



JUDICIAL CRITICISM OF COUNSEL IN NIGERIA: THE CASE FOR REMEDIES AGAINST PROFESSIONAL REPUTATION DAMAGE

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ABSTRACT: *Introduction- The legal profession is highly regarded in Nigeria. The premium placed on it derives from the fact that members are believed to be professionally trained and sound. To revile a counsel in the judgment of a trial court is not taken lightly because it goes to detract from counsel's professional standing while the Judge enjoys immunity. Methodology- This study adopted the doctrinal method and content analysis. It reviewed relevant statutory provisions, secondary sources on judicial precedents and journal articles on defamation. It applied them to the pronouncements of the trial Judge and the conduct of the counsel in the litigation which was founded on defamation where the professional reputation of counsel was gored by the trial Judge who held that counsel was incompetent. Finding- The research critically examined the judgments of the trial High Court and Court of Appeal and found that the negative professional aspersion cast against counsel was ill-founded. It took counsel nearly a decade to reverse the decision to redeem his name from the fangs of public opprobrium yet damages were not awarded in his favour due to gap in the legal framework. Recommendation- It recommended that the judiciary should fashion out declaratory relief in monetary damages against unwarranted attack on the bar by the bench and in deserving cases, the appellate Judges should refer incidences to the National Judicial Council.*

KEYWORDS: Legal Profession, Defamation of Counsel, Judicial Immunity, Appellate review and Nigeria.



INTRODUCTION

The intercourse that occurs between the bench and the bar in the trial of citizens' causes in Nigeria is sometimes degenerative. The acrimonious exchanges end unfavourably on the bar. Judges sparingly tender apology in the aftermaths of the bruised image they cause counsel. Judges are hardly held responsible for their misconduct while on the bench or held liable for whatever happens in the course of their adjudication in a case. They are immune against legal action. When they attack counsel, he goes back to chambers with limited avenues for redress. Worst is the day when senior colleagues of his are onlookers. Senior lawyers have a certain degree of entitlement or penchant to cow down younger lawyers before Judges. There is nothing courageous about them on such occasions. They would be the first to shout, dress down the younger counsel and apologize on his behalf even when he may be right. That is how the profession is built to make the *judex* infallible at least, in the public eye. But it gets nagging, when the Judge writes off counsel in his judgment as incompetent and the blame for his client's loss. The doctrine that the sin of counsel should not be visited on the client is thusly resonated. No windows are opened to a counsel who has been profiled as incompetent by a Judge in his judgment when the holding is wrong and is set aside on appeal.

Ordinarily, Judges should be above board in integrity and competence so as to justify the provisions of the law on judicial immunity (*Ugwu v. The State*, Legalpedia-05798 (SC) (2025-02) No Judge acting judicially should be liable to be sued or punished or reviled in any court for an act done or ordered to be done by him in the discharge of his duty within the limits of his powers. It has however been clarified by De Smith that judicial immunity is conferred for the benefit of the administration of justice and not necessarily for the protection of the Judge. As Lord Denning MR, puts it, 'no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he imposes cannot be made the subject of judicial proceedings against him' (Odujinrin & Adefulu, 2022).

The positions of De Smith and Denning are sacrosanct provided the Judge has not accepted bribe or has not perverted the course of justice and is within his jurisdiction and acted in good faith. Even if the Judge is to be proceeded against, the National Judicial Council (NJC) which controls and supervises the activities of all judicial officers in Nigeria must, as a condition precedent, entertain and determine the complaint against the Judge before any further action can be taken against him. However, if the complaint has no bearing with his office and duties as a judicial officer, the NJC cannot interfere. In other words, judicial immunity is not an absolute category it only prevents a person who sues a Judge from recovering damages for harm caused by the Judge's decision (Ibekwe & Nweze, 2020).

But counsel was not a party in *CA/AS/193/2020 Ogwezzy v. Mgbabego* yet, he received the worst attack in the judgment. He took the blame for why his client's case failed. On appeal, he was proved right but no damage was awarded for his injured reputation.

Statement of the problem

Counsel was described in a trial Judge's judgment as incompetent; an appeal taken succeeds and the judgment is upturned. What happens to the indicted reputation of counsel? The law has not made any provision through which the dented image of counsel can be redressed. The defamation of counsel by the trial high court was not the appeal before the Court of Appeal; it



was the defamation of Ogwezzy. Does the official immunity the Judge enjoys in the conduct of his office cover unwarranted inimical aspersions cast on counsel in CA/AS/193/2020? What remedial avenues are doctrinally available to counsel whose professional competence is impugned in a trial judgment that is later reversed on appeal?

METHODOLOGY

This study was based on the doctrinal method and content analysis of relevant provisions of appellate practice, the National Library and Evidence Acts. It reviewed secondary sources on recent judicial precedents of superior Courts and journal articles of renowned authorities on judicial immunity, professional reputation and defamation in Nigeria. It applied them to the conduct of counsel and the pronouncements of the trial Judge in the critical examination of the judgment of the trial High Court that was reversed by the Court of Appeal in the case-study of CA/AS/193/2020 *Ogwezzy v. Mgbabego*. The analysis revealed a practical-knowledge gap on empirical remedy available to counsel whose professional reputation has been impugned in Nigeria.

LITERATURE REVIEW

Conceptual Clarification

Judicial immunity

In the conduct of his office and the trial of causes coming before him, a Judge cannot be sued for anything done in respect thereof whether his decision is wrong or right. He enjoys immunity from harassment. Litigants and the public cannot hold him responsible before a court for his judicial conduct. What is open to anyone who is dissatisfied with the outcome of litigation, being the decision of a Judge in a cause, is to appeal and have the decision reversed.

Defamation

In *C.S.S.D.F. Ltd. v. Schlumberger (Nig.) Ltd.*, 287 LRCN 82 (2019) Kekere-Ekun, JSC, citing with approval, *NITEL v. Tugbiyele* FWLR (Pt.246) 357 (2005) and *Edem v. Orpheo Nig. Ltd.*, 7 SC 92 (2003), defines defamation as a tort consisting of the publication to a third person(s) of any words which tend to lower the person defamed in the estimation of right thinking members of society or to cut him off or to expose him to hatred, contempt, opprobrium or to injure his reputation in his office, trade or profession or to injure his financial credit. The point being considered in this study as defamation is the statements of the trial Judge about the presentation of the case by counsel which was termed as ‘very poor presentation’.

Appeal

Appeal is the window open to an aggrieved party after a judicial determination. The right of appeal is so powerful that in some cases it is regarded ‘as of right’ while in others it is ‘with leave’. When an appeal is of right it means that no permission is needed before the aggrieved party lodges it especially if there is an error on the face of the record. But where it is with leave, it means that the permission of the trial court or the appellate court is needed especially when



the time stipulated for doing so has expired or the appeal is largely premised on facts. The purpose of appeal is to call upon a higher court to review the proceedings of the trial court because the appellant believes that the trial Judge had made a mistake (*Alize v. Umaru*, FWLR (Pt. 121) 2009 (2002)). In an appeal, the appellant is granted an opportunity to indict the findings of the trial court and if he succeeds in convincing the appellate court that the trial court was wrong, the judgment of the trial court would be set aside and a favourable one would be entered for the appellant.

Sins of Counsel

Courts are generally enjoined not to visit the mistakes of counsel on litigants (*Doherty & Anor v. Doherty* SC. 600/1965) to ensure that litigants are not unjustly penalized for the fundamental errors of their counsel. In this study, the trial Judge, as found by Abundaga JCA, ‘observed that the claimant had a very good case but it was poorly presented by his counsel...Finally the learned trial Judge held that the claimant’s case failed not due to lack of substance per se but due to counsel very poor presentation.’

Non-suit

In *Egbuchu v. Continental Merchant Bank Plc & Ors.*, LPELR-40053(SC 2016), it was settled that an order non-suiting a claimant can be made where he has not failed entirely to prove his case; or where the defendant is not in any event entitled to the court’s judgment; or where no wrong or injustice to the defendant would be occasioned. Furthermore, the case of *Oguzie & Ors v. Oguzie*, LPELR – 41086 (CA 2016) establishes that a court can only make an order of non-suit if the claimant failed to prove his case due to blunders of counsel and it would be unjustifiable to dismiss the case in its entirety; or where there was failure by the trial judge to make proper and specific findings and an appellate court cannot correct the error based on the printed evidence; or where, on the evidence before the court, neither party would be entitled to judgment.

Ogwezzy v. Mgbabego case

On 3rd April, 2016 Ogwezzy (the Ugoichi and Onotu-Uku of Obodeti community of Emu) filed a suit against Mgbabego in the following terms: General damages in the sum of N100,000,000.00 for defamation of character in that in Grassroots Trumpet International of February, 2017 Vol. 8 No. 40 ISSN: 2350-2398 circulating internationally and published by Glory of All Investment Limited of 8 Ashaka Road, Kwale, Delta State the defendant published of and concerning the claimant the following defamatory words at page 11 of the said Newspaper:-

‘The trouble in this community is as a result of Chief Ogwezzy’s quest and thirst for power and some of his collaborators. They want to rule this community and dictate the pace of what happens here in this town by force....The problem is that Chief Ogwezzy never knew that the law he has consistently used against people, will one day affect (him).... At a point...Ogwezzy started causing problems...later Ojuma, the Onotu Uku and Chiefs in this community withdrew their titles. Chief Ogwezzy now Mr. Ogwezzy...are no longer Chiefs...the King, and the entire Emu Kingdom suspended them from being High Chiefs.

Chief Ogwezzy wants to destroy himself and not this community because he cannot destroy this community. He wants to rule the community by force. I know with God on our side, the



secret of Ogwezzy's intention will be made known...Ogwezzy connived with some persons that somebody is a regent. Where have you seen our community operating regency? Not in our history.

What I can tell you is that Chief Ogwezzy was suspended from the palace because of this crisis...It is only themselves that are right, but the community knows that his views are self-centered and propelled by greed. He wants to be Onotu-Uku by force, some people are meeting at his place he claimed to be the Onotu-Uku, the Ugo, the Okpala-Uku, the Odua, just one person...

He should also go to the Okpala-Uku palace to appeal to the elders and chiefs so that his title can be restored. Ogwezzy refused...He wants to be the Onotu-Uku but he would not follow the normal process. As soon as you pronounce Ogwezzy the Onotu-Uku today everything will be over, but he would not follow the due process to achieve that.

Ogwezzy should come to the community, humility is no crime you cannot lead people without being humble. How can Ogwezzy say Okpala-Uku should be removed because he wants to lead? Ogwezzy has taken everybody to court and wants to rule, who is he going to lead? Only last week he brought a fresh suit against Chief Ways who is the same father with his wife. And I am sure he has planned to sue more people because he has money to pay lawyers'.

Courts' Factual reviews

The factual reviews of the trial court and the Court of Appeal indicate that the case has a chequered history caused by the defendant. In the beginning Ekeruche Esq entered appearance for the defendant. Shortly after filing all the processes, he ceased to appear in court. Counsel for the claimant on 13/6/2017, filed a motion seeking an order to enter judgment in favour of the claimant in default of defence. This prompted the defendant's counsel to file a motion seeking extension of time to file and serve his statement of defence on 8/11/2017. It was granted. Again, Ekeruche Esq stopped coming to court and subsequently withdrew on 23/1/2018.

Upon his withdrawal, Obodaya Esq. took over the case of the defendant. Several motions were filed and of particular note is, the one filed on 19/6/2018 to recall for cross examination the claimant due to unexplainable absence of the defendant and his counsel. It was granted on 13/11/2018 and he was recalled and cross examined by Obodaya Esq. The CW1 was the only witness; he adopted his statement on oath made on 3/4/2017. All through the proceedings, the defendant did not appear. Obodaya Esq. also stopped appearing for the defendant after a feeble attempt to cross examine the claimant. His only noticeable effort to prosecute the defence was two letters for adjournment dated 12/12/2018 and 22/1/2019. He, however, filed an address when the defendant did not appear in court to defend the action and the only issue raised by him is whether the claimant had established his claim by admissible and credible evidence to be entitled to judgment.

It was the contention of Obodaya Esq that the claim was founded on defamation and the alleged defamatory words were published in a Newspaper called Grassroots Trumpet International of February 2017 which was Exhibit A in the proceedings. He submitted that Exhibit A was inadmissible because it was not certified and thusly had no probative value. The cases of *Agbai v. INEC*, LPELR 3647 (2008) and *Oneh v Obi*, 7 NWLR (Pt. 611) 487 (1998) were cited demonstrating that it did not matter that the defendant and his counsel were absent in court



when Exhibit A was tendered and admitted in evidence. As the condition for its admissibility had not been met, it was inadmissible in evidence and once it was expunged, the claimant's claim collapses. Obodaya Esq relied on section 102 of the Evidence Act, section 2 and 4 of the National Library Act and urged the court to dismiss the case of the claimant.

Counsel to the claimant on the other hand submitted that the claimant's claim was essentially in defamation and he led evidence and tendered Exhibit A and called a witness. But the defendant failed to defend the action. He abandoned his defence together with his counsel. This has left the case of the claimant unchallenged and the court has no option than to accept it as proved. There was nothing on the other side of the imaginary scale for consideration vis-à-vis the case of the claimant. Therefore, the court was urged to sustain the case of the claimant in its entirety and grant all the reliefs sought.

On due compilation and transmission of the record of appeal, briefs of argument were filed. Appellant's brief of argument was filed on 19/8/2020, while the respondent's brief was filed on 1/7/2024. The respondent incorporated in his brief, a notice of preliminary objection that the grounds of appeal were vague without particulars. On 24/10/2024, the appellant filed a reply brief which addressed the respondent's notice of preliminary objection.

When the appeal came up for hearing on 28/10/2024, Obodaya Esq. argued the respondent's preliminary objection and urged the court to strike out the appeal. The appellant's counsel also adopted the Reply brief and urged the court to dismiss the objection and allow the appeal.

Arguments on appeal

The grip against the preliminary objection (*which was subsequently dismissed*) was that the notice and grounds of appeal were neither vague nor incompetent. The issues formulated for determination were concise and the respondent was not left in doubt as to what the Court of Appeal was being called upon to determine thus particulars of the grounds were unnecessary.

In the main appeal, it was the appellant's submission that by a cumulative reading of sections 4 and 7 of the National Library Act and section 102 of the Evidence Act, a newspaper becomes a public document once copies are deposited with the National Library by the publisher. Only an original or a certified true copy is admissible (*Kubor & Anor v. Dickson & Ors.*, LPELR – 9871 (SC 2012) and *In Re: Glaxosmithline Consumer Nigeria Plc.*, LPELR – 47498 (CA 2019).

Exhibit A was not a photocopy that required certification. It was an original. By section 86 (4) of the Evidence Act, 'Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest' (*Goodwill & Trust Investment Limited v. Witt & Bush Limited*, LPELR – 1333 (SC 2011) and *Uwua Udo v. the State*, 2 – 3 SC (Pt. 111) 29 (2016). An original form of a public document is admissible in evidence by virtue of sections 85 and 86 of the Evidence Act, 2011. Having been tendered in its original form Exhibit A ought not to have been expunged. It did not require certification by the National Library Act.



The Judgments in *Ogwezzy v. Mgbabego*

Justice Ofesi of the trial court observed that in determining whether the words complained of are defamatory, it was the duty of the court to apply the test of a reasonable man: Whether under the circumstances in which the words were published a reasonable man would likely understand them to be libelous. In other words, there must be the publication of the libelous matter to a third party other than the person libeled being the victim. It is the opinion of others and not the personal opinion of the victim that is significant (*A.I.B Ltd v Asaolu*, supra).

He found that the statements complained of were capable of injuring the reputation of Ogwezzy in the eyes of an ordinary man. There was also no doubt that they were capable of lowering his reputation in the estimation of members of his community in Emu-Obodeti. However, Justice Ofesi held that Exhibit A was a public document requiring certification in accordance with the provisions of section 102 of the Evidence Act as contended by Obodaya Esq. It did not matter that the defendant and his counsel were absent when it was admitted in the proceedings. The trial Judge then proceeded to hold as follows:

‘Having failed to meet the requirement of the law as stated above, the said Exhibit A is hereby expunged ... It is obvious that the defendant did not appear in court any day and never testified. The evidence of the claimant therefore is unchallenged which the court is bound to act upon. The court however can only act on valid evidence presented by the claimant even if uncontroverted by the defendant.’

Justice Ofesi then came after counsel as follows:

‘I observed that the claimant had a very good case but poorly presented by his counsel. Claimant’s counsel cannot claim lack of knowledge of the provisions of section 102 (b) of the Evidence Act and section 2 (1), 2 (a), 4 (1) and 4 (7) of the National Library Act and their effect in a case of defamation. The publication of the alleged defamatory words and proof of same are fundamental in an action such as the instant case. Having expunged Exhibit A from this proceeding, the claimant’s case is therefore lacking the essential evidence to succeed. Consequently, claimant’s case failed not due to substance per se but due to counsel very poor presentation.’

Justice Abundaga, JCA allowing the appeal held that Exhibit A was no doubt an original copy of a newspaper report and that the original of a public document was admissible. His Lordship cited *Dr. Owakah v. Rivers State Housing & Property Development Authority & Anor.*, LPELR – 57950 (2021) (SC) where Justice Mary Ukaego Peter-Odili, JSC held that:

‘A public document can be proved by the production of the original copy of the document itself, and same admitted in evidence without the luxury or necessity of any certification. In other words, it is only in the absence of the original documents that certified copies are admissible as secondary copies of public documents... the DW2 produced before the trial court the original copies of the bound volumes of the Nigerian Tide Newspapers publications and sought to tender them in evidence as Exhibits. In the case of *Kassim v. State*, this court reiterated the time honoured position of the law thus: “Now, what really is the essence of the demand for a certified true copy of a public document? I think it is the assurance of the authenticity of the document vis-à-vis the original. And so, why go for that assurance in the certified true copy vis-à-vis the original, when the cap is in the market, the head is also in the market; there is no further need to take the cap home from the market in order to test it on the



head....therefore ... where the original copy of a document is available, it is admissible without the requirement of certification”.’

There is no doubt in Ogwezzy’s case that Exhibit A is the original copy of Vol. 8 No. 40 February, 2017 Edition of Grassroots Trumpet International Newspaper. As such, it did not need certification to be admissible. The appellate Justices then proceeded to hold that:

‘The position of the law has been laid bare in the avalanche of cases already cited. The law thus exposes the misconception of the learned trial Judge in expunging Exhibit A. In other words, Exhibit A was wrongly expunged. The finding above is therefore set aside’.

Justice Ofesi had earlier found that Mgbabego meant that Ogwezzy was troublesome and his views were self-centered and propelled by greed; that he was a dictator foisting regency on the community; that he ruled by force, and wanted to be the Onotu-Uku, Ugo, and Odua all at a time; that he had a secret intention with a thirst and quest for power and wanted to destroy himself and or the community; and that he was no longer a Chief but a monster. These innuendos were capable of lowering the reputation of Ogwezzy in the estimation of members of his community. Justice Ofesi had finally held that Ogwezzy had a very good case but it was poorly presented by his counsel and his case failed not due to lack of substance per se but due to counsel’s very poor presentation suggesting that but for the learned trial Judge’s misconceived position on Exhibit A being inadmissible, Ogwezzy’s case was otherwise proved. Consequently, Abundaga JCA reversed Justice Ofesi as follows:

‘I have already made the finding that Exhibit A was wrongly expunged. The expunging of Exhibit A was the sole reason the learned trial Judge dismissed the appellant’s claim. Therefore, having set aside the order of the trial court expunging Exhibit A, the judgment of the trial court premised on that *erroneous finding is also set aside*.... That leaves the court with the question whether on the evidence before the court the appellant proved his case and is entitled to judgment’.

Abundaga JCA then proceeded to invoke section 15 of the Court of Appeal Act and relied on *Kusamotu v APC & Ors.*, LPELR – 46802 (2019) to rehear the case and found Mgbabego liable in defamation in the sum of N10,000,000.00, perpetual injunction and public apology to be published in two national newspapers with cost assessed at N200,000.00 in favour of Chief Ogwezzy. Ita G. Mbaba and Abdul-Azeez Waziri, JJCA concurred.

DISCUSSION

The Image deficit of Counsel

Now, nothing was said about the battered image of counsel in the judgment of Justice Ofesi. The five critical years (2020 – 2025) that counsel went about plying his trade with the stigma of incompetence did not receive attention at the Court of Appeal. Rather, it turned out that it was the trial court that misconceived the law. The success of the appeal is insufficient for the injured reputation. One of the drivers of this study is that the trial court could have reached the decision it did without having to remonstrate that counsel poorly presented his client’s case. Choice of words and perspectives matters significantly in the rendition of opinions of courts.



This is because equity cannot suffer a wrong without a remedy but no remedy is clearly available to counsel.

While canvassing the issues of whether Justice Ofesi erred in visiting the sin of counsel on the litigant and whether he erred in not non-suiting Ogwezzy, counsel argued that the Judge seemed to have allowed Obodaya Esq to take it by surprise by capitalizing on the exclusion of Exhibit A. It is clear from the tenor of the judgment that the Judge who admitted Exhibit A without qualms in the proceeding turned around in his judgment to revile counsel's competence and visited his sin on his client which the law clearly frowns upon. To non-suit was an exercise in discretion which the trial court ought to have done in favour of the appellant having been satisfied that the infraction was that of counsel (*A.C.B. v. Elosiuba*, supra).

But as Justice Abundaga's judgment shows, the holding of the trial Judge was incurably wrong. He did not only visit the sin of counsel on the litigant, he also damaged the professional reputation of counsel by passing the counsel off as incompetent. To state that the litigant's case 'was poorly presented by his counsel' was an act in deliberate measurement and evaluation of the overall reputation and professional competence of counsel. As the holding turned out on appeal to be incurably wrong and in small communal societies reputational standing of counsel can easily be gored, the remediation of awarding N10,200,000.00 in favour of Ogwezzy is not for counsel. The law and equity do not seem to have any remedy for counsel whose competence and reputation have been wrongfully profiled and pilloried in the face of the judicial immunity which the trial Judge enjoys.

The law is settled in *Adeyeye v. The State*, 305/2010 (SC 2013) that a finding of a competent court persists until it is set aside on appeal. It was the finding of the learned trial Judge that Ogwezzy's case was very poorly presented by counsel that was determined on appeal. That finding subsisted from the date of the pronouncement of the trial court until it was set aside by the judgment of the Court of Appeal. The finding having been set aside does not address or redress the matter that counsel was framed and defamed. It can be argued that counsel has been absorbed from blame by the decision in the appeal. But it remains cogent that the issue of the competence of counsel was not directly before the Court of Appeal. Counsel who argued the case of the appellant before the Court of Appeal did not raise the issue whether he was defamed by the trial court's judgment or did he call out to be set aside, the finding of Justice Ofesi that he was incompetent. It was the defamation in Grassroots Trumpet International that was before the Court of Appeal not the defamation that was contained in the judgment of the trial court that counsel was incompetent.

Confessions to Justice Ofesi

The fact that Justice Ofesi misconceived the law in the process of adjudication in CA/AS/193/2020 is not prima facie evidence of bias. There must be clear and hard evidence on the record to prove an allegation of bias (*D. T. Trans Ent. Nig. Co. Ltd v. Busari*, 191 LRCN 25 (2011)). But the temptation of Judges to hitch on to technical instead of substantial justice may have accounted for the slip into the error that occurred at the trial. The learned trial Judge proceeded on the assumption that the formulation of the issue on the admissibility of Exhibit A under the Library and the Evidence Acts as couched by Obodaya Esq was fanciful and did not border to cross check the authenticity of the formulation in case law.



It is common to find that some counsel misuse their knowledge of the law and legal procedure to mislead and misdirect unsuspecting Judges and stultify the process of administration of justice (*Idisi v Ecodril Nig. Ltd. & Ors.*, SC. 127/2005 (2016) and *Salihu v. Gana & Ors.*, LPELR -23069 (CA 2014). This is because playing in the mind of the trial Judge may be the principle of law that Exhibit A is inadmissible in all events. And thusly, if it is wrongfully admitted in evidence, an appellate court has the jurisdiction to exclude it where no objection was raised to its going in at the trial (*Aminu & Ors v. Hassan & Ors.*, 231 LRCN 84 (2014).

Additionally, Justice Ofesi was not assisted by counsel when the issue of certification was formulated and presented. It was as if the submission was correct and counsel did not engage in a stout advocacy of rebuttal to dissuade Justice Ofesi from toeing, hook line and sinker, the formulation of Obodaya Esq. Counsel only woke up at the Court of Appeal in the face of the crooked formulation when he argued that ‘since the head and the cap were already in the market place, the cap ought not to be taken home to try it on the head’. This became the hallmark of the position of the Court of Appeal in sustaining the appeal.

Why ‘very poor presentation’?

Choice of words by judicial officers in couching judgments is important. Perspectives and direction of enquiry are also significant. Justice Abundaga, JCA in broaching the problem in the appeal firstly observes positively that Exhibit A is no doubt an original copy of a newspaper report and that the court must be cautious in dealing with the issue because it is settled law that the original of a public document is admissible and the position of the law does not change even where what is tendered is original copy of a newspaper publication in a defamation suit and cited the case of *Dr. Owakah v. Rivers State Housing & Property Development Authority & Anor.*, *supra*.

Abundaga JCA proceeded further to capture the opinion of the trial Judge which was an uncritical adoption of the formulation and submission of Obodaya Esq. and proceeded to show that the correct law ‘has been laid bare in the avalanche of cases cited’ which exposes the misconception of the trial Judge in expunging Exhibit A. The appellate Justices did not, even as they had the opportunity, condescend on Justice Ofesi with disparaging words to hold that he decided the case very poorly or rendered his opinion very poorly or ought not to be ignorant of the law.

The appellate Justices committed to the case before them than testing, measuring and evaluating the knowledge of the law of the trial Judge. Thusly, the indictment of the counsel by the trial Judge that the ‘counsel cannot claim lack of knowledge of the provisions the Evidence Act and the National Library Act and their effect in a case of defamation’ is clearly a misdirection in perspectives and choice of words. The trial Judge was not to speak to lack of knowledge of law by counsel but to whether Ogwezzy’s case was sustainable or not.

Justice Ofesi was more disparaging in the judgment when he clinched the rendition with the remarks: ‘consequently claimant’s case failed not due to lack of substance per se but due to counsel very poor presentation’. Again, he was speaking to the test, measurement and evaluation of counsel’s knowledge of the law than to the case of the appellant. Throughout, the appellate Justices did not comment on the revilement of counsel by the trial Judge even as the issue was staring at them in the face. Their Lordships fixed their gaze on the appeal before



them. They were more interested in rescuing the case of the appellant from miscarriage of justice than the disparaging commentaries that the trial Judge ran against the counsel.

In fact, the vilification of the integrity of counsel by Justice Ofesi was like ‘some imported commodity floating around’ the appeal. In *Reichie v. N.B.C.I.*, 257 LRCN 164 (2016) it was settled that a party who is dissatisfied by the decision of a court when seeking a revisit by the appellate court has to confine itself to the matter already adjudicated upon and ‘not some imported commodity floating around’. This is because a Court of Appeal can only enter into a discourse on issues the trial court decided against that were joined, litigated and adjudicated upon by the trial court. The incompetence or lack of knowledge of the law, or the very poor presentation of counsel was not before the trial court and the Court of Appeal. They were ‘some imported commodity floating around’.

Another sub-question is the effect of the exact words of disparagement on the relationship between counsel and Ogwezzy and between them and Emu-Obodeti community. It is extant that Justice Ofesi did not seem to weigh the implication of the comments on the trade and professional calling of counsel and his relationship with his clientele. The judgment was capable of exposing counsel to ridicule and scorn; and in all of these, it is the impression the words (taken as a whole) would convey to the ordinary reasonable reader presumed not to be naïve, but capable of reading in between the lines (and not unduly suspicious to reach a predetermined conclusion) that is the test.

In *Ologe & Ors v. N.A.H. Ltd.*, 220 LRCN (Pt. 1) 120 (2013) words are not defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of the reputation in the eyes of right thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation (*Mfa & Anor. v. Inongba*, 230 LRCN 89 (2014)). It is the words of the publication as a whole that must be considered not a single word or phrase.

One of the reasons that drove Ogwezzy’s appeal was the desire to redeem the image of counsel not necessarily to claim damages for defamation as Justice Ofesi had already found that Ogwezzy was defamed and was entitled to his claims but for the very poor presentation of his case by his counsel. As Ogwezzy and his counsel walked out from the seat of judgment in the courtroom to the courtyard, there was palpable tension and ill feelings against the counsel. For a learned trial Judge to pronounce from the Bench that Ogwezzy lost his good case because of the very poor presentation by his counsel sets tongues wagging and reduces the self-esteem and integrity of counsel. Nothing is capable of destroying a professional carrier in a local environment than a pronouncement from the Bench in the locality that a named counsel is incompetent and presents client’s case very poorly and lacks the knowledge of the law in the field.

Where Justice Ofesi erred

The decision in *Alahassan & Anor. v. Ishaku & Ors.*, 258 LRCN 73 (2016) is that it is the duty of counsel to object to the admissibility of a document and if, as it happened in Ogwezzy’s case, inadmissible evidence is admitted it becomes the duty of the trial Judge when delivering judgment to treat such evidence as if it was never admitted. Exhibit A was admitted in evidence in the absence of Obodaya Esq. It was settled that his continuous absence in a case he was



handling as shown in the records amounted to obstruction of the course of justice and contempt of court (*Mfa & Anor. v. Inongba supra*). But it did not seem to be the desire of the trial Judge to deprecate the ‘very poor conduct’ of the case at the trial by the defence. It seemed in sync with the law for them to be absent in the estimation of the trial Judge when he held that: ‘It does not matter whether the defendant and counsel were absent or present when Exhibit A was tendered and admitted in this proceedings. The law (on certification) cannot be waived by the absence or presence of the parties’.

Presumably, it was right in the thinking of the trial Judge that once a document is received in evidence without objection by a party (who was in any case absent in court) such a party is not estopped, even in the appellate court, from raising the issue of its admissibility. This is because if a document is unlawfully admitted at the court of first instance, an appellate court still reserves the inherent power to exclude it even though counsel at the trial did not object to its going in (*Aminu & Ors v. Hassan, supra*).

But the foregoing law was far from what the trial Judge was confronted with. An original copy of a newspaper was admissible and required no certification even if the case was in defamation. The sections 2 and 4 of the Library Act that defence counsel comingled with section 102 of the Evidence Act to formulate the proposition of the law that Exhibit A must be certified before it can be tendered was what befuddled the learned trial Judge who erroneously accepted the proposition and deployed it to hold that counsel exhibited a crass ignorance of the law whereas the reverse was the case.

Why Ogwezzy appealed

Ogwezzy could have believed that his counsel was incompetent as held by Justice Ofesi. He could have decided to brief a different counsel for the appeal, and counsel would not have had the opportunity of being involved in the processes of reversing the decision in the case. But he swiftly appealed the judgment engaging counsel in the process. This could be interpreted to mean that he did not lose confidence in his counsel. If he had lost confidence in him the consequence would have been to engage a different counsel in the appeal. The choice of continuing with him can also be explained in the relationship both had had in the struggles that later came to be known as the Emu-Obodeti crises (Okwelum, 2023).

Both were genuinely disturbed and mutually affected by the judgment. But by the nature of the judgment, both ought to have been put asunder. Ogwezzy ought to have genuinely felt that his counsel was incompetent as Justice Ofesi had ruled but no, both cleaved more together and pursued the appeal jointly. Presumably, while Ogwezzy felt that he had been ‘robbed of his judgment’ his counsel felt that he had been ‘robbed of his professional reputation’.

Was Justice Ofesi compromised?

In any case where a Judge is accused of bias during the course of proceedings or after the delivery of judgment, Justice Kekere-Ekun, CJN in *Babarinde & Ors v. the State*, 231 LRCN 124 (2014) says that the guiding principles are to be found in cases such as *The Secretary, Iwo Central LG v. Adio*, 8 NWLR (Pt. 667) 115 (2000) where Ogundere, JSC cites with approval the view of Lord Denning M.R. *Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon*, (1969) 1 QB 577 as follows:



‘There must be circumstances from which a reasonable man would think it likely or probable that the Justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: “The judge was biased”.’

One of the issues that arose after the judgment was whether the trial Judge was malicious or biased in the rendition. Counsel justifiably believed that the trial Judge was clearly malicious in the rendition of the judgment while Ogwezzy felt he was biased. It was felt that a better way of conveying the issue of the presentation of the case if it was very poorly done was open to the learned trial Judge without having to pillory counsel. But in an action for defamation, there is no need to prove malice. It is implied from the mere publication of the defamatory words except the occasion is privileged. Was the occasion the learned trial Judge delivered the judgment with the defamatory laden words not privileged giving rise to the defences of qualified privilege and judicial immunity?

The Supreme Court in *Iloabachie v. Iloabachie*, 5 SC (Pt. 11) 146 (2005) quotes Lord Esher, MR in *Pullman v Hill Ltd*, 1 QB (1891) as stating that ‘an occasion is privileged when the person who makes the documentation has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both conditions must exist in order that the occasion may be privileged’. Where the defence of qualified privilege is made out, malice is rebutted. While communicating his decision to the parties and the public in Ogwezzy’s case, the aim of immunity as explained by Tobi, JSC (cited in Oladele, 2023) is not to protect Justice Ofesi from blame and litigation that may result from his pronouncement provided it is made within his jurisdiction and whether he made it rightly or wrongly. But the immunity is to protect him from unwarranted harassment and imbue him with the ‘maximum independence in the performance of his duties’ resulting in the pronouncement he makes that counsel is incompetent in the presentation of the case of his client.

Justice Ofesi was morally and legally bound by his duty to deliver a judgment in the suit and he did so in open court. Counsel also had a moral duty to hear from the trial Judge, the outcome of the case whether his client won or lost. To receive the damaging communication that he presented his client’s case very poorly is relatively outside the remit of the learned trial Judge to communicate. It is ‘some imported commodity floating around’. Judicial caution would have demanded that in presenting the judgment, the measurement and evaluation of the performance of counsel should not have been the dominant focus and the reductionist posture of the language of the trial Judge. Although the appellate Justices did not deprecate the trial Judge’s choice of words, they were clear in reaching the conclusion that the reason for the communication was erroneous and that the trial Judge misconceived the law. By setting aside the judgment, it could be contended that the image of counsel which was battered is redeemed but this study thinks otherwise because it is not the image of counsel that was at stake in the appeal in CA/AS/193/2020.



CONCLUSION

As the judiciary is the last hope of the common man, the day a counsel finds that he cannot get redress for his damaged reputation from an unfounded aspersion cast upon him by a Judge from the exalted position of immunity signals the disequilibrium in the relationship between the bar and the bench. This is because the law should not allow the principle of judicial immunity to operate in such a manner as to deny a counsel who has been unjustly profiled as incompetent access to court or administrative review process to redeem a damaged professional reputation.

The Constitution has provided ample opportunity for aggrieved persons to ventilate their grievances in court and other administrative panels which are empowered to determine any civil proceeding in which the existence of a legal right, power, duty, liability, interest, obligation or claim is in issue. This right, in the circumstances of this study, is the going of the reputation of counsel in a judgment. It cannot be taken away or made subject to any legislative principle bordering on judicial immunity. This is because the Constitution is supreme and if judicial immunity is inconsistent with the Constitution, the latter prevails.

RECOMMENDATION

- The judiciary should fashion out a procedural remedy for unwarranted attack on the bar by the bench.
- When a counsel, in the course of plying his trade is wrongfully reviled by a Judge who enjoys immunity, some measure of financial rebuke should be awarded in counsel's favour by the appellate courts and or the incident should, upon proper complaint, be referred to the National Judicial Council.
- The damage in such situations should be paid by the state on whose behalf the Judge acts.

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