IN THE COURT OF APPEAL OF NIGERIA

HOLDEN AT IBADAN

ON MONDAY, THE 6TH DAY OF MAY 1991

BEFORE THEIR LORDSHIPS

IBRAHIM KOLAPO SULU-GAMBARI	**JUSTICE COURT OF APPEAL**
YEKINI OLAYIWOLA ADIO	**JUSTICE COURT OF APPEAL**
JUSTIN THOMPSON AKPABIO	**JUSTICE COURT OF APPEAL**

CA/I/49/89

BETWEEN:

I.J. ADENUGA……APPELLANT

And

ILESANMI PRESS & SONS (NIG.) LTD. ……. RESPONDENT

JUDGMENT

(Delivered by **YEKINI OLAYIWOLA ADIO, J.C.A.)**

This was an appeal against the dismissal of the appellant's claim by the trial court. The Court of Appeal unanimously allowed the appeal and remitted the case back to the High Court for determination of quantum of damages

ISSUES:

1.
Was it the appellant or the respondent, on the state of the pleadings, that, in law, had the onus.to prove and establish the nature of the transaction between them?

2.
Whether it was proper and legal for the learned trial Judge to admit Exhibit "H" which was a document not pleaded by any of the parties.

3.
If the answer to the issue raised in (2) above is in the negative, whether the wrongful admission of the said Exhibit "H" affected the decision of the learned trial Judge or occasioned a substantial miscarriage of justice to warrant the judgment being reversed.

4.
Whether the respondent proved, in the manner recognized by law, that the appellant consented to the publication of the said book.

FACTS:

In the High Court, the appellant's claim against the respondent was for:

"(a) N350,000 damages for infringement of Copyright or an inquiry as to damages.

(b) An order for delivery to the plaintiff of all copies of the said book which are in the possession of the defendant, and damages for their detention.

(c) an injunction restraining defendant from reproducing or authorizing the reproduction of the plaintiffs said literary work titled: "West Africa School Certificate Examination Objective chemistry or any substantial part thereof in any material form whatsoever without the consent of the plaintiff."

The appellant testified that in 1977 he submitted the manuscript of the book to the respondent. The page proof was corrected later by him. There was no written agreement between the appellant and the respondent in relation to the publication of the book.

Sometime in 1980 the appellant discovered that the respondent had published the book and copies were being sold to the members of the public. The appellant testified that he did not either orally or in writing vest the respondent with authority to publish the book. He had never received any letter from the respondent since he gave the manuscript to it and had not received any amount as royalty on the book. He identified, under cross-examination, a letter, Exhibit 'H', written by him in which he asked the respondent for royalty. This letter was not pleaded by either of the parties.

The respondent's Chairman/Managing Director testified that the appellant agreed that the respondent should publish the book and that he had never refused to negotiate the royalty with the appellant. He agreed that there was no written agreement between the respondent and the appellant in relation to the publication of the book and that no royalty had been paid to the appellant.

The learned trial Judge dismissed the appellant's claims. He held that the appellant gave his consent to the publication of the book. The trial Judge also held that- it could be inferred from the conduct of the appellant that he gave nonexclusive licence to the respondent to publish the book.

Dissatisfied with the decision, the appellant appealed to the Court of Appeal.

The provisions of sections 5(i), 10(3), 11(1), 19(I)&(2)(a) of the Copyright Law which were considered and construed by the Court of Appeal read as follows: -

"5(1) Subject to the exceptions specified in Schedule 2 to this, Decree, copyright in literary, musical or artistic work or in a cinematography film shall be the exclusive right to control the doing in Nigeria of any of the following acts, namely -

(a) the reproduction in any material form,
(b)the communication to the public, and
© the broadcasting, of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original."

"10(3), No assignment of copyright and no exclusive license to do an act the doing of which is controlled by copyright shall have effect unless it is in writing."

"11(1), Copyright is infringed by any person who, without the license of the owner of the copyright -

(a) does, or causes any other person to do, an act the doing of which is controlled by copyright, or

(b) imports into Nigeria, otherwise than for his private and domestic use, or distributes therein by way of trade, hire or otherwise, or by way of trade exhibits in public, any article in respect of which copyright is infringed under paragraph (a) above.

"19(1) ...'reproduction" means the making of one or more copies of a literary, musical or artistic work, cinematography film or sound recording.

(2)(a) a work shall be deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public."

Held (Unanimously allowing the Appeal):

1. **On Onus of proof in civil cases -**

The onus of proving his case is generally on a plaintiff but the onus of proving particular facts in the case depends on the averments in the pleadings. In civil cases, the onus of proving particular facts is fixed by the pleadings and it does not remain static but shifts from side to side and in the end, the onus is on the person who will fail if such evidence is not adduced. [Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at 84; H.M.S. Ltd v. First Bank (1991) 1 NWLR (Pt.167) 290 referred to.]

2. **On Bindingness of pleadings-**

Parties are bound by their pleadings and matters not pleaded cannot be proved. In this case, the question whether the appellant demanded payment of royalty was not raised in the respondent's statement of defense or averred in the further amended statement of claim. Therefore, the evidence of appellant, under cross-examination, on the question of demand for payment of royalty, and the letter Exhibit "H" relating to it went to no issue. [Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172 referred to.]

3. **On Admissibility of document not pleaded -**

"...the letter, Exhibit "H", was not tendered under or by virtue of the provisions of sections 198, 207 or 209 of the Evidence Act to discredit the appellant or impeach his credit, as the case might be. It was for the purpose of stopping him to assert that he did not demand for payment of royalty. In the circumstance, the respondent had invoked estoppel, and, for that reason, estoppel ought to have been pleaded in the Statement of Defense of the respondent otherwise the letter, Exhibit "H" was not admissible. See African Continental Bank Ltd. v. Gwagwada, (1989) 4 N.W.L.R. (Pt.113) 85. The answer to the question raised under the second issue above is in the negative. It was not proper and/ or legal for the learned trial Judge to admit Exhibit "H" which was a document not pleaded by any of the parties."

4. **On Wrongful admission of evidence -**

Where a matter or document has been improperly received in 1 evidence in the court below, even when no objection has been raised, it is the duty of the Court of Appeal to reject it and decide the case on legal evidence. The appeal court should exclude the inadmissible evidence and deal with the case on the remaining legally admitted evidence. [Owonyin v. Omotosho (1961) 2 SCNLR 57; Ayanwale v. Atanda (1988) 1 NWLR (Pt. 68) 22 referred to]

5. **On Wrongful admission of evidence -**

It is not every slip of a Judge in his Judgement that can warrant the Judgment being upset; for a mistake to warrant such result, it must be substantial in the sense that it affects the decision appealed against [Onojobi v. Olanipekun (1985) 11 S.C. (Pt.2) 156 applied]

6. **On Wrongful admission of evidence -**

Wrongful admission of evidence alone cannot be a reason for reversing a judgment unless without the evidence, which was wrongfully admitted, the Judgment of the court would have been otherwise. [Idundun v. Okumagba (1976) 9-10 S.C.227 followed.]

7. **On Attitude of appellate court to wrongful admission of evidence by the trial court -**

"The implication of the foregoing analysis is that the voluntary submission of the manuscripts of the book by the appellant to the respondent, visits of the appellant to the offices of the respondent, and the correction and signing of each page of the page proof by the appellant were not facts from which it could reasonably be inferred that the appellant consented to the publication of the said book as the learned trial Judge had done. The only other reason for the conclusion of the learned trial Judge that the appellant consented to the publication of the said book was the alleged demand for payment of royalty contained in Exhibit "H". In the circumstance, it can reasonably be said that, but for the wrongful admission of Exhibit "H", the Judgment of the learned trial Judge would have been otherwise. In other words, the admission of the document affected the decision of the learned trial Judge and occasioned a substantial miscarriage of justice."

8. **On Meaning of copyright-**

Copyright is, subject to the exceptions specified in schedule 2 of Act 61 of 1970, in the case of a literary work, the right to control, in Nigeria, the reproduction of it in any material form, the communication of it to the public, and the broadcasting of it.

9. **On Meaning of "reproduction" -**

"Reproduction" is defined in section 19(1) of the Act as the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording.

10. **On What constitutes infringement of copyright -**

Copyright, according to section 11(1) of the Act, would be infringed by any person who, without the license of the owner of the copyright, did or caused any other person to do an act, the doing of which was controlled by copyright. In the instant care, the respondent by publishing the book and selling copies of it to the members of the public infringed the copyright of the appellant in the book, unless it could show that it had the license of the appellant.

11. **On Consent to publication under Copyright Law -**

By virtue of the Copyright Act No. 61 of 1970, applicable at the time the cause of action in this case arose, consent of the owner of a copyright to the publication of his book may be in an assignment of the copyright or in the granting of an exclusive license or a non-exclusive license.

12. On When a work is deemed published -

A work is deemed, under section 19 (2) (a) of the Copyright Act, to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public.

13. On Need for written agreement as basis for authority to publish a book -

The mere signing of the proof copy of a manuscript could not be a valid and effective substitute for a written agreement that will set out the terms of the transaction for publication such as whether it was an assignment or an exclusive license that was being granted; the reward of the author which could be royalty, or a share of the profits made on the publication and sale of the books.

14. On Whether authority, to print a book amounts to authority to publish same.

"It should be noted, in this connection, that there was evidence before the court that the respondent was not only a publisher it was also a printer. Voluntary submission of a manuscript of a book, visits of the author to the establishment of office of the printer end publisher to which the manuscript was voluntarily submitted, and the correction and signing of each page of the "page proof' were not conclusive evidence that the author of the book had consented to its publication. All the foregoing acts could equally be construed as evidence of the author of the book requesting the printing of the book simpliciter.

Indeed, the evidence of the respondent made it clear that it used to distinguish between request for printing of books and request for publication of it in its dealing with its customers. In the case of printing of manuscripts, certainly the author had to submit the manuscripts to the respondent and had to correct and sign each page of the "page proof' to show that what, he wrote in the manuscripts had been correctly printed. If the book was to be published, the author would in addition to doing everything connected with the printing of the book, be given a written agreement by the respondent to sign. A request by the respondent to the author of the book to sign the agreement and the signing of the agreement by the author distinguish between a transaction relating to printing of the book only and a transaction involving the printing of the book and publication of it."

15. On Exclusive license to publish-

An exclusive license is a license in writing signed by the owner or by the person duly authorized by the owner in that behalf authorizing the grantee to the exclusion of all other persons including the grantor, to exercise the right which by virtue of the copyright Act 1970 would (apart from the license) be exercisable exclusively by the owner of the copyright.

16. On Exclusive license to publish -

Since the respondent in this case averred that it had an exclusive license to publish the book, that onus was on it to lead evidence to establish the averment. An exclusive license, by virtue of section 10 (3) of the Act must be in writing and could not be inferred from conduct as in the case of. non-exclusive license. The failure of the respondent to prove its averment meant that it did not have the exclusive license claimed.

17. On Propriety of court making out a case for a party -

A court should not make for a party a case which the party does not make for himself. [Ajayi v. Texaco (1987) 3 NWLR (Pt.62) 577 at 593; Adebanjo v. Brown (1990) 3 NWLR (Pt.141) 661. Referred.

18. On When appellate court will interfere with trial court's findings-

A court of appellate will intervene and will reverse the findings of a trial court if the finding is unjustified, unreasonable, perverse or has occasioned a substantial miscarriage of justice.

19. On When appellate court will interfere with trial court's findings

The finding of the learned trial judge in this case, was having regard to the pleadings and totality of the evidence, unjustified. His finding should have been that the respondent infringed the copyright of the appellant in the aforesaid book in that the respondent published the said book without having the exclusive license of the appellant which the respondent alleged that it had.

Nigerian Cases Referred to in the Judgment:

A.C.B. Ltd. v. Gwagwada (1989) 4 NWLR (Pt. 113)85

Adebanjo v. Brown (1990) 3 NWLR (Pt.141) 661

Ajayi v. Texaco (Nig.) Ltd. (1987) 3 NWLR (Pt.62) 577

Ayanwale v. Atanda (1988) 1NWLR (Pt.68) 22

H.M.S. Ltd v. First Bank (Nig.) Ltd. (1991) NWLR (Pt.167) 290

Idundun v. Okumagba (1976) 9-10 S.C. 227

Morohunfola v. Kwara College of Tech. (1990) 4NWLR (Pt.145) 506

Nigerian Maritime Services Ltd v. Afolabi (1978) 2 S.C 79,

Ogiamen v. Ogiamen (1967) NMLR 245,

Onojobi v. Olanipekun (1985) 11 S.C. (Pt.2) 156

Oredoyin v. Arowolp (1989) 4 NWLR (Pt. 114) 172

Owonyin v. Omotosho (1961) 2 SCNLR 57

Utih v. Onoyivwe (1991) 1 NWLR (Pt.166) 166

Foreign Case Referred to in the Judgment:

Jacker v. The International Cable Co. Ltd. (1888) 5T.L.R. 13

Nigerian Statutes Referred to in the Judgment:

Copyright Act, 1970, Act No. 61 of 1970, Ss. 5 (1), 10 (3), 11(1) and 19 (1) & (2)

Evidence Act, SS. 198,207 & 209

ADIO, J.C.A. (Delivering the Leading Judgment):

In an action instituted by the appellant against the respondent in the High Court of Oyo State, Ilesha Judicial Division, the appellant's claim was, as stated in paragraph 8 of the further Amended Statement of Claim, as follows: -
"(a) N350,000 damages for infringement of copyright or an inquiry as to damages.
(b)An order for delivery to the plaintiff of all copies of the said book which are in the defendant's possession as aforesaid, and damages for their detention.
(c)An injunction to restrain the defendant by itself or by its agents or servants from reproducing or authorizing the reproduction of the plaintiff's said literary works entitled: -
'WEST AFRICAN SCHOOL CERTIFICATE EXAMINATION, OBJECTIVE CHEMISTRY'

Pleadings were duly filed and exchanged. The appellant told the learned trial Judge that he (appellant) was the author of the book entitled: "WEST AFRICAN SCHOOL CERTIFICATE EXAMINATIONS OBJECTIVE CHEMISTRY". In 1977, he submitted the manuscript of the book to the respondent. The page proof of the manuscript was corrected later by the appellant. There was no written agreement between the appellant and the respondent in relation to the publication of the aforesaid book.

Sometime in 1980, the appellant discovered that the aforesaid book had been published by the respondent and that copies of it were being sold to the members of the public by the respondent and in some bookshops. As a result, the appellant contacted the Managing Director and another functionary of the respondent on the matter. The answers of the Managing Director of the respondent to the appellant's questions in relation to whether the respondent had published the book were evasive. The appellant was able to buy a copy of the book from the Warehouse of the respondent for N3.50k. The receipt, the invoice, the

delivery notes and the copy of the book which was bought by the appellant were Exhibits "B", "C", "D" and "E" respectively. The manuscript of the book which the appellant gave to the respondent was Exhibit "F".

The appellant testified further that he did not, either orally or in writing, vest the respondent with authority to publish the book. He had never received any letter from the respondent since he gave the manuscript to it and had not received any amount as royalty on the book. He made corrections on the pages of the printer's proof copy (Exhibit "J") and he signed them. He identified, under cross-examination, a letter, Exhibit "H", written by him in which he asked the respondent for royalty.

The evidence led by the respondent was that the appellant agreed that the respondent should publish the said book. The respondent's Chairman and Managing Director, who described himself as a printer and publisher, told the lower court that the appellant gave his consent to the publication of the book and that he (the Chairman and Managing Director of the respondent) had never refused to negotiate with the appellant on the question of royalty. He agreed that the respondent published the said book in October 1979. He also agreed that there was no written agreement between the respondent and the appellant in relation to the publication of the book and that no royalty had been paid to the appellant.

The learned trial Judge, after considering the evidence led by both parties and to the submissions of their learned counsel, dismissed the appellant's claim. He held that the appellant gave his consent to the publication of the book. In the view of the learned trial Judge, it could be inferred from the conduct of the appellant that he gave non-exclusive license to the respondent to publish the book. Dissatisfied with the judgment, the appellant has appealed to this court. The notice and one ground of appeal are at pages 53 and 54 of the record of proceedings. The appellant was granted leave to file and argue additional grounds of appeal. The ground of appeal and the additional grounds of appeal, without their particulars, are as follows: -

1. The judgment is against the weight of evidence.

2. The learned trial Judge erred in law when he admitted in evidence Exhibit H and relied on it to find against the plaintiff.

3.The learned trial Judge erred in law when he required the plaintiff to plead and give evidence of the nature of the transaction he had in mind when he submitted the manuscript to the defendant.

4. The learned trial Judge erred in law when he held as follows: - 'If the owner of a copyright has consented to an act which would otherwise be an invasion of his right, there is no infringement. The consent needs no formalities to make it effective and needs no consideration to support it. It can be inferred from the conduct of the Plaintiff in this matter that he had granted a non-exclusive license to the Defendant to publish his book although the plaintiff did not give a nature of license granted.

In the present case, I have no difficulty in concluding that the work Exhibit F was published with the consent of the plaintiff, and I hold so. There was no infringement of his copyright as he fully consented to the publication of his manuscript.'

5. The learned trial Judge erred in law when he dismissed the plaintiff's claim, the defendant having failed to establish that the publication of the works was with the plaintiff's consent in a manner recognizable in law,"

In accordance with the rules of this Court, the. parties filed and exchanged briefs. Four issues for determination were identified in the appellant's brief while three were identified for determination in the respondent's brief. Having regard to all the circumstances of this case, the issues for determination in this appeal are as follows; -

(1) Was it the appellant or the respondent, on the state of the pleadings, that, in law, had the onus to prove and establish the nature of the transaction between them?

(2) Whether it was proper and/or legal for the learned trial Judge to admit Exhibit "H" which was a document not pleaded by any of the parties.

(3) If the answer to the issue raised in (2) above is in the negative, whether the wrongful admission of the said Exhibit "H" affected the decision of the learned trial Judge or occasioned a substantial miscarriage of justice.

(4) Whether the respondent proved, in the manner recognized by law, that the appellant consented to the publication of the said, book.

The learned trial Judge, after pointing out that the main issue or question to be decided in this matter was whether the appellant assigned or licensed the respondent to publish the manuscript found, rightly in my view, that there was no dispute between the parties about the publication of the manuscript by the respondent. He also found, rightly in my view, that there was no dispute that some copies of the said book were sold by the respondent. There was ample evidence before the learned trial Judge to support the foregoing findings. The learned trial Judge then proceeded to determine the party on whom was the onus of proving the kind or nature of the transaction between the parties. That was the question raised under the first issue above. The conclusion of the learned trial Judge was that it was the appellant that had the burden. The learned trial Judge said, inter alia, as follows: -

"In the instant case, the plaintiff did not plead what kind of transaction he had in mind when he submitted his manuscript to the defendant. He admitted that he voluntarily submitted the manuscript to the defendant.

Did he want to grant an exclusive license? Or did he intend to assign his copyright to the defendant? Or further did he intend to grant a non-exclusive license? The plaintiff had not given any evidence as regards any kind of license or an assignment which he intended to grant to the defendant when he submitted the manuscript to it."

The submission in the appellant's brief was that the learned trial Judge erred in law when he held, in this connection, that the onus was on the appellant to prove the nature of the

transaction which he had in mind when he submitted the manuscript to the respondent. After referring to sections 136 and 138 of the Evidence Act, it was submitted that the initial burden on the appellant was to adduce evidence which, prima facie, showed that the publication of the appellant's book by the respondent was without authority and that the appellant discharged the burden. It was further submitted that the appellant, having discharged the aforesaid initial burden, the onus was then on the respondent to show that the publication of the book by the respondent was with the appellant's authority. The submission in the respondent's brief was that if the appellant had intended to grant exclusive license to the respondent, the appellant should have pleaded it and having not pleaded it, the learned trial Judge was right in the view which he expressed on the matter.

The learned trial Judge noted (in lines 29 to 31 of page 44 of the record of proceedings) in his judgment that the appellant pleaded that the respondent had infringed his copyright by publishing his manuscript without his consent. If that was so, the determination of the burden of proving the nature of the transaction would then depend on what the respondent averred in its pleading in answer or response to the allegation in the appellant's Further Amended Statement of Claim that the publication of the book was without the appellant's consent. The onus of proving his case generally is on a plaintiff but the onus of proving particular facts in the case depends on the averments in the pleadings. In civil cases, the onus of proving particular facts is fixed by pleadings and it does not remain static but shifts from side to side and in the end the onus of adducing further evidence is on the person who will fail if such evidence is not adduced. See Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at 84 and H.M.S. Ltd. v. First Bank (1991) 1 NWLR (Pt.167) 290. The respondent's reaction or response to the averment in the appellant's Further Amended Statement of Claim that the respondent infringed his (appellant's) copyright by publishing the aforesaid book without his consent, was reflected in paragraph 13 of the Statement of Defense in which the respondent averred as follows: -

"13. The defendant avers that the authority to publish the book is only vested in the company and no other party and this is so printed in the book."

The learned trial Judge gave consideration to the question of the circumstances in which one person might have authority to publish the book written by another person without infringing the copyright of that other person and rightly came to the conclusion that it could be as a result of an assignment of the copyright or granting of an exclusive or non-exclusive license by the owner of the copyright to the publisher under the Copyright Act, 1970. In the present case, there was no assignment of the copyright in the said book. There is no doubt that the respondent averred in paragraph 13 of the Statement of Defense not only that it had the. authority of the appellant to publish the book but also that the aforesaid authority which it had was exclusive which was in effect an exclusive license since the aforesaid authority which the respondent allegedly had made it the only party that could publish the book. In the circumstance, the averment in paragraph 13 of the Statement of Defense disclosed the nature of the alleged transaction, which according to the respondent, was between the appellant and the respondent. He who asserts something has the burden of proving it. The appellant having adduced evidence that he; was the author of the book in question; that the respondent published it; and that the publication was without his consent or authority, the onus was on the respondent who alleged that it had an exclusive license to publish it to prove it. It was, therefore, wrong for the learned trial Judge to hold that the onus was on the

appellant to aver in his Further Amended Statement of Claim the nature of the transaction that he (appellant) intended when he submitted the manuscript to the respondent. It should be noted here that the respondent was a printer and also a publisher. Therefore, it will be shown, at the appropriate stage in this judgment, that submission of manuscripts by an author to the respondent, and the correction and signing of the printer's proof were not conclusive evidence on the question whether the author authorized publication of the book; the whole exercise could relate to the printing of the book and no more.

The question raised under the second issue above is whether it was proper and/or legal for the learned trial Judge to admit Exhibit "H" which was a document not pleaded by any of the parties. The argument in the appellant's brief was that the question whether the appellant ever demanded payment of royalty or the letter in which such demand was made was not pleaded and since the letter was not used under sections 208 and 209 of the Evidence Act, the learned trial Judge was wrong to admit it. The contention of the respondent in its brief was that the admission of the letter was supported by sections 198 and 208 of the Evidence Act. Part of the record of proceedings which showed the circumstances in which the letter was admitted as Exhibit "H" was as follows: -

"Cross-examination by Chief Ogedengbe: I cannot remember whether I had ever asked the defendant for royalty. If I see my letter of demand,

I will recognize it. The letter shown to me was written by me. Tendered. No objection. Admitted and marked Exhibit "H".

The question whether the appellant demanded for payment of royalty was not raised in the respondent's Statement of Defense or averred in the Further Amended Statement of Claim. Parties are bound by their pleadings and matters not pleaded cannot be proved. See Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172.

It is necessary to limit the parties to a suit to the issues raised in their pleadings and evidence given on any matter not pleaded should be ignored. See Morohunfola v. Kwara College of Technology (1990) 4 NWLR (Pt. 145) 506. Matters not pleaded are extraneous matters, the consideration of which is not permissible. See Ogiamien v Ogiamien (1967) NMLR 245 at 248 and 249. On the foregoing grounds alone, the evidence of the appellant, under cross-examination, on the question of demand for payment of royalty and the letter, Exhibit "H", relating to it went to no issue and should be ignored.

The foregoing is not the end of the matter. The part of the record of proceedings in relation to the issue quoted above showed clearly that the letter, Exhibit "H", was not tendered under or by virtue of the provisions of sections 198,

207 or 209 of the Evidence Act to discredit the appellant or impeach his credit, as the case might be. It was for the purpose of stopping him to assert that he did not demand for payment of royalty. In the circumstance, the respondent had invoked estoppel, and, for that reason, estoppel ought to have been pleaded in the Statement of Defense of the respondent otherwise the letter, Exhibit "H" was riot admissible.

See, African Continental Bank Ltd. v. Gwagwada (1989) 4 NWLR (Pt. 113)85. The answer to the question raised under the second issue above is in the negative. It was no proper and/or legal for the learned trial Judge to admit Exhibit "H" which was a document not pleaded by any of the parties.

I now come to the question raised under the third issue. The position was that the document, Exhibit "H", was admitted and the learned trial Judge made use of its contents in concluding on the question of whether the respondent published the said book with the consent of the appellant. The learned trial Judge stated, inter alia, in his judgment: -

"In any event, it is for the plaintiff to prove that the defendant published the book without authority. The evidence before me showed that the plaintiff submitted the manuscript (Exhibit F) to the defendant voluntarily and that the plaintiff signed the pages of the 'proof copy' made from the manuscript. See Exhibit J. There is also uncontroverted evidence from the 1st and 2nd defendant's witnesses that throughout the period of publication, the plaintiff visited their workshop several times. I believe and accept this evidence. Furthermore, when the plaintiff got to know that his manuscript had been published as a book, he wrote to the defendant (after paying him at least a visit on the 20th of July 1982 to demand his royalty. See Exhibit 'H' written on the 20th of September 1982 All these irresistibly point to the conclusion that the plaintiff gave the defendant his consent to publish the book if the copyright which he said the defendant infringed was that granted under an exclusive license, he has not proved his case as a contract can be inferred from several documents. Exhibit J, the page proof was signed by the plaintiff, and he also wrote Exhibit H to demand for royalty.

I hold that a contract can be inferred from the fact that the plaintiff signed the 'page proof and also asked for his royalty through the letter Exhibit H." Italics mine.

The submission in the appellant's brief was that the learned trial Judge relied on the letter, Exhibit "H", in making the finding that the publication of the book was with the appellant's consent. The respondent's submission was that as there was no objection to its admissibility when the said letter was tendered, the learned trial Judge properly made use of it in arriving at his decision. Alternatively, it was submitted that if the admission of the said document was wrongful this court should not reverse the decision of the learned trial Judge as it could not reasonably be said that the document affected the decision of the learned trial Judge. If, as has been held in this appeal, the letter, Exhibit "H", was wrongfully admitted, an appellate court should decide the case on legal evidence alone. This is because where a matter or document has been improperly received in evidence in the court below, even when no objection has been raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence. See Jacker v. The International Cable Co. (Ltd.) (1885) 5 TLR 13 cited with approval in Owonyin v. Omotosho (1961) 1 All NLR 304 at 308, (1961) 2 SCNLR 57. The appeal court should exclude the inadmissible evidence and deal with the case on the remaining legally admitted evidence. See Ayanwale v. Atanda (1988) 1 NWLR (Pt.68) 22. The foregoing is what this court may, subject the conclusion which may be reached on other issue(s) to be considered, do.

The next question for consideration is whether the decision of the learned trial Judge could be reversed because of his wrongful admission of the letter, Exhibit "H", alone. It is not every slip of a Judge in his judgment that can warrant the judgment being upset; for a mistake to

warrant such result, it must be substantial in the sense that it affects the decision appealed against. See Onojobi v. Olanipekun (1985) 11 S.C. (Pt.2) 156. Wrongful admission of evidence alone cannot be a reason for reversing a judgment unless without the evidence which was wrongfully admitted the judgment of the court would have been otherwise. See Idundun v. Okumagba (1976) 9-10 S.C. 227. In other words, the question is whether, in this case, the wrongful admission of the document must have occasioned a substantial miscarriage of justice. There was no doubt that one of the reasons for the learned trial Judge concluding that the appellant consented to the publication of the said book was the alleged demand for payment of royalty made in Exhibit; "H". That is very obvious from the extract of the judgment of the learned trial Judge quoted above. Other reasons include:

(a) the voluntary submission of the manuscripts of the book by the appellant to the respondent.
(b)visits of the appellant to the office or establishment of the respondent; and correction and signing by the appellant of each page of the 'page proof'.

The submission in the appellant's brief was that it could not reasonably be inferred that the appellant consented to the publication of the said book merely because the appellant voluntarily submitted the manuscripts of the book to the respondent, visited the office of the respondent several times, and correction and signing of each page of the "page proof' by the appellant. The respondent's submission was that the foregoing other things could reasonably lead to the irresistible conclusion that the appellant gave his consent to the publication of the book. It should be noted, in this connection, that there was evidence before the court that the respondent was not only a publisher, it was also a printer. Voluntary submission of a manuscript of a book, visits of the author to the establishment or office of the printer and publisher to which the manuscript was voluntarily submitted, and the correction and signing of each page of the "page proof" were not conclusive evidence that the author of the book had consented to its publication. All the foregoing acts could equally be construed as evidence of the author of the book requesting the printing of the book simpliciter. Indeed, the evidence of the respondent made it clear that it used to distinguish between request for printing of books and request for publication of it in its dealing with its customers. In the case of printing manuscripts, certainly the author had to submit the manuscripts to the respondent and had to correct and sign each page of the "page proof" to show that what he wrote in the manuscripts had been correctly printed. If the book was to be published, the author would, in addition to doing everything connected with the printing of the book, be given a written agreement by the respondent to sign. A request by the respondent to the author of the book to sign the agreement and the signing of the agreement by the author distinguish between a transaction relating to printing of the book only and a transaction involving the printing of the book and publication of it. The Chairman and Managing Director of the respondent, 1st D.W., stated, at P.33 of the record of proceedings, inter alia, as follows

"It is the policy of my company that an author should sign proof copy to signify that what he wrote in the manuscript has been correctly printed in the page proof."

The witness attempted to qualify the foregoing clear and unambiguous statement by saying that it was not necessary on all occasions to have a written agreement in addition to the proof copy. Certainly, merely signing the proof copy could not be a valid and effective substitute for a written agreement that will set out the terms of the transaction for publication,

for examples, there are such things as whether it was an assignment or an exclusive license that was being granted; the reward of the author which could be royalty or a share of the profits made on the publication and sale of the books. In any case, what the Managing Director and Chairman of the respondent said, under cross-examination, where publication of a book by the respondent was contemplated was, inter alia, as follows: -

"I have entered into written contracts with authors before. When we print and we want to market, we send our agreement to the author to sign. We always first agree with the author to publish before we send the agreement after printing."

The implication of the foregoing analysis is that the voluntary submission of the manuscripts of the book by the appellant to the respondent, visits of the appellant to the offices of the respondent, and the correction and signing of each page of the page proof by the appellant were not facts from which it could reasonably be inferred that the appellant consented to the publication of the said book as the learned trial Judge had done. The only other reason for the conclusion of the learned trial Judge that the appellant consented to the publication of the said book was the alleged demand for payment of royalty contained in Exhibit "H". In the circumstance, it can reasonably be said that, but for the wrongful admission of Exhibit "H", the judgment of the learned trial Judge would have been otherwise. In other words, the admission of the document affected the decision of the learned trial Judge and occasioned a substantial miscarriage of justice.

The question which then arises is whether the respondent proved, in the manner recognized by law, that the appellant consented to the publication of the said book. It is, in this connection, that one has to rely only on the legally admissible evidence. The law that was applicable in the present case was the law at the time that the cause of action arose. See Utih v. Onoyivwe (1991) 1 NWLR (Pt.166) 166. That law was the Copyright Act 1970, Act No. 61 of 1970. Consent, under the Act, of the owner of a copyright to the publication of his book may be in an assignment of the copyright or in the granting of an exclusive license or a non-exclusive license. In the present case, there was no question of the assignment of the copyright by the appellant to the respondent. The appellant led evidence that the respondent published the book and copies thereof were being sold to the members of the public. The Chairman and Managing Director of the respondent confirmed that the respondent published the book, sold copies thereof and advertised it in the newspapers for sale. Copyright is, subject to the exceptions specified in Schedule 2 to the Act, in the case of a literary work, the right to control, in Nigeria, the reproduction of it in any material form, the communication of it to the public, and the broadcasting of it. Sections 5(1) of the Act. The word "reproduction" was defined in section 19(1) of the Act as the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording. Copyright, according to section 11(1) of the Act, would be infringed by any person who, without the license of the owner of the copyright, did or caused any other person to do an act the doing of which was controlled by copyright. On the facts of this case, the appellant was the owner of the copyright of the book in question. The respondent by publishing the book and selling copies of it to the members of the public infringed the copyright of the appellant in the book; unless it could show that it had the license of the appellant. A work is deemed, under section 19(2)(a) of the Act, to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public. The respondent claimed in paragraph 13 of the Statement of Defense that it had authority to publish the book.

The averment in the said paragraph was as follows: -

"13. The defendant avers that the authority to publish the book is only vested in the company and no other party and this is so printed in the books."

The foregoing showed-that what the respondent averred that it had was an exclusive license. An exclusive license, having regard to the provisions of the Act, is a license in writing signed by the owner or by the person duly authorized by the owner in that behalf authorizing the grantee, to the exclusion of all other persons, including the grantor, to exercise the right which by virtue of the Copyright. Act, 1970 would (apart from the license) be exercisable exclusively by the owner of the copyright. However, the finding of the learned trial Judge was that the respondent had a non-exclusive license to publish the book and did not, therefore, infringe the copyright of the appellant. The submission in the appellant's brief was that the onus was on the respondent to prove that it had authority to publish the book in the manner recognized by law. It was further submitted that as the license which the respondent alleged that it had was an exclusive license which under section 10(3) of the Act must be in writing, the respondent did not discharge the onus on it and, for that reason, judgment should have been given for the appellant. The submission in the respondent's brief was that the learned trial Judge was in order to infer from the alleged conduct of the appellant that the appellant granted a non-exclusive license to the respondent to publish the book.

As the respondent averred in paragraph 13 of the Statement of Defense that it had was an exclusive authority or exclusive license to publish the book, the onus was on it to lead evidence to establish the averment. An exclusive license, by virtue of section 10(3) of the Act must be in writing and could not be inferred from conduct as in the case of non-exclusive license. The failure of the respondent to prove the averment in paragraph 13 of the Statement of Defense in the manner recognized by law meant that it did not have the exclusive license which it claimed that it had. For that reason, the learned trial Judge should have entered judgment for the appellant. It was an error in law for the learned trial Judge to hold that the respondent had a non-exclusive license to publish the book when what the respondent claimed in its Statement of Defense that it had was an exclusive license. A court should not make for a party a case which the party does not make for himself. See Ajayi v. Texaco Nigeria Ltd. (1987) 3 NWLR (Pt.62) 577 at 593; and Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661, A court of appeal will intervene and will reverse the finding of a trial court if the finding is unjustified, unreasonable, perverse or has occasioned a substantial miscarriage of justice. See Adebanjo's case (supra). The finding of the learned trial Judge was, having regard to all the circumstances of this case including the pleadings and the totality of the evidence before him, unjustified and had occasioned a substantial miscarriage of justice. His finding should have been that the respondent infringed the copyright of the appellant in the aforesaid book in that the respondent published the said book without having the exclusive license of the appellant which the respondent alleged that it had. The aforesaid finding of the learned trial Judge is hereby reversed, and judgment is entered in favour of the appellant accordingly.

In view of the conclusion to which the learned trial Judge came in his judgment, no consideration was given in the judgment to the damages and other reliefs claimed by the

appellant. In other that the overall situation and all the circumstances of the case may be taken into consideration in the assessment of the damages and the determination of the other reliefs claimed by the appellant, this case is remitted t the High Court of Justice, Oyo State, Ilesha Judicial Division, for retrial limited only to the assessment of the damages and the determination of the other reliefs claimed by the appellant.

The sum of N100 is hereby awarded to the appellant as costs in the lower court and the sum of N200 is awarded to him as costs in this court. The order of the lower court for costs is hereby set aside and if the costs had been paid it should be refunded to the appellant.

SULU-GAMBARI, J.C.A.: I have had the privilege of reading in advance the judgment just read by my learned brother, Adio, J.C.A., and I entirely agree with the conclusions reached by him.

I also subscribe to the order of costs as assessed by him.

AKPABIO, J.C.A.: I agree.

Counsel:

O.A. Obiose Esq. - for the Appellant.

E. A. Adelekun Esq. - for the Respondent.