

Privy Council Appeal No. 20 of 1962

Abudu Gbadamosi Ijale - - - - - *Appellant*
v.
B. A. Shonibare - - - - - *Respondent*

FROM
THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY 1964

Present at the Hearing:

VISCOUNT RADCLIFFE

LORD EVERSHERD

LORD UPJOHN

[Delivered by LORD UPJOHN]

This is an appeal from the decree dated 25th July 1960 of the Federal Supreme Court of Nigeria which allowed the appeal of the first defendant, the respondent before the Board, from the judgment of Dickson J. on the 23rd April 1959 in the High Court of Lagos who had entered judgment for the plaintiff (the appellant before the Board) for £1,500 against the respondent.

The action relates to a business transaction as long ago as the month of February 1952. The appellant was a produce buyer for A. G. Leventis and Company, and, as the learned trial judge found, there was no doubt that he from time to time had transactions with each of the defendants, in selling produce to him.

On 22nd February 1952, the appellant paid to the first defendant (the respondent) the sum of £1,500 and the respondent wrote out and signed a receipt in these terms " I received £1,000 myself and Y. L. Goodluck; also £500 for S. O. Hassan to-day, 22nd February 1952."

This payment and receipt was always admitted by the respondent.

Goodluck and Hassan were respectively the second and third defendants, but the learned judge held that on the evidence it was a matter of conjecture whether either of them received any monies from the respondent and he dismissed the action as against them. From that part of the judgment there has been no appeal.

The sole issue in the action was whether this sum of £1,500 was paid to the respondent as an advance for the purchase of produce in the future or was in payment of produce already supplied. This was purely a question of fact, though upon the evidence extremely controversial; and the learned trial judge, preferring the evidence of the appellant, found that the respondent received the sum of £1,500 by way of advance to himself and his co-defendants for the purchase of produce in the future, and therefore gave judgment in favour of the appellant against the respondent for £1,500.

The respondent appealed to the Federal Supreme Court who reversed the decision of the trial judge on the ground that he had not properly directed his mind to some of the evidence. Accordingly the appeal was allowed and the appellant's action was dismissed with costs.

There were many issues of fact before the trial judge but only one relevant to this appeal namely an important issue as to the existence of a ledger or produce book alleged to belong to the appellant which the respondent said,

would contain entries relating to the transaction and would establish his case. The appellant denied the existence of any such book and the trial judge decided this issue in his favour. The Federal Supreme Court differed from the trial judge fundamentally in holding that this ledger or produce book must be in existence. Therefore it followed, as the appellant had not produced it, that the inference must be drawn that its production would prove unfavourable to him. On this ground they allowed the appeal.

In these circumstances some review of the evidence by their Lordships is necessary but they propose only to review the pleadings and evidence relating to this question and in no wise to cover the many other matters which were in controversy before the trial judge, but did not arise on the appeal before the Federal Supreme Court or before their Lordships.

The appellant's case relied naturally on the receipt of the £1,500 (the terms of which have already been stated), and an allegation that the payment was in respect of an advance for future purchases. The amended defence of the respondent, however, among other defences contained this averment in paragraph 8: "The defendant states that the whole transactions between him and the plaintiff are contained in the latter's produce buying books and ledgers which had always remained in his (plaintiff's) possession."

The hearing occupied a number of days over a long period of time. In October 1958 the appellant gave evidence and he produced the receipt as Exhibit A which was pasted into an account book Exhibit B. He also produced an account book Exhibit D. These books, together with Exhibit E later mentioned, have been produced to their Lordships and it is fair to say that neither Exhibit B nor D bear any resemblance to what is ordinarily understood by the use of the word "ledger".

The appellant was cross-examined and swore that Exhibits B and D were the only books kept by him in his business, and that he had no other ledger book except B. During the course of his cross-examination it is quite plain from the following extract of the judge's note of the evidence that he was suspicious of the appellant's story: "I wrote down the advances made to the first defendant in the ledger (now he says he wrote down the advances on a slip of paper) and when the account closed would tear it out from the file and give it to the first defendant".

Then the appellant's clerk, Ambali Jaji, gave evidence partly in October 1958 and partly at an adjourned hearing in January 1959 which in general supported the appellant's story. He kept the books as it was his duty to do and gave evidence about that. During a lengthy cross-examination as to his method of keeping books a ledger Exhibit E admittedly belonging to the appellant was put to him by counsel for the third defendant. This ledger appeared to cover the material period but there was no trace of the transaction sued upon. The witness said that all the entries in the book were in his handwriting and in answer to the learned judge explained that this ledger had just been started. He further stated that he had made no entry relating to the alleged advance of £500 to the third defendant in 1952 as he had not checked that account.

The case was further adjourned and in February 1959 the respondent gave evidence to the effect that there were ledgers and account books kept by the appellant other than those that had been disclosed. He stated that he had seen these books and from time to time had in accordance with the normal practice signed entries in them. Immediately after that evidence one Ayanbanjo, who had been the appellant's clerk at the relevant period in 1952, was called on the respondent's behalf. His evidence was to the effect that there was in use at the material time a ledger which the appellant had not produced. The second and third defendants then gave evidence tending to support the view that the appellant had a ledger which should have contained entries relating to the transaction now under appeal.

In addition there was some evidence before the court as to the books of account kept by such companies or firms as Leventis, John Holt and United Africa Company.

At the conclusion of the evidence counsel for the second and third defendants addressed the learned judge and quite properly put in the forefront of his argument the failure of the appellant to produce the relevant ledger or produce books. The judge's note of his argument reads: "Plaintiff has kept the real ledger out of the way" and later, "When the party is in possession of a document and fails to produce, it is presumed against him."

Counsel for the respondent following, according to the judge's note, submitted: "There is a book which customers signed every month. It has not been produced; suppressed."

The learned judge delivered a reserved judgment on 23rd April 1959. He dealt in great detail with matters which do not concern their Lordships in this appeal, save that he stated: "I have approached the consideration of this case with anxiety and much concern in order to ascertain in so far as I can where is the truth. There has been lying by everyone who gave evidence" and a little later "The plaintiff appears to be slightly literate and does not impress me as a shrewd business man."

He then dealt with the question of the appellant's books of account and said:

"It has been shewn that as a rule when advances are made to produce buyers by the defendant they are recorded in a book like Exhibit B; the record taking the form of a receipt which is signed by the buying agent receiving the loan. It has also been shewn that it is the system of the plaintiff to enter the loans from Exhibit B into a ledger and when this is done the folio of the ledger is noted against the appropriate receipt in Exhibit B. Comment has been made as to the practice of keeping books amongst produce buyers and it has been suggested as the plaintiff has not followed the recognised practice his claim against the defendants cannot succeed.

In the first place, I should think that a man is entitled to keep his books as he pleases and is not bound to follow the practice of others in every detail. Standards and methods of keeping books vary with the educational standard and may be culture of the proprietor of a business. The system adopted by Messrs. John Holt or U.A.C. would not necessarily be the criterion for the less articulate.

In the instant case, it is alleged by the plaintiff that he made three advances in all to the 1st defendant at his (the plaintiff's) house; the receipt of which in each case was acknowledged by the 1st defendant on a slip of paper. The plaintiff says when two repayments were made he returned the respective receipts to the 1st defendant. The third receipt is the subject matter of this case. He gives as his reason for adopting this method that the transactions took place at his home as it were after office hours. In my view there is nothing wrong with that. Is it being seriously contested that because a receipt is not made out in an office and in a particular book, it is not effective? Indeed, the 1st defendant is saying that it is effective in so far as it acknowledges payment for money made to him for produce supplied. Neither is the receipt in question nor the two others recorded in Exhibit B or the ledger. The fact that Exhibit A has not been recorded in either book would not prohibit the plaintiff from recovering on it."

And then omitting an immaterial paragraph, the learned judge continued:

"The issue to my mind is this: was the receipt Exhibit A an acknowledgment of monies received by the 1st defendant for himself and his co-defendants as advances and not in payment of produce? The point has been made that the ledger Exhibit E is not the real ledger of the plaintiff. It appears that Exhibit E has been recently posted from Exhibit B; but the fact remains that Exhibit B is not of recent origin. The question of the ledger has only been brought in as a 'red herring' across the trail.

It is my judgment that the 1st defendant received the sum of £1,500 as set out in Exhibit A as advances to himself and his co-defendants. I

believe the plaintiff on this aspect. The defence of the 1st defendant is a subtle attempt to deprive the plaintiff of his money.”

So he gave judgment for the appellant.

The respondent appealed, and the only ground of appeal with which the Federal Supreme Court of Nigeria dealt was in these terms: “ The learned trial judge erred in law by failing to consider that the failure or refusal of the plaintiff to produce the Ledger Book or buying book (showing the indebtedness of the first defendant to him as claimed) which he admitted was in existence, was an evidence that he was hiding material fact which was against his case ”.

Their Lordships note that this paragraph seems to be inaccurate in that so far as the record is concerned there was no admission, apart from a certain hesitation on the part of the appellant in cross-examination which has been quoted already, that any ledger or buying book was in existence other than those produced. The Federal Supreme Court in which the leading judgment was delivered by Sir Adetokunbo Ademola C.J. with whom Hubbard Ag.F.J. and Taylor Ag.F.J. agreed, pointed out that a subpoena had been served upon the appellant to produce the ledger or produce book. In his judgment the learned Chief Justice examined the evidence relative to this matter and very properly referred to the very late production of Exhibit E. He also mentioned the fact that the learned judge had pressed for production of the ledger which was not forthcoming. He then quoted the evidence of Ayanbanjo the former clerk of the appellant to which reference has been made. Then the learned Chief Justice stated “ In his judgment the learned trial judge gave no consideration to all this evidence about the ledger or buying book ”. He then referred to an entirely different transaction which it is true tended to throw suspicion upon the evidence of the appellant. Then the learned Chief Justice referred to the following observations of Lord Somervell in the House of Lords in *Benmax v. Austin Motorcar Co.* [1955] A.C. 370 at 377:

“ On the other hand there are sentences in his judgment which indicate very probably but not certainly that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness which he has relied on, or his general conclusions . . . ”

He continued:

“ The learned Judge in the Court below in the present appeal having found that the parties to the action told lies, he did not, it appears advert his mind to whether the plaintiff’s lies related to the existence or otherwise of the ledger or produce book which was the basis of the defence. Had he directed his mind to it, he would undoubtedly have asked himself why such document was not produced by the plaintiff.”

Continuing a little later, the learned Chief Justice said:

“ If there was in fact a ledger showing the transactions between the parties, as all the evidence pointed to, and it was not produced by the plaintiff/respondent, the only conclusion to be inferred is that the production of it would be unfavourable to him and this would have materially affected the outcome of the case. It appears to me that the learned Judge was on the facts, by virtue of Section 148(d) of the Evidence Ordinance, entitled to draw unfavourable conclusions against the plaintiff/respondent had he addressed his mind to the fact that he kept away the ledger or produce book which clearly from the whole evidence must be in existence.”

Their Lordships agree that the absence of any ledger referring to the transaction was a highly suspicious circumstance. It is clear that the learned trial judge was at one stage himself highly suspicious of the appellant’s story and he might well have taken the view that a material ledger had been suppressed; on that footing he would most certainly have been entitled both at common law and under section 148 (d) of the Evidence Ordinance to draw unfavourable conclusions against the respondent and have dismissed the action.

The question however whether the ledger was being suppressed, that is fraudulently, as there was no suggestion that it had been lost, was essentially a matter for the trial judge, especially where he has found that "there has been lying by everyone who gave evidence."

Thus the sole question for their Lordships is whether the Federal Supreme Court was justified in taking the view that the learned trial judge gave no consideration to the evidence about the ledger or buying book and that he did not advert his mind to whether the appellant's lies related to the existence or non-existence of that book. Their Lordships regret that upon this question they have not had the assistance of counsel for the respondent, and their Lordships have given most anxious consideration to it.

Their Lordships have set out at some length the pleadings, evidence and arguments to show that this question of the existence or non-existence of the ledger was at all stages in the forefront of the issues between the parties and could hardly have been overlooked by the trial judge. In his judgment the judge dealt with the appellant's bookkeeping methods and with the point that Exhibit E was not the real ledger of the appellant. Thus whatever his earlier suspicions of the appellant's evidence he reached the ultimate conclusion in his judgment (as he was entitled to do after seeing all the witnesses) that the appellant was not of a high standard of education and kept but few books but that he should be acquitted of fraud in this particular respect, though he may have lied in other ways.

It is quite true that the learned trial judge did not review the oral evidence as to the existence of an unproduced ledger, much of it no doubt supporting the view that there was such a ledger, but in the end he reached the conclusion that the question of the ledger had been brought in as a "red herring"; in other words he accepted the appellant's story as to the non-existence of another ledger and disbelieved the evidence given by and on behalf of the respondent. Their Lordships cannot agree that it is proper to infer from the language used by the learned trial judge that he overlooked the important evidence of Ayanbanjo which was given much later in the trial than that of the appellant and his clerk. Indeed when there is a complete conflict of evidence on an issue of primary fact such as the existence of a ledger where the proper conclusion can only be reached after estimating the credibility of the witnesses on oath a trial judge is not to be criticised for a failure to review the evidence in detail and he may properly only state his conclusion of fact. This he did in the sentence about the "red herring".

Consequently with regret their Lordships are unable to agree with the Federal Supreme Court that the proper conclusion is that the trial judge either overlooked any oral evidence or failed to bring his mind to bear upon this question of the alleged suppression of the ledger.

On that footing their Lordships do not think in a matter such as this involving issues of credibility on primary questions of fact that the Federal Supreme Court would dissent from the view that there would be no proper ground for disturbing the finding of the trial judge. In the result their Lordships are unable to agree with the Federal Supreme Court that another ledger was in existence and feel bound to accept the finding of the trial judge who reached the conclusion, surprising perhaps to those who have not had the opportunity of observing the attitude and demeanour of the witnesses on this acute controversy of fact, that he believed the appellant that the sum of £1,500 was paid by way of advance to the respondent.

For these reasons their Lordships will humbly advise Her Majesty that the appeal of the appellant be allowed, the Judgment of the Federal Supreme Court of 25th July 1960 reversed with costs to the appellant and the judgment of Dickson J. restored. The respondent must pay the costs of this appeal.

In the Privy Council

ABUDU GBADAMOSI IJALE

v.

R. A. SHONIBARE

DELIVERED BY
LORD UPJOHN

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