IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA, AD. 2016

CORAM: **ADINYIRA (MRS), JSC. [PRESIDING]**
BAFFOE - BONNIE, JSC.
BENIN, JSC.
AKAMBA , JSC.
APPAU, JSC.

CIVIL APPEAL
NO.J4/3/2016

1ST JUNE 2016

EMMANUEL OSEI AMOAKO - - PLAINTIFF/RESPONDENT/RESPONDENT

VRS

STANDFORD EDWARD OSEI - - DEFENDANT/APPELLANT/APPELLANT

(SUBST. BY BRIDGET OSEI LARTEY & KOFI ASARE)

JUDGMENT

APPAU, JSC:

The appellant herein was the defendant in the trial High Court while the respondent was the plaintiff. They were uterine brothers; appellant being the elder of the two. In this judgment, they would be referred to simply as appellant and respondent respectively.

By a writ of summons filed in the High Court on 18th November 2002, the respondent claimed the following reliefs against the appellant:

a. *Declaration of title to the new Russia and Larteh properties jointly acquired by both parties;*
b. *Declaration of title to two (2) Bedford trucks, one Toyota corolla taxi, one V.W. Beetle and two (2) air-conditioners jointly acquired by both parties;*
c. *An order of accounts into the business called Seico Auto Parts jointly run by both parties from 1985 to 1993;*
d. *An order for the respondent to be given his just share in profits jointly acquired by the two parties including the house at Russia and land at Larteh;*
e. *An order for accounts in the running of the two (2) Bedford trucks and one (1) taxi;*
f. *Compensation for not being able to complete his school as a result of appellant's persuasion;*
g. *Perpetual injunction restraining the appellant from harassing respondent and his family in the Russia house; and*
h. *Any other order that the trial court deemed fit to make.*

Respondent's case

The respondent's case in brief was that in the year 1983 while he was a second-year student at Accra Polytechnic, the appellant who was his elder brother, persuaded him to curtail his schooling and to assist him operate a spare-parts business which he (appellant) had established. Before he stopped schooling, he was staying with their eldest brother called Paul Osei Kumi who was then a tutor at Accra Academy. The appellant too was staying in rented premises with his family. During holidays, he would move to the appellant's shop to assist him. He finally truncated his schooling and joined the appellant to run the business, which appellant started on a table top with the understanding that the business would ultimately belong to the two of them. Later, through his instrumentality, the business was registered in 1985 as an enterprise with the name 'Seico Auto Parts'. Again, they managed to secure a loan from the National Investment Bank with the help of his father in-law who was then a manager at the National Investment Bank to revamp the business.

He claimed further that through their joint efforts, they built the business into a successful business enterprise. They made a lot of profits and

acquired a lot of properties including two shops, and those mentioned in the endorsement on the writ of summons. He was running one of the shops whilst his elder brother the appellant was in charge of the second.

Later, his eldest brother Paul Osei Kumi with whom he was staying, left Accra Academy to continue his education at the University of Education, Winneba. He was therefore compelled to move out from the Accra Academy campus to join the appellant in the Russia house, which they had then acquired but remained uncompleted. Appellant gave him two rooms in the Russia house which he occupied with his wife and two children while appellant and his family also occupied four rooms.

In 1993, disagreements ensued between them as to the running of the business and the sharing of profits. The appellant began to harass him and his family and even tried to eject him from the Russia house. All attempts to resolve their differences and to share the properties then acquired failed. He therefore instituted this action claiming the reliefs as endorsed on the writ of summons.

Appellant's case

The appellant denied respondent's claim and counter-claimed inter alia, for declaration of title to the Russia house, recovery of possession and an order for the eviction of respondent and his family from the Russia house. His case was that, the respondent who was his younger brother was a student at Swedru Technical School. He dropped out of school when he impregnated a girl. He subsequently moved to live with their eldest brother Paul Osei Kumi who was a tutor at the Accra Academy. When their eldest brother gained admission to the University of Education, Winneba, he had to give up his bungalow at Accra Academy. The respondent, who had nowhere to stay, approached him to accommodate him in his house. By then, he had purchased the Russia house which was then uncompleted. He allowed the respondent with his wife and two children then, to move in to stay with him. He gave the uncompleted hall and one bedroom to the respondent and his family of four (including himself), to occupy. Respondent was assisting him in his spare-part business and running errands for him as a younger brother. He in turn provided house-keeping money for his family and was paying his children's school fees. He later

registered the business as a sole proprietorship with the name 'Seico Auto Parts'.

Sometime after, he sourced a loan from his bankers the National Investment Bank, to expand his business. He opened two shops and gave the first shop he was operating to the respondent to run whilst he also run the second shop. Respondent was accounting to him. The business subsequently picked up and he used to send the respondent on errands to Lagos, Nigeria to bring in goods while he went to London. All this while, he was remunerating respondent for the services rendered, whilst he catered for his wife and children.

However, respondent later wanted to usurp his authority and was not accounting properly to him. He was therefore compelled to sell the first shop which the respondent had virtually run down. He realised eleven million cedis (c11,000,000.00) from the sale of the shop. Out of this sum, he paid the landlord c5,000,000.00 as rent owed and gave the remaining c6,000,000.00 to the respondent to run his own business. The respondent was not content with this and differences reared their ugly head in their relationship resulting in the present action which respondent initiated against him in the High Court.

He denied that respondent owned any share in the business and the properties which respondent listed in his claim. He provided documents to support his claim that all the properties listed and the business enterprise called Seico Auto Parts, belonged to him solely.

During the trial in the High Court, the respondent called their eldest brother as his only witness. He testified as P.W.1. His testimony supported the respondent on his claim. The trial High Court believed the respondent and gave him judgment on all the reliefs sought with the exception of relief (f), which was a claim for compensation from appellant for persuading him to stop his schooling.

Not satisfied with the decision of the High Court, the appellant launched an appeal in the Court of Appeal. The grounds of appeal in the Court of Appeal were as follows:

a. **The judgment was against the weight of evidence.**

b. **The learned trial judge failed to take into consideration all the evidence adduced in court that the plaintiff (respondent) made no financial contributions at all to the business of the (defendant) appellant and as a result came to a wrong conclusion.**
c. **The learned trial judge's decision that the respondent is entitled to half of the properties acquired by the appellant is not supported by the evidence before the court.**

The Court of Appeal, like the High Court, believed respondent's narration and preferred it to that of the appellant, which had solid documentary support. It accepted the trial court's finding that the respondent was a student at Accra Poly and that through appellant's persuasion, he stopped schooling to join appellant to make the profits with which the listed properties were acquired. It again accepted the finding by the trial court that the respondent was a co-owner of the business entity called Seico Auto Parts because he was instrumental in raising a loan for the business and was also taking risky trips to Nigeria to purchase goods for the Shop and therefore entitled to equal shares of profit from the business. It also accepted the trial court's finding that the Russia house belonged to both respondent and appellant that was why the house had already been shared between the parties. Again, the Court of Appeal, like the High Court, believed hook, line and sinker, the testimony of respondent's only witness Paul Osei Kumi (P.W.1) who happened to be the eldest brother of both parties. It accordingly affirmed the judgment of the trial High Court in its entirety.

The original appellant died before the Court of Appeal delivered its decision. He was substituted by his surviving spouse and another. The substituted appellants, not satisfied with the judgment of the Court of Appeal, have invoked our appellate jurisdiction to revisit the decisions of the two lower courts and reverse same on the following grounds:

1. **The judgment of the Court of Appeal in dismissing appellant's appeal is against the weight of evidence on the record.**
2. **The Court of Appeal did not adequately consider the case put forward at the trial court by the defendant on record and therefore erred in dismissing the appellant's appeal.**

3. **The Court of Appeal did not adequately consider the evidence of the defendant and his witnesses on record and thus erred in its conclusion that the respondent contributed immensely to the business and was not a salary earning worker but a part owner of the company.**

Appellants' submissions in support of the three grounds are basically the same since the grounds are three in one; being that the Court of Appeal did not adequately consider the totality of evidence on record and therefore came to a wrong conclusion in affirming the decision of the High Court.

The first contention was that the appellant's testimony as to how and when he established the spare parts business before the respondent, who was his destitute brother came to join him, was not challenged. Appellant said he started the business in 1976 when he sold his Nissan bus he was operating as 'trotro' for that purpose. Because of the revolution, he was keeping his goods in a chop-box and customers who knew him were contacting him for goods. His brother (respondent) joined him in 1985 to assist him whilst he catered for respondent's family of four; a wife and two children (including himself). His brother therefore did not contribute anything to the business apart from the errands he was running for him. He denied that he ever sat with respondent and P.W.1 to agree that the business belonged or would eventually belong to the two of them.

He submitted that the period of starting the business and the seed money was central to the case. Therefore his evidence that he single-handedly started his business about nine (9) years before the respondent joined him should have been considered carefully by the two lower courts in deciding the true owner of the enterprise. He said it was wrong for the trial High Court and the Court of Appeal to hold that the business belonged to the two parties equally because the respondent is a co-owner.

On the properties acquired as listed on the endorsement of the claim, the contention of the appellant was that since the respondent claimed the said properties were jointly owned, it was incumbent on him to produce sufficient evidence to establish the joint ownership. He did not discharge this responsibility but both the trial High Court and the first appellate court believed his empty narration or bare assertion contrary to the decision of

this Court in **DZAISU v GHANA BREWERIES LTD [2007-2008] SCGLR 539.** The respondent was of the view that the judgments of the two lower courts must not be disturbed.

In determining the issues raised in this appeal, we are very mindful of two basic legal principles that have been well established by this Court in several of its decisions. The first is that an appeal is by way of rehearing. The second is that a second appellate court must be slow in interfering with concurrent findings of fact made by a trial court and the first appellate court.

The law is that where an appellant contends that the judgment is against the weight of evidence, the appellate court has the responsibility to consider the totality of the evidence on record, including all documents tendered in evidence or rejected and to find out whether or not the trial court came to the right conclusion by properly applying the law to the facts on record. It does not matter whether the appellate court is a second appellate court like this Court; it has the same responsibility. Some of the cases in point are: AKUFFO-ADDO v CATHERINE [1992] 1 GLR 377; ACHORO v AKANFELA [1996-97] SCGLR 209; TUAKWA V BOSOM [2001-2002] SCGLR 61; ARYEH & AKAPO v AYAA IDDRISU [2010 [SCGLR 891]; ACKAH v PERGAH TRANSPORT LTD [2010] SCGLR 728; BROWN v QUARSHIGA [2003-2004] SCGLR 930; etc.

Acquah, JSC (as he then was) summed up the above principles expounded in the cited cases beautifully and elaborately in the case of **KOGLEX LTD (NO.2) v FIELD [2000] SCGLR 175** at page 184-185 as follows:

"Where findings of the trial court are based solely on the demeanour and credibility of the witness, then the trial court, which had the opportunity of seeing and hearing the witnesses, is in a decidedly better position than an appellate court. And therefore the appellate court should be extremely slow in interfering with such findings…

On the other hand, where the findings are based on established facts, then the appellate court is in the same position as the trial court and can draw its own inferences from those established facts.

A second appellate court, like the Supreme Court, is bound by the same principles set out above. It must further satisfy itself that the judgment of the first appellate court based on findings of facts is justified on the basis of the evidence and materials in the record of proceedings.

However, where the first appellate court has confirmed the findings of the trial court, the second appellate court is not to interfere with the concurrent findings unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice is apparent in the way in which the lower court dealt with the facts: see ***Achoro v Akanfela [1996-97] SCGLR 209****."*

His Lordship then went ahead to give instances where such concurrent findings may be interfered with. They include:

i. *Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory;*
ii. *Improper application of a principle of evidence; or where the trial court has failed to draw an irresistible conclusion from the evidence;*
iii. *Where the findings are based on a wrong proposition of law, that if that proposition is corrected, the finding disappears; and*
iv. *Where the finding is inconsistent with crucial documentary evidence on record.*

So the fact that the first appellate court did confirm the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment, like the trial court's, is supported or justified by the evidence on record.

From the pleaded cases before the trial court and the reliefs claimed by both parties in their claim and counter claim respectively, the issues that confronted the trial court for resolution were:

1. *Whether or not the Respondent was a student at Accra Polytechnic at the time he joined the appellant in his business;*
2. *Whether or not it was the appellant who persuaded the respondent to stop his schooling so as to assist him in his business;*
3. *Whether or not the parties established a joint business;*

4. *Whether or not the respondent contributed substantially towards the establishment of the joint business;*
5. *Whether or not the appellant and the respondent jointly operated the business;*
6. *Whether in the circumstances, respondent is entitled to half share of the profits from the business and the properties acquired.*
7. *Whether respondent was entitled to his claim; and*
8. *Whether appellant was entitled to his counterclaim*

On the first two issues, the appellant vehemently denied that the respondent was a student at the Accra Polytechnic and that he persuaded him to stop schooling. He said respondent never attended Accra Polytechnic as he claimed and that he dropped out from Swedru Technical School where he was when he put a girl in a family way.

With this denial, it behoved the respondent to lead sufficient evidence to prove that he was indeed a student at Accra Polytechnic in 1983 and that it was the appellant who persuaded him to quit schooling. It is surprising that respondent did not produce any sufficient evidence to support this assertion nevertheless, both the trial High Court and the first appellate court believed his bare assertion without any cogent proof and buttressed their later findings on this wrong premise.

The only evidence respondent led on this issue was that in 1983 he was in his second year at Accra Polytechnic, reading Mechanical Engineering when the appellant persuaded him to stop schooling to join him in his business and he also obliged. The only document he tendered in evidence to support this contention, which appellant strongly denied, was Exhibit 'A', a copy of a Student's Bill, on which the name Emmanuel Osei Amoako has been written.

Quite apart from the fact that Exhibit 'A' is no conclusive proof that respondent was a student at Accra Polytechnic, there are more questions than answers to its genuineness. In the first place, respondent said he was in the second year in 1983 when appellant persuaded him to quit schooling. Exhibit 'A' is however dated 12th October 1981. It was supposed to be the student's bill for the 1st term. Whilst it was dated 12th October 1981, the same document contains the words; ***"Next term begins on 6th***

October, 1981." That is incredible! How could the second term begin on 6th October 1981 when the bill indicating the amount to be paid as fees on re-opening is dated 12th October 1981?

Again, it was indicated on the said exhibit that the respondent was in the second (2nd) year at the time it was issued. This means that the respondent, as at 12th October, 1981, was in the second year at Accra Polytechnic. His evidence, however, was that in 1983, he was in the second year. So going by Exhibit 'A', respondent would have graduated from Accra Polytechnic by the year 1983 when he said the appellant persuaded him to stop schooling.

The appellant challenged the respondent to produce his admission letter if he claimed to be a student at Accra Polytechnic. He promised to do so but he could not do so. At least, respondent could have produced his admission letter to the school or his student's identity card or even any other report from the school to support his claim that he was such a student in the wake of appellant's strong denial, but he did not. The two lower courts believed him because P.W.1 who is the eldest brother of the two parties had come to confirm it by word of mouth without more.

The question is; how genuine or credible was the testimony of P.W.1, which the two lower courts placed much premium or reliance on? P.W.1 testified on 18th February 2009 and during cross-examination, he himself admitted that he was not on speaking terms with the appellant, with whom he had not talked for the past four (4) years as at the date he was testifying. What sort of testimony was expected from a witness who was at logger-heads with the party against whom he was giving his testimony?

First, he claimed he was the administrative manager of the business when none of the parties said they ever had an administrative manager. Respondent himself said it was the appellant who was controlling the business and he was accountable to him on all sales he made from the shop he was operating. How can a full-time tutor at Accra Academy be an administrative manager of a spare-parts business?

If it is true that respondent was a second year student reading mechanical engineering at Accra Poly, (which is not borne out from the evidence on record anyway) and P.W.1, an elder brother and tutor at Accra Academy with whom respondent was staying, could allow him to stop his mechanical

engineering course to sell spare parts from a table top on the persuasion of appellant, when he P.W.1 was preparing to enter University, then he (P.W.1), was a bad elder brother.

That story, from the totality of the evidence on record, was cooked up and could not be true. On the evidence, respondent could not establish that he was a second year student at Accra Polytechnic and that it was the appellant who persuaded him to stop schooling. Not surprisingly, the trial High Court refused to grant him his relief (f), which was a claim for compensation from appellant for persuading him to stop schooling.

It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of Khoury and Another v Richter, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of **Majolagbe v Larbi & Anor [1959] GLR 190 at 192**; *"where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true."*

See also the decision of the Court of Appeal in **Zabrama v Segbedzi [1991] 2 GLR 221** and that of this Court in **Bonsu v Kusi [2010] SCGLR 60**, affirming this position.

We are of the view that respondent was very economical with the truth. He tried to deny every suggestion made to him by the appellant during cross-examination, including the fact that he impregnated a girl while in school thus his inability to complete school at Swedru. When he was asked to tell the age of his first child, he refused to do so, saying he did not know his own child's age; someone who said he was a student at Accra Polytechnic.

On the preponderance of probabilities, we find the appellant's assertion that the respondent was neither working nor schooling when he joined him

in his business for sustenance, more appealing and probable than that of the respondent that he was a student at Accra Poly and that it was the appellant who persuaded him to quit schooling. The trial court's finding on these two issues, which were affirmed by the Court of Appeal were clearly unsupported by the evidence on record, as same is inconsistent with respondent's own Exhibit 'A'.

On the third and fourth issues as to whether or not the parties established a joint business and whether or not the respondent contributed substantially towards the establishment of the joint business, respondent led no evidence to prove same. Appellant's testimony that he sold his Nissan 'trotro' bus to establish this business from a table top in 1976 was neither denied nor challenged. Respondent himself said appellant was already in the business and he was visiting the shop, which was then being run from a table top, to assist him during vacations. Whether appellant began from a table top or a shop, it was he who established the business without any contribution from the appellant. Respondent himself admitted that he did not personally inject any capital in the business. He came to meet his elder brother already doing it and he was going there on vacations to assist him. When P.W.1 was asked of respondent's contribution in the establishment of the business which was later registered as Seico Auto Parts in 1985, he said; they were crediting the goods from people and paid them after sales. Later they went for a loan through the instrumentality of the respondent. Respondent said the same thing.

The point is; if they were crediting the goods from people, it was upon the goodwill of the appellant who was already in the business that people were crediting him goods. The respondent did not know the customers of the appellant at the time he joined him so he did not add anything substantial to the growth of the business. It was not because of him but because of the appellant that they had the benefit of credited goods to be paid for after sales.

It is unfortunate that the trial court and the Court of Appeal rejected the testimony of the appellant on the sale of his 'trotro' bus to establish the business as an after-thought because it was not pleaded. The authorities are clear that once an unpleaded testimony is allowed to go in without any objection from the opposing side, the court cannot close its eyes to it or

ignore such piece of evidence in determining the issues at stake, unless that piece of evidence was inadmissible per se. Acquah, JSC (as he then was) in the case of **EDWARD NASSER & CO LTD v McVROOM & Another [1996-97] SCGLR 468**, made this point clear when he, speaking for the Court, held as follows: ***"...where evidence in respect of an unpleaded fact had been led without objection, the trial court was bound to consider that evidence in the overall assessment of the merits of the case, unless that evidence was inadmissible per se..."***

The respondent did not know how the appellant started his table top spare-parts business. He therefore did not object when appellant said he had a 'trotro', which he sold to start the business. Being evidence not inadmissible per se, it was wrong for both the trial court and the Court of Appeal to reject same because it was not pleaded.

Respondent led no evidence to establish that he injected any capital in the establishment of Seico Auto Parts. There is no question to the fact that the business was registered solely in appellant's name. There is also no question that it was only the appellant who was running the accounts at the National Investment Bank, for which he was granted the loan of two million cedis (c2,000,000.00) which he used to expand the business. The loan was granted to the appellant as the account holder but not to both the appellant and the respondent. In fact, apart from saying that he was instrumental in the application for the loan, respondent did not go further to prove that it was through him that the loan was granted to the respondent who was the sole proprietor of the business. And even granted that it was through his instrumentality that the loan was granted to the appellant, that act per se did not make him a part-owner or co-owner of the business.

The law is that he who asserts must prove. Respondent did not offer any proof to suggest that the business Seico Auto Parts was a partnership that he owned jointly with the appellant. He again did not establish in any way that he ever contributed anything in its establishment.

Though respondent denied that he was being remunerated by the appellant all the while that he was assisting him, there is ample evidence to show that respondent was staying with appellant in the Russia house with his wife and two children. The question is; how was respondent fending for the wife

and children if appellant never remunerated him in any way? The claim by the appellant that he was feeding respondent and his family of four was never denied and we find it as a fact.

The fact is that the Court of Appeal erred when it relied on the decision in DOMFEH v ADU [1984-86] 1GLR 655 to conclude that the respondent is a co-owner of the business Seico Auto Parts. The facts in that case are distinguishable from the instant case. In the Domfeh case, the parties were married couple who were fighting over property acquired during the subsistence of their marriage. The trial court found that the respondent contributed immensely in the establishment of the business then in dispute. It was clear on the record that the wife who was the respondent in the case then on appeal to the Court of Appeal, was the one who provided the seed capital for the establishment of the business they were fighting over. In fact, the husband (appellant) was said to be a man of straw until the woman provided the seed money to commence the business, which the husband was managing.

The trial court also found that the husband (appellant) registered the business in his sole name without informing his wife who provided the seed capital for the establishment of the business. The court found that under the English law of trusts, the respondent was a beneficial owner and therefore entitled to half share since the appellant (husband) was holding the business in trust for both of them. That is not the position in this case.

In this case, the respondent was the younger brother of appellant who had joined the appellant to assist him in a business the appellant had already established. Clearly, respondent could not, by any stretch of imagination, be a co-owner unless there is an express indication to that effect. Respondent, did not go beyond his rhetorical statements that he was instrumental in the registration of the business; he was instrumental in the acquisition of the loan and again that he was risking his life by travelling to Nigeria to bring in goods to be sold in the shops, and by those acts, he was a joint owner of the business.

Judgments must be based on established facts not mere rhetoric or narrations without any supporting evidence that can sustain the claim. Both the trial High Court and the Court of Appeal allowed emotions and

passion to direct their minds in concluding the way they did, instead of justice according to law.

On the properties acquired by the appellant, particularly the Russia house, it was wrong for the two lower courts to conclude that the respondent was a joint-owner. Appellant said he purchased that property, then uncompleted, from one Mr Mintah. He had the documents on the house registered in his name in January 1989 and the respondent signed as a witness to the sale or lease. If from 1985 when the business was registered, the understanding was that it was owned jointly by them therefore any property acquired thereafter would be the joint property of appellant and respondent, then why did the respondent allow the appellant to register the house in his sole name?

The reason that the Court of Appeal gave to justify its conclusion that the house was jointly owned by the parties was very shallow and quite unfortunate. This was what the court said: ***"There is evidence that the Russia house which had six (6) rooms was shared between the parties. The plaintiff occupied the master bedroom in addition to another room. If the house which is registered in his name is for him alone, why did he agree to share them with plaintiff? The answer is simple: - the rooms were shared because, the house belonged to the two of them. He also paid half the share of the proceeds accruing from the sale of the shop to plaintiff because that store also belonged to them. In our view therefore, the learned judge did not err in arriving at the conclusion that the business belonged to both of them and that they were entitled to equal share of the proceeds."***

In fact, contrary to this conclusion by the Court of Appeal, there was no evidence whatsoever that the parties did at any time share the rooms in the Russia house because it belonged equally to the two of them; or that they shared equally the proceeds from the sale of the first shop because the business belonged to the two of them in equal shares.

In respect of the first shop that was sold, appellant said the respondent ran the shop down and embezzled proceeds from the sales he made. He also owed the landlord. He therefore sold the store for c11 million. He gave c5 million to the owner of the property housing the store and the remaining

c6 million to the respondent to start his own business. From that point, he did not have anything to do with respondent again and that brought about the misunderstanding between them.

In respect of the house, he said, when respondent moved in with his wife and two children after P.W.1 had left for the University of Education, Winneba in 1993, he had to provide accommodation for them. He then gave respondent the hall, which was then uncompleted and one bedroom to occupy with his family. That act did not constitute sharing and even respondent never said they ever shared the rooms. If they owed the house equally, then why did appellant take four rooms and gave respondent only two? The Court of Appeal got it all wrong when it concluded this way.

A careful analysis of the testimony of respondent shows clearly that he was not a truthful witness. On why he had in his custody documents covering the Russia house, which appellant said he stole from his briefcase, he gave two different explanations. The first was that when appellant was travelling to Korea in 1994, he handed over the documents to him to assure him that on his return, they would share all the properties acquired from the business. The second explanation was that appellant gave the documents to him to keep after registration because the property was their joint property. From the documents covering the house, the registration was done in 1989. So when did appellant hand over the documents to him; 1989 or 1994?

The fact that appellant accepted his younger brother in his house and gave him (including his wife and two children) two rooms to occupy, is no proof that the house had been shared. That finding of the Court of Appeal is not supported by the evidence on record.

Though it is well accepted that a trial court that observes a witness stands in a better position to determine the demeanour of such witness, it is not wholly true that it is only through physical observation that a court could properly determine the credibility of witnesses. From the nature of the testimony of the witness (both in-chief and during cross-examination) on the issue(s) involved, the pleaded case the witness is supposed to support and other material facts established on record through other means as matters of relevance to the issue(s) at stake, an appellate court that did not

have the benefit of an ocular view and auricular attention of a witness could tell, from the record, whether such a witness was a witness of truth or not.

The fact that the respondent was carrying big money to Nigeria to purchase goods was no proof that he was a partner or co-owner of the business Seico Auto Parts with the appellant. The fact also that appellant gave the first shop he acquired to respondent to operate after acquiring the second shop did not make respondent a co-owner of the business. That finding by the Court of Appeal that respondent and appellant were co-owners of the business in equal shares was unfortunate since there is nothing on record to support that finding. As a civil claim, it was incumbent on the respondent to produce sufficient evidence on the balance of probabilities, to support his contention that he was a part-owner of the business called Seico Auto Parts. He could not do this.

This Court is of the view that the findings of the two lower courts that the respondent was a part-owner of Seico Auto Parts and therefore entitled to half share of all the properties acquired by the appellant was not supported by the evidence on record. They are again inconsistent with the documents appellant tendered to establish his ownership of the said properties, which were not challenged in any way as having been fraudulently procured. With regard to the document on the Russia house, respondent signed the lease as a witness confirming appellant's ownership. How can respondent now turn round to say that at the time he was signing the document, he was a joint owner of the property?

With regard to the business enterprise, it was registered in appellant's name as the sole proprietor. He started his business when the respondent was nowhere. He later registered it into a business enterprise in his own name. The fact that respondent and P.W.1 were those who advised or suggested the registration as uterine brothers is no proof that any of them is a joint or co-owner of the business. The same applies to all properties acquired by the appellant in his name. The respondent has failed to establish joint-ownership in any of the listed properties.

It is unfortunate that appellant did not survive this action. However, he is survived by his wife and nine children. His wife is one of the substituted

appellants' herein. Inferences drawn from the evidence on record, show clearly that there was no intention on the part of the parties to create a joint-ownership in the business.

Respondent said when appellant sold his first store in 1993, he gave him c5 million though appellant said it was c6 million. Appellant again gave him c4 million when he returned from Korea in 1994. Appellant gave respondent all these monies for him to establish on his own. We are of the view that even if respondent was entitled to any compensation at all, appellant duly compensated him when their relationship became severed. The decisions of the two lower courts are therefore reversed. We grant appellant his counterclaim. The Russia house, being the only house appellant acquired during his lifetime becomes the property of his wife and children by law with his demise, granted he died intestate. Respondent is therefore ordered to vacate the portion he is occupying and make it available for the appellant's wife and children. We order accordingly.

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COU

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

COUNSEL

VINCENT GARR ESQ WITH HIM DAIVID JENTUAH FOR THE PLAINTIFF/ RESPONDENT/RESPONDENT.

EMMANUEL KUMADEY ESQ. FOR THE DEFENDANT/APPELLANT /APPELLANT.