'s brief, if is not only in cases in which the allegation of negligence, is based on tort, that particulars are required as appears to be the decision of the learned trial Judge at pages 105 and 106 of the records. See the case of Seismograph Services (Nig.) Ltd, v. Mark (1993) 7 NWLR (Pt.304) 203 @.... - per Uwaifo-, J.C.A (as he then was) also cited and relied on in the said brief. As a matter of fact, in Bullen & Leake Precedents of Pleadings 11th edition, page 533, also reproduced in the brief, the following appear, inter alia:

'It is not enough for the plaintiff in his statement of claim to allege merely that the defendant acted negligently and thereby caused him damages, he must also set out facts which show that the alleged negligence was a breach of duty, which the defendant owed to the plaintiff. The statement of claim \"ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged\" per Willes J. in Gautret v. Egeraon (1867) LR. 2 C P 31. Then should follow an allegation of the precise breach of that duty of which the plaintiff complains; in what respect the defendant was negligent; and lastly the details of the damage sustained'.

(the underlining his)

This statement I note, relates to road accident cases. So also die case of Adeoshun v. Adisa (1986) 5 NWLR (Pt.40) 255 (@), 236-237 C.A. - per Maidaa, J.C.A, also cited and relied on in the appellant\'s brief.

The appellant has therefore, submitted that the justice of this case, demands that the respondent\'s case be dismissed for failure to plead the particulars of negligence. With respect, I do not quite agree. This is because, the complaint in this issue, is not the failure of the respondent to supply the particulars of negligence, but because of the failure of the court below to pronounce on it. So, I am obliged to deal with this specific complaint.

Now, it is firmly settled that it is the duty of all lower courts, to consider all issues placed before it except in the clearest cases. In the case of Owodunni v. Registered Trustees of Celestial Church of Christ & 3 ors. (2000) 6 SCNJ, 299 @ 426-427, this court - per Ogundare, J.S.C (of blessed memory) stated that this court has frowned, in a number of cases, at the failure of lower courts, to intermediate court, should endeavour to resolve all issues put before it. His lordship referred to the cases of Odunayo v. The State (1972) 8-9 S.C. 290(@t) 296 - per Sowemimo, J.S.C (as he then was and of blessed of memory) and Ifeanyi-Chukwu (Osondu) Ltd, v. Saleh Boneh Ltd. (2005) 5 NWLR 322 (a), 351 which is also reported in (2000) 3 SCNJ. 18.

The learned counsel for the respondent, has admirably, conceded in paragraph 4.02 of their brief, of this fact or settled principle. He even cited/referred to the case of Alhaji Olowolagbai & ors. V Bakare & ors. (1998) 3 NWLR (Pt.543) 528 @ 534; (1998) 3 SCNJ. 75. But he describes it as \"the general rule\". I note that the appellant or his learned counsel has not stated in their brief, or in oral submission, what prejudice or embarrassment, that the appellant has suffered or what miscarriage of justice, the omission, has occasioned to it. As rightly submitted in the respondent\'s brief citing and relying on the case of Ejelikwu v. The State (1993)7NWLR (Pt, 307) 554 (a) 583 (it is also reported in (1993) 9 SCNJ. 152.) - per Karibi-Whyte, J.S.C, for a condition to nullify a judicial proceeding, it must be a substantial provision, which affects the jurisdiction or competence of the court, or a procedural defect in a miscarriage of justice.

I also ask does the omission to supply the particulars of negligence and or the failure of the court below to pronounce on the issue as I have hereinabove stated, affect the jurisdiction or competence of the court below, or is there any procedural defect in the proceedings which had resulted in any miscarriage of justice' Certainly, I think not.

I am not going into what a miscarriage of justice means. But you can read the definition in Black\'s Law Chambers Dictionary 7th Edition page 1013 and the cases of Total (Nig.) Ltd. & Anor. v. Wilfred Nweke & anor. (1978) 5 S.C. 1 @ 14; (1978) 5 S.C. (Reprint); Nnajiofor v. Ukonu (1986) 4 NWLR (Pt.36) 505 (a), 516-517 cited and relied on in the respondent\'s brief and Aidoko v.Sule Anyegwu (2003) FWLR (Pt.49) 1439 (a), 1446.

My answer to the respective issue of the parties, is that although I agree with the complaint of the appellant that the court below, failed or neglected to pronounce on the failure of the respondent to plead the particulars of negligence, I also agree with the respondent, that this failure, did not occasion any miscarriage of justice that will warrant the dismissal of the suit on this ground.

Issue 2 of the appellant and Issue 3.02 of the respondent

It is contended at paragraph 4.01 in the appellant\'s brief that the court below erred in law in proceeding to re-evaluate the evidence before it from the printed record. That the court below, after expunging exhibit CA 57 stated severally that the said exhibit, was the basis of the decision by the trial court.

Now, it is settled that an appeal is in the nature of re-hearing in respect of all issues raised in respect of the case. See the ease of Sabrue Motors Nig. Ltd. v. Rajab Enterprises Nig. Ltd. (2002) 4 SCN.J. 370@ 382. In doing so, it is also settled that the duty of an appellate court, is to inquire into ways the trial court, tried and settled the dispute and not to re-open and re-try cases. See the cases of Oroke v. Ede (1964) NNLR 119 - 120; Ajadi v. Okenihun (1985) 1 NWLR (Pt.3) 484 (a), 492 cited and relied on in the respondent\'s brief; This is why it is also settled that what an appellate court has to decide, is whether the decision of the trial court was/is right and not the reasons for the decision. Thus, if a judgment of a trial court is -correct, it will not be liable to reversal, merely because it was anchored on a wrong reason. See the cases of Ukejianya v. Uchendu (1950) 13 WACA 45@46; Ayeni & ors. v. Williams Sowemimo (1982) 5 S.C. 6@73-74; Odukari v, Ogunbiyii (1998) 8 NWLR (Pt.561) 339 350 and recently, Jikantoro &6ors. v. Dantoro & 6ors. (2004) 5 SCNJ. 152 @178 just to mention but a few.

In respect of this issue, the court below - per M. D. Muhammad, J.C.A at pages 187 and 188 (not Page 184 as erroneously stated in the appellant\'s brief), stated inter alia, as follows:

'It is true that the court had, (see page. 100 - 103 of the record) largely based its finding of negligence on the part of the appellant on exhibit CA57, which has been expunged. It is still my considered view that in the light of the evidence given both by PW1 and PW2 which evidence had remained uncontradicted, the same conclusion of negligence would have been arried (sic) (meaning arrived) at without necessarily drawing from the expunged document. In particular PW1, the expert that he was, had testified to the fact that appellant\'s diagnosis of the faults in the respondents (sic) (respondent's) vehicle was wrong. So where are the repairs conducted.

In sum, the appellant by the uncontradicted testimony of PW1 and PW2 had been shown to have displayed, in the discharged (sic) of its obligation to the respondent a deficient skill.

The trial court\'s reason for finding that appellant was negligent might therefore be wrong but not the finding self (sic) (meaning itself). The court was bound to use evidence that had remained unshaken and uncontradicted see Oyetayo v. Mosojo (1997) 10 NWLR (Pt. 526) 627; Dimlong v. Dimlong (1998) 2 NWLR (Pt.538) 381 CA and Ifeanyi Chukwu Osondu v, Akhigbe (1999) 11 NWLR (Pt. 625) 1 S.C.'

(the underlining mine)
His lordship, continued thus,

\" Undoubtedly, the court had erred when it based its decision largely on a document that has been adjudged inadmissible and or of little or no probative value. This error by itself in view of the subsisting credible evidence given by PW1 and PW2 cannot lead to a reversal, of the decision appealed against. The finding has not been shown to be perverse. See Okokji (sic) (meaning Okonji) v. Njokanma (1999) 14 NWLR (Pt.628) 250 S.C. The finding has remained unaffected by our holding that Exhibit \'CA57\' is inadmissible. By virtue of S.I 6 of the Court of Appeal Act, the lower court\'s reasons for its findings are hereby retailored to reflect our foregoing observations .....\"

(the underlining mine)

It is now firmly established that where the findings of a trial court, are perverse or use made of a document, goes beyond its evidential value particularly in respect of documentary evidence, it is the duty of the appellate court, to re-consider, re-assess the evidence and apply it if the justice of the case so requires. See the cases of Adeleke v. lyande (2001) 13 NWLR (Pt.729)1 (a), 20; (2001) 6 SCNJ. 101: and Tsokwa Oil Marketing Co. Nig. Ltd, v. Bank of the North Ltd. (2002) 5 SCNJ. 176 @ 200. This is why, there is the need for a trial and an appellate court, to consider, all relevant evidence before them.

This is exactly what the court below did. It gave its reasons for expunging exhibit CA57 from its records at pages 181 to 183. Some of them include that Exhibit CA57, was not specifically pleaded; that it had not been made part of the record, it was clear that DW1 through whom it was tendered, was neither the maker nor the addressee of the very document.

That the maker of the document, did not testify so also the addressee and therefore, it had not been possible to cross-examine either of them; thus that there was nothing on record, to indicate that the exhibit, had been written by and received by the persons so alleged; that worse still, that the learned trial Judge, did not reproduce the content of the document nor was the court below, afforded an opportunity to physically, examine the content of the exhibit. Finally, that the document never had the probative value ascribed to it by the trial court chiefly because, its maker was neither called nor its origin and destination fully ascertained. That for the first reason, the trial court, should have discountenanced the document.

Fine! There seems to be no quarrel about the court below\'s decision in expunging the said document or exhibit from the records. The complaint by the appellant is that having expunged the said document, the court below, ought not and should have not proceeded to re-evaluate the evidence before it. I have, with respect, rejected this contention/submission. I gave my reason for so doing.

In addition and this is also settled, Section 16 of the Court of Appeal Act, gives it full jurisdiction over the whole proceedings as if the proceedings, had been initiated in the court of appeal as the court of first instance and therefore, may re-hear the case as a whole or in part or may remit it, to the trial court for the purpose of rehearing or trial de novo. I will add also, that the incontestable limit, is that such first instance jurisdiction exercised by the court of Appeal, does not, include what a trial court, could not have done. See the cases of The State v. Dr. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 (a), 46, 56, 58: (1992) 2 SCNJ. 1: Abbas & ors.) v. Solomon & ors. (2001) 7 SCNJ.546 and Attorney-General, Anambra State &5ors. v. Okeke &4ors.(2002)5SCN. 318@333,339,345.

It has to be borne in mind and this is also settled, that if an appellate court is of the opinion (as in the instant case reproduced by me hereinabove), that the inadmissible evidence, cannot or could not reasonably, have affected the decision, it will not interfere. But if it is of the opinion that without the inadmissible evidence, the decision must have been different, it will interfere. See the cases of Ajayi v. Fisher (1956) 1 FSC 90 (a). 92; (1956) SCNLR 279; R. v. Thomas (1958) 3 FSC 8; Raimu v. Alhaji Akintoye (1986) 5 S.C. 87 and recently. Chief Durosuro v. Ayorinde (2005) 3 SCNJ. 8 (a), 16-17; (2005) 3-4 S.C. 14 citing also Idundu v. Okumagba (1976) 9-10 S.C. 227(a), 245. There is no doubt and this also firmly established that where inadmissible evidence, has been admitted, it is the duty of the court, not to act upon it. See Olukade v. Alade (1976) 2 S.C. 183 (a), 188-189. This is why the court below, stated that the trial court, should have discountenanced the said exhibit or document.

The problem or quarrel is the holding of the court below, that the evidence of PW1 and PW2 remained uncontradicted. I respectfully, do not agree with this view. I agree with the submission in the appellant\'s brief at page 7, that by stating so, the court below, in effect, sought to eliminate the entirety of the evidence of the DW1 and DW2. The learned counsel for the appellant has submitted that the evidence of the PW2 (the \"expert\"), was merely speculative and academic and that there was no evidence from him that stated that the appellant, was negligent. That the evidence of the DW1 at pages 44 to 46 of the records were all in rebuttal of negligence. I agree: This is because, this witness - DW1, testified that he participated in dis-mantling the engine and that they discovered that the engine was damaged because two (2) out of the eight (8) cylinders, were worn out. DW2 was the witness who received the car. He testified that the vehicle, was releasing blue-white smoke from the exhaust and that the car, had a tapping noise for which the appellant, was to effect repair as necessary. He also testified that no negligence occurred.

I agree with the submission in the appellant\'s brief, that the court below, instead of saying that there was uncontroverted evidence, but in is re-evaluation; it was in effect dealing with the credibility of the witnesses. That in the circumstances, it could have ordered a re-trial. The cases of shell B.P. v. Cole (1978) 3 S.C. 183; Okeowo v. Miglore (1979) 11 S.C. 138. and Ezeoke v. Nwagbo (1988) 1 NWLR (Pt.72) 616 have been cited and relied on for this proposition. It is settled that the function of assessment of credibility of witnesses, is essentially, for the trial court and not that of an appellate court. See the cases of Akpakpuna & ors. v. Nzeka & ors. (1983) 2 SCNLR I (a), 14 and Obodo & anor. v. Ogba & ors. (1987) 3 S.C 459 460 -61, 480-482, 485; (1987) 2 NWLR (Pt.54) 1; (1987) 3 SCNJ. 82 and recently, Agbaje & ors. v. SCNJ. 64 and many others. The trial court, in my respectful view, adequately or substantially, dealt with the evidence before it particularly at pages 102 and part of page 103 of the Records and came to its conclusion at pages 117 and 118 of the record. I will come later to its award in favour of the respondent. So, in spite of the stance of the court below in holding that the evidence of the PW1 and PW2, were uncontradicted, it is now firmly established that it is not every mistake or

error in a judgment, that necessarily determines an appeal in favour of an appellant or automatically results in the appeal being allowed, It is only when the error, is so substantial, that it has occasioned a miscarriage of justice, that the appellate court, is bound to interfere. There are too many decided authorities in this regard. See Onajobi v. Olanipekun (1985) 4 S.C. (Pt.2) 156 @ 168; Osafile & anor. v. Odi & anor. (No.1) (1990) 3 NWLR (Pt.137) 130; (1990) 5 SCNJ. 118, Anyanwu v. Mbara (1992) 5 NWLR (Pt.242) 386@ 400 Odukwe v. Mrs. Ethel N. Ogunbiyi (1998) 8 NWLR (Pt.....) 338 (@)351; (1998) 6 SCNJ, 102 (a), 113 and International Bank for West Africa Ltd, v. Pavek International Co. (Nig) Ltd. (2000) 1 NWLR (Pt.663) 128; (2000) 4 SCNJ, 200 just to mention but a few.

My answer to this issue therefore, is partly, in the affirmative, but I hold that the court below, with respect, was wrong in holding that the evidence of the PW1 and PW2 remained uncontradicted. Incidentally, that was the submission of the learned counsel for the respondent as recorded by the court below, at page 180 of the records. Even if it dealt with the credibility of the witnesses, with respect, it was not entitled to do so because, the assessment of credibility of witnesses, is that of the trial court. The effect, in my respectful view, is that the trial court, having preferred the evidence of the respondent to that of the defence/appellant through its two witnesses, that finding subsists. For the avoidance of doubt, the trial court at page 112 of the Records, stated inter alia, as follows:

'I had the opportunity of watching the demeanour of the plaintiff while he was in the witness box. He impressed me as an honest, prudent, innocent but unfortunate customer in the hands of a team of inexperienced and incompetent, workmen in the employment of an otherwise reputable automobile engineering company with a poorly stated branch office at Onitsha I hold that the plaintiff has proved his case on preponderance of evidence and that the defendant company\'s workmen at Onitsta damaged the plaintiff's mercedes benz car engine while they were working on it in a most reckless, negligent and incompetent manner for which I hold the defendant company vicariously liable in damages (sic) to the plaintiff.....'

(the underlining mine)

Issue 3 of the appellant and 3.02 of the respondent

I have under Issue 2 of the appellant, dealt with part of Issue 3.03 of the respondent which read as follows:

\"Whether the court of appeal is justified in its decision that the evidence of PW1 and PW2 were uncontroverted.....'

The rest of the sentence is substantially, the same with Issue 3 of the appellant.

The law is firmly settled as to the attitude or powers of an appellate court in respect of an award of damages by a trial court. An appellate court, ought not to upset an award of damages by a trial court merely because, if it had tried the matter, it might have awarded a different figure. An award of damages can only he upset or interfered with by an appellate court, if it is shown by the appellant, either that:

'(a) the trial court acted or proceeded upon wrong principles of law, or

(b) the amount awarded by the trial court, is manifestly and extremely high or low, or

(c) the amount, was on an entirely erroneous estimate which no reasonable tribunal, will make.'

See the cases of F.R. A. Williams v. Daily Times of Nig. Ltd. (1990) 1 NWLR (Pt,l24) l@49; (1990) 1 SCNJ.1; Ndinma v. Igbenedion (2001) 5 NWLR (Pt.705) 140 C.A.; Nzeribe v. Dave Engineering Co. Lid. (1990) 3 NWLR (Pt.361) 124 @ 140 and recently, The Shell Petroleum Development Co. of Nig. Ltd. & 4 ors. v. Chief Tiebo VII (2005) 3-4 S.C. 137; (2005) 4 SCNJ. 39 (a), 56.

In other words, in order to justify interference with any decision of a trial judge on the amount of damages awarded, it

must be convinced that the above ingredients are present. In the instant case, while the trial court in its final decision at page 118 of the records, entered judgment in favour of the respondent in the following terms:

\"(1) The defendant-company shall pay to the plaintiff the sum of Nl.5m being the cost of replacement of the plaintiff\'s 500 SEL Mercedes Benz car engine damaged by the defendant.

(2) The defendant-company shall also pay to the plaintiff the sum of N25, 000.00 being special damages for the chartering of alternative vehicle by the plaintiff for his business and personal movements for 51 days at N500.00 per day until his car was back on the road.

(3) The defendant-company will also pay the plaintiff the sum of N650, 000, 00 being general damages for breach of contract.\"

In paragraph 18 of the Respondent\'s Statement of Claim which appears at page 8 of the Records, the Respondent, claimed as follows:

\"(a) Two million naira (N2, 000.000.00) being the cost or replacement of the plaintiff\'s said 500 SEL Mercedes Benz car engine damaged by the defendant.

(b) Five hundred naira (N500) per day from 28th January, 1993 till the date of judgment being the cost of chartering vehicle for the plaintiffs business movement between Akwuzu and Onitsha.

(c) One million naira (N1, 000.000.00) being general damages for emotional distress, financial and social disability caused to the plaintiff since the 28th January, 1993.

In supporting the enhancement of the award in respect of the engine, the respondent has submitted that the court below because, according to the respondent, it is sustained by the body of evidence on record before the court. It is submitted that it is empowered to interfere with the award made by the trial court \"where the circumstances calling for such interference are shown to the -appellate court. The cases of Soleh Bonah Overseas (Nig.) Ltd, v. Ayodele (1984) (sic) (it is (1989) 1 NWLR (Pt.99) 549 (a), 563 and Union Bank of Nig. Ltd v. Odusote Bookstore Ltd.(1995)9 NWLR(pt.421)558 have been cited and relied on. It is further submitted that there is counter-evidence on record and that the award of two million naira (N2m) by the court below was right since it was pleaded and proved. The case of Michael Adebowale Dada (1984) 7SC 149@167 is cited and relied on. That the said award was to restore the respondent to the position he would have been if the breach, had not occurred. That it was not a windfall. The case of Union Bank Nig. Ltd, v. Ogboh (1991) 1 NWLR (Pt.167) 367 @ 389 is cited and relied on.

Now, the court below at pages 189 to 194 of the records, dealt with the said three (3) heads of claim of the respondent and the award made by the trial court. At page 192 thereof, the following appear inter alia:

'What did the lower court do in the instant case' In spite of the fact that the appellant neither challenged the pleadings nor evidence in proof of respondent\'s head of claim, the lower court arbitrarily proceeded to award the respondent N1.5m instead of the N2m claimed for which cogent and uncontroverted evidence had been supplied. In answer to appellant\'s 4th issue for determination, it must be said, that the award of Nl.5m in respect of the respondent\'s 1st head of claim was arbitrary and cannot be said to have had any legal basis. The court had no option than to act on the evidence that was before it by awarding a relief sustained by such body of evidence. See Boshali v. Allied Commercial Exporters Ltd. (1965) SCNLR 332 and Calabar East Co. v. Ikot (supra). The issue is accordingly resolved in favour of the appellant adverse as the consequence appears to be\".

I must confess that the underlined sentence is worrisome to me. This is because, if issue 4 is resolved in favour of the appellant that is the same appellant in this appeal then it could not have enhanced the said award.

That Issue 4 of the appellant reads as follows:

'Whether there was any basis for the award of N1, 500.000.00 (one million, five hundred thousand naira) after the learned trial judge had held that lie does not believe the plaintiff/respondent\'s evidence on the cost of engine"

This issue is very clear and unambiguous. Surprisingly and with respect erroneously, the court below at page 194 of the records, stated inter alia as follows:

\"The appellant\'s 4th and 5th issue (sic) must have been formulated with a view that at this level, we review the damages awarded to the respondent if we find the lower court\'s award incorrect. The Supreme Court has provided conditions by virtue of which an appellate court will be justified in interfering with the award of damages made by the trial court. These are ..... \"

(the underlining mine)

With respect, nothing can be far from the truth in respect of my underlined statement. As rightly submitted in the appellant\'s brief, firstly, the issue was raised by the court below, suo motu. This court has in many decided cases, deprecated a court raising a matter/point suo motu, without affording the parties, the opportunity of addressing it on the matter/point as it amounts to a denial of fair hearing guaranteed in Section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria now Section 36(1) of the 1999 Constitution. See the cases of Odiase v. Agbo (1972) 1 ANLR (pt.1) 170; Alhaji Otapo v. Alhaji Sunmonu (1987) 2 NWLR (Pt.58) 587; and recently, Mallam Mohammed v. Alhaji Mohammed (2005) All FWLR .275) 502 @ 508, 516 citing other cases therein and Mrs. Fombo v. Rivers State Housing and Property Development Authority (2005) 5 SCNJ. 213 also citing some other cases therein, just to mention but a few.

I note that at page 149 of the records, the respondent\'s issue 4 in this regard, reads as follows:

\"Whether the award of Nl. 5m (one million, five hundred thousand naira) as the cost of Mercedes Benz 500 SEL car-engine in all the circumstances of this case is such an outrageous award in the face of the unchallenged evidence of PW1 and PW2 to attract the intervention of an appellate court\".

This issue is also clear and unambiguous. It did not talk or refer to an enhancement of the award. It is also firmly settled that, it is the duty of a court to confine or limit itself, only to the issue raised and/or canvassed by the parties before it. There are also too many decided authorities in this respect. See Onwunalu & ors. v. Osademe (1991) ANLR 15 @ 17 - per Coker, J.S.C, cite University of Calabar v. Dr. Essien (1996) 10 NWLR (Pt.477) 225 @ 251; , (1996) 12 SCNJ. 304 (a). 326: Madam Obulor & anor. v. Oboro (2001) 8 NWLR (Pt.714)25@l32 (2001) 4 SCNJ. 22 (2001) 4 S.C. 10 and recently. Nigerian Bank for Commerce & Industry v. Interior cited Gas (Nig.) Ltd. & anor. (2005) 4 NWLR (Pt.916) 617 Co), 644; (2005) ! SCNJ. 104: (2005) 1 S.C. (Pt.l) 133 and many others.

Secondly, the trial court, at pages 112 and 113 stated inter alia, as follows:

\"..... The plaintiff testified that his car engine costs N2m, PW2 corroborated this piece of evidence that Mercedes Benz 500 SEL engine is expensive. I don\'t believe that it costs to N2m

There is no evidence from the Defendant-Coy, particularly DWl as to the cost of N500 SEL Mercedes Benz car engine .....\"

(the underlining mine)

I note that this was or amounted to speculation or assumption to which it is not entitled to do. Although the learned trial judge did not give any reason as to the basis of his unbelief as it is settled that a court, must give reason or reasons, for a particular finding of fact or holding, but the respondent, as rightly submitted in the appellant\'s brief, did not appeal against this holding i.e. there was/is no cross-appeal by the respondent in respect of the said holding of not believing the respondent more so, as the evidence, was not controverted by the appellant\'s said witness DWl. I am aware and this is

settled, that a court, should give adequate consideration to the evidence offered in support of a claim for special damages and that if the accepted evidence possesses such probative value as preponderates the case in favour of the person claiming, then an award, would be justified. See Oshinjirin & ors. v. Elias & ors. (1970) & ors. (1970) 1 ANLR 153 (a),156 and perhaps, the case of Boshali v. Allied Commercial Exporters Lid, (supra), (it is also reported in (1961) ANLR 917) cited and relied on by the court below. But C/F (compare) this, decision in Boshali\'s case with the case of Calabar Cement Co. Ltd. v. Abiodun Daniel (1991) 4 NWLR (Pt.118) 750 (a), 760 - per Katsina-Alu, J.C.A, (as he then was). In any case, the above, is not the issue. What is in issue, is that the court below, raised the issue of enhancement of the award of damages made under relief appeal. I have already noted and held with respect, misconception as to the interpretation by the court below, of the said Issue 4 of both parties. I have no hesitation in holding and I so hold, that the court below, in all the circumstances, was wrong in enhancing the said award from N1.5m (One Million five hundred thousand naira) to N2m (two million naira). I have no doubt in my mind, that the learned trial Judge, was not at all justified in holding, that he does not believe that that type of engine, will cost N2m (two million naira). I have stated that he gave no reason for his unbelief especially, when he conceded that the evidence of the respondent was not controverted in respect thereof. But the respondent, did not cross-appeal and enhancement of the said award, was not an issue raised by any of\' the parties in. the court below. There is no doubt in my mind, that the learned Justices of the court below, must have been peeved (this is again speculation by me), because of the apparent recklessness, incompetence and negligence of the staff of the appellant which in fact, led to the sack of its workshop manager. \"What should have been enhanced (if it was asked for on appeal), was the claim for general damages having regard to decided authorities about award for pain, agony, bitterness, embarrassment, etc. caused by breach of contract as in the instant case where the respondent gave copious evidence at pages 24 to 31 about what happened to him and his said car which remained in the appellant\'s custody for some period of four (4) years!

In conclusion, from what has been adumbrated by me above, the third issue of the parties is resolved in favour of the appellant. This appeal therefore, succeeds in part 1 hereby set aside the said award of N2m (two million naira) by the court below and affirm the decision of the trial court in respect of the awards in claims/reliefs paragraph 18 of the respondent\'s statement of claim.

Costs follow the event. I assess and award the sum of N8, 000.00 (eight thousand naira) instead of N10, 000.00 in favour of the respondent, payable to him by the appellant.

Judgment delivered by
Sylvester Umaru Onu. J.S.C.

Having had the opportunity to read before now the judgment of my learned brother Ogbuagu, J.S.C just delivered, I am in entire agreement with him that but for the award of N2 million made suo motu by the court below which was set aside in replacement of Nl.5 million rightly made by the trial court, I too allow the appeal in part and dismiss the appellant\'s appeal. I abide by the orders made as to costs as contained in the lead judgment.

Judgement delivered by
Dahiru Musdapher. J.S.C.

I have read before now, the judgment of my Lord Ogbuagu, J.S.C. just delivered with which I respectfully agree. For the same reasons lucidly set out in the judgment which I adopt as mine, I too allow the appeal in part. I set aside the award of N2 million made by the Court of Appeal and restore the decision of the trial court in respect of the award in the reliefs as per paragraph 18 of the statement of claim.

I abide by the order for costs proposed in the aforesaid lead judgment.

Judgment delivered by
Sunday Akinola Akintan. J.S.C

The respondent, as plaintiff, instituted this action at Onitsha High Court in Anarabra State. The appellant was the defendant. The plaintiffs claim was for the sum of N2 million being the cost of replacement of the engine of the plaintiffs Mercedez Benz 500 SEL car destroyed by the defendant; N500 per day from Jan, 28th, 1993 till the date of judgment being cost of chartering vehicle for his movement; and N1, 000,000 being general damages for emotional distress, financial and social disability caused by the plaintiff during the period. Pleadings were filed and exchanged and at the end of the trial, the learned trial Judge entered judgment for the plaintiff as per his claim.

The facts of the case, briefly are that the plaintiff, now respondent, sent his Mercedes Benz 500 SEL car to the appellant company for repairs. According to the job card opened by the company in respect of the car, the items of repairs to be carried out on the car included replacement of the exhaust manifold gasket and correcting the tapping noise from the engine among others. The plaintiff's case was that when the car was returned to him some weeks later, more faults were discovered. The car therefore had to be sent back to the defendant/appellant. When the car was not returned, the plaintiff/respondent had to institute the action.

At the conclusion of the trial, the learned trial Judge held that the plaintiff had proved his case. Judgment was accordingly entered in his favour as per his claim. The defendant was dissatisfied with the judgment and an appeal to the court below was filed. That appeal was dismissed and the award of N1.5 million awarded as the value of the engine of the car damaged, was however increased to N2 million even though there was no cross-appeal. The present appeal is against that judgment.

Three issues were raised and canvassed in this court. But the two main points canvassed and which I will like to further comment on are:

(1) the contention of learned counsel for the appellant that the plaintiffs case must fail since he failed to plead negligence and lead evidence in support and also since res ipsa loquitor was not pleaded, the onus could not rest on the defendant to establish that there was no negligence; and

(2) that in the absence of a cross-appeal, it was erroneous in law for the court below to increase the award made by the trial court.

On the first question, the contention of the trial court was that although no particulars of negligence was specifically pleaded by the plaintiff; such omission could be and was in fact cured because the plaintiff has clearly indicated in his pleadings what his case was all about. I entirely agree with that view. I therefore believe and hold that although a plaintiff may not specifically set out the particulars of negligence in his pleadings, that omission could be cured if the relevant details are contained in the various paragraphs of his pleadings. As that condition was met in the instant case, the appeal on that point must fail.

On the second point, I entirely agree that it was wrong of the court below to suo motu increase an award made by the trial court when there was no cross-appeal on that point. The parties never joined issues on the quantum of the award and no argument was preferred on that point before the court below. The court below was therefore wrong in increasing the said award.

I had the privilege of reading the draft of the lead judgment written by my learned brother, Ogbuagu, J.S.C. For the reasons I have given above, and the fuller reasons given in the said lead judgment, I also hold that the appeal is partially allowed in that the additional award made by the court below is set aside and I accordingly restore the awards made by the trial court. I abide with the order on costs made in the lead judgment.

Judgment delivered by
Mahmud Mohammed. J.S.C.

The parties in this appeal were also parties before the High Court of Justice of Anambra State sitting at Onitsha where they went to have the dispute between them settled. The respondent was the plaintiff at the trial court and his claim against the appellant which was the defendant was for the sum of N2 million being cost of replacement of the engine of plaintiffs Mercedez-Benz 500 SEL car destroyed by the defendant; N500.00 per day from 28th January, 1993 until the date of judgment for procuring alternative transport and N1.0 million being damages for breach of contract.

The cause of action arose when the plaintiff brought his Mercedez-Benz 500 SEL car to the defendant\'s workshop for repairs. The car which was driven into the defendant\'s workshop Onitsha for the repairs was however towed out of the workshop three years later without its entire engine, alternator, air conditioner compressor with hose, starter motor and automatic gear box, when the plaintiff was informed at the workshop that the engine of the car had been taken to the Lagos workshop of the defendant. The engine of the car and other parts thereof were not returned to the plaintiff up to the time he sought reliefs in his action at the trial court against the defendant.

After giving the parties a full hearing in the matter, the learned trial judge in his judgment found for the plaintiff and granted all the reliefs. Dissatisfied with the judgment of the trial court, the defendant appealed to the court of appeal where the appeal was heard and dismissed. However, the court of appeal in its judgment delivered on 3rd July, 2001, suo motu, increased the amount of damages for the replacement of the engine of the plaintiff's car from Nl.5 million awarded by the trial court, to the sum of N2 million.

On further and final appeal to this court against the judgment of the court of appeal, the defendant in his appellant\'s brief of argument has raised three issues for the determination of the appeal. These issues were considered and resolved admirably in the judgment of my learned Ogbuagu, J.S.C, which he has just delivered and with which I entirely agree.

The main complaint of the defendant/appellant in this appeal in which it asked this court to set aside the judgment of the trial court which was affirmed by the court of appeal and dismiss the plaintiff/respondent\'s claim, was the alleged failure\' of the plaintiff/respondent to plead and prove particulars of negligence in support of his claim. This complaint is certainly not supported by the statement of claim. Although no particulars of negligence were specifically pleaded by the plaintiff in one particular paragraph of the statement of claim, the facts averred in paragraphs 4, 5, 6, 7, 8, 9, 11, 12, 13 and 15 thereof, clearly contain the required particulars of negligence of the defendant/appellant in handling the repairs of the plaintiff/respondent\'s car.

Accordingly, except for the setting aside of the order of the Court of Appeal increasing the award for the replacement of the engine of the plaintiff/respondent\'s car from N1.5 million made by the trial court, to the sum of N2.0 million, I also dismiss this appeal and abide by the orders in the lead judgment including the order on costs.

Counsel

J.E.P. Anikpe
with him
Paul Agbasionwe ..... For the Appellant

Not represented ..... For the Respondent