In The Supreme Court of Nigeria

On Friday, the 8th day of March 2002

Before their Lordships

Uthman Mohammed	……	Justice, Supreme Court
Aloysius Iyorgyer Katstina-Alu	……	Justice, Supreme Court
Umaru Atu Kalgo	……	Justice, Supreme Court
Samson Odemwinge Uwaifo	……	Justice, Supreme Court
Akintola Olufemi Ejiwunmi	……	Justice, Supreme Court

SC.202/2000

Between

Samson Ugochukwu …… Appellant

And

Unipetrpol Nigeria Plc ……. Respondent

Judgment of the Court
Delivered by
Uthman Mohammed. JSC

This is an appeal from the decision of the Court of Appeal, Lagos Divisional. From the pleadings, the appellant who was plaintiff at the trial court claimed that on the 2nd day of June, 1993 he went to buy fuel at Marina filling station Lagos, belonging to the respondent. While he was at the filling station waiting to buy fuel an explosion erupted and he was severely burnt in the face, neck, legs and upper limb. He was rushed to Oscar Clinic Lagos and due to severity of the burn was transferred to Moria Clinic, Lagos. The appellant averred that the burns caused him permanent disability and he was no longer able to take part in any sports as he used to do. He incurred substantial costs for his treatment both at Oscar and Moria Clinics. He gave particulars of the injuries he suffered and negligence of the respondent. He also relied on the doctrine of *res ipsa loquitur*. For the reasons disclosed in the Statement of Claim, the appellant claimed ₦500,000.00 as damages.

The suit was originally filed against Unipetrol (Nigeria) Plc the 1st defendant, Chief V. Odofin-Bello as the 2nd defendant. However, at the conclusion of the hearing, but before addresses learned counsel for the appellant, Mr. Olusina Sofola, applied to withdraw the suit against the 2nd defendant who was reported seriously ill. The court in granting the application observed that the 2nd defendant was a nominal defendant and it struck his name from the suit.

The respondent, in the statement of defense admitted that there was a fire at their Marina filling station on the 2nd day June 1993 but had no evidence whatsoever that the appellant was one of the fire victims.

The trial opened. The appellant gave evidence-in-chief and called a doctor who specialized in skin diseases. The doctor testified that he examined the appellant on 5/11/94, six months after the incident and observed that he had severe burns involving legs, the right upper arm and the left forearm. He issued a report when the appellant asked for it. The defense also called witnesses. Both parties tendered documents, including a Police Report during the hearing. At the conclusion of the trial the learned trial judge considered all the evidence adduced and held that the respondent was not responsible for the injuries suffered by the appellant. The court thereafter dismissed the case. The learned trial judge, after observing that appellate courts always admonish judges of courts of first instance in failing to give an alternative judgment, considered the injuries suffered by the appellant. He awarded ₦227,550.00 being special and general damages suffered by the appellant as a result of the fire which erupted at the respondent's filling station

The appellant was dissatisfied with the decision of the High Court. He filed an appeal to the Court of Appeal. The Court of Appeal considered all the submission and the briefs filed by the parties and, in a considered judgment, dismissed the appeal for being lacking in merit. The appellant, armed with five grounds of appeal, registered this appeal praying for the judgment of the Court of Appeal to be reversed and judgment be given in favor of the appellant as per the writ of summons and the statement of claim or in the alternative judgment, as per the alternative judgment of the trial court. Learned counsel for the appellant identified the following five issues for the determination of the appeal.

a) Whether the appellant was a trespasser in the business premises of the respondents and thus not owed a duty of care by the respondents.

b) Whether the duty of care, owed to the appellant was breached by the respondents.

c) Whether the doctrine of *res ipsa loquitur* does not apply here.

d) Whether the Court of Appeal was right in holding that the accident was inevitable.

e) Whether judgment is not against the weight of evidence."

Learned counsel for the respondent raised only two issues; that there are no special circumstances warranting the Supreme Court to disturb the concurrent findings of fact by the two lower courts, that the appellant had not led credible evidence in line with his pleadings to prove his claim.

Learned counsel for the appellant arguing the first issue submitted that in the joint statement of defense the respondents did not deny that the appellant was a licensee or an invitee. It follows that paragraphs 4 and 5 of the statement of claim are deemed admitted. Counsel referred to cases of *ABN (Nig.) Ltd. v Akubueze (1997) 6 NWLR (Part 509) 374 at 395* and *Adeyeri v Okobi (1997) 6 NWLR (Part 510) 534 at 547.*

Learned counsel further submitted that the appellant was a visitor and an invitee because any entrant to the premises to purchase fuel is a lawful entrant. He referred to the case of *Wheat v F. Lacon & Co. Ltd. (1966) AC. 552* where Viscount Dilhorne held;

> "An invitee it states, is a person who goes on to a premises on business which concerns the occupier and on his invitation, either express or implied e.g. by Conduct which includes persons having business with the occupier to come on to the premises".

The defendants in their joint statement of defense denied paragraphs 4, 5, 6, 7, 8, 9 and 10 and put the appellant to strictest proof of the averments in those paragraphs. I do agree that allegations of fact in a statement of claim if not denied expressly or by implication by the defense, shall be deemed to be indirectly admitted. However, a general traverse in the sense of a general denial is effective to cast on the plaintiff the burden of proving the allegations denied - *Jimona v N.E.C. (1966) 1 All NLR 122 SCNLR.* It is not correct that this court said in the case of <u>*Lewis & Peat (NRI) Ltd. v Akhimien*</u> that a mere traverse of material facts is not enough to deny such facts. What was decided in that case is as follows:

> "When as a result of exchange of pleadings by parties to a case a material fact is affirmed by one of the parties but denied by the other, the question thus raised between the parties is an 'issue of fact'. We must observe, however, that in order to raise an issue of fact in these circumstances there must be a proper traverse; and a traverse must be made either by a denial or non-admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically; and he does not do this satisfactorily by pleading thus: "defendant is not in a position to admit or deny (the particular allegation in the statement of claim) and will at the trial put the plaintiff to proof. " As was held in *Harris v Gamble (1878) 7 Chapter D. 877* a plea that the "defendant puts plaintiff to proof'" amounts to insufficient denial; equally a plea that the "defendant does not admit correctness" (of a particular allegation in the statement of claim) is also an insufficient denial see; *Rutter v Tregent (1879) 12 Chapter D. 758."*

In the case in hand the respondents specifically denied paragraphs 4 and 5 and it was for the appellant to prove them. It is pertinent therefore to look into the pleadings and evidence adduced by the appellant in order to see if he fits into the qualification of a visitor or invitee at the premises of the respondent. I will reproduce hereunder paragraphs 4-7 of the statement of claim:

> "4. On the 2nd day of June 1993 the plaintiff went to buy fuel at the second defendant's Marina filling station, Lagos.
>
> 5. While the plaintiff waited to buy fuel at the said filling station an explosion erupted and he was severely burnt
>
> 6. The plaintiff who was severely burnt in the face, neck, legs and upper limb was rushed to Oscar Clinic Lagos by his brother.
>
> 7. That due to the severity of the bums the plaintiff was subsequently taken to Moria Clinic, Lagos."

From the averments in the above paragraphs the appellant was at the Marina petrol filling station in order to buy fuel. He was waiting to buy fuel when the explosion occurred, resulting in what the appellant averred in the pleadings that he sustained severe bums. When the appellant gave evidence he testified, *inter alia*, thus:

> "I am Mr. Samson Ugochukwu, I live at 21, Coker Lane, Orile Iganmu, Lagos, I am a trader. I am 25 years old, I trade at Market Street, Lagos. I know 1st defendant. On 21/6/93 when I went to buy fuel at Unipetrol. The salesman was selling into jerry can. My car was at a distance, some people were struggling to get fuel. The petrol attendant threw the nuzzle which hit an iron and fire erupted. The fire spread and touched my skin, hand and chest. I ran into Leventis to get water but people advised against it as incompatible with burns so I was taken to the hospital, my body was on fire"
>
> .

This evidence would seem to relate to the facts pleaded. However, when the appellant was cross examined, his testimony changed and the answers he gave to questions put to him were clearly at variance with his pleading. I will reproduce the answers the appellant gave during cross- examination. He said as follows:

> Mrs. Adegbomire: Cross-exams the plaintiff Witness: I am not a driver. I have been to petrol station and (sic) the risk of fire at petrol station. I accompanied a friend who wanted to buy petrol, it was during the fuel scarcity and we queued up. Our vehicle was about the 4th in line. I was standing by my own car ordinarily. I am a trader. I work on Monday - Saturday, I do not trade on Sunday."

It is very clear from the evidence reproduced above that the appellant had given two conflicting testimonies on his visit to the respondent's petrol station. The learned trial Judge observed, quite correctly, that anyone reading the pleadings would think that the appellant was the motorist wishing to buy petrol but his evidence showed the contrary.

The appellant failed to call his friend who he accompanied to the petrol station to testify to the fact that he was with him at the petrol station on the fateful day. The police investigated the incident and so did the Fire Brigade. The reports of both the Police and Fire Brigade were admitted in evidence. None of the reports identified the appellant as one of the victims of the explosion. In fact no witness identified the appellant at the scene when the explosion occurred. The car of his friend, if there was such a car in existence, was not one of the cars burnt in the premises. It should be pointed out that the appellant had to prove his case as pleaded. It is a settled principle of law, that where a trial is conducted on the basis of pleadings matters alleged must be proved by evidence and such evidence must not derogate from the pleadings. *See Idahosa v Oronsaye (1959) SCNLR 407; (1959) 4 FSC, 166 at l71 and NIPC v Thompson Organisation (1969) All NLR l3.*

It is evidently clear that the appellant failed to prove that he was physically present at the Marina filling station when the explosion occurred. He pleaded that he was there and when he came to give evidence he gave two inconsistent testimonies. I agree that the court below was right in affirming the holding of the trial court that he had failed to prove that he was either an invitee or a licensee. If a visitor fails to prove that he is a licensee or invitee he is a trespasser.

Having agreed that the appellant was neither a licensee nor an invitee at the filling station when the accident occurred it goes without saying that the respondent did not owe a duty of care to the appellant at the Marina filling station. See Sections 7 and 8 of Law Reform (Torts) Law, the Laws of Lagos State of Nigeria, 1994. Even if the appellant was not held a trespasser it is plain that the appellant had not established that the respondents were in breach of their duty of care to their visitors when the explosion occurred. The learned trial Judge, quite correctly, found that the appellant had failed to prove that the respondent was negligent or had failed to provide fire fighting equipments. On the contrary, the respondent's witnesses established that the respondent had always taken care and managed the filling station properly. The case of *Ward v Tesco Stores Ltd. (1976) 1 AELR 219* where it was held that it was the duty of the defendants and their servants to see that the floors of the store were kept clean and free from spillages so that accidents do not occur is not helpful to the appellant. No evidence was adduced to show the respondent's negligence. The evidence of DW3 clearly exonerated the respondent from allegation of negligent conduct. This is where DW3 said as follows:

> "… …. After selling fuel into a car that day and as the attendant moved to the next car the former car's silencer sparked fire then the whole place caught fire and all ran away for safety."

This evidence the learned trial Judge believed and, in my view, she is right in accepting this testimony since the appellant had not adduced any convincing evidence to cast doubt on it. The Court of Appeal is therefore right to hold that the accident was inevitable. Issues 2 and 4 are resolved in favor of the respondent. The doctrine of *res ipsa loquitur* cannot avail the appellant in this case. The trial court believed the witnesses called by the Respondent. The court below affirmed the account given by the witnesses on how the accident occurred. I have no reason to disagree with these concurrent findings. The appellant has failed to impeach the findings of the two lower courts.

The fifth issue is not relevant in the Supreme Court. This court is not sitting on appeal from the decision of the trial court. Considering the confusion the appellant put himself when he gave evidence I think he would be the last one to talk about "weight of evidence" before the court. He was the one who asserted the facts and he must prove what he had asserted. I have already disclosed that he has failed to prove those facts.

In conclusion, this appeal has failed and it is dismissed. I affirm the judgment of the Court of Appeal. I assess ₦10,000.00 in favor of the respondent.

Judgment delivered by
Aloysius Iyorgyer Katstina-Alu. JSC

I have had the privilege of reading in draft the judgment of my learned brother Uthman Mohammed. JSC. I agree with it. The appellant as plaintiff pleaded in paragraphs 4 and 5 of his amended statement of claim thus:

> "4. On the 2nd day of June 1993 the plaintiff went to buy fuel at the second defendant's Marina filling station, Lagos.
>
> "5. While the plaintiff waited to buy fuel at the said filling station an explosion erupted and he was severely burnt."

In his evidence at the trial the appellant testified thus:

> "On 2/6/93 when I went to buy fuel at Unipetrol, the salesman was selling into jerry can. My car was at a distance, some were struggling to get fuel - the petrol attendant threw the nuzzle which hit an iron and fire erupted. The fire spread and touched my skin, hand and chest."

Under cross-examination the appellant said:

> " am not a driver ... I accompanied a friend who wanted to buy petrol, it was during the fuel scarcity and we queued up. Our vehicle was about the 4th in line."

The appellant clearly failed to prove his case put forward in Paragraphs 4 and 5 of the amended statement of claim. Rather his evidence is at variance with his pleadings. The position of our law is that parties are bound by their pleadings and evidence on facts not pleaded goes to no issue. See *Bamgboye v Olarewaju (1991) 4 NWLR (Part l84) 132; Titiloye v Olupo (1991) 7 NWLR (Part 205) 519.*

I find it curious that the appellant did not call the friend he accompanied to the filling station as a witness at least to show that he was at the 2nd defendant's filling station on the 2nd of June, 1993 and at the material time when the fire broke out. As it stands there is no evidence that he was at the filling station as an invitee, or licensee or visitor. I think the omission is fatal to his case.

It is also to be pointed out that there is a concurrent finding by the trial court and the Court of Appeal that the appellant is a trespasser. This court will not ordinarily disturb concurrent findings of fact by a trial court and the Court of Appeal unless such findings are perverse and not supported by evidence - See *Enang v Adu (1981) 11-12 SC 25; Nigerian Bottling Co. Ltd. v Ngonadi (1985) 1 NWLR (Part 4) 739; Anaeze v Anyaso (1993) 5 NWLR (Part 291).* Nothing has been shown in this appeal to convince the court to disturb the concurrent finding that the appellant is a trespasser.

For the foregoing reasons and the fuller reasons given in the leading judgment, I too dismiss this appeal with ₦10,000.00 costs to the respondent.

Judgment delivered by
Umaru Atu Kalgo. JSC

I have read in draft the judgment of my learned brother Mohammed. JSC just delivered in this appeal and I entirely agree with his reasoning and the conclusions reached therein. I also find no merit in the appeal for the reasons stated in the judgment which I adopt as mine. I therefore dismiss the appeal with ₦l0, 000.00 costs in favor of the respondent.

Judgment delivered by
Samson Odemwinge Uwaifo. JSC

I agree.

Judgment delivered by
Akintola Olufemi Ejiwunmi. JSC

I was privileged to have read in advance the judgment just delivered by my learned brother, Mohammed JSC. For the reasons that he has set out in the said judgment, I also dismiss the appeal with costs in the sum of ₦10,000.00 in favor of the respondent.

Counsel

Olusina Sofola ….. For the Appellant

with him	…..	
Maruf Lanre Lawal		
Omotayo Olajide	…..	For the Respondent