**JUBRIN GARBA AND OTHERS**

**V.**

**TIMOTHY KUR**

COURT OF APPEAL (JOS DIVISION)

3RD DAY OF DECEMBER, 2002

CA/J/1/2000

**LEX (2002) - CA/J/1/2000**

OTHER CITATIONS

2PLR/2017/138 (CA)

**BEFORE THEIR LORDSHIP**

ALOMA MARIAM MUKHTAR, JCA (Presided)

AMIRU SANUSI, JCA (Read the Lead Judgment)

IFEYINWA CECILIA NZEAKO, JCA

**BETWEEN**

1. JUBRIN GARBA

2. MATTHEW IZUNNA – Appellants

AND

TIMOTHY KUR - Respondent

**ORIGINATING COURT**

HIGH COURT OF BENUE STATE, GBOKO DIVISION

**REPRESENTATION/LAWYERS**

E. A. HARUNA - for the Appellants.

W. H. AKU, Esq. - for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURY LAW – MOTOR VEHICLE ACCIDENT:- Claim by plaintiff for damages for damaged car, medical treatment and general damages for loss of use of the said car – Counter-claim by defendant for special damages and general damages and for loss of use of their own vehicle too – How treated

TRANSPORTATION LAW – MOTOR VEHICLE – ROAD ACCIDENT:- Claim for damages to vehicle and injuries to the person – How treated

**PRACTICE AND PROCEDURE ISSUES**

ACTION - COUNTER-CLAIM:- Need for it to be credibly proved – Effect of failure thereto

APPEAL - APPELLATE COURT:- When will interfere with award of general damages by trial court.

COURT - APPELLATE COURT:- Power of to evaluate evidence.

COURT - APPELLATE COURT:- When will interfere with award of general damages by trial court.

COURT:- Discretionary power of to grant general damages.

EVIDENCE – EVALUATION:- Power of appellate court to evaluate evidence.

EVIDENCE – PROOF:- Counter-claim - Need for to be credibly proved.

JUDGMENT AND ORDER - DAMAGES - GENERAL AND SPECIAL DAMAGES - Differences between - Discretionary power of court to grant general damages.

JUDGMENT AND ORDER - DAMAGES - GENERAL DAMAGES:- Award of by trial court - When appellate court will interfere with.

JUDGMENT AND ORDER - DAMAGES - SPECIAL DAMAGES FOR THE COSTS OF REPAIRS OF DAMAGED VEHICLE:- Failure to plead and prove pre-accident value of the vehicle for the award of – Effect.

JUDGMENT AND ORDER - DAMAGES - SPECIAL DAMAGES:- Need for to be strictly proved - Onus of proving same - On whom lies.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

On 15/10/1993 the plaintiff who is the respondent in the appeal was driving vehicle 504 Peugeot Registration No. BN 9744 M from Gboko to Makurdi in company of two other persons in his car. The 1st appellant was also driving a Bedford Kit car conveying some passengers and their goods.

The said vehicle Registration No. BN 1564 R was owned by the 2nd appellant and the 1st appellant was driving from Wunune market heading to Makurdi along the same direction with the respondent. At a point along the highway the respondent’s vehicle hit the 2nd appellant’s vehicle on its rear which had earlier been parked by the 1st appellant. As a result of the accident one person died in the respondent’s vehicle whereas the respondent and one other person sustained some injuries. The appellant parked his vehicle right on the road at night and an on-coming vehicle dipped its light on him thus making it difficult for him to see hence he hit the 2nd appellant’s vehicle wrongly parked by its driver the 1st appellant without rear lights put on. On the other hand the 1st appellant claimed that he parked properly by the roadside and that the respondent drove in excessive speed and recklessly and hit his stationary vehicle.

The respondent brought this suit against the appellants jointly and severally at High Court of Benue State holden at Gboko claiming various sums as special damages for his damaged car and his medical treatment and also general damages for loss of use of the said car. The defendants responded by filing a joint statement of defence wherein they counterclaimed for various sums as special damages and general damages and for loss of use of their own vehicle too.

At the conclusion of the trial the trial court gave judgments in favour of the plaintiff and awarded N160,000 to him as special damages for the cost of repairs of his car. It also awarded certain sums as general damages.

The court dismissed the counter-claim made by the defendant.

Being dissatisfied the appellants appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the Respondent and awarded N160,000 to him as special damages for the cost of repairs of his car as well as general damages. Dissatisfied, the Appellant appealed to the Supreme Court.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANTS:*

1. Was the learned trial Judge right to have awarded special damages of N160,000.00 to the plaintiff as representing the costs of repair of his car when no evidence was led in support at the trial?

2. Can it be said that the learned trial Judge judiciously and judicially exercised his discretion in the award of general damages he made in favour of the plaintiff?

3. Was the learned trial Judge right in relying on the report of the Vehicle Inspection Officer (V.I.O.) on 2nd defendant’s vehicle contained in exhibit “E”?

4. Can this court not evaluate the evidence called by either side on the issue of who caused the accident of 15/10/93 in order to properly resolve that issue which the learned trial Judge failed to do?

5. Can this court not evaluate the evidence called in support of 2nd defendant’s counter-claim and award any damages in consequence since the learned trial Judge failed to do so?

*BY RESPONDENT:*

[The respondent adopted the issues raised by the Appellant].

**MAIN JUDGMENT**

SANUSI, JCA (DELIVERING THE LEAD JUDGMENT):

In this suit a summary of the plaintiff’s claim against the defendants jointly and severally at High Court of Benue State holden at Gboko as contained in the writ of summons in statement of claim reads as follows:

(1) Special damages for the sum of five hundred thousand naira itemised as follows:

(a) Value of the car damaged beyond repairs N200,000.00

(b) Cost of medical treatment and burial expenses N 30,000.00

General damages Loss of use of the plaintiff’s car from the 15th October, 1993 to date and general inconveniences pains and injuries N270,000.00

TOTAL N500,000.00

Also when served with the writ and statement of claim, the two defendants responded by filing a joint statement of defence wherein the 2nd defendant made counter-claim against the plaintiff which is reproduced below:

(i) the sum of two hundred thousand Naira (N200,000.00) being special damages arising out of losses suffered on account of the accident by the reckless or negligent act of the plaintiff;

(ii) the sum of one thousand Naira (N1,000.00) being the daily proceeds from the use of the Bedford vehicle lost between the time of the accident and its sale; and

(iii) General damages of three hundred thousand Naira (N300,000.00).

The suit went on trial on the above two sets of claims and at the conclusion of the case, the court below gave judgment in favour of the plaintiff and awarded N160,000.00 to him as special damages for the cost of repairs of his car. It also awarded general damages as follows:

(1) Loss of use of plaintiff’s car from November, 1993 to January, 1995 ................ N30,000.00.

(2) Pain and injury suffered by the plaintiff on account of the accident ............... N10,000.00.

This brings the total award on both head of claims of damages to N200,000.00 in favour of the plaintiff. The court finally dismissed the court claim made by the defendant.

Being totally dissatisfied with the decision of the court below, the two defendant have now appealed to this court. They, sequel to that, filed six grounds of appeal as contained in the original grounds of appeal as shown on page 106 - 109 of the printed record of the lower court. With leave of this court the defendants as appellants also filed one additional ground of appeal making the total grounds of appeal to total up to seven grounds of appeal.

The facts of the case are simple and straight forward. On 15/10/1993 the plaintiff who is the respondent in the appeal was driving vehicle 504 Peugeot Registration No. BN 9744 M from Gboko to Makurdi in company of two other persons in his car. The 1st defendant was also driving a Bedford Kit car conveying some passengers and their goods. The said vehicle Registration No. BN 1564 R was owned by the 2nd defendant and the 1st defendant was driving from Wunune market heading to Makurdi along the same direction with the plaintiff. At a point along the highway the plaintiff’s vehicle hit the 2nd defendant vehicle on its rear which had earlier been parked by the 1st defendant. As a result of the accident one person died in the plaintiff’s vehicle whereas the plaintiff and one other person sustained some injuries. The plaintiff claimed that the accident occurred because the 1st defendant parked his vehicle right on the road at night and an on-coming vehicle dipped its light on him and he could not see hence he hit the 2nd defendant’s vehicle wrongly parked by its driver the 1st defendant without rear lights put on. On the other hand the 1st defendant claimed that he parked properly by the roadside and that the plaintiff drove in excessive speed and recklessly and hit his stationary vehicle. At the trial, the plaintiff (hereinafter to be referred to as “respondent”) testified and called five witnesses to prove his claims, the defendants (who will henceforth be referred to as “the appellants”) testified and called one witness to establish their defence and 2nd defendant’s counter-claim, on the damage suffered by his own vehicle driven by the 1st appellant. The respondent based his claims on the injuries himself and the two passengers in his car sustained and the cost of medication expended on such injuries as well as the cost of the coffin for the burial of the person who lost his life as a result of the accident which he alleged was caused by the first appellant (defendant).

The parties filed and exchanged their briefs of argument. The appellants on 29/1/2000 filed their joint brief of argument wherein they jointly formulated five issues for determination as follows:

1. Was the learned trial Judge right to have awarded special damages of N160,000.00 to the plaintiff as representing the costs of repair of his car when no evidence was led in support at the trial?

2. Can it be said that the learned trial Judge judiciously and judicially exercised his discretion in the award of general damages he made in favour of the plaintiff?

3. Was the learned trial Judge right in relying on the report of the Vehicle Inspection Officer (V.I.O.) on 2nd defendant’s vehicle contained in exhibit “E”?

4. Can this court not evaluate the evidence called by either side on the issue of who caused the accident of 15/10/93 in order to properly resolve that issue which the learned trial Judge failed to do?

5. Can this court not evaluate the evidence called in support of 2nd defendant’s counter-claim and award any damages in consequence since the learned trial Judge failed to do so?

The respondent filed his brief of argument on 19/3/2001 with leave of this court upon being served with the appellants’ brief of argument.

Therein, he merely copied the appellants’ five issues for determination as reproduced above. He did not formulate any issue of his own for the determination of the appeal by this court. Even though he did not say that he adopted the appellants’ brief of argument the fact that he proceeded to advance arguments on each of the five issues and that he did not raise or formulate any issue one can say that he impliedly adopted these five issues for the determination of the instant appeal. I shall now proceed to consider this appeal on the five issues raised by the appellants and in doing so I shall consider the issues serially.

On the first issue which related to award of special damages of N160,000.00 by the trial court in favour of the respondent, the learned appellants’ counsel conceded that the lower court was right in dismissing the claims by the respondent regarding cost of medical treatment and burial expenses. However, it was submitted on behalf of the appellants, that the award by the trial court on the other hand on value of the car damaged to the tune of N160,000.00 was wrongly made as no evidence was led by the respondent (plaintiff at the lower court) to establish the parts of the vehicle replaced and at what cost. The learned appellants’ counsel argued that in his evidence at the lower court the plaintiff gave the estimated cost of repairs as “about N216,000.00 and at the same time sought for damages of N200,000.00 for repairs of the vehicle. Also the mechanic called to testify for the plaintiff as PW3 merely stated that he assessed the extent of damages, wrote down the damaged parts and assessed the cost of repairs as N263,750.00. This estimate was rejected by the court and marked as “rejected exhibit D”. It was further submitted by the appellants’ counsel that the mechanic did not state in his evidence in court that he repaired the respondent’s car. Also the respondent did not tender the receipts for the repairs which he pleaded as costing N200,000.00k. He further argued that the special damages sought in the statement of claim was for the value of a car “damaged almost beyond repairs - N200,000.00K”. He then argued that the evidence led at the trial on the estimated cost of repairs did not tally with the relief sought in the plaintiff/respondent’s pleadings. For these arguments, the appellants’ counsel urged that the head of claim for “value of car damaged” should be discountenanced. He cited Nzeribe vs. Dave Engineering Co. Ltd. (1994) 8 NWLR (Pt. 361) 124 or (1994) 9 SCNJ 161. He finally urged this court to set aside the award of N160,000.00k made by the learned trial Judge as it was speculative. Replying to the appellants’ counsel’s argument on this issue, the respondent’s counsel submitted that they led evidence through PWs 3, 4 and 5 to establish that the respondent’s vehicle was damaged beyond repairs. Also according to the learned counsel these witnesses stated that they saw the vehicle and PW3 a mechanic drew the estimate and repaired it and he listed the items in exhibit D and the V.I.O. PW5 confirmed the damages suffered by the car in his report in exhibit E. He submitted that since the pieces of evidence by these witnesses mentioned above were not discredited, the lower court was right in accepting them and in acting on them by making the award. He cited Olatunde vs. Adeogbo (1988) 2 NWLR (Pt. 75) 238 at 255; Nwabuoke vs. Otti (1961) 1 ALL NLR 487; Faseun vs. Pharco Nig. Ltd. (1965) 2 ALL NLR 216.

I deem it apposite to refer to the judgment of the lower court contained in the printed record where the learned trial Judge reached his conclusion and made the award of N160,000.00k complained of by the appellants. At page 102 of the record, part of the judgment of the lower court reads thus:

“On cost of repair it is a fact that rather than tender receipts for the repairs as pleaded, the plaintiff tendered estimates made by PW3. The estimate was rejected as it did not agree with what was pleaded. This however does not render the evidence of plaintiff and its mechanic in the cost of repairs of the car useless. PW3 James Ordoo gave the estimated cost of repair of the car to be N263,750.00k.

Plaintiff testified that the cost of repair was N261,000.00k. The mechanic who is PW3 inspected the vehicle and the cost of repairs. He is an expert in his field.

The court is of the view that the evidence of PW3 on the estimated cost of repair has established the cost of the repair of the vehicle. It cannot be said that it was not established by the plaintiff. The rejection of the estimated cost coming from receipts tendered does not remove the oral evidence of PW3 that he checked the details of the damage and estimated the parts and the costs of what was to be replaced. It was after proper examination that PW3 came out with the estimate of N263,750.00k. It was however an estimate at the time it was compiled, as estimate can be more or less, the court prefers to make it less in this case. The court will award the plaintiff the cost of repairs of his car at N160,000.00k. This amount is hereby awarded to plaintiff.” (Italics supplied by me).

It is clear from paragraph 19 of the statement of claim that the respondent (plaintiff) made a claim of N200,000.00k which he expended on the repairs, panel beating and to spray the car. In his testimony PW3 the mechanic merely stated that he inspected the vehicle and made an estimate of the damaged parts and gave the estimate to the plaintiff/respondent: He nowhere stated that he repaired the vehicle of the respondent. No panel beater or sprayer was also called to testify and no estimate on such was tendered. Only the estimate of the repairs by the mechanic was tendered but rejected hence the lower court could not act on it. Also, although in the said paragraph 19 of the statement of claim the receipts were pleaded, none was tendered in evidence to establish the actual cost of repairs. Also PW3 was not led to state the name of each of the damaged part and possibly its cost at the time the said estimate was drawn. In short, the respondent in my view failed to lead evidence as he should on how he arrived at N200,000.00k he claimed since such fall under “special damages head of claim which in law need to be strictly proved. No explanation was given on why such receipts were not tendered even though they were pleaded. It is worthy of note that while in paragraph 19, the respondent was claiming N200,000.00k as cost of repairs, in paragraph 20 of the same statement of claim he was claiming the said sum as value of car “damaged almost beyond repairs.”

Coming to the award of N160,000.00 made by the trial court, the learned trial Judge did not state the yardstick he used in arriving at the sum he awarded bearing in mind the fact that such sum was not claimed either in the pleadings or even the evidence led before him oral or documentary.

This is moreso in view of the fact that the estimate tendered through PW3 was rejected and marked rejected exhibit “D” in the course of the trial. In Alhaji Otaru & Sons Ltd. vs. Audu Idris & Anor. (1999) 6 NWLR (Pt. 606) 330 or (1999) 4 SCNJ 156 the Supreme Court at page 172 held thus:

“Special damages must be strictly proved. So far as special damages are concerned, a trial Judge cannot make his individual assessment but must act strictly on the evidence before him which he accepts as establishing the amount to be awarded.”

Now even if the lower court by its award meant same to represent the value of the respondent’s vehicle as claimed in paragraph 20 of the statement of claim, such award is still not justifiable since the respondent/plaintiff failed to strictly prove the actual pre-accident value of his damaged vehicle. The Supreme Court in Alhaji Otaru & Sons Ltd. vs. Audu Idris & Anor (supra) held further at line 13 of page 172 as below:

“Since there was no evidence of the pre-accident value of the damaged vehicle and the learned trial Judge used the figure N30,000.00k pleaded as purchase price of the vehicle for his assessment of the pre-accident value which was not pleaded the award he made of N22,000.00k to the appellant as the pre-accident value ought in law and in good sense to be set aside.”

It is apt to say, that unlike “general damages”, “special damages” are damages that do not follow in the ordinary course. They are by their nature exceptional in their character and as such must be proved strictly. On the other hand “general damages” are such that the law will presume to be the direct, natural and probable results of the act complained of. In special damages, a trial Judge cannot make his individual assessment but must be guided by the evidence led before him in making the award. In the instant case the lower court cannot be said to have been guided by any such evidence before arriving at the amount of special damages it awarded to the tune of N160,000.

I must point out here too that the onus to strictly prove special damages is on the plaintiff. This burden he must discharge by showing credible evidence that he is indeed entitled to such damages claimed. Such evidence required must show some particularity as is necessary in line with his pleadings. This is far from being so in the instant case. One would have expected receipts indicating the cost of any of the parts damaged and replaced or the cost of labour in replacing it. Or if reliance was to be placed on oral rather than documentary evidence, such items damaged and replaced should have been mentioned and its cost or purchase price and the entire labour cost. Also it must be proved that the vehicle had actually been repaired at such damaged sum. All these are not the case in this instant case. Therefore, the award of N160,000.00k in favour of the respondent by the trial court was not supported by evidence and ought to be set aside.

See Imana vs. Robinson (1979) 3 - 4 SC 1; Obasuyi vs. Business Ventures Ltd. (2000) FWLR (Pt. 10) 1722, (2000) 5 NWLR (Pt. 658) 608; Ecobank (Nig) Plc. vs. Gateway Hotels (Nig) Ltd. (1999) 11 NWLR (Pt. 627) 397; Gurara Securities & Finance Ltd. vs. TIC Ltd. (1999) 2 NWLR (Pt. 589) 29; UBA Ltd. vs. Ademuyiwa (1999) 11 NWLR (Pt. 628) 570; Nzeribe vs. Dave Engr. Co. Ltd. (supra); Consolidated Breweries Plc. vs. Aisoweeren (2001) 15 NWLR 1r (Pt.736) 424; Ibile Holdings Ltd. vs. Professional Date Secretarial Services (2002) 16 NWLR (Pt. 792) 117 at 129; Att.- Gen., Oyo State vs. Fair Lakes Hotels Ltd. (1987) 5 NWLR (Pt. 121) 255; NB Plc. vs. Adetoun Oladeji Nig. Ltd. (2002) 15 NWLR (Pt. 791) 589 at 632/633.

Thus in the light of all I said above, I am of the view that the award on this head of claim of N160,000.00k is unjustifiable. The trial Judge was wrong in awarding that sum. It is accordingly set aside. The issue is therefore resolved in favour of the appellants.

The second issue deals with the award of general damages and it is whether the trial court exercised its discretion judicially and judiciously when it awarded N30,000.00k and N10,000.00k to respondent as general damages for loss of use of vehicle and for pains and injury suffered by the respondent/plaintiff respectively. The appellants’ counsel argued that the sum of N30,000.00k awarded to the respondent by the lower court for loss of use of his car was not founded on any proved fact as no evidence was led to show the nature of any inconvenience suffered on account of use of his car. He submitted that it is not for the court to presume that such inconvenience was suffered. He argued further that the learned trial Judge was wrong in awarding N30,000.00k as general damages for loss of use of plaintiff’s car without stating how he arrived at that amount.

Also on the award of N10,000.00k general damages in favour of the respondent/plaintiff for pain and injury suffered, he argued that such award was arbitrary. He relied on Olurotimi vs. Ige (1993) 10 SCNJ 1 at 10. He urged that the entire award of N40,000.00k general damages should be set aside as the appellants were not the cause of the accident. He cited Adene vs. Dantumbo (1994) 2 SCNJ 131 at 151.

In reply, the respondent’s counsel submitted that evidence led through PW 1 & PW 2 who were eye witnesses established that the 1st appellant caused the accident and both confirmed that the respondent’s vehicle was out of use. There was no need for the respondent to prove or specify the nature of the inconvenience suffered. It was further argued that evidence was led to show that the two passengers in the respondent’s car sustained injuries and suffered some pains. The injured victims gave unchallenged evidence on such pains and injuries. He submitted that the award was rightly made by the trial court.

The learned trial Judge when making the award of general damages of N40,000.00k on head of claims of loss of use of the vehicle suffered by the respondent/plaintiff and on injury and pains suffered had this to say in his judgment on pages 103/104 of the record:

“On loss of use of the vehicle PW3 testified that the vehicle was brought to him for repairs in 1995. This will show that plaintiff could not make use of his vehicle from October 1993 to 1995. The exact date of repairs were done in 1995 is not certain. This will nevertheless give the court an idea as to how long plaintiff was without his vehicle. The court feels that plaintiff is entitled to damages for loss of use of the car and the inconveniences he was subjected to as a result of the loss of use of the car. The court will award N30,000.00k to plaintiff for loss of use of his car from November 1993 to January 1995. This amount is hereby awarded.”

Also on the head of claim of injury and pains, the court below went further to state as below:

“The court is informed by the evidence available that for several days plaintiff could not go about his normal business as a result of the injury and pain he suffered from the accident.

Though the nature of injury is not stated by the plaintiff the plaintiff is nevertheless entitled to general damages for the pain and injury suffered. The court has awarded N10.000.00k for pain and injury.”

Generally speaking a trial court has discretion to award general damages even though such discretion must be exercised judicially and judiciously.

General damages are classified into two for purposes of proof; that is to say:

1. where general damages may be inferred as in defamation cases or presumed as in personal injury matters for pain and suffering; and

(ii) where general damages have to be proved.

It is not unusual or abnormal for trial courts to award general damages even where special damages on an item has not, been proved strictly, in as much as there is evidence showing that the party so claiming suffered some damages. See Att.-Gen., Oyo State vs. Fairlakes Hotels Ltd. (supra); Arbico vs. N.M.T. Ltd. (2002) 15 NWLR (Pt. 789) 1. In this appeal, it has been shown and rightly believed by the trial court (in my view) that the respondent suffered some pains and injury and also did not use his vehicle between November 1993 when the accident occurred and 1995 even though the exact date the repairs took place was not shown. This does not change the position even if the car was not repaired at all. The important thing is that the vehicle was shown to be rendered un-operational during the period.

This evidence is believed by the trial court. A trial court always has the opportunity of listening to and watching the demeanour of witnesses called to testify before it by parties in an action. This opportunity is rarely made available to appellate courts. Issue of award of general damages is an issue purely within the precinct of trial courts. An appeal court does not normally disturb or interfere with such award except in the under mentioned circumstances; namely

(1) where a trial court acted under a mistake of law;

(2) where the trial court acted in disregard of principles; or

(3) where it acted under misapprehension of facts; or

(4) where the trial court has taken into account irrelevant matters or failed to consider relevant matters; or

(5) where injustice would result if the appeal court does not interfere; or

(6) where the amount awarded is either ridiculously so low or ridiculously high that it must have been a wholly erroneous estimate of the damages.

See Shell Petroleum Development Co. (Nig.) Ltd. vs. H.R.H. G.B.A. Tiebo VII (1996) 4 NWLR (Pt. 445) 657; NB Plc vs. Adetoun Oladeji (Nigeria) Ltd. (supra). In the instant case, I am convinced that the court in making the award of general damages did not violate any of the principles listed above as would justify me to interfere with the award made by the court below. I opine that the award of general damages made in favour of the respondent is reasonable and rightly made by the lower court. I accordingly decline to set it aside and instead endorse same. I therefore resolve this issue in favour of the respondent and against the appellant.

I will now come to the 3rd issue for determination. Herein, the appellant’s counsel contends that the learned trial Judge was wrong in relying heavily on and acting on the V.I.O’s report contained in exhibit E which led him to arrive at the conclusion he reached. He argued that the learned trial Judge was in error in concluding that the 1st appellant was responsible in causing the accident. A close examination of the V.I.O’s report according to the learned appellants’ counsel could not justify the conclusion arrived at by the learned trial Judge. The learned counsel to the appellants raised dust on the alleged disparity in the name of V.I.O Moses Uhembe as he gave the court when testifying as PW5 and the name that appeared in the report issued by him as M. E. Kwembe and urged this court to hold that PW5 was not the maker of the report. Similarly the learned counsel urged this court to consider the difference given by witness as to the time the vehicle was allegedly inspected. This is to say plaintiff/respondent gave the time of inspection as 8pm on 15/10/93 while PW5 gave the time as 6pm and stated that he informed that he used to close from work daily at 6pm.

He urged that in the light of the above alleged disparity and contradiction this court should reverse the finding by the learned trial Judge. Replying, the learned counsel for the respondent submitted that the trial court rightly relied on the V.I.O’s report on 2nd defendant’s vehicle and acted on same.

He submitted that the PW5 confirmed being the writer of the V.I.O’s report.

There was therefore no contradiction as to his identity as the maker and issuer of the report. It was finally submitted on behalf of the respondent that the evidence of PW 4 & 5 and the respondent on the issue of the V.I.O’s report is more cogent and probable and he urged this court to uphold it.

I have closely studied the proceedings and judgment of the court below. In my view the court had duly considered the evidence adduced before it and the exhibits especially the V.I.O. reports contained in exhibit E before it arrived at its conclusion that the accident occurred as a result of the wrong parking by the 1st appellant and the alleged disparity on the name of PW5 the V.I.O. i.e Moses Uhembe and the name given in the V.I.O’s report as M.E. Kwembe. The trial Judge found thus:

“The central issue in this matter is whether PW5 inspected the two vehicles or not. The report contains the names of PW5 as the person that carried out the inspection in respect of the two vehicles. It is not correct as submitted by Mr. Haruna for the defendants that the report contained different names of a person that examined the vehicles.”

The Court of Appeal is always very reluctant in interfering with finding of facts made by a trial court except where the finding of facts is found to be perverse or is based on wrong principle of law. In this instant case, the court below arrived at its conclusion after it duly considered the evidence adduced before it before concluding that the 1st appellant caused the accident or before relying on the V.I.O’s reports and acting on them as to base its conclusion on same and in holding that the evidence was unchallenged and uncontradicted. In the circumstance the Court of Appeal will not interfere with its finding. See Woluchem vs. Gudi (1981) 5 SC 291; Ebba vs. Ogodo (2000) FWLR (Pt. 27) 2094, (1984) 1 SCNC 372; Olawoake vs. Salawu (2000) 1 NWLR (Pt. 677) 27; NB Plc. vs. Adetoun Oladeji (supra); Sosanya vs. Onadeko (2000) 11 NWLR (Pt. 677) 34. I therefore resolve this 3rd issue in favour of the respondent.

The 4th issue has to do with whether this, as an appeal court, can evaluate the evidence called by either side on the issue of who caused the accident of 15/10/93 in order to resolve the issue which the learned trial Judge failed to do. I think this is an elementary issue. This court though an appeal court is in same position as trial court and has the power to evaluate evidence adduced during a proceeding in the lower court where the latter fails to properly evaluate or wrongly evaluated the evidence adduced before it. See Odubeko vs. Fowler (1993) 9 SCNJ (Pt.11) 185 at 198. I have partially dealt with this issue when treating the 3rd issue for determination and held that the lower court had properly evaluated the evidence adduced before it by the parties relating to the issue of the party that caused the accident of 15/10/93. It duly considered, assessed and evaluated the evidence adduced by the parties especially on the V.I.O’s reports, evidence of injuries sustained by the plaintiff and the manner the vehicle of 2nd appellant (defendant) was parked by the 1st appellant (defendant). That being the case this as an Appeal Court has no justification in disturbing the finding of the lower court in that regard.

The 5th issue is not dissimilar with the penultimate issue I dealt with above especially with regard to the power of an appellate court in the evaluation of evidence adduced before a trial court which the said trial court failed to evaluate or wrongly evaluated. This does not differ with the case of counter-claim too. But then a counter-claim is a distinct claim in itself. Evidence must also be led by the counter-claimant to credibly prove the claims made. A counter-claimant cannot just rely on the evidence of a claimant in order to prove his counter-claim or rely on the weakness of a claimant’s case as proof of his counter-claim. Evidence must be led to prove such counter-claim in order to succeed. The fact that a claimant fails to prove his claim does not automatically make a counter-claim succeed.

Admittedly, the learned trial Judge ought to have specifically considered in his judgment, the counter-claim made by the appellants. But then that notwithstanding, it cannot be said that the trial Judge did not consider the evidence adduced by the counter-claimants. The trial Judge after considering the entire evidence arrived at the conclusion that the accident was caused by the 1st appellant who wrongly parked his vehicle “right on the lane and started trying to repair the lights that had suddenly gone out”. The trial court after giving due consideration to the evidence adduced before it concluded as follows:-

“The court does not agree with the 1st defendant that he parked well as he has claimed. ... The court is therefore convinced that it was the wrong parking of the 1st defendant and absence of lights from his vehicle that gave use to the accident.”

Perhaps it was because of the above finding of facts by the trial court that made it reach the following conclusion:

“As the court is convinced that this accident was caused by the act of the 1st defendant the counter-claim is dismissed for lack of merit.”

Thus having held that the accident was caused by the 1st appellant due to his wrong parking, after duly evaluating the evidence adduced by both parties, it impliedly means that the evidence adduced by the appellants in defence of the action (or claim) by the respondent and to establish their counter-claim was rejected. It also means that the court was convinced by the evidence adduced by the respondent and it believed it and as a result held that the respondent proved his case upon the preponderance standard.

The trial court also did not see merit in the counter-claim and therefore rejected it. As I said above, this as an appeal court ought not interfere with the finding of the lower court since there is no reason to believe that it was perverse or based on wrong evaluation of evidence at its disposal. This court will therefore not interfere with such finding. This issue is also resolved against the appellants.

In the result this appeal succeeds in part. The award of the sum of N160,000.00 as special damages by the lower court is hereby set aside. But the general damages awarded by the lower court i.e. N30,000.00k as loss of use of appellants’ vehicle and N10,000.00k for pain and injury is affirmed.

No cost is awarded so each party should bear its own costs.

**MUKHTAR, JCA:**

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Sanusi, JCA. I am satisfied that the appeal deserves to succeed in part. In this wise, I am in full agreement with the reasoning of my learned brother and the conclusion reached. I also abide by the consequential orders made in the lead judgment.

**NZEAKO, JCA:**

I agree with the judgment of my learned brother Sanusi, JCA, that this appeal succeeds in part. In particular, even in terms of the findings of the learned trial Judge himself in his judgment, it is without equivocation the position that the respondent who was the plaintiff in the court below, failed to strictly prove his claim for special damages as required by law. This is with respect to the cost of repair to the damaged vehicle.

The learned trial Judge had stated as follows:-

“On cost of repair, it is a fact that rather than tender receipts, for the repairs he pleaded, the plaintiff tendered estimates made by PW3 ... rejected as it did not agree with what was pleaded.

This however does not render the evidence of plaintiff and its mechanic in the cost of repairs ... unless. PW3 ... gave the estimated costs of repairs of the car to be N263,750.00.

Plaintiff testified that cost of repair was N261,000.00. The mechanic who is PW3 inspected the vehicle and the cost of repairs. He is an expert in his field. The court is of the view that the evidence of PW3 on the estimated cost of repair has established the cost of repair of the vehicle. It cannot be said that it was not established by the plaintiff. ... It was after proper examination that PW3 came out with the estimate of N263,750.00. It was however an estimate.... As estimate can be more or less, the court prefers to make it less in this case.

The court will award the plaintiff the cost of repairs of his car at N160,000.00.” (Italics mine).

With profound respect to the learned trial Judge, the language of the above excerpts from his judgment is just equivocating, not addressing the facts in the language of the law and justice. The court’s own findings which show so clearly that the plaintiff did not prove his claim for special damages strictly, ought to have caused him to dismiss that aspect of the claim, not to equivocate and to award N160,000.00, based on no evidence before him or the pleadings of the plaintiff.

I would emphasise that the award of special damages is not based on the discretion of the trial Judge but evidence before him strictly proving the plaintiff’s entitlement to the award. Special damages are not at large like general damages which is often said to be at the discretion of the trial court. Special damage are precuniary losses which have crystalised in terms of cash and value, before trial. See Ijebu-ode LG vs. Balogun (1991) 1 NWLR (Pt. 166) 136 or (1991) SCNJ 1.

From the evidence on record upon which the learned trial Judge in this matter made his findings (supra) no special sum of money in terms of the plaintiff’s claim seems to have crystalised. This head of claim ought to be dismissed and I dismiss it.

I am also in agreement with my learned brother with regard to the rest of his decision in the lead judgment. This appeal succeeds in part in favour of the appellant and in part for the respondent. I also make no order as to costs.

Appeal allowed in part