Judgment 44, 1954

No. 30 of 1952.

In the Privy Council

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (NIGERIAN SESSION).

BETWEEN

THE UNITED AFRICA COMPANY LIMITED (Plaintiffs) . . . . . *Appellants*

AND

SAKA OWOADE (Defendant) . . . . *Respondent.*

Case for the Appellants.

RECORD.

1. These are two appeals. The first is an appeal from a judgment of the West African Court of Appeal dated 15th May 1951 allowing an appeal by the Respondent from a judgment of the Supreme Court of Nigeria (Judicial Division of Lagos) dated 30th March 1950 in favour of the Appellants for £4,732 13s. 4d. The West African Court of Appeal gave judgment for the Respondent. The second appeal is an appeal from an order of the West African Court of Appeal dated 19th November 1951 refusing the Appellants final leave to appeal to Her Majesty in Council from the judgment of 15th May 1951. Special Leave to appeal to Her Majesty in Council against both the judgment and the Order was granted by Her Majesty at a Council held on the 9th April 1952.

2. The facts leading up to this litigation are comparatively simple. The Appellants are General Merchants in Lagos and elsewhere in West Africa. The Respondent owns lorries and is a transport contractor. In February 1948 the Respondent came to the Appellant's premises and saw certain of their employees and solicited employment to carry goods from Lagos to their branches up country. He introduced to the Appellants' employees two men whom he said were his driver and clerk and stated that when the Appellants had goods for him to carry they should give them to the driver and clerk. The clerk in question attended at the Appellants' premises on two occasions in March and April 1948 and on each occasion was given certain goods namely, cigarettes and brandy the total value of which was £4,777 9s. 4d. for carriage to two branches up country. The goods were never delivered to the two branches up country and the lorry driver and clerk were subsequently convicted of stealing them.

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pp. 4 and 5.

pp. 4 and 5.

p. 1. p. 2. p. 3. p. 3. pp. 3 and 4.

3. The Appellants issued their writ on the 2nd March 1949 claiming £4,777 9s. 4d. the value of the goods. The Statement of Claim was delivered on the 11th April 1949 and the Defence on the 22nd April 1949. The case came on for hearing on the 27th February 1950. The Appellants' Counsel in opening the case said that the Appellants put their case in two alternate ways, first they said that the Respondent was a common carrier who had failed to deliver the goods and secondly they said that he was liable on the basis of *respondeat superior*. This phrase was used both by Counsel and by the Trial Judge as covering a conversion or detention of the goods by the Respondent's servants acting in the course of their employment and for which it was claimed by the Appellants that the Respondent was liable. The Appellants called two witnesses who established the facts as set out in paragraph 2 above. The Case was then adjourned to the 14th March. When the hearing was resumed Counsel for the Respondent elected to call no evidence and submitted that he had no case to answer since the Appellants had not proved that the Respondent was a common carrier and he alleged that no other case was open to the Appellants on the pleadings. The Trial Judge Mr. Justice Reece reserved judgment and his reserved judgment was given on the 30th March 1950. The Judge held that the goods had been delivered to the Respondent's servants in the course of their employment and stolen by them in such capacity, and gave judgment for the Appellants for £4,732 13s. 4d. There is nothing in the judgment to show why this figure was substituted for £4,777 9s. 4d. but it appears probable that this was due to some oversight. Upon the question of the pleadings the Judge said that the pleadings should contain and contain only the material facts relied upon and not contentions of law and that the Statement of Claim did contain allegations of the facts material to their alternate case for conversion.

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4. The Respondent appealed to the Court of Appeal and the case was heard on the 15th May 1951 by Sir John Verity the Chief Justice, Mr. Justice Lewey and Mr. Justice De Comarmond. The Court of Appeal held that the form of the pleadings was such that the Appellants were only entitled to rely upon non-delivery by a common carrier and that as they had not proved that the Respondent was a common carrier their case must fail. The Court of Appeal therefore gave judgment for the Respondent.

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5. As the sum involved exceeded £500 the Appellants were entitled, under the provisions of the relevant Order in Council, to appeal to Her Majesty in Council subject to fulfilment of certain conditions one of which was the provision of such security for the Respondent's costs as should be fixed by the Court of Appeal. The Court of Appeal on the 2nd July 1951 fixed the security at £500 and also ordered the Appellants to pay £50 into Court to cover the costs of the preparation of the record. Pursuant to this order the Appellants, within the time stated in the Order of the Court of Appeal, paid into Court to the credit of the Appeal the sum of £550. The relevant portion of the Order of the Court of Appeal giving conditional leave to appeal was in the following terms :—

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" It is ordered that conditional leave to appeal in the above " matter to His Majesty s Privy Council be granted to the United " Africa Company Limited the Plaintiffs/Appellants upon fulfilment " in three months from the date hereof of the following conditions."

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"(A) that the Plaintiffs/Appellants the United Africa "Company Limited do deposit in Court the sum of £50 for the "preparation of the record of Appeal and for the despatch "thereof to His Majesty's Privy Council.

"(B) that the Plaintiffs/Appellants the United Africa "Company Limited do enter into good and sufficient security to "the satisfaction of the Court in the sum of £500 for the due "prosecution of the appeal and the payment of all such costs "as may become payable to Saka Owoade the Defendant/ "Respondent . . ."

The Respondent took the point that paragraph (B) of the Order could only be fulfilled by the provision of a bond and that payment of the sum of money mentioned, namely, £500 into Court was not a compliance with the Order.

This matter came before the Court of Appeal and the judgment of the Court was given on the 19th November 1951 by Mr. Justice Jibowu. p. 23. The judgment was that the payment into Court was not a compliance with the Order and the Court of Appeal therefore refused leave to appeal to Her Majesty in Council.

6. The Appellants petitioned for Special Leave to appeal to Her Majesty in Council against both the substantive judgment of the 15th May 1951 and also against the Order of the 19th November 1951 refusing leave to appeal from the said judgment. On the 9th April 1952 the Appellants p. 26. were granted special leave to appeal to Her Majesty in Council against both judgment and order.

7. As the substantive appeal turns almost entirely upon the form of the pleading it would appear necessary to set them out in full. They are as follows :—

"No. 1.

"Suit No. 51/49.

"CIVIL SUMMONS.

"Between

"THE UNITED AFRICA CO. LTD. . . Plaintiff

"and

"SAKA OWOADE . . . . . Defendant.

"To Saka Owoade of Alade Street, Isale Ijebu, Ibadan, or "c/o John Holt & Co. Ltd., Ibadan (Produce Department).

"Your are hereby commanded in His Majesty's name to attend "this Court at Tinubu Square, Lagos, on Monday the 28th day of "March, 1949, at 9 o'clock in the forenoon to answer a suit by "The United African Co. Ltd., of c/o Messrs. Irving & Bonnar, "Barclays Bank Chambers, Lagos, against you.

"The Plaintiff's claim against the Defendant is in the sum "of £4,777 9s. 4d., whereof £4,732 13s. 4d. is value of 40 cases

" of Guinea Gold Cigarettes and £44 16s. is cost of 4 cases of Jules " Charrent Brandy delivered and accepted by the Defendant's " clerk and Lorry Driver on behalf of the Defendant on or about " 15th March, 1948, and 13th April, 1948, as common carriers for " transporting to the Plaintiffs' Station at Ilorin which he has " failed to deliver.

" Issued at Lagos the 2nd day of March, 1949

	£	s	d.
" Summons	25	0	0
" Service		5	6
	£25	5	6

" (Sgd.) FRANCIS H. BAKER,
" Senior Puisne Judge.

" TAKE NOTICE : That if you fail to attend at the hearing " of the suit or at any continuation or adjournment thereof, the " Court may allow the Plaintiff to proceed to judgment and " execution."

" No. 2

" STATEMENT OF CLAIM

" STATEMENT OF CLAIM.

" 1. The Plaintiffs are a limited liability Company carrying " on the business inter alia of wholesale suppliers of goods in Lagos " and elsewhere. The Defendant is a Produce Assistant to " Messrs. John Holt & Co. Ltd. in Ibadan, and also owns lorries " and carries on a road transport business as a common carrier.

" 2. In February, 1948, the Defendant introduced his clerk " and a lorry driver to the clerk to the Plaintiffs who deals with " despatch of goods up country and also introduced the said clerk " and lorry driver to the Plaintiffs' storekeeper. The Defendant " requested at the same time that the Plaintiffs should entrust " him with freight of their goods to stations up country.

" 3. In March, 1948, the Plaintiffs entrusted goods to the " value of £4,777 9s. 4d. to the clerk to the Defendant for carriage " and delivery to places up country.

" 4. The said goods were never delivered to their destinations " and the said clerk and lorry driver to the Defendant were later " convicted of the theft of the said goods.

" 5. The Defendant is liable as a common carrier to make good " to the Plaintiffs the value of the said goods but has failed to do so.

" Whereof the Plaintiffs claim as per writ of Summons.

" Dated at Lagos this 11th day of April, 1949.

" (Sgd.) IRVING & BONNAR,
" Plaintiffs' Solicitors."

" No. 3.

" DEFENCE

" STATEMENT OF DEFENCE

" 1. The Defenant denies paragraphs 2, 3, 4 and 5 of the " Plaintiffs' Statement of Claim and puts the said Plaintiffs to their " very strict proof.

" 2. The Defendant admits paragraph 1 of the Plaintiffs' " Statement of Claim save and except the averment that he is a " common carrier which he denies and puts the said Plaintiffs " to their strict proof.

" 3. The Defendant says that the person alleged to be his " Clerk in paragraph 3 was not and has never been his Clerk is " one who touts for passengers and loads to be carried to certain " places and is no way an Agent of the Defendant.

" 4. The Defendant became aware of paragraph 4 after the " prosecution of his driver and the said tout Simeon Dejo.

" 5. The Defendant avers that he is not a common carrier.

" 6. The Defendant says that his driver did not have the said " Defendant's consent before the said goods of the Plaintiffs were " entrusted to him, nor was it done with this knowledge.

" Dated at Lagos this 22nd day of April, 1949.

" (Sgd.) JOHN TAYLOR.
" Defendant's Solicitor."

8. The Court of Appeal in their judgment said that the Writ did not comply with the provisions of Order 2 rule 2 of the Supreme Court (Civil Procedural) Rules which laid down that a Writ of Summons should state briefly and clearly the subject matter of the claim and the relief sought for. It is submitted that the Writ did do both these things since it was clearly shown that the Appellants complaint was that they had entrusted goods to the value of £4,777 9s. 4d. to the Respondent's servants and that they had never been delivered and it is also showed the relief claimed namely judgment for the value of the goods. However even if this were not so it is submitted that any defect in this respect was cured by the Statement of Claim. p. 19.

9. So far as the Statement of Claim is concerned it is submitted that the Trial Judge was correct in stating that the pleadings need only state facts and not contentions of law. It is submitted that paragraphs 2 and 3 contain all the allegations of fact necessary to establish that the goods were delivered to the Respondent's servants acting in the course of their employment for delivery to the Appellants' premises up country. In paragraph 4 it is stated that the goods were never delivered to their destination and the clerk and lorry driver of the Respondent were later convicted of the theft of the said goods. It is true that an English pleader would presumably plead that the goods had been converted or stolen by the Defendant's servants rather than using the phrase that the Defendant's p. 11.

servants had been convicted. It is however submitted that no one can have been in any doubt but that it was being alleged the Defendant's servants stole the goods and the course taken at the trial shows this. In any event it is submitted that when goods are delivered to a bailee and they are for delivery at a certain place and he does not deliver them that in itself constitutes a conversion or detention of the goods. The non-delivery is clearly alleged in paragraph 4 of the Statement of Claim. Paragraph 5 of the Statement of Claim does aver that the Respondent is liable as a common carrier but as the Trial Judge pointed out this was really an unnecessary averment since it is not necessary in a pleading to plead conclusions of law but only the facts relied upon and it is then for the Court to determine whether or not the Defendant is liable. In the judgment of the Court of Appeal it was suggested that this pleading did not comply with Order 22 rule 8 of the Civil Procedure Rules the material part of which reads :—

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> " Where the Plaintiff seeks relief in respect of several distinct " claims or causes of complaint founded upon separate and distinct " facts they shall be stated as far as may be separately and " distinctly."

It is respectfully submitted that the alternate cases submitted on behalf of the Appellants at the trial were not founded on separate distinct facts. The facts were the same namely that the goods had been delivered to the Respondent's servants acting in the course of their employment and had not been delivered but had been stolen by the said servants acting in the course of their employment. If the Respondent were a common carrier then he would be liable for the non-delivery unless he could establish one of the very few excuses available to a common carrier such as Act of God. If he were not a common carrier he could of course escape liability by showing that the goods were lost without any fault on his part. The distinction between the case as against a common carrier and as against an ordinary carrier lay not so much in the facts to be established by the Plaintiffs but the defences open to the Respondent. In any case paragraph 4 of the Statement of Claim did set out separately the alleged theft of the goods which was not necessary to be established in the case relating to a common carrier but was a material factor in a case of conversion or detinue. It is submitted therefore that in so far as the facts were separate and distinct they were set out separately and distinctly. In any case it is submitted that there could be no possible doubt as to the case being made.

10. The defence is an ambiguous document. In paragraph 1 the Respondent denies paragraphs 2, 3, 4 and 5 of the Statement of Claim and puts the Plaintiffs to their very strict proof. In paragraph 4 however the Respondent says " the Defendant became aware of paragraph 4 (of the " Statement of Claim) after the prosecution of his driver and the said tout " Simeon Dejo." This is not introduced by any words such as further or in the alternative and is therefore an admission of the facts in paragraph 4 namely that the goods were never delivered to their destination and that the clerk and lorry driver were convicted of the theft of the goods. If there is both a denial (in paragraph 1) and an admission in paragraph 4 to the Defence the Appellants were surely entitled to think that the latter

paragraph was the operative part and that the Respondent was in fact admitting the non-delivery and the theft. It is submitted that the real defences raised by the Defence were first that raised in paragraph 5, namely, that the Respondent averred that he was not a common carrier and second that raised in paragraphs 3 and 6 that the clerk and lorry driver were not his authorised agents.

11. So far as the facts of the case are concerned the Trial Judge dealt with these at some length but his findings are summarised in five lines towards the end of his judgment in these words :—

" In the case before the Court the clerk and driver were p. 13, l. 17.
" authorised by the Defendant to accept goods for carriage to the
" provinces for they were introduced by the Defendant to the store-
" keeper. The goods were delivered to Simeon Dejoh as the
" Defendant's representative and he took the goods purporting to
" transport them to Ilorin and Oshogbo but stole them. On the
" evidence I am satisfied that Simeon Dejoh and the driver were
" acting within the scope of their authority when Dejoh signed the
" way bills for the goods and had them delivered to the lorry.
" Guided by the decision in *Lloyd* v. *Grace Smith and Company* I
" enter judgment for the Plaintiff for the amount claimed in the
" writ, viz. £4,732 13s. 4d. and costs."

The Judge had earlier stated that it was common ground between the p. 12, l. 13.
parties that the goods were never delivered to their destination but were stolen and that both Simeon Dejoh and Adebola Amao were prosecuted to a conviction for stealing the aforesaid goods.

12. The Respondent in his Notice of Appeal to the Court of Appeal set out three grounds for the Appeal. The first ground raised the matter p. 14.
argued in the Court below namely whether it was open to the Appellants on their Statement of Claim to succeed without proving that the Respondent was a common carrier and also certain subsidiary points as to evidence. The second and third grounds raised however a point which had never been suggested in the Court below. This point was stated in the following terms in the Notice of Appeal :—

" 2. The learned trial Judge misdirected himself in the
" following passage in his judgment : ' It is common ground
" ' between the parties that the goods were never delivered to their
" ' destination but were stolen and that both Simeon Dejoh and
" ' Adegbola Amao were prosecuted to a conviction for stealing the
" ' aforesaid goods.' "

When paragraph 1 of the Statement of Defence denies such allegations.

" 3. The judgment is against the weight of evidence."

The Appellants objected and took a preliminary objection to the p. 15.
second ground of appeal on the ground that no such point had been taken in the Court below. The preliminary objection was overruled but having p. 16.
regard to the view which they took upon the question of the pleadings the Court of Appeal did not in fact express any view upon the matter in their judgment.

The position as it developed at the trial was as follows : in paragraph 4 of the Statement of Claim it had been alleged that the goods were never delivered to their destinations and the clerk and lorry driver were later convicted of the theft of the said goods. While it is true that this allegation had been denied in paragraph 1 of the Defence yet it was apparently admitted in paragraph 4 of the Defence. At the hearing the first witness Mr. Macfor gave evidence that the clerk and the driver were convicted and he was not cross-examined on that point. The second witness did not therefore refer to this matter but he was asked questions in cross-examination about the evidence he gave at the Criminal Trial with a view apparently to assisting the Respondent's case on the question of agency but not otherwise. When the Respondent's Counsel made his submission of no case he never referred at all to the question as to whether the theft of the goods was established. He relied solely on the point that on the pleadings the Appellants were not entitled to succeed as they had not proved that the Respondent was a common carrier. The Appellants' Counsel in his reply stated *inter alia* that it was common ground that the goods were stolen. According to the Judge's note of the argument this was the last statement but one which the Appellants' Counsel made in his reply and it must therefore have been well in the mind of the Respondent's Counsel when he rose to make his rejoinder. In spite of this there is not a word in the Rejoinder to suggest that the statement made at the bar that it was common ground between the parties that the goods were stolen was not accepted by the Respondent. The Judge in his judgment also stated that it was common ground that the goods had been stolen. The Respondent's Counsel never suggested to the learned Judge that he was under a misapprehension and that this was not common ground. If the Respondent had taken the point in the Court below the Appellants could have applied for leave to call further evidence on this point. As it was however the Respondent's Counsel allowed the matter to proceed upon the basis that everyone understood that it was common ground between both parties that the goods had been stolen and that the only issue was whether that question was open on the pleadings. In these circumstances it is submitted that the Court of Appeal were wrong in over-ruling the objection to this ground of Appeal and that the Respondent should not now be allowed to take a point which was never taken in the Court below.

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It is also material to note that no shorthand note of either evidence or arguments was made and that therefore there may have been direct evidence of the theft as opposed to evidence of the conviction. It is also possible that Counsel for the Respondent may have made a definite admission on this matter. At all events what is clear is that the learned Judge was left under the impression that the Respondent admitted this fact.

In any event it is submitted that even if only the conviction and not the theft was not established there is still evidence of the conversion or detention of the goods. If a carrier received by his duly authorised servants goods for delivery at a named destination and does not deliver them surely that is in itself evidence of conversion and detention which unless explained away by the Defendant entitles the Plaintiff to judgment.

13. Upon the substantive appeal the Appellants submit that the evidence established that the goods had been received by the Respondent's duly authorised agents and had been stolen by them and that the Respondent was responsible for this conversion and further that the goods having been received by the Respondent's duly authorised agents for delivery at two named places and not having been so delivered that is evidence of detention and conversion which can only be displaced by the Respondent giving evidence that the loss occurred without any fault on his part. It is further submitted that the pleadings contained all the allegations of fact necessary to this case and that the Trial Judge was right in giving judgment for the Appellants.

14. The point which arises on the procedure appeal is a very short one. It is submitted that all the Order required the Appellants to do was to enter into good and sufficient security to the satisfaction of the Court in the sum of £500 for the due prosecution of the appeal and the payment of all such costs as might be payable to the Respondent. It is submitted that this does not mean that the security must necessarily be by way of a bond and that there could not be any better security than a payment into Court and as the money was paid into Court and accepted by the Court for the credit of the appeal that constituted a signification by the Court of their satisfaction with the security.

15. The Appellants humbly submit that the judgment of the Supreme Court of Nigeria was right and the judgment of the West African Court of Appeal was wrong for the following amongst other

REASONS

(1) THE evidence establishes that the goods in question were received by and then converted or detained by the Defendant's agents acting in the scope of their authority and that the Respondent is liable for the value of the goods in an action.

(2) HAVING regard to the form of the pleadings and the course taken at the trial it is not open to the Respondent to argue in the higher Courts that there was no evidence of the theft of the goods by the Defendant's clerk and driver.

(3) THAT in any event the evidence established that the goods had been received by the Defendant's duly authorised agents for delivery at two named places and that the goods had never been so delivered and that proof of these facts establishes a *prima facie* case of conversion or detention by the Respondent which case he never displaced and is liable to the Appellants for the value of the goods.

(4) THAT all the material facts necessary to establish a case in detention or conversion were pleaded.

(5) THAT the Trial Judge was right in giving judgment for the Appellants and the Court of Appeal were wrong in reversing that judgment.

(6) THAT the Appellants are entitled to recover for the reasons given in the judgment of the trial judge.

And the Appellants humbly submit that the Order of the West African Court of Appeal of the 19th November 1951 was wrong for the following amongst other reasons

(7) PAYMENT of £500 into Court was a proper compliance with the Order of the 2nd July 1951 and the West African Court of Appeal's order of the 19th November 1951 refusing final leave to appeal was wrong.

T. G. ROCHE.

No. 30 of 1952.

In the Privy Council.

ON APPEAL

from the West African Court of Appeal (Nigerian Session).

THE UNITED AFRICA COMPANY LIMITED
(Plaintiffs) . . *Appellants*

AND

SAKA OWOADE
(Defendant) . *Respondent.*

Case for the Appellants.

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