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29th JANUARY 2018
JSCNLR VOL. 3

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OFONEME ENUKORA
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 217/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower courts – Onus on appellant to displace – How discharged – Failure to do so – Effect.

COURT: Additional jurisdiction of the Federal High Court – Source – How determined and exercised.

COURT: Criminal Jurisdiction of the Federal High Court – Extent of Criminal Jurisdiction conferred by S.251 of the Constitution of Federal Republic of Nigeria – Whether exhaustive.

COURT: Evaluation of evidence and ascription of probative value – Primary duty of trial court – Whether there are exceptions thereto.

COURT: *Jurisdiction – Fundamental nature of – Implication of lack of jurisdiction on the judgment and proceedings of a court.*

COURT: Jurisdiction – Source – How determined.

STATUTE: S.251(1) of the 1999 Constitution of Federal Republic of Nigeria 1999 (as amended) – Provision on Jurisdiction of the Federal High Court – Import and essence.

STATUTE: Section 14 of Advanced Fee Fraud and Other Fraud Related Offences Act – Purport, extent and significance.

WORDS AND PHRASES: False pretences – Meaning

Issues for Determination

1. **Whether the trial court had the jurisdiction to entertain the charge(s) against the appellant? (Ground 1).**

2. **Whether the court below was right in holding that the prosecution proved the ingredients of the charge in count 2 beyond reasonable doubt.**

Facts of the Matter

This is an appeal against the judgment of the Federal High Court sitting at Awka delivered on 13th May 2015 convicting and sentencing the appellant in respect of charge No. FHC/AWK/14C/2015. The appellant was prosecuted for the offence of obtaining money by false pretences. In addition to the seven years imprisonment without an option of fine, the trial court ordered the appellant to refund the sum of four and a half million naira (N4,500,000.00) he falsely obtained from his victim.

The appellant and one other person were charged for conspiracy and obtaining the sum of N4,500,000.00 by false pretences contrary to Section 8 (A) and (1) A of the Advance Fee fraud and other related offences Act 2006 punishable under Section 1(3) of the same statute. The appellant was convicted on the 2nd count only.

The prosecutor's case is that DW5, the 2nd accused at the trial court, approached PW4, the complainant, informing him that the appellant had a plot for sale at a price of four million five hundred naira. Desirous of purchasing the piece of land, PW4 instructed PW1, his personal assistant, to pay for the same on establishing the geniuness of title to and being satisfied that the land was free from any encumbrances. On being assured by DW5, PW4 instructed PW1 to pay the agreed purchase price of the sum of four million five hundred thousand naira to the appellant and a purchase agreement was subsequently executed.

PW4 moved unto the acquired land intending to commence construction thereon. His workmen were however chased away by the family of one Mr. Onuorah who had died in 1996 whose family asserted ownership of the land. Mr. Onourah's wife claimed she had inherited the land from her husband on the latter's demise. All efforts by PW4 to get the appellant refund his money having failed, he petitioned the EFCC. The appellant and DW5 were then arrested and charged jointly for conspiracy and obtaining by false pretences.

Whereas DW5 was discharged and acquitted for both offences, the appellant on the other hand was convicted on the 2nd count for obtaining by false pretences and sentenced to seven years imprisonment without option of fine. Appellant was further ordered to refund the four and a half million naira he obtained from Pw4.

Aggrieved, the appellant filed his notice of appeal against the trial court's judgment on 26th May 2015 to the Court of Appeal. The appeal was found unmeritorious and dismissed by the court, He has further appealed to the Supreme Court.

Held: (*Unanimously dismissing the appeal***)**

1. *The fundamental nature of court's jurisdiction*
   It is settled that the issue of jurisdiction is fundamental as it touches on the competence of the court. Jurisdiction remains a threshold issue. Being the lifewire of any determination by the court, it should be considered and determined first before anything else since no matter how well considered the court's decision is it will come to naught once the court lacks the competence to try and determine the

issue before it. In the case at hand the lower court's judgment appealed against would come to nothing once the trial court which decision the former affirmed is shown to have lacked the competence to try and determine the charge against the appellant. As it has always been, you can only add something unto something. See Madukolu vs. Nkemdilim (1962) 1 ALL NLR 587, Skenconsult vs. Ukey (1981) 11 SC 6 and AG Lagos State vs. Dosunmu (1989) 3 NWLR (Pt III) 552. *(Pp 12 – 13 Paras I – C)*

2. *The Source and determination of court's Jurisdiction*

On the first issue, both counsel agree and they are indeed right that jurisdiction of a court is statutorily conferred be the statute the Constitution or a lesser legislation. Where vehemently canvassed as does the appellant herein, a court's jurisdiction is determinable in the light of what is set out in the enabling law vis-à-vis the charge for which the appellant has been tried and convicted by the trial court. Thus, where the facts on which the charge the appellant is tried and convicted for lie within the jurisdiction conferred on the court by the enabling law the court, learned respondent's counsel would be right, has properly assumed jurisdiction.

Where however the offence for which the appellant is convicted is outside the jurisdiction conferred on the trial court by the enabling law, learned appellant's counsel would be particularly right that the trial court being bereft of the necessary jurisdiction would have proceeded in vain. See Onwudiwe vs. FRN (2006) 10 NWLR (Pt 988) 382 at 425 and Charles Egbirika vs. The State (2014) 1 SCM 36 at 54. *(P 16 Paras A – D)*

3. *Extent of jurisdiction of the Federal High Court under S.251 of the 1999 Constitution*

Learned appellant's counsel has argued that the criminal jurisdiction of the trial court is as exhaustively provided for by Section 251 of the 1999 Constitution (as amended) and that the offence for which the appellant is convicted having not been provided for under the section, the trial court has wrongly assumed jurisdiction.

Not surprisingly learned respondent's counsel contends to the

contrary. He submits, and rightly too, that the jurisdiction conferred on the trial court by section 251 of the 1999 Constitution (as amended) is not exhaustive since the section admits of appropriate situations where the legislature may confer on the court additional jurisdiction to be exercised exclusively or concurrently with other courts of record. *(P 16 Paras D – G)*

4. *Additional jurisdiction of the Federal High Court*

In the exercise of its powers, the legislature, further submits learned respondent's counsel, has enacted the Advance Fee Fraud and other Fraud Related Offences Act 2006 and conferred the trial court with jurisdiction to try the appellant. The lower court's affirmation of the trial court's legitimate assumption of jurisdiction, it is further contended, cannot be faulted. Learned respondent counsel's submissions are unassailable.

It is indeed the decision of this court that the trial court, where conferred with such additional jurisdiction by the legislature, notwithstanding the provision of Section 251(1)(a) – (s) of the 1999 Constitution (as amended), may exercise same either exclusively or concurrently with other courts of record as the case may be. Put differently, quite apart from the jurisdiction vested in the trial court by Section 251(1) (a)-(s) of the constitution (as amended), the court enjoys such additional jurisdiction as is conferred on it by the National Assembly which for the purpose of the case at hand enacted in Section 14 of the Advance Fee Fraud and other Fraud Related Offences Act thus:-

> **"14 The Federal High Court or the High Court of the Federal Territory and the High Court of the State shall have jurisdiction to try offences an d impose penalties under this Act."**
> *(Pp 16 – 17 Paras G – D)*

5. *The trial court properly assumed jurisdiction by virtue of the additional jurisdiction conferred by S.14 of the Advanced Fee Fraud and other Fraud Related offences Act*

Having been conferred by the foregoing section such jurisdiction in

addition to the jurisdiction it enjoys under Section 251(1)(a) – (s), learned respondent counsel's insistence that the trial court's assumption of jurisdiction is proper does prevail. The trial court's judgment is, therefore, not a nullity as posited learned appellant's counsel. See Senator Dahiru Bako Gassol vs. Alhaji Abubakar Umar Tutare & ors (2013) LPELR-20232(SC), General Mohammed A. Garba (RTD) vs. Mustapha Sani Mohammed & ors (2016) LPELR-40612 (SC). *(P 17 Paras D – F)*

6. *The Primary duty of a trial court to evaluate evidence*

It is well settled that the evaluation of evidence and ascription of probative value to same is primarily the function of the trial court. See Mogaji vs. Odofin (1978) NSCC 275 at 277 (Pt 265) 260-278, Alake vs. State (1992) 9 NWLR and Nkebisi & anor vs. State (2010) LPELR-2046 (SC). The lower court and indeed this court, both sitting in their appellate capacity, would only interfere with the trial court's findings of fact if the findings are perverse. See Akpan vs. Bob (2010) 17 NWLR (Pt 1223) 421 at 479 and James vs. INEC & ors LPELR-24494 (SC). In the instant case where the two courts below are concurrent in their findings, this court is very hesitant to interfere unless their findings are shown to be manifestly perverse. It is only where the appellant has established clear errors in law or fact which have occasioned miscarriage of justice that this court intervenes to reverse the concurrent findings of fact of the two courts. See Ogundiyan vs. The State (1991) LPELR-2333 (SC), Iyaro vs. The State (1998) 1 NWLR (Pt 69) 256 and Ukpabi vs. State (2004) LPELR-3346 (SC).

If indeed the respondent has not proved any of the ingredients of the offence for which the appellant is convicted by both courts below, learned appellant's counsel would be correct in his contention that the offence has not been proved beyond reasonable doubt and conviction thereon must fail. See Bakare vs. The State (1987) 3 SC 1 at 32 and Afolabi vs. State (2010) 6-7 MJSC 187.
(Pp 17 – 18 Paras H – D)

7. *The meaning of false pretence*

By Section 20 of the Act, "false pretence" means any representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present, which the person making it, knows to be false or does not believe to be true.

In the case at hand, there is evidence on record: that the appellant had offered through DW5 a plot of land for sale to PW4, his victim, for the sum of (N4,500,000.00k) four million five hundred thousand naira; that the appellant had collected the purchase price from PW1 whom PW4 instructed to pay the former on ensuring that the appellant is the owner of the land and that the land is not encumbered; that the land, contrary to what the appellant represented to PW1 and PW4, belong to PW2's deceased husband from whom the latter inherited and continued to cultivate until 2007 when she realized that someone had trespassed on the land; that as at 2008 when the appellant offered the land to PW4 for sale he knew that he does not own the land and that the land was encumbered. It is on account of these facts that the trial court found the appellant guilty as charged. *(P 19 Paras D – H)*

8. *Onus on appellant to displace concurrent findings of two lower courts*

The foregoing are the findings of the lower court the appellant asserts constitute erroneous affirmation of the trial court's judgment. They cannot be. The lower court could not have arrived at a decision contrary to that of the trial court.

The trial court's decision that emanated from the evidence of parties which evidence the court, having had the advantage of seeing, listening to and observing the witnesses in the course of their testimony, faultlessly evaluated, must endure. Appellant's failure to establish that these concurrent findings are perverse, renders his appeal unmeritorious. I so hold, dismiss the appeal and further affirm the judgment of the trial court convicting and sentencing the appellant as charged. *(P 20 Paras E – H)*

9. *Construction of S. 251(1) of the 1999 Constitution*

The learned counsel seems, apparently, to have misconceived the effect of the unambiguous provisions of sub-section (1) of Section

251 of the Constitution, to wit:

> **251(1)** ***Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of*** **the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.** *(P 22 Paras F – H)*

Per Eko (JSC)

> **"Concurrent findings of fact on the ingredients of the offence under count 2 defended by the appellant is the substance of the Issue 2 canvassed by the appellant. The appellant's arguments under the issue also touch on the primary function of the trial court in the evaluation of the evidential materials and ascription of probative value to the evidence duly evaluated. This court, as appellate court, has adopted a deliberate policy of not readily intervening and interfering with the concurrent findings made by the trial and the intermediate courts below it. It does however interfere with the concurrent findings of fact only in very exceptional circumstances. That is, when the concurrent findings of fact are manifestly perverse and they occasion a miscarriage of justice. The appellant, who desires this court to interfere with the concurrent findings of fact which are adverse to him, must show in what respect that the findings are perverse and or occasion miscarriage of justice to him; failing which the appeal on the point is liable to be dismissed.**

I have painstakingly read the briefs filed and exchanged in this appeal viz-a-vis the records of appeal. Contrary to the held views of the appellant, the court below was right in holding that the prosecutor at the trial court proved the ingredients of the offence of advance fee fraud the subject of count 2 beyond reasonable doubt. *(P 23 Paras B – G)*

10 *The meaning of false pretense.*

False pretence is the *sin qua non* of the said count 2. It means, in the words of Section 20 of the Advance Fee Fraud and Other Related Offences Act, 2006: any representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present, which the person making it, knows to be false or does not believe to be true.

The appellant in this case offered to sell a piece of land in the sum of N4,500,000.00 to the PW.4 through the DW.5. The appellant had represented to the PW.4 that he has title to pass over the piece of land and that there were no encumbrances to the title. In other words, he offered his good and valid title to the piece of land. It turned out, in actuality, that the title to the land vested in PW.2's husband from whom the PW.2 inherited and in virtue of that the PW.2 had been in exclusive possession of the land. When the appellant offered to sell the same land to the PW.4, in 2008; the appellant knew that he was not, in law and in fact, the owner of the land. *(Pp 23 – 24 Paras G – C)*

11. How to disclose concurrent findings

The appellant was convicted for advance fee fraud or obtaining by false pretence on these facts. The conviction was affirmed by the court below. As I earlier indicated, the appellant must show that these concurrent findings are perverse and or had occasioned miscarriage of justice to him. The findings are not perverse. The appellant also suffers no injustice or miscarriage of justice by the concurrent findings. *(P 24 Paras C – D)*

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James vs. INEC & ors LPELR-24494 (SC).
Madukolu vs. Nkemdilim (1962) 1 ALL NLR 587;
Mogaji vs. Odofin (1978) NSCC 275
Nkebisi & anor vs. State (2010) LPELR-2046 (SC).
Ogundiyan vs. The State (1991) LPELR-2333 (SC),
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Skenconsult vs. Ukey (1981) 11 SC 6
Ukpabi vs. State (2004) LPELR-3346 (SC).

Nigerian Statutes
Advance Fee Fraud and other Fraud Related Offences Act – Section 14
Constitution of the Federal Republic of Nigeria 1999 (as amended) – Section 251

Representation
TOCHUKWU MADUKA, with him: Eromosele Ehiane for the appellant.
MBACHIE INNOCENT TORWUNDU for the Respondents.

DATTIJO MUHAMMAD, (JSC) (Delivering the Lead Judgment):

This is an appeal against the judgment of the Federal High Court sitting at Awka delivered on 13th May 2015 convicting and sentencing the appellant in respect of charge No. FHC/AWK/14C/2015. The appellant was prosecuted for the offence of obtaining money by false pretences. In addition to the seven years imprisonment without an option of fine, the trial court ordered the appellant to refund the sum of four and a half million Naira (N4,500,000.00) he falsely obtained to his victim. The facts on which the appeal hinges are briefly narrated at once.

The appellant and one other person were charged for conspiracy and obtaining the sum of N4,500,000.00 by false pretences contrary to Section 8 (A) and (1) A of the Advance Fee fraud and other related offences Act 2006 punishable under Section 1(3) of the same statute. The appellant was convicted on the 2nd count only.

The prosecutor's case is that DW5, the 2nd accused at the trial court, approached PW4, the complainant, informing him that the appellant had a plot for sale at a price of four million five hundred Naira. Desirous of purchasing the piece of land, PW4 instructed PW1, his personal assistant, to pay for the same on establishing the geniuness of title to and being satisfied that the land was free from any encumbrances. On being assured by DW5, PW4 instructed PW1 to pay the agreed purchase price of the sum of four million five hundred thousand Naira to the appellant and a purchase agreement was subsequently executed.

PW4 moved unto the acquired land intending to commence construction thereon. His workmen were however chased away by the family of one Mr. Onuorah who had died in 1996 whose family asserted ownership of the land. Mr. Onourah's wife claimed she had inherited the land from her husband on the latter's demise. All efforts by PW4 to get the appellant refund his money having failed, he petitioned the EFCC. The appellant and DW5 were then arrested and charged jointly for conspiracy and obtaining by false pretences.

Whereas DW5 was discharged and acquitted for both offences, the appellant on the other hand was convicted on the 2nd count for obtaining by false pretences and sentenced to seven years imprisonment without option

of fine. Appellant was further ordered to refund the four and a half million Naira he obtained from PW4.

Aggrieved, the appellant filed his notice of appeal against the trial court's judgment on 26th May 2015 to the Court of Appeal. The appeal was found unmeritorious and dismissed by the court, hereinafter referred to as the lower court. He has further appealed to this Court vide a notice dated the 25th but filed on the 27th of February, 2017 containing two grounds. Under the first ground of appeal, the appellant challenges the jurisdiction of the trial court while under the 2nd ground he asserts that his conviction and sentence by the trial court which the lower court affirmed is not proved beyond reasonable doubt.

In keeping with the rules of this Court, parties have filed and exchanged briefs of argument which, on being identified at the hearing of the appeal, they adopted and relied upon as their arguments for and against the appeal.

The two issues the appellant distilled at paragraph 2 page 2 of his brief settled by his counsel Tochukwu Maduka Esq., Read:

> **"(i) Whether the trial court had the jurisdiction to entertain the charge(s) against the appellant? (Ground 1).**
>
> **(ii) Whether the court below was right in holding that the prosecution proved the ingredients of the charge in count 2 beyond reasonable doubt."**

The respondent at paragraph 3, page 6 of its brief coded appellant's 2nd issue as its first and appellant first issue as its 2nd issue as arising for the determination of the appeal. The issues distilled by the appellant shall be resolved in the determination of the appeal firstly because he is the party aggrieved by the decision appealed against and, most importantly, the determination whether or not the trial court has jurisdiction to try and convict the appellant, upon which decision the lower court's affirmation rests, is overriding. It is settled that the issue of jurisdiction is fundamental as it touches on the competence of the court. Jurisdiction remains a

threshold issue. Being the lifewire of any determination by the court, it should be considered and determined first before anything else since no matter how well considered the court's decision is it will come to naught once the court lacks the competence to try and determine the issue before it. In the case at hand the lower court's judgment appealed against would come to nothing once the trial court which decision the former affirmed is shown to have lacked the competence to try and determine the charge against the appellant. As it has always been, you can only add something unto something. See **Madukolu vs. Nkemdilim (1962) 1 ALL NLR 587, Skenconsult vs. Ukey (1981) 11 SC 6** and **AG Lagos State vs. Dosunmu (1989) 3 NWLR (Pt III) 552.**

On the 1st issue, learned appellant's counsel contends that the law allows him to raise the issue of the trial court's competence for the first time at this Court. He relies on a tremendous number of cases that includes **Obikoya vs. The Registrar of Companies & Official Receiver of pool House GRP (1975) 4 SC (reprint) 23** and **Oni vs. Carbury Nigeria Plc (2016) 9 NWLR (Pt. 1516) 80.**

The appellant, argues learned counsel, is convicted by the Federal High Court at Awka under Section 1(1)(b) of the Advance Fee Fraud and other Fraud Related Offences Act and sentenced under Section 1(3) of the same Act for obtaining money by false pretences. Appellant, learned counsel further submits, it alleged to have falsely sold a piece of land which he knew he did not own. Neither the transaction nor the parties thereto, it is contended, fall within the purview of Section 251(1) of the 1999 Constitution to confer jurisdiction on the Federal High Court. The jurisdiction to try the appellant, by virtue of Section 272 of the 1999 Constitution, it is submitted, lies in the High Court of Anambra State as against the Federal High Court. Not being a cause that has arisen from any of the items listed under Section 251 (1), the trial, conviction and sentence of the appellant by the trial court, submits learned counsel, are all in vain. Relying on **Eze vs. Federal Republic of Nigeria (1987) 1 NWLR (Pt 51) 506 and Mandara vs. Attorney General of the Federation (1989) ALL NLR 219,** learned counsel urges that the issue be resolved in appellant's favour and his trial, conviction and sentence by the trial court that is

lacking of the necessary jurisdiction be set aside.

On the 2nd issue, it is argued that the law requires the respondent to prove the charge against the appellant beyond reasonable doubt. The ingredients of the offence for which the appellant is convicted in count 2 of the charge, it is further submitted, has not been established by respondent. None of the five witnesses called by the respondent, learned counsel argues, proved the fact that the appellant had the intention of defrauding the complainant. On the other hand, it is further contended, the appellant by himself and the witnesses he called clearly established that he owned the land he sold to the complainant which evidence was neither challenged nor controverted. Most surprisingly, the lower court at page 251 of the record, submits learned appellant's counsel, fell into the same error as did the trial court that the appellant had made some misrepresentation to the PW1 and PW4. A conviction, submits learned counsel, cannot be founded on unproved facts. Relying on **Kim vs. State (1992) 4 NWLR (Pt 233) 17, Igabele vs. State (2006) 6 NWLR (Pt 975) 100, Nweke vs. State (2001) 4 NWLR (Pt 704) 588, Ijuaka vs. Commissioner of Police (1976) 6 SC 99** and **Onwudiwe vs. FRN (2006) 10 NWLR (Pt 988) 382,** learned appellant's counsel further submits that the decision of the lower court that does not arise from the evidence on record having occasioned miscarriage of justice be set-aside on the appeal being allowed.

Responding under their 2nd issue, learned respondent's counsel contends that the charge or information before the court vis-à-vis the law by virtue of which the accused stands trial determines the jurisdiction of the court where same is challenged. Indeed, it is submitted, the law is settled that the jurisdiction of a court is statutorily conferred. The appellant, learned respondent's counsel submits, is tried and convicted under Section 1(1) (b) of the Advanced Fee Fraud and other Fraud Related Offences Act 2006 and punished under Section 1(3) of the same Act. Section 14 of the statute, it is further submitted, confers jurisdiction on the trial court to try and convict the appellant. It is not the law, learned counsel contends, that the character of the evidence led against an accused person determines whether or not the court by which an accused is tried or convicted has the requisite jurisdiction. Once the criminal elements of the offence the

accused stands charged for are contained in the information the court will exercise the jurisdiction conferred on it by the law. The trial court, argues learned respondent's counsel, rightly refused to bother itself with the contractual relationship between the appellant and the complainant. Rather, it is submitted, the court correctly fixed its decision on the fact that at the time of the transaction the appellant pretended that he owned the land and that same was not encumbered. These are facts well within the charge the appellant is convicted as provided for by the statute that confers jurisdiction on the trial court. The court, contends learned respondent's counsel, rightly assumed jurisdiction. Relying on **Hon. Gabriel Yinusa Olofu & 3 ors vs. Michael Adejo Itofo & 5 ors (2010) 12 Sc (Pt 1) 165, Abas vs. COP (1998) 12 NWLR (Pt 577) 308** and **Onwudiwe vs. FRN (2006) 10 NWLR (Pt 988) 382 at 425**, learned counsel submits that the lower court is equally right to have affirmed the trial court's judgment. He prays that the issue be resolved against the appellant.

Under respondent's 1st issue, it is contended that all the elements of the offence under section 1(1)(a) of the Advance Fee Fraud and other Fraud Related Offences Act 2006 have been established by the respondent beyond reasonable doubt. The appellant failed to successfully controvert the evidence led by the prosecution witnesses that he had received the sum of 4.5 million Naira from the PW4 fraudulently either through cross examination or evidence proffered on his behalf. Having received the money with the intention of transferring the plot he knows does not belong to him the appellant, it is contended, has brought himself within the offence he is convicted for. On the authority inter-alia of **Gbadamosi & ors vs. Akinloye & ors (2013) LPELR-20937 (SC); Reptico S.A. Geneva vs. Afri Bank Nig Plc (2013) LPELR-20662 (SC), State vs. Babangida John (2013) 12 NWLR (Pt 1368) 337 and Dibie vs. The State (2007) 9 NWLR (Pt 1038) 30,** given the evidence on record, learned respondent's counsel concludes, appellant's guilt has been proved beyond reasonable doubt. He urges that appellant's 2nd issue be resolved against him too and that the unmeritorious appeal be dismissed.

The two issues this appeal raises have long been settled by this court.

A On the first issue, both counsel agree and they are indeed right that jurisdiction of a court is statutorily conferred by the statute – the Constitution or a lesser legislation. Where vehemently canvassed as does the appellant herein, a court's jurisdiction is determinable in the light of
B what is set out in the enabling law vis-à-vis the charge for which the appellant has been tried and convicted by the trial court. Thus, where the facts on which the charge the appellant is tried and convicted for lie within the jurisdiction conferred on the court by the enabling law the court, learned
C respondent's counsel would be right, has properly assumed jurisdiction.

Where however the offence for which the appellant is convicted is outside the jurisdiction conferred on the trial court by the enabling law, learned appellant's counsel would be particularly right that the trial court
D being bereft of the necessary jurisdiction would have proceeded in vain. See **Onwudiwe vs. FRN (2006) 10 NWLR (Pt 988) 982 at 425** and **Charles Egbirika vs. The State (2014) 1 SCM 36 at 54.**

Learned appellant's counsel has argued that the criminal jurisdiction
E of the trial court is as exhaustively provided for by Section 251 of the 1999 Constitution (as amended) and that the offence for which the appellant is convicted having not been provided for under the Section, the trial court has wrongly assumed jurisdiction.

F Not surprisingly learned respondent's counsel contends to the contrary. He submits, and rightly too, that the jurisdiction conferred on the trial court by Section 251 of the 1999 Constitution (as amended) is not exhaustive since the Section admits of appropriate situations where the
G legislature may confer on the court additional jurisdiction to be exercised exclusively or concurrently with other courts of record. In the exercise of its powers, the legislature, further submits learned respondent's counsel, has enacted the Advance Fee Fraud and other Fraud Related Offences Act
H 2006 and conferred the trial court with jurisdiction to try the appellant. The lower court's affirmation of the trial court's legitimate assumption of jurisdiction, it is further contended, cannot be faulted. Learned respondent counsel's submissions are unassailable.

I It is indeed the decision of this court that the trial court, where conferred with such additional jurisdiction by the legislature,

notwithstanding the provision of Section 251(1)(a) – (s) of the 1999 Constitution (as amended), may exercise same either exclusively or concurrently with other courts of record as the case may be. Put differently, quite apart from the jurisdiction vested in the trial court by Section 251(1)(a)-(s) of the Constitution (as amended), the court enjoys such additional jurisdiction as is conferred on it by the National Assembly which for the purpose of the case at hand enacted in Section 14 of the Advance Fee Fraud and other Fraud Related Offences Act thus:

> **"14 The Federal High Court or the High Court of the Federal Territory and the High Court of the State shall have jurisdiction to try offences and impose penalties under this Act."**

Having been conferred by the foregoing section such jurisdiction in addition to the jurisdiction it enjoys under Section 251(1)(a) – (s), learned respondent counsel's insistence that the trial court's assumption of jurisdiction is proper does prevail. The trial court's judgment is, therefore, not a nullity as posited by learned appellant's counsel. See **Senator Dahiru Bako Gassol vs. Alhaji Abubakar Umar Tutare & ors (2013) LPELR-20232(SC), General Mohammed A. Garba (RTD) vs. Mustapha Sani Mohammed & ors (2016) LPELR-40612 (SC).**

The first issue in the appeal is accordingly resolved against the appellant.

The 2nd issue in the appeal touches on the evaluation of evidence carried out by the trial court as affirmed by the court below. Learned appellant's counsel argues that the judgment of the trial court which the lower court affirmed is not founded on the evidence on record. Learned respondent's counsel posits otherwise.

It is well settled that the evaluation of evidence and ascription of probative value to same is primarily the function of the trial court. See **Mogaji vs. Odofin (1978) NSCC 275 at 277 (Pt 265) 260-278, Alake vs. State (1992) 9 NWLR** and **Nkebisi & anor vs. State (2010) LPELR-2046 (SC).** The lower court and indeed this Court, both sitting in their appellate

capacity, would only interfere with the trial court's findings of fact if the findings are perverse. See **Akpan vs. Bob (2010) 17 NWLR (Pt 1223) 421 at 479 and James vs. INEC & ors LPELR-24494 (SC).** In the instant case where the two courts below are concurrent in their findings, this Court is very hesitant to interfere unless their findings are shown to be manifestly perverse. It is only where the appellant has established clear errors in law or fact which have occasioned miscarriage of justice that this Court intervenes to reverse the concurrent findings of fact of the two courts. See **Ogundiyan vs. The State (1991) LPELR-2333 (SC), Iyaro vs. The State (1998) 1 NWLR (Pt 69) 256** and **Ukpabi vs. State (2004) LPELR-3346 (SC).**

If indeed the respondent has not proved any of the ingredients of the offence for which the appellant is convicted by both courts below, learned appellant's counsel would be correct in his contention that the offence has not been proved beyond reasonable doubt and conviction thereon must fail. See **Bakare vs. The State (1987) 3 SC 1 at 32** and **Afolabi vs. State (2010) 6-7 MJSC 187.**

The appellant is charged and convicted under Section 1(1) (b) of the Advance Fee Fraud and other Related Offences Act 2006 for obtaining the sum of 4.5 million Naira by false pretenses. The Section provides:

> **"(1). Notwithstanding anything contained in any other enactment or law any person who by any false pretence, and with intent to defraud.**
>
> **(a) Obtains from any other person in Nigeria or in any other country for himself or any other person;**
>
> **(b) Induces any other person in Nigeria or in any other country to deliver to any person; or**
>
> **(c) Obtains any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, commits an offence under this Act.**

(2). A person who by false pretence and with the intent to defraud, induces any other person in Nigeria or in any other country to confer a benefit on him or any other person by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for commits an offence under this Act.

(3). A person who commits an offence under this subsection (1) or (2) of this section is liable on conviction to imprisonment for a term not more than twenty years and not less than seven years without the option of fine."

By Section 20 of the Act, "false pretence" means any representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present, which the person making it, knows to be false or does not believe to be true.

In the case at hand, there is evidence on record: that the appellant had offered through DW5 a plot of land for sale to PW4, his victim, for the sum of (N4,500,000.00k) four million five hundred thousand Naira; that the appellant had collected the purchase price from PW1 whom PW4 instructed to pay the former on ensuring that the appellant is the owner of the land and that the land is not encumbered; that the land, contrary to what the appellant represented to PW1 and PW4, belong to PW2's deceased husband from whom the latter inherited and continued to cultivate until 2007 when she realized that someone had trespassed on the land; that as at 2008 when the appellant offered the land to PW4 for sale he knew that he does not own the land and that the land was encumbered. It is on account of these facts that the trial court found the appellant guilty as charged.

In affirming the trial court's findings leading to the conviction and sentence of the appellant for the offence of obtaining by false pretence, the lower court at page 252 of the record of appeal inter-alia held as follows:-

A **"No doubt the criminal intent of the Appellant was manifested by his sale of the land to an innocent third party for value immediately the land dispute became persistent and serious. He wanted to get out of the problem by**
B **shifting it on an innocent purchaser. He refused to return the purchase price and only offered to do so after he was convicted. From the evidence on record, he knew that he had passed on to PW4 questionable title."**

C

The court concluded at page 253 of the record of appeal as follows:

"Once all the ingredients of an offence have been proved
D **by the prosecution to the satisfaction of the court, the charge is said to have been proved beyond reasonable doubt. I am convinced that the charge before the trial court was proved beyond reasonable doubt, the**
E **prosecution having proved the required ingredients as enumerated above."**

The foregoing are the findings of the lower court the appellant asserts
F constitute erroneous affirmation of the trial court's judgment. They cannot be. The lower court could not have arrived at a decision contrary to that of the trial court.

The trial court's decision that emanated from the evidence of parties
G which evidence the court, having had the advantage of seeing, listening to and observing the witnesses in the course of their testimony, faultlessly evaluated, must endure. Appellant's failure to establish that these concurrent findings are perverse, renders his appeal unmeritorious. I so
H hold, dismiss the appeal and further affirm the judgment of the trial court convicting and sentencing the appellant as charged.

Musa Dattijo Muhammad
Justice, Supreme Court

I

BAYANG AKAAHS, (JSC): I read in advance the leading judgment of my learned brother M.D. Muhammad (JSC) dismissing the appeal as lacking in merit.

The appellant is quarreling with the Federal High Court's exercise of jurisdiction which tried and convicted him of Advance Fee Fraud. Section 14 of the Advance Fee Fraud and other Offences Act, 2006 conferred the Federal High Court with jurisdiction to try offences and impose penalties under the Act. The National Assembly enacted the Act pursuant to S. 251 of the Constitution which provides:

> **"251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by the National Assembly the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters."**

The Advance Fee Fraud and other Offences Act, 2006 was duly passed by the National Assembly into law. The appellant cannot be heard to question the jurisdictional competence of the Federal High Court in trying, convicting and ordering him to pay compensation to the victim under the Act.

The appeal is unmeritorious and it is accordingly dismissed.

K. B. AKAAHS
Justice, Supreme Court

CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the leading judgment which my Lord, Muhammad, JSC, just delivered now. I agree with His Lordship that this is devoid of merit.

I, accordingly, enter an order dismissing it. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

EJEMBI EKO, (JSC): The Federal High Court sitting at Awka, on the charge **No. FHC/AWK/14C/2015**, had on 13th May, 2015 convicted and sentenced the appellant to 7 years imprisonment for the offence of obtaining the sum of N4,500,000.00 from the PW.4 by false pretences. The appellant was also ordered to refund the said sum of N4,500,000.00 to his victim.

There are only two (2) issues for the determination of this appeal. That is:

1. **Whether the trial court had jurisdiction to entertain the charge(s) against the appellant?**
2. **Whether the court below was right in holding that the prosecution proved the ingredients of the charge in count 2 beyond reasonable doubt?**

The learned appellant's counsel had argued, under issue 1, that Section 251 of the 1999 Constitution, as amended, has exhaustively provided for the jurisdiction of the Federal High Court, and that the offence(s) of advance fee fraud for which the trial Federal High Court convicted and sentenced the appellant do not fall within the jurisdiction of the Federal High Court. The learned counsel seems, apparently, to have misconceived the effect of the unambiguous provisions of sub-section (1) of Section 251 of the Constitution, to wit:

> **251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.**

Clearly, Section 251(1) of the Constitution, as amended, empowers the National Assembly to enact an Act conferring additional jurisdiction on the Federal High Court. It is in pursuance of this power that the National

Assembly enacted the Advance Fee Fraud and Other Offences Act, 2006, wherein in Section 14 thereof it vested jurisdiction in the Federal High Court in the following terms. That is:

> **14. The Federal High Court shall have jurisdiction to try offences and impose penalties under this Act.**

Concurrent findings of fact on the ingredients of the offence under count 2 defended by the appellant is the substance of the Issue 2 canvassed by the appellant. The appellant's arguments under the issue also touch on the primary function of the trial court in the evaluation of the evidential materials and ascription of probative value to the evidence duly evaluated. This court, as appellate court, has adopted a deliberate policy of not readily intervening and interfering with the concurrent findings made by the trial and the intermediate courts below it. It does however interfere with the concurrent findings of fact only in very exceptional circumstances. That is, when the concurrent findings of fact are manifestly perverse and they occasion a miscarriage of justice. The appellant, who desires this Court to interfere with the concurrent findings of fact which are adverse to him, must show in what respect the findings are perverse and or occasion miscarriage of justice to him; failing which the appeal on the point is liable to be dismissed.

I have painstakingly read the briefs filed and exchanged in this appeal viz-a-vis the records of appeal. Contrary to the held views of the appellant, the court below was right in holding that the prosecutor at the trial court proved the ingredients of the offence of advance fee fraud the subject of count 2 beyond reasonable doubt.

False pretence is the *sin qua non* of the said count 2. It means, in the words of Section 20 of the Advance Fee Fraud and Other Related Offences Act, 2006: any representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present, which the person making it, knows to be false or does not believe to be true.

The appellant in this case offered to sell a piece of land in the sum of N4,500,000.00 to the PW.4 through the DW.5. The appellant had represented to the PW.4 that he has title to pass over the piece of land and that there were no encumbrances to the title. In other words, he offered his good and valid title to the piece of land. It turned out, in actuality, that the title to the land vested in PW.2's husband from whom the PW.2 inherited and in virtue of that the PW.2 had been in exclusive possession of the land. When the appellant offered to sell the same land to the PW.4, in 2008; the appellant knew that he was not, in law and in fact, the owner of the land. The appellant was convicted for advance fee fraud or obtaining by false pretence on these facts. The conviction was affirmed by the court below. As I earlier indicated, the appellant must show that these concurrent findings are perverse and or had occasioned miscarriage of justice to him. The findings are not perverse. The appellant also suffers no injustice or miscarriage of justice by the concurrent findings.

On the strength of my foregoing and for the fuller reasons in the Lead Judgment delivered in the appeal by my learned brother, MUSA DATTIJO MUHAMMAD, **JSC**, which judgment I hereby adopt; I find no substance in this appeal.

The appeal is hereby dismissed in its entirety. The decision of the Court of Appeal affirming the conviction, sentence and orders made by the trial Federal High Court, as they relate to the appellant, are hereby affirmed.

Ejembi Eko,
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Musa Dattijo Muhammad, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. There is no merit in this appeal and it's accordingly dismissed. I abide by all the orders contained in the lead Judgment.

Sidi Dauda Bage
Justice, Supreme Court

ONTARIO OIL & GAS LTD
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 518/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

*CASE LAW: Principles in **A-G Ondo State vs. A-G federation (2002) 9 NWLR (pt. 772) 222.***

*CASE LAW: Principles in **FRN vs. Okey Nwosu (2016) 17 NWLR (Pt. 1514) 226.***

*CASE LAW: Principles in **Queen vs. Owoh (1962) NSCC***

*CASE LAW: Principles in **State vs. Williams (1978) NSCC 38***

CONSTITUTIONAL LAW: Power of Federal Attorney-General to initiate criminal proceedings – S.174 of CFRN 1999 – Whether Federal A-G can iniate criminal proceedings in respect of Federal Offences in a State High Court.

COURT: Criminal Jurisdiction of the Federal High Court – How determined – Need to consider the charge rather than the subject matter of the transaction that led to the charge or the nature of documents tendered – Whether charge relates to any of the items listed in S.251(1) of the CFRN 1999.

COURT: Criminal Jurisdiction – Whether the Federal High Court has exclusive Criminal jurisdiction.

COURT: Criminal Jurisdiction of State High Court – Whether a High Court of a State has jurisdiction to try offences under Advanced Fee fraud and other Fraud Related offences Act, 2006 – S.4 of the said Act – Relevancy.

COURT: Error – Whether every error of court will not vitiate proceedings – Relevant considerations thereof.

COURT: Jurisdiction Criminal Jurisdiction of State High Court – Whether a State High Court has jurisdiction to try Federal Offences – S.286 CFRN 1999 – Relevancy.

COURT: Jurisdiction – Criminal Jurisdiction of Federal High Court – S.251(3) CFRN 1999 – Relevancy.

PRACTICE AND PROCEDURE: Appeal – Party appealing on obiter dictum – Propriety – Effect.

STATUTE: S.251 (3) CFRN 1999 – Purport and Significance.

Issue for Determination

1. Having regard to the lower court's finding that the trial court breached the principle of fair hearing in striking down section 19 of the Admiralty Jurisdiction Act (AJA), whether the lower court was

not in grave error and so acted without jurisdiction when it thereafter failed to set aside the trial court's ruling of 10th October, 2014. (Ground 1).

2. **Having regard to the clear provisions of Section 251(I) (a), (g), (n), (s) and (3) of the Constitution, Section 8 (1) of the Federal High Court Act (FHC Act), Sections 1, 2, 19 and 25 of the AJA vis-a-viz the information preferred against the appellant at the trial court, as well as the evidence adduced by the prosecution, whether the lower court was not in grave error in holding that the trial court rightly assumed jurisdiction on the information dated 20th July 2012. (Grounds 2, 3, 4,5 and 6).**
3. **Whether the lower court was not in error when it failed to be bound and to follow the decision of this honourable court in George vs. FRN (2014) 5 NWLR (Pt. 1399) 1 and its own decision in Okey Nwosu vs. FRN Appeal No. CA/L/601/11 delivered on 21st November 2013 and Akingbola vs. FRN – Appeal No. CA/L/490//14 delivered on 31st December 2014. (Ground 7).**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Lagos Division on 30th day of April, 2015 Coram: Amina Adamu Augie JCA (as she then was), Abubakar Tijani and Abimbola Osarugie Obaseki-Adejumo JJCA wherein the lower court dismissed the appellant's appeal and affirmed the ruling of the trial High Court of Lagos.

The appellant and four other defendants were charged before the High Court of Lagos State in a 9 count information dated 20th July, 2012 for offences of obtaining money by false pretence under Section 1 of the Advance Fee Fraud and other Fraud Related Offences Act, 2006, forgery and uttering under the Criminal Code, Cap. C. 17, Laws of Lagos State of Nigeria, 2003 and conspiracy to commit the offences. The information relates to fraudulent practices allegedly perpetrated by the appellant and other defendants before the trial court with respect to the operation of the Petroleum Support Fund (PSF)

Scheme otherwise known as fuel subsidy. The PSF is a pool of funds contributed by the three tiers of governments comprising the Federal, State and the Local Government in Nigeria. Under the PSF Scheme, petrol is bought locally in Nigeria in the open market at a government subsidized rate. The oil marketing companies, under licence, to import petrol into Nigeria would bring in petroleum otherwise known as Petroleum Motor Spirit (PMS) from overseas having purchased same at the international rate and then submit their claims to the Government for payment. The amount paid by the Government is the difference in price between the International market rate which is always higher and the subsidized rate which is usually lower. The difference paid by the Government to cushion the effect of the high cost of importation from the international market is regarded as subsidy. The purpose is to stabilize domestic prices of petroleum products against volatility in the International Crude and Oil Prices. The claim by the marketer under the PSF Scheme is based on what is actually discharged at the tank farm and as verified by the officers of Petroleum Products Pricing Regulatory Authority (PPPRA), Department of Petroleum Resources (DPR), External Auditors, the Surveyor to the marketer involved and the Surveyor to the tank farm owner.

Sometime around 2011, the subsidy being paid by Government jumped up astronomically and as result of the suspicious increase, the Honourable Minister of Petroleum Resources forwarded a petition to the Economic and Financial Crimes Commission (EFCC) requesting for investigation of all forms of corruption and abuse within the petroleum subsidy regime.

Ontario Oil & Gas Nigeria Limited (the 5th defendant in the trial court, who is the appellant herein) was one of the companies licensed by the Government to import petrol into the country. The appellant and the 1st and 2nd defendants in the trial court were involved in two contentious transactions which were investigated by the EFCC. The first transaction was an allocation given for the third quarter of 2010 to import PMS and for that transaction they claimed to have imported 19,327,460 liters of PMS and discharged same into Integrated Oil & Gas depot on 7th July, 2010. The second transaction in which the appellant and the 1st and 2nd defendants were involved was an allocation for the fourth quarter of 2010 and in the said transaction, they claimed to have imported and discharged 19,523,892 liters of PMS into Obat Oil Storage

Facilities in Apapa between 14th and 15th November, 2010.

The evidence led by the prosecution reveals that only 12,470,706 litters of PMS were discharged into Integrated Oil & Gas facility as against the claim by the appellant, 1st and the 5th defendants and with this misrepresentation, there was an additional 6,815,830.73 litters fraudulently added to the 12,470,706 litters and a sum in excess of N34,178,111.24 was paid on the inflated litters. Similarly, for the 2nd transaction, evidence revealed that only 10,146,594 litters were discharged by the appellant on 15th November, 2010 into the Obat Storage Facility and these discoveries showed that the product discharged was inflated by 9,377,298 litters and a sum of N414,757,890.54 was paid by the Federal Republic of Nigeria on the inflated litters.

After the appellant and other defendants took their plea in the lower court and the other defendants were admitted to bail, trial commenced and the prosecution called 12 witnesses during which 712 documents were admitted as exhibits. The appellant and the other defendants before the trial court brought a No case submission application pursuant to Section 239 of the Administration of Criminal Justice Law of Lagos State. The appellant, in its application also raised the issue of jurisdiction contending that the evidence led shows that the charge relates to revenue of the Federal Government, petroleum and crude oil products and admiralty matters and that by virtue of the provisions of section 251 of the 1999 Constitution, the High Court of Lagos State had no jurisdiction to entertain the charge.

The respondent in reaction to the said No case submission application, filed a counter affidavit along with a written submission. In its ruling dated 10th October, 2014, the High Court of Lagos State dismissed the No case submission application and held that a prima facie case has been made out sufficient for the appellant to enter its defence and that the High Court of Lagos State had the jurisdiction to try the offences contained in the information as the offences relate to obtaining property by false pretence, forgery, uttering and their conspiracy count. Dissatisfied with the said ruling of the High Court, the appellant appealed to the Court of Appeal by its notice of appeal.

The Court of Appeal, delivered its judgment on 30th April, 2015 wherein it dismissed the appeal against the existence of prima facie and also found that

the High Court of Lagos State had the jurisdiction to try the offences of obtaining money by false pretence, forgery, uttering and conspiracy. The appellant, being dissatisfied with the decision of the Court of Appeal appealed to the Supreme Court.

***Held**: (Unanimously dismissing the appeal)*

1. *Jurisdiction of State High Court to try offences under Advance Fee Fraud and other Related offences Act.*
The charge or the offences alleged against the appellant borders on revenue of the Federal Government, Admiralty jurisdiction and mines and minerals and as such jurisdiction is conferred exclusively on the Federal High Court by virtue of Section 251(3) and 272 of the Constitution 1999. To get a clearer view the charge culminating in this appeal are forgery, uttering and obtaining by false pretence which items are not within the explicit lists of items defined as offences under Section 251 (1) CFRN 1999. Also has to be noted is that the information upon which the appellant was arraigned had no mention of Admiralty Offences.
Another way of saying the same thing is that the information at the trial High Court is predicated on the offences of forgery, uttering and conspiracy as prescribed by Criminal Code Law of Lagos State, while the offence of obtaining property by false pretence is prescribed by the Advance Fee Fraud and other Fraud Related Offences Act, 2006. By Section 14 of the said Act of 2006, the High Court of a state shall among other courts have jurisdiction to try the offences and impose penalty under the Act since the National Assembly expressly conferred jurisdiction on the State High Court. *(Pp 53 – 54 Paras G – C).*

2. *How to determine the nature of the criminal Jurisdiction of the Federal High Court*
The implication of what has been so stated above is that the integrity of the extent of the criminal jurisdiction of the Federal High Court

has been left untampered with and respected. That was the position when the case of Daboh vs. The State (1977) NSCC 309 was decided as the Supreme Court considered the provisions of sections 7 (1), (2) and 8 of the 1973 decree. Indeed, although the case of Daboh vs. State (supra) related to the offence of false pretence in delivering a certificate of registration to the Register of Insurance, Federal Ministry of Trade, the Supreme Court still held that notwithstanding Sections 7 (1) & (2) and 8 (1) of the Federal High Court Act, the Federal High Court would not have jurisdiction because the offence does not relate to matters listed in section 7 (1) of the Federal High Court Act or the Exclusive Legislative List. See also Queen vs. Owoh (1962) NSCC 416.

It is to be noted that the provisions of Sections 7(1) & (2) and 8 (1) of Decree No. 13 of 1973 are in pari material with the provisions of Sections 7(1) & (2) and 8(1) of the Federal High Court Act. What all these translate to is that in determining the court with the requisite jurisdiction to entertain a criminal matter, the court would always consider the nature of the charge rather than the transaction forming the subject matter of the charge or the documents attached as proof of evidence. That is to say that a court does not get a panic attack or nervous breakdown on seeing a Federal Agency involvement and automatically throws in the towel with a helpless gesture signifying a loss of jurisdiction. The court has to dig deeper into ascertaining the genre or nature of the charge to decide whether the State High Court has the jurisdiction or not. Stated differently, the court has to be discerning and not shy away on being confronted by an information which may on first sight look like what is outside the court's domain. The court has to go the extra mile to find out where it stands with what is before it. *(Pp 54 – 55 Paras C – A).*

3. *Principles relevant to the determination of the Criminal jurisdiction of the Federal High Court and State High Courts.*

This court has cleared the grey areas on this matter of criminal jurisdiction as between either the Federal High Court and the State High Courts handling certain subject matters or those ones where

only the State High Courts alone may entertain or those exclusive to the Federal High Court. In this I shall refer to a few dicta of my learned brothers along the way and thus, see FRN vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226 at 304-305 per Ogunbiyi JSC who stated as follows:

> **"The offence of stealing being alleged against the 1st respondent was created under the law enacted by the Lagos State House of Assembly, the same house could not have conferred jurisdiction on the Federal High Court but only conferred on the High Court of the State. The offence of stealing does not fall within items (a) – (s) listed in Section 251 of the 1999 Constitution. The control of capital issue does not also fall within any of the items specifically listed in Section 251 (1) of the 1999 Constitution. Assuming that the offence of stealing falls within the items listed as (a) (s) in Section 251, that in itself would not confer exclusive jurisdiction on the Federal High Court to try criminal cases arising from such items. This is in view of section 251 (3) and the phrase "the Federal High Court shall also have and exercise jurisdiction." By Section 251 (3) the Federal High Court shall also have jurisdiction along with other courts in criminal causes or matters but not an exclusive jurisdiction as was conferred on the Federal High Court in civil matters listed in subsection 1 of section 251 of the 1999 Constitution… as rightly submitted by the appellant therefore, the learned justices of the Court of Appeal were in great error in holding that the High Court of Lagos State had no requisite jurisdiction to try the 1st respondent for the offence of stealing by conversion preferred against him under Section 390 (7) of the Criminal Code Laws of Lagos State, 2003."**

Also at page 304, His Lordship, Ogunbiyi JSC opined further:

> **"In criminal law and the administration of criminal justice, the determination of jurisdiction will be taken in the light of the enabling law setting out the jurisdiction vis-à-vis the charge preferred against the accused. Section 272 of the 1999 Constitution is also relevant. The charge before the court is what determines its jurisdiction. While Section 251(1) of the Constitution confers exclusive jurisdiction in civil matters in respect of items listed as (a) – (s), Section 251 (3) does not however confer exclusive jurisdiction on the Federal High Court in criminal causes and matters listed in subsection (1). By the use of the phrase, "the Federal High Court shall also have and exercise jurisdiction" can only mean that other courts apart from the Federal High Court can exercise jurisdiction also in respect of criminal matters relating to matters listed in Section 251 (1). The phrase "to the exclusion of any other court" is omitted deliberately. It is difficult in the circumstance to appreciate the reasoning of the Court of Appeal that what the respondents did with the proceeds of crime of stealing would divest the court (High Court) of its jurisdiction to try the offence of stealing."**

M. D. Muhammad (JSC) at pages 290-291, opined thus:

> **"The jurisdiction of the trial court as spelt out under Section 272 of the 1999 Constitution operates subject to the restriction placed on it by Section 251 (2) and (3) of the same Constitution. The latter subsection vests criminal jurisdiction in the Federal High Court regarding all the items for which the court is conferred**

exclusive civil jurisdiction under Section 251 (1). ***None of these items pertains to simple stealing for which the 1st respondent stands trial at the trial court.*** **He is not being charged for stealing shares. As learned senior counsel for the appellant further observed, and correctly too, the 1st respondent does not stand trial at the Federal High Court for same offence of stealing preferred against him at the trial court. At the Federal High Court, he faces trial only for those offences for which, by virtue of the relevant items in the Exclusive Legislative List, the National Assembly has passed laws on. The lower court's judgment that the trial court has lost its jurisdiction to the Federal High Court on the basis of the latter's exclusive jurisdiction under** ***Section 251 (1) of the 1999 Constitution is therefore, preserve.*** **It is a decision that neither draws from the evidence on record nor from a correct construction of Section 251 (3) of the Constitution the lower court held the exclusive jurisdiction of the Federal High Court stems from. The truth is that stealing is a matter which falls within the legislative competence of the Lagos State House of Assembly and having been legislated upon, the trial court retains the jurisdiction of trying the 1st respondent. See Daboh & Anor vs. State (1977) NSCC 309 at 321-322."** *(Pp 55 – 57 Paras A – G).*

4. *The Principles in State vs. Williams*

Indeed this court being consistent on the issue way back had in the case of The State vs. Williams (1978) NSCC 38 in matters relation to Exchange Control which on the face appeared to be headed for the Federal Revenue Court but the Apex Court was able to say, a surgical operation is necessary to dichotomise what should be taken to the Federal Revenue Court and what remained in the domain of a State Court however the matter was clothed to appear otherwise. In

that case of The State vs. Williams (supra) this court held thus at page 43:

> **"It is after a consideration of Section 24 of the Interpretation Act, the learned judge held that the offences charged under the Criminal Code as contained in the information were validly charged, Sections 7 (2) (3) and 8 of the Federal Revenue Court Decree No. 13 of 1973 should not have arisen for consideration. Strictly, Section 8 (2) deals with "Criminal causes and matters arising out of or connected with any section which are matters relating to Federal Laws on specific subjects.**
>
> **In considering the provisions of Section (2), the learned trial judge did not perceive that their scope was limited by subsection (3) which makes the jurisdiction confer by Section 7 (2) subject to Section 63 (3) and includes in its original jurisdiction in respect of offences under the provisions of the Criminal code being offences in relation to which proceedings may be initiated at the instances of the Attorney General of the Federation. Neither Section 104 of the Constitution of the Federation nor Section 341 of the Criminal Procedure Law of Lagos State confers original jurisdiction on the attorney General of the Federation to initiate proceedings by way of information in the Lagos State High Court with respect to offences under the Criminal code of that State. A consideration in matters contained in the Exclusive Legislative List including taxation of companies, customs and excise duties, banking, foreign exchange, currency and fiscal measures of the Government of the Federation. It is quite clear to us on a careful consideration of the provisions of Decree No. 13 of 1973 that the Decree does not take away the**

jurisdiction of the High Court of a State in matters within the competence of the State under reference to Section 63 subsection 64 (3) & (4) of the Federal High Court, Cap. F12."

The Supreme Court went further to hold at page 44 of the report, thus:

"As the learned Attorney General submitted, all that have been done was to transfer jurisdiction in respect of such criminal matters falling within the competence of Federal Military Government to the Federal Revenue Court. If therefore these sections are interpreted in the light of what we have said the Federal Revenue Court Decree No. 13 of 1973 should only apply where a charge is laid under a Federal Act or Decree and when this has been done, it will be necessary whether jurisdiction still exists in the State High Court or has been exclusively vested in the Federal Revenue Court. ***For instance, if a person commits an offence of stealing custom's papers in Lagos State, he would be charged under Criminal Code of Lagos State for the offence of stealing and when it comes to the question of the punishment to be given, subsection (1) of the section 390 of the Criminal Code may then come for consideration.*** **(Italics mine).** *(Pp 57 – 59 Paras G – E).*

5. *Principles in Queen vs. Owoh*

I would dare to posit that what is glaring on the policy posture of this court which I would go so far as to say has acquired the status of a traditional culture is that the fact that an aspect in the offence has the semblance of a Federal insignia would not take a State offence properly legislated for in a State Assembly Law into the realm that would endow the Federal High Court with not only the jurisdiction to try and penalize on the offence but to have the exclusivity for that. This culture has been enhanced by many decisions of this court,

some I have mentioned above and some such as Queen vs. Owoh (1962) NSCC 4126, the allegation against the appellants therein was that they were said to be involved in fraudulent evasion of import duties of customs and charged for stealing, fraud, forgery and uttering under the Criminal Code of Eastern Nigeria. The Supreme Court held that those offences of conspiracy, stealing, forgery and uttering are not laws in the Exclusive Legislative List of the Federation and so the Director of Public Prosecutions of the Federation cannot institute or undertake the prosecution of those offences as Federal Laws rather they were offences within the then regional law.

A similar interpretation was made by the Supreme Court in Akwule vs. The Queen (1963) NSCC 157 in relation to the offence of criminal breach of trust. The Apex Court went so far as to say that the fact that the Penal Code which prescribes the offence of criminal breach of trust as a State Law does not mean it could not extend to bank or banking matters which are matters within the Exclusive Legislative List. Another way of saying so is that the fact that banking is within the Exclusive Legislative List does not prevent the exercise of the residual power of the State to make law for criminal breach of trust under Section 312 of the Penal Code or stealing under Section 390 of the Criminal Code. *(Pp 59 – 60 Paras F – D).*

Per Peter Odili (JSC)

> **"As I said earlier on the consistency exhibited by this court in these criminal jurisdiction matters in relation between the Federal High Court or its predecessor on the one part and the State High Court on the other. The 1999 Constitution has not thrown any spanners in the works as it has not conferred exclusive criminal jurisdiction on the Federal High Court on the various items listed in Section 251 (1) of 1999 Constitution of the Federal Republic of Nigeria unless there is an express enactment by the National Assembly in which such exclusive criminal jurisdiction is donated and so the**

> **State High Court would continue to exercise jurisdiction on the matters within the jurisdiction of the State High Court.**

It is to be noted that Section 251 (1) (5) CFRN in recognizing the National Assembly's power to confer jurisdiction provides thus:

> **"…such other jurisdiction, civil or criminal, and whether to the exclusion of any other court or not as may be conferred upon it by an Act of National Assembly".** *(P 60 Paras D – H).*

6. *Power of State High Court to try Federal Offences*
In fact the Constitution of the Federal Republic of Nigeria, 1999 went so far as to stipulate, in Section 286 that the National Assembly may confer such power to State Courts to try Federal offences and so Section 286 (1) (b) (c) and (2) 1999 Constitution of the Federal Republic of Nigeria has provided for the trial by State Courts on Federal offences in like manner as they would try State offences so long as the court is presided over by a qualified legal practitioner in Nigeria. *(Pp 60 – 61 Paras H – A).*

7. *Power of Federal Attorney General to initiate proceedings in respect of Federal Offences*
Section 174 of 1999 CFRN has gone further to endow the Federal Attorney General with the power to approach any court including State courts to initiate criminal proceedings in relation to Federal offences and the only limitation has to do with martial law and court. The expatiation of the scenario was stated by the Supreme Court in the case of A.G. Ondo State vs. A.G. Federation (2002) 9 NWLR (Pt. 772) 222 at 308 per Uwais CJN thus:

> **"The next point is whether the Attorney General of the Federation or any person authorized by the ICPC can lawfully initiate or authorized the initiation of criminal proceedings in any court in Ondo State in respect of**

> **offences created by the Act. The plaintiff's contention is that the answer is in the negative if the answer to Issues Nos. (i) and (ii) have been answered in the negative. But I have held otherwise and so the opposite is the case. I therefore, hold that the criminal proceedings can be initiated in the court in Ondo State in accordance with the provisions of Section 286 subsection (1) (b) of the Constitution which provides ….. Federal offences are defined in subsection (3) thereof to mean "an offence contrary to the provisions of an Act of the National Assembly or any law having effect as if so enacted."**
> *(P 61 Paras A – G).*

8. *The principle in Mandara vs. A-G of the Federation*
To restate the situation as has been variously explained by this court I shall refer to Mandara vs. Attorney General of the Federation (1984) 1 SCNL 311 at 330 wherein this court held as follows:

> **"There can be no room for a situation of Federal Justice and State Justice; there can only be justice according to the laws of this land. It would certainly need express legislation such as would enable the Attorney General of the Federation to take all its cases to Federal High Courts, thus avoiding State Courts. This court demonstrated conclusively in Bronik that such separation of powers as there exist in our 1979 Constitution is neither watertight nor absolute as I have endeavoured to show earlier on in this judgment. *State High Court tries Federal Causes in what I would describe as Federal Presence. By this I mean that law and order in the State or in any court in the State is maintained by the Nigeria Police, which is an arm of the Federal executive arm of Government. The decrees and orders of such Courts are enforced by the Federal Arms of Government, it is the case that the crime is investigated and recommended for prosecution by the police in each State. Again, prosecution of criminal cases in the inferior State courts is done by the Nigeria Police. Thus, it would be seen***

that the constitutional arrangement in this regard is porous and there is constant interaction between the Federal and the State organs of the Government". **(Italics mine).** *(Pp 61 – 62 Paras G – E).*

9. *Admilarity jurisdiction does not apply and irrelevant in these proceedings*
Per Odili (JSC)

"Section 19 which was really only a tiny part of the large picture and so dispensing with that area, the court below went into the meat of what was before it. The Court of Appeal held correctly in my view that what was at stake was nothing to do with Admiralty proceedings and that the trial court should not have struck out Section 19 of Admiralty Jurisdiction Act as the appellant's right to fair hearing was breached thereby inspite of the fact that it did not come into play in the first place and was clearly an obiter dictum which was outside the ratio decidendi. That settled I need say that it is not every error in a court's judgment that would lead to the setting aside of a judgment or decisions. This is because before such an error would have the nullifying effect it must be material and germane. Also it is only the ratio decidendi of a decicion, ruling or judgment that is appealed against or considered in an appeal and not a passing remark or opinion. See Chukwuma vs. FRN (2011) 13 NWLR (Pt. 1264) 391 at 420 421; Solola vs. State (2005) 2 NWLR(264) 154; Nasiru vs. Bindawa (2006) 1 NWLR (961) 355 at 371. *(Pp 63 – 64 Paras F – A).*

10. *When Supreme Court will not depart from concurrent findings*
I shall conclude by stating that from all I have been trying to impart above, the two courts below have arrived at the concurrent findings of the substance of the matter before them. I see no line of departure

than to go along in holding that the decision of the Court of Appeal in affirming the Ruling of the High Court that it had jurisdiction to entertain the information contained in Charge No: ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and other fraud related offences Act, 2006 forgery, uttering and conspiracy under Section 467 and 468 of the Criminal Code Cap C.17, Volume 2, Laws of Lagos State, Nigeria 2003. *(P 64 Paras A – D).*

11. *When Supreme Court will depart from concurrent findings*
In conclusion, I have noticed that in this instant appeal, there are concurrent findings of two lower courts, more particularly on issue of jurisdiction which is life wire of every case. As in the long existing practice, this apex court rarely interferes with or disturbs concurrent findings of two lower courts except in very special or exceptional circumstances such as where such finding is perverse or where there had been misapplication of law or misconception of fact which had occasion miscarriage of justice to any of the parties. See EHOLOR vs. OSAYANDE (1992) NWLR (Pt. 249) 524 IGWEGO & ORS vs. EZEUGO & ANOR (1992) 6 NWLR (Pt. 249) 561 OYIBO IRIRI & ORS vs. ESERORAYE (1991) 2 NWLR (Pt. 173) 262.
(Pp 65 – 66 Paras H – B)

12. *Interpretation of S.251 (3) CFRN 1999*
The constitution in Section 251(3) from the operative words: "The Federal High Court shall ALSO have and exercise jurisdiction in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this Section", intends that the criminal jurisdiction it has bestowed on the Federal High Court is an additional jurisdiction. The word <u>ALSO</u>, as used in Section 251(3) of the Constitution means, or can only mean "in addition".

Accordingly, when subsections (1) and (3) of Section 251 of the Constitution are read together the natural inference is: in addition to the exclusive jurisdiction vested in the Federal High Court in relation to the "civil causes and matters" listed in subsection (1); the Federal High Court shall also have and exercise criminal

jurisdiction "in respect of criminal causes and matters *in respect of which jurisdiction is conferred by* subsection (1) of" Section 251 of the Constitution. It appears to me that the criminal jurisdiction vested in the Federal High Court, which is an additional jurisdiction, is only in respect of or in relation to the causes or matters it has been conferred exclusive jurisdiction, as a civil court, by dint of Section 251(1) of the Constitution. This "additional" jurisdiction vested in the Federal High Court is not intended to oust the jurisdiction vested in the State High Courts to try "Federal offences" by other provisions of the Constitution. The provisions of Section 251(3) of Constitution do not also appear to give Federal High Court monopoly over Federal offences created by Acts of the National Assembly. *(P 68 Paras A – F).*

13. *Principles of the Criminal Jursidiction of the State High Court*
Per Eko (JSC)

> **"Section 272(1) of the Constitution vests general jurisdiction on the High Court of a State to determine *inter alia* any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of *an offence* committed by any person". This of course is "subject to the provision of Section 251 and OTHER PROVISIONS of this Constitution". I said earlier that nothing in Section 251 of the Constitution is intended to oust the jurisdiction of the High Court of a State to try any person for "Federal offences".**

The "other provisions of this Constitution" include Section 286 of the same Constitution. Subsection (2)(b) of the Constitution unambiguously vests in the High Court of a State "jurisdiction with respect to the investigation, inquiry into, or trial of persons for Federal offences". Thus, what the Constitution has expressly vested in the High Court of a State let nobody by whatever altruistic or opportunistic argument take away.

The learned appellant's counsel was completely in error in positing that the High Court of Lagos State has no jurisdiction to try the appellant for offences created by advance fee fraud and other related offences Act, 2006, being Federal offences. We are here concerned with the interpretation or construction of the constitution, the organic law or groundnorm of the Nation. We are, as this court stated in RABIU vs. KANO STATE (1980) 8-11 SC 130; ONYEMA vs. OPUTA (1987) 6 SC 362, enjoined to interpret the Constitution in a manner to give it a liberal and broad construction so as to promote its purpose. That is, to promote good government and people's welfare. Accordingly, a narrow and conservative construction that denies or defeats its purpose must be avoided.
(Pp 68 – 69 Paras F – D).

14. *The principle in A-G Ondo vs. A.G. Federation*
This same point the appellant has raked up was raised and was conclusively determined by the full court of this court in A.G. ONDO STATE vs. A.G. FEDERATION & ORS (2002) LPELR-623 (SC). It was declared loud and clear in that case that the Constitution vests jurisdiction in the High Court of the States to try Federal offences.
(P 69 Paras D – E).

Nigerian Cases cited

A.G. Ondo State vs. A.G. Federation & Ors (2002) LPELR-623 (SC).
A.G. Ondo State vs. A.G. Federation (2002) 9 NWLR(Pt. 772) 222
Akwule vs. The Queen (1963) NSCC 157
Chukwuma vs. FRN (2011) 13 NWLR (Pt. 1264) 391;
Daboh vs. The State (1977) NSCC 309
Ebolor vs. Osayande (1992) NWLR (Pt. 249) 524
FRN vs. Okey Nwosu (2016) 17 NWLR (Pt. 1514) 226
George vs. FRN (2014) 5 NWLR (Pt. 1399) 1
Igwego & Ors vs. Ezeugo & Anor (1992) 6 NWLR (Pt. 249) 561
Nasiru vs. Bindawa (2006) 1 NWLR (961) 355
Onyema vs. Oputa (1987) 6 SC 362,
Oyibo Iriri & Ors vs. Eseroraye (1991) 2 NWLR (Pt. 173) 262.

A *Queen vs. Owoh (1962) NSCC 4126,*
Queen vs. Owoh (1962) NSCC 416.
Rabiu vs. Kano State (1980) 8-11 SC 130;
Solola vs. State (2005) 2 NWLR(264) 154;
B *State vs. Williams (1978) NSCC 38*

Nigerian Statutes Cited
1999 Constitution Section 251
C *Administration of Criminal Justice Law of Lagos State Section 239*
Advance Fee Fraud and other Fraud Related Offences Act, 2006
Sections 1 and 14, 8 (A) & 1 (A), 1 (3)
Constitution 1999 Section 251(3) and 272
D *Criminal Code Section 390.*
Federal High Court Act, Sections 7 (1) & (2) and 8 (1)
Penal Code Section 312

E **Representation**
Y. A. Kadiri, (Esq.) with C.O Alaje (Esq.) for the Appellant
Mrs. Funmi Falana, (Esq.) with her, Olusola Egbeyinka, (Esq.) and Marshal Abubakar (Esq.) for the Respondent

F

PETER-ODILI, (JSC) (Delivering the Lead judgement): This is an appeal against the judgment of the Court of Appeal, Lagos Division or court below or lower court on 30th day of April, 2015 Coram: Amina Adamu
G Augie JCA (as she then was), Abubakar Tijani and Abimbola Osarugie Obaseki-Adejumo JJCA wherein the lower court dismissed the appellant's appeal and affirmed the ruling of the trial High Court of Lagos.

H **FACTS BRIEFLY STATED**
The appellant and four other defendants were charged before the High Court of Lagos State in a 9 count information dated 20th July, 2012 for offences of obtaining money by false pretence under Section 1 of the
I Advance Fee Fraud and other Fraud Related Offences Act, 2006, forgery and uttering under the Criminal Code, Cap. C. 17, Laws of Lagos State of

Nigeria, 2003 and conspiracy to commit the offences. The information relates to fraudulent practices allegedly perpetrated by the appellant and other defendants before the trial court with respect to the operation of the Petroleum Support Fund (PSF) Scheme otherwise known as fuel subsidy. The PSF is a pool of funds contributed by the three tiers of governments comprising the Federal, State and the Local Government in Nigeria. Under the PSF Scheme, petrol is bought locally in Nigeria in the open market at a government subsidized rate. The oil marketing companies, under licence, to import petrol into Nigeria would bring in petroleum otherwise known as Petroleum Motor Spirit (PMS) from overseas having purchased same at the international rate and then submit their claims to the Government for payment. The amount paid by the Government is the difference in price between the International market rate which is always higher and the subsidized rate which is usually lower. The difference paid by the Government to cushion the effect of the high cost of importation from the international market is regarded as subsidy. The purpose is to stabilize domestic prices of petroleum products against volatility in the International Crude and Oil Price. The claim by the marketer under the PSF Scheme is based on what is actually discharged at the tank farm and as verified by the officers of Petroleum Products Pricing Regulatory Authority (PPPRA), Department of Petroleum Resources (DPR), External Auditors, the Surveyor to the marketer involved and the Surveyor to the tank farm owner.

Sometime around 2011, the subsidy being paid by Government jumped up astronomically and as result of the suspicious increase, the Honourable Minister of Petroleum Resources forwarded a petition to the Economic and Financial Crimes Commission (EFCC) requesting for investigation of all forms of corruption and abuse within the petroleum subsidy regime.

Ontario Oil & Gas Nigeria Limited (the 5th defendant in the trial court, who is the appellant herein) was one of the companies licensed by the Government to import petrol into the country. The appellant and the 1st and 2nd defendants in the trial court were involved in two contentious transactions which were investigated by the EFCC. The first transaction was an allocation given for the third quarter of 2010 to import PMS and for

that transaction they claimed to have imported 19,327,460 liters of PMS and discharged same into Integrated Oil & Gas depot on 7th July, 2010. The second transaction in which the appellant and the 1st and 2nd defendants were involved was an allocation for the fourth quarter of 2010 and in the said transaction, they claimed to have imported and discharged 19.523,892 liters of PMS into Obat Oil Storage Facilities in Apapa between 14th and 15th November, 2010.

The evidence led by the prosecution reveals that only 12,470,706 litters of PMS were discharged into Integrated Oil & Gas facility as against the claim by the appellant, 1st and the 5th defendants and with this misrepresentation, there was an additional 6,815,830.73 litters fraudulently added to the 12,470,706 litters and a sum in excess of N34,178,111.24 was paid on the inflated litters. Similarly, for the 2nd transaction, evidence revealed that only 10,146,594 litters were discharged by the appellant on 15th November, 2010 into the Obat Storage Facility and these discoveries showed that the product discharged was inflated by 9,377,298 litters and a sum of N414,757,890.54 was paid by the Federal Republic of Nigeria on the inflated litters.

After the appellant and other defendants took their plea in the lower court and the other defendants were admitted to bail, trial commenced and the prosecution called 12 witnesses during which 712 documents were admitted as exhibits. The appellant and the other defendants before the trial court brought a No case submission application pursuant to Section 239 of the Administration of Criminal Justice Law of Lagos State (see pages 1705-1982 of the record for the joint No case submission application brought by the appellant herein, 2nd and the 5th defendants). The appellant, in its application also raised the issue of jurisdiction contending that the evidence led shows that the charge relates to revenue of the Federal Government, petroleum and crude oil products and admiralty matters and that by virtue of the provisions of section 251 of the 1999 Constitution, the High Court of Lagos State had no jurisdiction to entertain the charge.

The respondent in reaction to the said No case submission application, filed a counter affidavit along with a written submission (see

pages 1783-1863 of the record). In its ruling dated 10th October, 2014, the High Court of Lagos State dismissed the No case submission application and held that a prima facie case has been made out sufficient for the appellant to enter its defence and that the High Court of Lagos State had the jurisdiction to try the offences contained in the information as the offences relate to obtaining property by false pretence, forgery, uttering and their conspiracy count. Dissatisfied with the said ruling of the High Court, the appellant appealed to the Court of Appeal by its notice of appeal (which was subsequently amended by order of the Court of Appeal granted on 9th February, 2015).

The Court of Appeal, delivered its judgment on 30th April, 2015 wherein it dismissed the appeal against the existence of *prima facie* and also found that the High Court of Lagos State had the jurisdiction to try the offences of obtaining money by false pretence, forgery, uttering and conspiracy. The appellant, being dissatisfied with the decision of the court below appealed to the Supreme Court by its notice of appeal dated 27th May, 2015 only on issue of jurisdiction. By the leave of this court, the appellant filed an application praying for extension of time to file the notice of appeal and to compile and transmit record to this court which application was granted on 28th April, 2016.

On the 8th November, 2017 date of hearing, learned counsel, Yusuf Asamah Kadiri, Esq. for the appellant adopted the amended appellant's brief of argument filed on 7/11/17 and deemed filed on 8/11/17. He distilled three issues for determination from the seven grounds of appeal which are thus:

i. Having regard to the lower court's finding that the trial court breached the principle of fair hearing in striking down section 19 of the Admiralty Jurisdiction Act (AJA), whether the lower court was not in grave error and so acted without jurisdiction when it thereafter failed to set aside the trial court's ruling of 10th October, 2014. (Ground 1).

ii. Having regard to the clear provisions of Section 251(I) (a), (g), (n), (s) and (3) of the Constitution, Section 8 (1) of the Federal High Court Act (FHC Act), Sections 1, 2, 19 and 25 of the AJA vis-a-viz the information preferred against the appellant at the trial court, as well as the evidence adduced by the prosecution, whether the lower court was not in grave error in holding that the trial court rightly assumed jurisdiction on the information dated 20th July 2012. (Grounds 2, 3, 4,5 and 6).

iii. Whether the lower court was not in error when it failed to be bound and to follow the decision of this honourable court in George vs. FRN (2014) 5 NWLR (Pt. 1399) 1 and its own decision in Okey Nwosu vs. FRN – Appeal No. CA/L/601/11 delivered on 21st November 2013 and Akingbola vs. FRN – Appeal No. CA/L/490//14 delivered on 31st December 2014. (Ground 7).

The appellant's counsel also adopted a reply brief filed on 23/10.17 and deemed filed on 8/11/17.

Mrs. Funmi Falana, learned counsel for the respondent adopted its brief of argument filed on 8/6/17 and deemed filed on 8/11/17. In it was couched a single issue which is thus:

Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had jurisdiction to entertain the information contained in Charge No. ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and other Fraud Related Offences Act, 2006, forgery, uttering and conspiracy under Section 467 and 468 of the Criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003.

The sole issue crafted by the respondent covers the grounds in the dispute that is to be considered and determined in this appeal and I shall use it as raised.

SOLE ISSUE:

Whether the Court of Appeal was not right in upholding the decision of the High Court of Lagos State that it had jurisdiction to entertain the information contained in Charge No. ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and other fraud related offences Act 2006, forgery, uttering and conspiracy under Section 467 and 468 of the Criminal Code Cap. C17, Volume 2, Laws of Lagos State, Nigeria 2003.

Learned counsel for the appellant contended that the court below was under a constitutional duty to set aside the entire decision of the trial court once it came to the firm conclusion that there was an occasion of breach of fair hearing. He cited **Section 135 of the Evidence Act 2011; State vs. Oladotun (2011) 10 NWLR (Pt. 1256) 542 at 572; Idakwo vs. Ejiga (2002) 13 NWLR (Pt. 783) 156 at 165-166; PAI Incorp vs. S.L. Limited (2010) 6 NWLR (Pt. 1189) 98 at 109-110; Danladi vs. Dangiri (2014) 11 SC 1 at 71, 75** etc.

That when the lower court found that there was a breach of the right to fair hearing at the trial court, the follow up should be a nullification of the trial court's decision. He cited **Odofin vs. Agu (1992) 23 NSCC (pt. 1) 520 at 532; Obi vs. INEC (2007) 11 NWLR (Pt. 1046) 560 at 628 629; A.G. Rivers State vs. Ude (2006) LPELR 626 (SC).**

It was further submitted for the appellant that the lower court failed to give effect to the clear provisions of Section 251 (1) (a), (g), (n) and (s) and Section 251 (3) of the Constitution, Section 8 (1) of the Federal High Court and Sections 1, 2, 19 and 25 of the AJA. That the law is settled that jurisdiction conferred by Section 251 (1) of the Constitution is exclusive to

A the Federal High Court which exclusive jurisdiction has been guarded jealously by this court and the lower court. That the provisions of Section 272 CFRN which vest jurisdiction generally in the trial High Court, Lagos State are made subject to the provisions of Section 251 (1) CRRN. He
B referred to **A.G. Lagos vs. Eko Hotels** (2006) 18 NWLR (Pt. 1011) 378 at 460; **NEPA vs Edegbero** (2002) 18 NWLR (Pt. 798) 79 at 100; **Achebe vs Nwosu** (2003) FWLR (Pt. 136) 891 at 907; **Section 8 (1) of the Federal High Court Act and Sections 1, 2, 19 and 25 AJA.**

C That the subject matter of the information preferred before the trial court cannot be extricated from the provisions of Section 251 (1) (a), (g), (n) and (s) and Section 251 (3) of the Constitution, Section 8 (1) of the Federal High Court Act, Sections 1, 2,19 and 25 of the AJA. That the law is
D settled that in the interpretation of the CFRN, related sections must be read together to discover the legislative intent. He relied on **Ojokolobo vs. Alamu** (1987) 3 NWLR (Pt. 61) 377 at 413; **Tukur vs. Government of Gongola State** (1989) 4 NWLR (Pt. 117) 513 at 579; **Ehuwa vs. OSIEC**
E (2006) 18 NWLR (Pt. 1012) 544 at 588.

Learned counsel for the appellant stated that the decision of the lower court as well as that of the trial court which it affirmed is in breach of the age-long principle of stare decisis in **George vs. FRN (2014) 5 NWLR**
F **(Pt. 1399) 1 at 24; Atolagbe vs. Awuni (1997) (Pt. 522) 536 at 561; Dalhatu vs. Turaki (2003) 15 NWLR (Pt. 843) 310 at 350 351; Dingyadi vs INEC (2011) 10 NWLR (Pt. 1255) 347 at 402.**

Responding, Mrs Funmi Falana for the respondent submitted that the
G appellant is invoking the principle of stare decisis and the decision in **George vs FRN** (Supra) out of context. That the decision in **George vs. FRN** (supra) is that the act of splitting contract was not an offence created by an Act of the National Assembly or Laws of a State House of Assembly
H and that section 203 and 104 of the Criminal Code of Lagos State did not create an offence of splitting of contract.

That the Supreme Court has laid to rest the conflict surrounding the extent of the criminal jurisdiction of the Federal High Court in **FRN vs.**
I **Okey Nwosu** (2016) 17 NWLR (Pt. 1541) 226 at 304-305.

Learned counsel for the respondent further stated that the offences charged in the information are forgery, uttering and obtaining property by false pretence none of which offences are listed in section 251(1) 1999 CFRN. Also that there is no admiralty offences charged in the information and none of the revenue of the Federal Government. That the offences relevant for this appeal are prescribed by the Criminal Code Law of Lagos State and section 14 thereof donated jurisdiction to the Lagos State High Court to try the offences and impose penalty under the said Act. She relied on **Daboh vs. State** (1977) NSCC 309; **Queen vs. Owoh** (1962) NSCC 416; **The State vs. Williams** (1978) NSCC 38.

For respondent, learned counsel stated that by section 251(1))(c) of CFRN 1999 the National Assembly has power to confer such other jurisdiction, civil or criminal, and whether to the exclusion of any other court or not as may be conferred upon it by an Act of National Assembly which means the National Assembly can confer jurisdiction to any other court including state courts in an area where the National Assembly has power to legislate and decide not to give such exclusive jurisdiction to the Federal High Court. She cited section 286(1)(b)(c) and 2 1999 CFRN; **A.G. Ondo State vs. A.G. Federation** (2002) 9 NWLR (Pt. 772) 222 at 308 per Uwais CJN.

It was also submitted for the respondent that there is no separation in the powers of the Attorney General of the Federation initiating and prosecuting all cases whether in the Federal High Court or State Courts. She cited **Mandara vs. A.G. Federation** (1984) 1 SCNL 311 at 330.

Learned counsel for the respondent said that the court below rightly found that the charge against the appellant was not on admiralty and that being the case, there was no point in considering section 19 of the Admiralty Jurisdiction Act (AJA) since that section was not in issue. That whatever else the court below said thereafter became a mere obiter dictum which is not for appeal as appeals are on the ratio decidendi of the decision. She referred to **Saraki vs Kotoye** (1992) 9 NWLR(Pt. 264) 154; **Nasiru vs. Bindawa** (2006) 1 NWLR (Pt. 961) 355 at 371-372.

In reply on points of law, the appellant posits that the trial court in striking out section 19 of the Admiralty Jurisdiction Act worked on the

fundamental principle of the appellant's right to fair hearing and it was not in a passing remark or a mere opinion of the court as it was rather a ratio decidendi and the plank upon which the court arrived at its own decision. Learned counsel cited **Ominyi vs. Alabi** (2015) 6 NWLR (Pt. 1456) 572 at 589-591.

What I see before me is the contest between the parties as to whether the Court of Appeal was right, upholding the decision of the High Court of Lagos State that it had jurisdiction to entertain the information contained in charge No: ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and Other Fraud Related Offences Act, 2006, forgery, uttering and conspiracy under sections 467 and 468 of the Criminal Code Cap C17, Volume 2, Laws of Lagos State, Nigeria 2003. The stance of the appellant is that the question should be answered negatively, that is, that the Lagos State High Court lacked the necessary vires to adjudicate on those offences while the respondent takes an opposing view point.

In fact the court below in its own words had taken the view espoused by the respondent as recaptured hereunder, thus:

> **"On the whole, I am unable to hold the view that the matters herein are within the jurisdiction of the Federal High Court. It is simply a criminal matter on the offences committed on documents allegedly uttered, forged and false pretence under the State Criminal Code and not Federal. Karibi Whyte JSC held in Eze vs. FRN (supra).**
>
> **I entirely agree with the conclusion on the summary, of two counts, that the documents relied upon in this case are only relevant for the determination whether an offence or what offence has been committed. It may be relevant for determining the jurisdiction of the court if the offence disclosed is one within the jurisdiction of the court. In this case, where the complaint against the document is that it is forged, that is the complaint that is relevant for the purpose**

of the jurisdiction of the court. If the forgery is for the evading of customs duty, then it is the Federal High Court…otherwise as in the case, where the issue of evasion of payment of custom duty did not arise and not an issue, then it is not matter within the jurisdiction of the Federal High Court.

The above shows that the Supreme Court recognized the extent of the criminal jurisdiction as it pertains to the items where the Federal High Court has been conferred jurisdiction and that when the matter is on criminal offences under the Criminal Code, the State High Court has jurisdiction. In conclusion, the complaint in this matter at hand, is that documents were allegedly uttered and forged under false pretence for the purpose of illegally collecting payment under sections 419 of the Advance Fee Fraud and other related offences and the State Criminal Code and therefore not under Federal High Court Act. It is merely upon the documents used to collect money allegedly forged and uttered; not the character of evidence used in proof of evidence. I resolve the issue in favour of the respondent."

The narrow area of the dispute herein surrounds the interpretation of the provisions of section 251 CFRN 1999 and sections 7 and 8 of the Federal High Court. If the charge or the offences alleged against the appellant borders on revenue of the Federal Government, Admiralty jurisdiction and mines and minerals and as such jurisdiction is conferred exclusively on the Federal High Court by virtue of section 251(3) and 272 of the Constitution 1999. To get a clearer view the charge culminating in this appeal are forgery, uttering and obtaining by false pretence which items are not within the explicit lists of items defined as offences under section 251 (1) CFRN 1999. Also has to be noted is that the information upon which the appellant was arraigned had no mention of Admiralty Offences.

Another way of saying the same thing is that the information at the trial High Court is predicated on the offence of forgery, uttering and conspiracy as prescribed by Criminal Code Law of Lagos State, while the offence of obtaining property by false pretence is prescribed by the Advance Fee Fraud and other Fraud Related Offences Act, 2006. By section 14 of the said Act of 2006, the High Court of a state shall among other courts have jurisdiction to try the offences and impose penalty under the Act since the National Assembly expressly conferred jurisdiction on the State High Court.

The implication of what has been so stated above is that the integrity of the extent of the criminal jurisdiction of the Federal High Court has been left untampered with and respected. That was the position when the case of **Daboh vs. The State** (1977) NSCC 309 was decided as the Supreme Court considered the provisions of sections 7 (1), (2) and 8 of the 1973 decree. Indeed, although the case of **Daboh vs. State (supra)** related to the offence of false pretence in delivering a certificate of registration to the Register of Insurance, Federal Ministry of Trade, the Supreme Court still held that notwithstanding Sections 7 (1) & (2) and 8 (1) of the Federal High Court Act, the Federal High Court would not have jurisdiction because the offence does not relate to matters listed in section 7 (1) of the Federal High Court Act or the Exclusive Legislative List. See also **Queen vs. Owoh (1962) NSCC 416.**

It is to be noted that the provisions of sections 7(1) & (2) and 8 (1) of Decree No. 13 of 1973 are in pari material with the provisions of sections 7(1) & (2) and 8(1) of the Federal High Court Act. What all these translate to is that in determining the court with the requisite jurisdiction to entertain a criminal matter, the court would always consider the nature of the charge rather than the transaction forming the subject matter of the charge or the documents attached as proof of evidence. That is to say that a court does not get a panic attack or nervous breakdown on seeing a Federal Agency involvement and automatically throws in the towel with a helpless gesture signifying a loss of jurisdiction. The court has to dig deeper into ascertaining the genre or nature of the charge to decide whether the State High Court has the jurisdiction or not. Stated differently, the court has to be

A discerning and not shy away on being confronted by an information which may on first sight look like what is outside the court's domain. The court has to go the extra mile to find out where it stands with what is before it.

This court has cleared the grey areas on this matter of criminal B jurisdiction as between either the Federal High Court and the State High Court handling certain subject matters or those ones where only the State High Courts alone may entertain or those exclusive to the Federal High Court. In this I shall refer to a few dicta of my learned brothers along the C way and thus, see **FRN vs. Okey Nwosu** (2016) 17 NWLR (Pt. 1514) 226 at 304-305 per Ogunbiyi JSC who stated as follows:

> **"The offence of stealing being alleged against the 1st** D **respondent was created under the law enacted by the Lagos State House of Assembly, the same house could not have conferred jurisdiction on the Federal High Court but only conferred on the High Court of the State. The offence** E **of stealing does not fall within items (a) – (s) listed in Section 251 of the 1999 Constitution. The control of capital issue does not also fall within any of the items specifically listed in Section 215 (1) of the 1999 Constitution. Assuming** F **that the offence of stealing falls within the items listed as (a) – (s) in Section 251, that in itself would not confer exclusive jurisdiction on the Federal High Court to try criminal cases arising from such items. This is in view of section 251** G **(3) and the phrase "the Federal High Court shall also have and exercise jurisdiction." By Section 251 (3) the Federal High Court shall also have jurisdiction along with other courts in criminal cases or matters but not an exclusive** H **jurisdiction as was conferred on the Federal High Court in civil matters listed in subsection 1 of section 251 of the 1999 Constitution… as rightly submitted by the appellant therefore, the learned justices of the Court of Appeal were** I **in great error in holding that the High Court of Lagos State had no requisite jurisdiction to try the 1st respondent for**

A **the offence of stealing by conversion preferred against him under Section 390 (7) of the Criminal Code Law of Lagos State, 2003."**

B Also at page 304, His Lordship, Ogunbiyi JSC opined further:

"In criminal law and the administration of criminal justice, the determination of jurisdiction will be taken in
C **the light of the enabling law setting out the jurisdiction vis-à-vis the charge preferred against the accused. Section 272 of the 1999 Constitution is also relevant. The charge before the court is what determines its jurisdiction. While Section**
D **251(1) of the Constitution confers exclusive jurisdiction in civil matters in respect of items listed as (a) (s), Section 251 (3) does not however confer exclusive jurisdiction on the Federal High Court in criminal cases and matters listed in**
E **subsection (1). By the use of the phrase, "the Federal High Court shall also have and exercise jurisdiction" can only mean that other courts apart from the Federal High Court can exercise jurisdiction also in respect of criminal matters**
F **relating to matters listed in Section 251 (1). The phrase "to the exclusion of any other court" is omitted deliberately. It is difficult in the circumstance to appreciate the reasoning of the Court of Appeal that what the respondents did with**
G **the proceeds of crime of stealing would divest the court (High Court) of its jurisdiction to try the offence of stealing."**

H M. D. Muhammad JSC at pages 290-291, opined thus:

"The jurisdiction of the trial court as spelt out under Section 272 of the 1999 Constitution operates subject to the
I **restriction placed on it by Section 251 (2) and (3) of the same Constitution. The latter subsection vests criminal**

jurisdiction in the Federal High Court regarding all the items for which the court is conferred exclusive civil jurisdiction under Section 251 (1). ***None of these items pertains to simple stealing for which the 1st respondent stands trial at the trial court.*** **He is not being charged for stealing shares. As learned senior counsel for the appellant further observed, and correctly too, the 1st respondent does not stand trial at the Federal High Court for same offence of stealing preferred against him at the trial court. At the Federal High Court, he faces trial only for those offences for which, by virtue of the relevant items in the Exclusive Legislative List, the National Assembly has passed laws on. The lower court's judgment that the trial court has lost its jurisdiction to the Federal High Court on the basis of the latter's exclusive jurisdiction under** ***Section 251 (1) of the 1999 Constitution is therefore, preserve.*** **It is a decision that neither draws from the evidence on record nor from a correct construction of Section 251 (3) of the Constitution the lower court held the exclusive jurisdiction of the Federal High Court stems from. The truth is that stealing is a matter which falls within the legislative competence of the Lagos State House of Assembly and having been legislated upon, the trial court retains the jurisdiction of trying the 1st respondent. See Daboh & Anor vs. State (1977) NSCC 309 at 321-322."**

Indeed this court being consistent on the issue way back had in the case of **The State vs. Williams** (1978) NSCC 38 in matters relation to Exchange Control which on the face appeared to be headed for the Federal Revenue Court but the Apex Court was able to say, a surgical operation is necessary to dichotomise what should be taken to the Federal Revenue Court and what remained in the domain of a State Court however the matter was clothed to appear otherwise. In that case of **The State vs. Williams** (supra) this court held thus at page 43:

"It is after a consideration of Section 24 of the Interpretation Act, the learned judge held that the offences charged under the Criminal Code as contained in the information were charged, Sections 7 (2) (3) and 8 of the Federal Revenue Court Decree No. 13 of 1973 should not have arisen for consideration. Strictly, Section 8 (2) deals with "Criminal causes and matters arising out of or connected with any section which are matters relating to Federal Laws on specific subjects.

In considering the provisions of Section (2), the learned trial judge did not perceive that their scope was limited by subsection (3) which makes the jurisdiction confer by Section 7 (2) subject to Section 63 (3) and includes in its original jurisdiction in respect of offences under the provisions of the Criminal code being offences in relation to which proceedings may be initiated at the instances of the Attorney General of the Federation. Neither Section 104 of the Constitution of the Federation nor Section 341 of the Criminal Procedure Law of Lagos State confers original jurisdiction on the Attorney General of the Federation to initiate proceedings by way of information in the Lagos State High Court with respect to offences under the Criminal code of that State. A consideration in matters contained in the Exclusive Legislative List including taxation of companies, customs and exercise duties, banking, foreign exchange, currency and fiscal measures of the Government of the Federation. It is quite clear to us on a careful consideration of the provisions of Decree No. 13 of 1973 that the Decree does not take away the jurisdiction of the High Court of a State in matters within the competence of the State under reference to Section 63 subsection 64 (3) & (4) of the Federal High Court, Cap. F12."

The Supreme Court went further to hold at page 44 of the report, thus:

> **"As the learned Attorney General submitted, all that have been done was to transfer jurisdiction in respect of such criminal matters falling within the competence of Federal Military Government to the Federal Revenue Court. If therefore these sections are interpreted in the light of what we have said the Federal Revenue Court Decree No. 13 of 1973 should only apply where a charge is laid under a Federal Act or Decree and when this has been done, it will be necessary whether jurisdiction still exists in the State High Court or has been exclusively vested in the Federal Revenue Court.** ***For instance, if a person commits an offence of stealing custom's papers in Lagos State, he would be charged under Criminal Code of Lagos State for the offence of stealing and when it comes to the question of the punishment to be given, subsection (1) of the section 390 of the Criminal Code may then come for consideration.*** **(Italics mine).**

I would dare to posit that what is glaring on the policy posture of this court which I would go so far as to say has acquired the status of a traditional culture is that the fact that an aspect in the offence has the semblance of a Federal insignia would not take a State offence properly legislated for in a State Assembly Law into the realm that would endow the Federal High Court with not only the jurisdiction to try and penalize on the offence but to have the exclusivity for that. This culture has been enhanced by many decisions of this court, some I have mentioned above and some such as **Queen vs. Owoh** (1962) NSCC 4126, the allegation against the appellants therein was that they were said to be involved in fraudulent evasion of import duties of customs and charged for stealing, fraud, forgery and uttering under the Criminal Code of Eastern Nigeria. The Supreme Court held that those offences of conspiracy, stealing, forgery and uttering are not laws in the Exclusive Legislative List of the Federation and so the Director

of Public Prosecutions of the Federation cannot institute or undertake the prosecution of those offences as Federal Laws rather they were offences within the then regional law.

A similar interpretation was made by the Supreme Court in **Akwule vs. The Queen** (1963) NSCC 157 in relation to the offence of criminal breach of trust. The Apex Court went so far as to say that the fact that the Penal Code which prescribes the offence of criminal breach of trust as a State Law does not mean it could not extend to bank or banking matters which are matters within the Exclusive Legislative List. Another way of saying so is that the fact that banking is within the Exclusive Legislative List does not prevent the exercise of the residual power of the State to make law for criminal breach of trust under Section 312 of the Penal Code or stealing under Section 390 of the Criminal Code.

As I said earlier on the consistency exhibited by this court in this criminal jurisdiction matters in relation between the Federal High Court or its predecessor on the one part and the State High Court on the other. The 1999 Constitution has not thrown any spanners in the works as it has not conferred exclusive criminal jurisdiction on the Federal High Court on the various items listed in Section 252 (1) of 1999 Constitution of the Federal Republic of Nigeria unless there is an express enactment by the National Assembly in which such exclusive criminal jurisdiction is donated and so the State High Court would continue to exercise jurisdiction on the matters within the jurisdiction of the State High Court.

It is to be noted that Section 251 (1) (5) CFRN in recognizing the National Assembly's power to confer jurisdiction provides thus:

> **"…such other jurisdiction, civil or criminal, and whether to the exclusion of any other court or not as may be conferred upon it by an Act of National Assembly".**

In fact the Constitution of the Federal Republic of Nigeria, 1999 went so far as to stipulate, in Section 286 that the National Assembly may confer such power to State Courts to try Federal offences and so Section 286 (1) (b) (c) and (2) 1999 Constitution of the Federal Republic of Nigeria has provided

for the trial by State Courts on Federal offences in like manner as they would try State offences so long as the court is presided over by a qualified legal practitioner in Nigeria.

Section 174 of 1999 CFRN has gone further to endow the Federal Attorney General with the power to approach any court including State courts to initiate criminal proceedings in relation to Federal offences and the only limitation has to do with martial law and court. The expatiation of the scenario was stated by the Supreme Court in the case of **A.G. Ondo State vs. A.G. Federation** (2002) 9 NWLR(Pt. 772) 222 at 308 per Uwais CJN thus:

> **"The next point is whether the Attorney General of the Federation or any person authorized by the ICPC can lawfully initiate or authorized the initiation of criminal proceedings in any court in Ondo State in respect of offences created by the Act. The plaintiff's contention is that the answer is in the negative if the answer to Issues Nos. (i) and (ii) have been answered in the negative. But I have held otherwise and so the opposite is the case. I therefore, hold that the criminal proceedings can be initiated in the court in Ondo State in accordance with the provisions of Section 286 subsection (1) (b) of the Constitution which provides ….. Federal offences are defined in subsection (3) thereof to mean "an offence contrary to the provisions of an Act of the National Assembly or any law having effect as if so enacted."**

To restate the situation as has been variously explained by this court I shall refer to **Mandara vs. Attorney General of the Federation (1984) 1 SCNL 311 at 330** wherein this court held as follows:

> **"There can be no room for a situation of Federal Justice and State Justice; there can only be justice according to the laws of this land. It would certainly need express legislation such as would enable the Attorney General of**

> **the Federation to take all its cases to Federal High Courts, thus avoiding State Courts. This court demonstrated conclusively in Bronik that such separation of powers as there exist in our 1979 Constitution is neither watertight nor absolute as I have endeavoured to show earlier on in this judgment.** ***State High Court tries Federal Causes in what I would describe as Federal Presence. By this I mean that law and order in the State or in any court in the State is maintained by the Nigeria Police, which is an arm of the Federal executive arm of Government. The decrees and orders of such Courts are enforced by the Federal Arms of Government, it is the case that the crime is investigated and recommended for prosecution by the police in each State. Again, prosecution of criminal cases in the inferior State courts is done by the Nigeria Police. Thus, it would be seen that the constitutional arrangement in this regard is porous and there is constant interaction between the Federal and the State organs of the Government". (Italics mine).***

The appellant had a grouse on the issue of the alleged breach of its fair hearing rights, stating that the Court of Appeal having found that the trial High Court had breached the fair hearing right of appellant by striking out Section 19 of the Admiralty Jurisdiction Act. That the remedy that ought to have followed was the nullification of the ruling of October 10, 2014 of the trial High Court. What the appellant pushed forward was just part of what transpired in the court below and even at the trial High Court. I shall recall an excerpt in the court below which is thus:

> **"In applying this guideline to this case, the subject matter is the documents that were allegedly altered/forged and used under pretence to obtain money for what was not supplied. The produce had been discharged in tank farm, fully; there is no complaint of loss or damage. Nothing happened in the high sea. It is merely a complaint that**

A **what was paid for was not what was supplied, simple! Upon the above analysis, it is clear that the admiralty jurisdiction of the court has not arisen."**

B The Court of Appeal held further:

"That the learned trial judge having held that it was not an admiralty matter before striking down Section 19 of the
C **Act, there was therefore no need for the "striking down", especially as it did not affect the jurisdiction of the State High Court with regard to this case in her findings. Furthermore, this was done by the court suo motu which**
D **violates the principle of fair hearing. Counsel were not invited to address the court before the striking down was done. It was done from the blue so to speak. Therefore, it cannot be allowed to stand. In this regard, I set aside that**
E **part of the decision striking down Section 19 of the Admiralty Jurisdiction Act, 1991."**

The truth of the matter is that the court below disagreed with what the trial
F court did with regard to the issue of the Admiralty matter with specific reference to Section 19 which was really only a tiny part of the large picture and so dispensing with that area, the court below went into the meat of what was before it. The Court of Appeal held correctly in my view that what was
G at stake was nothing to do with Admiralty proceedings and that the trial court should not have struck out Section 19 of Admiralty Jurisdiction Act as the appellant's right to fair hearing was breached thereby inspite of the fact that it did not come into play in the first place and was clearly an obiter
H dictum which was outside the ratio decidendi. That settled I need say that it is not every error in a court's judgment that would lead to the setting aside of a judgment or decisions. This is because before such an error would have the nullifying effect it must be material and germane. Also it is only the
I ratio decidendi of a decision, ruling or judgment that is appealed against or considered in an appeal and not a passing remark or opinion. See

Chukwuma vs. FRN (2011) 13 NWLR (Pt. 1264) 391 at 420 421; Solola vs. State (2005) 2 NWLR(264) 154; Nasiru vs. Bindawa (2006) 1 NWLR (961) 355 at 371.

I shall conclude by stating that from all I have been trying to impart above, the two courts below have arrived at the concurrent findings of the substance of the matter before them. I see no line of departure than to go along in holding that the decision of the Court of Appeal in affirming the Ruling of the High Court that it had jurisdiction to entertain the information contained in Charge No: ID/115C/2012 bordering on the offences of obtaining money by false pretence under the Advance Fee Fraud and other fraud related offences Act, 2006 forgery, uttering and conspiracy under Section 467 and 468 of the Criminal Code Cap C.17, Volume 2, Laws of Lagos State, Nigeria 2003.

Mary Peter-Odili
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my learned brother Mary Ukaego Peter-Odili, (JSC) and I agree that the appeal lacks merit and should be dismissed.

The lone issue raised in this appeal, questions the propriety of the lower court when it upheld the decision reached by the trial High Court that it had jurisdiction to entertain the information contained in the charge against the accused, inclusive of the appellant herein, who was one of the companies licensed by the Government to import petrol products into the country.

The facts of the case have been stated comprehensively and in clear terms in the lead judgment. The matter now before us is interlocutory. The two lower courts did not mince their words on the questions of jurisdiction raised. The objection in other words is greatly misconceived and which should not serve to delay the hearing of this case on the merit. Without having to be labour the point therefore and in terms as the lead judgment, which I endorse as mine, I also dismiss this appeal and make an order that the trial of the appellant should proceed forthwith.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): The draft judgment in this appeal delivered by my learned brother Mary Odili (JSC), was served on me before now. Having perused the said judgment, I find myself in entire agreement with the reasoning and conclusion she arrived at, that this appeal lacks merit. That notwithstanding, I still would like to chip in few comments just to further support the judgment and also for purpose of emphasis. The facts giving rise to this appeal and submissions made by learned counsel for the parties have been ably and admirably stated in the lead judgment and therefore need not be repeated here.

Looking at the facts of the case as could be gleaned from the record, it is clear that the appellant was charged with offences of obtaining money by false pretenses under the Advance Free Fraud and Other Fraud Related Offences Act, 2006 and also of forgery, uttering and conspiracy, contrary to Sections 467 and 468 of the Criminal Code, Cap 17, Vol. 2 Laws of Lagos State 2003. There is nowhere in the charge where Admiralty Act featured. Notwithstanding the offence under the Advance Free Fraud Act, the trial court had jurisdiction to hear and determine that offence alongside with the other majority offences under the Criminal Code which the appellant was being tried on. My considered view is that the trial court had jurisdiction as rightly held by the court below. It will therefore not be correct to say that only the Federal High Court had jurisdiction to try the appellant, herein. The catch-phrase of the whole matter is that the prosecution chose to prosecute the appellant basically on the offences of obtaining money by false pretences given the alleged or involvement of the appellant in the perpetration of such crimes. There can not be any dispute, that such allegations fall squarely under the provisions of the Criminal Code of Lagos State. The High Court of Lagos State is therefore the correct court garbed with jurisdiction to try or inquire into such allegations and certainly NOT the Federal High Court as the appellant's counsel wanted to portray. See FRN vs Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226 at 304/305.

In conclusion, I have noticed that in this instant appeal, there are concurrent findings of two lower courts, more particularly on issue of jurisdiction which is life wire of every case. As in the long existing practice, this apex court rarely interferes with or disturbs concurrent

findings of two lower courts except in very special or exceptional circumstances such as where such finding is perverse or where there had been misapplication of law or misconception of fact which had occasion miscarriage of justice to any of the parties. See EBOLOR vs. OSAYANDE (1992) NWLR (Pt. 249) 524 IGWEGO & ORS vs. EZEUGO & ANOR (1992) 6 NWLR (Pt. 249) 561 OYIBO IRIRI & ORS vs. ESERORAYE (1991) 2 NWLR (Pt. 173) 262.

Thus, for these few comments of mine and for the fuller and more detailed reasoning in the lead judgment of my learned brother Mary Odili JSC which I entirely agree with, I also see no merit in this appeal. I accordingly dismiss it with no hesitation and uphold the decision of the lower court which had earlier affirmed the judgment of the trial High Court.

Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by my learned brother, MARY UKAEGO PETER-ODILI, (JSC). I need only add a few words of mine thereto, having adopted the adroit summary of the facts therein.

The substance of this appeal is subsumed in the issue formulated by the respondent's counsel for the determination of the appeal. That is: whether the lower court was right in upholding the decision of the trial court that the High Court of Lagos State had jurisdiction to try Federal offences?

Section 286(3) of the extant Constitution defines "Federal offence" to mean an offence contrary to the provision of an Act of the National Assembly or any Law having effect as if so enacted. The offence of obtaining by false pretence the appellant is defending, among others, is an offence created by the Advance Fee Fraud and Other Related Offences Act, 2006, an Act of the National Assembly. The offence is therefore a Federal offence by dint of Section 286(3) of the Constitution.

The appellant, for the objection culminating in this appeal, has profusely laboured under a misconception that the Lagos State High Court has no jurisdiction to try him for Federal offences. The three provisions of

the Constitution germane for the debunking of the appellant's entrenched misconception are sections 251(3), 272(1) and 286(1)(b) of the Constitution. They are herein below reproduced as follows:

251. (3) The Federal High Court shall *also* have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction, is conferred by subsection (1) of this section.

272. (1) Subject to the provisions of Section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

286. (1)(b) Whereby the law of a State jurisdiction is conferred upon any court for the investigation, inquiry into, or trial of persons accused of offences against the laws of the State and with respect to the hearing and determination of appeals arising out of any such trial or out of any proceedings connected therewith, the court shall have jurisdiction with respect to the investigation, inquiry into, or trial of persons for Federal Offences and the hearing and determination of appeals arising out of the trial proceedings.

The constitution in Section 251(3) from the operative words: "The Federal High Court shall ALSO have and exercise jurisdiction in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this Section", intends that the criminal jurisdiction it has bestowed on the Federal High Court is an additional jurisdiction. The word **ALSO**, as used in Section 251(3) of the Constitution means, or can only mean "in addition".

Accordingly, when subsections (1) and (3) of Section 251 of the Constitution are read together the natural inference is: in addition to the exclusive jurisdiction vested in the Federal High Court in relation to the "civil causes and matters" listed in subsection (1); the Federal High Court shall also have and exercise criminal jurisdiction "in respect of criminal causes and matters *in respect of which jurisdiction is conferred by* subsection (1) of" Section 251 of the Constitution. It appears to me that the criminal jurisdiction vested in the Federal High Court, which is an additional jurisdiction, is only in respect of or in relation to the causes or matters it has been conferred exclusive jurisdiction, as a civil court, by dint of Section 251(1) of the Constitution. This "additional" jurisdiction vested in the Federal High Court is not intended to oust the jurisdiction vested in the State High Courts to try "Federal offences" by other provisions of the Constitution. The provisions of Section 251(3) of Constitution do not also appear to give Federal High Court monopoly over Federal offences created by Acts of the National Assembly.

Section 272(1) of the Constitution vests general jurisdiction on the High Court of a State to determine *inter alia* any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of *an offence* committed by any person". This of course is "subject to the provision of Section 251 and OTHER PROVISIONS of this Constitution". I said earlier that nothing in Section 251 of the Constitution is intended to oust the jurisdiction of the High Court of a State to try any person for "Federal offences".

The "other provisions of this Constitution" include Section 286 of the same Constitution. Subsection (2)(b) of the Constitution unambiguously vests in the High Court of a State "jurisdiction with respect

to the investigation, inquiry into, or trial of persons for Federal offences". Thus, what the Constitution has expressly vested in the High Court of a State let nobody by whatever altruistic or opportunistic argument take away.

The learned appellant's counsel was completely in error in positing that the High Court of Lagos State has no jurisdiction to try the appellant for offences created by advance fee fraud and other related offences Act, 2006, being Federal offences. We are here concerned with the interpretation or construction of the constitution, the organic law or groundnorm of the Nation. We are, as this court stated in **RABIU vs. KANO STATE** (1980) 8-11 SC 130; **ONYEMA vs. OPUTA** (1987) 6 SC 362, enjoined to interpret the Constitution in a manner to give it a liberal and broad construction so as to promote its purpose. That is, to promote good government and people's welfare. Accordingly, a narrow and conservative construction that denies or defeats its purpose must be avoided.

This same point the appellant has raked up was raised and was conclusively determined by the full court of this court in **A.G. ONDO STATE vs. A.G. FEDERATION & ORS** (2002) LPELR-623 (SC). It was declared loud and clear in that case that the Constitution vests jurisdiction in the High Court of the States to try Federal offences. This appeal, if the appellant's counsel had bothered to read the opinion of this court expressed in A.G. ONDO vs. A.G. FEDERATION (supra), is a mere artful distraction from the trial of the appellant at the High Court of Lagos State. As the saying goes: the appellant's counsel has left his task to chase ducklings.

The appeal lacking any merits is hereby dismissed. I affirm the decision of the Court of Appeal. As ordered in the lead judgment: The High Court of Lagos shall proceed with plea taking and the trial of the appellant, as the accused person forthwith.

Ejembi Eko
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother, **Mary Ukaego Peter-Odili, JSC,** just

A delivered. I agree entirely with the reasoning and conclusion reached. The appeal is without merit and it is hereby dismissed. I abide by all the orders contained in the judgment.

Sidi Dauda Bage
B ***Justice, Supreme Court***

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OZIEGBE AMEDE
AND
UNITED BANK FOR AFRICA PLC

SC. 346/2008

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Undefended list – Where notice of intention to defend challenges the rate of calculation of interest – Whether defendant has raised a triable issue.

ACTION: Undefend list – Notice of intention to defend – Issues relevant therein – Relevant considerations thereof

ACTION: Undefended list – Triable issue – Where the notice of intention to defend contains mere denials without any materials for the trial court to act – Whether defendant has not disclosed a triable issue.

APPEAL: Brief writing – No issue formulated from a ground of appeal – Effect.

BANKING: Payment of interest – Nature, purpose and imperatives.

BANKING: Where party undertakes to guarantee an over draft facilities – Implications thereof:

PRACTICE AND PROCEDURE: Undefended list – Notice of intention to defend – When necessary to consider.

Issues for Determination

1 **Whether the learned Justices of the Court of Appeal were right when they held that the Appellant's affidavit in support of notice of intention to defend did not disclose triable issues or create sufficient doubt in the case of the Respondent to warrant a transfer of the case from the undefended list to the general cause list.**

2 Whether in view of Exhibit 'B' which limited the guarantor's liability to N30,000.00 only, the learned Justices of the Court of Appeal were right when they upheld the judgment of the trial court which awarded against the Appellant the sum of N2,189,654.00 and other interest charges thereon.

Facts of the Matter

One **Chief S. E. Okonofua** trading as 'Stesok Enterprises' operated an account No. 6010091242 domiciled with UBA the respondent in this appeal. In order to secure facilities at various times Chief S.E. Okonofua introduced the appellant herein to the respondent as guarantor to his account, who shall pay the amount standing at debit to the said account in the event of default in payment by him. On the 3rd of April, 1989 the respondent entered into contract of guarantee in respect of the sum of N30,000 overdraft facility advanced to Chief S.E. Okonofua. Sometimes in September, 1998, the respondent discovered that Chief S. E. Okonofua was no longer servicing his account properly as same had become inactive. A letter was written to Chief S. E. Okonofua, in which his

attention was drawn to his failure to service his account properly. In his reply, Chief Okonofua acknowledged his indebtedness to the respondent and promised to redeem the indebtedness. The acknowledgement letter is **Exhibit D** in this appeal. After this communication, Chief Okonofua stopped replying subsequent letters as he abandoned his account. The respondent no longer had access to Chief Okonofua, as such the appellant was called upon to make good his guarantee by paying off the debt accruing to Chief Okonofua's account. The appellant refused and/or neglected to do so after repeated demands. The respondent took out a writ of summons at the High Court of Edo State sitting in Benin, where it claimed against the appellant the following reliefs:

> **"1. Two million one hundred and eighty nine thousand, six hundred and fifty four Naira (N2,189,654.00) being amount standing to the debit on Account No. 6010091242.**
> **2. Interest on the said sum of two million, one hundred and eighty nine thousand, six hundred and fifty four Naira (N2,189,654.00) at the rate of 21% per annum with effect from 1st April, 2002 till judgment and at the rate of 10% thereafter till full payment is realized."**

In the affidavit in support of this claim, the respondent asked the trial court to place the suit on the undefended list. The suit was so placed on the undefended list and service of the enrollment order dated 25th March, 2003 as well as other court processes and necessary exhibits were effected on the appellant who subsequently filed a notice of intention to defend the suit on the 27th October, 2003. On the 17th March, 2004, parties were heard. It was argued for the appellant that the notice of intention to defend the action disclosed sufficient reasons why the suit should be transferred to the general cause list. The reasons were enumerated as:

1. **The guarantee is not signed by the appellant.**
2. **The guarantee is limited to N30,000.00**

3. **The action is statute barred.**
4. **That the loan agreement with Chief S. E. Okonofua was not attached to the affidavit in support of the claim.**

The trial court discountenanced the Notice of Intention to defend and entered judgment for the plaintiff. The defendant appealed to the Court of Appeal. It was dismissed hence his further appeal to the Supreme Court.

Held: (*Unanimously dismissing the appeal***)**

1. *Where no issue is formulated from a ground of appeal*
Issue 1 is said to arise from the 1st and 2nd grounds of appeal, while the 2nd issue arose from ground 4. No issue is formulated from the 3rd ground of appeal. It is deemed abandoned. Accordingly the 3rd ground of appeal is struck out. *(P 81 Paras B – C).*

2. *Source and how to determine whether the defendant has a defence on the merit.*
On this issue, I agree entirely with the conclusion of the lower court. The question as to whether a defendant has a defence on the merit can only be answered from the affidavit in support of the notice of intention to defend. It cannot be answered from the counsel's address or from the brief of argument filed before the court. See Nkwo Market Community Bank (Nig) Ltd vs. Obi (2010) 14 NWLR (Pt. 1213) 169 at 184 Paras G G, where this court held:

> **"It must also be stressed that in an action brought under the undefended list procedure, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of the notice of intention to defend the suit. Once the court comes to conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an undefended suit and enter judgment accordingly without calling on the defendant even if present in court to answer or be**

heard. However, where there is conflict in the affidavit of parties, evidence is the only way by which the conflict can be resolved and it is mandatory to enter the suit on the general cause list. Where there are documentary evidence by which the conflict could be resolved, calling of evidence becomes unnecessary." See Haido vs Usman (2004) 3 NWLR (Pt. 859) 65; Ebong vs. Ikpe (2002) 17 NWLR (Pt. 797) 504.
(P 83 Paras B – H)

3. *When necessary to consider notice of intention to defend*
A consideration of the affidavit in support of the notice of intention to defend, can only be made where the plaintiff on the face of his claims has satisfied the court that there is no defence to the action for recovery of debt and/or liquidated money demand. See S.B.N. Plc vs Kyenta (1998) 2 NWLR (Pt. 534) 41. The trial court and the lower court in their concurrent findings of facts came to the conclusion that the respondent's affidavit has shown that the appellant has no defence to the respondent's suit. *(Pp 83 – 84 Paras H – A)*

4. *Relevant considerations on whether to transfer a case to the general cause list.*
I have carefully read through the appellant's notice of intention to defend and I am of the firm view that the respondent's claims at the trial court were not contradicted in the sense of raising triable issues. For a claim to be transferred to the general cause list under the undefended list procedure, the defendant must satisfy the court that he had raised triable issues or a defence on the merit or that he has created doubt in the mind of the judge about the genuineness of the plaintiff's claim. For the purpose of the procedure under the undefended list procedure is to enable plaintiff obtain summary judgment without trial where his case is patently clear and unassailable. It is not however, designed to shut out a defendant who can show that there is triable issue.

See Cow vs. Cassey (1914) 1 KB 481; Sodipo vs. Lemin Kainen & Ors (1986) NWLR (Pt. 15) 220; Nishizawa vs. Jethwani (1984) 12 SC 124/234. Where the defendant's notice of intention to defend is

frivolous, vague or designed to delay the trial of an action and where same does not show that there is dispute between the parties, the trial Judge must hear the suit as undefended, as he will have no reason to transfer it to the general cause list. *(P 86 Paras C – G)*

5. *Appellant did not disclose any triable issue*
Paragraph 2 of the appellant's affidavit in support of his intention to defend the suit is a general denial of the respondent's claim. At paragraph 3 of the same affidavit, the appellant deposed that he did not agree on an interest rate of 32% per annum or any interest on the alleged overdraft. Learned counsel for the appellant contended that these denials were sufficient triable issues that would have warranted the trial court to transfer the suit from undefended list to the general cause list. I cannot with all sense of responsibility agree with learned counsel on this score. The depositions in paragraphs 2 and 3 are mere denials devoid of any particulars which when proved can afford the appellant any defence. If the appellant did not agree on an interest of 32%, what was then the interest agreed upon by the parties" *(Pp 86 – 87 Paras H – B)*

6. *When interest is payable in a loan agreement*
In **Ayotrin vs A.G Federation (1996) 12 SCNJ 236 at 240 (1996) 9 NWLR (Pt. 475) 634 at 662 663 this court held as follows:**

> **"The general rule at common law is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Interest will however be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties or where an obligation to pay interest arises from the custom or usage of a particular trade or business."**
> *P 87 Paras B – E)*

7. *When notice of intention to defend contains mere denials, but no triable issue raised therein.*
By custom or usage of the operation of the respondent in the instant

case, the appellant was obligated to pay interest. If the appellant had challenged how the interest was calculated, surely a triable issue would have arisen. See Nkwo Market Community Bank (Nig) Ltd vs Obi (Supra). But the appellant said he did not agree on an interest on the alleged overdraft. Clearly, this is no sufficient defence on the merit and so I hold. The remaining paragraphs of the appellant's affidavit are also mere denials with no materials upon which the trial court could have decided whether to transfer the suit to the general cause list. I therefore agree with the lower court that the appellant's affidavit in support of his notice of intention to defend the suit did not conatin triable issues. In the result, the first issue is resolved against the appellant and in favour of the respondent. *(P 87 Paras E – H)*

8. *Appellants liability not limited to the payment of interest of N30,000.00.*
I think the learned counsel misconceived Exhibit B, because he has failed to read the document in full. Paragraph C of Exhibit B upon which learned counsel for the appellant places so much reliance that the appellant's liability is limited to N30,000.00 as agreed by the parties, is surrounded by provisions which clearly show that the appellant would not only pay the interest on the overdraft, but will also pay banking and legal charges as well. *(P 88 Paras A – B).*

9. *Implications where party undertakes to guarantee an ever draft*
By agreeing to guarantee the overdraft, the appellant placed himself in the position of the principal debtor and is therefore bound to undertake the responsibilities of the principal debtor. Banks are not charitable organizations. They are business entities whose custom it is to charge interest on all the loans and overdrafts which they extend to customers. These interest change from time to time depending on the Central Bank guidelines. The essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It represents the interest the respondent would have made if it had the money. To allow the appellant pay the N30,000.00 being the principal sum advanced to the principal debtor only will not only negate the spirit of banking operations and the guarantee agreement, but will have the effect of

financial loses and ultimate collapse of the respondent.
(P 88 Paras B – E)

Nigerian Cases Cited

Ayotrin vs A.G Federation (1996) 12 SCNJ 236 (1996) 9 NWLR (Pt. 475) 634
Ebong vs Ikpe (2002) 17 NWLR (Pt. 797) 504.
Haido vs Usman (2004) 3 NWLR (Pt. 859) 62;
Nishizawa vs Jethwani (1984) 12 SC 124/234.
Nkwo Market Community Bank (Nig) Ltd vs Obi (2010) 14 NWLR (Pt. 1213) 169
S.B.N. Plc vs Kyenta (1998) 2 NWLR (Pt. 534) 41.
Sodipo vs Lemin Kainen & Ors (1986) NWLR (Pt. 15) 220;

Foreign Case Cited

Cow vs Cassey (1914) 1 KB 481;

Representation

MR. SOLOMON O. EIMIUHI (ESQ) for the Appellant.
MR. AFOLABI KUTI (ESQ) and Mr. Gospel Adams for the Respondent.

ADAMU GALINJE, (JSC) (Delivering the Lead Judgment): One **Chief S. E. Okonofua** trading as 'Stesok Enterprises' operated an account No. 6010091242 domiciled with UBA the respondent in this appeal. In order to secure facilities at various times Chief S.E. Okonofua introduced the appellant herein to the respondent as guarantor to his account, who shall pay the amount standing at debit to the said account in the event of default in payment by him. On the 3rd of April, 1989 the respondent entered into contract of guarantee in respect of the sum of N30,000 overdraft facility advanced to Chief S.E. Okonofua. Sometimes in September, 1998, the respondent discovered that Chief S. E. Okonofua was no longer servicing his account properly as same had become inactive. A letter was written to Chief S. E. Okonofua, in which his attention was drawn to his failure to service his account properly. In his reply, Chief Okonofua acknowledged

his indebtedness to the respondent and promised to redeemed the indebtedness. The acknowledgement letter is **Exhibit D** in this appeal. After this communication, Chief Okonofua stopped replying subsequent letters as he abandoned his account. The respondent no longer had access to Chief Okonofua, as such the appellant was called upon to make good his guarantee by paying off the debt accruing to Chief Okonofua's account. The appellant refused and/or neglected to do so after repeated demands. The respondent took out a writ of summons at the High Court of Edo State sitting in Benin, where it claimed against the appellant the following reliefs:

> **"1. Two million one hundred and eighty nine thousand, six hundred and fifty four Naira (N2,189,654.00) being amount standing to the debit on Account No. 6010091242.**
>
> **2. Interest on the said sum of two million, one hundred and eighty nine thousand, six hundred and fifty four Naira (N2,189,654.00) at the rate of 21% per annum with effect from 1st April, 2002 till judgment and at the rate of 10% thereafter till full payment is realized."**

In the affidavit in support of this claim, the respondent asked the trial court to place the suit on the undefended list. The suit was so placed on the undefended list and service of the enrollment order dated 25th March, 2003 as well as other court processes and necessary exhibits were effected on the appellant who subsequently filed a notice of intention to defend the suit on the 27th October, 2003. On the 17th March, 2004, parties were heard. It was argued for the appellant that the notice of intention to defend the action disclosed sufficient reasons why the suit should be transferred to the general cause list. The reasons were enumerated as:

A

1. **The guarantee is not signed by the appellant.**
2. **The guarantee is limited to N30,000.00**
3. **The action is statute barred.**
4. **That the loan agreement with Chief S. E. Okonofua was not attached to the affidavit in support of the claim.**

B

For the respondent, it was argued that the appellant did not in his notice of intention to defend the action deny the claim as reflected in **Exhibit C** and
C that the action is not statute barred, since the debt was resurrected by the appellant's letter, **Exhibit D** which acknowledged the indebtedness.

In his judgment, the learned trial Judge, Itu J found that the appellant had no defence to the claim of the Respondent. Accordingly, judgment was
D entered in favour of the respondent as per its claims. In addition, the appellant was ordered to pay N5000 as costs to the respondent.

The appellant, being aggrieved appealed to the Court of Appeal. In a reserved and considered judgment delivered on the 28th June, 2007, the
E Court of Appeal dismissed his appeal. He has now brought this appeal. His notice of appeal dated 19th May, 2008 and filed on the 21st of May, 2008, contains four grounds of appeal.

Parties filed and exchanged briefs of argument. The appellant's
F amended brief of argument, settled by **S. O Eimiuhi Esq** of counsel to the appellant is dated and filed on the 26th April, 2013. At page 4 of the said brief of argument, two issues has been formulated for determination of this appeal. They read as follows:

G

(1) **Whether the learned Justices of the Court of Appeal were right when they held that the Appellant's affidavit in support of notice of intention to defend did not disclose triable issues or create sufficient doubt in the case of the Respondent to warrant a transfer of the case from the undefended list to the general cause list.**

H

I

(2) Whether in view of Exhibit 'B' which limited the guarantor's liability to N30,000.00 only, the learned Justices of the Court of Appeal were right when they upheld the judgment of the trial court which awarded against the Appellant the sum of N2,189,654.00 and other interest charges thereon.

Issue 1 is said to arise from the 1st and 2nd grounds of appeal, while the 2nd issue arose from ground 4. No issue is formulated from the 3rd ground of appeal. It is deemed abandoned. Accordingly the 3rd ground of appeal is struck out.

The respondent's brief of argument, settled by Afolabi Esq of counsel to the respondent is dated 16th June 2016 and filed on the 23rd June, 2016. Learned counsel for the respondent submitted two issues for determination of this appeal, and they read as follows:

(a) Whether or not the lower court was right in upholding the judgment of the trial court that the Appellant's affidavit in support of the Notice of Intention to defend did not create triable issues to warrant a transfer of the case from the undefended list to the General Cause List?

(b) Whether having regard to the evidence before the lower court, the lower court was right in awarding the sum of N2,189,654.00 against the appellant and in favour of the respondent being the principal sum and the accrued interest?

The issues formulated by the appellant and those formulated by the respondent are similar. This being so, this appeal shall be determined on the bases of the issues formulated by the appellant. In doing so, I shall consider the issues in the order in which they were argued.

In arguing the first issue for determination of this appeal, learned

counsel for the appellant submitted that the learned Justices of the lower court erred in law when they wrongly upheld the findings and decision of the trial court that the notice of intention filed by the appellant did not disclose a defence on the merit or create doubt in the mind of the court to warrant a transfer of the suit from the undefended list to the general cause list. In a further argument, learned counsel submitted that the error of the learned Justices of the lower court arose out of their wrong evaluation and or examination of the affidavit in support of appellant's notice of intention to defend the action and their failure to properly examine or identify the obvious flaws in the affidavit in support of respondent's claim and the exhibits attached thereto, particularly **Exhibits 'B', 'D' and 'G'.**

Still in argument, learned counsel submitted that the trial court and the lower court speculated on the rate of interest that swelled the overdraft from N30,000.00 to N2,189,654. According to the learned counsel, the correctness of the interest charged on Mr. Okonofua's account was subject to proof by the respondent. It is learned counsel's contention that where proof is required in order to establish a claim, such claim must be transferred from undefended list to a general cause list. Finally learned counsel urged this court to allow the appeal and order the transfer of the respondent's suit at the trial court from undefended list to the general cause list for trial in line with Order 23 Rule 3(2) of the High Court (Civil Procedure) Rules 1988 as applicable to Edo State then.

Learned counsel for the respondent in his argument, submitted that the lower court was right in affirming the decision of the trial court that the affidavit in support of the Notice of Intention to defend the appellant's action did not disclose any defence on the merit.

The lower court after a painstaking examination of the notice of intention to defend the suit by the appellant and the affidavit in support, as well as the exhibits annexed thereto, came to the following conclusion.

> **"Based on the foregoing, it is my considered view that, the appellant has failed in his affidavit in support of his notice of intention to defend to disclose a good defence on the merit. The learned trial Judge was therefore right**

to have disallowed the suit from being transferred to the general cause list and entered judgment for the respondent."

On this issue, I agree entirely with the conclusion of the lower court. The question as to whether a defendant has a defence on the merit can only be answered from the affidavit in support of the notice of intention to defend. It cannot be answered from the counsel's address or from the brief of argument filed before the court. See **Nko Market Community Bank (Nig) Ltd vs Obi (2010) 14 NWLR (Pt. 1213) 169 at 184 Paras G – G,** where this court held:

"It must also be stressed that in an action brought under the undefended list procedure, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of the notice of intention to defend the suit. Once the court comes to conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an undefended suit and enter judgment accordingly without calling on the defendant even if present in court to answer or be heard. However, where there is conflict in the affidavit of parties, evidence is the only way by which the conflict can be resolved and it is mandatory to enter the suit on the general cause list. Where there are documentary evidence by which the conflict could be resolved, calling of evidence becomes unnecessary." See Haido vs Usman (2004) 3 NWLR (Pt. 859) 62; Ebong vs Ikpe (2002) 17 NWLR (Pt. 797) 504.

A consideration of the affidavit in support of the notice of intention to defend, can only be made where the plaintiff on the face of his claims has satisfied the court that there is no defence to the action for recovery of debt

and/or liquidated money demand. See **S.B.N. Plc vs Kyenta (1998) 2 NWLR (Pt. 534) 41.** The trial court and the lower court in their concurrent findings of facts came to the conclusion that the respondent's affidavit has shown that the appellant has no defence to the respondent's suit. The respondent's affidavit in support of its claim is at pages 3-5 of the printed record of this appeal. I reproduce the relevant paragraphs as follows:

> **1. That one Chief S. E. Okonofua trading as Stesok Enterprises is the owner of Account No. 6010091242 with the plaintiff.**
>
> **2. That in the Banker and Customer relationship existing between the plaintiff and the said Chief S.E. Okonofua in order to secure facilities at various times, from the plaintiff the said Chief S. E. Okonofua introduced the defendant to the plaintiff as Guarantor to his said account and who is to pay the amount standing at the debit on his account in the event of default on his part.**
>
> **3. That at the request of the defendant, the plaintiff then entered into contract of Guarantee on the said account on 3rd April, 1989 and the sum of N30,000.00 (Thirty Thousand Naira) was advanced to the said Chief S. E. Okonofua as overdraft facility on his account No. 601091242. Copies of the application for Overdraft and the Contract of Guarantee are attached herewith as Exhibit 'A' and 'B' respectively.**
>
> **4. That the interest rate at the time the Overdraft was granted was 32% per annum and it was agreed by the parties that the interest rate shall vary from time to time without recourse to the**

defendant.

5. That the said Chief S. E. Okonofua made use of the overdraft facilities by which he became indebted to the plaintiff.

The question now is did the appellant contradict the respondent's claims in his notice of intention to defend the action in the sense of raising triable issues in his affidavit in support of the notice of intention to defend? To answer this question, I have to refer to the relevant paragraphs of the appellant's affidavit in support of his notice, which I reproduce hereunder as follows:

1. That paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the affidavit in support of claim are false.

2. That I am not aware of Account No. 6010 091242 allegedly operated by Chief S. E. Okonofua and I did not guarantee any overdraft facility for the said Chief S. E, Okonofua on the said Account.

3. That I do not agree on an interest rate of 32% per annum or any interest on the alleged overdraft.

4. That I am not aware that Plaintiff approved an overdraft facility of N30,000.00 (Thirty Thousand Naira) for the said Chief S. E. Okonofua as I was not informed by the plaintiff.

5. That the plaintiff is aware of the whereabout of Chief S. E. Okonofua whom it sued on 11th August, 1999 in suit No. B/548/99. The said Chief S. E. Okonofua resides at No. 6, Omorogieve Street, Upper Mission Road, Benin City.

6. That the said suit No. B/548/99 was struck out on 22nd October, 2001 with N1,000.00 (One Thousand Naira) cost against the Plaintiff for lack of diligent

persecution.

7. That I am not aware of Exhibits 'C', 'D', 'E', 'F', and 'G' referred to in the affidavit in support of claim. The plaintiff did not notify me of same.

8. That my solicitor S. O. Eimiuhi Esq informs me and I verily believe him that this action is statute barred as the cause of action in this suit arose in 1989.

9. That the Plaintiff has no cause of action against me.

10. That I have a good defence to this action.

I have carefully read through the appellant's notice of intention to defend and I am of the firm view that the respondent's claims at the trial court were not contradicted in the sense of raising triable issues. For a claim to be transferred to the general cause list under the undefended list procedure, the defendant must satisfy the court that he had raised triable issues or a defence on the merit or that he has created doubt in the mind of the judge about the genuineness of the plaintiff's claim. For the purpose of the procedure under the undefended list procedure is to enable plaintiff obtain summary judgment without trial where his case is patently clear and unassailable. It is not however, designed to shut out a defendant who can show that there is triable issue.

See **Cow vs Cassey (1914) 1 KB 481; Sodipo vs Lemin Kainen & Ors (1986) NWLR (Pt. 15) 220; Nishizawa vs Jethwani (1984) 12 SC 124/234.** Where the defendant's Notice of Intention to defend is frivolous, vague or designed to delay the trial of an action and where same does not show that there is dispute between the parties, the trial Judge must hear the suit as undefended, as he will have no reason to transfer it to the general cause list.

Paragraph 2 of the appellant's affidavit in support of his intention to defend the suit is a general denial of the respondent's claim. At paragraph 3 of the same affidavit, the appellant deposed that he did not agree on an interest rate of 32% per annum or any interest on the alleged overdraft. Learned counsel for the appellant contended that these denials were sufficient triable issues that would have warranted the trial court to transfer

the suit from undefended list to the general cause list. I cannot with all sense of responsibility agree with learned counsel on this score. The depositions in paragraphs 2 and 3 are mere denials devoid of any particulars which when proved can afford the appellant any defence. If the appellant did not agree on an interest of 32%, what was then the interest agreed upon by the parties. In **Ayotrin vs A.G Federation (1996) 12 SCNJ 236 at 240 (1996) 9 NWLR (Pt. 475) 634 at 662 663 this court held as follows:**

> **"The general rule at common law is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Interest will however be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties or where an obligation to pay interest arises from the custom or usage of a particular trade or business."**

By custom or usage of the operation of the respondent in the instant case, the appellant were obligated to pay interest. If the appellant had challenged how the interest was calculated, surely a triable issue would have arisen. See **Nkwo Market Community Bank (Nig) Ltd vs Obi (Supra).** But the appellant said he did not agree on an interest on the alleged overdraft. Clearly, this is no sufficient defence on the merit and so I hold. The remaining paragraphs of the appellant's affidavit are also mere denials with no materials upon which the trial court could have decided whether to transfer the suit to the general cause list. I therefore agree with the lower court that the appellant's affidavit in support of his notice of intention to defend the suit did not conatin triable issues. In the result, the first issue is resolved against the appellant and in favour of the respondent.

On the second issue, learned counsel for the appellant submitted that the lower court erred in law when it upheld the judgment of the trial court which awarded against the appellant the sum of N2,189,654 and other interest charges, although **Exhibit 'B'** the guarantee agreement, limited

appellants liability to N30,000.00 only. I think the learned counsel misconceived **Exhibit B,** because he has failed to read the document in full. Paragraph C of **Exhibit B** upon which learned counsel for the appellant places so much reliance that the appellant's liability is limited to N30,000.00 as agreed by the parties, is surrounded by provisions which clearly show that the appellant would not only pay the interest on the overdraft, but will also pay banking and legal charges as well. By agreeing to guarantee the overdraft, the appellant placed himself in the position of the principal debtor and is therefore bound to undertake the responsibilities of the principal debtor. Banks are not charitable organizations. They are business entities whose custom it is to charge interest on all the loans and overdrafts which they extend to customers. These interest change from time to time depending on the Central Bank guidelines. The essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It represents the interest the respondent would have made if it had the money. To allow the appellant pay the N30,000.00 being the principal sum advanced to the principal debtor only will not only negate the spirit of banking operations and the guarantee agreement, but will have the effect of financial loses and ultimate collapse of the respondent. The 2nd issue is also resolved against the appellant and in favour of the respondent.

Having resolved the two issues against the appellant this appeal shall be and it is hereby dismissed.

I make no order as to costs.

Paul Adamu Galinje
Justice, Supreme Court

I.T. MUHAMMAD, (JSC): I agree with my lord Galinje, JSC that this appeal lacks merit. I align my view with my lord Galinje's view. I, too, dismiss the appeal as lacking in merit. I abide by consequential orders made in the lead judgment.

Ibrahim Tanko Muhammad
Justice, Supreme Court

A **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Galinje, (JSC)** just delivered. I agree entirely with the reasoning and conclusion that the appeal is devoid of merit and should be dismissed. I too will dismiss the appeal.

B Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

C **BAYANG AKAAHS, (JSC):** I was privileged to read in draft the judgment of my learned brother, Galinje JSC. I agree that the appeal lacks merit and should be dismissed. The appellant did not disclose any triable issue in the affidavit in support of his intention to defend the action. His averments in **D** the said affidavit in support were mere denials. Consequently the appeal is lacking in merit and it is accordingly dismissed. I also make no order on costs.

K. B. AKAAHS
E ***Justice, Supreme Court***

ADAMU AUGIE, (JSC): I had a preview of the lead Judgment just delivered by my learned brother, Galinje, JSC, and I agree with him that in **F** the circumstances of this case, this appeal totally lacks merit, and must be dismissed.

The Respondent was the Plaintiff at the Edo State High Court, wherein the action it filed against the Appellant was placed on the **G** Undefended List, upon its request. The Appellant subsequently filed a notice of intention to defend the action on the ground that the debt in question was statute barred after then years of accrual, and that he did not guarantee any facility for Chief S.E. Okonofua.

H The learned trial Judge, Itua, J., found that the appellant had no defence to the claim, and entered Judgment for the respondent.

Dissatisfied, the respondent appealed to the Court of Appeal, and in dismissing his appeal, the Court of Appeal held that the Suit was not statute **I** barred as the cause of action was predicated upon demand and refusal to pay, and not otherwise, as provided in the agreement of the Parties; and that

the affidavit disclosing a defence must not be a sham defence but must condescend on particulars.

Further dissatisfied, the appellant has appealed to this Court. He argued that the Suit should be on the general cause list as fresh issues were raised that controvert the affidavit of the respondent; that the triable issues are on the rate of interest chargeable by the respondent, and the loan on overdraft that he guaranteed; and that his liability is only limited to N30,000 and not the amount claimed.

The respondent insists that the Court of Appeal was right to affirm the trial Court's decision that the Affidavit in support of the notice of intention to defend did not disclose any defence on merit.

The respondent is right; the Court of Appeal was standing on firm ground when it affirmed the trial Court's decision. An affidavit in support of the notice of intention to defend a Suit should contain enough facts and particulars to satisfy the Court to remove the case from the undefended list to the general cause list. In other words, where the affidavit in support of the notice of intention to defend discloses no defence, the case would not be in the general cause list. Even if a statement of defence is filed, a Plaintiff can still apply for summary Judgment, if the Statement discloses no defence therein.

See **Pan Atlantic Shipping & Transport Agencies vs. Rhein Mass GMBH** *(1997) LPELR – 2899 (SC),* and **Ed-Of Nigeria Ltd. vs. Snig Nigeria Ltd.** *(2013) LPELR – 19888(SC),* where this Court held:

> **It must be emphasized that the respondent must, therefore, show in the affidavit supporting his notice of intention to defend not only the fact of his intention to defend, but the further fact of a defence on the merit. Beyond disclosing an *ex facie* good defence to the appellant's action, the Defendant must supply full details of the actual defence he intends, if given leave, to place before the court.**

A In this case, there are concurrent findings of fact by the trial Court and the Court of Appeal, which indicate that the appellant has no defence to the respondent's action, and I see no reason to interfere.

My learned brother reproduced paragraphs of the affidavit in support **B** of the notice of intention to defend in the lead Judgment, and as he said, the depositions in paragraphs 2 & 3 are mere denials devoid of any particulars, and it is same with the other paragraphs.

Obviously, the appellant did not provide the trial Court with full **C** details of the actual defence he intended to place before it and sufficient material from which it could deduce a defence on merit that would warrant transferring the Suit to the general cause list.

Thus, I also dismiss the appeal I make no order as to costs.

D **Amina Adamu Augie,**
Justice, Supreme Court

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PATIENCE OKORO EYE
AND
THE FEDERAL REPUBLIC OF NIGERIA

SC. 154/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Consolidation of suits – Proper procedure – Obligations of court thereto.

CONSTITUTIONAL LAW: Right of fair hearing – Court failed to consider affidavit evidence of applicant in an application for bail – Whether failure does not amount to a breach of the right of applicant's fair hearing.

COURT: Consideration of bail application – Fundament importance of affidavit evidence before court – Failure to consider – Effect.

COURT: Discretionary powers in bail issues – How properly exercised – Relevant considerations thereof.

COURT: Distinction between arbitrary exercise of discretion and judicious

exercise of discretion – Implications thereof.

COURT: Exercise of discretion – Affidavit evidence in support of bail application not considered – Whether discretion of court was not exercised judicially and judiciously.

COURT: Exercise of discretion – Attitude of appellate courts thereto – Relevant principles thereof.

CRIMINAL LAW AND PROCEDURE: Bail – Factors relevant in the consideration of bail applications.

CRIMINAL LAW AND PROCEDURE: Bail – Whether the provisions of ACJA 2015 removed the discretion of the trial court in the consideration of bail applications – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Bail – Discretionary nature of – S.118(2) of the Criminal Procedure Act – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Where offence is bailable – Attitude of a trial Court to application of bail – Relevant consideration.

STATUTE: S. 158 of ACJA 2015 – Import.

STATUTE: S. 162 of ACJA 2015 – Import.

Issue for Determination

Whether the lower court was right in refusing to interfere with the exercise of discretion of the learned trial judge refusing to admit the appellant to bail pending the determination of her trial.

Facts of the Matter

The appellant Mrs. Patience Okoro Eye and five others, namely Afolabi Olufemi Johnson, Ilori Adekunle Sunday, Asemota Augustina, Kolawole Babalola, Olaniran Muniru Adeola and Fatai Adedokun Yusuf were on 2nd June, 2015 arraigned before the Federal High Court, Ibadan Judicial Division, charged with abuse of office, corrupt practices, fraud and illegally owing assets. The particulars of the offence charged are as follows:

> **COUNT 1**
> **"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, KOLAWOLE BABALOLA, OLANIRAN MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, have by virtue of abuse of your office, being employees of Central Bank of Nigeria, contributed to the economic adversity of the Federal Republic of Nigeria when you destroyed a box marked "Counted Audited Dirty" filled with Newspapers in place of a box containing N10,000,000 (Ten Million Naira) of N1,000 denomination and which activity led to the increase of money in circulation which the briquetting exercise of Central Bank of Nigeria was intended to control and you thereby committed an offence punishable under Section 1(2) (b) and Section 10(1) of the Recovery of Public Property (Special Provision) Act, Cap. R4, Laws of the Federation of Nigeria, 2004."**
>
> **COUNT 2**
> **"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, KOLAWOLE BABALOLA, OLANIRAN MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, engaged in**

corrupt practices when you replaced the content of a box of N1,000 notes denomination in a total sum of N10,000,000 (Ten Million Naira) marked as "Counted Audited Dirty" meant for briquetting with Newspapers and which sum you converted to your own use and you thereby committed an offence punishable under Section 1(2) (a) and Section 10(1) of the Recovery of Public Property (Special Provision) Act Cap. R4 Laws of the Federation of Nigeria, 2004."

COUNT 3

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, ASEMOTA AUGUSTINA, KOLAWOLE BABALOLA, OLANIRAN MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, being employees of Central Bank of Nigeria owned asset, to wit: the sum of N10,000,000.00 (Ten Million Naira) being money you took from a box marked "Counted Audited Dirty" which was meant for briquetting and which you replace with Newspapers and for your personal purpose which asset is in excess of your legitimate, known and provable income and assets and you thereby committed an offence under Section 7 (2) of the Bank Employees etc, (Declaration of Assets) Act Cap. B1 Laws of the Federation of Nigeria, 2004,"

COUNT 4

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, and ILORI ADEKUNLE SUNDAY, on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, with intent to defraud, were privy to making false entry in a document, to wit: the report of your briquetting exercise that took place at Central Bank of Nigeria, headquarters, Abuja, to the effect that the

briquetting exercise was successful without any abnormality when indeed a box stuffed with newspapers as against N10,000,000 (Ten Million Naira) notes was discovered during your briquetting exercise on the 5th of September, 2014 and you thereby committed an offence punishable under Section 438(b) of the Criminal Code Act Cap. C38 Laws of the Federation of Nigeria, 2014."

COUNT 5

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON 1st – 3rd and ILORI ADEKUNLE SUNDAY, on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, with intent to defraud, were privy to omitting material particulars from a document to wit: the report of your briquetting exercise that took place at Central Bank of Nigeria, Ibadan branch which you submitted to Central Bank of Nigeria headquarters Abuja, to the effect that the briquetting exerciser was successful without any abnormality when indeed a box stuffed with newspapers as against N10,000,000 (Ten Million Naira) notes was discovered during your briquetting exercise on the 5th of September, 2014 and you thereby committed an offence punishable under Section 438 (c) of the Criminal Act Cap, C38, Laws of the Federation of Nigeria, 2004."

The appellant pleaded not guilty to all the counts of the charge and the trial proceeded. On 2nd June, 2015, an oral application was made on behalf of the appellant for bail and same was refused, thereafter, on the same day a formal application was filed accompanied by an affidavit in support and a written address.

On the 8th June, 2015, the respondent filed its counter affidavit and a written address in opposing the bail application. The trial court delivered a ruling refusing the bail application.

Dissatisfied with the Ruling of the trial court, the appellant filed an appeal. It was heard by the Ibadan Division of the Court of Appeal. The court on 9th December, 2015 affirmed the decision of the trial Court. The appellant has further appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal).*

1. *The grant of bail is discretionary*
On the part of this court, Section 118(2) of the Criminal Procedure Act, in my view makes the grant of bail to an accused person standing trial before a High Court, purely a discretionary matter in the hands of the trial judge. The trite position of the law is that in exercising the jurisdiction given to him by the law in the grant or refusal of bail, the trial judge is bound to consider the weight of facts pleaded to, in an affidavit evidence placed before him. The determination of the criteria is quite important because the liberty of the appellant stands or falls by the decision of the court. In performing the judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously.
See BAMAIYI vs. THE STATE (2001) 8 NWLR (Pt. 715) 270 EKWENUGO vs. F.R.N. (2001) 6 NWLR (Pt. 708) 171 DANTATA vs. POLICE (1958) NRNLR 3. *(P 115 Paras E – H).*

2. *The proper exercise of court's discretions in bail issues*
In exercising its discretion, the Court is bound to examine the evidence before it without considering any extraneous matter. The court cannot exercise its whims indiscriminately. Similarly, there is no room for the court to express its sentiments. I must say that, it is a hard matter of law, facts and circumstances which the court considers without being emotional sensitive or sentimental.
See ADAMU SULEIMAN & ANOR vs. C.O.P. PLATEAU STATE, 33 NSCQR (Pt. 2) 735 at pp. 758-759.
In EKWENUGO vs. F.R.N. supra the court held that:

> **"The issue of grant of bail by a trial court calls for due exercise of discretion which entails the application of common sense based on a given set of facts and attendant circumstances in accordance with justice. The discretion must be exercised not only judicially, but judiciously as well."**

See also UNIVERSITY OF LAGOS vs. OLANIYAN (1985) 1 NWLR (Pt. 1) 156 SAFFIDINE vs. C.O.P. (1965) 1 All NLR 54 UGBOMA vs OLISE (1971) All NLR 8 and ODUSOTE vs. ODUSOTE (1971) All NCR 219. *(Pp 115 – 116 Paras H – E).*

3. *The attitude of appellate court to the exercise of discretion by trial court*
It is well settled that if judicial discretion has been exercised bonafide uninfluenced by irrelevant considerations and not arbitrarily or illegally by the lower court, an appeal court will not ordinarily interfere. But there are exceptions whereby this court is entitled to impeach the exercise of judicial discretion by the lower court. Thus, an appellate court may interfere with exercise of judicial discretion if it is shown that there has been a wrongful exercise of the discretion such as where the trial court acted under misconception of law or under misapprehension of facts in that it either gave weight to irrelevant or unproved matters or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases, where it is in the interest of justice to interfere.
See ENEKESE vs. ENEKESE (1964) 1 All NLR 102 at 106, DEMUREN vs. ASUNI (1967) 1 All NLR 94 at 101, MOBIL OIL vs. FEDERAL BOARD OF INLAND REVENUE (1977) 3 SC 97 at 141, SOLANKE vs. AJIBOLA (1968) 1 All NLR 46 at 52.
(P 116 ParasE – I).

4. *Fundamental relevance of affidavit evidence in bail applications*
Learned trial judge in his Ruling at page 533 of the record stated that:

> **"I have considered and reflected on the proof of evidence. They are mind boggling and weighty. I have not been persuaded by the applications and submissions made before me to think otherwise."**

It is quite clear that the learned trial judge did not consider the affidavit evidence before him, for if he had considered it and gave it the attention it deserves, he would not have reached that decision. As a matter of fact it is the affidavit evidence that he should have dwelt on, rather than the proof of evidence which he dealt with extensively and went into the merit of the case.

In STATE vs. AKAA (2002) 10 NWLR (Pt. 774) 157 at 172, the Court of Appeal stated thus:

> **"In an application for bail, it is the affidavit evidence before it that a court should dwell on rather than the proof of evidence. In the instant case, the trial court failed to consider the affidavit and counter affidavit deposed to by the parties. Rather it dwelt extensively on the proof of evidence thereby going in to the merit of the case."** *(P 117 Paras A – F).*

5. *Court failed to exercise discretion properly when it ignored to consider affidavit evidence placed before it.*

The respondent, on the other hand, has also filed a counter affidavit. As I have stated earlier, the learned trial judge dwelt so much on the proof of evidence which he dealt with extensively thereby ignoring the affidavit evidence by the appellant.

A judicial discretion ought to be founded upon the facts and circumstances presented to the court, from which it must draw a conclusion governed by law. A discretion must be exercised honestly and in the spirit of the law. See UNIVERSITY OF LAGOS & ORS vs. C.I.O. OLANIYAN (1985) 1 S.C 295 at 344.

(Pp 118 – 119 Paras G – A).

6. *Distinction between arbitrary and judicious and judicial exercise of discretion*

It must be borne in mind that the essential difference between an arbitrary or wrongful exercise of discretion, on the one hand, and judicial cum judicious exercise of it on the other is that whereas the former is the exercise of it with either no reason at all or with wrong or insufficient, correct and convincing reason. While judicial and judicious exercise of discretion is acceptable in law, an arbitrary exercise of it is not. *(P 119 Paras A – C).*

7. *What is the proper approach of court in the determination of application for bail which is bailable*

In the final analysis, and, as stated earlier on, and from the particulars of the offences charged, the offences are bailable in law, and the learned trial judge ought to have exercised his discretion in favour of the appellant, in view of the content of the affidavit evidence before him. The Court of Appeal also ought to have looked at that affidavit evidence where the trial court had failed to do so. The sole issue for determination in this appeal is hereby resolved in favour of the appellant. The appeal is meritorious and it is hereby allowed. *(P 119 Paras C – E).*

8. *Obligations of court where suits are consolidated*

What is at play is the issue of what a court must do when it consolidates suits and what it entails when an order of consolidation is made. A journey back in time into the facts of this case would assist and that is that the learned trial judge on the 9th day of June, 2015 consolidated the applications for bail of all the defendants including the herein appellant and heard then. It is necessary to state that it is permissible in law to consolidate suits or applications so as to get a speedy resolution of the nagging issues and possibly remove bottlenecks or hurdles that might impede the main suit which would not happen where the applications and suits are to be handled separately. To get to the decision to order consolidation, the court gets to that position satisfied that there are common questions of law or facts arising in both or all the causes or matters or even the rights of relief which are claimed in respect of or arise out of the

same transactions or for some other reasons in which it makes it desirable to make an order under the rules of court. Therefore consolidation so to speak of suits or applications is generally made for expediency and convenience such that those suits or applications having same common characteristics of law or facts or stemming from a common transaction may be heard and determined at the same time in order to avoid multiplicity of actions and to economize time and costs.

To embark on consolidation of suits or applications, the court doing so has a bounden duty which it must discharge and that is, that each of the suits or applications must be resolved in their individual or distinct identity in that common trial. In other words, consolidation does not take away the separate identity of a particular suit or application within that grouping. Also evidence accepted in one suit or application is not evidence in any of the others. This scenario the court must bear in mind and in sight throughout, from the beginning of the consolidation till the conclusion at the judgment stage or ruling point. I refer to Dugbo vs. Kporoaro (1958) SCNLR 180; Diab Nasr vs. Complete Home Enterprises (Nig) Ltd (1977) 5 SC 1; Iloabuchi vs. Ebigbo (2000) 8 NWLR (Pt. 668) 197. *(P 123 Paras A – H).*

9. *Failure of court to deliver separate rulings in the suits.*

The guiding principle above stated, it turned out that in the case in hand the trial court fused the applications and delivered a single ruling in respect of all six applications. In this error the learned trial judge failed to consider the affidavit and further affidavit of the appellant before rejecting her bail application and this happened because that court missed its way and referred to what was not in the affidavit of the appellant and the counter affidavit against the application. Also entered into submissions that were nonexistent as counsel for the appellant made no such. The circumstances that arose showed that the court of first instance having jumbled all the applications and treating them as one utilized facts or evidence that had no relationship or relevant to specific application of the appellant. The fall out therefore is that the right of fair hearing of the

appellant had been clearly breached and the correctness of the decision was neither here nor there. This is because the proceedings having been fundamentally flawed on account of this failure to adhere to the rule of natural justice of the appellant's right to fair hearing jeopardised the proceedings and nothing could come out of it. The dictum of my learned brother, Kekere-Ekun JSC in Inogha Mfa & Ors vs. Mfa Inongha (2014) LPELR-22010 (SC) is apt for my use and I follow it. He stated thus:

> **"It is also well settled that any proceedings conducted in breach of a party's right to fair hearing, no matter how well conducted would be rendered a nullity. See Tsokwa Motors (Nig) Ltd vs. U.B.A. Plc. (2008) ALL FWLR (Pt. 403) 1240 @ 1255 A-B; Adigun vs. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 674; Okafor vs. A.G. Anambra State (1991) 3 NWLR (Pt. 200) 59; Leaders & Co Ltd. vs. Bamaiyi (2010) 18 NWLR (Pt. 1225) 329. It was held in recent decision of this court in Abubakar Audu vs. FRN (2013) 53 NSCOR 456 @ 469: "The law is indeed well settled that fair hearing within the meaning of section 36(1) of the Constitution of Federal Republic of Nigeria, 1999, means a trial or hearing conducted according to all legal rules formulated to ensure that justice is done to the parties. It requires the observation or observance of the twin pillars of the rules of natural justice, namely audi alteram partem and nemo judex in causa sua. These rules, the obligation to hear the other side of a dispute or the right of a party in dispute to be heard, is so basic and fundamental a principle of our adjudicatory system in the determination of disputes that it cannot be compromised on any ground. See Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136) 22. The effect of a denial of fair hearing is trite in law. In order words, once there is a breach of the right of fair hearing, the whole proceeding in the course of which the breach**

> **occurred and the decision arrived at by the court becomes a nullity".**

The situation is well cut out and clearly with the proceedings that have come unhinged the decision of the trial court has nothing to hang on and so the Court of Appeal was wrong to have sustained that flawed decision. *(P p 123 – 125 Paras H – D).*

10. *Interpretation of S.185 and 162 of ACJA 2015*
Per Sanusi (JSC)
Section 158 of the Administration of Criminal Justice Act 2015 provides as follows:

> **"When a person who is suspected to have committed an offence or is accused of an offence is arrested or detained, or appears or is brought before a court, he shall, subject to the provisions of this Act, be entitled to bail.**

The above provision appear to be in tanderm with the provisions of Section 118(2) of the Criminal Procedure Act which states that person charged with a felony other than a felony punishable with death, could be admitted to bail. There is no gain stating that the offence the appellant was facing trial on, is certainly not one attracting death punishment. With the use of the article "shall" in Section 158 of the Administration of Criminal Justice Act 2015, that presupposes that the appellant is mandatorily entitled to be granted bail by the court right from the out set. Again, Section 162 of the same Act provides that where the offence which an applicant/accused is facing trial on or accused of committing exceeds three years punishment, as in this instant case, he shall still be admitted to bail except on some specified circumstances spelt out in paragraphs (a) – (f) of the said sections, namely :

(a) If there is reasonable ground that the accused will commit another offence or offences.
(b) Whether he will evade trial;
(c) Whether he will influence, interfere with, intimidate witnesses and or interfere with the investigation of the case.
(d) Attempt to destroy evidence,
(e) Prejudice the investigation of the offence; or
(f) He will undermine or jeopardize the objective, purpose or function of criminal justice administration including bail system.

Notwithstanding the above listed conditions, the courts are still given discretionary powers to grant or refuse bail under Section 163 of the Act. It must however be emphasised that the Bench mark of the exercise of discretion by courts is that the decision to use discretionary powers must be exercised judiciously and judicially too. See Bamaiyi vs. The State (2001) 3 NWLR (Pt. 715) 230; Dantata vs. COP (1958) NRNLR 3. or (2001) 4 SC 126.
(Pp 126 – 128 Paras H – A).

11. *Factors which the courts take into account in the consideration of bail*
Thus, from the cumulative effect of the above provisions of the Act and of course, the Criminal Procedure Act, in exercising the discretion to grant bail to an applicant the court has a duty to consider the nature of the charge, the severity of the punishment, the character of the evidence, the applicant's criminal record as well as the likelihood of him repeating the offence and including all the elements mentioned in Section 162 of the Act as stated supra. The trite position of the law is that in exercising the discretion to grant or refusal of bail, a trial court must consider the weight of facts deposed to in an affidavit evidence placed before it and all other requirements as highlighted supra. In this instant case, the applicant now appellant had in the affidavit sworn to by her, deposed to some far reaching averments (as shown on page 465 of the record) the conditions or requirements of Section 162 which she averred that she would refrain from committing or contravening if

granted such bail. Such averments were not in any way controverted or challenged by the -- learned respondent's counsel. *(P 128 Paras A – E).*

12. *The trial court failed to evaluate the affidavit evidence*
It is rather bizarre to note that the learned trial judge based his reason for refusing to grant bail to the applicant/appellant not on the affidavit evidence, but he merely dwelt on the proof of evidence and totally ignoring to consider the averments which are crucial and relevant for exercising his discretion whether or not to grant the bail application. If he had duly examined, assessed and evaluated such affidavit evidence placed on his table, he would have arrived at a different conclusion.

The lower court on its part had unfortunately, failed to advert its mind to or consider the averments in the applicant's affidavit before affirming and endorsing the trial court's decision refusing to grant the bail. It merely glossed it over. I must say that there were justifiable reasons placed before the lower court to warrant its querying, disturbing or tampering with the trial judges exercise of judicial discretion in refusing the application before him in this case. *(P 128 Paras E – H).*

Nigerian Cases Cited

Abubakar Audu vs. FRN (2013) 53 NSCOR 456:
Adamu Suleiman & Anor vs. C.O.P. Plateau State, 33 NSCQR (Pt. 2) 735.
Adigun vs. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 674;
Bamaiyi vs. The State (2001) 3 NWLR (Pt. 715) 230;
Dantata vs. COP (1958) NRNLR 3. or (2001) 4 SC NJI 126.
Demuren vs. Asuni (1967) 1 All NLR 94
Diab Nasr vs. Complete Home Enterprises (Nig) Ltd (1977) 5 SC 1;
Dugbo vs. Kporoaro (1958) SCNLR 180;
Ekwenugo vs. F.R.N. (2001) 6 NWLR (Pt. 708) 171
Enekese vs. Enekese (1964) 1 All NLR 102,
Iloabuchi vs. Ebigbo (2000) 8 NWLR (Pt. 668) 197.
Inogha Mfa & Ors vs. Mfa Inongha (2014) LPELR-22010 (SC)
Leaders & Co Ltd. vs. Bamaiyi (2010) 18 NWLR (Pt. 1225) 329.

A *Mobil Oil vs. Federal Board of Inland Revenue (1977) 3 SC 97,*
Nwokoro vs. Oruma (1990) 3 NWLR (Pt. 136) 22.
Odusote vs. Odusote (1971) All NCR 219.
Okafor vs. A.G. Anambra State (1991) 3 NWLR (Pt. 200) 59;
B *Saffidine vs. C.O.P. (1965) 1 All NLR 54*
Solanke vs. Ajibola (1968) 1 All NLR 46.
State vs. Akaa (2002) 10 NWLR (Pt. 774) 157.
Tsokwa Motors (Nig) Ltd vs. U.B.A. Plc. (2008) ALL FWLR (Pt. 403) 1240;
C *Ugboma vs Olise (1971) All NLR 8*
University of Lagos & ORS vs. C.I.O. Olaniyan (1985) 1 S.C 295.
University of Lagos vs. Olaniyan (1985) 1 NWLR (Pt. 1) 156

D **Nigerian Statutes Cited**
Administration of Criminal Justice Act 2015 - Section 158
Criminal Procedure Act - Section 118(2)
Recovery of Public Property (Special Provision) Act, Cap. R4, Laws of the
E Federation of Nigeria, 2004. - Section 1(2) (b) and Section 10(1)

Representation
Ken. Ahia with E.C. Ani, C.I., Okoro and L. Onyenipa for the appellant.
F Adebisi Adeniyi with O.A. Atolagbe for the respondent.

DAUDA BAGE, (JSC) (Delivering the Lead Judgment): The appellant Mrs. Patience Okoro Eye and five others, namely Afolabi Olufemi
G Johnson, Ilori Adekunle Sunday, Asemota Augustina, Kolawole Babalola, Olaniran Muniru Adeola and Fatai Adedokun Yusuf were on 2nd June, 2015 arraigned before the Federal High Court, Ibadan Judicial Division, charged with abuse of office, corrupt practices, fraud and illegally owing assets.
H The particulars of the offence charged are as follows:

COUNT 1
"That you PATIENCE OKORO EYE, AFOLABI
I **OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, KOLAWOLE BABALOLA, OLANIRAN**

MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, have by virtue of abuse of your office, being employees of Central Bank of Nigeria, contributed to the economic adversity of the Federal Republic of Nigeria when you destroyed a box marked "Counted Audited Dirty" filled with Newspapers in place of a box containing N10,000,000 (Ten Million Naira) of N1,000 denomination and which activity led to the increase of money in circulation which the briquetting exercise of Central Bank of Nigeria was intended to control and you thereby committed an offence punishable under Section 1(2) (b) and Section 10(1) of the Recovery of Public Property (Special Provision) Act, Cap. R4, Laws of the Federation of Nigeria, 2004."

COUNT 2

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, KOLAWOLE BABALOLA, OLANIRAN MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, engaged in corrupt practices when you replaced the content of a box of N1,000 notes denomination in a total sum of N10,000,000 (Ten Million Naira) marked as "Counted Audited Dirty" meant for briquetting with Newspapers and which sum you converted to your own use and you thereby committed an offence punishable under Section 1(2) (a) and Section 10(1) of the Recovery of Public Property (Special Provision) Act Cap. R4 Laws of the Federation of Nigeria, 2004."

COUNT 3

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, ILORI ADEKUNLE SUNDAY, ASEMOTA AUGUSTINA, KOLAWOLE BABALOLA, OLANIRAN MUNIRU ADEOLA and FATAI ADEDOKUN YUSUF on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, being employees of Central Bank of Nigeria owned asset, to wit: the sum of N10,000,000.00 (Ten Million Naira) being money you took from a box marked "Counted Audited Dirty" which was meant for briquetting and which you replace with Newspapers and for your personal purpose which asset is in excess of your legitimate, known and provable income and assets and you thereby committed an offence under Section 7 (2) of the Bank Employees etc, (Declaration of Assets) Act Cap. B1 Laws of the Federation of Nigeria, 2004,"

COUNT 4

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON, and ILORI ADEKUNLE SUNDAY, on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, with intent to defraud, were privy to making false entry in a document, to wit: the report of your briquetting exercise that took place at Central Bank of Nigeria, headquarters, Abuja, to the effect that the briquetting exercise was successful without any abnormality when indeed a box stuffed with newspapers as against N10,000,000 (Ten Million Naira) notes was discovered during your briquetting exercise on the 5th of September, 2014 and you thereby committed an offence punishable under Section 438(b) of the Criminal Code Act Cap. C38 Laws of the Federation of Nigeria, 2014."

COUNT 5

"That you PATIENCE OKORO EYE, AFOLABI OLUFEMI JOHNSON 1st – 3rd and ILORI ADEKUNLE SUNDAY, on or about 5th August, 2014 in Ibadan within the Jurisdiction of this honourable court, with intent to defraud, were privy to omitting material particulars from a document to wit: the report of your briquetting exercise that took place at Central Bank of Nigeria, Ibadan branch which you submitted to Central Bank of Nigeria headquarters Abuja, to the effect that the briquetting exerciser was successful without any abnormality when indeed a box stuffed with newspapers as against N10,000,000 (Ten Million Naira) notes was discovered during your briquetting exercise on the 5th of September, 2014 and you thereby committed an offence punishable under Section 438 (c) of the Criminal Act Cap, C 38, Laws of the Federation of Nigeria, 2004."

The appellant pleaded not guilty to all the counts of the charge and the trial proceeded. On 2nd June, 2015, an oral application was made on behalf of the appellant for bail and same was refused, thereafter, on the same day a formal application was filed accompanied by an affidavit in support and a written address.

On the 8th June, 2015, the respondent filed its counter affidavit and a written address in opposing the bail application. In refusing the bail, the learned trial judge in his Ruling delivered on 15th June, 2015 held as follows:

"……. I hold that the accused persons have not been able to persuade me by strong and cogent reasons why I should exercise my discretion in their favour. The application fail and same are hereby dismissed.

Alternatively, I enter an order for accelerated hearing and in making this order, the court will not tolerate frivolous application particularly on adjournment either from the prosecution or defence counsel."

Dissatisfied with the Ruling of the trial court, the appellant filed an appeal. It was heard by the Ibadan Division of the Court of Appeal. The court on 9th December, 2015 affirmed the decision of the trial Court when it said:

"I remain of the firm view that the learned trial judge was painstakingly enough in considering all the most relevant materials before him, in terms of the affidavits of the appellant and the counter affidavit of the respondent as well as the proofs of evidence and applicable well established principles governing the granting or refusal of the application in the instant appeal. I am unable to see, in this appeal, any strong reason to fault any of the steps taken by the learned trial judge in the exercise of his discretion. I am not convinced that there is any good reason to call for this court to accept or accede to the request to interfere with the exercise of the discretionary power of the lower court in the instant appeal with respect to its refusal of the application for bail. I am fully satisfied that the learned trial judge in the circumstance exercised his power to grant or refuse bail to the appellant judicially and judiciously."

This appeal is against that judgment. In accordance with Rules of this court, briefs of argument were duly filed and served. The appellant's brief was filed on the 26th September, 2016, while the respondent's brief was filed on the 23rd October, 2017 and was deemed duly filed and served on 26th October, 2017.

Learned counsel for the appellant formulated three issues for the determination of his appeal.

A **1. Whether the Court below was correct in all the circumstances to have upheld the decision of the trial court in refusing the appellant bail after findings as it did, that there were "procedural**
B **Missteps" taken by the trial court in reaching its ruling? – Ground 1 and 5."**

"2. Whether the court below was correct in accepting
C **as unchallenged paragraphs 9, 11, 12, 13 and 18 contained in respondent's Counter Affidavit in opposition to the appellant's bail application and act on the story as set out by the respondent? –**
D **Ground 2."**

"3. Whether the court below was correct in affirming the decision of the trial court in the light of the
E **provisions of Sections 158 and 162 of the Administration of Criminal Justice Act, 2015 as well as Sections 36(5) of the Constitution of Federal Republic of Nigeria, 1999 (as Amended)?**
F **– Grounds 3 and 4."**

Although learned counsel for the appellant formulated 3 issues for determination, learned counsel for the respondent respectfully submitted
G that only two issues call for determination in this appeal and the issues are:

"1. Whether the Court of Appeal was not right in refusing to interfere with the exercise of discretion
H **of the learned trial judge refusing to admit the appellant to bail pending her trial (See Grounds 2, 3 and 4)".**

I **2. Whether the Court of Appeal was not right in holding that the procedure adopted by the**

learned trial judge in the consideration of the appellant's application for bail did not occasion any prejudice or miscarriage of justice to warrant the setting aside of the decision of the trial court. (See Ground 1 and 5)."

After a careful perusal at the issues formulated by both the appellant and the respondent, the view of this court is that a lone issue arise for the determination of this appeal to wit:

> **"Whether the lower court was right in refusing to interfere with the exercise of discretion of the learned trial judge refusing to admit the appellant to bail pending the determination of her trial."**

Learned counsel for the appellant submitted that where an offence carries a sentence exceeding 3 years imprisonment, bail in such a case is not a mere matter of course, but rather, at the discretion of the court which must be exercised judicially and judiciously. Learned counsel argued that, the Administration of Criminal Justice Act, 2015 has obviated the need to make the grant of bail substantially subject to the discretion of the trial judge.

Counsel cited Section 158 of the Administration of Criminal Justice system as follows:

> **"When a person who is suspected to have committed an offence or is accused of an offence is arrested or detained, or appears or is brought before a court, he shall, subject to the provisions of this part, be entitled to bail."**

Learned counsel argued that, the world "shall" inserted into the drafting of the provision of the law cited above removes the discretionary tone in admitting to bail a defendant. Counsel submitted that in **TABIK**

INVESTMENT LTD. & ANOR. vs. GUARANTY TRUST BANK PLC (2011) IPELR this court held that:

> **"The word "Shall" connotes mandatory discharge of a duty or obligation, and when the word is used in respect of a provision of the law that requirement must be met. The word shall may have other meanings, for when used in legislation, it may be capable of translating into a mandatory act giving permission or direction. See NONYE vs ANYICHIE & Ors. (2005) 2 NWLR (Pt. 910) page 623. The use of word shall in the case at hand, to my mind conjures mandatoriness, the conditions of which must be met and satisfied.**

Learned counsel also cited Section 118(2) of the Criminal Procedure Act which provides thus:

> **"Where a person is charged with any felony other than a felony punishable with death, the court may if it thinks fit, admit him to bail."**

Counsel submitted that the wordings of Section 118(2) above, indicate that the court "may" used in Section 118(2) above, indicate that the courts were given total discretion as to the granting of bail to a defendant.

Learned counsel argued that the appellant had in paragraph 23 of her affidavit in support of the application for bail at pages 465 of the record stated that she would regularly attend court to stand for her trial if admitted to bail. The averment which was not contradicted by the respondent in its counter affidavit at pages 483 to 487 of the record of appeal.

Learned counsel further submitted that there is no evidence before the trial court indicating that the appellant would commit another offence or attempt to evade her trial.

Counsel argued that the provision of Section 162 do not permit mere speculation when opposing the granting of bail. He further argued that the

respondent counter affidavit was bereft of any facts or solid evidence alluding to an attempt by the appellant to run foul of any of the provisions in Section 162 save for feeble averment in paragraph 12.

In his final argument, learned counsel for the appellant submitted that it is settled law that legislation is to be given its ordinary interpretation and effect, most especially where words used are straight forward and unambiguous he cited **TORIOLA vs WILLIAMS** (1982) 7 SC. 27 and **LAWAL vs. G.B. OLLIVANT** (1972) 3 SC.

He urged the court to hold that the lower court was incorrect in upholding the decision of the trial court in light of Section 158 and 162 of Administration of Criminal Justice Act 2015 and Section 36(5) of the Constitution of Federal Republic of Nigeria 1999 (as amended).

On the other hand, learned counsel for the respondent argued that there is a concurrent finding of fact by Federal High Court, Ibadan and the Court of Appeal that the appellant is not entitled to bail having regards to the materials presented before the court. He submitted that the attitude of this court over the years is that it would not interfere with the concurrent findings of facts of both the High Court and the Court of Appeal unless it is shown by the appellant that such findings are perverse. He cited **SOBAKIN vs THE STATE (1981) 5 SC 375.**

Learned counsel observed that although the power of the trial court to admit the appellant to bail in respect of the offences for which she is standing trial, is discretionary, such discretionary power must be exercised judicially and judiciously, counsel submitted that since appellant's appeal is against the exercise of discretion, the appellant needs to satisfy this court that the lower court did not exercise its discretion judicially and judiciously.

Learned counsel argued that in a situation such as the instant appeal, which borders on the exercise of the discretion, the duty of this court is simply to look at the record, review same and determine whether the trial court and the court below exercise the discretion judicially and judiciously having regards to the facts and circumstances of the case, he cited **ALI vs. THE STATE (2012) 10 NWLR (Pt. 1309) 589** at 609 Paras A – D and **SAPPEDDINE vs. C.O.P. (1965) 1 All NLR 54.**

Learned counsel submitted that the requirements set out under Section 162 of the Administration of Criminal Justice Act has not changed the position of the law with regard to the factors that the court would consider in refusing or granting bail, according to him, it has also not removed the discretionary power of the court to refuse or grant bail.

Counsel observed that the gravity of the offence involved is of paramount importance to a trial court in deciding on the grant or refusal of bail. He further argued that the offences being alleged against the appellant attract the maximum sentence of twenty (20) years imprisonment, it is like capital offence against the nation's economy. So, if released on bail, the severity of the punishment which conviction would entail would make the appellant to evade her trial if released on bail at this stage.

Learned counsel submitted that it is settled law that the more cogent the evidence before the court, the greater the possibility that the defendant may attempt to evade his trial or may refuse to appear at his trial.

Learned counsel finally urged this court to hold that there is no miscarriage of justice in the approach adopted by the two lower courts.

On the part of this court, Section 118(2) of the Criminal Procedure Act, in my view makes the grant of bail to an accused person standing trial before a High Court, purely a discretionary matter in the hands of the trial judge. The trite position of the law is that in exercising the jurisdiction given to him by the law in the grant or refusal of bail, the trial judge is bound to consider the weight of facts pleaded to, in an affidavit evidence placed before him. The determination of the criteria is quite important because the liberty of the appellant stands or falls by the decision of the court. In performing the judicial function, the court wields a very extensive discretionary power, which must be exercised judicially and judiciously.

See **BAMAIYI vs. THE STATE (2001) 8 NWLR (Pt. 715) 270 EKWENUGO vs. F.R.N. (2001) 6 NWLR (Pt. 708) 171 DANTATA vs. POLICE (1958) NRNLR 3.**

In exercising its discretion, the Court is bound to examine the evidence before it without considering any extraneous matter. The court cannot exercise its whims indiscriminately. Similarly, there is no room for the court to express its sentiments. I must say that, it is a hard matter of law,

facts and circumstances which the court considers without being emotional, sensitive or sentimental.

See **ADAMU SULEIMAN & ANOR vs. C.O.P. PLATEAU STATE,** 33 NSCQR (Pt. 2) 735 at pp. 758-759.

In **EKWENUGO vs. F.R.N.** supra the court held that:

> **"The issue of grant of bail by a trial court calls for due exercise of discretion which entails the application of common sense based on a given set of facts and attendant circumstances in accordance with justice. The discretion must be exercised not only judicially, but judiciously as well."**

See also **UNIVERSITY OF LAGOS vs. OLANIYAN (1985) 1 NWLR (Pt. 1) 156 SAFFIDINE vs. C.O.P. (1965) 1 All NLR 54 UGBOMA vs OLISE (1971) All NLR 8 and ODUSOTE vs. ODUSOTE (1971) All NCR 219.**

It is well settled that if judicial discretion has been exercised bonafide uninfluenced by irrelevant considerations and not arbitrarily or illegally by the lower court, an appeal court will not ordinarily interfere. But there are exceptions whereby this court is entitled to impeach the exercise of judicial discretion by the lower court. Thus, an appellate court may interfere with exercise of judicial discretion if it is shown that there has been a wrongful exercise of the discretion such as where the trial court acted under misconception of law or under misapprehension of fact in that it either gave weight to irrelevant or unproved matters or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases, where it is in the interest of justice to interfere.

See **ENEKESE vs. ENEKESE (1964) 1 All NLR 102 at 106, DEMUREN vs. ASUNI (1967) 1 All NLR 94 at 101, MOBIL OIL vs. FEDERAL BOARD OF INLAND REVENUE (1977) 3 SC 97 at 141, SOLANKE vs. AJIBOLA (1968) 1 All NLR 46 at 52.**

Learned trial judge in his Ruling at page 533 of the record stated that:

> **"I have considered and reflected on the proof of evidence. They are mind boggling and weighty. I have not been persuaded by the applications and submissions made before me to think otherwise."**

It is quite clear that the learned trial judge did not consider the affidavit evidence before him, for if he had considered it and gave it the attention it deserves, he would not have reached that decision. As a matter of fact it is the affidavit evidence that he should have dwelt on, rather than the proof of evidence which he dealt with extensively and went into the merit of the case.

In **STATE vs. AKAA (2002) 10 NWLR (Pt. 774) 157 at 172**. The Court of Appeal stated thus**:**

> **"In an application for bail, it is the affidavit evidence before it that a court should dwell on rather than the proof of evidence. In the instance case, the trial court failed to consider the affidavit and counter affidavit deposed to by the parties. Rather it dwelt extensively on the proof of evidence thereby going in to the merit of the case."**

The appellant in the instant case, had deposed to his affidavit at page 465 of the record as follows:

> **"I have also been in the custody of the EFCC since Wednesday the 27th day of May, 2015 till the date of filing this application after I obediently reported to the office of the EFCC when I received a call from one of the investigating officers to report at their office in Abuja.**
>
> **I know as a fact that I never breached the conditions of my bail when I was granted administrative bail by the EFCC**

A **before I was further detained for several days and before formally charging me to court.**

I know that I neither stuffed any box with newspapers nor
B **colluded with anybody to stuff the box with newspapers.**

I know as a fact that I have never been convicted of any criminal offence in my life.

C

I have responsible people who could stand as sureties for me if I was granted bail by this honourable court.

D **I never tempered with the investigation conducted by the EFCC while I was granted administrative bail.**

I will regularly come to court to stand trial in the charge
E **filed against me if I was granted bail by this honourable court.**

I verily believe all preliminary investigations have been
F **concluded before filling this charge against me.**

I make this solemn declaration conscientiously, believing same to be true and in accordance with the Oaths Act."

G

The respondent, on the other hand, has also filed a counter affidavit. As I have stated earlier, the learned trial judge dwelt so much on the proof of evidence which he dealt with extensively thereby ignoring the affidavit
H evidence by the appellant.

A judicial discretion ought to be founded upon the facts and circumstances presented to the court, from which it must draw a conclusion governed by law. A discretion must be exercised honestly and in the spirit

I

of the law.

See **UNIVERSITY OF LAGOS & ORS vs. C.I.O. OLANIYAN** (1985) 1 S.C 295 at 344.

It must be borne in mind that the essential difference between an arbitrary or wrongful exercise of discretion, on the one hand, and judicial cum judicious exercise of it on the other is that whereas the former is the exercise of it with either no reason at all or with wrong or insufficient, correct and convincing reason. While judicial and judicious exercise of discretion is acceptable in law, an arbitrary exercise of it is not.

In the final analysis, and, as stated earlier on, and from the particulars of the offences charged, the offences are bailable in law, and the learned trial judge ought to have exercised his discretion in favour of the appellant, in view of the content of the affidavit evidence before him. The Court of Appeal also ought to have looked at that affidavit evidence where the trial court had failed to do so. The sole issue for determination in this appeal is hereby resolved in favour of the appellant. The appeal is meritorious and it is hereby allowed.

The appellant is granted bail with a bond to provide two sureties in the sum of N100,000.00k each, and each one of them to submit one title document from any part of Nigeria, to be verified by Chief Registrar Supreme Court.

Sidi Dauda Bage,
Justice, Supreme Court

RHODES-VIVOUR, (JSC): My lords, I have had the advantage of reading in draft the leading judgment of my learned brother, **Bage JSC** wherein his lordship granted the appellant bail, despite the refusal by both courts below. I agree entirely with his lordship reasoning and conclusion.

Appeal allowed.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I am in total agreement with the judgment just delivered by my learned brother, Sidi Dauda Bage JSC and to register that

support, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Ibadan Division or lower court or court below delivered on the 9th December, 2015. Which affirmed the Ruling of the Federal High Court delivered on 15th June, 2015 wherein the learned trial judge dismissed the appellant's application for bail on the ground that there were no strong and concrete reasons why the court could exercise its discretion in favour of the appellant.

The fuller facts leading to this appeal are well captured in the lead judgment and so dispensing of the need to repeat them save for when it becomes necessary to make reference to any part of those facts in the course of this deliberation.

On the 26th October, 2017 date of hearing learned counsel for the appellant, Ken Ahia adopted the brief of argument settled by Awa U. Kalu SAN and filed on 26th September, 2016 and the reply brief filed on 25th October, 2017 and deemed filed on 26th October 2017. The learned Senior Advocate identified three issues for determination which are thus:

1. **Whether the court below was correct in all circumstances to have upheld the decision of the trial court in refusing the appellant bail after finding as it did, that there were 'procedural missteps' taken by the trial court in reaching its ruling? (Ground 1 and 5).**

2. **Whether the court below was correct in accepting as unchallenged paragraphs 9, 11, 12, 13 and 18 contained in respondent's counter affidavit in opposition to the appellant's bail application and act on the story set out by the respondent? (Ground 2).**

3. **Whether the court below was correct in affirming the decision of the trial court in the light of the provisions of sections 158 and 162 of the**

Administration of Criminal Justice Act, 2015 as well as sections 36(5) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) Grounds 3 and 4.

Adebisi Adeniyi of counsel for the respondent adopted its brief of argument filed on 23rd October, 2017 and deemed filed on 26th October, 2017. In it were raised two issues for determination which are as follows:

1. **Whether the Court of Appeal was not right in refusing to interfere with the exercise of discretion of the learned trial judge refusing to admit the appellant to bail rending her trial. (Grounds 2, 3 and 4).**
2. **Whether the Court of Appeal was not right in holding that the procedure adopted by the learned trial judge in the consideration of the appellant's application for bail did not occasion any prejudice or miscarriage of justice to warrant the setting aside of the decision of the trial court. (Grounds 1 and 5).**

From the issues as crafted on either side, I see issue one of the appellant as adequate for use in the determination of this appeal and I shall so utilize it.

ISSUE No. 1

Whether the court below was correct in all the circumstances to have upheld the decision of the trial court in refusing the appellant bail after finding as it did, that there were "procedural missteps" taken by the trial court in reading its ruling.

Learned counsel for the appellant contended that consolidation of suits or applications is generally made for expediency and convenience such that suits or applications having same and common characteristics of law or facts or arising from common transactions may be heard and determined at the same time in order to avoid multiplicity of actions and to

economize time and costs. That it must be stated however that when a court gives an order to consolidate suits or applications it automatically creates a duty on itself, which it must discharge and so does not lose sight of the distinct identity of each applicant and his application in relation to other applicants and respective application. That each application remains separate and distinct and its judgment or ruling must be given separately at the end of the common trial. The reasoning being that the consolidation of suits or applications does not render evidence accepted in one evidence in the other. He cited **Dugbo vs. Kporoaro (1958) SCNLR 180**; **Diab Nasr vs. Complete Home Enterprises (Nig) Ltd (1977) 5 SC 1** e.t.c.

That it is for the principle above that in this instance the trial court erred when it fused the applications and delivered a single ruling in respect of all applications and in doing so failed to consider the affidavit and further affidavit of the appellant before refusing her bail application.

Learned counsel for the appellant contended that it is not the decision that matters but the procedure adopted in reaching the decision which is flawed as it raised the issue of a lack of fair hearing. That since the right to fair hearing of the appellant was compromised the decision cannot be sustained. He cited **Inogha Mfa & Ors vs. Mfa Inongha (2014) LPELR-22010 (SC)** per **Kekere Ekun JSC.**

For the appellant, learned senior counsel stated that the major criterion for granting bail is for the accused to attend his/her trial and it is on this criterion that all other reasons hang. He cited **Adamu Suleiman & Anor vs. COP, Plateau State (2008)- LPELR-3126 SC (Pt. 21**).

Learned counsel for the respondent submitted that the appeal is against the concurrent findings of facts of both the Federal High Court and Court of Appeal on the ground that the appellant is not entitled to bail having regard to the materials presented before the court and in line with the attitude of the Supreme Court over the years, this court should not interfere with those findings being not perverse. He referred to **Sobakun vs. State (1981) 5 SC 375; University of Lagos vs. Olaniyan (No 1) (1985) 1 NWLR (Pt. 1) 156 at 163; Minister, P.M.R vs. E. L. (Nig) Ltd (2010) 12 NWLR (Pt. 1208) 261 at 292.**

A What is at play is the issue of what a court must do when it consolidates suits and what it entails when an order of consolidation is made. A journey back in time into the facts of this case would assist and that is that the learned trial judge on the 9th day of June, 2015 consolidated the
B applications for bail of all the defendants including the herein appellant and heard then. It is necessary to state that it is permissible in law to consolidate suits or applications so as to get a speedy resolution of the nagging issues and possibly remove bottlenecks or hoddles that might impede the main
C suit which would not happen where the applications and suits are to be handled separately. To get to the decision to order consolidation, the court gets to that position satisfied that there are common questions of law or facts arising in both or all the causes or matters or even the rights of relief
D which are claimed in respect of or arise out of the same transactions or for some other reasons in which it makes it desirable to make an order under the rules of court. Therefore consolidation so to speak of suits or applications is generally made for expediency and convenience such that those suits or
E applications having same common characteristics of law or facts or stemming from a common transaction may be heard and determined at the same time in order to avoid multiplicity of actions and to economize time and costs.

F To embark on consolidation of suits or applications, the court doing so has a bounden duty which it must discharge and that is, that each of the suits or applications must be resolved in their individual or distinct identity in that common trial. In other words, consolidation does not take away the
G separate identity of a particular suit or application within that grouping. Also evidence accepted in one suit or application is not evidence in any of the others. This scenario the court must bear in mind and in sight throughout, from the beginning of the consolidation till the conclusion at
H the judgment stage or ruling point. I refer to **Dugbo vs. Kporoaro (1958) SCNLR 180; Diab Nasr vs. Complete Home Enterprises (Nig) Ltd (1977) 5 SC 1; Iloabuchi vs. Ebigbo (2000) 8 NWLR (Pt. 668) 197.**

The guiding principle above stated, it turned out that in the case in
I hand the trial court fused the applications and delivered a single ruling in respect of all six applications. In this error the learned trial judge failed to

consider the affidavit and further affidavit of the appellant before rejecting her bail application and this happened because that court missed its way and referred to what was not in the affidavit of the appellant and the counter affidavit against the application. Also entered into submissions that were nonexistent as counsel for the appellant made no such. The circumstances that arose showed that the court of first instance having jumbled all the applications and treating them as one utilized facts or evidence that had no relationship or relevant to specific application of the appellant. The fall out therefore is that the right of fair hearing of the appellant had been clearly breached and the correctness of the decision was neither here nor there. This is because the proceedings having been fundamentally flawed on account of this failure to adhere to the rule of natural justice of the appellant's right to fair hearing jeopardised the proceedings and nothing could come out of it. The dictum of my learned brother, **Kekere-Ekun JSC in Inogha Mfa & Ors vs. Mfa Inongha (2014) LPELR-22010 (SC)** is apt for my use and I follow it. He stated thus:

> **"It is also well settled that any proceedings conducted in breach of a party's right to fair hearing, no matter how well conducted would be rendered a nullity. See Tsokwa Motors (Nig) Ltd vs. U.B.A. Plc. (2008) ALL FWLR (Pt. 403) 1240 @ 1255 A-B; Adigun vs. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 674; Okafor vs. A.G. Anambra State (1991) 3 NWLR (Pt. 200) 59; Leaders & Co Ltd. vs. Bamaiyi (2010) 18 NWLR (Pt. 1225) 329. It was held in recent decision of this court in Abubakar Audu vs. FRN (2013) 53 NSCOR 456 @ 469: "The law is indeed well settled that fair hearing within the meaning of section 36(1) of the Constitution of Federal Republic of Nigeria, 1999, means a trial or hearing conducted according to all legal rules formulated to ensure that justice is done to the parties. It requires the observation or observance of the twin pillars of the rules of natural justice, namely audi alteram partem and nemo judex in causa sua. These rules, the obligation to hear the**

A **other side of a dispute or the right of a party in dispute to be heard, is so basic and fundamental a principle of our adjudicatory system in the determination of disputes that it cannot be compromised on any ground. See Nwokoro vs.**
B **Oruma (1990) 3 NWLR (Pt. 136) 22. The effect of a denial of fair hearing is trite in law. In order words, once there is a breach of the right of fair hearing, the whole proceeding in the course of which the breach occurred and the decision**
C **arrived at by the court becomes a nullity".**

The situation is well cut out and clearly with the proceedings that have come unhinged the decision of the trial court has nothing to hang on and so
D the Court of Appeal was wrong to have sustained that flawed decision.

In the light of the foregoing and the better reasoning in the lead judgment, I also allow the appeal and abide by the consequential orders made.

E **Mary Ukaego Peter-odili**
Justice, Supreme Court

BATA OGUNBIYI, (JSC): The facts of this case have been spelt out
F clearly in the lead judgment. The appellant is seeking bail before conviction. The determining factor is whether the appellant will avail himself for trial if bail is granted him.

It is trite law that the granting of bail in such situation is not a matter
G of course but is at the discretion of the court having regard to the circumstance of the case before it.

My learned brother, **Bage, JSC** had dealt adequately with the case at hand and I have no reason to decide otherwise. I therefore adopt his
H judgment as mine and also resolve the sole issue raised in favour of the appellant.

The appeal has merit and is allowed. I hereby grant bail in terms of the lead judgment of my learned brother.

I **Clara Bata Ogunbiyi**
Justice, Supreme Court

AMIRU SANUSI, (JSC): This appeal is against the judgment of the Court of Appeal, Ibadan division (lower court), delivered on 9th December, 2015. In the said judgment, the lower court affirmed the decision of Federal High Court Ibadan (trial court) delivered on 15th day of June, 2015 which refused to admit the appellant, then applicant to bail.

The appellant as applicant at the trial court was along with her four other colleagues arraigned before the trial court on various allegations of crimes as adumbrated in the lead judgment. After pleading not guilty to each of the five counts, the appellant applied for bail. At the close of arguments by counsel on the application, the learned trial judge refused to grant her bail, and instead, ordered accelerated hearing.

Aggrieved by the trial court's refusal to admit her to bail, she appealed to the lower court which endorsed and affirmed the Ruling of the trial court refusing the bail. She again became disenchanted with the lower court's refusal to admit her to bail and then further appealed to this court.

Briefs of argument were filed and exchanged by learned counsel for the parties. In the appellant's brief of argument settled by Awa Uwa Kalu SAN, three issues were raised for the determination of the appeal, whereas Mr. Adebisi Adeniyi of learned counsel for the respondent had in his respondent's brief identified two issues for the determination of this appeal. As both sets of issues had been set out in the lead judgment, I feel it will be repetitive to reproduce them here again.

Considering the circumstances of this case, I feel the germane issue calling for determination in this appeal is simply whether the lower court acted rightly by refusing to interfere with the decision of the trial court in refusing to admit the present appellant to bail or to put it in another way, whether the refusal to exercise the discretion to grant bail to the accused/applicant, (now appellant) by the trial court, was correctly affirmed by the lower court.

Section 158 of the Administration of Criminal Justice Act 2015 provides as follows:

> **"When a person who is suspected to have committed an offence or is accused of an offence is arrested or**

detained, or appears or is brought before a court, he shall, subject to the provisions of this Act, be entitled to bail.

The above provision appear to be in tanderm with the provisions of Section 118(2) of the Criminal Procedure Act which states that person charged with a felony other than a felony punishable with death, could be admitted to bail. There is no gain saying that the offence the appellant was facing trial on, is certainly not one attracting death punishment. With the use of the article "shall" in Section 158 of the Administration of Criminal Justice Act 2015, that presupposes that the appellant is mandatorily entitled to be granted bail by the court right from the out set. Again, Section 162 of the same Act provides that where the offence which an applicant/accused is facing trial on or accused of committing exceeds three years imprisonment as in this instant case, he shall still be admitted to bail except on some specified circumstances spelt out in paragraphs (a) – (f) of the said sections, namely :

(a) If there is reasonable ground that the accused will commit another offence or offences.
(b) Whether he will evade trial;
(c) Whether he will influence, interfere with, intimidate witnesses and or interfere with the investigation of the case.
(d) Attempt to destroy evidence,
(e) Prejudice the investigation of the offence; or
(f) He will undermine or jeopardize the objective, purpose or function of criminal justice administration including bail system.

Notwithstanding the above listed conditions, the courts are still given discretionary powers to grant or refuse bail under Section 163 of the Act. It must however be emphasised that the Bench mark of the exercise of discretion by courts is that the decision to use discretionary powers must be exercised judiciously and judicially too. See **Bamaiyi vs. The State (2001)**

3 NWLR (Pt. 715) 230; Dantata vs. COP (1958) NRNLR 3. or (2001) 4 SC NJI 126.

Thus, from the cumulative effect of the above provisions of the Act and of course, the Criminal Procedure Act, in exercising the discretion to grant bail to an applicant the court has a duty to consider the nature of the charge, the severity of the punishment, the character of the evidence, the applicant's criminal record as well as the likelihood of him repeating the offence and including all the elements mentioned in Section 162 of the Act as stated supra. The trite position of the law is that in exercising the discretion to grant or refuse bail, a trial court must consider the weight of facts deposed to in an affidavit evidence placed before it and all other requirements as highlighted supra. In this instant case, the applicant now appellant had in the affidavit sworn to by her, deposed to some far reaching averments (as shown on page 465 of the record) the conditions or requirements of Section 162 which she averred that she would refrain from committing or contravening if granted such bail. Such averments were not in any way controverted or challenged by the learned respondent's counsel.

It is rather bizarre to note that the learned trial judge based his reason for refusing to grant bail to the applicant/appellant not on the affidavit evidence, but he merely dwelt on the proof of evidence and totally ignoring to consider the averments which are crucial and relevant for exercising his discretion whether or not to grant the bail application. If he had duly examined, assessed and evaluated such affidavit evidence placed on his table, he would have arrived at a different conclusion.

The lower court on its part had unfortunately, failed to advert its mind to or consider the averments in the applicant's affidavit before affirming and endorsing the trial court's decision refusing to grant the bail. It merely glossed it over. I must say that there were justifiable reasons placed before the lower court to warrant its querying, disturbing or tampering with the trial judges exercise of judicial discretion in refusing the application before him in this case.

Apropos of the above, I also see merit in this appeal. It is meritorious and is accordingly allowed by me. I am at one with the reasoning and conclusion arrived at by my learned brother Sidi Bage, JSC for allowing

this appeal.

I abide by the consequential orders made in the lead judgment.

Amiru Sanusi
Justice, Supreme Court

PML (SECURITIES) COMPANY LIMITED
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 255/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY THE 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower courts – Attitude of Supreme Court thereto – Guiding principles.

COURT: Appellate Court – Whether does not have jurisdiction to venture outside its record of appeal – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Amended charge – Effective date of commencement – Whether it takes effect retrospectively – S. 164(4) of CPA – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Amendment of charge – Meaning – Implication – Guiding principles thereto.

CRIMINAL LAW AND PROCEDURE: Filing of charge – The date of filing of a charge – Whether the date of filing is not more material than the date of signing of charge.

CRIMINAL LAW AND PROCEDURE: Power of EFCC – Power to compound an offence – Whether does not include power to compound a crime – Relevant considerations thereto.

CRIMINAL LAW AND PROCEDURE: Power of EFCC – Power to compound an offence – S.14(2) of EFCC Act – Extent and scope.

CRIMINAL LAW: Defence – Plea bargain – S. 270 ACJA 2015 – Imperatives – Whether not applicable.

CRIMINAL LAW: Plea bargain – Nature and purpose – Relevant principles thereto.

PRACTICE AND PROCEDURE: Abuse of court process – Where a party alleges – Whether has onus to prove malice – Failure thereto – Implication.

STATUTE: S.14(2) of EFCC Act – Extent, purport and imperatives.

WORDS AND PHRASES: Acquittal – Meaning.

WORDS AND PHRASES: Compounding a crime – Meaning.

WORDS AND PHRASES: Compounding the offence – Meaning

WORDS AND PHRASES: Condonation – Meaning.

Issues for Determination

(1) Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with Economic and Financial Crimes Commission [*EFCC]* does not inure to the benefit of the appellant herein.

(2) Whether the Court of Appeal was right when it held that a crime cannot be condoned by the State.

(3) Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant.

(4) Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading up to the appeal did not constitute an abuse of court process.

(5) Whether the Court of Appeal did not misdirect itself and occasion a serious miscarriage of justice when it summarized the evidence incorrectly in favour of the respondent by erroneously holding that the appellant's lead counsel herein continued to appear as counsel for the 4th accused person to the original charge dated 22/1/2008 Ekpen and Sons Company, when in fact, the name of the said 4th accused person has been struck out by the trial court on 23/1/2008.

Facts of the Matter

This is another appeal filed by one of the limited liability companies that were charged with *Lucky Nosakhare Igbinedion* at the Federal High Court, Enugu **[FHC Enugu]** in **2008**, and Federal High Court, Benin [**FHC Benin**] in **2011.**

On **22/1/2008,** respondent filed a **Charge No. FHC/EN/6C/2008** at the **FHC Enugu** against the said *Lucky Nosakhare Igbinedion* and four others. The appellant and a sister Company *PML (Nigeria) Limited,* whose appeal on same matter has been heard and determined by this court on **15/12/2017,** were not listed in the original charge, but they were included as the sixth and seventh accused persons in an *Amended Charge* filed on **13/10/2008.**

The *Amended Charge* was further amended, and the *Further Amended Charge* filed on **18/10/2008**, listed only *Lucky Nosakhare Igbinedion* and one of the limited liability companies earlier charged – *Kiva Corporation Limited,*

as accused persons. The names of other accused persons were removed.

Based on a Plea Agreement between *Lucky Nosakhare Igbinedion* and the respondent, the said *Lucky Nosakhare Igbinedion* and *Kiva Corporation,* pleaded guilty on **18/12/2008**, to offences relating to each of them in the said *Further Amended Charge* filed that day, and were convicted and sentenced.

On **31/1/2011,** respondent filed another **Charge No. FHC/B/11C/2011** at the **FHC Benin** against *"Lucky Nosakhare Igbinedion & 6 Ors.",* including the appellant. The appellant and the other accused persons filed a Joint application at the **FHC Benin**, wherein they prayed for the following Orders:

1. **A declaration that this Hon. court lack jurisdiction and competence to arraign the accused persons/applicants and to trial (sic), hear and determine the offences contained in these proceedings.**

2. **An Order setting aside *Charge No. FHC/B/11C/2011* – FRN vs. Lucky Nosakhare Igbinedion & Ors in the proceedings on the grounds of double jeopardy and condonation arising from *Charge No. FHC/EN/6C/2008* – FRN vs. Lucky Nosakhare Igbinedion & Ors in respect of which judgment was entered on *18/12/2008* by Hon. justice A. Abdu-Kafarati sitting at the Federal High Court, Enugu Judicial Division and in respect of which an appeal was filed by the respondent herein in *Appeal No. CA/E/207M/2010* – FRN Vs. Lucky Nosakhare Igbinedion.**

3. **An Order of perpetual injunction against Federal Republic of Nigeria *FRN* or any of her agencies, including but not limited to Honourable Attorney-General of the Federation [HAGF], the Economic and Financial Crimes Commission *[EFCC];* Independent Corrupt Practices Commission *[ICPC]* and Inspector General of Police from instituting and or maintaining any criminal proceedings or charge relating to any of the Charges contained either in its original or amended form in *Charge No. FHC/EN/6C/2008***

or any other offences having the same ingredients as the offences contained either in its original or amended form in *Charge No. FHC/EN/6C/2008* – FRN Vs. Lucky Nosakhare Igbinedion & Ors.

4. An Order of perpetual injunction against the *FRN* or any of her agencies, including but not limited to the *HAGF;* the *EFCC;* the *ICPC;* and the *IGP* from arresting and or detaining the accused persons/applicants in respect of any matter contained in *Charge No. FHC/EN/6C/2008* – FRN Vs. Lucky Nosakhare Igbionedion & Ors either in its original or amended charge except upon the orders of a Court superior to this Hon. Court.

5. An Order staying the arraignment of the applicants/accused persons in these proceedings – pending the determination of this application.

The ***GROUNDS*** upon which the said application was brought are as follows:

(i) The applicants participated – in *Charge NO. FHC/EN/6C/2008* which originated on *22/1/2008* between *FRN* as complainant and (1) Lucky Nosakhare Igbinedion (2) KIVA Corporation (3) GAVA Corporation (3) Ekpen & Sons Company and (5) Romrig Nig. Ltd. as accused persons.

(ii) The said *Charge No. FHC/EN/6C/2008* was subsequently amended vide amended charge dated *13/10/2008* to read *FRN* Vs. (i) Lucky Nosakhare Igbinedion (2) Michael Igbinedion (3) KIVA Corporation Ltd. (4) GAVA Corporation Ltd. (5) Romrig Nig. Ltd. (6) PML Securities Co. Ltd. [the appellant herein] and (7) PML Nigeria Limited.

(iii) The *Charge No. FHC/EN/6C/2008* culminated in a plea bargain in the amended charge dated *17/12/2008* and filed on *18/12/2008* leaving the parties thereto as *FRN* Vs. (1) Lucky Nosakhare Igbinedion and (2) KIVA Corporation Limited in keeping faith with the said plea bargain.

(iv) The ingredients of the offences in these proceedings i.e *Charge No. FHC/B/11c/2011* (1) Lucky Nosakhare Igbinedion (2) Patrick Eboigbodin (3) Michael Igbinedion (4) GAVA Corporation Ltd. (5) Romrig Nig Ltd (6) PML Securities Co. Ltd [the appellant] (7) PML Nigeria Limited are the same with that in *Charge No. FHC/EN/6C/2008* in respect of which of Hon. justice A. Abdu Kafarati of the Enugu Judicial Division of this Hon. court delivered the judgment on *18/12/2008* following a plea bargain.

(v) The respondent curiously lodged an appeal against the said judgment to the Court of Appeal in *Appeal No. CA/E/207M/2010* – FRN vs. Lucky Nosakhare Igbinedion which (is) pending before Enugu Division of the Court of Appeal and in respect of which the appeal has been entered.

(vi) The present *Charge No. FHC/B/11c/2011* is caught by the doctrine of double jeopardy and condonation.

(vii) The present *Charge* is curably bad and it is a violent abuse of [Court] process by reason of which the court is deprived of its jurisdiction and competence to arraign, trial (sic), hear and determine same.

In opposing the application, the respondent filed a 38-paragarph *Counter-affidavit* and 9-paragraph *Further Counter-Affidavit,* wherein it was averred:

> **The 2nd – 7th accused persons were never tried, convicted or acquitted for any offence in *Charge No. FHC/EN/6C/2008* and there was no agreement at any material time that they would not be prosecuted for any money allegedly laundered through or by them.**

[See paragraph 7 (b) of the respondent's *Further Counter-Affidavit]*

In his ruling delivered on **31/5/2011**, the learned trial judge, Hobon, J., granted the application as prayed by *Lucky Nosakhare Igbinedion,* who was the first accused person, and discharged him from the said proceedings. However, he held as follows in respect of the other accused persons:

> **None of the 2nd – 7th accused persons has shown or adduced evidence to show that he went through or under any trial and was convicted or acquitted or pardoned. No evidence of any plea bargain agreement with the prosecution or Commission to drop or condone the charges, which they are now called upon to answer for the second time. In fact, nothing is disclosed in their favour on any of the grounds the application is founded. In the absence of any evidence, the doctrine of double jeopardy and abuse of court process is not available and open to any of the 2nd – 7th accused persons/applicants. it appears upon the totality of this case, the grounds upon which this application is founded and all points raised, each is traversed, and considered and none is established by 2nd – 7th accused persons/applicants, including a plea for pardon, under Section 36(10) of the Constitution. Consequently, their application must fail in entirely (sic) and be so dismissed. It is hereby dismissed entirely for lack of merit, frivolity and wanting in bona fide. Each of them is called upon to enter his plea.**

Held: (*Unanimously dismissing the appeal)*

1. The applicability of plea bargain – S. 278 of ACJA 2015
All the same, the first question that must be resolved is whether there was a plea bargain agreement between the appellant and the respondent at the FHC Enugu. Plea bargain is an imported concept, and as the Court of Appeal per Lokulo-Shodipe, JCA, who wrote the lead judgment, observed:

> **In the criminal jurisprudence in this country, it would appear that plea bargain as a prosecutorial strategy or tool is an emerging phenomenon, thus, there would appear to be no codified guidelines in relation to it as it obtains in some other jurisdictions. It would also appear that there is a dearth of authorities of our court therein as it is an emerging phenomenon.**

The first legislation to bring in plea bargain into our criminal jurisprudence is the Administration of Criminal Justice Law of Lagos State (ACJL), 2011. The second is the Administration of Criminal Justice Act, 2015, [ACJA] which provides in its Section 270 (1) that:

> **"notwithstanding anything in this Act or in any other law, the Prosecutor may: Receive and consider a plea bargain from a defendant charged with an offence directly from that defendant or on his behalf; (b) Offer a plea bargain to a defendant charged with an offence".**

As the respondent rightly submitted, the application of the said *ACJI* is limited to Lagos State and is, therefore, not applicable in this case, and the said *ACJA* was not in existence at the time of the facts of this case. However, this appeal is not concerned with the legality or otherwise of the plea bargain; rather it is based on the application challenging the jurisdiction of *FHC Benin* to try, hear and determine the offences in the *Benin Charge* filed in *2011.*

The appellant's complaint against the decision is that he is covered by the plea bargain arrangement at the ***FHC Enugu,*** and once *Lucky*

Igbinedion **was held to suffer double jeopardy, the same must also go for him, since they were all taken into consideration before the *Enugu Charge* was terminated.** *(Pp 161 – 162 Paras E – E)*

2. *An appellate copurt is bound by its record*
It is settled that an appellate court is bound by the record of appeal, and cannot venture outside the perimeter of its contents – see Orugbu vs. Una *(2002) 16 NWLR (Pt. 792) 175 at 206-207,* where Tobi, JSC, observed:

> **An appellate court has no jurisdiction to read into the record what is not there and it equally has no jurisdiction to read out of the record what is there. Both are forbidden areas of an appellate court. An appellate court must read the record in its exact content and interpret it.** *(P 165 Paras F – I)*

3. *The material date in a charge is the date of filing not the date of signing of charge*
Obviously, the appellant's arguments lack merit. First of all, the number of accused persons listed on the record for the proceedings of *17/12/08* and *18/12/08* are different. The seven accused persons, including the appellant as 6th accused, may have been "covered" by the proceedings of *17/12/2008,* however, it is clear from the proceedings of the *FHC Enugu* on *18/12/2008* that only two out of the seven accused persons were *"covered"* that day.

Also, the amended charge dated *17/12/2008* was filed on *18/12/2008;* and the material date is of filing, not the date a party or legal practitioner appended on it see Eke vs. Ogbonda *(2006) 18 NWLR (Pt. 1012) 505 SC.* In this case, *"Richard Oma Ahonaruogho",* whose name was misspelt on the record of *17/12/2008,* appeared for the 2nd – 7th accused persons that day.

On *18/12/2008,* the same *"Richard Oma Ahonaruogho"* appeared for *KIVA CORPORATION LIMITED,* who was the 3rd accused on *17/12/2008.* There is no mention of other accused persons he represented on *17/12/2008* in the proceedings of *18/12/2008,* and it cannot, therefore, be argued that since they were all represented by counsel, they are also covered by the plea bargain

arrangement, which resulted in the said *Further Amended Charge.*

Finally, and more importantly, the FHC Benin stated clearly that *"where a charge is amended, the former one seizes to govern the proceedings and remains a nullity and of no useful purpose";* and Court of Appeal observed:

> **The position of the law remains the same in the instant situation where the amended charge accepted on *14/10/2008* was not formally withdrawn but was by force of law no longer in existence consequent to the filing of another charge by the prosecutor on 18/12/2008.**

The respondent, citing Section 164 (4) of the criminal procedure Act *[CPA],* Attah vs. State *(1993) 7 NWLR (Pt. 305) 257* and FRN vs. Adewunmi *(2007) 10 NWLR (Pt. 1042) 399,* submitted as follows at pages 17-18 of its brief:

The effect of the amendment or the substitution of the charge of *18/12/2008* by *FHC Enugu* in *Charge No: FHC/EN/6C/2008* was to relate back to the date that the first charge was filed and the original charge of *22/1/2008* and that of *13/10/2008* are deemed not to be in existence. The appellant herein and the other accused persons cannot, therefore, claim that they were charged under those original charges and the amended charge of *13/10/2008.* The effect of the amendment of *18/12/2008* is to render all previous charges irrelevant. *(Pp 167 – 169 Paras H – C)*

4. *When an amended charge takes effect*
Per Augie JSC

> **"As Karibi-Whyte, JSC, observed in Attah vs. State (supra), Subsection (4) of Section 164 of the CPA renders an amendment retrospective to the date of filing of a charge. Essentially, "the Amended Charge shall replace the original Charge and shall be read and explained to the accused as the new charge" – see Uguru vs. State**

(2002) 9 NWLR (Pt. 771) 90 SC [per Kalgo, JSC].

This, in effect, means that whenever the prosecution decides to amend a charge before a court, it can proceed to do so, it then applies to the court to accept the amendment pursuant to Section 163 of the CPA, and the court after hearing the parties, may or may not accept or allow the amendment.

If it allows the amendment, the amended charge replaces the original charge, which shall be read and explained to the accused as the new charge. If the court rejects the charge, then the original charge remains. This is what obtains in criminal matters pertaining to amendment of charges generally – see Uguru vs. State *(supra),* where this court also explained that Section 163 does not give any condition precedent to its application but ensures that the amended charge shall be read out and explained to the accused person.
(Pp 169 – 170 Paras G – D)

5. The Nature and essence of a plea bargain

It should be borne in mind that the essence of Plea Bargain is to conclude the trial. Here all parties where represented during the plea bargain by counsel and it was agreed that since *Lucky Nosakhare Igbinedion* who was the principal, he should take the fall and plead guilty to count 1 of the *Further Amended Charge,* and for one of the companies associated with him (*Kiva Corporation Lmited)* to plead guilty to the remaining counts in the *Further Amended Charge,* pay the sum of N500 million, forfeit 3 properties and have its business wound-up thus leading to the final charge *[Further Amended Charge* dated *17/12/2008* but filed on *18/12/2008)* in which the [appellant]'s name was removed by the respondent together with other accused, who were not to be convicted in the Enugu trial.

But the essence of a plea bargain agreement is not just to conclude a trial. There has to be a negotiated agreement between the prosecution and the person accused of a crime, whereby the accused agrees to plead guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecution, which is usually in the form of a more lenient sentence or a dismissal of the

other charges – see *Black's Law Dictionary, 9th Ed.*

In this case, prosecution counsel told the *FHC Enugu* on *17/12/2008* that *"the accused persons approached us for settlement".* But there is no evidence on record to indicate that the appellant was one of the "*accused persons",* who approached the prosecution, for *"settlement"* on *17/12/2008.*

The proceedings of the next day – *18/12/2008* reinforces the fact that there was no plea bargain agreement between the prosecution and appellant because its name had been removed from the *Further Amended Charge,* and there was no mention of the appellant in the proceedings. The appellant says its name was removed because they agreed that *Lucky Igbinedion "should take the fall";* and that *Kiva Corporation* should plead guilty to some counts.

However, *"agreement"* to plead guilty is the essence of a plea bargain, and even if there was an agreement for one of the accused *"to take the fall",* as the appellant argued, the Court of Appeal was absolutely right that:

> **A plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused wherein the accused must suffer a conviction no matter how insignificant or trivial the offence to which the conviction relates. The appellant personally never suffered a conviction of any kind in respect of any of the charges. This condition is sine qua non for a plea bargain to be in place between the prosecutor and an accused relying on plea bargain.**
> *(Pp 170 – 172 Paras G – C)*

6. The difference between compounding a crime with compounding an offence

The respondent is right that EFCC's power to compound an offence is different from condonation, but it confused *"compounding a crime or offence",* which is an offence, with *"compounding of an offence",* which is different. *"Compounding* "includes *"to agree for consideration not to prosecute (a crime)", "compounding a crime""* defined in same *Black's Law Dictionary, 9th Ed.,* is:

> **The offense of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution.**

See legal-dictionary.thefreedictionary.com, **wherein it was further explained:**

> **Under the Common Law and most modern statutes, a compounding offense consists of three basic elements: (1) knowledge of the crime; (2) the agreement not to prosecute or inform; and (3) the receipt of consideration. The offense is complete when there is an agreement to either withhold evidence of the crime, conceal it, or fail to prosecute it.**

"Compounding of offences", **on the other hand, is an act on the part of the victim, who decides to pardon the offence committed by the accused person, and asks the court to exonerate him, which does not mean that the offence has not been committed; it only means that the victim is willing to pardon it or has accepted some form of compensation for what he or she has suffered.**

The compounding of offences terminates the legal proceeding against the offender and he is entitled to an acquittal. This law is provided for in many other jurisdictions. For instance, in Singapore, compounding of an offence (also known as composition) refers to the settlement of a charge (without entering a conviction) between the alleged victim and the accused person. The accused makes monetary compensation and offers apology to a victim. When an offence has been compounded, the accused is effectively acquitted of the crime – see *singaporelegaladvice.com,* wherein it is further explained:

> **Usually, only the alleged victim may compound an offence. However, as to the compoundable offences**

> **listed in the Fourth Schedule (of the Singapore Criminal Procedure Code [CPC], where police investigations have commenced, or where the accused has been charged in court for that offence, they may only be compounded with the consent of the public prosecutor. This is provided for in Section 241 of the CPC. Separately, Section 242 of the CPC confers the public prosecutor with the power to compound offences by collecting from the accused a sum of money, which shall not exceed one half of the amount of the maximum fine that is prescribed for the offence or $5,000, whichever is lower. – Compounding is initiated by the accused and his lawyer.** *(Pp 174 – 176 Paras F – A)*

7. *The power of EFCC to compound an offence*
Coming home to Nigeria, Section 14(2) of the EFCC Act provides that:

> **Subject to the provisions of Section 174 of the Constitution – (which relates to power of the Attorney General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.**

Thus, *EFCC* has power to *compound* any offence punishable under the Act by accepting such sum of money as it thinks fit, not exceeding the maximum amount that the accused would have been liable if he had been convicted, which is *"compounding of an offence"*, and not *"compounding a crime"*. *(P 176 Paras B – F)*

8. The principles in Chidolue vs. EFCC

In the case of Chidolue vs. EFCC *(supra),* which the respondent relied upon, the Court of Appeal based its decision on compounding a crime thus:

> **The *Black's Law Dictionary, 6th Ed.,* defines *compounding crime* in the following words:**
>
> > **"Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime"**
>
> **The same dictionary gives three elements at common law and under typical compounding statute that must be present before an offence can be compounded. These elements are:**
> **(1) An agreement not to prosecute**
> **(2) Knowledge of the actual commission of crime**
> **(3) The receipt of some consideration**
>
> **It is clear from the proceedings at the lower court that the appellant had knowledge of the crime for which he was arrested and detained. This is so because all the statements he made were so made after he had been duly cautioned. It is also on record that he paid N100,000,000 to the respondent. However, there is no evidence that there is a valid agreement between the appellant and the respondent on the issue of compounding the crime for which the appellant was charged. The three elements in a typical compounding statute as is provided for under Section *13(2) (sic) 14(2)* of the Act and they must be established conjunctively.**

From the provisions of section 13 (2) (sic) 14 (2) of the Act, the amount liable to be accepted by the respondent shall be such amount that a person convicted should have paid as fine. This is clearly the import of the Section. The 100,000,000 received from the appellant is said to belong to Bayelsa State Government. It is not representing the amount of fine which the appellant would have paid if he were convicted. The collection of that money is certainly not in accordance with the provision of section *13 (2) (sic) 14 (2)* of the Economic and Financial Crimes Commission (Establishment) Act, 2004. *(Pp 176 – 177 Paras B – H)*

9. *Misconceptions about compounding an offence and compounding a crime*

The respondent reproduced this decision in Chidolue vs. EFCC *(supra),* and based its arguments on the misconception that *"compounding a crime"* is the same as *"compounding of an offence"* in a criminal trial, which is not correct. *"Compounding a crime* is an offence itself, while *"compounding of an offence"* allows the accused person to be exonerated and acquitted for the crime.
(Pp 177 – 178 Paras H – A)

10. *Meaning of condonation purport and significance*

Even so, *"compounding"* and *"condonation"* are two different concepts. *"Condonation"* is *"the voluntary overlooking or pardon of an offence"* – see *Marriam-Webster.com,* wherein *condonation* is also defined as the *"implied pardon of an offence by treating the offender as if it had not been committed".* Thus, the difference is that while the *compounding of an offence* does not mean that the offence had not been committed, by *condoning* the offence, the offender is treated as if the offence had not been committed in the first place.

"*Condonation"* is a defence to an action for divorce that the *"innocent"* spouse having forgiven the adulterous spouse cannot

now take proceedings – *legal-dictionary.thefreedictionary.com.* In his book – *Nigerian Family Law,* Professor Itse Sagay explained the concept of condonation, as follows:

> **In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong on the condition that the spouse whose wrong is so condoned does not thenceforth, commit any further matrimonial offence.**

Again on the issue of condonation, which the appellant invokes, it is necessary to seek the definition as stated in Black's Law Dictionary 8th Edition at pages 315 as:

> ***"A victim's* expressed or implied forgiveness of an offence especially by treating the offender as if there has been no offence. *Condonation is not usually a valid defence to a crime.* One's spouse expresses or implied forgiveness of a marital offence by resuming marital life and sexual intimacy."** *(Pp 178; 193 Paras B – G; A – D)*

11. The principles in Nigeria Army vs. Aminum Kano

In Nigerian Army vs. Aminum-Kano *(supra),* respondent pleaded that since charges against him were withdrawn and substituted with a *"final warning letter",* he could not be subjected to trial as this amounted to condonation.

This plea was dismissed and at the end of the day, he was found guilty, convicted and sentenced. The Court of Appeal allowed his appeal, and in dismissing the appeal filed by the Nigerian Army, Oguntade, JSC, observed:

> **Section 171 of the Act divests any court or tribunal of competence to subject the respondent to any further**

trial after having been condoned by the appropriate authority. Thus, if any court or tribunal should proceed to make pronouncements on persons such as the respondent in spite of the condonation and damning the consequences of lack of competence, this court cannot close its eyes on such abnormality or illegality. *(P 179 Paras A – E)*

12. *The nature purport and significance of double jeopardy*
Double jeopardy, which prohibits a person from being tried or punished twice for the same offence with the same set of facts, is enshrined as a right under Section 36(9) & (10) of the 1999 Constitution, which provides:

> **(1) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.**
> **(2) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.**

Section 36(9) of the 1999 Constitution (as amended) makes it very clear that any accused person, who shows that he had been tried for a criminal offence, and was convicted or acquitted, shall not be tried again for the same offence or for a criminal offence having the same ingredients as that said offence. *(Pp 180 – 181 Paras G – D)*

13. *The meaning of acquittal*
In this case, appellant argued that withdrawing the charges against it, amounted to an *"acquittal"*, which is – *"a setting free from the charge of an offense by verdict, sentence or other legal process"*-

***merriam-Webster.com.* – See *Black's Law Dictionary, 9th Ed.,* where *autrefois acquit* is defined as:**

> **[Law French "previously acquitted"] A plea in bar of arraignment that the defendant has been acquitted of the offense Also termed former acquittal. See Double Jeopardy. Cases: Criminal Law; Double Jeopardy:**
>
> **"Suppose that a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a second time. He has what is termed in legal Frenglish (sic), the defence of autrefois acquit. Similarly, if he is convicted, even though he is left off very lightly, he cannot afterwards be charged on fresh evidence, because he will have the defence of autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of *"previous acquittal"* and *"previous conviction";* and *"double jeopardy"* makes an acceptable generic name for both." Glanville Williams, Textbook of Criminal Law.** *(Pp 181 – 182 Paras D – B)*

14. Failure of appellant to adduce material evidence

In this case, in resolving this issue against the appellant, the *FHC Benin* held that it did not adduce any evidence to show that it had gone through any trial and was convicted or acquitted or pardoned; and that since there was also no evidence of any plea bargain agreement with the prosecution or the *EFCC* to drop or condone the said charges then *"the doctrine of double jeopardy and abuse of court process is not available and open"* to the appellant herein.

In affirming the trial court's decision on this issue, the Court of Appeal also held that the appellant is not entitled to defences of double jeopardy and abuse of court process, which are predicated on

a non-existent plea bargain.

Obviously, the concurrent findings of the two lower courts are based on sound and logical reasoning, which cannot be faulted. The appellant predicated its entitlement to those defences on a non-existent plea bargain. It did not plead to the amended charge at the *FHC Enugu,* and it was never tried, convicted or acquitted by any court of law for the offences or similar offences contained in the said *Benin Charge;* the appellant did not adduce any evidence of an agreement with *EFCC* to compound the said offences; there is no evidence that the appellant was pardoned for the acts complained of in the said charge; and the appellant did not also adduce any evidence to show that prosecution or *EFCC* acted in any way to condone those offences. The said conclusions of the two lower courts are, therefore, unassailable. *(P 182 Paras B – H)*

15. The nature and significance of abuse of court process

As to *abuse of court process,* it is settled that the term has an element of malice in it – see Amaefule vs. State *(1988) 2 NWLR (Pt. 75) 156 SC,* wherein this court per Oputa, JSC, expounded on this defence, as follows:

> **To amount to an abuse of process, the proceeding or step in the proceeding complained of, will, in any event, be lacking in bona fides; it has to be an improper use or perversion of process after it had been issued. The term abuse of process has an element of malice in it. It thus, has to be a malicious perversion of a regularly issued process, civil or criminal, for a purpose, and to obtain a result not lawfully warranted or properly attainable thereby.**

In this case, where is the evidence of malice or malicious perversion

of court processes by the prosecution? The appellant adduced no evidence of such; rather it resorted to nothing but sentiments, for instance; it argued as follows:

> **It would amount to breaching the confidence of the appellant and indeed back stabbing for the respondent to be allowed to do what it is doing now, by going into an arrangement whereupon Lucky Igbinedion pleaded guilty to certain charges (sic) would amount to leaving the appellant defenseless and arming the respondent with the weapon acquired in peace time confidential arrangement to be used by the respondent against the appellant.**

It is well-settled that sentiments have no place in judicial deliberations – Kalu vs. FRN & *(2016) 9 NWLR (Pt. 1516) 1.* The appellant was not charged or tried at the *FHC Enugu,* and there is no evidence that the respondent or *EFCC* made improper use of any legitimately issued court process to obtain a result that is unlawful or beyond the scope of the said process, which is the definition of *abuse of process* in *Black's Law Dictionary, 9th Ed.* So, there is no reason to interfere with the concurrent decisions of the Court of Appeal and the trial court *FHC Benin,* which are, in my view, sound decision.
(Pp 182 – 183 Paras H – H)

16. *Attitude of Supreme Court to concurrent findings of two lower courts*
Per Odili (JSC):

> **"The scenario therefore is that of concurrent findings of two courts below which the Supreme Court is averse to interfering with except in circumstances where the findings have emanated from a perverse source or due to a wrong application of the law occasioning a miscarriage of justice. See Sobakin vs. State (2013) 13**

NWLR (t. 1372) 619 at 636; Egunjobi vs. FRN (2013) 3 NWLR (Pt. 1342) 534-555.

For a jolting of the memory, the National Assembly enacted the Administration of Criminal Justice Act (ACJA), 2015 which also provides for a plea bargain agreement which must be reduced into writing. However at the time the facts leading to this appeal took place the ACJA was not in existence. The first legislation in Nigeria to localize and import plea bargain into Nigeria's Criminal jurisprudence is the Administration of Criminal Justice Law of Lagos State ACJL, 2011 which can be considered the forerunner of the present ACJA of the Natioanl Assembly.

The court below followed the definition of plea bargain as stated in Black's Law Dictionary which makes it clear that a plea bargain can only be a conscious and deliberate act between the prosecution and an accused with a plea of guilty being an overt act on the part of the accused in evidence of the plea bargain. In the instant situation what is evident is that the prosecution entered into a plea bargain with the 1st accused person in the Enugu Federal High Court at the proceeding of 18th December, 2008 which is that the accused approached the prosecution for settlement and that necessitated the amendment of the charge. In that amendment of charge of 18th December, 2008 the number of accused persons were reduced from seven to two and the appellant was not one of the two and its name was not reflected in the amended charge.

The facts not in dispute are that neither the appellant nor any of those accused persons outside of the two who took the plea bargain had returned any funds covered by the transactions which are the subject matter of counts 1-66 in charge No: FHC/B/11C/2011 initiated at the Federal High Court Benin against the appellant and some other accused persons. *(Pp 190 – 191 Paras B – A)*

17. The Legal position where a charge is amended or substituted

What cannot be lost out is the effect of the amendment of the charge and fall out in relation to the appellant and those other accused persons whose names are not reflected in the amended charge. The trial judge held that where a charge is amended, the former one ceases to govern the proceedings and remain a nullity and of no useful purpose. The Court of Appeal affirmed that decision stating that when the new charge albeit the amended one is filed the former charge is no longer in existence while the amended charge takes its life from the date of the disposed charge as the new takes the position of the extant charge. It is deemed to have been filed in the same form and on the same date as the discarded one. There is no question of two valid charges struggling for space. *(P 191 Paras D – G)*

Per Odili (JSC):

> **The Supreme Court had variously cleared any doubts as to what the reality is when an amendment or substitution takes place. I would refer to a few of the authorities such as the case of Attah vs. State (1993) 7 NWLR (Pt. 305) 257 at 286 per Karibi-Whyte JSC stated thus:**
>
> **"Subsection (4) of section 164 renders an amendment retrospective to the date of filing of the charge. Hence, it is always necessary to read subsection (1) & (4) of section 164 together…. The amendments to the offences relates back to the date of filing of the documents containing them."**

See also FRN vs. Adewunmi (2007) 10 NWLR (Pt. 1042) 399 where Ogbuagu JSC said at pages 422 of the report that:

> **"Now, a substitution is the same thing as an amendment and an amendment whenever made by the court, relates back, to the original date of the documents so amended."**
> *(P p 191 – 192 Paras G – B)*

18. Power of EFCC to compound an offence

The appellant has pushed forward to the point that the EFCC can compound and compounded the offences alleged against it by virtue of section 14(2) of the EFCC Act, 2004 which provides thus:

> **"Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of Attorney General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of Law), the commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, not *exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence,"***

The content of the provision in section 14(2) of the EFCC Act, 2004 is that the following factors are present:

1. **The EFCC has the power to compound an offence.**
2. **The offence to be compounded must be one that is punishable under the EFCC Act.**
3. **The EFCC can accept money in compounding the offence.**
4. **The sum of money the EFCC can accept must be that which must not exceed the maximum amount to which that person would have been liable to pay if he had been convicted of that offence.**

Interestingly none of the three elements from 2-4 is present for section 14(2) of the EFCC Act to be applicable and so the issue of compounding of the offence by EFCC cannot come into play.
(Pp 192 – 193 Paras C – A)

Nigerian Cases Cited
Amaefule vs. State (1988) 2 NWLR (Pt. 75) 156 SC,
Attah vs. State (1993) 7 NWLR (Pt. 305) 257

Attah vs.State (1993) 7 NWLR (Pt. 305) 257
Egunjobi vs. FRN (2013) 3 NWLR (Pt. 1342) 534-555.
Eke vs. Ogbonda (2006) 18 NWLR (Pt. 1012) 505 SC.
FRN vs. Adewunmi (2007) 10 NWLR (Pt. 1042) 399
FRN vs. Adewunmi (2007) 10 NWLR (Pt. 1042) 399
Kalu vs. FRN & (2016) 9 NWLR (Pt. 1516) 1
Orugbu vs. Una (2002) 16 NWLR (Pt. 792) 175
Sobakin vs. State (2013) 13 NWLR (t. 1372) 619
Uguru vs. State (2002) 9 NWLR (Pt. 771) 90 SC.

Nigerian Statutes Cited

EFCC Act, 2004 – Section 14(2)
CPA – Section 163
1999 Constitution (as amended) Section 36(9)

Representation

Chief Richard Oma Ahonaruogho, **with** Anozie Obi, Esq., **and** Chukwudubem Chukwura, Esq., for the **appellant.**
Ebun-Olu Adegboruwa, Eq., for the **respondent.**

ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): This is another appeal filed by one of the limited liability companies that were charged with *Lucky Nosakhare Igbinedion* at the Federal High Court, Enugu **[FHC Enugu]** in **2008**, and Federal High Court, Benin [**FHC Benin**] in **2011.**

On **22/1/2008,** respondent filed a **Charge No. FHC/EN/6C/2008** at the **FHC Enugu** against the said *Lucky Nosakhare Igbinedion* and four others. The appellant and a sister Company *PML (Nigeria) Limited,* whose appeal on same matter has been heard and determined by this court on **15/12/2017,** were not listed in the original charge, but they were included as the sixth and seventh accused persons in an Amended Charge filed on **13/10/2008.**

The Amended Charge was further amended, and the Further

Amended Charge filed on **18/12/2008**, listed only *Lucky Nosakhare Igbinedion* and one of the limited liability companies earlier charged *Kiva Corporation Limited,* as accused persons. The names of other accused persons were removed.

Based on a Plea Agreement between *Lucky Nosakhare Igbinedion* and the respondent, the said *Lucky Nosakhare Igbinedion* and *Kiva Corporation,* pleaded guilty on **18/12/2008**, to offences relating to each of them in the said Further Amended Charge filed that day, and were convicted and sentenced.

On **31/1/2011,** respondent filed another **Charge No. FHC/B/11C/2011** at the **FHC Benin** against *"Lucky Nosakhare Igbinedion & 6 Ors.",* including the appellant. The appellant and the other accused persons filed a Joint application at the **FHC Benin**, wherein they prayed for the following Orders:

1. A declaration that this Hon. court lack jurisdiction and competence to arraign the accused persons/ applicants and to trial (sic), hear and determine the offences contained in these proceedings.

2. An Order setting aside Charge No. FHC/B/11C/2011 – FRN vs. Lucky Nosakhare Igbinedion & Ors in the proceedings on the grounds of double jeopardy and condonation arising from Charge No. FHC/EN/6C/2008 FRN vs. Lucky Nosakhare Igbinedion & Ors in respect of which judgment was entered on 18/12/2008 by Hon. justice A. Abdu-Kafarati sitting at the Federal High Court, Enugu Judicial Division and in respect of which an appeal was filed by the respondent herein in Appeal No. CA/E/207M/2010 FRN vs. Lucky Nosakhare Igbinedion.

3. An Order of perpetual injunction against Federal Republic of Nigeria FRN or any of her agencies,

including but not limited to Honourable Attorney-General of the Federation [HAGF], the Economic and Financial Crimes Commission [EFCC]; Independent Corrupt Practices Commission [ICPC]and Inspector General of Police from instituting and or maintaining any criminal proceedings or charge relating to any of the Charges contained either in its original or amended form in *Charge No. FHC/EN/6C/2008* or any other offences having the same ingredients as the offences contained either in its original or amended form in *Charge No. FHC/EN/6C/2008* – FRN vs. Lucky Nosakhare Igbinedion & Ors.

4. An Order of perpetual injunction against the FRN or any of her agencies, including but not limited to the *HAGF;* the *EFCC;* the *ICPC;* and the *IGP* from arresting and or detaining the accused persons/applicants in respect of any matter contained in *Charge No. FHC/EN/6C/2008* – FRN vs. Lucky Nosakhare Igbionedion & Ors either in its original or amended charge except upon the orders of a Court superior to this Hon. court.

5. An Order staying the arraignment of the applicants/accused persons in these proceedings – pending the determination of this application.

The **GROUNDS** upon which the said application was brought are as follows:

(i) The applicants participated – in *Charge NO. FHC/EN/6C/2008* which originated on *22/1/2008* between FRN as complainant and (1) Lucky Nosakhare Igbinedion (2) KIVA Corporation (3) GAVA Corporation (3) Ekpen & Sons Company and (5) Romrig Nig. Ltd. as accused persons.

A

(ii) The said *Charge No. FHC/EN/6C/2008* was subsequently amended vide amended charge dated *13/10/2008* to read *FRN* vs. (i) Lucky Nosakhare Igbinedion (2) Michael Igbinedion (3) KIVA Corporation Ltd. (4) GAVA Corporation Ltd. (5) Romrig Nig. Ltd. (6) PML Securities Co. Ltd. [the appellant herein] and (7) PML Nigeria Limited.

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(iii) The *Charge No. FHC/EN/6C/2008* culminated in a plea bargain in the amended charge dated *17/12/2008* and filed on *18/12/2008* leaving the parties thereto as *FRN* vs. (1) Lucky Nosakhare Igbinedion and (2) KIVA Corporation Limited in keeping faith with the said plea bargain.

D

(iv) The ingredients of the offences in these proceedings i.e *Charge No. FHC/B/11c/2011* (1) Lucky Nosakhare Igbinedion (2) Patrick Eboigbodin (3) Michael Igbinedion (4) GAVA Corporation Ltd. (5) Romrig Nig Ltd (6) PML Securities Co. Ltd [the appellant] (7) PML Nigeria Limited are the same with that in *Charge No. FHC/EN/6C/2008* in respect of which of Hon. Justice A. Abdu Kafarati of the Enugu Judicial Division of this Hon. court delivered judgment on *18/12/2008* following a plea bargain.

E

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(v) The respondent curiously lodged an appeal against the said judgment to the Court of Appeal in *Appeal No. CA/E/207M/2010* – FRN vs. Lucky Nosakhare Igbinedion which (is) pending before Enugu Division of the Court of Appeal and in respect of which the appeal has been entered.

H

(vi) The present *Charge No. FHC/B/11c/2011* is caught by the doctrine of double jeopardy and condonation.

I

> **(vii) The present Charge in curably bad and it is a violent abuse of [Court] process by reason of which the court is deprived of its jurisdiction and competence to arraign, trial (sic), hear and determine same.**

In opposing the application, the respondent filed a 38-paragarph **counter-affidavit** and 9-paragraph **Further Counter-Affidavit,** wherein it was averred**:**

> **The 2nd – 7th accused persons were never tried, convicted or acquitted for any offence in *Charge No. FHC/EN/6C/2008* and there was no agreement at any material time that they would not be prosecuted for any money allegedly laundered through or by them.**

[See paragraph 7 (b) of the respondent's *Further Counter-Affidavit]*

In his ruling delivered on **31/5/2011**, the learned trial judge, Hobon, J., granted the application as prayed by *Lucky Nosakhare Igbinedion,* who was the first accused person, and discharged him from the said proceedings. However, he held as follows in respect of the other accused persons:

> **None of the 2nd – 7th accused persons has shown or adduced evidence to show that he went through or under any trial and was convicted or acquitted or pardoned. No evidence of any plea bargain agreement with the prosecution or commission to drop or condone the charges, which they are now called upon to answer for the second time. In fact, nothing is disclosed in their favour on any of the grounds the application is founded. In the absence of any evidence, the doctrine of double jeopardy and abuse of court process is not available and open to**

any of the 2nd – 7th accused persons/applicants --- it appears upon the totality of this case, the grounds upon which this application is founded and all points raised, each is traversed, and considered and none is established by 2nd – 7th accused persons/applicants, including a plea for pardon, under Section 36(10) of the Constitution. Consequently, their application must fail in entirely (sic) and be so dismissed. It is hereby dismissed entirely for lack of merit, frivolity and wanting in bona fide. Each of them is called upon to enter his plea.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal, and in its judgment delivered on ***9/4/2014,*** the Court of Appeal found against the appellant. It held that there was no plea bargain between the appellant and respondent at the **FHC Enugu,** and in dismissing the appeal, it stated**:**

Learned lead counsel predicated the entitlement of the appellant to all or any of the defences and plea the appellant is said to be entitled to (and all of which the lower court found the appellant not to be entitled to) on the plea bargain between the prosecution and the appellant in the *FHC Enugu Charge.* – Having found that there was never a plea bargain agreement between the appellant and the prosecution in any respect in the *FHC Enugu Charge,* it follows that the appellant *ipso facto* cannot be entitled to all or any of the defences of condonation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process, which were predicated on a non-existent plea bargain between the prosecution and the appellant. In the final analysis, the instant appeal is unmeritorious and is hereby dismissed.

Aggrieved, the appellant filed a notice of appeal containing eleven ground

of appeal in this court, and he formulated five issues for determination i.e.:

(1) Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with Economic and Financial Crimes Commission *[EFCC]* does not inure to the benefit of the appellant herein.

(2) Whether the Court of Appeal was right when it held that a crime cannot be condoned by the State.

(3) Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant.

(4) Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading up to the appeal did not constitute an abuse of court process.

(5) Whether the Court of Appeal did not misdirect itself and occasion a serious miscarriage of justice when it summarized the evidence incorrectly in favour of the respondent by erroneously holding that the appellant's lead counsel herein continued to appear as counsel for the 4th accused person to the original charge dated *22/1/2008* Ekpen and Sons Company, when in fact, the name of the said 4th accused person has been struck out by the trial court on *23/1/2008*.

The respondent, however, submitted in its brief of argument that this appeal can be effectively determined by two issues for determination, as follows:

1. Whether the Court of Appeal was not right in affirming the decision of the trial High Court that there was no plea bargain agreement between the

appellant and the respondent in respect of the charge before the Federal High Court Enugu; and

2. Whether the Court of Appeal was not right in affirming the decision of the trial High Court that the appellant is not entitled to any of the defences of condonation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process.

I must point out that the appellant is being represented by the same counsel, who represented the appellant in the sister **Appeal No. SC/256/2017 – PML (Nig.) Ltd. vs. FRN**, and I wrote the lead judgment delivered by this court on **15/12/2017.** The appellant in this appeal and appellant in that appeal raised same issues and canvassed exactly the same arguments in both appeal's. The respondent, although represented by another counsel, raised the same issues and canvassed the same argument's as in that sister appeal.

All the same, the first question that must be resolved is whether there was a plea bargain agreement between the appellant and the respondent at the **FHC Enugu.** Plea bargain is an imported concept, and as the Court of Appeal per Lokulo-Shodipe, JCA, who wrote the lead judgment, observed:

In the criminal jurisprudence in this country, it would appear that plea bargain as a prosecutorial strategy or tool is an emerging phenomenon, thus, there would appear to be no codified guidelines in relation to it as it obtains in some other jurisdictions. It would also appear that there is a dearth of authorities of our court therein as it is an emerging phenomenon.

The first legislation to bring in plea bargain into our criminal jurisprudence is the **Administration of Criminal Justice Law of Lagos State (ACJL), 2011.** The second is the **Administration of Criminal Justice Act, 2015,** [**ACJA**] which provides in its Section 270 (1) that *"notwithstanding*

anything in this Act or in any other law, the Prosecutor may: Receive and consider a plea bargain from a defendant charged with an offence directly from that defendant or on his behalf; (b) Offer a plea bargain to a defendant charged with an offence".

As the respondent rightly submitted, the application of the said **ACJI** is limited to Lagos State and is, therefore, not applicable in this case, and the **ACJA** was not in existence at the time of the facts of this case. However, this appeal is not concerned with the legality or otherwise of the plea bargain; rather it is based on the application challenging the jurisdiction of **FHC Benin** to try, hear and determine the offences in the **Benin Charge** filed in **2011**.

The appellant's complaint against the decision is that he is covered by the plea bargain arrangement at the **FHC Enugu,** and once *Lucky Igbinedion* was held to suffer double jeopardy, the same must also go for him, since they were all taken into consideration before the **Enugu Charge** was terminated.

In resolving whether the plea bargain agreement/arrangement covered the appellant, the Court of Appel per Lokulo-Sodipo, JCA, held as follows:

> **The concept of plea bargain – clearly operates in personam, so to say, and not by privy or proxy. By this I mean that a plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused person or specific accused person in a charge wherein the accused person or each of the specified accused persons must suffer a conviction (I have advisedly not used the word sentence) no matter how insignificant or trivial the offence to which the conviction relates. Undisputedly, the appellant personally never suffered a conviction of any kind in respect of any of the charges that came up before the *FHC Enugu.* This condition is sine qua non for a plea bargain to be in place between the prosecutor and an accused relying on plea bargain. An accused person, who alleges that he had a**

plea bargain with the prosecutor, cannot emerge from the matter unscarred or without blemish or stigmatization of conviction. Going by all the arguments or submissions of learned lead counsel the said appellant has not been shown to have come out worse than when it came before the court. Indeed, if the position of learned lead counsel for the appellant that there was a plea bargain between the appellant and prosecuting counsel in the charge before the Enugu FHC is correct, the appellant would appear to have emerged from its situation much better than when it was brought before the court. This is because without having undergone any trial talk less of suffering any form of conviction, it would not want to be tried at all for the matter in respect of which he was initially brought to court or any offences related thereto. The main purpose of criminal trial is to ensure that a person, who has chosen to break any aspect of the criminal law, is not left to go scot free and for this reason the prosecution has to establish the guilt of an accused person beyond reasonable doubt to pave the way for his punishment by law. The concept of plea bargain has in no way derogated from the purpose or objective of criminal prosecution given the fact that before an accused can benefit from the arrangement, the accused in question must plead guilty to some form of offence and, of course, be convicted for what he has pleaded guilty to. It would therefore appear indisputable that to the extent that it is the pleas of guilty of *Lucky Igbinedion* and *Kiva Corporation Ltd,* that the appellant relies upon in respect of its plea bargain, no plea bargain can be said to have been made between the appellant and the prosecution. And that the plea bargain in the charge entertained by the *FHC Enugu* was between the prosecution and *Lucky Igbinedion* and *Kiva Corporation.*

The appellant's contention is that the Court of Appeal is wrong because as a

corporate entity, it can only act through human medium or agency, and if, *Lucky Igbinedion* is let off the hook, other persons connected to the charge through him as agent or accomplice, must also be let off the hook – **Idiok vs. State (2008) 13 NWLR (Pt. 1104) 225, Ebri vs. State (2004) 11 NWLR (Pt. 885) 589, Okoro vs. State (2012) 4 NWLR(Pt. 1290) 351, Adele vs. State (1995) 2 NWLR (Pt. 377) 269, Kalu vs. State (1988) 4 NWLR (Pt. 90) 503.**

It further argued that the **Enugu Charge** was amended after parties reached a compromise, and once parties have agreed and it is given effect, none of them should be allowed to renege or go back on the promise made **A.G., Rivers State vs. A.G., Akwa Ibom State (2011) 8 NWLR (Pt. 1248) 31, Ude vs. Osuji (1988) 10 SCNJ 75, Mil. Gov., Lagos State vs. Adeyiga (2012) 5, NWLR (Pt. 1293) 291, Anaeze vs. Anyaso (1993) 5 NWLR (Pt. 291) 1, A.G., Nasarawa State vs. A.G., Plateau State (2012) 10 NWLR (Pt. 1309) 419, BFI Group Corporation vs. BPE (2012) 18 NWLR (Pt. 1332) 209 and Maiyegun vs. The Gov., Lagos State (2011) 2 NWLR (Pt. 1230) 154 cited.**

Furthermore, that the proceedings of ***17/12/2008*** at the **FHC Enugu** covered all accused persons because they were represented by counsel, who has authority to compromise any aspect of his client's case; and that the counsel to both parties decided to compromise on certain issues – **Ogboru vs. Uduaghah** *(2013) 13 NWLR (Pt. 1370) 33* and 5 other cases cited by him.

The respondent proffered explanations/arguments on the facts leading up to the **Enugu Charge;** and its appeal against the decision of **FHC Enugu.** However, this appeal is against the decision of the **FHC Benin** and this issue questions whether there was a plea bargain agreement between both parties.

As it is, the respondent argued that appellant has not adduced strong, compelling and special reasons that would make this court interfere with the concurrent findings of the two lower courts that there was no plea bargain agreement between the parties; that the attitude of this court is that it would not interfere with such findings, unless it is shown to be perverse – **Sobakin vs. State** *(1981) 5 SC 375,* **Abirifon vs. State** *(2013)13 NWLR*

(Pt. 1372) 619 and **Egunjobi vs. FRN** *(2013) 3 NWLR (Pt. 1342) 534;*and that no evidence of any plea bargain agreement was placed before the court by the appellant.

The appellant argued in its reply brief that the evidence identifying parties to the plea bargain is the record of proceedings of the **FHC Enugu** on **17/12/2008**; that the only evidence available to the court of terms of the plea bargain is the "*respondent's sudden move to amending the amended charge by a further amended charge by when [its] name was deleted, based on the plea bargain";* and that a court of law can draw inference based on circumstantial evidence in the absence of direct evidence, however, that the court is not allowed to speculate, which is what the two lower courts did when they made the findings that it was not a party to the plea bargain.

Furthermore, that had the court noted this court's decisions that where parties have acquiesced to an irregular procedure, they cannot turn around to complain, it would have arrived at a different conclusion – **Enterprise Bank vs. Aroso (2014) 3 NWLR (Pt. 1394) 256, Sonugu vs. Anadein (1967) ANLR 98, Buhari vs. Obasanjo (2005) 13 NWLR (Pt. 941) 1, Borishade vs. FRN (2012) 18 NWLR (Pt. 1332) 347, Ugba vs. Suswan (2014) 14 NWLR (Pt. 1427) 264;** and that this court can interfere with concurrent findings of the lower courts where they are perverse – **Matanmi vs. Dada (2013) 7 NWLR (Pt. 1353) 319.**

It is settled that an appellate court is bound by the record of appeal, and cannot venture outside the perimeter of its contents – see **Orugbu vs. Una (2002) 16 NWLR (Pt. 792) 175 at 206-207,** where Tobi, JSC, observed:

> **An appellate court has no jurisdiction to read into the record what is not there and it equally has no jurisdiction to read out of the record what is there. Both are forbidden areas of an appellate court. An appellate court must read the record in its exact content and interpret it.**

In this case, the proceedings of the **FHC Enugu** on **17/12/2008** reads thus:

"BETWEEN
FEDERAL REPUBLIC OF NIGERIA – COMPLAINANT
AND
1. LUCKY N. IGBINEDION
2. MICHAEL IGBINEDION
3. KIVA CORPORATION LIMITED
4. GAVA CORPORATION LIMITED
5. ROMRIG NIGERIA LIMITED
6. PML SECURITIES COMPANY LIMITED
7. PML (NIGERIA) LIMITED } **ACCUSED**

Accused person present.
Mr. Rotimi Jacob's for the Prosecution (with him J. O. Uzor Esq.)
Mr. Adetunji Oyeyipo SAN (with him N. O. O. Oke SAN, Ebenezer Obeya Esq. and Anselem Ojezua Esq.) for the 1st accused.
Mr. Richard Ahonamogho (sic) (with him Mrs. O.H. Adewunmi and Cyril Okoro Esq.) for the 2nd – 7th accused persons.

Mr. Jacob's: **The accused persons approached us for settlement and we are about to conclude the term and also amend the charge accordingly. We need a date to report back. We have agreed on tomorrow, 18th day of December 2008.**

Mr. Oyeyipo SAN: That is the position.
Mr. Ahonamogho (sic): That is the position.

Court: Case adjourned to *18/12/2008* at 10.00a.m for plea.
(SIGNED)
A. ABDU-KAFARATI
JUDGE, 17/12/08.

The proceedings of the ***FHC Enugu*** the next day ***18/12/2008*** reads

BETWEEN
FEDERAL REPUBLIC OF NIGERIA – COMPLAINANT
AND
1. LUCKY NOSAKHARE IGBINEDION ACCUSED
2. KIVA CORPORATION LIMITED
Accused persons present.
Mr. Rotimi Jacobs (with him J.O. Uzor Esq.) for the prosecution.
Mr. Adetunji Oyeyipo SAN (with him N. O. O. Oke SAN, Ebenezer Obeya Esq. and Anslem Ojezua(sic) and C. Udekalu) for the 1st accused.
Mr. Richard Oma Ahonaruogho (with him O.H. Adewunmi Mrs.) (sic) the 2nd accused person.

Mr. Jacobs: We filed an amended charge dated *17/12/08* and filed on *18/12/08*. I pray the court to accept the amended charge.

Mr. Oyeyipo SAN: We have been served and we have been served (sic).
Mr. Ahonoruogbo: We have no objection. We have been served.

Court: Amended charge dated 17/12/08 accepted. Amended charge to be read to the accused for their plea.

(Signed)
A. Abdu-Kafarati
Judge, 18/12/08

Obviously, the appellant's arguments lack merit. First of all, the number of accused persons listed on the record for the proceedings of **17/12/08** and **18/12/08** are different. The seven accused persons, including the appellant

as 6th accused, may have been "covered" by the proceedings of **17/12/2008**, however, it is clear from the proceedings of the **FHC Enugu** on **18/12/2008** that only two out of the seven accused persons were *"covered"* that day.

Also, the amended charge dated **17/12/2008** was filed on **18/12/2008;** and the material date is of filing, not the date a party or legal practitioner appended on it – see **Eke Vs. Ogbonda** *(2006) 18 NWLR (Pt. 1012) 505 SC.* In this case, *"Richard Oma Ahonaruogho",* whose name was misspelt on the record of **17/12/2008**, appeared for the 2nd – 7th accused persons that day.

On **18/12/2008**, the same *"Richard Oma Ahonaruogho"* appeared for *KIVA CORPORATION LIMITED,* who was the 3rd accused on **17/12/2008.** There is no mention of other accused persons he represented on **17/12/2008** in the proceedings of **18/12/2008**, and it cannot, therefore, be argued that since they were all represented by counsel, they are also covered by the plea bargain arrangement, which resulted in the said Further Amended Charge.

Finally, and more importantly, the **FHC Benin** stated clearly that *"where a charge is amended, the former one seizes to govern the proceedings and remains a nullity and of no useful purpose";* and Court of Appeal observed*:*

> **The position of the law remains the same in the instant situation where the amended charge accepted on 14/10/2008 was not formally withdrawn but was by force of law no longer in existence consequent to the filing of another charge by the prosecutor on 18/12/2008.**

The respondent, citing Section 164 (4) of the criminal procedure Act [**CPA**], **Attah vs.State** *(1993) 7 NWLR (Pt. 305) 257* and **FRN vs. Adewunmi** *(2007) 10 NWLR (Pt. 1042) 399,* submitted as follows at pages 17-18 of its brief:

A **The effect of the amendment or the substitution of the charge of 18/12/2008 by FHC Enugu in Charge No: FHC/EN/6C/2008 was to relate back to the date that the first charge was filed and the original charge of 22/1/2008**
B **and that of 14/10/2008 are deemed not to be in existence. The appellant herein and the other accused persons cannot, therefore, claim that they were charged under those original charges and the amended charge of**
C **14/10/2008. The effect of the amendment of 18/12/2008 is to render all previous charges irrelevant.**

I agree entirely, Section 163 of the **CPA** empowers a court to alter, amend or
D add to any charge in a criminal case at any time before judgment is given, and Section 164 (1) and (4) of the same **CPA** further stipulates as follows:

> **(1) If a new charge is framed or alteration made to a**
> **E** **charge under the provisions of Section 162 Section 163 of this Act, the court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge.**
>
> **F**
>
> **(4) Where a charge is so amended, a note of the order for amendment shall be endorsed on the charge, and the charge shall be treated for the purposes of all**
> **G** **proceedings in connection therewith as having been filed in the amended form.**

As Karibi-Whyte, JSC, observed in **Attah vs. State** *(supra),* Subsection (4)
H of Section 164 of the CPA renders an amendment retrospective to the date of filing of a charge. Essentially, *"the Amended Charge shall replace the original Charge and shall be read and explained to the accused as the new charge"* – see **Uguru vs. State** *(2002) 9 NWLR (Pt. 771) 90 SC* [per Kalgo,
I JSC].

A This, in effect, means that whenever the prosecution decides to amend a charge before a court, it can proceed to do so, it then applies to the court to accept the amendment pursuant to Section 163 of the CPA, and the court after hearing the parties, may or may not accept or allow the B amendment.

If it allows the amendment, the amended charge replaces the original charge, which shall be read and explained to the accused as the new charge. If the court rejects the charge, then the original charge remains. This is C what obtains in criminal matters pertaining to amendment of charges generally – see **Uguru vs. State** *(supra),* where this court also explained that Section 163 does not give any condition precedent to its application but ensures that the amended charge shall be read out and explained to the D accused person.

In this case, the appellant did not plead to the **Amended Charge** before respondent applied to **FHC Enugu** to accept the **Further Amended Charge,** with only two out of the five accused persons listed on the original E charge, and out of the seven accused persons listed on the first **Amended Charge** of **14/10/2008**. Learned counsel for the two accused persons had no objection, and the **FHC Enugu** *"accepted"* the **Further Amended Charge,** and ordered:

F

"Amended charge to be read to the accused for their plea"

The appellant's contention, as argued in its reply brief, is as follows:

G

> **It should be borne in mind that the essence of Plea Bargain is to conclude the trial. Here all parties where represented during the plea bargain by counsel and it was** H **agreed that since *Lucky Nosakhare Igbinedion* was the principal, he should take the fall and plead guilty to count 1 of the *Further Amended Charge,* and for one of the companies associated with him (*Kiva Corporation Lmited)*** I **to plead guilty to the remaining counts in the *Further Amended Charge,* pay the sum of N500 million, forfeit 3**

properties and have its business wound-up thus leading to the final charge *[Further Amended Charge* dated 17/12/2008 but filed on 18/12/2008) in which the [appellant]'s name was removed by the respondent together with other accused, who were not to be convicted in the Enugu trial.

But the essence of a plea bargain agreement is not just to conclude a trial. There has to be a negotiated agreement between the prosecution and the person accused of a crime, whereby the accused agrees to plead guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecution, which is usually in the form of a more lenient sentence or a dismissal of the other charges – see *Black's Law Dictionary, 9th Ed.*

In this case, prosecution counsel told the **FHC Enugu** on **17/12/2008** that *"the accused persons approached us for settlement"*. But there is no evidence on record to indicate that the appellant was one of the "*accused persons",* who approached the prosecution, for *"settlement"* on **17/12/2008.**

The proceedings of the next day – **18/12/2008** reinforces the fact that there was no plea bargain agreement between the prosecution and appellant because its name had been removed from the *Further Amended Charge,* and there was no mention of the appellant in the proceedings. The appellant says its name was removed because they agreed that *Lucky Igbinedion "should take the fall";* and that *Kiva Corporation* should plead guilty to some counts.

However, *"agreement"* to plead guilty is the essence of a plea bargain, and even if there was an agreement for one of the accused *"to take the fall",* as the appellant argued, the Court of Appeal was absolutely right that:

A **A plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused wherein the accused must suffer a conviction no matter how insignificant or trivial the offence to which the conviction**
B **relates. The appellant personally never suffered a conviction of any kind in respect of any of the charges. This condition is sine qua non for a plea bargain to be in place between the prosecutor and an accused relying on plea**
C **bargain.**

I need say no more; the decision of the Court of Appeal on this issue cannot be faulted, thus, the concurrent findings of the two lower courts remain
D intact.

The Court of Appeal also held that because there was no plea bargain between the appellant and the respondent, the appellant cannot be entitled to all or any of the other defences of condonation, plea of *autrefois convict,*
E doctrine of double jeopardy and abuse of court process. The respondent's **Issue 2** encompasses appellant's **Issue (2) to (4)**, on whether the Court of Appeal was right to so hold, and I will address the questions raised together.

On condonation, the appellant submitted that **EFCC** has the power
F to compound offences under the **EFCC** (Establishment Act), **2004** [now **EFCC** (Establishment etc) Act, Cap. E1, LFN, **2010**], citing Section 14 (2), **Nigerian Army vs. Aminu-Kano** *(2010) 5 NWLR (Pt. 1188) 429,* **Asake vs. Nigerian Army** *(2007) 1 NWLR (Pt. 1051) 408;* and that once the
G prosecution and the **EFCC** had reached a compromise and *'decided to collect money from Lucky Igbinedion",* who is its *"principle"* and *"dramatis personae in all the counts of the charges [at]* ***FHC Enugu*** and ***Benin",*** *the said offences alleged against it, had been compromised,*
H *compounded or condoned, therefore, the* ***EFCC*** cannot come up again to prosecute it for the same offences in **FHC Benin.**

Furthermore, that the withdrawal of the charges at the **FHC Enugu** amounted to an acquittal; and that since it was charged as an agent of *Lucky*
I *Nosakhare Igbinedion,* it must be allowed to go free because the maxim is *qui facit per alum facit perse*- he who acts through another acts by himself,

citing **Yisi (Nig.) Ltd vs. Trade Bank** *(2013) 7 NWLR (Pt. 1357) 522,* **Quo Vadis Hotels vs. Maritime Services** *(1992) NWLR (Pt. 250) 653,* **Ikedife vs. Obienu** *(1975) 4 SC 27,* **Okwejimonor vs. Gbakeji** *(2008) 5 NWLR (Pt. 1079) 172* and **James vs. Midmotors Nig. Ltd.** *(1978) 11-12 SC 31.*

As to double jeopardy, it cited Section 36(9) of the Constitution, Section 18 & 25 of the Interpretation Act, Section 181(1) & (2) of the **CPA**, **Nafiu Rabiu vs. The State** *(1980) 2 NLR 117, The Presidential Constitution of Nigeria* by Professor B. Nwabueze, and **Unibiz (Nig.) Ltd vs. Commercial Bank Credit Lyonnais** *(2003) 6 NWLR (Pt. 816) 40,* and argued that *"fault cannot be ascribed to both principal and agent separately or severally; once one is liable, that liability covers the other, once one is set free, the other also enjoys the freedom";* and that it amounts to approbating and reprobating to allow the prosecution to bring further charges against it; and that:

> **By going into an arrangement whereupon *Lucky Nosakhare Igbinedion* pleaded guilty- - would amount to leaving the appellant defenseless and arming the respondent with the weapon acquired in peace time *"confidential arrangement"* to be used by the respondent against the appellant.**

Furthermore, that having allowed *Lucky Igbinedion* to let down his guards by a *"plea of guilty",* equity and good conscience will not allow the respondent to attack him and his *"disclosed agent"* at the time of the said *"plea of guilty"* – **Okonkwo vs. Kpajie** *(1992) NWLR (Pt. 226) 633,* **Tika – Tore Press vs. Abina** *(1973) 12 SC 67,* **Ude vs. Nwara** *(1993) 2 NWLR (Pt. 278) 638;* and that the lower courts having held that the charge against *Lucky Igbinedion* constituted abuse of court process, the two courts were wrong to hold that the charge against it did not also constitute an abuse of court process.

The respondent argued that appellant confused the power of **EFCC** to compound an offence under Section 14 (2) of **EFCC** Act with condonation, which is different; and that *"no scintilla of evidence"* has

been produced by the appellant to show that the **EFCC** accepted or agreed to accept *"any sum of money"* from it or *Lucky Igbinedion* – **Chidolue vs. EFCC** *(2012) 5 NWLR (Pt. 1292) 160,* therefore, the said Section 14 (2) of **EFCC Act** is inapplicable.

Furthermore, that even if the offences were compounded, it is without prejudice of Attorney General's power to still initiate the criminal proceedings Section 174 of the Constitution; and that a careful perusal of Section 14 (2) of the said **EFCC** Act would reveal that the Section is designed to apply to offences not yet brought before the court, that is, during investigation, and therefore, the said Section 14 (2) cannot be applied to a pending proceeding.

It referred to definition of condonation in *Black's Law Dictionary, 8th Ed.,* and *Nigerian Family Law,* and submitted that condonation, which is usually prescribed by statutes, has its limitations when it comes to its application in criminal cases, citing Section 26 of the Matrimonial Causes Act, Section 171 (1) & (2) of the Armed Forces Act, and Section 119 of the Nigerian Army Act; that condonation applies mainly to matrimonial causes and to persons subject to service law; and not to criminal offences, except where it is expressly provided for in a statute, and so, in the absence of any statutory provision to the contrary, condonation cannot constitute a bar to criminal prosecution.

The respondent is right that **EFCC's** power to compound an offence is different from condonation, but it confused *"compounding a crime or offence",* which is an offence, with *"compounding of an offence",* which is different. *"Compounding "*includes *"to agree for consideration not to prosecute (a crime)", "compounding a crime""* defined in same *Black's Law Dictionary, 9th Ed.,* Is:

> **The offense of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution.**

See legal-dictionary.thefreedictionary.com, wherein it was further explained*:*

Under the Common Law and most modern statutes, a compounding offense consists of three basic elements: (1) knowledge of the crime; (2) the agreement not to prosecute or inform; and (3) the receipt of consideration. The offense is complete when there is an agreement to either withhold evidence of the crime, conceal it, or fail to prosecute it.

"Compounding of offences", on the other hand, is an act on the part of the victim, who decides to pardon the offence committed by the accused person, and asks the court to exonerate him, which does not mean that the offence has not been committed; it only means that the victim is willing to pardon it or has accepted some form of compensation for what he or she has suffered.

The compounding of offences terminates the legal proceeding against the offender and he is entitled to an acquittal. This law is provided for in many other jurisdictions. For instance, in Singapore, compounding of an offence (also known as composition) refers to the settlement of a charge (without entering a conviction) between the alleged victim and the accused person. The accused makes monetary compensation and offers apology to a victim. When an offence has been compounded, the accused is effectively acquitted of the crime see *singaporelegaladvice.com,* wherein it is further explained:

Usually, only the alleged victim may compound an offence. However, as to the compoundable offences listed in the Fourth Schedule (of the Singapore Criminal Procedure Code [CPC], where police investigations have commenced, or where the accused has been charged in court for that offence, they may only be compounded with the consent of the public prosecutor. This is provided for in Section 241 of the CPC. Separately, Section 242 of the CPC confers the public prosecutor with the power to compound offences by collecting from the accused a sum of money, which shall not

A **exceed one half of the amount of the maximum fine that is prescribed for the offence or $5,000, whichever is lower. Compounding is initiated by the accused and his lawyer.**

B Coming home to Nigeria, Section 14(2) of the **EFCC** Act provides that**:**

Subject to the provisions of Section 174 of the Constitution (which relates to power of the Attorney General of the
C **Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sum of money**
D **as it thinks fit, not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.**

E Thus, **EFCC** has power to *compound* any offence punishable under the Act by accepting such sum of money as it thinks fit, not exceeding the maximum amount that the accused would have been liable if he had been convicted, which is *"compounding of an offence",* and not *"compounding*
F *a crime"*.

In the case of **Chidolue vs. EFCC** *(supra),* which the respondent relied upon, the Court of Appeal based its decision on compounding a crime thus*:*

G

The *Black's Law Dictionary, 6th Ed.,* defines *compounding crime* in the following words:

H **"Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime"**

I

The same dictionary gives three elements at common law and under typical compounding statute that must be present before a crime can be compounded. These elements are:

(1) An agreement not to prosecute
(2) Knowledge of the actual commission of crime
(3) The receipt of some consideration

It is clear from the proceedings at the lower court that the appellant had knowledge of the crime for which he was arrested and detained. This is so because all the statements he made were so made after he had been duly cautioned. It is also on record that he paid N100,000,000 to the respondent. However, there is no evidence that there is a valid agreement between the appellant and the respondent on the issue of compounding the crime for which the appellant was charged. The three elements in a typical compounding statute as is provided for under Section 13(2) (sic) 14(2) of the Act must be established conjunctively - - From the provisions of section 13 (2) (sic) 14 (2) of the Act, the amount liable to be accepted by the respondent shall be such amount that a person convicted should have paid as fine. This is clearly the import of the Section. The 100,000,000 received from the appellant is said to belong to Bayelsa State Government. It is not representing the amount of fine which the appellant would have paid if he were convicted. The collection of that money is certainly not in accordance with the provision of section 13 (2) (sic) 14 (2) of the Economic and Financial Crimes Commission (Establishment) Act, 2004.

The respondent reproduced this decision in **Chidolue vs. EFCC** *(supra),* and based its arguments on the misconception that *"compounding a crime"*

is the same as *"compounding of an offence"* in a criminal trial, which is not correct. *"Compounding a crime* is an offence itself, while *"compounding of an offence"* allows the accused person to be exonerated and acquitted for the crime.

Even so, *"compounding"* and *"condonation"* are two different concepts. *"Condonation"* is *"the voluntary overlooking or pardon of an offence"* – see *Marriam-Webster.com,* wherein *condonation* is also defined as the *"implied pardon of an offence by treating the offence as if it had not been committed"*. Thus, the different is that while the *compounding of an offence* does not mean that the offence had not been committed, by *condoning* the offence, the offender is treated as if the offence had not been committed in the first place.

"Condonation" is a defence to an action for divorce that the *"innocent"* spouse having forgiven the adulterous spouse cannot now take proceedings *legal-dictionary.thefreedictionary.com.* In his book – *Nigerian Family Law,* Professor Itse Sagay explained the concept of condonation, as follows:

> **In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong on the condition that the spouse whose wrong is so condoned does not henceforth, commit any further matrimonial offence.**

Section 171 (1) (c) of the Armed Forces Act also provides as follows:

> **Where a person subject to service law under this Act**
>
> **(A) Has had an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a Court Martial or to have the case dealt with summarily under this Act.**

In **Nigerian Army vs. Aminum-Kano** *(supra),* respondent pleaded that since charges against him were withdrawn and substituted with a *"final warning letter",* he could not be subjected to trial as this amounted to condonation.

This plea was dismissed and at the end of the day, he was found guilty, convicted and sentenced. The Court of Appeal allowed his appeal, and in dismissing the appeal filed by the Nigerian Army, Oguntade, JSC, observed:

> **Section 171 of the Act divests any court or tribunal of competence to subject the respondent to any further trial after having been condoned by the appropriate authority. Thus, if any court or tribunal should proceed to make pronouncements on persons such as the respondent in spite of the condonation and damning the consequences of lack of competence, this court cannot close its eyes on such abnormality or illegality.**

In this case, the appellant argued that once the respondent collected money from *Lucky Nosakhare Igbinedion,* the offences alleged against it had been *"effectively compromised, compounded or condoned".* By the respondent countered that its contention is not only strange but misconceived bearing in mind that in our criminal jurisprudence, criminal liability is personal – **ACB vs. Okonkwo** *(1997) 1 NWLR (Pt. 480) 194;* and it is not a valid defence in law for an accused person to argue that while committing the offence, he was acting as agent of a principal since this is not a defence that is known to law.

I agree with the respondent; criminal liability is, undoubtedly, personal, it cannot be transferred since the *mens rea or actus reus* is on the accused – **Akpa vs. State** *(2008) 14 NWLR (Pt. 1106) 72.* In this case, even if it can be held that the said *Lucky Nosakhare Igbinedion* is vicariously liable for the said offences allegedly committed by the appellant, where is the evidence that the respondent had *compromised, compounded or condoned* the offence?

There is no evidence that **EFCC** accepted to collect money from the said *Lucky Nosakhare Igbinedion,* thereby compounding the offence, and no evidence from which it can be implied that **EFCC** had previously condoned the alleged act about which they are complaining. The appellant, therefore, failed to establish that the said offences were *"compounded"* or *"condoned"*.

On double jeopardy, the appellant argued that the semantics involved in whether the defence applies in the absence of a conviction or an acquittal must be judged in relation to peculiar facts and circumstances of this case; that in whatever circumstances it is held that the plea of *autre fois acquit* and convict will protect *Lucky Igbinedion,* it must be open to it as it is an agent of *Lucky Igbinedion,* and the charges against it are inextricably tied to *Lucky Igbinedion,* who can no longer be tried again because of the plea bargain.

The respondent submitted that double jeopardy will only arise where a person is able to show he had earlier been convicted or acquitted in respect of a matter for which he is being prosecuted – **Kalu vs. Nigerian Army** *(2010) 4 NWLR (Pt. 1185) 433;* that there must be evidence of a previous conviction or acquittal – **Chief of Air Staff vs. Iyen** *(2005) 6 NWLR (Pt. 922) 496;* that there is no evidence that appellant had been convicted or acquitted by any court on account of offences alleged against it; that none of the counts in the **Benin Charge** is similar to offences alleged in the **Enugu Charge**, **Connelly vs. DPP (1964) 2 All ELR 401, DPP vs. Humphrys (1977) AC 1, Edu vs. COP 14 WACA 163;** and that the dictum of Udoma, JSC, in **Rabiu vs. State** *(1980) 2 NLR 117,* quoted by the appellant at page 18 of its brief, cannot assist it.

Double jeopardy, which prohibits a person from being tried or punished twice for the same offence with the same set of facts, is enshrined as a right under Section 36(9) & (10) of the 1999 Constitution, which provides:

> **(1) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted**

A **shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.**

B **(2) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.**

C Section 36(9) of the 1999 Constitution (as amended) makes it very clear that any accused person, who shows that he had been tried for a criminal offence, and was convicted or acquitted, shall not be tried again for the same offence or for a criminal offence having the same ingredients as that **D** said offence.

In this case, appellant argued that withdrawing the charges against it, amounted to an *"acquittal",* which is *– "a setting free from the charge of an offense by verdict, sentence or other legal process"- merriam-* **E** *Webster.com. –* See *Black's Law Dictionary, 9th Ed.,* where *autrefois acquit* is defined as*:*

[Law French "previously acquitted"] A plea in bar of **F** **arraignment that the defendant has been acquitted of the offense – Also termed former acquittal. See Double Jeopardy. Cases: Criminal Law; Double Jeopardy:**

G **"Suppose that a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a** **H** **second time. He has what is termed in legal Frenglish (sic), the defence of autrefois acquit. Similarly, if he is convicted, even though he is left off very lightly, he cannot afterwards be charged on** **I** **fresh evidence, because he will have the defence of**

A **autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of *"previous acquittal"* and *"previous conviction";* and *"double jeopardy"* makes**
B **an acceptable generic name for both." Glanville Williams, Textbook of Criminal Law**

In this case, in resolving this issue against the appellant, the **FHC Benin**
C held that it did not adduce any evidence to show that it had gone through any trial and was convicted or acquitted or pardoned; and that since there was also no evidence of any plea bargain agreement with the prosecution or the **EFCC** to drop or condone the said charges then *"the doctrine of double*
D *jeopardy and abuse of court process is not available and open"* to the appellant herein.

In affirming the trial court's decision on this issue, the Court of Appeal also held that the appellant is not entitled to defences of double
E jeopardy and abuse of court process, which are predicated on a non-existent plea bargain.

Obviously, the concurrent findings of the two lower courts are based on sound and logical reasoning, which cannot be faulted. The appellant
F predicated its entitlement to those defences on a non-existent plea bargain. It did not plead to the amended charge at the **FHC Enugu,** and it was never tried, convicted or acquitted by any court of law for the offences or similar offences contained in the said **Benin Charge;** the appellant did not adduce
G any evidence of an agreement with **EFCC** to compound the said offences; there is no evidence that the appellant was pardoned for the acts complained of in the said charge; and the appellant did not also adduce any evidence to show that prosecution or **EFCC** acted in any way to condone those
H offences. The said conclusions of the two lower courts are, therefore, unassailable.

As to *abuse of court process,* it is settled that the term has an element of malice in it – see **Amaefule vs. State** *(1988) 2 NWLR (Pt. 75) 156 SC,*
I wherein this court per Oputa, JSC, expounded on this defence, as follows:

> **To amount to an abuse of process, the proceeding or step in the proceeding complained of, will, in any event, be lacking in bona fides; it has to be an improper use or perversion of process after it had been issued. The term abuse of process has an element of malice in it. It thus, has to be a malicious perversion of a regularly issued process, civil or criminal, for a purpose, and to obtain a result not lawfully warranted or properly attainable thereby.**

In this case, where is the evidence of malice or malicious perversion of court processes by the prosecution? The appellant adduced no evidence of such; rather it resorted to nothing but sentiments, for instance; it argued as follows:

> **It would amount to breaching the confidence of the appellant and indeed back stabbing for the respondent to be allowed to do what it is doing now, by going into an arrangement whereupon Lucky Igbinedion pleaded guilty to certain charges (sic) would amount to leaving the appellant defenseless and arming the respondent with the weapon acquired in peace time confidential arrangement to be used by the respondent against the appellant.**

It is well-settled that sentiments have no place in judicial deliberations – **Kalu vs. FRN &** *(2016) 9 NWLR (Pt. 1516) 1.* The appellant was not charged or tried at the **FHC Enugu**, and there is no evidence that the respondent or **EFCC** made improper use of any legitimately issued court process to obtain a result that is unlawful or beyond the scope of the said process, which is the definition of *abuse of process* in *Black's Law Dictionary, 9th Ed.* So, there is no reason to interfere with the concurrent decisions of the Court of Appeal and the trial court **FHC Benin,** which are, in my view, sound decision.

The appellant's **Issue 5**, which questions the summary of evidence by the **FHC Benin**, as it relates to *Ekpen and Sons Company,* the 4th accused

person in the **Benin Charge**, is of no relevance to this appeal because the said 4th accused, *Ekpen and Sons Company,* is not a party to this appeal.

In the final analysis, this appeal lacks merit; it fails and it is dismissed.

Amina Adamu Augie
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amina Adamu Augie and to register that support I shall make some remarks.

Five issues were raised for the determination of the appeal and they are thus:

1. **Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with the Economic and Financial Crimes Commission (respondent) does not inure to the benefit of the appellant herein. (Grounds 1, 2, 3 and 5).**

2. **Whether the Court of Appeal was right when it held that a crime cannot be condoned by the state (Ground 4).**

3. **Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant (Grounds 6, 10 and 11).**

4. **Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading up to this appeal did not constitute an abuse of court process. (Grounds 7 and 9).**

5. **Whether the Court of Appeal did not misdirect itself and occasion a serious miscarriage of justice when it**

summarized the evidence incorrectly in favour of the respondent by erroneously holding that the appellant's lead counsel herein continued to appear as counsel for the 4th accused person to the original charge dated 22nd January, 2008 - Ekpen and Sons Company when in fact the name of the said accused person had been struck out by the trial court on 23rd January, 2008 (Ground 8).

Ebun-Olu Adegboruwa Esq. of counsel for the respondent, adopted its brief of argument filed on the 29th June 2017 and in it crafted two issues for determination, viz:

1. **Whether the Court of Appeal was not right in affirming the decision of the trial High Court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the Federal High Court Enugu. (See grounds 1, 2, 4 and 5).**

2. **Whether the Court of Appeal was not right in affirming the decision of the trial High Court that the appellant is not entitled to any of the defences of condonation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process. (See grounds 4, 6, 7, 10 and 11).**

ISSUES 1 AND 2

These raise the questions on the rightness of the Court of Appeal in affirming the decision of the trial High Court that there was no plea bargain between appellant and respondent and the appellant not entitled to the defences of condonation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process.

Learned counsel for the appellant Mr. Oma Ahonaruogho contended that the lower court was wrong when it held that the plea bargain agreement

entered into in Enugu with the respondent does not inure to the benefit of the appellant in this appeal. That it is a common ground that before the Federal High Court at Enugu, the appellant was amongst those originally charged in charge No. FHC/EN/6C/2008 between Federal Republic of Nigeria vs. Lucky Nosakhare Igbinedion & Ors and the appellant was the 3rd accused person in that charge. That appellant being a corporate entity can only act through human medium or agency. He cited **Nigeria National Supply Co Ltd** (1988) NWLR (Pt. 74) 23; **Lennards Carrying Co. Ltd vs. Asiatic Co Ltd** (1915) etc.

For the appellant, learned counsel stated that as long as the appellant was charged as an agent or privy of the said Lucky Nosakhare Igbinedion and was charged as such, any rights or privileges which should ordinarily inure to the said Lucky Nosakhare Igbinedion should also inure in favour of the appellant. That since the charge against the 1st accused, Lucky Nosakhare Igbinedion then the benefit should be visited on the appellant as an earlier co-accused before the charge was amended excluding him. That the charge involving the appellant was amended by the plea bargain in the Federal High Court Enugu.

He further contended for the appellant that once the prosecutor, EFCC had reached a compromise and decided to collect money from the 1st accused who is the principal of the appellant in all the counts charged before the trial Federal High Court at Enugu and Benin City, the offences alleged against the appellant herein had been effectively compromised, compounded or condoned and the EFCC cannot be heard to come up again to prosecute the appellant for the same offences especially as the Federal High Court in Benin has set Lucky Nosakhare Igbinedion free and appellant as agent must be set free too. He cited **YISI (NIG) LTD vs. TRADE BANK PLC** (2013) 7 NWLR (Pt. 1357) 522 at 539 e.t.c. *Section 36(9) of the 1999 CFRN; Section 25 thereof; Section 181(1) and (2)* of **The Criminal Procedure Act** *(Cap C.41) LFN 2010;* **Nafiu Rabiu vs. The** State (1981) 2 NWLR (Pt.293).

Responding, Mr. Adegboruwa for the respondent submitted that the concurrent findings of the fact by the Federal High Court Benin and the Court of Appeal that the plea bargain in the Enugu Federal High Court

cannot be invoked by the appellant which has to be upheld by this court as the appellant was not involved in that plea bargain. That this court should not interfere in that concurrent finding as it did not arise from a perverse base. He cited **Sobakin vs. State** (1981) 5 SC 375, **Abirifon vs. State** (2013) 13 NWLR (Pt. 1372) 619 at 636; **Egunjobi vs. FRN** (2013) 3 NWLR (Pt. 1342) 534 at 555; *Section 76(4) Administration of Justice Law (ACJL); Section 270(7) of the ACJA 2015.*

That the court should take into account the circumstances under which the charge was amended in Enugu Federal High Curt leading to appellant and other accused except for 1st & 2nd accused being discharged and which discharge cannot be taken as an acquittal or a situation upon which an autrefois convict as would apply to 1st accused to also apply to those discharged accused including the appellant.

Learned counsel for the respondent submitted that by section 164(4) of the Criminal Procedure Act, where a charge is amended, it shall be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form. He cited **Attah vs. State** (1993) 7 NWLR (Pt. 305) 257 at 286; **FRN vs. Adewunmi** (2007) 10 NWLR (Pt. 1042) 399 at 422.

That condonation as a doctrine has limitations when it comes to its application in criminal cases since its application is usually prescribed by statutes such as *section 26 of the Matrimonial Causes Act, Cap M7, Laws of the Federation, 2004; Section 171 (1) & (2) of the Armed Forces Act Cap A20, LFN, 2004 and Section 119 of the Nigerian Army Cap 294, LFN,* 1990 which specially provide for condonation. He cited **Nigerian Army vs. Aminu Kano** (2010) 5 NWLR (Pt. 1188) 429 at 453-454.

Learned counsel for the respondent further contended that it is not a valid defnece in law for any person who is alleged to have committed an offence to argue that while committing that offence he was acting as an agent of principal. That criminal liability is personal. He referred to **A.C.B. vs. Okonkwo** (1997) 1 NWLR (Pt. 480) 194 at 207.

He stated on that the issue of double jeopardy will only arise where a person is able to show that he had earlier been convicted or acquitted in respect of the matter for which he is being prosecuted. He cited **Kalu vs.**

Nigerian Army (2010) 4 NWLR (Pt. 1185) 433 at 451; *Section 181-185 CPA now Sections 238-240 of the Administration of Criminal Justice Act;* **Chief of Air Staff vs. Iyen** (2005) 6 NWLR (Pt. 922) 496 at 535.

For the respondent it was submitted that there is nothing to show that the appellant was convicted or acquitted in respect of the transactions for which charges were initiated against it at the Federal High Court Benin and there is no abuse of court process.

In brief, the appellant contends that it is inequitable to allow the respondent to continue with the prosecution of charge FHC/B/11C/2011 having condoned the charges as appellant was a mere agent of lucky Nosakhare Igbinedion who has been set free is therefore entitled to be set free too. That the pleas of condonation, plea bargain and abuse of court process are available to the appellant.

The opposing stand of the respondent is that the appellant is not entitled to any of the defences of condondation, plea of autrefois convict, doctrine of double jeopardy and abuse of the court process, as it was not part of any plea bargain with the prosecution in Enugu.

The trial court stated as follows:

> **"However, regrettably enough, none of the 2nd – 7th accused persons applicants has shown or adduced evidence to show that he went through or under any trial and was convicted or acquitted or pardoned.**
>
> **No evidence of any plea bargain agreement with the prosecutions (sic) or Commission to drop or condone the charges which they are now called upon to answer for the second time. In fact, nothing is disclosed in their favour on any of the grounds the application is founded.**
>
> **In absence of any evidence, the doctrine of double jeopardy and abuse of court process is (sic) not available and opened to any of the 2nd – 7th accused persons – applicants.**

In fact, there is uncontroverted evidence that some of the accused-applicants escaped from jurisdiction while the case at Enugu was going on. How can such accused-applicant turn round now and raise the defence of or plea double jeopardy?

It appears upon the totality of this case the grounds upon which this application is founded and all points raised, each is traversed, and considered and none is established by the 2nd – 7th accused persons-applicants, including a plea for pardoned, (sic) under section 36(10) of the constitution. Consequently, their application must fail in its entirety and be so dismissed. It is hereby dismissed entirely for lack of merit, frivolity and wanting in bonafide".

Also, at pages 2421-2422 of Vol. v of the **Record of Appeal,** the Court of Appeal found as follows:

"Having, read the affidavit in support of the motion which the lower court ruled upon, and also the briefs of argument of the parties it is very clear that *appellant never established the existence of any document that ought to have been placed before the FHC Enugu, containing or setting out the terms agreed upon by the parties sequel* to the settlement which the prosecuting counsel informed the court that the accused persons approached the prosecution for.

"Suffice it to say it is my considered view that the stance of learned lead counsel can only be found to be well grounded if the fact of a plea bargain agreement is established to have been reached between the prosecution and the accused relying on the said plea bargain agreement. And it is also, my considered view that it has been sufficiently

demonstrated that the prosecuting counsel before the FHC Enugu, cannot be said to have made any plea bargain with the appellant having regard for the amended charge file on 18th December, 2008 vis-à-vis the proceedings of the court on both 17th December, 2008 and 18th December, 2008."

The scenario therefore is that of concurrent findings of two courts below which the Supreme Court is averse to interfering with except in circumstances where the findings have emanated from a perverse source or due to a wrong application of the law occasioning a miscarriage of justice. See **Sobakin vs. State (2013) 13 NWLR (t. 1372) 619 at 636;Egunjobi vs. FRN (2013) 3 NWLR (Pt. 1342) 534-555.**

For a jolting of the memory, the National Assembly enacted the Administration of Criminal Justice Act (ACJA), 2015 which also provides for a plea bargain agreement which must be reduced into writing. However at the time the facts leading to this appeal took place the ACJA was not in existence. The first legislation in Nigeria to localize and import plea bargain into Nigeria's Criminal jurisprudence is the Administration of Criminal Justice Law of Lagos State ACJL, 2011 which can be considered the forerunner of the present ACJA of the National Assembly.

The court below followed the definition of plea bargain as stated in Black's Law Dictionary which makes it clear that a plea bargain can only be a conscious and deliberate act between the prosecution and an accused with a plea of guilty being an overt act on the part of the accused in evidence of the plea bargain. In the instant situation what is evident is that the prosecution entered into a plea bargain with the 1st accused person in the Enugu Federal High Court at the proceeding of 18th December, 2008 which is that the accused approached the prosecution for settlement and that necessitated the amendment of the charge. In that amendment of charge of 18th December, 2008 the number of accused persons were reduced from seven to two and the appellant was not one of the two and its name was not reflected in the amended charge.

The facts not in dispute are that neither the appellant nor any of those accused persons outside of the two who took the plea bargain had returned

any funds covered by the transactions which are the subject matter of counts 1-66 in charge No: FHC/B/11C/2011 initiated at the Federal High Court Benin against the appellant and some other accused persons. The Court of Appeal's decision in that regard is stated hereunder as follows:

> **"Undisputedly, the appellant personally never suffered a conviction of any kind in respect of any of the charges that came up before the FHC Enugu. This condition is sine qua non for a plea bargain to be in place between the prosecutor and an accused relying on plea bargain. An accused person who alleges that he had a plea bargain with the prosecutor cannot emerge from the matter unscarred or without blemish or stigmatization of conviction."**

What cannot be lost out is the effect of the amendment of the charge and fall out in relation to the appellant and those other accused persons whose names are not reflected in the amended charge. The trial judge held that where a charge is amended, the former one ceases to govern the proceedings and remain a nullity and of no useful purpose. The Court of Appeal affirmed that decision stating that when the new charge albeit the amended one is filed the former charge is no longer in existence while the amended charge takes its life from the date of the disposed charge as the new takes the position of the extant charge. It is deemed to have been filed in the same form and on the same date as the discarded one. There is no question of two valid charges struggling for space.

The Supreme Court had variously cleared any doubts as to what the reality is when an amendment or substitution takes place. I would refer to a few of the authorities such as the case of **Attah vs. State** (1993) 7 NWLR (Pt. 305) 257 at 286 per Karibi-Whyte JSC stated thus:

> **"Subsection (4) of section 164 renders an amendment retrospective to the date of filing of the charge. Hence, it is always necessary to read as subsection (1) & (4) of section 164 together…. The amendments to the offences relates**

back to the date of filing of the documents containing them."

See also **FRN vs. Adewunmi** (2007) 10 NWLR (Pt. 1042) 399 where Ogbuagu JSC said at pages 422 of the report that:

"Now, a substitution is the same thing as an amendment and an amendment whenever made by the court, relates back, to the original date of the documents so amended."

The appellant has pushed forward to the point that the EFCC can compound and compounded the offences alleged against it by virtue of section 14(2) of the EFCC Act, 2004 which provides thus:

"Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of Attorney General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of Law), the commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, not *exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence,"*

The content of the provision in section 14(2) of the EFCC Act, 2004 is that the following factors are present:

1. **The EFCC has the power to compound an offence.**
2. **The offence to be compounded must be one that is punishable under the EFCC Act.**
3. **The EFCC can accept money in compounding the offence.**
4. **The sum of money the EFCC can accept must be that which must not exceed the maximum amount to which that person would have been liable to pay if he had been convicted of that offence.**

Interestingly none of the three elements from 2-4 is present for section 14(2) of the EFCC Act to be applicable and so the issue of compounding of the offence by EFCC cannot come into play.

Again on the issue of condonation, which the appellant invokes, it is necessary to seek the definition as stated in Black's Law Dictionary 8th Edition at pages 315 as:

> ***"A victim's*** **expressed or implied forgiveness of an offence especially by treating the offender as if there has been no offence.** ***Condonation is not usually a valid defence to a crime.*** **One's spouse expresses or implied forgiveness of a marital offence by resuming marital life and sexual intimacy."**

Prof. Itse Sagay SAN in his book Nigerian Family Law pages 393 defines condonation to be thus:

> **"In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong on the condition that the spouse whose wrong is so condoned does not thenceforth, commit any further matrimonial offence. Condonation has two essential ingredients"**
>
> **1. Forgiveness of the wronged spouse, and**
> **2. Reinstatement of the offending spouse to his former position."**

The point has to be made that condonation as a doctrine has its own limitation when it is to be applied in criminal cases and these limitations are found in section 26 of the Matrimonial Cause Act, Cap A 20, LFN, 2004, Section 171 (1)&(2) of the Armed Forces Act Cap A 20, LFN, 2004 and section 119 of the Nigerian Army Cap 294 LFN, 1990 which provide

specifically for condonation with the extent of the application of the doctrine and the persons to whom the defence is available or applicable. This boundary of application are well set out in the case of Nigerian Army vs. Aminu Kano (2010) 5 NWLR (Pt.1188) 429 at 453-254 per I.T Muhammad JSC stating thus:

> **I think we need to seek for the definition of the word "condoned" or condone which, literarily means to pardon; to overlook (an offence), to forgive or to act so as to imply forgiveness. Thus, condonation is the act of condoning or pardoning a wrong act, the implied forgiving or pardon of an offence by overlooking it. See lexicon Webster Dictionary. Vol.1. 1980.. In Law, however, the word "condone" or "condonation" which has several variants such as condonment, condonance, strictly *speaking, has conditional remission of forgiveness, by means of continuance or resumption of matrimonial cohabitation by one of the married parties* of a known matrimonial offence e.g. Adultery committed by the other that would constitute a course of divorce, the condition being that the offence shall not be repeated. See Obafemi vs.Obafemi (1965) 1 NMLR 446 at P. 448. If adultery is charged as a ground for divorce and condonation is proved, the forgiving spouse is barred from proof of that offence…. In the revised editions of 1999 and 2004 of the Black's Law Dictionary, the authors brought to fore the definition of the word condonation as it relates to, general application of the word where they defined it to mean a victims express or, especially implied, forgiveness of an offence by treating the offender as if there has been no offence."**
>
> **"Where *a person subject to service law* under this Act**
> **1.(c) has had an offence condoned by his commanding officer, he shall not be liable in respect of that**

offence to be tried by a court martial or to have the case dealt with summarily under this Act.

2.(c) an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed an offence if *and only if, that officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstance,* informed him that he will not be charged with the offence.

There is no beating about the bush on what is and what is not that there is definiteness in the application of the doctrine of condonation and that is that the Federal High Court in this case at hand and criminal proceedings before that court are regulated by the Criminal Procedure Act now Administration of Criminal Justice Act and in these Acts condonation is not contemplated and so does not apply to all criminal cases. In the Nigerian Army Act which specifically provided for condonation, the Supreme Court interpreted it thus:

In **Ngerian Army vs. Aminu Kano** (supra), the Supreme Court, per Muhammad JSC, held at page 457-458 as follows:

"Thus, by taking a look at exhibit p. 45 starting from the title of the document; "withdrawal of charges preferred against Col. M. Aminu Kano (N/6422) and substitution with a final warning letter" and traversing through the contents of the whole documents which is made up of seven paragraphs, the last paragraphs ended the document in the following word: 7. The forgoing is presented hopefully for ease in our charge process. You are seriously warned… it is my view that exhibit P. 45 has covered both sets of charges framed against the respondent. The warning handed over to the respondent must, *for all intents and purposes be construed to mean condonation as contemplated*

A ***by section 171 of the Act."***

At page 467, Muhammad JSC continues:

B **"Now, I think this is what the court below was stating that by subjecting the respondent to another series of punishments, convictions, sentences before another body, whether sitting as a panel, a tribunal, a court of law**
C **including the court martial, in spite of all the warnings, reprimand in strong terms, which were of course capable of portraying the respondent as an "irresponsible" Senior Officer of the Nigerian Army, would mean subjecting the**
D **respondent to double jeopardy. This would certainly be against the spirit of section 171 (1) (c) of the Act."**

It is to be taken that since the EFCC Act or any other Act has not provided
E for condonation, then it cannot be applied as a doctrine without statutory provision. That makes calling condonation up in defence in these offences in the case on hand an invocation in futility.

Of note is the contention of the appellant to be given the freedom as
F invited to its principal, a posture far removed from our criminal jurisprudence as criminal liability is personal. In fact there is no valid defence in law for a person who is alleged to have committed an offence to hang onto the fact that while committing that offence he was acting as an
G agent of a principal. See A.C.B. vs. Okonkwo (1997) 1 NLWR (Pt. 480) 194 at 207.

The appellant had sought to rely on section 36(9) to talk of its being visited with double jeopardy in the trial initiated in Benin Federal High
H Court. The appellant needs to be reminded that for section 36(9) CFRN on double jeopardy to apply, the appellant must establish that it has been either acquitted or convicted for the same offence for which it is presently called upon to answer. I place reliance on **Kalu vs. Nigerian Army (2010) 4**
I **NWLR (Pt. 1185) 433 at 451.**

Sections 181 and 182 of the Criminal Procedure Act provides as follows:

"181

(1) Without prejudice to section 171 of this Act, a person charged with an offence (in this section referred to as "the offence charged") shall not be liable to be the tried thereafter if it is shown:

(a) that he has previously been convicted or acquitted of the same offence by a competent court; or

(b) that he has previously been convicted or acquitted by a competent court on a charge on which he might have been convicted of the offence charged; or

(c) that he has previously been convicted or acquitted by a competent court of an offence other than the offence charged, being an offence of which, apart from this section, he might be convicted by virtue of being charged with the offence charged.

(2) Nothing in subsection (1) of this section shall prejudice the operation of any law giving power to any court, on an appeal, to set aside a verdict or finding of any other court and order a re-trial.

182.

A person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him on the previous trial under the provisions of section 158 of this Act."

"According to section 36(9) of the 1999 Constitution, it is a conviction or acquittal by a

court of competent jurisdiction that can found a plea of autrefois convict or autrefois acquit."

In this case in hand the appellant has not proffered any evidence that it has been convicted or acquitted by any court of law on account of the offences alleged against it in charge No.FHC/B/11C/2011 as it was only Lucky Nosakhare Igbinedion and Kiva Corporation Limited that were convicted in charge No: FHC/EN/6C/2008.

None of the counts in charge No: FHC/B/11C/2011 is similar to the offences alleged in the Federal High Court Enugu's charge. What cannot be debated for the principle of autrefois convict or acquit to apply is that it must be the same offence both in fact an in law. I rely on **Connelly vs. DPP** (1964) 2 ALL ER 401 at 433; **DPP vs. Humphrey** (1977) A 1; **Edu vs. COP** 14 WACA 163;.

When those factors that should be present before the doctrine of double jeopardy, autrefois convict or acquit are not available then the issue of abuse of court process cannot arise. See the State Vs. Ilori (1983) 1 SCNLR 94 at 109 per ESO JSC.

The follow up conclusion from all that is available is that the concurrent findings cannot be faulted or upset or interfered with which leads to the fact that this appeal lacks merit. In line with the well articulated lead judgment I too dismiss the appeal.

Mary Ukaego Peter-odili
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my learned brother Augie, JSC. I agree with the reasoning and conclusion that the appeal is devoid of any merit. My learned brother has done justice to the issues raised herein and I do adopt his judgment as mine and also dismiss the appeal in terms of the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had the advantage of reading in advance the judgment prepared by my learned brother Augie, JSC, just delivered. I am in agreement with the reasoning and the conclusion he arrived at that this appeal lacks merit. While adopting her reasoning and conclusion as mine. I shall also dismiss this appeal. I abide by the order made therein appeal is accordingly dismissed by me.

Amiru Sanusi
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amina Adamu Augie, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage,
Justice, Supreme Court

ROE LIMITED
AND
UNIVERSITY OF NIGERIA

SC. 42/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

APPEAL: Brief writing – Proliferation of issues for determination – Relevant principles thereof.

APPEAL: Concurrent findings – When the Supreme Court will interfere and disturb same – Relevant principles.

*CASE LAW: Principles in **Adelekan vs. Ecu-Line Nv (2006) 12 NWLR (Pt. 993) 33** – Interpretation and application.*

*CASE LAW: Principles in **NEPA vs. Edegbero & Ors (2002) 18 NWLR (Pt. 798) 19** – Proper interpretation and application thereof.*

*CASE LAW: Principles in **Obiuweubi vs. CBN (2011) 7 NWLR (Pt. 1247) 465** – Considerations and applications.*

*CASE LAW: Principles in **Onuorah vs. RRPC (2005) 6 NWLR (Pt. 921) 393** – Relevant considerations thereof.*

COURT: Federal High Court – Jurisdiction – Section 151 (1)(p) (q)(r) of the constitution of the Federal Republic of Nigeria 1999 (as amended) – Scope – Relevant considerations thereof.

COURT: Jurisdiction – What determines – Whether the jurisdiction of the Federal High Court is limited to items specified under S.251 of the constitution of Federal Republic of Nigeria 1999 (as amended).

COURT: Jurisdiction of the Federal High Court – S.251 CFNR – Interpretation – Proper approach thereto

COURT: Whether the Federal High Court has no jurisdiction to entertain claims in contract involving a Federal agency – Proper interpretation of S. 251(1)(p)(q)(r) of the constitution of Federal Republic of Nigeria 1999 (as amended) – Relevant considerations thereof.

PRACTICE AND PROCEDURE: Doctrine of stare decisis – Nature, essence – Proper application thereof.

PRACTICE AND PROCEDURE: Doctrine of stare decisis – Propriety of applying a relevant authority which is later in time.

STATUTE: S.251(1)(p)(q)(r) of the constitution of Federal Republic of Nigeria (1999) (as amended) – Scope and extent of the jurisdiction of the Federal High Court.

Issues for Determination

1. **Whether Section 251(1)(p)(q)(r) of the Constitution of the Federal Republic of Nigeria 1999 vests jurisdiction in the Federal High Court in matters pertaining to**

recovery of debt owed by the Federal Government or any of its agencies under a simple contract? And or whether the decision in NEPA vs. Edegbero & Ors (2002) 18 NWLR (Pt. 798) 79 is to the effect that once a Federal Government Agency is a party in a suit, the State High Court has no jurisdiction to entertain the suit.

2. **Whether the Respondent can validly for the first time without leave of court raise an appeal the Public Officers Protection Act? And or whether the Public Officers Protection Act applies to breaches of contract.**

Facts of the Matter

The appellant herein, a private limited liability Company with its head office at Lagos, Nigeria, was in 1996 awarded a contract by the respondent to computerize some of its departments. The contract was worth the sum of twelve million, seven hundred and sixty-seven thousand, one hundred and ninety-eight Naira, fifty-three kobo (N12,767,198.53k). The appellant executed the contract satisfactorily and was issued with a certificate of completion. During the execution of the contract aforesaid, the respondent made a certain payments to the appellant. At the completion and successful execution of the contract, the appellant and the respondent reconciled their accounts and they arrived at an outstanding balance of two million eight hundred and one thousand three hundred and three Naira, nine kobo (N2,801,303.09) standing to the credit of the appellant. This was acknowledged by the respondent through its letter dated 6th October, 1997 to the appellant. The respondent refused to pay the balance, despite repeated demands by the appellant. As a result of the respondent's refusal to pay the outstanding balance, the appellant took out a writ of summons at the Enugu State High Court, holding at Nsukka dated 16th of October, 2001 in which he claimed the following reliefs:

"(a) The sum of N2,801,303.09 (Two Million Eight Hundred and One Thousand, Three Hundred and Three Naira, Nine Kobo) being the outstanding balance owed the plaintiff by the defendant for the contract performed for the defendant.

(b) 5% interest on the judgment debt from the date of judgment until it is fully liquidated."

This claim was accompanied by a 15 paragraphs affidavit in which the appellant asked the court to place the suit on the undefended list because it was convinced that the respondent had no defence to the suit.

The writ of summons was served on the respondent Instead of filing a Notice of Intention to defend the suit, the respondent filed a notice of preliminary objection in which it challenged the jurisdiction of the trial court in the following words:

"TAKE NOTICE that the Defendant in this case intends to raise preliminary objection to this suit in that the court lacks jurisdiction to entertain the matter."

The preliminary objection was heard and in a reserved and considered ruling delivered on the 25th September, 2003, the trial court upheld the preliminary objection on the ground that the action was statute barred and that the contract was a business between the appellant and a Federal Government agency which by Section 251 (1)(p)(q)(r) is justiciable only at the Federal High Court since such transaction comes within the term administration or management and control of a Federal Government agency. The appellant's suit was accordingly struck out.

The appellant's appeal to the Court of Appeal was unsuccessful as same was dismissed on the 30th of November, 2006. The appellant has further appealed to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Proliferation of issues for determination not acceptable*
The appellant filed two grounds of appeal and formulated two issues for determination of this appeal. It is the aggrieved party against whom the High Court and the Court of Appeal gave judgment against. The respondent who is not bereaved seems to be crying more by formulating four issues from the two grounds of appeal. This court has in a number of decided cases deprecated the rather increasing habit of some counsel who appear before it of showing very little care in the way and manner papers relating to appeals are drafted. The pronouncement of this court on proliferation of issues are made to guide counsel in the way and manner issues for determination of appeal are to be drafted. Several years after the introduction of brief writing, some counsel have shown little interest in learning from the decisions of the courts how issues are to be drafted. No wonder therefore, learned counsel for the respondent found it difficult to tie the four issues to the grounds of appeal. The rule is that an issue can be tied to several grounds of appeal, but a ground of appeal cannot support more than one issue. Where issues framed by either appellant or respondent are in excess of the grounds of appeal, the issues in excess of the grounds of appeal which do not seem to arise from those grounds of appeal are liable to be struck out. See Ayangade vs. O.A.U T.H, C.M.B (2001) 7 NWLR (Pt. 711) 187; Dung vs. Gyang (1994) 8 NWLR (Pt. 362) 315; Labiyi vs. Anretiola (1992) 8 NWLR (Pt. 258) 139. *(P 218 Paras C – H).*

2. *The interpretation of S.251 (1)(p)(q)(r) of the constitution of Nigeria 1999*
Per Galinje (JSC)

> **"The decision in the case of NEPA vs. Edegbero (supra) which was heavily relied on by the lower court was based on Section 251 (1)(p)(q)(r) of the 1999**

Constitution of the Federal Republic of Nigeria. Both the appellant and the respondent strongly relied on the provisions of Section 251 (1)(p)(q)(r) of the Constitution in putting forward their respective cases. It is therefore relevant to reproduce the provisions of the aforementioned section of the constitution for clarity as follows:

"251 (1) notwithstanding anything to the contrary, contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.

(a) the administration or the management and control of the Federal Government or any of its agencies;

(b) subject to the provisions of this constitution, in so far as it affects the Federal Government or any of its agencies.

(c) any action or proceeding for a declaration or injunction, affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies…."

At page 97 paragraphs E – F of the case of NEPA vs. Edegbero (supra) this court per Ogundare said:

"From what I have said earlier in this judgment, the aim of paragraphs (q) (r) and (s) of subsection 230 was to vest exclusive jurisdiction in the Federal High Court in matters in which the Federal Government or any of

its agents was a party. A state High Court would no longer have jurisdiction in such matters notwithstanding the nature of the claim in the action."

It is to be noted that Section 230 of the 1979 Constitution is the same as Section 251 of the 1999 Constitution. *(Pp 220 – 221 Paras C – D)*

3. Principles in NEPA's Case

In the case of NEPA vs. EDEGBERO (supra), the respondents were employees of the appellant (NEPA). Following an industrial action embarked upon by the employees of the appellant including the respondents in August, 1994 the respondents' appointments were by a letter dated 10/8/1994 terminated. The respondents instituted various suits claiming in each case as follows:

1. **A declaration that the purported termination of the respondents' appointment was irregular, wrongly null and void and of no effect whatsoever.**

2. **An order reinstating the respondents and payment of their salaries and all their entitlements.**

3. **A perpetual injunction restraining the appellant from harassing, intimidating and violation of the respondents' right.**

The various actions initiated by the respondents were consolidated. It was contended at the High Court that the State High Court had no jurisdiction since NEPA is an agent of the Federal Government. Reference was made to Section 230 (1)(q)(r) and (s) of the 1979 Constitution, which is in pari material with Section 251 (1)(q)(r) and (s) of the 1999 Constitution, as amended by Decree 107 of 1993. High Court overruled the objection on jurisdiction. Appeal to the Court

of Appeal was dismissed. On a further appeal to this court, it was held:

> **"It is not in dispute that the defendant NEPA is a Federal Government Agency. The two courts below made a finding of fact to this effect and this has not been challenged by the plaintiffs. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant. The decision is for declaration and an injunction and the principal purpose of it is to nullify the decision of the defendant terminating the appointment of the plaintiffs and others. In the light of all these, therefore, the action on hand came squarely within the provision of Section 230 (1)(q)(r) and (s) of the 1979 Constitution."**

The claims of the respondents in NEPA vs. EDEGBERO (Supra) were clearly meant to interfere with the decision of the appellant to dismiss the respondents declaration and injunction which clearly fall under Section 251 (1)(p)(q) and (r) of the 1999 Constitution and are therefore justiciable only at the Federal High Court. This lower court misunderstood the pronouncement in NEPA vs EDEGBERO (supra) at page 97 paragraph F, where this court said:

> **"A state High Court would no longer have jurisdiction in such matters notwithstanding the nature of the claim in the action."**

I think that pronouncement concerned such matters as the ones claimed by the respondents and nothing more. In the instant case the appellant's claim has nothing to do with administration or the management and control of the University of Nigeria, an agent of the Federal Government. It was a claim for debt arising from a simple contract which has been held in a myriad of decisions that the

Federal High Court has no jurisdiction to entertain.
(Pp 221 – 223 Para E – B).

4. *The decision in Onuorah vs. KRPC ;*
Per Galinje (JSC):

> **In Onuorah vs. KRPC (2005) 6 NWLR (Pt. 921) 393, the appellant entered into a contract to purchase specified number of empty tins from the respondent at an agreed amount which he paid to the respondent. Before delivery was made to the appellant the respondent increased the price of the tins and asked the appellant to pay the difference between the old and the new prices. The appellant refused and insisted that the respondent was bound to deliver to him the quantity of the empty tins he had ordered at the price agreed by the parties. Consequently, the appellant filed an action at the Federal High Court in which he claimed:**
>
> **(a) An order of court declaring the purported price increase as not affecting the plaintiff who paid for his own empty tins much earlier than the commencement date of the price increase.**
>
> **(b) An order of specific performance directing the defendant to supply the plaintiff the remaining empty tins not later than 30 days from the date of judgment.**
>
> **(c) N1,000,000 general damages.**

The Federal High Court granted the first and 2nd reliefs. The respondent appealed and raised the issue of jurisdiction for the first time at the Court of Appeal. The Court of Appeal allowed the appeal on the ground that the Federal High Court had no jurisdiction and

the suit was struck out. At the Supreme Court it was argued that the respondent being a subsidiary of NNPC which in turn is an agent of the Federal Government, the trial Federal High Court had jurisdiction to entertain the appellant's claims. On the other hand, it was contended on behalf of the respondent that the trial court lacked jurisdiction to entertain the appellant's claims because it was based on simple contract and that only a state High Court has jurisdiction to hear and determine the suit.

This court, per Akintan (JSC) held at page 405 paragraphs A – D as follows:

> **"A close examination of the additional jurisdiction conferred on the Federal High Court in the section and by the 1979 Constitution clearly shows that the court was not conferred with jurisdiction to entertain claims founded on contract as in the instant case. In other words, Section 230(1) provides a limitation to the general and all-embracing jurisdiction of the State High Court because the items listed under the said Section 230(1) can only be determined exclusively by the Federal High Court. All other items not included in the list would therefore still be within the jurisdiction of the State High Court. In the instant case, since disputes founded on contracts are not among those included in the additional jurisdiction conferred on the Federal High Court that court therefore had no jurisdiction to entertain the appellant's claim. The lower court therefore acted rightly in its decision that the Federal High Court lacked jurisdiction to entertain the claim." See Seven-Up Bottling Co. Ltd vs. Abiola & Sons Bottling Co. Ltd (2010) 13 NWLR (Pt.730) 469; Trade Bank Plc vs. Benilux (Nig) Ltd (2003) 9 NWLR (Pt. 825) 416 at 430 & 431.** *(Pp 223 – 224 Paras B – H)*

5. *Decision in Adefekan vs. Ecu-Line*
In Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33 at 52, this court in a lead judgment delivered by Onnoghen JSC (as he then was) held:

> **"The provision of Section 251 of the Constitution of the Federal Republic of Nigeria, 1999, hereinafter called the 1999 Constitution are very clear and unambiguous. It is the section that confers jurisdiction on the Federal High Court, which jurisdiction clearly does not include dealing with any case of simple contract or damages for negligence as envisaged by the action before the trial court."** *(Pp 224 – 225 Paras H – B).*

6. *What determines jurisdiction of a court*
The law is very well settled beyond any argument that the jurisdiction of a court is determined by the nature of the claim before it. See Tukur Govt. of Gongola State (1989) 4 NWLR (Pt. 17) 517. The Federal High Court is a special court with exclusive jurisdiction limited to those items specified under Section 251 of the 1999 Constitution of the Federal Republic of Nigeria and any other jurisdiction as may be conferred on it by an Act of the National Assembly. *(P 225 Paras C – D).*

7. *The proper approach to the interpretation of S.251 of the constitution*
A court must not while interpreting the provisions of Section 251 of the Constitution, and any other statutes whose wordings are very clear and unambiguous import into them something which is not contained in them. Section 251, has clearly made provisions for action against Federal Government or any of its agency in any other court in the Proviso after sub-paragraph (s) which reads thus:

> **" Provided that nothing in the provisions of paragraphs (p)(q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages injunction or specific performance where the action is based on any enactment, law or equity."** *(P 225 Paras D – G).*

8. *Improper application of stare decesis*
Per Galinje (JSC):

"The judgment in Onuorah vs. KRPC was delivered on the 11th of February 2005 and was cited in the appellant's brief of argument before the Court of Appeal. Throughout the judgment of the Court of Appeal, no reference was made to this very important authority. No wonder therefore the lower court acting on the principle of stare decisis dwelt so much on NEPA vs. EDEGBERO (supra) which was an earlier decision that was decided on a claim other than the claim for recovery of debt arising from simple contractual relationship.

Under the doctrine of stare decisis, lower courts are bound to follow the decisions of high courts, irrespective of whether those decisions are wrong. The doctrine is meant to achieve certainty and stability in the decision of the courts. However in doing so, the lower courts must not rely on previous decisions that have been overruled. The Supreme Court is the final court in the land. The justices of the court are not super human beings that are infallible. So where they err, they take liberty to correct. In the process some of the courts' decisions are overruled. It is on this premise that the lower courts are enjoined to follow latter or latest decisions of this court. Even if the decisions in NEPA vs. EDEGBERO (supra) and Onourah vs. KRPC (supra) were founded on the same facts, the decision in Onuorah vs. KRPC (supra) was latter in time and the lower court was bound to follow it. Its failure to do so found no justification in the doctrine of stare decisis, and I so hold. *(Pp 225 – 226 Paras H – F).*

9. *Counsel are to follow decisions that are more recent*
In Obiuweubi vs. CBN (2011) 7 NWLR (Pt. 1247) 465 at 501 paras C D, this court held:

> **"S.P.D.C Nig Ltd vs. Isaiah (supra) was decided in 2001 while O.H.M.B vs. Garba (supra); Olutola vs Unillorin (supra); Osakwe vs. F.C.E (supra) were decided in 2002, 2004 and 2010. The position of stare decisis is not for counsel to follow the decision he likes, but to follow the decision that is more recent."** *(P 226 Paras F – H).*

10. *When a fresh issue may be raised on appeal without leave*
The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court. But where the question sought to be raised involves substantial points of law, substantive or procedural and it is plain that no further evidence could be adduced in its support, the court will allow the question to be raised and the points taken in order to prevent an obvious miscarriage of justice. See Apane vs. Barclays Bank of Nigeria & Anor (1977) 11 NSCC 29; Shonekan vs. Smith (1964) ALL NLR 168 at 173. *(P 227 Para A – C).*

11. *Issue of filing of process within time is a jurisdictional issue*
The issue of whether or not an action is filed within the time stipulated by law goes to the jurisdiction of the court. Any omission to institute proceedings within the statutory time limit deprives the court of jurisdiction to hear and determine the matter. Jurisdiction being the soul of adjudication, can be raised at any stage of proceedings and even at the Supreme Court for the first time. In Isaac Gaji & Ors vs. Emmanuel D. Paye (2003) 8 NWLR (Pt. 823) 583 at 599 – 600 paras H – A, where this court held:

> **"The general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts whether that issue pertains to land or otherwise leave to file and argue the issue must be had**

and obtained first. But where the point or issue sought to be raised relates to the issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time". See Obiakor vs. The State (2002) 10 NWLR (Pt. 776) 612 at 626; UTB Ltd & Ors vs. Dolmetsch Pharmacy Nig Ltd (2007) 6 SC (Pt. 1) 1.
(P 227 Paras C – H)

12. *Limitation to the application of public officers protection Law*
However, I entirely agree with learned counsel for the appellant that the Public Officers Protection Act does not apply to cases of breach of contract for work done or recovery of debt. This court in F.G.N vs. Zebra Energy Ltd (2002) 18 NWLR (Pt. 798) 162 at 196 held:

> **"The Public Officer Protection Act was not intended by the legislature to apply to contracts. The law does not apply in cases of recovery of land, breaches of contract or for claims for work and labour done." See N.P.A vs. Construction (1974) 1 ALL NLR (Pt. 11) 463; Soule vs. L.E.D.B (1965) L.L.R 118. I entirely agree with the previous views of my brothers.** *(Pp 227– 228 Paras I–C).*

13. *When the Supreme Court can interfere with concurrent findings*
This appeal is against the concurrent findings of the High Court and the Court of Appeal. The attitude of this court is that it will not interfere with the concurrent findings of the High Court and the Court of Appeal unless there are special and exceptional reasons that warrant such interference. Such reasons could be that the findings of the two lower courts are either not supported by evidence or that the courts have drawn wrong conclusions from accepted or proved facts and by such conduct, their conclusion has led to a miscarriage of justice. In the instant case, there are sufficient reasons for interference by this court based on the resolution of the two issues submitted by the appellant for determination of this appeal.
(P 228 Paras D – F).

Nigerian Cases Cited

Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33
Apane vs. Barclays Bank of Nigeria & Anor (1977) 11 NSCC 29;
Ayangade vs. O.A.U T.H, C.M.B (2001) 7 NWLR (Pt. 711) 187;
Dung vs. Gyang (1994) 8 NWLR (Pt. 362) 315;
F.G.N vs. Zebra Energy Ltd (2002) 18 NWLR (Pt. 798) 162
Isaac Gaji & Ors vs Emmanuel D. Paye (2003) 8 NWLR (Pt. 823) 583
Labiyi vs. Anretiola (1992) 8 NWLR (Pt. 258) 139.
N.P.A vs. Construction (1974) 1 ALL NLR (Pt. 11) 463;
NEPA vs. Edegbero & Ors (2002) 18 NWLR (Pt. 798) 79
Obiakor vs. The State (2002) 10 NWLR (Pt. 776) 612
Obiuweubi vs. CBN (2011) 7 NWLR (Pt. 1247) 465
Onuorah vs. KRPC (2005) 6 NWLR (Pt. 921) 393,
Seven-Up Bottling Co. Ltd vs. Abiola & Sons Bottling Co. Ltd (2010) 13 NWLR (Pt.730) 469;
Shonekan vs. Smith (1964) ALL NLR 168.
Soule vs. L.E.D.B (1965) L.L.R 118.
Trade Bank Plc vs. Benilux (Nig) Ltd (2003) 9 NWLR (Pt. 825) 416
Tukur Govt of Gongola State (1989) 4 NWLR (Pt. 17) 517.
UTB Ltd & Ors vs Dolmetsch Pharmacy Nig Ltd (2007) 6 SC (Pt. 1) 1.

Nigerian Statute Cited

The 1999 Constitution of the Federal Republic of Nigeria Section 251;
Section 251(1)(p)(q)(r)

Representation

MR. EMEKA MOZIE ESQ for the Appellant.
MR. C. EJIKE-UME ESQ and Nwachukwu Ibegbu for the Respondent.

ADAMU GALINJE, (JSC) (Delivering the Lead Judgment): The appellant herein, a private limited liability Company with its head office at Lagos, Nigeria, was in 1996 awarded a contract by the respondent to computerize some of its departments. The contract was worth the sum of

twelve million, seven hundred and sixty-seven thousand, one hundred and ninety-eight Naira, fifty-three kobo (N12,767,198.53k). The appellant executed the contract satisfactorily and was issued with a certificate of completion. During the execution of the contract aforesaid, the Respondent made a certain payments to the appellant. At the completion and successful execution of the contract, the appellant and the respondent reconciled their accounts and they arrived at an outstanding balance of two million eight hundred and one thousand three hundred and three Naira, nine kobo (N2,801,303.09) standing to the credit of the appellant. This was acknowledged by the respondent through its letter dated 6th October, 1997 to the appellant. The respondent refused to pay the balance, despite repeated demands by the appellant. As a result of the Respondent's refusal to pay the outstanding balance, the appellant took out a writ of summons at the Enugu State High Court, holding at Nsukka dated 16th of October, 2001 in which he claimed the following reliefs:

"(a) The sum of N2,801,303.09 (Two Million Eight Hundred and One Thousand, Three Hundred and Three Naira, Nine Kobo) being the outstanding balance owed the plaintiff by the defendant for the contract performed for the defendant.

(b) 5% interest on the judgment debt from the date of judgment until it is fully liquidated."

This claim was accompanied by a 15 paragraphs affidavit in which the appellant asked the court to place the suit on the undefended list because it was convinced that the respondent had no defence to the suit.

The Writ of Summons was served on the appellant. Instead of filing a Notice of Intention to defend the suit, the appellant filed a notice of preliminary objection in which it challenged the jurisdiction of the trial court in the following words:

"TAKE NOTICE that the Defendant in this case intends to raise preliminary objection to this suit in that the court lacks jurisdiction to entertain the matter."

The preliminary objection was heard and in a reserved and considered ruling delivered on the 25th September, 2003, the trial court upheld the preliminary objection on the ground that the action was statute barred and that the contract was a business between the Appellant and a Federal Government Agency which by Section 251 (1)(p)(q)(r) is justiciable only at the Federal High Court since such transaction comes within the term administration or management and control of a Federal Government Agency. The appellant's suit was accordingly struck out.

The appellant's appeal to the Court of Appeal was unsuccessful as same was dismissed on the 30th of November, 2006.

The appellant's notice of appeal before this court, dated 4th January, 2007 and filed on the 5th January, 2007 contains two grounds of appeal which I reproduce hereunder without their particulars thus:

(1) The Court of Appeal erred in law when it held that the suit of the appellant was statute barred under the Public Officers Protection Act.

(2) The Court of Appeal erred in law by upholding the decision of the High Court that once a Federal Agency is a party in any suit or matter the State High Court lacks jurisdiction.

Parties filed and exchanged briefs of argument. The appellant's brief of argument settled by **Emeka Mozie Esq** of counsel to the appellant is dated 6th March, 2008 and filed on the 7th of March, 2008, but deemed filed on the 12th of November, 2008. At page 3 of the said brief of argument, two issues were formulated for determination of this appeal, and they read as follows:

A

1. **Whether Section 251(1)(p)(q)(r) of the Constitution of the Federal Republic of Nigeria 1999 vests jurisdiction in the Federal High Court in matters pertaining to recovery of debt owed by the Federal**

B

Government or any of its agencies under a simple contract? And or whether the decision in NEPA vs. Edegbero & Ors (2002) 18 NWLR (Pt. 798) 79 is to the effect that once a Federal Government Agency is

C

a party in a suit, the State High Court has no jurisdiction to entertain the suit.

2. **Whether the Respondent can validly for the first time without leave of court raise on appeal the**

D

Public Officers Protection Act? And or whether the Public Officers Protection Act applies to breaches of contract.

E

The respondent's brief of argument settled by **Chief Dr. Ejike Ume SAN,** learned counsel for the respondent is dated 6th March, 2009 and filed on the 19th March, 2009, but deemed filed on the 16th October, 2017. At page 2 of the brief aforesaid, four issues have been submitted for determination of

F

this appeal. They read thus:

(1) **Whether the Court of Appeal can depart or refuse to follow the decision of the Supreme Court of Nigeria**

G

in NEPA vs. EDEGBERO (supra).

(2) **Whether the Court of Appeal was right in upholding the decision of the trial court and dismissing the**

H

Appellant's appeal.

(3) **Whether the respondent can validly raise for the first time on appeal the issue of jurisdiction at the**

I

Court of Appeal to the effect that the action is incompetent in that it is statute barred under the

Public Officers Protection Act Cap 379 Laws of the Federal Republic of Nigeria, 1990 without leave of court.

(4) Whether the respondent comes within the class or classes of person(s) or body(s) that can be protected by the Public Officers Protection Act.

Learned counsel for the appellant filed a reply brief on the 24th March, 2009.

The appellant filed two grounds of appeal and formulated two issues for determination of this appeal. It is the aggrieved party against whom the High Court and the Court of Appeal gave judgment against. The respondent who is not bereaved seems to be crying more by formulating four issues from the two grounds of appeal. This court has in a number of decided cases deprecated the rather increasing habit of some counsel who appear before it of showing very little care in the way and manner papers relating to appeals are drafted. The pronouncement of this court on proliferation of issues are made to guide counsel in the way and manner issues for determination of appeal are to be drafted. Several years after the introduction of brief writing, some counsel have shown little interest in learning from the decisions of the courts how issues are to be drafted. No wonder therefore, learned counsel for the **r**espondent found it difficult to tie the four issues to the grounds of appeal. The rule is that an issue can be tied to several grounds of appeal, but a ground of appeal cannot support more than one issue. Where issues framed by either Appellant or Respondent are in excess of the grounds of appeal, the issues in excess of the grounds of appeal which do not seem to arise from those grounds of appeal are liable to be struck out. See **Ayangade vs. O.A.U T.H, C.M.B (2001) 7 NWLR (Pt. 711) 187; Dung vs. Gyang (1994) 8 NWLR (Pt. 362) 315; Labiyi vs. Anretiola (1992) 8 NWLR (Pt. 258) 139.**

Having read the materials available to me in this appeal, I am of the firm view that the issues submitted by learned counsel for the appellant can conveniently determine this appeal. I therefore adopt the two issues for that purpose. In doing so, I will consider the two issues in the order in which

A they are argued.

On issue one, learned counsel for the appellant submitted that Section 251 (1)(p)(q)(r) of the 1999 Constitution of the Federal Republic of Nigeria does not vest jurisdiction in the Federal High Court in matters
B pertaining to recovery of debt under a contract. Learned counsel urged this court to give the words of section 251 (1)(p)(q)(r) their ordinary meaning and not to resort to any external aid. In aid learned counsel cited **Texaco Panama Incorporation vs. Shell Petroleum Development Co. Nig Ltd**
C **(2002) 2 SCNJ 102 at 112 – 113; Justice Kalu Anya & Ors vs. Iyayi (1993) 9 SCNJ (Pt 1) 53; Dayo Omosowan & 2 Ors vs. Fred Chiedozie (1998) 9 NWLR (Pt. 56) 472.**

In a further argument, learned counsel submitted that the jurisdiction
D of a court is determined by the plaintiff's claim as endorsed in the Writ of Summons. In aid, learned counsel cited **Tolarin & Ors vs. Akinnola (1994) 4 SCNJ 30; Federal Mortgage Bank of Nigeria vs. Nigeria Deposit Insurance Co. (2001) KLR (Pt. 77) 331; Tukur vs. Government**
E **of Gongola State (1989) 4 NWLR (Pt. 117) 517; Onuorah vs. KRPC Ltd (2005) 21 NSCQR 130 (2005) 6 NWLR (Pt. 921) 393 A. G Abia State vs. A. G Federation (2003) 4 NWLR (Pt. 809) 138.**

Learned counsel urged this court to ignore the authority in **NEPA vs.**
F **Edegbero (2002) 18 NWLR (Pt. 798) 79** because it is not applicable in the instant case. Finally on this issue learned counsel urged this court to allow the appeal.

Learned counsel for the respondent submitted on this issue that the
G lower court was right in upholding the decision of the trial court, because the two courts below were bound by the decision of this court in **NEPA vs. Edegbero (supra).** In a further argument, learned counsel urged this court not to disturb the concurrent findings of both the High Court and the Court
H of Appeal unless it is shown that there is miscarriage of justice. In aid learned counsel cited the authorities in **David Adganmonyi vs. A-G of Bendel State (1987) 1 NWLR (Pt. 47) 26; Chinwendu vs. Mbamali (1980) 3 SC 31.**

I In resolving the contentions by the respective parties, the lower court at page 51 of the printed record of this appeal held:

"To my mind the relief being sought by the Appellant against the Respondent are for claims affecting the administrative decision of the Federal Government Agency. The Supreme Court has put the exclusiveness in respect of the jurisdiction of the Federal High Court in matters touching and concerning Federal Agency, which the Respondent is, in the case of Nepa vs. Edegbero (supra) beyond controversy at page 97 E – F…"

The decision in the case of **NEPA vs. Edegbero (supra)** which was heavily relied on by the lower court was based on Section 251 (1)(p)(q)(r) of the 1999 Constitution of the Federal Republic of Nigeria. Both the appellant and the respondent strongly relied on the provisions of Section 251 (1)(p)(q)(r) of the Constitution in putting forward their respective cases. It is therefore relevant to reproduce the provisions of the aforementioned section of the constitution for clarity as follows:

"251 (1) notwithstanding anything to the contrary, contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.

(a) the administration or the management and control of the Federal Government or any of its agencies;

(b) subject to the provisions of this constitution, in so far as it affects the Federal Government or any of its agencies.

(c) any action or proceeding for a declaration or injunction, affecting the validity of any executive or administrative action or decision

by the Federal Government or any of its agencies…."

At page 97 paragraphs E F of the case of **NEPA vs. Edegbero (supra)** this court per Ogundare said:

> ***"From what I have said earlier in this judgment, the aim of paragraphs (q) (r) and (s) of subsection 230 was to vest exclusive jurisdiction in the Federal High Court in matters in which the*** **Federal Government or any of its agents was a party. A state High Court would no longer have jurisdiction in such matters notwithstanding the nature of the claim in the action."**

It is to be noted that Section 230 of the 1979 Constitution is the same as Section 251 of the 1999 Constitution.

In the case of NEPA vs. EDEGBERO (supra), the respondents were employees of the appellant (NEPA). Following an industrial action embarked upon by the employees of the appellant including the respondents in August, 1994 the respondents' appointments were by a letter dated 10/8/1994 terminated. The respondents instituted various suits claiming in each case as follows:

1. **A declaration that the purported termination of the respondents' appointment was irregular, wrongly null and void and of no effect whatsoever.**

2. **An order reinstating the respondents and payment of their salaries and all their entitlements.**

3. **A perpetual injunction restraining the appellant from harassing, intimidating and violation of the respondents' right.**

The various actions initiated by the respondents were consolidated. It was contended at the High Court that the State High Court had no jurisdiction since NEPA is an agent of the Federal Government. Reference was made to Section 230 (1)(q)(r) and (s) of the 1979 Constitution, which is in pari material with Section 251 (1)(q)(r) and (s) of the 1999 Constitution, as amended by Decree 107 of 1993. High Court overruled the objection on jurisdiction. Appeal to the Court of Appeal was dismissed. On a further appeal to this court, it was held:

> **"It is not in dispute that the defendant NEPA is a Federal Government Agency. The two courts below made a finding of fact to this effect and this has not been challenged by the plaintiffs. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant. The decision is for declaration and an injunction and the principal purpose of it is to nullify the decision of the defendant terminating the appointment of the plaintiffs and others. In the light of all these, therefore, the action on hand came squarely within the provision of Section 230 (1)(q)(r) and (s) of the 1979 Constitution."**

The claims of the respondents in **NEPA vs. EDEGBERO** were clearly meant to interfere with the decision of the Appellant to dismiss the respondents declaration and injunction which clearly fall under Section 251 (1)(p)(q) and (r) of the 1999 Constitution and are therefore justiciable only at the Federal High Court. This lower court misunderstood the pronouncement in **NEPA vs. EDEGBERO** (supra) at page 97 paragraph F, where this court said:

> **"A state High Court would no longer have jurisdiction in such matters notwithstanding the nature of the claim in the action."**

A I think that pronouncement concerned such matters as the ones claimed by the respondents and nothing more. In the instant case the Appellant's claim has nothing to do with administration or the management and control of the University of Nigeria, an agent of the Federal Government. It was a claim
B for debt arising from a simple contract which has been held in a myriad of decisions that the Federal High Court has no jurisdiction to entertain. In **Onuorah vs. KRPC (2005) 6 NWLR (Pt. 921) 393,** the appellant entered into a contract to purchase specified number of empty tins from the
C respondent at an agreed amount which he paid to the respondent. Before delivery was made to the appellant the respondent increased the price of the tins and asked the appellant to pay the difference between the old and the new prices. The appellant refused and insisted that the respondent was
D bound to deliver to him the quantity of the empty tins he had ordered at the price agreed by the parties. Consequently, the appellant filed an action at the Federal High Court in which he claimed:

E **(a) An order of court declaring the purported price increase as not affecting the plaintiff who paid for his own empty tins much earlier than the commencement date of the price increase.**

F **(b) An order of specific performance directing the defendant to supply the plaintiff the remaining empty tins not later than 30 days from the date of judgment.**

G **(c) N1,000,000 general damages.**

The Federal High Court granted the first and 2nd reliefs. The respondent
H appealed and raised the issue of jurisdiction for the first time at the Court of Appeal. The Court of Appeal allowed the appeal on the ground that the Federal High Court had no jurisdiction and the suit was struck out. At the Supreme Court it was argued that the respondent being a subsidiary of
I NNPC which in turn is an agent of the Federal Government, the trial

Federal High Court had jurisdiction to entertain the appellant's claims. On the other hand, it was contended on behalf of the Respondent that the trial court lacked jurisdiction to entertain the appellant's claims because it was based on simple contract and that only a state High Court has jurisdiction to hear and determine the suit.

This court, per Akintan JSC held at page 405 paragraphs A – D as follows:

> **"A close examination of the additional jurisdiction conferred on the Federal High Court in the section and by the 1979 Constitution clearly shows that the court was not conferred with jurisdiction to entertain claims founded on contract as in the instant case. In other words, Section 230(1) provides a limitation to the general and all-embracing jurisdiction of the State High Court because the items listed under the said Section 230(1) can only be determined exclusively by the Federal High Court. All other items not included in the list would therefore still be within the jurisdiction of the State High Court. In the instant case, since disputes founded on contracts are not among those included in the additional jurisdiction conferred on the Federal High Court that court therefore had no jurisdiction to entertain the appellant's claim. The lower court therefore acted rightly in its decision that the Federal High Court lacked jurisdiction to entertain the claim." See Seven-Up Bottling Co. Ltd vs. Abiola & Sons Bottling Co. Ltd (2010) 13 NWLR (Pt.730) 469; Trade Bank Plc vs. Benilux (Nig) Ltd (2003) 9 NWLR (Pt. 825) 416 at 430 & 431.**

In **Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33 at 52**, this court in a lead judgment delivered by Onnoghen JSC (as he then was) held:

"The provision of Section 251 of the Constitution of the Federal Republic of Nigeria, 1999, hereinafter called the 1999 Constitution are very clear and unambiguous. It is the section that confers jurisdiction on the Federal High Court, which jurisdiction clearly does not include dealing with any case of simple contract or damages for negligence as envisaged by the action before the trial court."

The law is very well settled beyond any argument that the jurisdiction of a court is determined by the nature of the claim before it. See **Tukur Govt of Gongola State (1989) 4 NWLR (Pt. 17) 517**. The Federal High Court is a special court with exclusive jurisdiction limited to those items specified under Section 251 of the 1999 Constitution of the Federal Republic of Nigeria and any other jurisdiction as may be conferred on it by an Act of the National Assembly. A court must not while interpreting the provisions of Section 251 of the Constitution, and any other statutes whose wordings are very clear and unambiguous import into them something which is not contained in them. Section 251, has clearly made provisions for action against Federal Government or any of its agency in any other court in the Proviso after sub-paragraph (s) which reads thus:

" Provided that nothing in the provisions of paragraphs (p)(q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages injunction or specific performance where the action is based on any enactment, law or equity."

In the instant case, the appellant's claim at the High Court is for recovery of debt which arose from simple contract. The Enugu State High Court has jurisdiction to hear and determine the suit. The Enugu State High Court was wrong when it declined jurisdiction to hear and determine the case. The judgment in **Onuorah vs. KRPC** was delivered on the 11th of February

2005 and was cited in the appellant's brief of argument before the Court of Appeal. Throughout the judgment of the Court of Appeal, no reference was made to this very important authority. No wonder therefore the lower court acting on the principle of stare decisis dwelt so much on **NEPA vs. EDEGBERO (supra)** which was an earlier decision that was decided on a claim other than the claim for recovery of debt arising from simple contractual relationship.

Under the doctrine of stare decisis, lower courts are bound to follow the decisions of high courts, irrespective of whether those decisions are wrong. The doctrine is meant to achieve certainty and stability in the decision of the courts. However in doing so, the lower courts must not rely on previous decision that have been overruled. The Supreme Court is the final court in the land. The justices of the court are not super human beings that are infallible. So where they err, they take liberty to correct. In the process some of the courts' decisions are overruled. It is on this premise that the lower courts are enjoined to follow latter or latest decisions of this court. Even if the decisions in **NEPA vs. EDEGBERO** (supra) and **Onourah vs. KRPC** (supra) were founded on the same facts, the decision in **Onuorah vs. KRPC** (supra) was latter in time and the lower court was bound to follow it. Its failure to do so found no justification in the doctrine of stare decisis, and I so hold.

In **Obiuweubi vs. CBN (2011) 7 NWLR (Pt. 1247) 465 at 501 paras C – D**, this court held:

> **"S.P.D.C Nig Ltd vs. Isaiah (supra) was decided in 2001 while O.H.M.B vs. Garba (supra); Olutola vs Unillorin (supra); Osakwe vs. F.C.E (supra) were decided in 2002, 2004 and 2010. The position of stare decisis is not for counsel to follow the decision he likes, but to follow the decision that is more recent."**

For all I have said the first issue is resolved in favour of the appellant.

The second issue for determination is whether the respondent can validly for the first time without leave of court raise on appeal the Public

Officers protection Act. And or whether the Public Officers Protection Act applies to breaches of contract.

The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court. But where the question sought to be raised involves substantial points of law, substantive or procedural and it is plain that no further evidence could be adduced in its support, the court will allow the question to be raised and the points taken in order to prevent an obvious miscarriage of justice. See **Apane vs. Barclays Bank of Nigeria & Anor (1977) 11 NSCC 29; Shonekan vs. Smith (1964) ALL NLR 168 at 173.** The issue of whether or not an action is filed within the time stipulated by law goes to the jurisdiction of the court. Any omission to institute proceedings within the statutory time limit deprives the court of jurisdiction to hear and determine the matter. Jurisdiction being the soul of adjudication, can be raised at any stage of proceedings and even at the Supreme Court for the first time. In **Isaac Gaji & Ors vs. Emmanuel D. Paye (2003) 8 NWLR (Pt. 823) 583 at 599 – 600 paras H – A,** where this court held:

> **"The general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts whether that issue pertains to land or otherwise leave to file and argue the issue must be had and obtained first. But where the point or issue sought to be raised relates to the issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time". See Obiakor vs. The State (2002) 10 NWLR (Pt. 776) 612 at 626; UTB Ltd & Ors vs. Dolmetsch Pharmacy Nig Ltd (2007) 6 SC (Pt. 1) 1.**

The lower court was therefore not wrong when it allowed the Respondent to raise for the first time on appeal the issue of Public Protection Act. However I entirely agree with learned counsel for the Appellant that the

Public Officers Protection Act does not apply to cases of breach of contract for work done or recovery or debt. This court in **F.G.N vs. Zebra Energy Ltd (2002) 18 NWLR (Pt. 798) 162 at 196** held:

> **"The Public Officer Protection Act was not intended by the legislature to apply to contracts. The law does not apply in cases of recovery of land, breaches of contract or for claims for work and labour done." See N.P.A vs Construction (1974) 1 ALL NLR (Pt. 11) 463; Soule vs L.E.D.B (1965) L.L.R 118. I entirely agree with the previous views of my brothers.**

For the reasons I have set out hereinabove, this issue shall be, and it is hereby resolved in favour of the appellant.

This appeal is against the concurrent findings of the High Court and the Court of Appeal. The attitude of this court is that it will not interfere with the concurrent findings of the High Court and the Court of Appeal unless there are special and exceptional reasons that warrant such interference. Such reasons could be that the findings of the two lower courts are either not supported by evidence or that the courts have drown wrong conclusion from accepted or proved facts and by such conduct, their conclusion has led to a miscarriage of justice. In the instant case, there are sufficient reasons for interference by this court based on the resolution of the two issues submitted by the appellant for determination of this appeal. Having resolved the two issues in favour of the appellant, this appeal shall be and it is hereby allowed. The ruling of the trial court in which the respondent's preliminary objection was upheld and the judgment of the lower court affirming that ruling are hereby set aside and quashed.

The reliefs sought from this court by the Appellant is so clear. It reads as follows:

> **"That the judgment of the Court of Appeal be set aside and the appellant's suit relisted for hearing at the High Court Nsukka, which has jurisdiction in the matter."**

Having set aside the judgment of the lower court, as sought by the Appellant, this case shall be and it is hereby remitted to the Chief Judge of Enugu State High Court to be assigned to Nsukka Division of the said High Court for trial.

There shall be costs of prosecuting this appeal which I assess at N300,000 in favour of the Appellant and against the respondent.

Paul Adamu Galinje
Justice, Supreme Court

I. T. MHUHAMMAD, (JSC): I read in advance the judgment of my learned brother, Galinje, JSC, just delivered. I agree with him in allowing the appeal. I, too, allow the appeal herein. I abide by consequential orders made in the lead judgment.

Ibrahim Tanko Muhammad,
Justice, Supreme Court.

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother **Paul Galinje, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is meritorious and should be allowed. I too will allow it.

Appeal allowed.

I abide by the consequential orders in the lead judgment including the order on costs.

Olu Ariwoola
Justice, Supreme Court

BAYANG AKAAHS (JSC): My learned brother, Galinje JSC, made available to me his judgment, a preview of which I read before now. I am in total agreement with him that the appeal has merit and should be allowed.

The case between the parties was a simple contract for which part payment was made. The respondent for no reason whatsoever refused to pay the balance of the contract sum. No issue of administration or management and control of the Federal Government or any of its agencies is involved in this case even though the respondent is an agency of the

Federal Government. In **NEPA vs. Edegbero (2002) 18 NWLR (Pt. 798) 79**, one of the reliefs which the respondent sought was for declaration and injunction which falls within the express provision of section 251(1)(r) 1979 Constitution of the Federal Republic of Nigeria (as amended) which provides:

> **"251(1) Notwithstanding anything to the contrary, contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.**
>
> **(a) any action or proceeding for a declaration or injunction, affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies ……".**

No document is being sought to be interpreted in this case and so this case is distinguishable from that of **NEPA vs. Edegbero** (supra).

It is for this reason and the more elaborate reasons contained in the judgment of my learned brother Galinje JSC that I allowed the appeal. I abide by the order on costs made in the leading judgment.

K. B. Akaahs
Justice, Supreme Court

ADAMU AUGIE, (JSC): I had a preview of the lead judgment that was just delivered by my learned brother, Galinje, JSC, and I agree with him that the reliefs sought by the Appellant from this Court must be granted.

There are, indeed, sufficient reasons to interfere with the concurrent findings of the two lower Courts. I allow the Appeal, and abide by the consequential Orders in the lead Judgment, including the order as to costs.

Amina Adamu Augie,
Justice, Supreme Court

RUTH ADEHWE AWETO
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 584/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Brief writing – The role of a reply brief.

CONSTITUTIONAL LAW: Attorney-General of the Federation – Power to initiate criminal proceedings under Corrupt Practices and other Related Offences Act 2000 – S.26(2) thereof – Relevant considerations.

COURT: Federal High Court – Criminal jurisdiction – Whether has exclusive criminal jurisdiction in respect of the revenue of the Federal Government.

COURT: Jurisdiction – State High Court – Whether can hear an offence under Corrupt Practices and other Related Offences Act 2000 – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Burden of proof Where appellant

admitted facts for which she was charged – Whether prosecution obliged to prove such facts – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Ingredients of offence – S.17(1)(c) of Corrupt Practices and other Related offences Act 2000 – What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: Proof – Intent – S.17(1)(c) of Corrupt Practices and other Related Offences Act 2000 – How discharged.

CRIMINAL LAW: Charge under S.17(1)(c) of Corrupt Practices and other Related Offences Act – Purport.

STATUTE: Interpretation S.174 of the Constitution of Federal Republic of Nigeria 1999 – Scope and Significance.

STATUTE: Interpretation – S.251(3) of the Constitution of Federal Republic of Nigeria 1999 – Scope and Significance.

WORDS AND PHRASES: Intent – Meaning

Issues for Determination

(a) Whether or not the High Court of Oyo State had the jurisdiction to try the appellant for the offences charged under the Corrupt Practices and Other Related Offences Act 2000 having regard to the provisions of Section 251(1)(p) and 251 (3) of the Constitution of the Federal Republic of Nigeria (as amended).

(b) Whether the prosecution had proved corrupt intent as an ingredient of the offence created under the provisions of Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act 2000 to ground a conviction.

Facts of the Matter

The appellant herein and one **Mr. Adekanye Komolafe** were provost and bursar respectively of Federal Cooperative College, Ibadan. They were arraigned before the Oyo State High Court, Ibadan charged with offences bordering on contravention of Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act, 2000. During the trial the prosecution called five witnesses and tendered several documents in evidence. The appellant and her co-accused testified in their defence and called additional four witnesses.

At the end of the trial and in a reserved and considered judgment, the appellant and her co-accused were each convicted under counts 5,6,7 and 8 and sentenced to one year imprisonment on each count. The sentences were ordered to run concurrently.

The appellant was dissatisfied with the judgment of the trial court. Being aggrieved, she appealed to the Court of Appeal, Ibadan, where her appeal was dismissed. She has now brought this appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The Federal High Court does not have exclusive criminal jurisdiction in respect of the revenue of the Federal Government*
   It is true that the Federal Cooperative College, Ibadan is an agency of the Federal Government. The exclusive jurisdiction donated to the Federal High Court is in respect of civil causes and matters relating to those items set out in subsection (1)(a-s) of section 251 of the constitution. Section 251(3) of the same constitution is very clear. It provides as follows:

   > **"251 (3)The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section."**

   The word Exclusive is clearly absent in Section 251(3) of the 1999 Constitution. I therefore agree with the learned counsel for the

respondent where he stated in argument that if the framers of the constitution had intended that the Federal High Court should have exclusive jurisdiction in criminal matters relating to the revenue of the Federal Government of Nigeria, they would have said so in clear words. *(P 247 Paras B – F).*

2. *Principles in A-G Ondo State vs. A.G Federation*

In the case of Attorney General of Ondo State vs. The Attorney General of the Federation, the Attorney General of Ondo State, by an originating summons filed at the Supreme Court, asked for among other reliefs the following:

1. **A determination of the question whether or not the Attorney-General of the Federation or any person authorized by him can lawfully initiate legal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the corrupt practices and other related offences Act 2000.**

2. **A declaration that the Corrupt Practices and Other Related Offence Act 2000 is not in force as law in Ondo State.**

3. **A determination that it is not lawful for the Attorney-General of the Federation or any person authorized by him to initiate legal proceedings in any court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000.**

The full court of this court after hearing the parties came to the conclusion that, by virtue of Section 174(1) and 286 (1)(b) of the 1999 Constitution, the Attorney-General of the Federation or any person

authorized by the Independent Corrupt Practices Commission (ICPC) can lawfully initiate or authorize the initiation of criminal proceedings in any court other than a court martial in any state of the Federation in respect of offences created by the Corrupt Practices and Other Related Offences Act 2000. At page 419 paragraphs A-B, their Lordships had this to say:

> **"The Attorney-General of the Federation derives his powers under Section 174 of the Constitution as an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred…. nor can he be prevented from exercising his functions on the grounds that his jurisdiction does not extend to any particular state in Nigeria. Section 174 of the constitution does not impose any such limitation." See the State vs. Illorin (1983) 1 SCNLR 94.** *(Pp 247 – 248 Paras F – H).*

3. *The A-G of the Federation is deemed to initiate proceedings under the ICPC Act*
Section 6 of the Corrupt Practices and Other Related Offences Act says among other things that it shall be the duty of the ICPC to prosecute offenders. However, Section 26(2) of the same Act provides inter alia that every prosecution for an offence under the Act shall be deemed to be initiated by the Attorney-General of the Federation. It follows therefore that any criminal case initiated by the ICPC, is infact initiated by the Attorney-General of the Federation. *(Pp 248 – 249 Paras I – B).*

4. *A State High Court has jurisdiction to hear any offence under Corrupt Practices and Other Related Offences Act 2000*
It will appear that the learned counsel for the appellant has either failed to understand the decision in Attorney-General Ondo State vs. Attorney-General Federation (supra) or he has deliberately brought this issue to test the patience of this court. If learned counsel wants the court to depart from its decision, he has not properly placed his wishes before this court. For this court has clearly stated that the

State High courts and the FCT High Court which are designated by the Chief Judges under Section 61 (3) of the Act for hearing of cases bordering on offences created by the Corrupt Practices and Other Related Offences Act, have the requisite jurisdiction to hear such cases. In the instant case the High Court of Oyo State has jurisdiction to hear this case. The lower court was therefore right to so hold. *(P 249 Paras B – E).*

5. *Facts admitted require no further proof*
By the appellant's defence as reproduced above, the appellant admitted that the 41 causal staff which she represented in the budget were yet to be converted to permanent staff as at the time the budget proposals were submitted to the Federal Government. She also admitted that she was aware that Exhibit 83, the handover note did not disclose the true status of the 41 casual workers, and that is why they were subjected to interview with a view of converting them to permanent staff. Finally she admitted that the difference between the actual money paid to the 41 causal staff and the money received from the Federal Government was used to offset outstanding salaries of other staff, which is not the purpose for which the money was requested for in the budget. All these admissions were not disclosed to the Federal Government when the budget proposals were submitted.

The facts admitted by the appellant represent the allegation against her for which she was arraigned before the trial court. The law is settled beyond any argument that admitted facts require no further proof. See NNPC vs. Klifco (Nig) Ltd (2011) 10 NWLR (Pt. 1255) 209; Ikare Community Bank vs. Ademuwagun (2005) 7 NWLR (Pt. 924) 275; Ogolo vs. Fubura (2003) 11 NWLR (Pt 831) 231; Adeleke vs. Aserifa (1986) 3 NWLR (Pt 30) 575; Nnonye vs. Anyichie (1989) 2 NWLR (Pt 101) 110. *(Pp 250 – 251 Paras G – C).*

6. *Element of the offence under S.17(1)(c) of Corrupt Practices and Other Related Offences Act 2000*
From the provision of Section 17 (i)(c) which I have reproduced hereinabove, for the prosecution to succeed, it must prove that the accused knowingly deceived his principal or intended to deceive his

principal by presenting a document in which the principal is interested in and that the document contains false material. A man's intention can only be established by circumstances and facts leading to the commission of the crime for which he is charged. It is very difficult to know what a man intends without resorting to chains of events that culminated into the acts complained of. It is only God and perhaps the devil whose powers are beyond human comprehension that will know a man's intention. *(P 252 Paras A–C).*

7. *The definition of the word 'Intent'*
Intent is defined in Wager vs. Pro C.A 603 F, 2d 1005 as a mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. Also in State vs Gantt 26 NC, App. 554 intent is defined as a state of mind existing at the time a person commits an offence and may be shown by act, circumstances and inferences deducible therefrom. See State vs. Evans 219 Kan 548 P. 2d 772, 777.
(P 252 Paras C – E).

Per Galinje (JSC) :

> **"From the facts of this case the appellant and the bursar of the college knew that the 41 causal staff were not permanent staff. This is clearly admitted by the appellant who said because of that knowledge, they interviewed the 41 causal staff with a view to converting them to permanent staff.**
>
> **I therefore do not see the rationale behind learned counsel's argument that the prosecution failed to prove that the appellant had the necessary intention to commit the offence for which she was charged. The Court of Appeal was right when it affirmed the decision of the trial court".** *(P 252 Paras E – G).*

8. *The purport of S.17(1)(c) of Corrupt Practices and Other Related Offences Act 2000*
Section 17 (i)(c) does not suggest that money lost as a result of the receipt or misrepresentation must be recovered from an accused before she could be found guilty of the offence. Mere deception and presentation of false and erroneous or defective material by a person with intent to mislead his principal or any other person is enough. The omission of the word corruptly from the reproduction and consideration of the provision of Section 17 (i))(c) by the Court of Appeal has not affected the quality of its judgment.
(P 252 Paras G – I).

9. *Role or function of a reply brief*
I have also read through the reply brief and I have found that it contains argument canvassed in the appellant's brief of argument. The essence of a reply brief is not to reopen argument already canvassed. It is to reply to new issues that have arisen in the respondent's brief of argument. Learned counsel for the appellant has not convinced me to overturn the decision of the lower court on this issue, which I resolve against the appellant.
(Pp 252 – 253 Paras I – B).

10. *Jurisdiction of State High Court*
Per Odili (JSC):

> **"On the question whether there is a jurisdiction in the High Court of Oyo State to try the appellant for offences charged under the Corrupt Practices and Other Related Offences Act 2000 having regard to the provisions of Section 251(1)(P) and (3) CFRN, this court is mindful of Attorney General of Ondo State vs. Attorney General of the Federation & 35 Ors (2002) 6 SC (Pt.1) wherein the call to invalidate the Corrupt Practices and Other Related Offences Act 2000 failed. This court applying the blue pencil rule, struck down sections 26(3) and 35 and declared the rest of the Act unaffected and valid. This court per Uwais CJN held**

that section 26(3) and 35 of Act were unconstitutional and therefore null and void. See also Doherty vs. Balewa 1963) 2 SC NLR 256; A.G. Abia State and 36 Ors vs. A.G. Federation (2002) 3 SC 106 at 199-200 per Ogundare JSC.

It follows that there is nothing necessitating a review of the decision of A.G. Ondon State vs. A.G. Federation (supra) as cited above. That being the case, the respondent herein as prosecution was well situated under the said ICPC Act 2000 to initiate the charge, proceed and concluded the prosecution of the appellant. In this regard I shall quote the relevant sections thereof thus:

Section 61(3) of the ICPC Act provides:

> **"The Chief Judge of the State or the Federal Capital Territory, Abuja shall by order under his hand designate a court or judge or such number of courts or judges as he shall deem appropriate to hear and determine all cases of bribery, corruption, fraud or other related offences arising under this Act or any other laws prohibiting fraud, bribery or corruption; a court or Judge so designated shall not, while being so designated, hear or determine any other cases provided that all cases of fraud, bribery or corruption pending in any court before the coming into effect of this Act shall continue to be heard and determine by that court".**
> *(Pp 257 – 258 Paras G – G).*

11. *Federal High Court does not have exclusive criminal jurisdiction*
Taking the provisions of the ICPC Act 2000 and co-relating them with section 251 of the 1999 Constitution (as amended), what comes clear is that the Federal High Court does not have the exclusive jurisdiction to deal with the matters on the ICPC Act, rather it

shares the jurisdiction with the State High Court or the High Court of FCT and this as explained in section 251 (3) of the 1999 CFRN. For effect I shall quote the section and related subsections.
(P 259 Paras C – E).

12. *Proper interpretation*
In this case in hand the two courts below properly interpreted the law as they approached that duty of interpretation having in focus that the terms are plain without ambiguity and so nothing else was asked for but to accord the meaning of the words upon the ordinary and surrounding circumstance.

In that way the interpretation was made in order to uphold the purpose expected for the society at large and intendment of the law makers.See Fawehinmi vs. Inspector General of Police (2002) 7 NWLR (Pt. 767) 31-32 per Uwaifo JSC. *(P 260 Paras C – D).*

13. *Where an alleged error has not been shown to occasion a miscarriage of justice*
The appellant had made quite a fuss on the omission of the word 'corruptly' on the face of the charge which learned counsel had contended vitiated the proceedings as stipulated in the provisions of section 17(1)(c) of the ICPC Act.

This position now pushed forward by the appellant was not a matter in contention nor determination at the Court of Appeal and so this court can only keep within the limits of what was before the Court of Appeal except for when leave is sought for and granted to raise the new issue which did not happen herein. In the judgment at the trial court the word 'corruptly' was well stated when the section 17(1)(c) of the ICPC Act was referred to evaluating the evidence and arriving at the decision. That the court below made the omission in its consideration which can only be taken as a typographical error or omission which has not gone to the root of the matter before that court and no evidence of a miscarriage of justice has been occasioned. Again for emphasis, the appellant cannot at this stage claim to have been misled on what she faced at the trial court where the charge fully stated the infractions and the word 'corruptly' in place. *(P 260 Paras E – I).*

Per Odili (JSC)

Again to be said is that assuming the word 'corruptly' was omitted on the face of the charge at the trial stage, it would not derogate from the quantum of credible evidence adduced by the respondent in proving its case. This is because the mens rea of the offence was well deduced from the act of the appellant who knew that what she was doing was criminal as the inport of casual workers as permanent staff which was false pointed to the corrupt intent embedded in the entire transaction. The intent was easily deducible and was gleaned from the evidence adduced.

Indeed this is one of those occasions where the apex court is well advised to keep its peace and flow along with the concurrent findings of fact of the two courts below since there was nothing perverse or a finding not backed by evidence. I rely on Esangbedo vs. State (1998) 1 ACLR 109; Corporal Nicholas Okoh vs. Nigerian Army LER 2017 pages 109 at 115.
(P 261 Paras A – D).

14. Interpretation of S.251(3) CFRN 1999
Per K.B Aka'ahs

If the framers of the 1999 Constitution (as amended) had wanted to vest the Federal High Court with exclusive jurisdiction in criminal matters affecting the revenue of the Federal Government they would have stated so clearly in section 251(3) of the Constitution which states:

> **"251(3) The Federal High Court *shall also have* and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section" (Italics mine for emphasis.)**

By using the phrase *"shall also have"* implies sharing the jurisdiction with other courts; otherwise the subsection should have read: "The Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in criminal causes and matters-relating to the revenue of the Government of the Federation in which the said Government or any of its agencies is involved." In A-G Ondo State vs. A-G Federal (2002) 6 SC (Pt. 1) 1 (2002) 9 NWLR (Pt. 772) 222 a full panel of this court laid to rest the question whether State High Courts have jurisdiction to hear and determine criminal offences created by the National Assembly wherein it was held that:

> ***"The Attorney-General of the Federation derives his powers under section 174 of the Constituency as an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred nor can he be prevented from exercising his function on the ground that his jurisdiction does not extend to any particular State in Nigeria. Section 174 of the Constitution does not impose such limitation"* See: The State vs. Illorin (1983) 1 SC NLR 94. The decision in A.G. Ondo vs. A.G. Federation supra has debunked the argument by learned counsel for the appellant that since the conduct forming the basis of the charge against the appellant was in the performance of her duty as the Provost of the Federal Co-operative College, Ibadan, an agency of Federal**

Government, it is the Federal High Court that could validly try the offences alleged to have been committed by her. *(Pp 261 – 262 Paras F – G).*

Nigerian Cases Cited

Abia State and 36 Ors vs. A.G. Federation (2002) 3 SC 106
Adeleke vs. Asarifa (1986) 3 NWLR (Pt 30) 575;
Corporal Nicholas Okoh vs. Nigerian Army LER (2017) pages 109
Doherty vs. Balewa 1963) 2 SC NLR 256; A.G.
Esangbedo vs. State (1998) 1 ACLR 109;
Fawehinmi vs. Inspector General of Police (2002) 7 NWLR (Pt. 761) 31-32
Ikare Community Bank vs. Ademuwagun (2005) 7 NWLR (Pt. 924) 275;
In A-G Ondo State vs. A-G Federal (2002) 6 SC (Pt. 1) 1 (2002) 9 NWLR (Pt. 772) 222
NNPC vs. Klifco (Nig) Ltd (2011) 10 NWLR (Pt. 1255) 209;
Nonye vs. Anyichie (1989) 2 NWLR (Pt 101) 110
Ogolo vs. Fubara (2003) 11 NWLR (Pt 831) 231;
State vs Gantt 26 NC, App. 554
State vs. Evans 219 Kan 548 P. 2d 772, 777.
The State vs. Illorin (1983) 1 SC NLR 94.
Wager vs. Pro C.A 603 F, 2d 1005

Nigerian Statutes Cited

The Constitution of the Federal Republic of Nigeria (as amended). Section 251(1)(p) and 251 (3); Section 251(3); Section 174(1) and 286 (1)(b)
The Corrupt Practices and Other Related Offences Act, 2000 Section 17(1)(c)

Representation

MR. O. O. OGUNGBADE ESQ with Toyese Owoade; O.A. Adenipekun for the Appellant.

MR. GEORGE LAWAL ESQ with him is K.K Anabraba for the Respondent.

ADAMU GALINJE, (JSC) (Delivering the Lead Judgment): The appellant herein and one **Mr. Adekanye Komolafe** were provost and bursar respectively of Federal Cooperative College, Ibadan. They were arraigned before the Oyo State High Court, Ibadan charged with offences bordering on contravention of Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act, 2000. During the trial the prosecution called five witnesses and tendered several documents in evidence. The appellant and her co-accused testified in their defence and called additional four witnesses.

At the end of the trial and in a reserved and considered judgment, the appellant and her co-accused were each convicted under counts 5,6,7 and 8 and sentenced to one year imprisonment on each count. The sentences were ordered to run concurrently.

The appellant was dissatisfied with the judgment of the trial court. Being aggrieved, she appealed to the Court of Appeal, Ibadan, where her appeal was dismissed. She has now brought this appeal. Her amended notice of appeal dated 28th September, 2015 and filed on the same date contains nine grounds of appeal.

Parties filed and exchanged briefs of arguments. The appellant's brief of argument, settled by **Oluwasina Ogungbade Esq** of counsel to the appellant was filed on the 28th September, 2015. Learned counsel initially submitted three issues for determination of this appeal. However, when the appeal came up for hearing, learned counsel withdrew the first issue for determination of this appeal. The two issues left are hereunder reproduced as follows:

1. **Whether the High Court of Oyo State had the jurisdiction to try the appellant for the offences charged particular regard being had to the combined effects of the provisions of sections 251(1)(p) and 251(3) of the Constitution of the**

Federal Republic of Nigeria 1999 (as amended)?

2. **Whether in the absence of proof of a corrupt intent in the preparation of the budget proposals, the prosecution successfully discharged the burden of proof required for the conviction of the appellant under the provisions of Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act 2000.**

The respondent's brief of argument settled by **George Lawal Esq** of counsel was filed on the 24th October, 2017. Learned counsel formulated two issues for determination of this appeal. They read thus:

(a) **Whether or not the High Court of Oyo State had the jurisdiction to try the appellant for the offences charged under the Corrupt Practices and Other Related Offences Act 2000 having regard to the provisions of Section 251(1)(p) and 251 (3) of the Constitution of the Federal Republic of Nigeria (as amended).**

(b) **Whether the prosecution had proved corrupt intent as an ingredient of the offence created under the provisions of Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act 2000 to ground a conviction.**

Appellant filed a reply on 30th October, 2017. Before I delve into the submissions of learned counsel, I wish to set out in brief the facts that gave rise to this appeal, which are in my view simple and straight forward. The appellant herein was the provost of Federal Cooperative College Ibadan. Mr. Adekanye Komolafe was the bursar of the same college. The two of them prepared and submitted nominal rolls and budget proposals for the staff of the college for 2006, wherewith they presented 41 casual staff as

permanent staff. As a result of such presentation to the Federal Government, the sum of N7,041,861.15 was released every year as salaries and emoluments for the 41 causal staff, whereas the actual amount that was paid to the causal staff was N3,690,000.00 only.

In arguing the second issue, which is now the first issue, by virtue of the withdrawal of the first issue, learned counsel for the appellant submitted that Section 251(3) of the 1999 Constitution of the Federal Republic of Nigeria confers criminal jurisdiction on the Federal High Court in respect of matters over which it has exclusive jurisdiction under Section 251 (1) of the same constitution. According to the leaned counsel, one of the areas over which the Federal High Court has exclusive jurisdiction are matters involving the administration, management and control of the Federal Government and its agencies. It is the view of the learned counsel that the conduct forming the basis of the charge against the appellant was in the performance of her duty as the provost of the Federal Cooperative College, Ibadan, an agency of the Federal Government, as such only the Federal High Court could validly try the offences alleged to have been committed as reflected on the charge.

Section 251 (1)(a) and (p) of the 1999 Constitution provides as follows:

> **"251 (i) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:**
>
> **(a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government**

is a party;

(b) The administration or the management and control of the Federal Government or any or its agencies."

It is true that the Federal Cooperative College, Ibadan is an agency of the Federal Government. The exclusive jurisdiction donated to the Federal High Court is in respect of civil causes and matters relating to those items set out in subsection (1)(a-s) of Section 251 of the constitution. Section 251(3) of the same constitution is very clear. It provides as follows:

"251 (3) The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section."

The word **Exclusive** is clearly absent in Section 251(3) of the 1999 Constitution. I therefore agree with the learned counsel for the respondent where he stated in argument that if the framers of the constitution had intended that the Federal High Court should have exclusive jurisdiction in criminal matters relating to the revenue of the Federal Government of Nigeria, they would have said so in clear words.

In the case of **Attorney General of Ondo State vs. The Attorney General of the Federation,** the Attorney General of Ondo State, by an originating summons filed at the Supreme Court, asked for among other reliefs the following:

1. A determination of the question whether or not the Attorney-General of the Federation or any person authorized by him can lawfully initiate legal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the corrupt practices and

other related offences Act 2000.

2. A declaration that the corrupt practices and other related offence Act 2000 is not in force as law in Ondo State.

3. A determination that it is not lawful for the Attorney-General of the Federation or any person authorized by him to initiate legal proceedings in any court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the corrupt practices and other related offences Act, 2000.

The full court of this court after hearing the parties came to the conclusion that, by virtue of Section 174(1) and 286 (1)(b) of the 1999 Constitution, the Attorney-General of the Federation or any person authorized by the Independent Corrupt Practices Commission (ICPC) can lawfully initiate or authorize the initiation of criminal proceedings in any court other than a court martial in any state of the Federation in respect of offences created by the Corrupt Practices and Other Related Offences Act 2000. At page 419 paragraphs A-B, their Lordships had this to say:

> **"The Attorney-General of the Federation derives his powers under Section 174 of the Constitution as an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred…. nor can he be prevented from exercising his functions on the grounds that his jurisdiction does not extend to any particular state in Nigeria. Section 174 of the constitution does not impose any such limitation." See the State vs. Illorin (1983) 1 SCNLR 94.**

Section 6 of the corrupt practices and other related offences says among other things that it shall be the duty of the ICPC to prosecute offenders.

However, Section 26(2) of the same Act provides inter alia that every prosecution for an offence under the Act shall be deemed to be initiated by the Attorney-General of the Federation. It follows therefore that any criminal case initiated by the ICPC, is infact initiated by the Attorney-General of the Federation.

It will appear that the learned counsel for the appellant has either failed to understand the decision in Attorney-General Ondo State vs. Attorney-General Federation (supra) or he has deliberately brought this issue to test the patience of this court. If learned counsel wants the court to depart from its decision, he has not properly placed his wishes before this court. For this court has clearly stated that the State High courts and the FCT High Court which are designated by the Chief Judges under Section 61 (3) of the Act for hearing of cases bordering on offences created by the corrupt practices and other related offences Act, have the requisite jurisdiction to hear such cases. In the instant case the High Court of Oyo State has jurisdiction to hear this case. The lower court was therefore right to so hold. Issue one is therefore resolved against the appellant. The 9th ground of appeal upon which this issue was formulated is hereby dismissed.

The 3rd issue for determination, which is now the 2nd issue is whether in the absence of proof of a corrupt intent in the preparation of the budget proposals, the prosecution successfully discharged the burden of proof required for the conviction of the appellant under the provisions of Section 17(1)(c) of the Corrupt Practices and other related offences Act 2000? The appellant was accused of having made false representation in the budgetary proposals of the Federal Cooperative College, Ibadan for the year 2006 with the intention that her principal, the Federal Government of Nigeria would act on those false representations. Specifically the appellant was accused of presenting 41 causal staff of the Federal Cooperative College, Ibadan as permanent staff as a result of which the Federal Government released the sum of N7,041,816.15 as the benefits and emoluments of the said staff, when in reality they were as causal staff entitled to N3,690,000.00 only.

A The appellant's defence as reflected in the appellant's brief of argument are reproduced hereunder as follows:

> **(i) That the 41 causal staff had already been**
> B **interviewed by the respondent preparatory to their conversion to permanent staff and that the decision to include them as permanent staff was based upon the recommendation of the interview panel.**
>
> C
> **(ii) That prior to her assumption of office as the provost of the college, the said 41 causal staff had already been represented via Exhibit 83 (the handover note of her predecessor in office) to the respondent as**
> D **permanent staff.**
>
> **(iii) That the proposed conversion was delayed owing to policy of the government on employment.**
>
> E
> **(iv) There was a short fall of staff salary of over N9,000.000.00 million in 2004.**
>
> **(v) That the difference between the amount released by**
> F **the Federal Government as emolument of the causal staff and the amount actually paid to them was used to defray the short fall in staff salary from 2004.**

G By the appellant's defence as reproduced above, the appellant admitted that the 41 causal staff which she represented in the budget were yet to be converted to permanent staff as at the time the budget proposals were submitted to the Federal Government. She also admitted that she was H aware that **Exhibit 83,** the handover note did not disclose the true status of the 41 casual workers, and that is why they were subjected to interview with a view of converting them to permanent staff. Finally she admitted that the difference between the actual money paid to the 41 causal staff and the I money received from the Federal Government was used to offset outstanding salaries of other staff, which is not the purpose for which the

money was requested for in the budget. All these admissions were not disclosed to the Federal Government when the budget proposals were submitted.

The facts admitted by the appellant represent the allegation against her for which she was arraigned before the trial court. The law is settled beyond any argument that admitted facts require no further proof. See **NNPC vs. Klifco (Nig) Ltd (2011) 10 NWLR (Pt. 1255) 209; Ikare Community Bank vs. Ademuwagun (2005) 7 NWLR (Pt. 924) 275; Ogolo vs. Fubara (2003) 11 NWLR (Pt 831) 231; Adeleke vs. Asarifa (1986) 3 NWLR (Pt 30) 575; Nonye vs. Anyichie (1989) 2 NWLR (Pt 101) 110.**

Learned counsel for the appellant argued forcefully that the learned trial Judge failed to advert to the fact that the defences so enumerated negated any corrupt intention on the part of the appellant. According to the learned counsel, the Court of Appeal incorrectly held that the prosecution established the required mens rea for a conviction on the offence charged. In a further argument, learned counsel submitted that the lower court was wrong to have affirmed the conviction of the appellant when the evidence led before the trial court negated any corrupt intention.

Section 17(i)(c) of the Corrupt Practices and Other Related Offences Act 2000 provides as follows:

> **"17 (i) any person who corruptly**
> **(a) .....**
> **(b) .....**
> **(c) Knowingly gives to any agent, or being an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal or any other person, is guilty of an offence and shall on conviction be liable to five years imprisonment."**

From the provision of Section 17 (i)(c) which I have reproduced hereinabove, for the prosecution to succeed, it must prove that the accused knowingly deceived his principal or intended to deceive his principal by presenting a document in which the principal is interested in and that the document contains false material. A man's intention can only be established by circumstances and facts leading to the commission of the crime for which he is charged. It is very difficult to know what a man intends without resorting to chains of events that culminated into the acts complained of. It is only God and perhaps the devil whose powers are beyond human comprehension that will know a man's intention. Intent is defined in **Wager vs. Pro C.A 603 F, 2d 1005** as a mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. Also in **State vs. Gantt 26 NC, App. 554** intent is defined as a state of mind existing at the time a person commits an offence and may be shown by act, circumstances and inferences deducible therefrom. See **State vs. Evans 219 Kan 548 P. 2d 772, 777.** From the facts of this case the appellant and the bursar of the college knew that the 41 causal staff were not permanent staff. This is clearly admitted by the appellant who said because of that knowledge, they interviewed the 41 causal staff with a view to converting them to permanent staff.

I therefore do not see the rationale behind learned counsel's argument that the prosecution failed to prove that the appellant had the necessary intention to commit the offence for which she was charged. The Court of Appeal was right when it affirmed the decision of the trial court. Section 17 (i)(c) does not suggest that money lost as a result of the receipt or misrepresentation must be recovered from an accused before she could be found guilty of the offence. Mere deception and presentation of false and erroneous or defective material by a person with intent to mislead his principal or any other person is enough. The omission of the word **corruptly** from the reproduction and consideration of the provision of Section 17 (i))(c) by the Court of Appeal has not affected the quality of its judgment. I have also read through the reply brief and I have found that it contains argument canvassed in the appellant's brief of argument. The

essence of a reply brief is not to reopen argument already canvassed. It is to reply to new issues that have arisen in the respondent's brief of argument. Learned counsel for the appellant has not convinced me to overturn the decision of the lower court on this issue, which I resolve against the appellant.

Having resolved the two issues submitted for the determination of this appeal against the appellant, this appeal shall be and it is hereby dismissed.

The decision of the lower court is accordingly affirmed.

Paul Adamu Galinje
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Paul Adamu Galinje JSC and to register that support, I shall make some remarks.

This is an appeal against the judgment of Ibadan Division of the Court of Appeal or court below or lower court delivered on the 14th July, 2015 which affirmed the conviction and sentence of the appellant by the High Court of Oyo State for violations of provision of the corrupt Practices and Other Related Offences Act 2000. Dissatisfied with the said judgment of the court below the appellant has come before the Supreme Court of Appeal.

FACTS BRIEFLY STATED

The appellant's conviction was consequent upon an amended eight counts charge bordering on the violation of section 17(1) (c) of the Corrupt Practices and Other related Offences Act 2000 (hereinafter referred to as "The ICPC Act 2000"). The appellant was Provost of the Federal Cooperative College, Ibadan and she was charged alongside one Adekanye Komolafe who was the bursar of the said institution. They were essentially charged for misleading their principal, the Federal Government of Nigeria by claiming that some casual staff of the institution were permanent staff and monies were released to the school for payment of their emoluments as permanent staff in 2005 and 2006 when in fact they were paid as casual

staff. In proving its case the prosecution called five witnesses and tendered several exhibits, while the appellant called four witnesses.

At conclusion of trial, the appellant was convicted on counts 5, 6, 7 and 8 and sentenced to 1 year imprisonment on each count. The appellant was discharged and acquitted on counts 1, 2, 3 and 4. The appellant dissatisfied with that decision, lodged an appeal before the Ibadan Division of the Court of Appeal. The Court of Appeal after careful consideration found that the prosecution proved its case against the appellant and consequently affirmed the conviction and sentence imposed by the trial court. It is this decision of the Court of Appeal that the appellant has appealed to this honourable court.

On the 1st day of November 2017 date of hearing, learned counsel for the appellant adopted her brief of argument filed on 28th September, 2015 and deemed filed on 27th April, 2016 and a reply brief filed on the 30th October, 2017 and deemed filed on 1st November 2017. The appellant raised three issues but abandoned Issue 1 at the hearing which was struck out. The two extant issues therefore are:-

ISSUE TWO

Whether the High Court of Oyo State had jurisdiction to try the appellant for the offences charged particular regard being had to the combined effects of the provisions of Sections 251(1)(P) and 251(3) of the constitution of the Federal Republic of Nigeria 1999 (as amended)? (Ground 9).

ISSUES THREE

Whether in the absence of proof of a corrupt intent in the preparation of the budget proposals, the prosecution successfully discharged the burden of proof required for the conviction of the appellant under the provisions of Section 17(1) (c) of the Corrupt Practices and Other Related Offences Act 2000?

George Lawal, Chief Legal Officer of the ICPC adopted the respondent's brief of argument filed on 24th October, 2017 and deemed filed on 1st November, 2017. He crafted two issues for determination which are

as follows:

a. Whether or not the High Court of Oyo State had the jurisdiction to try the appellant for the offences charged under the Corrupt Practices and Other Related Offences Act 2000 having regard to the provisions of section 251(1)(P) and 251(3) of the Constitution of the Federal Republic of Nigeria (as amended).

b. Whether the prosecution had proved corrupt intent as an ingredient of the offence created under the provisions of section 17(1)(c) of the Corrupt Offences Act 2000 to ground a conviction.

I shall utilise the issues as crafted by the appellant for ease of reference.

ISSUES 2 & 3

These raises the question whether the Oyo State High Court has jurisdiction to try the appellant on the offences charged regard being had to the combined effect of section 251(1)(P) and (3) of the CFRN and if in the absence of proof of a corrupt intent the prosecution discharged the burden of proof required for the conviction of the appellant under Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act 2000.

Learned counsel for the appellant in advancing the argument for their position contended that the Oyo State High Court lacked the jurisdiction to try the appellant on the offence she was charged with and the Court of Appeal was wrong to affirm the decision convicting her as the jurisdiction is that of the Federal High Court sequel to section 251(3) CFRN. This is because the appellant was acting in her capacity as Provost of the Federal Co-operative College Ibadan, a Federal High Court could validly try for the commission of the offences alleged to have been committed as stated on the charge. He cited **NDLEA vs Omudina** (2013)

16 NWLR (Pt. 1381) 589; **George vs. FRN** (2014) 5 NWLR (Pt. 1399) 1.

Going on further, learned counsel for the appellant stated that the learned trial judge failed to avert to the fact that the defence of the appellant negated any corrupt intention on the part of the appellant. That the court below incorrectly held that the prosecution established the required mens rea for a conviction on the offence charged and so the affirmation by the court below of the conviction was erroneously done as the evidence led at the trial court negated any corrupt intention. He referred to Section 17(1)(c) of the Corrupt Practices and Other Related Offences Act 2000; **Njoku vs. State** (2013) 2 NWLR (Pt. 1339) 548.

He stated further that the omission of the word "corruptly" from the Court of Appeal reproduction of the provisions of section 17(1)(c) vitiated the proceedings as the fundamental right to fair hearing of the appellant was breached. He referred to **Otapo vs. Sunmonu** (1987) 2 NWLR (Pt. 58) 587; **Iwuoha vs. Okoroike** (1996) 2 NWLR (Pt. 1996) page 429.

That the court below was wrong when it held the defence of the appellant could not avail her as what she did amounted to an infraction of the provisions of Section 22(5) of the ICPC Act.

In response, learned counsel for the respondent submitted that there was jurisdiction in the Oyo State High Court. That the appellant is in effect asking the court to depart from its decision in **Attorney General of Ondo State vs. Attorney General of the Federation & 35 Ors** (2002) 6 SC (Pt. 1). He cited Section 61(3) of the ICPC Act.

For the respondent it was also contended that the omission on the face of the charge of the word **'corruptly'** did not derogate from the quantum of credible evidence adduced by the respondent in proving its case to the effect that the appellant's conduct and the fact that appellant knew the act was criminal as well and that she was not misled as to the charge against her.

That there is no basis for this court to tamper with the concurrent findings of the court below since the findings were not perverse and they were supported by the evidence. The cases of **Esangbedo vs. State** (1998) 1 ACLR 109; **Corporal Nicholas Okoh vs. Nigeria Army** 109 at 115, were referred to.

A The stance of the appellant on which this appeal is anchored is captured thus:

> **(i) The failure of the learned trial judge to record the**
> B **arraignment of the appellant contravenes the provisions of Section 36 of the Constitution and section 215 of the criminal procedure Act.**
>
> C **(ii) By virtue of the combined effect of section 251(1) and 251(3) and the facts of this case, the High Court of Oyo State lacked the jurisdiction to try the appellant for the offences charged.**
>
> D **(iii) The Court of Appeal was in error when it found that the prosecution established the mens rea for a conviction under the offence created in section 17(1)(c) of the ICPC Act 2000.**
>
> E **(iv) If the Court of Appeal had not inadvertently omitted the word "corruptly" from its reproduction and consideration of the provisions of section 17(1)(c), it would not have come to the conclusion that the**
> F **prosecution established the mens rea necessary for a conviction under the said section.**

The reaction of the respondent is that the Supreme Court should not tamper
G with the concurrent findings of fact of the court below as same were neither perverse nor illegal in the circumstance.

On the question whether there is a jurisdiction in the High Court of Oyo State to try the appellant for offences charged under the Corrupt
H Practices and other Related Offences Act 2000 having regard to the provisions of Section 251(1)(P) and (3) CFRN, this court is mindful of **Attorney General of Ondo State vs. Attorney General of the Federation & 35 Ors (2002) 6 SC (Pt.1)** wherein the call to invalidate the
I Corrupt Practices and Other Related Offences Act 2000 failed. This court applying the blue pencil rule, struck down sections 26(3) and 35 and

declared the rest of the Act unaffected and valid. This court per Uwais CJN held that section 26(3) and 35 of Act were unconstitutional and therefore null and void. See also **Doherty vs. Balewa 1963) 2 SC NLR 256; A.G. Abia State and 36 Ors Vs. A.G. Federation (2002) 3 SC 106 at 199-200 per Ogundare JSC.**

It follows that there is nothing necessitating a review of the decision of A.G. Ondon State Vs. A.G. Federation (supra) as cited above. That being the case, the respondent herein as prosecution was well situated under the said ICPC Act 2000 to initiate the charge, proceed and concluded the prosecution of the appellant. In this regard I shall quote the relevant sections thereof thus:

Section 61(3) of the ICPC Act provides:

> **"The Chief Judge of the State or the Federal Capital Territory, Abuja shall by order under his hand designate a court or judge or such number of courts or judges as he shall deem appropriate to hear and determine all cases of bribery, corruption, fraud or other related offences arising under this Act or any other laws prohibiting fraud, bribery or corruption; a court or Judge so designated shall not, while being so designated, hear or determine any other cases provided that all cases of fraud, bribery or corruption pending in any court before the coming into effect of this Act shall continue to be heard and determine by that court".**

While section 26(2) provides:

> **"Prosecution for an offence under this Act shall be initiated by the Attorney General of the Federation, or any person of Authority to whom he shall delegate his authority, in any superior court of record so designated by the Chief Judge or a State or the Chief**

Judge of the Federation Capital Territory, Abuja under section 61(3) of this Act; and every prosecution for an offence under this Act or any other law prohibiting bribery, corruption, fraud or any other related offence shall be deemed to be initiated by the Attorney General of the Federation".

It is clear therefore that the High Court of the various states and the High Court of the Federal Capital Territory (FCT) are empowered to entertain such prosecutions under the ICPC Act.

Taking the provisions of the ICPC Act 2000 and co-relating them with section 251 of the 1999 Constitution (as amended), what comes clear is that the Federal High Court does not have the exclusive jurisdiction to deal with the matters on the ICPC Act, rather it shares the jurisdiction with the State High Court or the High Court of FCT and this as explained in section 251 (3) of the 1999 CFRN. For effect I shall quote the section and related subsections as follows:

Section 251 of the 1999 Constitution (as amended) provides:

"(1) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction that maybe conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the EXCLUSION of any other court in civil cases and matters."

(A) Relating to the revenue of the Federal Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the Government is a party".

A While Section 251(3) provides:

> **"The Federal High Court shall also have and exercise jurisdiction and powers in respect of**
> B **criminal cases and matters in respect of which jurisdiction is conferred by subsection(1) of this section."**

C In this case in hand the two courts below properly interpreted the law as they approached that duty of interpretation having in focus that the terms are plain without ambiguity and so nothing else was asked for but to accord the meaning of the words upon the ordinary and surrounding circumstance.

D In that way the interpretation was made in order to uphold the purpose expected for the society at large and intendment of the law makers. See **Fawehinmi vs. Inspector General of Police** (2002) 7 NWLR (Pt. 761) 31-32 per Uwaifo JSC.

E The appellant had made quite a fuss on the omission of the word '**corruptly**' on the face of the charge which learned counsel had contended vitiated the proceedings as stipulated in the provisions of section 17(1)(c) of the ICPC Act.

F This position now pushed forward by the appellant was not a matter in contention nor determination at the Court of Appeal and so this court can only keep within the limits of what was before the Court of Appeal except for when leave is sought for and granted to raise the new issue which did not
G happen herein. In the judgment at the trial court the word '**corruptly**' was well stated when the section 17(1)(c) of the ICPC Act was referred to in evaluating the evidence and arriving at the decision. That the court below made the omission in its consideration which can only be taken as a
H typographical error or omission which has not gone to the root of the matter before that court and no evidence of a miscarriage of justice has been shown. Again for emphasis, the appellant cannot at this stage claim to have been misled on what she faced at the trial court where the charge fully stated
I the infractions and the word **'corruptly'** in place.

Again to be said is that assuming the word **'corruptly'** was omitted on the face of the charge at the trial stage, it would not derogate from the quantum of credible evidence adduced by the respondent in proving its case. This is because the mens rea of the offence was well deduced from the act of the appellant who knew that what she was doing was criminal as the input of casual workers as permanent staff which was false pointed to the corrupt intent embedded in the entire transaction. The intent was easily deducible and was gleaned from the evidence adduced.

Indeed this is one of those occasions where the apex court is well advised to keep its peace and flow along with the concurrent findings of fact of the two courts below since there was nothing perverse or a finding not backed by evidence. I rely on **Esangbedo vs. State** (1998) 1 ACLR 109; **Corporal Nicholas Okoh vs. Nigerian Army** LER (2017) pages 109 at 115.

In conclusion, from the foregoing and the better reasoning in lead judgment, I see no merit in this appeal which I too dismiss.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme

BAYANG AKAAHS, (JSC): I read before now the illuminating judgment of my learned brother, Galinje JSC and I agree with him that if the framers of the 1999 Constitution (as amended) had wanted to vest the Federal High Court with exclusive jurisdiction in criminal matters affecting the revenue of the Federal Government they would have stated so clearly in section 251(3) of the Constitution which states:

> **"251(3) The Federal High Court *shall also have* and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section" (Italics is mine for emphasis.)**

By using the phrase *"shall also have"* implies sharing the jurisdiction with other courts; otherwise the subsection should have read: "The Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in criminal causes and matters-relating to the revenue of the Government of the Federation in which the said Government or any of its agencies is involved." **In A-G Ondo State vs. A-G Federal (2002) 6 SC (Pt. 1) 1 (2002) 9 NWLR (Pt. 772) 222** a full panel of this court laid to rest the question whether State High Courts have jurisdiction to hear and determine criminal offences created by the National Assembly wherein it was held that:

> ***"The Attorney-General of the Federation derives his powers under section 174 of the Constitution an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred nor can he be prevented from exercising his function on the ground that his jurisdiction does not extend to any particular State in Nigeria. Section 174 of the Constitution does not impose such limitation"*** **See: The State vs. Illorin (1983) 1 SC NLR 94. The decision in A.G. Ondo vs. A.G. Federation supra has debunked the argument by learned counsel for the appellant that since the conduct forming the basis of the charge against the appellant was in the performance of her duty as the Provost of the Federal Co-operative College, Ibadan, an agency of Federal Government, it is the Federal High Court that could validly try the offences alleged to have been committed by her. It is for this reason and the more comprehensive reasons contained in the judgment of my learned brother, Galinje JSC that I dismissed the appeal. The decision of the lower court is further affirmed. The case is remitted to the Federal High Court for the appellant to enter into her defence. The case should be expeditiously handled.**
>
> **K. B. Akaahs**
> ***Justice, Supreme Court***

A **ADAMU AUGIE, (JSC):** I have had a preview of the judgment just handed out by my learned brother – Galinje, (JSC). I agree with the reasons therein advanced to arrive at the conclusions contained in the lead judgment that the appeal be dismissed.

B **Amina Adamu Augie,**
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead
C judgment of my learned brother Paul Adamu Galinje, (JSC), just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me. Judgment of the Court of Appeal Ibadan Division is hereby affirmed.

D **Sidi Dauda Bage,**
Justice, Supreme Court

E

F

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H

I

SAMUEL CHIDOZIE
AND
COMMISSIONER OF POLICE

SC. 330/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto – Whether can interfere under certain conditions – Relevant Considerations thereof.

COURT: Conviction – Whether can be based on the evidence of a single witness – Relevant principles thereto.

COURT: Power to convict – Whether can rely on the evidence of a single witness – Relevant Considerations thereto.

CRIMINAL LAW AND PROCEDURE: Proof – Criminal intimidation – S.397 Penal Code Law – Whether prosecution needs prove physical injury to succeed.

CRIMINAL LAW AND PROCEDURE: Proof – Nature of burden of proof in –

Criminal Proceedings – How discharged.

CRIMINAL LAW: Criminal intimidation – S.397 Penal Code Law – Elements of the offence.

Issues for Determination

1. **Whether having regard to the totality of the evidence adduced at the trial, the court below was right in affirming the conviction and sentence of the appellant.**

2. **Whether the prosecution has to prove physical injury to sustain the charge of criminal intimidation under Section 397 of the Penal Code.**

Facts of the Matter

The appellant was initially arraigned along with two others before the Chief Magistrate's Court, Lokoja for offences of criminal breach of trust, theft, criminal conspiracy and criminal intimidation. Upon his arrest, appellant volunteered an extra judicial statement denying committing the offences contrary to **Sections 97 (1), 306, 287, 322 and 397 of Penal Code.**

The appellant was the 1st accused in the case before the trial court while the 2nd and 3rd accused persons were Hycent Ndive and Cyril Onah.

The case of the prosecution is that the PW1, Godwin Ojike and the appellant are members of the National Union of Mobile Marketers and Advertisers of Nigeria (NUMMAN). Owing to some disagreements, the PW1 pulled out of the Union. Consequently, he was allegedly threatened and harassed by the appellant to come back to the union or leave Lokoja.

The prosecution in proof of its case called two witnesses and appellant testified on his own behalf in his defence without calling any witness. At the end of the evidence of the prosecution, a submission of no case to answer was made on behalf of the appellant which the trial court upheld, discharging the appellant of criminal conspiracy, criminal breach of trust and theft contrary to **Sections 97 (1), 312 and 287 of the Penal Code respectively.** The appellant was then only charged for the offence of criminal intimidation contrary to

Section 397 of the Penal Code.

The trial court at the end of the hearing convicted the appellant and sentenced him to a fine of N2,000.00 or 12 months imprisonment in case of default for the offence of criminal intimidation. The appellant dissatisfied appealed to the High Court which affirmed what the trial court did and the appellant aggrieved appealed to the Court of Appeal, Abuja Division to contest the validity of his conviction and sentence but the court below agreed with the High Court and further dissatisfied, the appellant has appealed to the Supreme Court.

Held: *(Unanumously dismissing the appeal)*

1. *The nature of onus placed on the prosecution in criminal cases.*
It is to be noted that the onus is always on the prosecution to prove all the ingredients of the offences charged and the standard of proof is beyond reasonable doubt in keeping with Section 135 (1) of the Evidence Act, 2011 as amended. That is not to say proof with absolute certainty, but what is required is that the ingredients of the offence charged are proved as expected or required by law and to the satisfaction of the court. This onus in a criminal trial rests throughout the proceedings on the prosecution to prove the guilt of the accused beyond reasonable doubt. It is not akin to proof beyond the shadow of doubt. See Obiakor vs. The State (2002) 6 SCNJ 193 at 202 per Kalgo JSC, State vs. Aibangbee (1988) 7 SC (Pt. 1) 96 at 132-133; Aric vs. The State (2009) 16 NWLR (pt. 1068) 443 at 457; Kabir Almu vs. The State (2009) 10 NWLR (Pt. 1148) 31 at 46.

The court of trial, the learned Magistrate in his summarisation had found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted the appellant pursuant to Section 397 of the Penal Code Law.
(P 279 Para B – E).

2. *A court can convict on the evidence of a single witness*
The angle taken by the appellant that the prosecution and later the trial court relied on the evidence of PW1 alone, is a standpoint that would not stand the test of the law or practice as a court can convict

on evidence of one single witness whose testimony can be believed given the circumstances of the case. That is to say that a sole credible witness can establish a case beyond reasonable doubt, particularly in circumstances where no corroboration is required. See Akpabio vs. The State (1994) 7-8 SCNJ 429 at 458.

The appellant had wanted this court to upset what the court below did on the ground that the conviction of the trial court which the High Court affirmed was based on the testimony of a sole witness, PW1. It is now settled law that the prosecution is not under any obligation to call a host of witnesses with whom it can prove the guilt of the accused appellant. This is because the fact that PW1 was the victim does not make out a necessity or need for an independent witness as in human dealings an alleged threat can emanate in a transaction between just two persons, one the person making the threat and the other, the person to whom it is made. To put across that once there is no other witness apart from the complainant, the offence cannot be established is to negate the intendment of the law and to give free hand to a person to dish out threats irrespective of the effects, injury or damage to the person and the perpetrator go scot free. It is to be reiterated that once the sole witness has proffered credible evidence uncontradicted and sufficient to satisfy the court that the burden of proof has been discharged, the fact that single witness is the complainant is of no moment. I rely on Olabode vs. The State (2009) 28 NSCQR (Pt. 1) 313 ar 332; **Buba vs. The State (1994) 7-8 SCNJ 472 at 478; State vs. Olatunji (2003) 14 NWLR (Pt. 839) 138 at 167-168**. *(PP 281; 284 Paras G – I; A – F).*

3. The purport of proof in criminal cases beyond all reasonable doubt

All our previous constitutions in this country had made adequate provisions affecting our criminal legal system especially on the age-long principle of law that an accused is presumed innocent until he is proven guilty.

This presumption of innocence places the onus of proof on the prosecution to prove a case beyond reasonable doubt, in accordance with Section 138 of the Evidence Act, Cap 112 of Laws of the Federation. The prosecution must, in the process prove all the ingredients of the offence charged by producing material and

credible evidence through vital witness or witnesses to testify during the proceedings. See Afolalu vs. The State (2010) 43 NSCQR 258/259. Once any of the ingredients of the offence charged is not proved, the prosecution shall fail and the accused must be acquitted of the offence charged as the burden never shifts. *(P 288 Para E – H).*

4. *Prosecution can rely on the testimony of a witness to secure conviction*
My attention has been attracted by the submission of the learned counsel for the appellant when he raised insinuations or sentiments that the trial court relied only on the testimony of one witness i.e the PW1, to convict the appellant. With due deterence to the learned counsel, once the prosecution was able to discharge its burden of proof of the offence charged, the court of trial can convict the accused even on the evidence of a single witness as in this instant case. See Amina vs. The State (1990) 6 NWLR (Pt. 155)' Okosi vs. Ag Bendel State (1989) 1 NWLR (Pt. 100) 642; Nwachukwu vs. The State (1985) 3 NWLR (Pt. II) 218; Ani vs. The State (2003) 11 NWLR (Pt. 830) 142; Afololu vs. The State (supra). It is a well settled principle of law, that the prosecution is not bound to call every person that was linked to the offence by physical presence or otherwise to give evidence of what he perceived. Once person who can testify to the actual commission of the crime and the other relevant ingredients has done so, it will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 of the Evidence Act. See Obue vs. State (1976) 2 SC 141; Sadau vs. State (1969) All NLR 124; The State vs. John Ogbudunjo & Anor (2001) 2 NWLR (Pt. 698) 576; Shurumo vs. The State (2010) 44 NSCQR 159. As a matter of fact, a single witness who gives cogent eye witness account of the incident, as in this instant case, will be sufficient. See Odili vs. State (1977) 4 Sc 1; Shurumo vs. The State (supra). *(Pp 288 – 289 Paras H – E).*

5. *Prosecution proved offence charged beyond reasonable doubt.*
To answer the question whether the Court of Appeal was right in upholding the concurrent findings of the two courts below it. That is whether at the trial court the offence charged under Section 396 Penal Code Law had been proved beyond reasonable doubt. I would

answer in the affirmative in that the prosecution/respondent proved it beyond reasonable doubt as the proof was borne out by the evidence from credible witness. I say so bearing in mind that not all doubts are reasonable and where they are not reasonable or fanciful doubt or imaginary doubt or speculative doubt, a doubt not sustained by the facts and circumstances of the case. In the case in hand there was sufficient evidence borne out of the record from which the proof beyond reasonable doubt was easily elicited and the concurrent findings were well situated, thereby staying the hand of this court from interfering. See Mufutau Bakare vs. The State (1987) 3 SC 33 per Oputa JSC; State vs. Aibangbee (supra).
(Pp 284 – 285 Paras F – A).

6. *Proof of injury not necessary in criminal intimidation*
To posit that the prosecution to prove criminal intimidation needs establish physical injury is a pedestrian viewpoint if I might humbly say so. This is because the need for the proof of a personal physical injury suffered by the complainant and in this case the PW1 is not an element or ingredient of the offence of criminal intimidation in establishing it as an offence worthy of conviction. It is enough if the prosecution is able to establish that the accused and in this case the appellant made a threat by which the victim is thrown into fear of a harm to himself or any other person of an instant harm. What the prosecution needs to prove are:

a. That the accused threatened the complainant or some other persons.
b. That the threat was of some injuries to him.
c. That it was given to cause alarm to him or to cause him not to do or omit to do any act which he is legally entitled to or not bound to do.

From the communication between the appellant and PW1 though, most of the communication was from the appellant asking PW1 to pack out of Lokoja with a threat and when he moved to his office, the appellant and his people came there to threaten him and followed

him to his house with threat of death. *(P 282 Paras A – F).*

7. *Ingredients of Criminal intimidation*
Per Sanusi (JSC):

> **(a) That the accused person threatened the complainant or some other person.**
> **(b) That the threat was of some injury to him;**
> **(c) That it was given to cause alarm to him or to cause him not to do or to omit to do any act which he is legally entitled to do or not bound to do.**

In this instance case evidence abound from the testimony of the complainant i.e. PW1 when he testified, inter alia:

> **(i) That the appellant and some other told him to pack out of Lokoja or else they were going to kill him hence he reported to his lawyer who advised him to register a complain.**
>
> **(ii) The latter followed him to his house to which he relocated his office and carried out the same threat.**
>
> **(iii) One of the accused persons told him that he must join them in their business or else they will kill him after all he (2nd Accused) knew the Inspector General of Police.**
>
> **(iv) That the 1st accused person now appellant, brought poison to him through the 2nd accused and tried to force him to drink it but he refused hence he reported the matter to Nigeria Police B Division.**

(v) Also, on 28/3/2007 some boys came to his house/office with pistol and threatened to kill him.

All these pieces of evidence of PW1 were not controverted as shown on the record. To my mind therefore, they provided sufficient instances of threat to the life of the complainant or at least of injury to be caused on him. Such series of threats were obviously calculated at or aimed at seeing that he the PW1 (complainant) either leaves Lokoja town or to join the business of the gang of persons accused in the case among whom the appellant was a prominent member if not a master minder. It is my view that the lower court's judgment now appealed against can not be faulted when that court affirmed the findings of both the High Court (intermediate court) and the Chief Magistrate's court (the trial court) and on arriving at the conclusion that the prosecution had proved the offence of criminal intimidation, contrary to Section 397 of the Penal Code beyond reasonable doubt against the present appellant. It needs to be emphasised that in an offence under Section 397 of the Penal Code it is immaterial that the complainant did not suffer actual physical injury, provided the prosecution proved that there was actual threat to his life or to injure him, which had obviously caused genuine fear in him of being killed or causing him harm or bodily injury. *(Pp 286 – 288 Paras I – C).*

8. Situations where Supreme Court can disturb concurrent finding

Clearly the three ingredients or elements of the offence under Section 397 of the Penal Code Law are made out. This is the fulcrum of the concurrent findings of the three courts below and in:

Action Congress of Nigeria vs. Sule Lamido & 4 Ors (2012) 8 NWLR (Pt. 1303) 560 at 594, this honourable court per Rhodes-Vivour JSC, held that:

> **"It is long settled that the concurrent findings of fact would rarely be disturbed by this court, but this court would be compelled to interfere if the findings are perverse or cannot be supported by the evidence before the court or there is/was a miscarriage of justice or violation of some principle of law or procedure".**

Similarly, in the case of Olatinwo Nurudeen Bright vs. The State (2012) 8 NWLR (Pt. 1302) 297 at 323 324, this court stated that:

> **"I said that findings of fact made by the trial court and confirmed by the Court of Appeal are very rarely disturbed or interfered with, but this court would quickly interfere and state the correct position if satisfied that there has been exceptional circumstances such as:**
> **(a) The findings cannot be supported by evidence or are perverse or**
> **(b) That there was miscarriage of justice or**
> **(c) The court overlooked some principles of law or procedure.**
> **See also Ogbu vs The State (1992) 8 NWLR (Pt. 259) 255".**

The above are the general principles on which an appellate court should act faced with concurrent findings. When the appellate court comes to the conclusion that the trial court did not properly advert to the evidence or give necessary consequence to the evidence given, the appellate court is duty bound to perform the exercise. That does not mean a usurpation of the area within the exclusive preserve of the trial court as failure of the appellate court to do that needful is an abdication of responsibility. See Lagga vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427 at 461.

Indeed what is before this court are concurrent findings of three courts including the trial court which court of first instance has shown that it evaluated the evidence before it within the areas that could only have been at the instance of the court that had the singular opportunity of hearing and seeing the vital witness or witnesses when they testified and so the two appellate courts lacked the power to interfere. This being because the exceptional circumstances on which an appellate court could interfere or disturb an earlier findings do not exist. The same apply to this court. See Nkebisi vs. The State (2010) 5 NWLR (Pt. 1188) 471; Dokubo Asari vs. FRN (2009) 37 NSCQR (Pt. 11) 1146 at 1173.
(Pp 282 – 284 Para F – A).

10. *Where there are three concurrent findings establishing the guilt of accused*
It is noted by me that there exist concurrent findings of three lower courts all establishing the guilt of the appellant. As a matter of practice and policy, this court does not ordinarily disturb or interfere with concurrent findings of lower courts except where special or exceptional circumstances exist as would warrant this court's interference. Some of this exceptional circumstances border on the fact that the findings are perverse or there has been apparent misconception or misapplication of law. See UGBO vs. ABURIM (1994) 9 SCNJ 23 at 38; Oshitoba vs. Olujitan (2000) 2 SCNJ 156 at 176, Action Congress of Nigeria vs. Sule Lamido & 4 ors (2012) 8 NWLR (pt. 1303) 560. In this instant appeal I have not been able to see any special or exceptional circumstance bordering on any of the above mentioned vices or features in the findings of facts or misapplication of law or that any miscarriage of justice was occasioned in the findings of the three lower courts as would justify my interference with or disturbance of such findings. I will therefore refuse to interfere with same. *(P 289 Paras E – I).*

Nigerian Cases Cited
Action Congress of Nigeria vs. Sule Lamido & 4 ors (2012) 8 NWLR (pt. 1303) 360.
Afolalu vs. The State (2010) 43 NSCQR 258/259.

Akpabio vs. The State (1994) 7-8 SCNJ 429 .
Amina vs. The State (1990) 6 NWLR (Pt. 155)'
Ani vs. The State (2003) 11 NWLR (Pt. 83) 142;
Aric vs. The State (2009) 16 NWLR (pt. 1068) 443
Buba vs. The State (1994) 7-8 SCNJ 472 ;
Dokubo Asari vs. FRN (2009) 37 NSCQR (Pt. 11) 1146 .
Kabir Alma vs. The State (2009) 10 NWLR (Pt. 1148) 31 .
Lagos vs. Sarhwa (2008) 16 NWLR (Pt. 1114) 427 .
Mufutau Bakare vs. The State (1987) 3 SC 33 ;
Nkebisi vs. The State (2010) 5 NWLR (Pt. 471) 492;
Nwachukwu vs. The State (1985) 1 NWLR (Pt. II) 218;
Obiakor vs. The State (2002) 6 SCNJ 193
Obue vs. State (1976) 2 SC 141;
Ogbu vs The State (1992) 8 NWLR (Pt. 259) 255
Okosi vs. Ag Bendel State (1989) 1 NWLR (Pt. 100) 642;
Olabode vs. The State (2009) 28 NSCQR (Pt. 1) 313
Olatinwo Nurudeen Bright vs. The State (2012) 8 NWLR (Pt. 1302) 297
Oshitoba vs. Olujitan (2000) 2 SCNJ 156 ,
Sadau vs. State (1969) All NLR 124;
Shurumo vs. The State (2010) 44 NSCQR 159.
State vs. Aibangee (1988) 7 SC (Pt. 1) 96
State vs. Olatunji(2003) 14 NWLR (Pt. 839) 138 .
The State vs. John Ogunbanjo & Anor (2001) 12 NWLR (Pt. 678) 576;
Ugbo vs. Aburim (1994) 9 SCNJ 23 ;

Nigerian Statutes Cited
Penal Code – Sections 97 (1), 306, 287, 322 and 397.
Evidence Act – S. 138

Representations
J.A. AKUBO for the appellant and with him is Sani Tijani.

IBRAHIM SANI MOHAMMED (SAN) for the respondent, A.G. KOGI STATE and with him are R.A. Alfa-DPP, H.E. Yusuf DDPP, E.T. Adeyemi

A Legal Officer, M.M. Tseja-Legal Officer.

PETER-ODILI, (JSC) (Delivering the Lead Judgment): The appellant was initially arraigned along with two others before the Chief Magistrate's
B Court, Lokoja for offences of criminal breach of trust, theft, criminal conspiracy and criminal intimidation. Upon his arrest, appellant volunteered an extra judicial statement denying committing the offences contrary to **Sections 97 (1), 306, 287, 322 and 397 of Penal Code.**

C The appellant was the 1st accused in the case before the trial court while the 2nd and 3rd accused persons were Hycent Ndive and Cyril Onah before the trial court.

D **FACTS**

The case of prosecution is that the PW1, Godwin Ojike and the appellant are members of the National Union of Mobile Marketers and Advertisers of Nigeria (NUMMAN). Owing to some disagreements, the PW1 pulled out
E of the Union. The appellant and the other members of the Union started threatening him and warned him to pack out of Lokoja town or he would be killed. In order to carry out their threats, the appellant along with the other members of the union started sending all kinds of strange visitors to harass
F him and followed the PW1 to monitor his movements and on one of such occasions, two boys armed with guns visited PW1's house and threatened to kill him.

The prosecution in proof of its case called two witnesses and
G appellant testified on his own behalf in his defence without calling any witness. At the end of the evidence of the prosecution, a submission of no case to answer was made on behalf of the appellant which the trial court upheld, discharging the appellant of criminal conspiracy, criminal breach
H of trust and theft contrary to **Sections 97 (1), 312 and 287 of the Penal Code respectively.** The appellant was then only charged for the offence of criminal intimidation contrary to **Section 397** of the Penal Code.

The trial court at the end of the hearing convicted the appellant and
I sentenced him to a fine of N2,000.00 or 12 months imprisonment in case of default for the offence of criminal intimidation. The appellant dissatisfied

A appealed to the High Court which affirmed what the trial court did and the appellant aggrieved appealed to the Court of Appeal, Abuja Division to contest the validity of his conviction and sentence but the court below agreed with the High Court and further dissatisfied, the appellant has
B appealed to the Supreme Court.

On the 26th October, 2017 date of hearing, learned counsel for the appellant, J.A. Akubo Esq. adopted his brief of argument, filed on 10/9/2012 in which he raised two issues for determination which are thus:

C

1. **Whether having regard to the totality of evidence and the surrounding circumstances in this case, the Court of Appeal was right in affirming the decision**
D **that the prosecution proved its case beyond reasonable doubt against the appellant and thereby affirmed his conviction and sentence. (Grounds 1, 3 and 4).**

E

2. **Whether the police informant (PW1) in this case suffered any injury by the conduct of the appellant (Ground 2).**

F Ibrahim Sani, Attorney General of Kogi State for the respondent adopted its brief of argument settled by J.A Abrahams Esq. the then Attorney General of Kogi State. The brief was filed on 29th November, 2012 and deemed filed on 9th October, 2013. He identified two issues for determination which are
G thus:

1. **Whether having regard to the totality of the evidence adduced at the trial the court below was right in**
H **affirming the conviction and sentence of the appellant.**

2. **Whether the prosecution has to prove physical**
I **injury to sustain the charge of criminal intimidation**

under section 397 of the Penal Code.

I shall utilise the issues as crafted by the respondent in the determination of this appeal as they are easy to use.

ISSUES 1 & 2

These question the rightness of the decision of the Court of Appeal affirming what the two courts below did and if physical injury is necessary to sustain the charge of criminal intimidation.

Learned counsel for the appellant submitted that a critical examination of the entire evidence in the record in relation to the statutes and that of the police Informant (PW1) in this case in National Union of Marketers and Advertisers of Nigeria (NUMAN) would show that the appellant would not commit the offence of criminal intimidation that the findings of the lower court cannot be sustained in law as they have not discharged the onus of proof beyond reasonable doubt. He cited Section 138 (1) of Evidence Act, laws of the Federation, 2004. now Section 135(1) of Evidence Act, 2011 (as amended); **Kabir Almu vs. The State** (2009) 10 NWLR (Pt. 1148) 31 at 46 etc.

That the proof beyond reasonable doubt demands that the prosecution must adduce credible and adequate evidence proving all the essential ingredients of the offence. He cited **The State vs. Azeez & 5 Ors** (2008) 14 NWLR (Pt. 1108) 439 at 478; **FRN vs. Mohammed Usman & Anor** (2012) 8 NWLR (Pt. 1301) 141 at 167.

For the appellant it was contended that the findings of the lower court should be disturbed as they are perverse not being supported by credible evidence before the trial court. He cited **Action Congress of Nigeria vs. Sule Lamido** (2012) 8 NWLR (Pt. 1303) 560 at 594; **Bright vs. The State** (2012) 8 NWLR (Pt. 1302) 297 at 323-324.

That there was no independent and material witness called by the prosecution to authenticate what PW1 alleged to prove that the offence had been proved beyond reasonable doubt as required by Section 138 (1) of the Evidence Act, 2004.

Learned Counsel for the appellant went on to state that the defence put up by the appellant was not considered by the trial court including the uncontradicted evidence of the DW3 and the failure ought to have made the appellate courts to re-evaluate the evidence before it on the printed record of appeal. He cited **Uche-Williams vs. The State** (1992) 10 SCNJ 74 at 80; **Ndukwe vs. The State** (2009) 7 NWLR (Pt. 1139) 43 at 85; **Samuel Omobo vs. COP** (1965-1066) NMLR 42.

That the fair hearing right of the appellant was breached when the lower court failed to consider the submission of counsel for the appellant over the findings of the trial court to the effect that PW1 should park out of Lokoja as a threat or criminal intimidation. He referred to **Gbadamosi vs. Olaitan Dairo (2007) 3 NWLR (Pt. 1021) 282 at 306-307; Oyewole vs. Karimu Akande & Anor (2009) 15 NWLR (Pt. 1163) 119 at 148**; **Amamachukwu vs. FRN** (2009) 8 NWLR (Pt. 1144) 475 at 486.

Learned counsel for the respondent submitted in response that they as prosecution had proved the case of criminal intimidation beyond reasonable doubt and the court below was right in concluding so. He cited **Obiakor vs. The State (2002) 6 SCNJ 193 at 202; State vs. Aibangbee (1988) 7 SC (Pt. 10 96 at 132-133** etc. That a court can convict on the evidence of one single witness once the witness can be believed given all the circumstances of the case that a single credible witness can establish a case beyond reasonable doubt. He cited **Akpabio vs. The State** (1994)7-8 SCNJ 429 at 458.

The learned Attorney General further submitted that there is no basis for this court to interfere with the concurrent findings of the Lower courts on the issues of facts. He cited **Ugbo vs. Aburime (1994) 9 SCNJ 23 at 38; Oshatoba vs. Olujitan (2000) 2 SCNJ 156 at 176 etc**.

That the concept of reasonable doubt is not fanciful doubts but doubts borne out by evidence and credible evidence at that. He referred to **Mufutau Bakare vs. The State (1987) 3SC at 33.**

The stance of the appellant is that there is no basis for his conviction on the offence of criminal intimidation as what transpired between him and the complainant, PW1 was not such as could be taken as the proof of the offence beyond reasonable doubt. That there was poor evaluation of the

A evidence proffered before the court.

The respondent's position is that the altercation that occurred showed that the PW1 was threatened and serious enough to meet the standard of proof beyond reasonable doubt of the offence of criminal
B intimidation.

It is to be noted that the onus is always on the prosecution to prove all the ingredients of the offences charged and the standard of proof is beyond reasonable doubt in keeping with Section 135 (1) of the Evidence Act, 2011
C as amended. That is not to say proof with absolute certainty, but what is required is that the ingredients of the offence charged are proved as expected or required by law and to the satisfaction of the court. This onus in a criminal trial rests throughout the proceedings on the prosecution to
D prove the guilt of the accused beyond reasonable doubt. It is not akin to proof beyond the shadow of doubt. See **Obiakor vs. The State (2002) 6 SCNJ 193 at 202 per Kalgo JSC, State vs. Aibangee (1988) 7 SC (Pt. 1) 96 at 132-133; Aric vs. The State (2009) 16 NWLR (pt. 1068) 443 at 457; Kabir Alma vs. The State (2009) 10 NWLR (Pt. 1148) 31 at 46.**

E The court of trial, the learned Magistrate in his summarisation had found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted the appellant pursuant to Section 397 of the Penal Code Law.

F The court below per Bada JCA summing up what had happened in the two courts below it, that is the trial Magistrate Court and the High Court in its appellate jurisdiction held thus:

G **"My conclusion on this issue is that the appellant has not been able to show that the findings of the lower court is perverse or that has occasioned a miscarriage of justice, therefore, it is my view that the prosecution has proved its**
H **case against the appellant beyond reasonable doubt and the lower court came to the right conclusion that the offence of criminal intimidation contrary to Section 397 of the Penal Code has been proved against the appellant."**

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For a clearer view the salient part of the evidence proffered by the prosecution would be put on display and that of PW1 is thus:

> **"I came to Lokoja on 12/3/2007 and the 2nd accused person gave the information to the 1st accused person. I was sweeping my premises when the accused persons broke in to my sitting room. They replied that it was an information given to them that made them to come to my house. They then turned and left my house on knowing my house at Lokoja. After two days, the accused persons called me to join them and they told me to pack out of Lokoja. After two days, the accused person called me to join them and they told me to pack out of Lokoja or they will kill me. I ran to Abuja to my family on several occasions. I went to my lawyer to complain and he advised me to register my own company, which I did the accused person also came to my place of business in Lokoja. I moved my office to my house yet the accused persons followed me that I must move out of Lokoja. The 2nd accused person told me that I must come and join them in their business or they will kill me as he knows the Inspector General of Police. On 1/12/2006, when I bought my car, the accused person brought poison to me through the 2nd accused and force me to drink it but I refused to drink it. I reported the matter to 'B' Division, Nigeria Police. On 28/3/2007, two boys came to my house with pistol. I thought they will shoot me on the way. I called a Police Officer on phone, but the call did not get through. I called another Police Officer by name Segun and it did not go".**

The Court of Appeal in re-evaluating what the High Court did in relation to its review of the findings of the trial court did state as follows:

(i) "That the instances cited by the PW1 established the ingredients of the offence of criminal intimidation.

(ii) That to ask PW1 to pack out of Lokoja is a threat, as this will diminish his freedom to act voluntarily and to do his business without let and hindrance.

(iii) That even when he moved his office to his house, they still followed him there that he must pack out of Lokoja.

(iv) That the appellant was usurping the function of the regulatory body.

(v) That the appellant went beyond his (sic) boundary by threating PW1 to pack out of Lokoja.

(vi) That the appellant threatened to kill PW1

(vii) That the threat to pack out of Lokoja was a breach of his fundamental right under Section 41 of the constitution of Federal Republic of Nigeria 1999.

A careful perusal of evidence of PW1 together with the review of the findings of the trial court would reveal that the lower court was right to conclude that the offence of criminal intimidation has been proved against the appellant.

The PW1 need not suffer any physical injury before it could be said that the prosecution has proved its case beyond reasonable doubt borne out by credible evidence".

Also to be stated is that the angle taken by the appellant that the prosecution and later the trial court relied on the evidence of PW1 alone, is a standpoint that would not stand the test of the law or practice as a court can convict on evidence of one single witness whose testimony can be believed given the circumstances of the case. That is to say that a sole credible witness can establish a case beyond reasonable doubt, particularly in circumstances where no corroboration is required. See **Akpabio vs. The State (1994) 7-8 SCNJ 429 at 458**.

To posit that the prosecution to prove criminal intimidation needs to establish physical injury is a pedestrian viewpoint if I might humbly say so. This is because the need for the proof of a personal physical injury suffered by the complainant and in this case the PW1 is not an element or ingredient of the offence of criminal intimidation in establishing it as an offence worthy of conviction. It is enough if the prosecution is able to establish that the accused and in this case the appellant made a threat by which the victim is thrown into fear of a harm to himself or any other person of an instant harm. What the prosecution needs to prove are:

a. That the accused threatened the complainant or some other persons.
b. That the threat was of some injuries to him.
c. That it was given to cause alarm to him or to cause him not to do or omit to do any act which he is legally entitled to or not bound to do.

From the communication between the appellant and PW1 though, most of the communication was from the appellant asking PW1 to pack out of Lokoja with a threat and when he moved to his office, the appellant and his people came there to threaten him and followed him to his house with threat of death. Clearly the three ingredients or elements of the offence under Section 397 of the Penal Code Law are made out. This is the fulcrum of the concurrent findings of the three courts below and in:

Action Congress of Nigeria vs. Sule Lamido & 40 Ors (2012) 8 NWLR (Pt. 1303) 560 at 594, this honourable court per Rhodes-Vivour JSC, held that:

"It is long settled that the concurrent findings of fact would rarely be disturbed by this court, but this court would be compelled to interfere if the findings are perverse or cannot be supported by the evidence before the court or there is/was a miscarriage of

A **justice or violation of some principle of law or procedure".**

Similarly, in the case of **Olatinwo Nurudeen Bright vs. The State (2012) 8 NWLR (Pt. 1302) 297 at 323 324**, this court stated that:

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> **"I said that findings of fact made by the trial court and confirmed by the Court of Appeal are very rarely disturbed or interfered with, but this court would quickly interfere and state the correct position if satisfied that there has been exceptional circumstances such as:**
>
> **(a) The findings cannot be supported by evidence or are perverse or**
>
> **(b) That there was miscarriage of justice or**
>
> **(c) The court overlooked some principles of law or procedure.**
>
> **See also Ogbu vs The State (1992) 8 NWLR (Pt. 259) 255".**

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The above are the general principles on which an appellate court should act faced with concurrent findings. When the appellate court comes to the conclusion that the trial court did not properly advert to the evidence or give unnecessary consequence to the evidence given, the appellate court is duty bound to perform the exercise. That does not mean a usurpation of the area within the exclusive preserve of the trial court as failure of the appellate court to do that needful is an abdication of responsibility. See **Lagos vs. Sarhwa (2008) 16 NWLR (Pt. 1114) 427 at 461.**

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Indeed what is before this court are concurrent findings of three courts including the trial court which court of first instance has shown that it evaluated the evidence before it within the areas that could only have been at the instance of the court that had the singular opportunity of hearing and seeing the vital witness or witnesses when they testified and so the two appellate courts lacked the power to interfere. This being because the exceptional circumstances on which an appellate court could interfere or

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disturb an earlier findings do not exist. The same apply to this court. See **Nkebisi vs. The State (2010) 5 NWLR (Pt. 471) 492; Dokubo Asari vs. FRN (2009) 37 NSCQR (Pt. 11) 1146 at 1173.**

The appellant had wanted this court to upset what the court below did on the ground that the conviction of the trial court which the High Court affirmed was based on the testimony of a sole witness, PW1. It is now settled law that the prosecution is not under any obligation to call a host of witnesses with whom it can prove the guilt of the accused appellant. This is because the fact that PW1 was the victim does not make out a necessity or need for an independent witness as in human dealings an alleged threat can emanate in a transaction between just two persons, one the person making the threat and the other, the person to whom it is made. To put across that once there is no other witness apart from the complainant, the offence cannot be established is to negate the intendment of the law and to give free hand to a person to dish out threats irrespective of the effects, injury or damage to the person and the perpetrator go scot free. It is to be reiterated that once the sole witness has proffered credible evidence uncontradicted and sufficient to satisfy the court that the burden of proof has been discharged, the fact that single witness is the complainant is of no moment. I rely on **Olabode vs. The State (2009) 28 NSCQR (Pt. 1) 313 ar 332; Buba vs. The State (1994) 7-8 SCNJ 472 at 478; State vs. Olatunji(2003) 14 NWLR (Pt. 839) 138 at 167-168.**

To answer the question whether the Court of Appeal was right in upholding the concurrent findings of the two courts below it. That is whether at the trial court the offence charged under Section 397 Penal Code Law had been proved beyond reasonable proved it beyond reasonable doubt. I would answer in the affirmative in that the prosecution/respondent proved it beyond reasonable doubt as the proof was borne out by the evidence from credible witness. I say so bearing in mind that not all doubts are reasonable and where they are not reasonable or fanciful doubt or imaginary doubt or speculative doubt, a doubt not sustained by the facts and circumstances of the case. In the case in hand there was sufficient evidence borne out of the record from which the proof beyond reasonable doubt was easily elicited and the concurrent findings were well situated, thereby

staying the hand of this court from interfering. See **Mufutau Bakare vs. The State (1987) 3 SC 33 per Oputa JSC**; **State vs. Aibangbee (supra).**

From the foregoing, there is clearly no merit in this appeal. I hereby order that the appeal is dismissed. I affirm the decision of the Court of Appeal in its affirmation of the judgment of the High Court which in turn affirmed the judgment, conviction and sentence of the trial Magistrate Court.

Appeal dismissed.

Mary Ukaego Peter-odili
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the opportunity of reading in draft the leading judgment prepared by my learned brother, Peter-Odili JSC. I entirely agree that this appeal has no merit and that it should be dismissed.

Accordingly I too hereby dismiss the appeal. The decision of the Court of Appeal is hereby affirmed.

Olabode Rhodes-vivour
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my learned brother **Mary Ukaego Peter-Odili, JSC.**

The judgment is well researched and reasoned. I do not have any useful thing further to add. I adopt the judgment as mine and also dismiss the appeal as lacking in merit.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): The appellant herein, along with two other co-accused persons were arraigned before a Lokoja Chief Magistrate Court (the trial court) for committing the offences of criminal breach of trust, theft, criminal conspiracy and criminal intimidation, contrary to Sections 97 (1), 306, 287, 322 and 397 of the Penal Code. At the close of the prosecution's case, the defence counsel made a submission of no case to answer' which the trial court upheld in respect of all the offences except the

offence of criminal intimidation, hence the appellant was charged with that offence, contrary to Section 397 of the Penal Code. At the end of the trial, the trial Chief Magistrate found the accused/appellant guilty of the offence of criminal intimidation and sentenced him to twelve months imprisonment or to pay an option of fine of#2,000.00. The appellant became unhappy with that conviction and sentence by the trial court hence he appealed to the High Court of Kogi State, Lokoja, sitting in its appellate jurisdiction which affirmed the appellant's conviction and sentence by the trial court. Dissatisfied with the judgment of the High Court (the intermediate court), the appellant appealed to the Court of Appeal, Abuja division (the lower court or court below) which affirmed the decisions of the two courts below. Still dissatisfied by the judgment of the lower court, he further appealed to this court.

Briefs of argument were filed and exchanged by parties. The appellant's learned counsel raised two issues for determination while the respondent's learned senior counsel who is the Hon. Attorney General of Kogi State, Ibrahim Sani Mohammed SAN, also identified two issues for the determination of this appeal which are identical to those raised by the appellant. Both the facts giving rise to this appeal and the issues for determination have been ably and adequately set out in the lead judgment and therefore need not be repeated here. To my mind, the salient point calling for consideration in resolving this appeal is whether the prosecution had led adequate and credible evidence in proof of their allegation of criminal intimidation against the appellant leading to the appellant's conviction by the trial court and also ultimately leading to concurrent findings of the two courts below affirming the trial courts conviction and sentence of the appellant of the offence of criminal intimidation.

For the prosecution to establish the offence of criminal intimidation under Section 397 of the Penal Code, it has the onus to prove the under mentioned ingredients in order to obtain conviction. The ingredients of the offence are listed hereunder:

(a) That the accused person threatened the complainant or some other person.

(b) That the threat was of some injury to him;

(c) That it was given to cause alarm to him or to cause him not to do or to omit to do any act which he is legally entitled to do or not bound to do.

In this instance case evidence abound from the testimony of the complainant i.e. PW1 when he testified, inter alia:

(i) That the appellant and some other told him to pack out of Lokoja or else they were going to kill him hence he reported to his lawyer who advised him to register a complain.

(ii) The latter followed him to his house to which he relocated his office and carried out the same threat.

(iii) One of the accused persons told him that he must join them in their business or else they will kill him after all he (2nd Accused) knew the Inspector General of Police.

(iv) That the 1st accused person now appellant, brought poison to him through the 2nd accused and tried to force him to drink it but he refused hence he reported the matter to Nigeria Police B Division.

(v) Also, on 28/3/2007 some boys came to his house/office with pistol and threatened to kill him.

All these pieces of evidence of PW1 were not controverted as shown on the record. To my mind therefore, they provided sufficient instances of threat to the life of the complainant or at least of injury to be caused on him. Such series of threats were obviously calculated at or aimed at seeing that he the PW1 (complainant) either leaves Lokoja town or to join the business of the gang of persons accused in the case among whom the appellant was a prominent member if not a master minder. It is my view that the lower

court's judgment now appealed against can not be faulted when that court affirmed the findings of both the High Court (intermediate court) and the Chief Magistrates court (the trial court) and on arriving at the conclusion that the prosecution had proved the offence of criminal intimidation, contrary to Section 397 of the Penal Code beyond reasonable doubt against the present appellant. It needs to be emphasised that in an offence under Section 397 of the Penal Code it is immaterial that the complainant did not suffer actual physical injury, provided the prosecution proved that there was actual threat to his life or to injure him, which had obviously caused genuine fear in him of being killed or causing him harm or bodily injury. In this instant case, all the three ingredients of the offence of criminal intimidation, under Section 397 of the Penal Code were duly established against the appellant and as such he was rightly convicted and sentenced by the learned trial Chief Magistrate and also as rightly affirmed by the two lower courts.

My lords, permit me to comment on or emphasize on the requirement of proof of crime by the prosecution in criminal matters. All our previous constitutions in this country had made adequate provisions affecting our criminal legal system especially on the age-long principle of law that an accused is presumed innocent until he is proven guilty.

This presumption of innocence places the onus of proof on the prosecution to prove a case beyond reasonable doubt, in accordance with Section 138 of the Evidence Act, Cap 112 of Laws of the Federation. The prosecution must, in the process to prove all the ingredients of the offence charged by producing material and credible evidence through vital witness or witnesses to testify during the proceedings. See **Afolalu Vs. The State (2010) 43 NSCQR 258/259.** Once any of the ingredients of the offence charged is not proved, the prosecution shall fail and the accused must be acquitted of the offence charged as the burden never shifts.

My attention has been attracted by the submission of the learned counsel for the appellant when he raised same insinuations or sentiments that the trial court relied only on the testimony of one witness i.e the PW1, to convict the appellant. With due deterence to the learned counsel, once the prosecution was able to discharge its burden of proof of the offence

charged, the court of trial can convict the accused even on the evidence of a single witness as in this instant case. See **Amina Vs. The State (1990) 6 NWLR (Pt. 155)' Okosi Vs. Ag Bendel State (1989) 1 NWLR (Pt. 100) 642; Nwachukwu vs. The State (1985) 1 NWLR (Pt. II) 218; Ani vs. The State (2003) 11 NWLR (Pt. 83) 142; Afololu vs. The State (supra).** It is a well settled principle of law, that the prosecution is not bound to call every person that was linked to the offence by physical presence or otherwise to give evidence of what he perceived. Once person who can testify to the actual commission of the crime and the other relevant ingredients has done so, it will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 of the Evidence Act. See **Obue vs. State (1976) 2 SC 141; Sadau vs. State (1969) All NLR 124; The State vs. John Ogunbanjo & Anor (2001) 12 NWLR (Pt. 678) 576; Shurumo vs. The State (2010) 44 NSCQR 159**. As a matter of fact, a single witness who gives cogent eye witness account of the incident, as in this instant case, will be sufficient. See **Odili vs. Satte (1977) 4 Sc 1; Shurumo vs. The State (supra).**

Finally, in this instant appeal, it is noted by me that there exist concurrent findings of three lower courts all establishing the guilt of the appellant. As a matter of practice and policy, this court does not ordinarily disturb or interfere with concurrent findings of lower courts except where special or exceptional circumstances exist as would warrant this court's interference. Some of this exceptional circumstances border on the fact that the findings are perverse or there has been apparent misconception or misapplication of law. See **UGBO vs. ABURIM (1994) 9 SCNJ 23 at 38; Oshitoba vs. Olujitan (2000) 2 SCNJ 156 at 176, Action Congress of Nigeria vs. Sule Lamido & 4 ors (2012) 8 NWLR (pt. 1303) 360.** In this instant appeal I have not been able to see any special or exceptional circumstance bordering on any of the above mentioned vices or features in the findings of facts or misapplication of law or that any miscarriage of justice was occasioned in the findings of the three lower courts as would justify my interference with or disturbance of such findings. I will therefore refuse to interfere with same.

A In the final result, I am in complete agreement with the reasoning and conclusion arrived at by my learned brother, Mary Odili, JSC. While adopting them as mine, I will also dismiss this appeal for being devoid of any merit. The instant appeal therefore fails and is accordingly dismissed
B by me. I duly affirm the judgment of the Court of Appeal, Abuja division which had earlier affirmed and endorsed the decisions of the two courts below it and affirmed the conviction and sentence of the appellant by the trial court. Appeal dismissed.

C **Amiru Sanusi**
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead
D Judgment of my learned brother Mary Ukaego Peter-Odili, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. And it is accordingly dismissed by me.

Sidi Dauda Bage
E ***Justice, Supreme Court***

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SOLOMON ADEKUNLE
AND
ATTORNEY GENERAL OF OGUN STATE

SC.448/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

JUDGMENT AND ORDERS: Academic question – Where judgment of court involves an academic question – Purport – Implications thereof.

PRACTICE AND PROCEDURE: Preliminary Objection – Nature, purpose – Or. 2 Rule 9 Supreme Court Rules 1985 (as amended) – Relevant considerations thereof.

WORDS AND PHRASES: Academic question – Meaning

Issues for Determination

1. **Whether the lower court was right in upholding the High Court's finding that the High court had no jurisdiction to interfere with the death sentence affirmed by this Honourable court notwithstanding the fact that the extant proceedings were for the enforcement of the**

applicant's constitutionally guaranteed fundamental rights.

2. **Whether the period of incarceration of the appellant on the "death Row" for six (6) years awaiting his execution, indeed constituted a violation of the appellant's fundamental right prescribed under section 34 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria as well as under Article 5 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation, 1990 justifying an interference with the appellant's death sentence.**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal Ibadan Division delivered on 20th February, 2014 – Coram: Chidi Nwaome Uwa, JCA, Haruna Simon Tsammani, JCA, Obietonbero Daniel-Kalio, JCA wherein, in dismissing the appellant's appeal the court affirmed the judgment of the trial court delivered on Friday the 15th day of June, 2007 in suit No. M/105/2006.

The appellant herein had earlier been charged with offence of murder, tried, convicted and consequently sentenced to death at the Ogun State High Court. His appeal to the court of Appeal was dismissed and the subsequent appeal to the Supreme Court was dismissed, whereby the conviction and sentence, passed on the appellant by the trial High court and affirmed by the Court of Appeal was affirmed by the Supreme Court on the 10th day of June, 2006. The applicant was then awaiting execution of the judgment of the court.

Subsequently, the appellant applied to the High Court of Ogun State for the enforcement of his fundamental Rights to Freedom from Torture, inhuman and degrading treatment as guaranteed by Section 34 of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 3,4,5,6, and 8 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap.10 Laws of the Federation of Nigeria, 1990.

By the said application, the appellant had sought the following reliefs:

"1. A DECLARATION that as a citizen of the Federal Republic of Nigeria, the applicant is entitled to protection against any form of infringement of his fundamental rights guaranteed under Section 34 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1999.

2. A DECLARATION that the punishment for murder is death and does not include prolonged period in detention before the execution of the death sentence.

3. A DECLARATION that the prolonged detention of the applicant under death row awaiting the execution of the death sentence with its associated trauma and anguish constitutes torture, cruel, inhuman and degrading treatment.

4. A DECLARATION that the prolonged detention of the applicant since he was convicted and sentenced to death in 13/10/2000 awaiting execution a period of more than 6 years constitutes another form of punishment i.e. long period of imprisonment under trauma and anguish of imminent death, for the same offence apart from the punishment of death and therefore deserving judicial remedy for the earlier sentence of death.

5. A DECLARATION that to carry out the execution of the death sentence on the applicant, a delay of more than 6 years constitutes inhuman and cruel punishment contrary to Section 34 (1) (a) of the constitution of the Federal Republic of Nigeria.

6. A DECLARATION that the period of more than 6 years in detention awaiting execution constitutes a period of despair, agony, uncertainty which impacts negatively on the mental, emotional and psychological health of the applicant and is

therefore unlawful and offends Section 34 (1) (a) of the Constitution of the Federal Republic of Nigeria.

7. **AN ORDER for stay of the execution of the death sentence passed on the applicant.**

8. **AN ORDER for unconditional release of the Applicant from prison or alternatively AN ORDER that the death sentence be converted to a term of imprisonment not exceeding 6 years including the period he was detained awaiting execution of his sentence.**

In support of the application were two affidavits and a Statement stating the grounds of the application. The respondent filed a counter affidavit to oppose the application and the appellant filed a further and Better Affidavit in response. Learned counsel to both parties thereafter addressed the trial court. In its reserved judgment delivered on 15/06/2007, the trial court granted the declaration sought in relief 1 above, that, as a citizen of the Federal Republic of Nigeria, the applicant is entitled to protection against any form of infringement of his fundamental rights guaranteed under Section 34 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1999. The declarations sought in reliefs 2,3,4, and 5 failed on ground of want of evidence. The two Orders sought in reliefs 7 and 8 above were adjudged without foundation and accordingly dismissed.

Dissatisfied with the judgment of the trial court led the applicant to appeal to the Court of Appeal on five (5) grounds of appeal from which four (4) issues were distilled for determination. In their reserved unanimous decision handed down on 27/2/2014, the appeal was dismissed after resolving all the issues presented for determination against the applicant. The judgment of the trial court was then affirmed.

Further dissatisfied led the appellant to appeal to the Supreme Court.

Held: *(Unanimously striking out the appeal)*

1. *The nature and purpose of preliminary objection*
Generally, pursuant to Order 2 rule 9 of the Rules of this court, a respondent is empowered to rely on a preliminary objection to the hearing of the appeal, the purpose being to bring the hearing of the appeal to an end for being incompetent or fundamentally defective. Consequently, once a preliminary objection raised to an appeal succeeds, it terminates the appeal and the court can no longer do anything with the appeal. It has come to an end. See; General Electric Co. vs Harry Ayoade Akande (2010) 18 NWLR (Pt.1225) 596 (2010) SCM (2010) LPELR 9356; Habib vs. Principal Immigration Officer (1958) 3 FSC 75, or (1958) SCNLR 219. In other words, it is trite that where a preliminary objection to the hearing of an appeal succeeds, the court is not expected, as there would be no need to go further to consider the arguments in support of the issues raised for determination. See; Ralph Uwazurike & Ors vs. Attorney General of the Federation (2007) 8 NWLR (Pt.1035) 1; (2007) SC 169; (2007) SCM; Attorney General of the Federation vs. ANPP & 2 Ors (2003) 12 SCNJ 67 at 81; (2003) SCM (2003) 18 NWLR (Pt.851) 182.
(Pp 302 – 303 Paras G – B).

2. *No execution while appeal was pending*
As earlier noted, the appellant was convicted of murder by the Ogun State High Court and accordingly, sentenced to death on the 13th day of October, 2000. His challenge of the conviction before the court below and then this court was unsuccessful. Naturally, the appellant was in detention and on "Death Row" during the period of the challenge of his conviction. During the period between the time he was convicted and sentenced to death by the trial court and when his sentence was finally affirmed by this court, the appellant was exercising his constitutionally guaranteed right of appeal, and therefore his sentence could not have been carried out by the Executive arms of the Government whose responsibility it is to execute or carry out the sentence order of the court on the appellant.
(Pp 305 – 306 Paras H – C).

3. *Appellant's death sentence was committed to life imprisonment*
It is clear on the record that the above reliefs were refused by the court below in its judgment, subject of this appeal on 27/2/2014.

However, earlier on 30th September, 2010 the then Executive Governor of Ogun State, Otunba Gbenga Daniel has taken the following steps on the appellant's case.

> **"in exercise of the power conferred upon me by subsection (1) of the Section 212 of the said Constitution and by virtue of all other powers enabling me in that behalf, do herby order that the sentence of death passed on Solomon Adekunle (m) upon his conviction aforesaid be commuted to life imprisonment and the said Solomon Adekunle (m) be committed to the Nigerian Prisons, Abeokuta for the said period with effect from his conviction."**

In other words, with the above Executive Order of the Governor of Ogun State which commuted the appellant's death sentence to life imprisonment he ceases to be on death row from the 30th day of September, 2010. Therefore, even as at the time of the judgement in the appeal before the court below in 2014 the appellant was no longer on death row, but had had his death sentence commuted to imprisonment by the Executive Governor who has the power under the Constitution so to do. See; Exhibit R.1. *(P 307 Paras B – G).*

4. *When Issues for determination have become academic and hypothetical*
However, again, while this appeal was pending, the appellant was said to have, on 6th April, 2016 caused the Prisons Service to put forward an application for further prerogative of Mercy to His Excellency Senator Ibikunle Amosun, which application was rejected on 25th May, 2016 following Advice by the Advisory Council on Prerogative of Mercy of Ogun State issued on 27th April, 2016. See; Exhibit R2.

There is no doubt that the issues being canvassed in the instant appeal are in relation to the death sentence passed on the appellant

by the trial High Court and affirmed by the court below and this court, but which sentence had since been commuted to imprisonment by the Governor of Ogun State. In which case as I said earlier, the appellant is no longer on "death row" since 2010. The issue, therefore, whether the period of his incarceration on the death row for six years awaiting his execution, constituted a violation of his constitutionally guaranteed Fundamental Right under the 1999 Constitution, in my view, has become academic and hypothetical. In view of the judgment of this court affirming the conviction and sentence of the appellant and the commutal of the sentence to life imprisonment, bearing in mind that the earlier delay in carrying out the appellant's execution was because he exercised his constitutional right of appeal up to this court, whatever, decision is expected in this appeal will be academic and hypothetical.
(Pp 307 – 308 Paras G – D).

5. *When a judgment becomes academic and hypothetical*
In Adeogun & Ors vs Olawole Fashogbon & Ors (2008) 17 NWLR (Pt.1115) 149; (2008) 5-6 SC (Pt.1) 23; (2008) 11 SCM1, this court on any judgment which does not decide a living issue, opined as follows:

> **"Any judgment which does not decide a living issue is academic or hypothetical. It stands in its best quality only as an advisory opinion. This court, and indeed, any court in Nigeria, will not engage in rendering such a judgment….. There cannot be said to be a live issue in a litigation of what is presented to the court for a decision, when decided cannot affect the parties thereto in any way either because of the fundamental nature of the reliefs sought or of changed circumstances since after the litigation started."**

This appeal has therefore become academic and hypothetical. In the circumstance, the preliminary objection to the hearing of this

appeal succeeds and is sustained. This court will not embark on the hearing of the appeal. Accordingly, the appeal is liable to being struck out. *(P 308 Paras D – I)*

Nigerian Cases Cited

Adeogun & Ors vs Olawole Fashogbon & Ors (2008) 17 NWLR (Pt.1115) 149; (2008) 5-6 SC (Pt.1) 23; (2008) 11 SCM1.

Attorney General of the Federation vs. ANPP & 2 Ors (2003) 12 SCNJ 67; (2003) SCM (2003) 18 NWLR (Pt.851) 182.

General Electric Co. vs Harry Ayoade Akande (2010) 18 NWLR (Pt.1229) 596 (2010) SCM (2010) LPELR 9356;

Habib vs. Principal Immigration Officer (1958) 3 FSC 75, or (1958) SCNLR 219.

Ralph Uwazurike & Ors vs. Attorney General of the Federation (2007) 8 NWLR (Pt.1035) 1; (2007) SC 169; (2007) SCM;

Nigerian Statute Cited

The 1999 Constitution of the Federal Republic of Nigeria – Section 34 (1) (a)

Representation

R. A. Aladesanmi, (Esq.) with G. S. Okewole, (Esq.) for the appellant
Dr. Olumide Ayeni, A.G. Ogun State with Mrs. Yetunde Oresanya, DLAS, Otenghabun Ebose, E(sq.) SA.l to A.G., Adekola llori (Esq.) SA.ll to A.G., and Prosper G. Akubue (Esq) for the respondent.

OLU ARIWOOLA, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal Ibadan Division delivered on 20th February, 2014 Coram: Chidi Nwaome Uwa, JCA, Haruna Simon Tsammani, JCA, Obietonbero Daniel-Kalio, JCA wherein, in dismissing the appellant's appeal the court affirmed the judgment of the trial court delivered on Friday the 15th day of June, 2007 in suit No. M/105/2006.

A The appellant herein had earlier been charged with offence of murder, tried, convicted and consequently sentenced to death at the Ogun State High Court. His appeal to the court below was dismissed and the subsequent appeal to this court was dismissed, whereby the conviction and
B sentence, passed on the appellant by the trial High court and affirmed by the court below was affirmed by this court on the 10th day of June, 2006. The appellant was then awaiting execution of the judgment of the court.

Subsequently, the appellant applied to the High Court of Ogun State
C for the enforcement of his fundamental Rights to Freedom from Torture, inhuman and degrading treatment as guaranteed by Section 34 of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 3,4,5,6, and 8 of the African Charter on Human and Peoples Rights (Ratification
D and Enforcement) Act, Cap.10 Laws of the Federation of Nigeria, 1990.

By the said application, the appellant had sought the following reliefs:

E **"1. A DECLARATION that as a citizen of the Federal Republic of Nigeria, the applicant is entitled to protection against any form of infringement of his fundamental rights guaranteed under Section 34 (1) (a) of the Constitution of the Federal Republic of**
F **Nigeria, 1999.**

2. A DECLARATION that the punishment for murder
G **is death and does not include prolonged period in detention before the execution of the death sentence.**

3. A DECLARATION that the prolonged detention of
H **the applicant under death now awaiting the execution of the death sentence with its associated trauma and anguish constitutes torture, cruel, inhuman and degrading treatment.**

I

4. A DECLARATION that the prolonged detention of the applicant since he was convicted and sentenced to death on 13/10/2000 awaiting execution – a period of more than 6 years constitutes another form of punishment i.e. long period of imprisonment under trauma and anguish of imminent death, for the same offence apart from the punishment of death and therefore deserving judicial remedy for the earlier sentence of death.

5. A DECLARATION that to carry out the execution of the death sentence on the applicant, a delay of more than 6 years constitutes inhuman and cruel punishment contrary to Section 34 (1) (a) of the constitution of the Federal Republic of Nigeria.

6. A DECLARATION that the period of more than 6 years in detention awaiting execution constitutes a period of despair, agony, uncertainty which impacts negatively on the mental, emotional and psychological health of the applicant and is therefore unlawful and offends Section 34 (1) (a) of the Constitution of the Federal Republic of Nigeria.

7. AN ORDER for stay of the execution of the death sentence passed on the applicant.

8. AN ORDER for unconditional release of the Applicant from prison or alternatively AN ORDER that the death sentence be converted to a term of imprisonment not exceeding 6 years including the period he was detained awaiting execution of his sentence.

A In support of the application were two affidavits and a Statement stating the grounds of the application. The respondent filed a counter affidavit to oppose the application and the appellant filed a further and Better Affidavit in response. Learned counsel to both parties thereafter addressed the trial
B court. In its reserved judgment delivered on 15/06/2007, the trial court granted the declaration sought in relief 1 above, that, as a citizen of the Federal Republic of Nigeria, the applicant is entitled to protection against any form of infringement of his fundamental rights guaranteed under
C Section 34 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1999. The declarations sought in reliefs 2,3,4, and 5 failed on ground of want of evidence. The two Orders sought in reliefs 7 and 8 above were adjudged without foundation and accordingly dismissed.

D Dissatisfied with the judgment of the trial court led the applicant to appeal to the court below on five (5) grounds of appeal from which four (4) issues were distilled for determination. In their reserved unanimous decision handed down on 27/2/2014, the appeal was dismissed after
E resolving all the issues presented for determination against the applicant. The judgment of the trial court was then affirmed.

Further dissatisfied led the appellant to appeal to this court.

Pursuant to the rules of this court, parties filed their respective briefs
F of argument. The appeal was heard on appellant's brief of argument filed on 23/10/2014, a Reply Brief filed on 02/11/2016 and a Reply to the Respondent's Preliminary Objection filed on 12/10/2017.

The respondent filed her brief of argument on 31/3/2016 which was
G deemed properly filed and served on 13/10/2016. The respondent however, filed a Notice of Preliminary Objection to the appeal on 10/11/2016.

In his brief of argument, appellant distilled two (2) issues for
H determination of the appeal as follows:-

Issues for Determination

I **1. Whether the lower court was right in upholding the High Court's finding that the High court had no**

jurisdiction to interfere with the death sentence affirmed by this Honourable court notwithstanding the fact that the extant proceedings was for the enforcement of the applicant's constitutionally guaranteed fundamental right.

2. **Whether the period of incarceration of the appellant on the "death Row" for six (6) years awaiting his execution, indeed constituted a violation of the appellant's fundamental right prescribed under section 34 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria as well as under Article 5 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation, 1990 justifying an interference with the appellant's death sentence.**

However, before this appellant proceeded with his appeal, learned Attorney General of Ogun State, Dr. Olumide Ayeni drew the attention of the court to his Notice of Preliminary Objection and urged the court to consider same with the appeal so as not to be seen as having abandoned the preliminary objection. See; **Ofonkiri vs. Maduike** (2003) 1 SCBH 440; **Tiza vs. Begba** (2005) 5 SCNJ 168; **Alhaji Saka Opobiyi & Anor vs. Layiwola Muniru** (2011) LPELR – 8232 (SC).

Generally, pursuant to Order 2 rule 9 of the Rules of this court, a respondent is empowered to rely on a preliminary objection to the hearing of the appeal, the purpose being to bring the hearing of the appeal to an end for being incompetent or fundamentally defective. Consequently, once a preliminary objection raised to an appeal succeeds, it terminates the appeal and the court can no longer do anything with the appeal. It has come to an end. See; **General Electric Co. vs Harry Ayoade Akande** (2010) 18 NWLR (Pt.1229) 596 (2010) SCM (2010) LPELR – 9356; **Habib vs. Principal Immigration Officer** (1958) 3 FSC 75, or (1958) SCNLR 219. In other words, it is trite that where a preliminary objection to the hearing of

an appeal succeeds, the court is not expected, as there would be no need to go further to consider the arguments in support of the issues raised for determination. See; **Ralph Uwazurike & Ors vs. Attorney General of the Federation (2007) 8 NWLR (Pt.1035) 1; (2007) SC 169; (2007) SCM; Attorney General of the Federation Vs. ANPP & 2 Ors (2003) 12 SCNJ 67 at 81; (2003) SCM (2003) 18 NWLR (Pt.851) 182.**

I shall therefore proceed at this stage to consider the preliminary objection, notice of which was given on 10/11/2016. In the said notice, the respondent is contending that the appeal is grossly incompetent and should be dismissed. The objection is predicated on the following grounds:

1. **The appellant has had his sentence of DEATH commuted to life imprisonment by His Excellency Otunba Gbenga Daniel, the Governor of Ogun State on 30th September, 2010 pursuant to Section 212 of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) and was not under Death Row at any time before the appeal at the lower court was heard or determined.**

2. **The appellant caused the Nigerian Prisons Service to put forward an application for further Prerogative of Mercy on 6th April, 2016 to His Excellency Senator Ibikunle Amosun OOn, FCA the Governor of Ogun State which was rejected on 25th May, 2016 following advice by the Advisory Council on Prerogative of Mercy of Ogun State issued on 27th April, 2016.**

3. **The appeal is hypothetical, academic as well as constitutes an utter abuse of the process of the Honourable Court on account of its agitation of no cause of action and or appeal.**

In support of the said Notice of Preliminary Objection is an affidavit

deposed to by the Hon. Attorney General of Ogun State himself. Attached to the said Notice are Exhibits R1 and R2 and a written address of counsel.

It is note worthy that the appellant filed a Reply on 12/10/17 to the Preliminary objection.

In his address, learned Attorney General referred to Section 212 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the consequent pronouncement of His Excellency the Executive Governor of Ogun State by Order of 30th September, 2010. Learned Attorney General contended that although the appellant reprehensibly failed to disclose the fact that the Governor has taken favourable action and commuted the appellant's death sentence to life imprisonment, while contumaciously seeking to agitate this appeal is abuse of the process; he submitted that the whole appeal is now hypothetical, moot and academic and should be dismissed. He relied on **A.G. of the Federation vs. All Nigeria Peoples Party & Ors** (2003) 19 NWLR (Pt.851) 182 at 215.

He referred to Exhibits R1 & R2 to show the desperate but reprehensible actions of the appellant, abusing at every turn, the process of this Honourable court as well as treating due process of law with utter contempt in his bid to bail out from prison hook, line and or sinker.

In conclusion learned Attorney General urged the court to refuse and dismiss the appeal as entirely unmeritorious and constituting an abuse of the process.

In response to the objection, learned counsel for the appellant referred to the respondent's objection and the grounds upon which it is predicated. He contended that none of the averment made in the objection is borne out by the records of the lower court before this, court. He submitted that the respondent has not been able to identify or address any inherent defect in the appeal before this court as constituted.

Learned counsel raised the following issue as having arisen for determination of the objection.

"Whether this court can countenance this preliminary objection as constituted."

Learned counsel referred to the relief being sought with the objection, which is to dismiss this appeal "in limine" or "peremptorily". He submitted that it is settled law that in determining a preliminary objection, the court is confined to the processes objected to and it is not the stage at which evidence is proffered by the objector. He submitted that the whole essence of a preliminary objection to an appeal is to foreclose hearing the appeal as constituted, based on the processes filed by the appellant. He relied on **Ndigwe vs. Nwude** (1999) 11 NWLR (pt.626) 314; **Yaro vs Arewa Construction Ltd** (2007) 16 NWLR (Pt.1063) 33.

Learned counsel further submitted that in raising a preliminary objection in this court, the respondent needed to file a formal application, containing the grounds of the objection and counsel must present his argument on the objection in the respondent's brief. He relied on **Ogbimi vs Niger Construction Coy** (2006) 4 SC (Pt.1) 210.

Learned counsel contended that it is a fundamental flaw to the objection that the purported issue of commutal of the appellant's sentence to life imprisonment, was never canvassed before the lower court, even though the purported commutal was said to have been done before the hearing of the appeal at the lower court. He submitted that in essence, this court is being invited to adjudicate upon an issue which was not argued before the lower court and which has not been raised at all on the extant Notice of Appeal, before this court. He submitted further that an appellate court, as well as the parties are bound by the record of appeal before the court and will not be permitted to do anything outside the record of appeal.

Learned counsel contended that the alleged facts upon which the objection is predicated are nowhere contained in the record of appeal. He contended further that the respondent has not sought the leave of this court to raise the "fresh issue". He submitted that there is no factual basis properly before this court, on which the issue raised in the preliminary objection is founded. He urged the court to dismiss the preliminary objection.

As earlier noted, the appellant was convicted of murder by the Ogun State High Court and accordingly, sentenced to death on the 13th day of

October, 2000. His challenge of the conviction before the court below and then this court was unsuccessful. Naturally, the appellant was in detention and on "Death Row" during the period of the challenge of his conviction. During the period between the time he was convicted and sentenced to death by the trial court and when his sentence was finally affirmed by this court, the appellant was exercising his constitutionally guaranteed right of appeal, and therefore the execution of his sentence could not have been carried out by the Executive arms of the Government whose responsibility it is to execute or carry out the sentence order of the court on the appellant.

The fresh action challenging the constitutionality of carrying out his execution had been instituted before the Ogun State High Court pursuant to the Fundamental Rights Enforcement Procedure Rules 1979, to the effect that proceeding with his execution after a period of six (6) years on death row would amount to a violation of his constitutional right not to be subjected to torture, inhuman or degrading treatment. The action was dismissed and the appeal to the court below was also dismissed leading to the instant further appeal.

It is note worthy that the lower court agreed with the trial court and held that by virtue of the affirmation of the death sentence on the appellant by this court:

> **…….no other court in Nigeria has the vires or jurisdiction to interfere under any guise whatsoever."**

The lower court opined that only pursuant to the prerogative of mercy by the Executive under section 212 of the 1999 Constitution of the Federal republic of Nigeria that the death sentence could be interfered with.

As clearly shown earlier, the appellant had sought the following two Orders from the court below:

> **(a) An Order for stay of the execution of the death sentence passed on the applicant, and**
>
> **(b) An Order for unconditional release of the applicant**

from prison or alternatively, an Order that the death sentence be commuted to a term of imprisonment not exceeding 6 years including the period he was detained awaiting execution of his sentence.

It is clear on the record that the above reliefs were refused by the court below in its judgment, subject of this appeal on 27/2/2014.

However, earlier on 30th September, 2010 the then Executive Governor of Ogun State, Otunba Gbenga Daniel has taken the following steps on the appellant's case.

"in exercise of the power conferred upon me by subsection (1) of the Section 212 of the said Constitution and by virtue of all other powers enabling me in that behalf, do herby order that the sentence of death passed on Solomon Adekunle (m) upon his conviction aforesaid be commuted to life imprisonment and the said Solomon Adekunle (m) be committed to the Nigerian Prisons, Abeokuta for the said period with effect from his conviction."

In other words, with the above Executive Order of the Governor of Ogun State which commuted the appellant's death sentence to life imprisonment he ceases to be on death row from the 30th day of September, 2010. Therefore, even as at the time of the judgement the appeal before the court below in 2014 the appellant was no longer on death row, but had had his death sentence commuted to imprisonment by the Executive Governor who has the power under the Constitution so to do. See; Exhibit R.1.

However, again, while this appeal was pending, the appellant was said to have, on 6th April, 2016 caused the Prisons Service to put forward an application for further prerogative of Mercy to His Excellency Senator Ibikunle Amosun, which application was rejected on 25th May, 2016 following Advice by the Advisory Council on Prerogative of Mercy of Ogun State issued on 27th April, 2016. See; Exhibit R2.

There is no doubt that the issues being canvassed in the instant appeal are in relation to the death sentence passed on the appellant by the trial High Court and affirmed by the court below and this court, but which sentence had since been commuted to imprisonment by the Governor of Ogun State. In which case as I said earlier, the appellant is no longer on "death row" since 2010. The issue, therefore, whether the period of his incarceration on the death row for six years awaiting his execution, constituted a violation of his constitutionally guaranteed Fundamental Right under the 1999 Constitution, in my view, has become academic and hypothetical. In view of the judgment of this court affirming the conviction and sentence of the appellant and the commutal of the sentence to life imprisonment, bearing in mind that the earlier delay in carrying out the appellant's execution was because he exercised his constitutional right of appeal up to this court, whatever, decision is expected in this appeal will be academic and hypothetical.

In **Adeogun & Ors vs Olawole Fashogbon & Ors** (2008) 17 NWLR (Pt.1115) 149; (2008) 5-6 SC (Pt.1) 23; (2008) 11 SCM1, this court on any judgment which does not decide a living issue, opined as follows:

> **"Any judgment which does not decide a living issue is academic or hypothetical. It stands in its best quality only as an advisory opinion. This court, and indeed, any court in Nigeria, will not engage in rendering such a judgment….. There cannot be said to be a live issue in a litigation of what is presented to the court for a decision, when decided cannot affect the parties thereto in any way either because of the fundamental nature of the reliefs sought or of changed circumstances since after the litigation started."**

This appeal has therefore become academic and hypothetical. In the circumstance, the preliminary objection to the hearing of this appeal succeeds and is sustained. This court will not embark on the hearing of the appeal. Accordingly, the appeal is liable to being struck out.

A Appeal struck out.

Olu Ariwoola
Justice, Supreme Court

B **BAYANG AKAAHS (JSC):** The issue which this court was called to resolve as pointed out by my learned brother, Ariwoola (JSC) in his leading judgment has become academic and hypothetical. I entirely agree with him. After the death sentence was passed on the appellant he waited for C over six years on the death row awaiting his execution. It was in this state of affairs that he applied to court for the enforcement of his fundamental rights to freedom from torture, inhuman and degrading treatment as enshrined in section 34 of the Constitution of the Federal Republic of Nigeria 1999 and D Articles 3,4,5,6 and 8 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria, 1990.

The appellant sought for several reliefs, two of which were:

E

"(a) An Order for stay of the execution of the death sentence passed on the applicant

F **(b) An Order for unconditional release of the applicant from prison or alternatively**

AND ORDER that the death sentence be converted to a G **term of imprisonment not exceeding 6 years including the period he was detained awaiting execution of his sentence".**

The trial court stayed execution of the judgment. The appeal to the Court of H Appeal was dismissed and the appellant further appealed to this Court. In the interim the Ogun State Governor, Otunba Gbenga Daniel, had exercised the prerogative of mercy and commuted the appellant's death sentence to life imprisonment. Based on this development, the Attorney-General filed I notice of preliminary objection to the hearing of the appeal.

A After an accused person has been tried and sentenced to death and his appeal is ultimately dismissed by the Supreme Court the death penalty hangs on his head until the execution is carried out. Where the State exercises its power to commute death sentence to life imprisonment, there
B is nothing the Court can do. The preliminary objection therefore succeeds and the appeal is struck.

K. B. AKA'AHS
Justice, Supreme Court

C

ADAMU AUGIE, (JSC): I had a preview of the lead Judgment delivered by my learned brother, Ariwoola, JSC, and I agree entirely with him that in the circumstances of this case, the Respondent's Preliminary Objection
D must be upheld.

Obviously, in the peculiar circumstances of this case, the issue of whether the Appellant's incarceration on death row for six years, while awaiting execution, constituted a violation of his Fundamental Right, has
E become academic and hypothetical. Courts of law are enjoined not to dwell on academic issues, which cannot affect the Parties in any way **Att.-Gen., Fed. V. ANPP & Ors** (2003) 19 NWLR (Pt. 851) 182.

In this case, the Preliminary Objection succeeds; it is sustained, and
F the Appeal is accordingly struck out.

Amina Adamu Augie,
Justice, Supreme Court

G **ADAMU GALINJE, (JSC):** I have had the advantage of reading in draft the judgment just delivered by my learned brother ARIWOOLA, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

H My learned brother has exhaustively dealt with the issues submitted for determination of this appeal. I have nothing useful to add. For the same reason articulated in the lead judgment, which I adopt as mine, this appeal is struck out.

I **Paul Adamu Galinje**
Justice, Supreme Court

SOUTH ATLANTIC PETROLEUM LIMITED
AND
1. THE MINISTER OF PETROLEUM RESOURCES
2. EMO EXPLORATION AND PRODUCTION LIMITED
3. ONGC/ MITTAL ENERGY LIMITED

SC. 143/2008

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Application for certiorari – When statute barred – Order 47 Rule 4(3) Federal High Court Rules 2000 – Relevant considerations thereof.

APPEAL: Ground of appeal – Where a ground of appeal challenges the reasoning of a court – Whether such a ground has any bearing or effect on the conclusion arrived from the reasoning – Does a complaint or reasoning also amount to a complaint on conclusion arrived therefrom.

PRACTICE AND PROCEDURE: Preliminary objection – Nature and purpose.

ACTION: Certiorari – The nature of application for certiorari – How determined at the Federal High Court – Or. 47 Rule 3(10) – Scope and

application.

CONSTITUTIONAL LAW: Breach of fair hearing – Whether an appellant who has established breach of fair hearing needs to show miscarriage of justice thereto.

CONSTITUTIONAL LAW: Formidable position of fair hearing – Effect of its violation – Relevant considerations thereof.

COURT: Where court takes and decides an issue suo motu – Issue not canvassed by parties either orally nor in their briefs – Case of appellant dismissed based on the said issue – Propriety.

LEGAL PRACTITIONERS: Citing of authorities in Court – What determines appropriate authorities to be cited in court – Relevant considerations thereof.

WORDS AND PHRASES: Reasoning – Meaning

Issues for Determination

1. Whether or not the lower court was right when it dismissed the appeal based on the ground that the appeal has become academic, without giving the appellant an opportunity to be heard on it.

2. Whether on the facts of this case, the term of OPL 246 had expired by effluxion of time on 28/3/2008, and if it had, whether the learned justices of the Court of Appeal were right in dismissing the appeal on the ground that the term of OPL 246 having expired prior to the date the judgment was delivered, the appeal was devoid of live issues and had therefore become academic.

3. Having regard to the unchallenged evidence before the court, were the learned justices of the Court of Appeal right in holding that the

appellant did not place materials before the court to support its prayer for *inter alia,* a declaration that the appellant has unexpired term of two years in *OPL 246,* which has been put in abeyance by the acts/omission of the 1st respondent complained of.

4. Did the learned justices of the Court of Appeal apply correct principles in failing to exercise their discretion to grant the declaration sought by the appellant? And if not, whether this honourable court should not exercise its powers under Section 22 of the Supreme Court Act to grant the declarations sought.

Facts of the Matter

The essence of the dispute namely the refusal by the Federal Government to accede to the appellant's request for the conversion of the eastern portion of Oil Prospecting License (OPL) 246 to an Oil Minning License (OML) but offered the said unconverted portion of OPL 246 for sale to other third parties including the 2nd and 3rd respondents.

The appellant was granted OPL 246 to explore and prospect for petroleum covering an area of 1000 square miles. When it struck oil in commercial quantity it applied for the conversion of OPL 246 into an OML and was granted OML 130 covering an area of 500 square miles. The policy of the Federal Government is that upon the grant of an OML, the holder of an OPL would be taken to have relinquished the residue of the OPL to the Government. When the appellant applied for the conversion of the remaining 500 square miles of OPL 246 into an OML, the application was turned down and in the letter of 21/3/2005, the appellant was told that:

> **"The Honourable Minister of State for Petroleum Resources has not approved your request for additional OML from the relinquished portion of OPL 246. Consequently, the relinquished portion of the OPL reverts to Government in line with existing Petroleum Regulations".**

The appellant was of the view that the lifespan of OPL 246 ran till March, 2008 since it was granted an extension of 5 years on 12/11/2002 and the letter granting OML 130 written on 12/2/2002 did not contain any specific conditions pertaining to the relinquishment of the remaining portion of OPL 246.

The appellant failed to convince the Government of its right to continue prospecting on OPL 246 and in May 2006 the Department of Petroleum Resources offered for sale the unconverted portion of OPL 246 to other parties including the 2nd and 3rd respondents.

The appellant then applied ex-parte to Federal High Court for a judicial review and on 10/5/2006 filed an originating motion seeking for declaratory and injunctive reliefs to the effect that its rights and interest in OPL 246 remained extant until March 2008 notwithstanding the grant of OML 130 out of OPL 246. The Federal High Court refused to grant the reliefs the appellant sought in the originating Motion. The appellant was aggrieved by the decision of the Federal High Court and appealed to the Court of Appeal. When the appeal was set down for hearing, the 2nd and 3rd respondents applied to be joined as interested parties since they had been awarded the unconverted portion of OPL 246 which was now changed to OPL 297. Their application for joinder was granted. At the hearing of the appeal there was no mention of the effect of the expiration date of OPL 246 but its judgment delivered on 29/4/2008, the Court of Appeal held that since OPL 246 expired on 28/3/2008, there was no live issue left in the appeal. And this is what prompted this appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *The nature and purpose of preliminary objection*
Apparently, the appellant and second and third respondents threw in extraneous arguments as if they are arguing the appeal; but this is a preliminary objection, which is a different ballgame.

A preliminary objection seeks to provide an initial objection before the actual commencement of the thing being objected to – Chief AKpan vs. Senator Effiong Bob (2010) 17 NWLR (Pt. 1223) 421 SC.

In other words, the primary purpose of every preliminary objection is to determine the proceeding in limine, and thereby dispense with the need to go into the suit, appeal or application before the court see Yaro vs. Arewa Construction Ltd. (2007) 17 NWLR (Pt. 1063) 333, and Efet vs. INEC (2011) 7 NWLR (pt. 1247) 423 where this court held:

> **"The aim/essence of a preliminary objection is to terminate at infancy or, as it were, to nip it at the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a court's proceeding.**
>
> **In other words, it forecloses hearing of the matter in order to save time.** *(P 332 Paras A – F).*

2. *How to determine the nature of application for certiorari at the Federal High Court*

An examination of Order 47 rule 3(10) of the Rules shows that it is only where there is relief for an order of prohibition or certiorari in an application for judicial review that the court can direct that the grant of leave shall operate as a stay of execution to which the application relates until determination of the application for judicial review. The applicant having applied that the grant of the leave shall operate as a stay of the decision of the Minister communicated in letters of 1/3/2006 & 21/3/2006 and auction scheduled for 19/5/2006 cannot now be heard to say that this auction is not also for an order of certiorari simply because it is dressed up as declaratory and injunctive reliefs. *(P 333 Paras E – I).*

3. *When application for certiorari is statute barred*

It is provided in Order 47 Rule 4(3) that an application for an order of certiorari has to be brought three months after the date of the proceeding. It was submitted that the decision to relinquish the residue of OPL 246 was communicated to the applicant on 29/6/2004. This shows that since 29/6/2004 the applicant became

aware of the Government position that the residue of OPL 246 had been relinquished. The applicant reacted in its letter (of) 11/8/2004 saying that it has not relinquished any portion of OPL 246. Thus as at 11/8/2004 the applicant joined issue with the Minister on whether or not (it) had relinquished the residue of OPL 246. The position of the respondent was restated in the Minister's letter (of) 31/10/2005 The applicant reacted in its letter (of) 24/11/2005 – wherein it restated its position that it had not at any time relinquished any portion of the license to Government. The fact that the applicant consistently maintained that it had not relinquished any portion of OPL 246 could not stop time from running either from 29/6/2004 or 31/10/2005. Whether the three months' period is calculated from 29/6/2004 or 31/10/2005. It is too late for (it) to challenge by way of judicial review the decision of the Minister that the residue of OPL 246 is relinquished and has reverted to the Government.
(Pp 333 – 334 Paras I – F).

4. *Meaning of the word reasoning*
The said respondent conceded that the said GROUND 1 targets the reasoning of the trial court, and the definition of "reasoning" is: "the process of forming conclusions, judgments or inferences from facts or pre mises" – see *dictionary.com.* what does that indicate? Obviously, that reasoning and conclusions always go hand in hand.

In this case, the trial court reasoned that appellant's prayers for declaratory and injunctive reliefs could pass as that for certiorari, and it concluded that since the appellant did not file its application within the three months' period allowed by the rules, it was too late to challenge, by way of judicial review, the decision of the Minister.

The appellant complained in GROUND 1 of its grounds of appeal that the learned trial judge erred in law when he likened its prayers for declaration and injunction to that for certiorari, which by Order 47 rule 4(2) of the said trial court's rules, could not be brought after three months, and he thereby failed to consider the reliefs it sought. *(Pp 334 – 335 Paras I – D).*

5. *Where a party challenges the reasoning of a court*
This complaint in GROUND 1 may not have specifically targeted the trial court's conclusion that it was too late for the appellant to challenge the said decision of the Minister; however, it is sufficient, in my view, to link the trial court's reasoning to the said conclusion.

In other words, it is the reasoning that led to the conclusion, and it follows, therefore, that if the reasoning is faulty, then the said conclusion is wrong, and the appeal would succeed and be allowed; but if the reasoning is sound then the conclusion arrived at is right, and the appeal against the judgment would have to be dismissed.

Thus, I do not see any reason to apply the extreme measure of dismissing this appeal merely because appellant did not complain about the conclusion, as second and third respondents postulate. Obviously, their objection lacks merit, and it is, therefore, overruled. *(P 335 Paras D – G).*

6. *The formidable position of the issue of fair hearing*
The issue of fair hearing holds a formidable position in the eyes of the law. This is because the consequence of a breach of the rule of natural justice or fair hearing is that the proceedings in the case are null and void – See Salu vs. Egeibon (1994) 6 NWLR (pt. 348) 23, wherein this court, per Adio, (JSC) further observed as follows:

> **If a principle of natural justice is violated, it does not matter whether if the proper thing had been done the decision would have been the same; the proceeding will still be null and void.**
>
> **In other words, if the principles of natural justice are violated in respects of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.**

So, a breach of fair hearing strikes deeply at the very roots of a trial, and renders the whole trial a nullity – See Adigun vs. A. – G. Oyo State (1987) 1 NWLR (Pt.53) 678 at 721 where Eso, JSC, very aptly stated:

> **I will like to refer to a pronouncement by the court that it was not shown that the absence of an oral hearing had in any way prejudiced the appellants. Once an appellant shows that there is an infringement of the principle of natural justice against him, it is my view that he needs show nothing more. The finding that there is an infringement of the principle is sufficient to grant him a remedy. This is not a case where one, after showing *injuria* would need to proceed to show *damnum.* The *injuria* herein, is proof of positive of *damnum.*** *(Pp 337 – 338 Paras G – E).*

7. *What determines the appropriate authority to be cited by counsel*
The answer is easily found because it is the facts and circumstances of each case that determines judicial authorities that counsel ought to cite in support of their argument in Court – see Adegoke Motors vs. Adesanya (1989) 3 NWLR (pt. 109) 250, wherein Oputa, JSC, said:

> **There is now a tendency among our lawyers, and sometimes among some of our Judges, to consider pronouncements made by justices of the Supreme Court in unnecessary isolation from the facts and surrounding circumstances of those particular cases in which those pronouncements were made. I think it ought to be obvious by now, that it is the facts and circumstances of any given case that frame the issues for decision in that particular case. Pronouncements of our justices whether they are *rationes decidendi* or**

> ***obiter dicta*** **must, therefore, be inextricably and intimately related to the facts of the given case. Citing those pronouncements without relating them to the facts that induced them will be citing them out of their proper context, for, without known facts, it is impossible to know the law on those facts.**
> *(P 349 Paras C – H).*

8. *The principle in Ikonta Best vs. A-G Rivers State*

In Ikenta Best vs. AG Rivers State (supra), cited by First respondent, the issue was whether the respondent's delay in appealing against the decision of the High Court was proper in the circumstances of that particular case. The respondent, who was the 2nd defendant, was brought into the proceedings at the instance of the appellant. He was served with the court processes but did not participate.

Judgment was entered against the defendants, including him, and the respondent sought leave to appeal against the Judgment. The Court of Appeal, in a majority ruling, granted him leave, thus:

> **The reason given for the delay as disclosed particularly in paragraphs (6) and (10) of the affidavit in support, could be attributed to error of judgment on the part of the previous counsel assigned to handle the matters, a situation for which the court is always reluctant at penalizing a litigant.**

In the appeal to this court, the issue No 1, for determination was:

> **(1) Whether the introduction suo motu of a fact not contained in the affidavits of the parties before it, and applying same in the exercise of the court's discretion to grant leave was proper.**

This court allowed the appeal, but on the Issue No 1, in addition to his above quoted pronouncement, Tobi, JSC, also stated as follows:

I do not agree with the learned senior advocate that the Court of Appeal raised an issue *suo motu.* The Court of Appeal drew an inference, particularly from paragraph 10 of the affidavit in support that the "delay could be attributed to error in judgment on the part of the counsel assigned to handle the matter". This is a capable inference drawn from paragraph 10 of the affidavit and I cannot see any justification for castigating the majority ruling of the Court of Appeal. Issue No 1 fails.
(Pp 349 – 350 Paras H – H).

9. *The Impropriety of court deciding a case not angered by the parties*
In this case, the appellant asked whether going by the dictum of Tobi, JSC, in Ikenta Best's Case (supra), "was it an issue between the parties that expiration of OPL 246 will render the appeal academic?

Its answer to the question is "a simple NO"; and I agree with it that the answer is, indeed, NO. The facts and circumstances in the Ikenta Best's case (supra) are, certainly, not the same as in this case. It is obvious from their arguments that the two sets of respondents missed the point completely about what is at stake in this appeal.
The fact that the said OPL 246 was to expire a few days after appeal was argued at the Court of Appeal is not being disputed. But the appellant's contention is that the Court of Appeal dismissed its appeal on the ground that the said OPL 246 had expired without hearing parties on the effect of the said expiration on the appeal.

It is one thing to have the fact replete in the court processes that the expiration date of OPL 246 is 28/3/2008; it is another thing to dismiss the appeal because the said OPL expired a few days after the appeal was argued, when the appellant and the first respondent who argued the appeal, and the court itself, never mentioned or raised the issue of the effect of the said expiration on the appeal.
(Pp 350 – 351 Paras I – E)

10. *Where court dismissed case based on issue raised suo motu by court which the parties never canvassed*
The Court of Appeal heard the appeal; it reserved judgment, and in its Judgment delivered on 29/4/2008, it dismissed the appeal on the ground that the OPL had expired. The parties never adverted to this issue at the court of Appeal or in their briefs of argument.
(P 351 Paras E – F).

11. *A party who proves breach of fair hearing needs not show any miscarriage of justice*
The first respondent also argued that the appellant failed to show that the decision would have been different if the court had invited the parties to address it on the issue, and so, it failed to show that the alleged error by the court occasioned a miscarriage of Justice.

But, as I pointed out earlier, the position of the law is that if a principle of natural justice is violated, it does not matter whether if the proper thing was done, the decision would have been the same, the proceeding will still be null and void, therefore, "the decision must be declared to be no decision" – see Salu vs. Egeibon (supra).

In effect, as Eso, JSC, said in Adigun vs. A. – G Oyo State (supra), once an appellant shows an infringement of the principle of natural justice against him, he needs show nothing more. The finding that there is such an infringement is sufficient to grant him remedy.

In this case, the "alleged error" as the first respondent put it, is a violation of the appellant's right to fair hearing, which is enough to grant him a remedy. It does not need to show that the decision would have been different if parties had been heard on the issue. They were not heard; particularly on the issue that put the last nail on the appeal's coffin. The appellant is right; the Court of Appeal ought to have recalled the parties, after it had reserved judgment and discovered that the OPL 246 had expired, to address it on the deleterious effect of the expiration of the OPL 246 on the appeal.
(Pp 351 – 352 Paras F – D).

Per K.B Aka'ahs (JSC)

> **"The Court of Appeal ought to have invited the parties, most especially the appellant, who would be adversely affected by dismissal of appeal to address the court on the propriety of pursuing the appeal.**

The appellant's right to be heard before an adverse order is made against it is enshrined in section 36(6) of the 1999 Constitution (as amended). No matter how obvious the answer would appear to be, since the lower court was going to base its decision on the appeal becoming spent and therefore academic, it was incumbent on the lower court to call on the appellant to address it on the effect of the appeal becoming stale. The rule of fair hearing has been breached and the appeal per force succeeds and must be allowed.
(P 354 Paras B – D).

Nigerian Cases Cited
Adegoke Motors vs. Adesanya (1989) 3 NWLR (pt. 109) 250
Adigun vs. A. G. Oyo State (1987) 1 NWLR (Pt.53) 678
Chief AKpan vs. Senator Effiong Bob (2010) 17 NWLR (PT. 1223) 421 SC.
Efet vs. INEC (2011) 7 NWLR (pt. 1247) 423
Ehinlawo vs. Oke (2008) 6-7 S.C. (Pt.II) 123,
Metal Construction (W.A) Ltd vs. D.A. Migliore & Ors (1990) 1 NWLR (PT. 126) 299
Salu vs. Egeibon (1994) 6 NWLR (pt. 348) 23 SC,
Yaro vs. Arewa Construction Ltd. (2007) 17 NWLR (Pt. 1063) 333

Nigerian statutes cited
The 1999 Constitution (as amended) Section 36(6)

Representative
Adetunji Oyeyipo (SAN) **and**

A Olabisi O. Soyebo (SAN) **with**
Adewale Atake (Esq.),
Mabruk Kunmi-Olayiwola (Esq.), and
Victor Okpara, (Esq.),
B For the **Appellant**

Fideliis Oditah (SAN) and
Robert Clarke (SAN) with
C Miss Onyeka Enunwa,
For the first **Respondent**

Ahmed Raji (SAN) with
D Adeola Adeipe (Esq.),
Victor Okwudiri (Esq.),
O. C. Ogunyemi (Miss) And
Idongestic Antai, (Esq.),
E For The **Second And Third Respondents**

ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): This appeal has to do with the relinquishment of oil blocks held by Exploration and
F production companies in Nigeria. The policy of the Federal Government is that upon the grant of an Oil Mining Lease **[OML]** to the grantee or holder of an oil prospecting License **[OPL],** the grantee or holder is taken to have mandatorily relinquished the unconverted part or residue of the **OPL** to the
G Federal Government.

On 23/2/1998, the appellant was awarded an **OPL (i.e.OPL246)** for a statutory 5-year tenure. It was then extended for final 5-year statutory tenure and was, therefore, due to expire on **28/3/2008.**

H The said **OPL 246** entitled the appellant to an exclusive right to explore and prospect for petroleum in the license area, and if, during exploration and prospecting, commercial quantities of crude oil are found, to apply for conversion of **OPL 246** into an **OML,** for a renewable
I statutory term of 20 years. Upon discovery of oil in commercial quantity, the appellant, by a letter Dated **8/3/2004,** applied to the Department of

A Petroleum Resources **(DPR)** for the conversion of the eastern portion of the said **OPL 246** to an **OML.**

By a letter dated **21/2/2005,** the **DPR** conveyed "Government approval for conversion of **OPL 246,** to one **OML** as sketched"; adding
B "the new block is designated **OML 130".** Since by law, the maximum size of an **OML** is 500 square miles, and the **OPL 246** covered an area of 1000 square miles, the appellant, by its letter dated **27/6/2005,** applied for an "additional"**OML** deriving from **OPL 246.** However, its application was
C rejected by letters dated **1/3/2006** and **21/3/2006** respectively. In the letter of **1/3/2005,**, the appellant was informed:

> **We regret to inform you that your request for additional**
> D **OML from the unconverted portion of OPL 246 was not approved by Government. Consequently, in accordance with provisions of petroleum Legislations, we wish to intimate you that you are required to commence**
> E **relinquishment process of the unconverted OPL 246 immediately - - -**

In the letter of **21/3/2005,** the appellant was categorically told that:

F

> **The Honourable Minister of State for Petroleum Resources has not approved your request for additional *OML* from the relinquished portion of *OPL 246.***
> G **Consequently, the relinquished portion of the OPL reverts to Government in line with existing petroleum Regulations.**

H But the appellant contended in its response dated **6/4/2006** that:

> **2. Whilst we note the contents of the said letter, we are inclined to believe that there is no need for a second consideration of the contents of our letter dated**
> I **16/3/2006 because in our view, the OPL 246**

necessarily survives the grant of the first OML (as otherwise, the right for the OPL holder to apply for and be granted an additional OML would be legally unfounded) and therefore cannot, be considered as automatically relinquished until such times as such *OPL* has been converted to an additional *OML* or has expired (i.e. March 2008) as applicable. In addition to this, neither the letter from the Government granting OPL 246 (23/2/1998 and 12/11/2002 for its extension) nor its letter granting OML 130 (12/2/2005) contained any specific conditions pertaining to relinquishment of the remaining portion of OPL 246.

3. As indicated in our letter dated 16/3/2006, we intend to continue exploration activities on the OPL246, which remains valid and subsisting until March 2008. These activities are to be conducted in line with the work programme and Budget, which received a positive vote at the last operating committee meeting.

4. Finally whilst reserving all legal rights in respect of our interest in OPL 246, we, together with our partners, are seeking an opportunity to meet with you to review, in depth, the contents of our above referenced letter and issues raised in your letter and the issue raised in your letter also under reference.

In **MAY 2006,** the **DPR** offered the unconverted portion of **OPL 246** for sale to the other third parties, including the 2nd and 3rd respondents.

On **4/5/2006,**the appellant issued a Notice Of Ex Parte Application For Leave To Apply For Judicial Review. On **9/5/2006,** A. Mustapha, J. (as he then was) of the Federal High Court granted the appellant:

Leave to apply to this court for judicial review in respect of the decision of the respondent communicated in letters dated 1/3/2006 and 21/3/2006, purporting to expropriate forthwith the applicant's rights, interest and legitimate expectation in OPL 246 and to auction to third parties on 19/5/2006, the Oil Block 246 in which the applicant has extant rights, interest and legitimate expectation.

He ordered that "the applicant shall be originating motion" and that "the leave shall operate as stay "of actions relating to **OPL 246.**

The appellant, on **10/5/2006,** brought an originating motion, seeking declaratory and injunctive reliefs to the effects inter alia that its rights and interest in **OPL 246** remain extant until **March 2008,** notwithstanding the grant of **OML 130** out of **OPL 246** and that the said letters asserting the "mandatory" relinquishment or forfeiture of the unconverted portion of **OPL 246** were unlawful, null and void.

The first respondent, by a motion on notice dated **15/5/2006,** objected to the competency of the suit on the ground that the relief sought was for an order of certiorari to quash the decisions of the Minister complained of in the said letters, so it ought to have been commenced within 3 months of the accrual of the cause of action as required by Order 47 Rule 4(2) of the Federal High court Rules.

In its judgment delivered on **4/10/2006,** the trial court upheld the 1st respondent's objection, and concluded as follows thereon:

The fact that applicant consistently maintained that it had not relinquished any portion of OPL 246 could not stop time from running either from 29/6/2004 or 31/10/2005; Whether the three months period is calculated from 29/6/2004 or 31/10/2005 I hold that it is too late for the applicant to challenge by way of judicial review the decision of the Minster that the residue of OPL 246 is relinquished and has reverted to the Government.

It however, considered the main question, and concluded thus:

> **Beside the deposition that the grant of this application will put the Federal Government of Nigeria's Oil and Gas policy and Administration into turmoil, I hold that the residue of OPL 246 is automatically relinquished and reverted to the Federal Government on the grant of OML 130 to the applicant. I hold also that there is nothing unlawful in the letters dated 1/3/2006 and 21/3/2006 wherein the Minister communicated to the applicant an additional OML from the unconverted portion of OPL 246. The reliefs sought in the originating motion are, therefore, refused.**

Dissatisfied with the above decision of the trial court, the appellant filed an appeal to the Court of Appeal that was argued on **17/3/2008.** In its judgment of **29/4/2008,** the Court of Appeal concluded thus:

> **The grant of OPL 246 expired on 28/3/2008. With expiration of the period, there seems to be no live issue left in this appeal, except perhaps the reliefs sought by the appellant that the live span of the license be extended for another two years from the expiration of the OPL. I am respectfully unable to appreciate the basis upon which this relief is being sought. The relief was sought at the trial court and repeated in this court. The justification for this is unclear. If it is to compensate for period lost during the pendency of the suit both in this court and the court below, the appellant failed to make out the case. The appellant lost no time. On granting leave to the appellant to apply for the judicial review of the action of the respondent, an order of injunction was equally made by the trial court. This court also granted an interim injunction pending the consideration and determination of an application for**

interlocutory injunction, which interim injunction was in place until hearing of this appeal. During the pendency of the two orders of injunction, the respondent took no step to interfere with appellant's quiet and peaceful possession of the leasehold. There is, therefore no material before this court showing that the appellant incurred any loss for which it is entitled to compensation. In any case, the appellant rendered report of prospecting it carried out on the OPL 245. The report was to the effect that oil had been found in commercial quantity. With that the plot was ready for a grant of an OML hence the appellant applied for and was refused OML which decision was communicated by letters dated 1st and 21st March, 2006. This decision of refusal of oil mining lease was not contested in the suit culminating in this appeal. This much the appellant conceded in its brief of argument. Since the term granted to the appellant is exhausted through effusion of time the whole of the appeal becomes academic. The court will confine itself with only live issues and not hypothetical nor fanciful nor speculative ones. It is more than settled that the court will not render advisory opinion nor treat a matter which is academic. The matter, having become academic, with the expiration of the appellant's interest in the *OPL 246,* the appeal ceases to have live issues for determination. It is for that singular reason dead and I, therefore, formally dismiss it.

Dissatisfied, the appellant filled two notices of appeal in this Court; it abandoned the first one and relied on the second dated **2/5/2008,** which it amended, and the amended notice of appeal contains six grounds of appeal. The appellant and first respondent filed their briefs of arguments, which they both amended, and the stage was, therefore, set for hearing of the appeal when second and third respondents, who were not parties at the lower courts, surfaced.

They filed an application on **23/3/2017,** wherein they stated that they were awarded the unconverted portion of the said **OPL 246;** that they did not know that there was a pending appeal because the "nomenclature had changed from **OPL 246 TO OPL 297";** and that it is in the interest of justice and fair play that they joined as parties.

The application was granted on **4/7/2017,** and upon being joined, they filed a notice of preliminary objection praying that the Appeal be dismissed because it is nullity. The grounds of objection are:

(a) The appellant commenced the suit at the trial Federal High Court by way of judicial review.

(b) The suit was not commenced within three months of the alleged cause of action, as mandatorily prescribed in order 47 Rule 4, of the Federal High Court (Civil Procedure) Rules, 2000.

(c) The learned trial judge upheld the 1st respondent's objection, on the ground that it was too late to challenge the suit by way of judicial review, having not complied with the instant provision.

(d) There is no appeal against the said finding of the learned trial judge.

(e) This vital decision of the trial Federal High Court is extant, having not been set aside by any court.

(f) Every other proceeding predicated on the defective suit is a nullity, including this appeal.

They argued the objection in their brief wherein they contend that by not appealing against the trial court's findings that it was too late to commence the suit by way of judicial review, the appellant was foreclosed from challenging the first Respondent's letter in court, citing thereon – **Wada vs. Bello** (2016) 17 NWLR (Pt. 1542) 374 at 433 SC and **Oguebego vs. PDP** (2016) 4 NWLR (Pt. 1503) 446 at 479/480 SC.

They also argued the appellant's complaint in **GROUND 1** of its notice of appeal filed at the court below is against the reasoning of the trial

court which is different from finding that it was too late to challenge the administrative decisions of the first respondent; and that its suit at the trial court rests on challenges as to propriety or otherwise of first respondent's claim on the reversionary right to the residue in **OPL 246,** which the trial court held was too late to commence the suit, and yet there is no appeal against this finding.

Furthermore, that jurisdiction is settled on the fact that where there is vital finding on which a judgment is predicated that is not appealed against, it remains intact, and an appellate court is bound to act on it, citing **Chitra Knitting & Weaving Manufacturing Co. vs. Akingbade** (2016) LPELR – - 40437 (SC), **Anyaduba & Anor vs. Nigerian Renowned Trading Co. Ltd.** (1992) 5 NWLR (PT.243) 535, **Onibu vs. Akinbulu (**1982) SC 60, **FCDA vs. Naibu** (1990) 3 NWLR (pt. 138) 270; **Compaign Generale De Geophysique vs. Aminu** (2015) 7 NWLR (PT. 1459) 577, **Oleksandr vs. Lonestar Drilling Co.** (2015) 9 NWLR (PT. 1464) 337 and **Ladoja vs. Ajimobi & Ors** (2016) 10 NWLR (PT. 1519) 87.

The appellant countered in its reply brief that their argument demonstrates its fundamental misconception of the proceedings at, and finding and decision of the trial court. It submitted that its case, not being an action to quash a judicial or quasi-judicial decision of a court or tribunal, is of a completely different nature to an action for an order of certiorari to which the 3-month time limit applies; that it is the lack of appreciation of this fundamental point that underpins the said respondents' misconception that this appeal is academic because it did not challenge the findings of the trial court that its application for judicial review was out of time, so, the conclusion that the second and third respondents have reached is incorrect.

It argued in the alternative that assuming, without conceding, that the respondents are right that the grounds it put forward did not directly address the finding that its application was time barred, their conclusion that this amounts to complete failure to appeal against the finding that it was time barred, is completely erroneous.

It submitted that the said finding that it was out of time relies entirely on the finding that its action was one of certiorari; that it challenged the propriety of the trial court's conversion of the action for declarations and

injunctions to one for an order of certiorari in the said **GROUND 1;** that without the trial court's error of converting its action to one for certiorari, the issue of the time bar to challenge the 1st respondent's decision would not have arisen; thus, it did not have to separately appeal the trial court's consequential finding.

The said respondents filed a *reply on points of Law,* wherein they submitted that it is clear from its application at the trial court that the appellant applied for judicial review, and it is, therefore wrong for it to argue that the suit was not commenced by way of judicial review; especially in view of the fact that the said argument is a total derogation from details contained in the record of appeal.

They further argued that the basis upon which the trial court concluded that the suit was commenced by judicial review was not because of its analysis of various forms by which a certiorari relief may be sought, rather, its focus was on the appellant's application *ex parte* for leave to apply for judicial review. Furthermore, that:

> **The printed record confirms that the appellant applied *ex parte* for leave to apply for judicial review. We are, however, surprised at the appellant's bold and courageous volte face that the suit was not commenced by way of judicial review. This is very serious ethical issue, which ought not to be condoned by any court, let alone the Supreme Court, it is important to emphasize that the operations of the court are scheduled for serious business considerations, not a game of hide and seek being played by the appellant. The justice of every case requires the evenness of fact and nobility of counsel.**

They also argued that the only reason the trial court made review of the unifying semblance between "declarations" and injunctions vis-avis certiorari was because the grant of an order of certiorari comes with the responsibility to stay proceedings, and in this case, when leave was granted to appellant to apply for judicial review, the learned trial judge equally

granted order to stay proceedings, which is a direct consequence on the grant of an order of certiorari.

Apparently, the appellant and second and third respondents threw in extraneous arguments as if they are arguing the appeal; but this is a preliminary objection, which is a different ballgame.

A preliminary objection seeks to provide an initial objection before the actual commencement of the thing being objected to – **Chief AKpan vs. Senator Effiong Bob** (2010) 17 NWLR (PT. 1223) 421 SC.

In other words, the primary purpose of every preliminary objection is to determine the proceeding in limine, and thereby dispense with the need to go into the suit, appeal or application before the court – see **Yaro vs. Arewa Construction Ltd.** (2007) 17 NWLR (Pt. 1063) 333, and **Efet vs. INEC** (2011) 7 NWLR (pt. 1247) 423 where this court held:

> **The aim/essence of a preliminary objection is to terminate at infancy, or as it were, to nip it at the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a court's proceeding.**
>
> **In other words, forecloses hearing of the matter in order to save time.**

In this case, the issue arising from the said objection boils down to whether appellant appealed against the trial court's findings that:

> **It is too late for the (appellant) to challenge by way of judicial review the decision of the Minister that the residue of OPL 246 is relinquished and has reverted to the Government.**

The appellant's take is that it challenged the trial court's reasoning that gave rise to the said finding in **GROUND I** of its grounds of appeal filed at the Court of Appeal, wherein it had complained as follows:

A **The learned trial judge erred in law, when he held that the appellant's prayers for declaration and injunction and looked like or could have been framed as a prayer for *certiorari* which by virtue of Order 47 Rule 4(2) of the** **B** **Federal High Court (Civil Procedure) Rules 2000 could not be brought after three months and he thereby failed to consider or evaluate the actual reliefs sought.**

C At this juncture, it is time to look at what the trial court said that:

Although the applicant did not mention the word *certiorari,* it did apply that the decision of the respondent **D** **communicated in letters dated 1/3/2006 and 21/3/2006 purporting to expropriate the applicants rights, interest and legitimate expectation in OPL 246 which is valid until 28/3/2008 and which is the res/subject matter of these** **E** **proceedings and any action further thereto including an auction scheduled for 19/5/2006 or any other be STAYED pending determination of the application for judicial review. That relief was granted by the court. An** **F** **examination of Order 47 rule 3(10) of the Rules shows that it is only where there is relief for an order of prohibition or certiorari in an application for judicial review that the court can direct that the grant of leave shall operate as a** **G** **stay of proceedings to which the application relates until determination of the application for judicial review. The applicant having applied that the grant of the leave shall operate as a stay of the decision of the Minister** **H** **communicated in letters of 1/3/2006 & 21/3/2006 and auction scheduled for 19/5/2006 cannot now be heard to say that this action is not also for an order of certiorari simply because it is dressed up as declaratory and** **I** **injunctive reliefs. It is provided in Order 47 Rule 4(3) that an application for an order of certiorari has to be brought**

three months after the date of the proceeding. It was submitted that the decision to relinquish the Residue of OPL 246 was communicated to the applicant on 29/6/2004. This shows that since 29/6/2004 the applicant became aware of the Government position that the Residue of OPL 246 had been relinquished. The applicant reacted in its letter (of) 11/8/2004 saying that it has not relinquished any portion of OPL 246. Thus as at 11/8/2004 the applicant joined issue with the Minister on whether or not (it) had relinquished the Residue of OPL 246. The position of the respondent was restated in the Minister's letter (of) 31/10/2005 The applicant reacted in its letter (of) 24/11/2005 – wherein it restated its position that it had not at any time relinquished any portion of the license to Government. The fact that the applicant consistently maintained that it had not relinquished any portion of OPL 246 could not stop time from running either from 29/6/2004 or 31/10/2005. Whether the three months' period is calculated from 29/6/2004 or 31/10/2005 – it is too late for (it) to challenge by way of judicial review the decision of the Minister that the Residue of OPL 246 is relinquished and has reverted to the Government.

In this case, the second and third respondents submitted that **GROUND 1** of the appellant's grounds of appeal is a mere complaint against the trial court's reasoning that prayers for declaration and injunction have the same effect of Certiorari, which is quite different from its conclusion that it is too late to challenge the said decision.

In my view, this issue is mere storm in a teacup; I quite agree with the second and third respondents that the appellant ought to have specially complained about the trial court's conclusion but I do not agree with them that the said **GROUND 1** will not save the day.

The said respondent conceded that the said **GROUND 1** targets the reasoning of the trial court, and the definition of "reasoning" is: "the

process of forming conclusions, judgments or inferences from facts or pre mises" – see *dictionary.com.* what does that indicate? Obviously, that reasoning and conclusions always go hand in hand.

In this case, the trial court reasoned that appellant's prayers for declaratory and injunctive reliefs could pass as that for certiorari, and it concluded that since the appellant did not file its application within the three months' period allowed by the rules, it was too late to challenge, by way of judicial review, the decision of the Minister.

The appellant complained in **GROUND 1** of its grounds of appeal that the learned trial judge erred in law when he likened its prayers for declaration and injunction to that for certiorari, which by Order 47 rule 4(2) of the said trial court's rules, could not be brought after three months, and he thereby failed to consider the reliefs it sought.

This complaint in **GROUND 1** may not have specifically targeted the trial court's conclusion that it was too late for the appellant to challenge the said decision of the Minister; however, it is sufficient, in my view, to link the trial court's reasoning to the said conclusion.

In other words, it is the reasoning that led to the conclusion, and it follows, therefore, that if the reasoning is faulty, then the said conclusion is wrong, and the appeal would succeed and be allowed; but if the reasoning is sound then the conclusion arrived at is right, and the Appeal against the judgment would have to be dismissed.

Thus, I do not see any reason to apply the extreme measure of dismissing this appeal merely because appellant did not complain about the conclusion, as second and third respondents postulate. Obviously, their objection lacks merit, and it is, therefore, overruled.

All is now set for appeal itself, which the second and third respondent were also prepared for. The appellant formulated the following four issues for determination in its amended brief:

> **1. Whether or not the lower court was right when it dismissed the appeal based on the ground that the appeal has become academic, without giving the appellant an opportunity to be heard on it.**

A

2. Whether on the facts of this case, the term of OPL 246 had expired by effluxion of time on 28/3/2008, and if it had, whether the learned justices of the Court of Appeal were right in dismissing the appeal

B

on the ground that the term of OPL 246 having expired prior to the date the judgment was delivered, the appeal was devoid of live issues and had therefore become academic.

C

3. Having regard to the unchallenged evidence before the court, were the learned justices of the Court of Appeal right in holding that the appellant did not

D

place materials before the court to support its prayer for *inter alia,* a declaration that the appellant has unexpired term of two years in *OPL 246,* which has been put in abeyance by the acts/omission of the 1st

E

respondent complained of.

4. Did the learned justices of the Court of Appeal apply correct principles in failing to exercise their

F

discretion to grant the declaration sought by the appellant? And if not, whether this honourable court should not exercise its powers under Section 22 of the Supreme Court Act to grant the declarations sought.

G

The first respondent contends that the amended notice of appeal raises four issues for determination of this court, as follows:

H

(a) Whether the Court of Appeal dismissed the appeal on an issue not canvassed by the parties and to which they were at no stage invited to address the Court (the "Fair hearing issue").

I

(b) Whether the court of Appeal was right to hold that the tenure of OPL 246 had expired by effluxion of time on 28/3/2008 (the "Expiration of OPL 246 Issue").

(c) Whether the court of Appeal was right to hold that the term of OPL 246 having expired by effluxion of time on 28/3/2008 and there being no challenge to the First respondent's refusal to grant a second OML to the appellant, there were no lives issues left in the appeal except the issue of extension of the duration of *OPL 246* (the "No Live Issue"); and

(d) Whether there is power to elongate the maximum statutory tenure of an *OPL* and, if there is, whether it should have been exercised in the present case to extend OPL 246 (the "Extension of Tenure Issue")

The second and third respondents, on their part, adopted the four issues distilled by the appellant from the six grounds of appeal in its amended notice of appeal. **Issue 1,** dubbed the fair hearing issue by first respondent, questions whether the court below was right to dismiss the appeal on the ground that it had become academic, without giving parties, not just appellant, opportunity to be heard.

The issue of fair hearing holds a formidable position in the eyes of the law. This is because the consequence of a breach of the rule of natural justice or fair hearing is that the proceedings in the case are null and void – See **Salu vs. Egeibon** (1994) 6 NWLR (pt. 348) 23 SC, wherein this court, per Adio, (JSC) further observed as follows:

If the principle of natural justice is violated, it does not matter whether if the proper thing had been done the decision would have been the same; the proceeding will still be null and void.

In other words, if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principle of justice. The decision must be declared to no decision.

So, a breach of fair hearing strikes deeply at the very roots of a trial, and renders the whole trial a nullity – See **Adigun Vs. A. – G. Oyo State** (1987) 1 NWLR (Pt.53) 678 at 721 where Eso, JSC, very aptly stated:

I will like to refer to a pronouncement by the court that it was not shown that the absence of an oral hearing had in any way prejudiced the appellants. Once an appellant shows that there is an infringement of the principle of natural justice against him, it is my view that he needs show nothing more. The finding that there is an infringement of the principle is sufficient to grant him a remedy. This is not a case where one, after showing *injuria* would need to proceed to show *damnum.* The *injuria* herein, is proof of positive of *damnum.*

Obviously, taking into consideration the importance of this ***Issue 1*** in the scheme of things, it is my view that it be dealt with first before taking on any other issues, as the case may be; and so shall it be.

The appellant's contention in this issue is that the decision of the court of Appeal was reached based on an infraction of its right to a fair hearing, which occasioned a grave miscarriage of justice.

It argued that the approach adopted by the court below was fundamentally flawed because while a court is permitted to raise an issue *suo motu,* it is against the grain of well-established authorities for it to determine such an issue without reference to the parties; and that the court is under an obligation to invite parties to address it on the point raised *suo motu*, citing **Oje vs. Babalola** (1991) 4 NWLR (Pt. 185) 267 at 280, **Lahan vs. Lajoyetan** (1972) 6 SC 190 at 200, **Kuti vs. Balogun** (1978) 11 NSCC

21.

It contends that the proper approach would have been for the court below to defer judgment and recall the parties to address it on the issue of the effect of the expiration of the **OPL** on the appeal, **Irom vs. Okimba** (1998) 3 NWLR (Pt. 540) 19 and **University of Calabar vs. Essien** (1996) 10 NWLR (Pt. 477) 225 cited. It argued that because of the fundamental nature of the issue, which had the potential effect of knocking off the substratum of its appeal, the court below ought to have invited parties to present arguments on the effect of the expiration of the **OPL** on the appeal, as this issue was critical to its appeal and is evident from reliefs sought at the trial court.

It further submitted that it is settled that when a judge raises an issue *suo muto,* and without hearing parties, proceeds to base his judgment on it, there emerges a case of mistrial and a breach of the rule of fair hearing; that the court below infringed upon its right to a fair hearing when they raised and determined *suo motu* the point on the expiration of the term of **OPL 246** and its effect on the appeal without calling parties to address it – **Ugo vs. Obiekwe** (1989) 5 NWLR (pt. 99)566, **Ejowhomu vs. Edok-Eter Mandilas** (1986) 5 NWLR (Pt. 39)1; **Tinubu vs. I.M.B. Securities Plc.** (2001) 16 NWLR (Pt. 740) 670 at 691, **Commissioner for Works, Benue State & Anor vs. Devcom Dev. Consultant Ltd.** (1988) 3 NWLR (Pt. 83) 407, **Adejumo vs. David** Hughes (1989) 5 NWLR (120) 146, **Araka vs. Ejeagwu** (2000) 15 NWLR (Pt.692) 689 at 700 and **Jemide vs. Nwanne** (2008) 28 WRN 150 at 167.

Furthermore, that it was imperative for the court of Appeal to have heard parties, particularly appellant, who was to be adversely affected as a result of the issue it raised *suo motu,* so as to avoid any breach of its right to a fair hearing – **Adegoke vs. Adibi** (1992) 5 NWLR (pt. 242) 410, **Ejeowhomu vs. Edot-Eter Mandilas Ltd.** (supra), **Oje vs. Babalola** (supra), **Abbas vs. Solomon** (2001) 15 NWLR (pt. 735) 144; and that where the court below based its decision on such an issue, as in this case, this court is duty bound to hold that its proceedings are nullity – **Imah vs. Ikogbe** (1993) 9 NWLR (pt. 316) 159, **Caribean Trading and Fidelity Corporation vs. NNPC** (1992) 7 NWLR (pt.252) 16 at 182 and **Olusanya**

vs. Olusanya (1983) 1 SCNLR 134 at 139 cited.

The first respondent contends that the appellant's complaint "is factually and legally wrong". It set out various paragraphs in the processes filed by appellant at the lower court's and this court, and argued that its "impossible argument" is "fundamentally flawed in fact and in law" for the following reasons enumerated in its brief:

- **First, the Court of Appeal considered and rejected the application for a two-year extension to the statutory tenure of OPL 246;**

- **Second, it was for the appellant to argue its case on the relief it sought from the Court of Appeal, not just its ground of Appeal and it failed or chose not to argue its case on the relief sought, it cannot complain that it was not given opportunity to do so or to address the court on it. A party given the opportunity to be heard but chooses not to present its case cannot be heard to complain that he was not given fair hearing: Bill Construction Ltd vs. Imani & Sons Ltd. (2006) 19 NWLR (PT.1013) 1.**

- **Third, the appellant filed its brief of argument and Reply to the first respondent/cross appellant's amended brief with its submissions running to some 70 pages! "what other opportunity did it need to argue its case on reliefs it had sought from the court of Appeal"?**

- **Fourth, the appellant sought a declaration that OPL 246 will "remain extant for its express tenure (until March, 2008)"; and it also sought a declaration that it had an unexpired 2-year term, which had been held in abeyance. Neither relief was argued substantively. The appellant simply repeated its prayers for relief as if these were self-evident.**

- **Fifth, the appellant did not show why it has an unexpired 2 years of OPL 246. It did not show how or why it contended that the court had jurisdiction to extend the maximum statutory tenure of an OPL or why, assuming that there was jurisdiction, it should be exercised in its favour. It also did not draw the court's attention to any evidence in the record, which was allegedly relevant to the disposal of that issue. It did not adduce any evidence that after the injunctions granted by justice Mustapha and the Court of Appeal, the first respondent prevented it from continuing to explore OPL 246 to see whether commercial quantities of crude oil could be found. It did not at any stage complain that the respondent the Federal Government of Nigeria had violated either injunction. It never brought committal proceedings against (it) for contempt, which is usual way injunctions are enforced.**

- **Sixth, the appellant's complaint is that the Court of Appeal should have travelled through over 1000 pages of the record of Proceedings and its own files to make a case, which the Appellant had itself failed to make. Its argument on the said relief was contained in 3 pages out of which more than half was devoted to cutting and pasting its prayers for relief without factual or legal articulation of its cases!**

- **Seventh, the appellant orally submitted at the Court of Appeal that the court should not be constrained by the outside consideration. We went to court to seek leave so as to demonstrate the strength of our case. The court in the circumstances has power to grant any relief, it thought we were entitled to.**

- **Eight, the appellant's contention misunderstands what it means for a court to raise an issue on its own.**

The correct position was stated in Ikenta Best (Nig.) Ltd. vs. AG Rivers State (2008) 6 NWLR (Pt. 1084) 612 at 642S-C. See also Dantiye vs .Kanya (2009) 4 NWLR (Pt. 1130) 13 at 43.

- **Ninth, the appellant cannot truly complain of lack of fair hearing as the requirement of fair hearing is met where parties present documents to court on the basis of which the court can sufficiently determine the issue in question. Fair hearing is satisfied where parties present are given opportunity to make either oral or document representation: Baba vs. Nigeria Civil Aviation Training Centre (1991) 5 NWLR (pt. 192) 388, Umoh vs. Industrial Training Governing Council (2002) 4 NWLR (pt. 703) 281.**

- **The appellant adduced evidence that the express tenure of OPL 246 expired on 28/3/2008. It sought declarations that OPL 246 will expire on 28/3/2008 and filed substantial oral and written arguments in support of its case. These documents formed part of the record of the Court of Appeal on the basis of which it was perfectly entitled to find as a fact that OPL 246 expired on 28/3/2008: Uzoho vs. National Council Privatization (2007)10 NWLR (pt. 1042) 320, Okeke vs. AG Anambra State (1997) 9 NWLR (pt.519) 123 at 142F-G; Section 74(1) (m) Evidence Act.**

- **Finally, it sought a declaration that its right in OPL 246 would expire in March, 2008. How could it plausibly be contended that the Court of Appeal decided the appeal on a ground not canvassed before the court?**

- **And that even if the appellant was not given opportunity to present its case on the expiry of OPL 246; to justify a reversal of the said decision, it must show not only that the error occasioned a miscarriage of Justice: Imah vs. Okogbe (1993) 9 NWLR (pt. 316)**

159, Yakubu Enterprises Ltd. vs. Omolaboje (2006) 3 NWLR (pt. 966) 195, Anatogu vs. Anatogu (1998) 6 NWLR (pt. 552) 42 and Ibekwe vs. Imo State E.S.B.(2009) 5 NWLR (pt. 1134) 234.

It is the first respondent's contention that the appellant failed to show that the decision would have been different if the Court of Appeal had invited the parties to address the court on the effect of the expiration of **OPL 246** so, the appellant has failed to show that the alleged error by the Court of Appeal led to miscarriage of justice.

The second and third respondents conceded that cases cited by the appellant "*reiterate the trite principle of law that a court ought not to raise and determine an issue* ***suo motu,*** except the parties, whose interest will be affected, have been given an opportunity to be heard on same". However, they posed the following question

> Did the Court *suo motu* raise and determine the point whether the appeal has become academic?

In answering this question in the negative, they submitted that the expiration of **OPL 246** on **28/3/2008** has never been in controversy, and they also set out portions of the court processes to that effect.

They argued that the fact of the said expiration is intricately knitted to the substance of the appeal, particularly as the appellant urged the Court of Appeal to extend time on the expired **OPL 246;** that it appeals to logic that if an extension is sought over a subject, the first port of review is a query as to when the subject expired or will expire; that the court had to consider when the **OPL 246** was to expire before deciding whether an extension would be appropriate in the circumstances; and this much was admitted by the appellant in paragraphs 4.1.9 & 4.1.10 of its amended brief of argument.

They also argued that the expiration of **OPL 246** by **28/3/2008** is fact that runs through the pages of the Record, and expressed surprise at the appellant's argument that the issue on expiration of **OPL 246** was *suo motu* raised by court. It is their contention that "the appellant's postulation on this issue is misconceived, totally misleading and not borne out of record"; and furthermore that:

The appellant is equally not consistent in presenting its case. In one breadth, the appellant by itself lays claim to the fact that time ought to be extended for OPL 246 because it was at the verge of expiration; while in another breadth, the appellant contends that it was the court that *suo motu raised the concern* as to the expiration of OPL 246.

They further submitted that this court has consistently emphasized that parties must be consistent in stating their cases, as the court will not allow a person to approbate at the same time – **Ajide vs Kelani** (1985) 3 NWLR (pt. 12) 248 at 269; that the court below did not raise and determine any issue *suo motu;* that the case cited by the appellant are not applicable; and that the judgment is a true reflection of the submissions placed before the court by the parties.

The appellant filed reply brief to the first respondent's brief and the other respondents' brief. It argued that the first respondent appears not to appreciate its contention that its case goes beyond the mere expiration of **OPL 246;** that its case is that the court below did not invite the parties to address it on the effect of the expiration of **OPL 246** on the appeal, which was raised and decided unilaterally by the Court below; and it did not put the question to parties, it is easy to see that it was in breach of the said fair hearing principle.

As to the contention that it cannot complain as it was for it to "argue its case on their reliefs it sought from the Court of Appeal" and not for it to "argue the grounds of appeal", the appellant said that it failed to see the relevance of this argument misplaced, it grossly misleading.

It argued that the facts of this case are distinguishable from the facts of the case in **Bill Construction vs. Imani & Sons Ltd** (supra), cited by first respondent; and that going by the dictum of Tobi, JSC, in **Ikenta Best (Nig.) Ltd. vs. A-G Rivers State** (supra), also relied on by the first respondent, the question that it must ask is "was it an issue between the parties that the expiration of the term of **OPL 246** will render the appeal academic? The answer, it said, is simple NO.

A It submitted that there is nowhere in the court process filed at the lower courts that the parties raised the question whether, by the expiration of **OPL 246**, the appeal has become academic, so, it is clear beyond doubt that the issue did not exist in the litigation; that it arose after the appeal had
B been heard by the court below, and having so arisen, the court was obliged to call parties to address it on the issue, which failed to do – **Irom vs. Okimba** (supra) cited.

It also argued that it cannot be contended that the said court
C dismissed the appeal after consideration of the substantive issues; that it did no such thing, rather, it adopted a curious, if not bizarre, approach of deviating from the rule that required it to pronounce on all the issue properly placed before the court for its decision.

D It concluded in its reply brief to the first respondent's brief that the failure by a court to pronounce on issues submitted to it by parties to a litigation is breach of the Party's right to fair hearing; that in this case, by failing to pronounce on all the issues it agitated, the Court of Appeal has
E wittingly breached its right to fair hearing and that the breach has occasioned a miscarriage of justice – **Brawal Shipping Ltd. vs. F. I Onwudike Co. Ltd.** (2000) 11 NWLR (pt. 678) 387 and **Cookey vs. Fombo** (2005) NWLR (pt.947) 182 at 200 D-E cited.

F In its reply brief to the second and third respondents' brief, the appellant argued that it did not say that "the issue of expiration of **OPL 246** was suo motu raised by the court", and it reiterated its arguments, *"seemingly conveniently"* does not address its argument on **Issue 1.**

G What is the issue exactly? The appellant is not disputing what is explicitly stated in the Court processes it filed at the Lower Courts, which is that the expiration date of the said **OPL 246** is **28/3/2008.**

The appeal was argued at the Court of Appeal on **17/3/2008,** with no
H mention whatsoever of the effect of the expiration of the said **OPL 246** on the appeal. In its judgment delivered on **29/4/2008,** after the said expiration date, the Court of Appeal held that with the expiration of the **OPL 246,** there was no live issue left in the appeal:

I

A **"Except perhaps the relief sought by appellant that the life span of the license be extended to another two years from expiration".**

B It considered and discountenanced that relief because it was "unable to appreciate the basis upon which the relief is being sought". It concluded in the said judgment that since the term granted to the appellant is exhausted "the whole of the appeal becomes academic" and having become **C** academic, "the appeal ceases to have live issues for determination". It categorically stated that the appeal is for that "singular reason dead", and it proceeded to "formerly dismiss it".

The appellant's position is that it raised *suo motu,* the question of the **D** expiration of **OPL 246** without inviting or giving parties an opportunity to address it, and it proceeded to use the expiration of the **OPL** as a basis for dismissing the appeal. It cited the following:

E **-Oje Vs. Babalola (supra) wherein Nnaemeka-Agu, JSC, stated:**

F **There are occasions when a court may feel that a point, which has not been raised by one of the parties, is necessary for consideration in order to reach a correct decision in a case. In the few cases when this situation does arise it is always necessary for the judge to bring it to the notice of the parties, or their counsel, as the case may be, so that they may address him on the point before he could base his decision on it. It is not competent for the Judge to raise the point and decide it without hearing the parties. If he does so he will be in breach of the party's right to fair hearing.**

In this country, this is a constitutional right and this court has always insisted that on no account should a Court raise a point *suo motu* and, no matter how clear it may appear to be, proceed to resolve it one way or the other without hearing the parties'.

- Lahan Vs .Lajoyetan (supra), wherein this court also observed:

> **We regret we cannot but repeat, that a procedure whereby a Court of Appeal takes up a point before parties or their counsel are heard and decides the issue is most inappropriate and irregular. We have often in the past drawn attention to the impropriety of dealing with an appeal in this way and it is our hope that this practice will be discontinued.**

– Irom Vs. Okimba (supra), wherein this court held as follows:

> **Where parties never adverted to a point of law of great importance to the decision or a constitutional issue and its surfaces during or after the appeal has been heard, the court has a duty not to ignore the point. Then what are the duties of the court in such a circumstance? The court is to invoke the time honoured principle of hearing the parties on the issue. In the case where the Court of Appeal decides one issue out of many and leaves the other issues unpronounced upon, this court frowns. This appeal is, however, in a worse state in that parties were not heard on the issues raised *suo motu* by the Court of Appeal. On discovering the issue as important as the matter of law and practice raised, the Court of Appeal ought to have deferred judgment and invited parties to address it on the issue. This is not a question of lack of fair hearing, it is that of not being heard. In the present case, the parties had long left the face of the court when the court discovered a point so important that it could be the kernel of the whole appeal, and it was. The parties never adverted to it before the court or in their briefs of argument. They ought to have been**

recalled to address on the new point with the court formulating the issues on the new point. The court never did this. Parties were not heard and the pronouncement of the Court of Appeal on this point is totally incompetent. It is more than a case of not being given fair hearing; it is that of not hearing the parties, a situation aggravated by the point being the sole one for the final decision. Ugo Vs. Obiekwe (supra), wherein Nnaemeka-Agu, JSC, said:

> **No one can have a decision entered against him without his being heard. This is the essence of the maxim *audi alteram partem.* That maxim implies not only that all the parties to be affected by a decision is given but also that if, in the course of hearing, any new point material to the decision arises, each of such parties shall be heard on it before a decision based upon it can rightly be handed down. Quite apart from this, a judge who, in our system must be and be seen as an impartial umpire will be anything but that, if he takes up a point, no matter how clear it may appear, and without hearing any of the parties to be affected by the decision, decides it. That cannot be even-handed justice. A court ought to never to raise an issue for either of the parties and, without hearing both parties proceed to base its judgment on it.**

The first respondent is, however, of the view that the appellant misunderstood what it means for a court to raise an issue on its own and that the correct position as far as this appeal is concerned is as stated by Tobi, JSC, in **Ikenta Best Vs. AG Rivers State** (supra) thus:

A court can only be accused of raising an issue, the matter or fact *suo motu,* if the issue, matter of fact did not exist in the litigation. A court cannot be accused of raising an issue, matter of fact *suo motu* if the issue, matter of fact exists in the litigation. A judge by the nature of his adjudicatory functions, can draw inference from stated facts in a case and by such inferences from the judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are raised *suo motu.* That is not correct.

The question staring me in the face is, whose authorities will prevail? The answer is easily found because it is the facts and circumstances of each case that determines judicial authorities that counsel ought to cite in support of their argument in Court – see **Adegoke Motors vs. Adesanya** (1989) 3 NWLR (pt. 109) 250, wherein Oputa, JSC, said

There is now a tendency among our lawyers, sometimes among some of our Judges, to consider pronouncements made by justices of the Supreme Court in unnecessary isolation from the facts and surrounding circumstances of those particular cases in which the pronouncements were made. I think it ought to be obvious by now, that it is the facts and circumstances of any given case that frame the issues for decision in that particular case. Pronouncements of our justices whether they are *rationes decidendi* or *obiter dicta* must, therefore, be inextricably and intimately related to the facts of the given case. Citing those pronouncements without relating them to the facts that induced them will be citing them out of their proper context, for, without known facts, it is impossible to know the law on those facts.

In **Ikenta Best vs. AG Rivers State** (supra), cited by First Respondent, the issue was whether the respondent's delay in appealing against the decision of the High Court was proper in the circumstances of that particular case.

The respondent, who was the 2nd defendant, was brought into the proceedings at the instance of the appellant. He was served with the court processes but did not participate.

Judgment was entered against the defendants, including him, and the respondent sought leave to appeal against the Judgment. The Court of Appeal, in majority ruling, granted him leave, thus:

> **The reason given for the delay as disclosed particularly in paragraphs (6) and (10) of the affidavit in support, could be attributed to error of the Judgment on the part of the previous counsel assigned to handle the matters, a situation for which the court is always reluctant at penalizing a litigant.**

In the appeal to this court, the **issue No 1,** for determination was:

> **(1) Whether the introduction *suo motu* of a fact not contained in the affidavits of the parties before it, and applying same in the exercise of the court's discretion to grant leave was proper.**

This court allowed the appeal, but on the ***Issue No 1,*** in addition to his above quoted pronouncement, Tobi, JSC, also stated as follows:

> **I do not agree with the learned senior advocate that the Court of Appeal raised an issue suo motu the Court of Appeal drew an inference, particularly from paragraph 10 of the affidavit in support that the "delay could be attributed to error in judgment on the part of the counsel assigned to handle the matter". This is a capable inference drawn from paragraph 10 of the affidavit and I cannot see any justification for castigating the majority ruling of the Court of Appeal. Issue No 1 fails.**

In this case, the appellant asked whether going by the dictum of Tobi, JSC,

in **Ikenta Best's Case** (supra), "was it an issue between the parties that expiration of **OPL 246** will tender the appeal academic?

Its answer to the question is "a simple NO"; and I agree with it that the answer is, indeed, NO. The facts and circumstances in the **Ikenta Best's case** (supra) are, certainly, not the same as in this case. It is obvious from their arguments that the two sets of respondents missed the point completely about what is at stake in this appeal.

The fact that the said **OPL 246** was to expire a few days after appeal was argued at the Court of Appeal is not being disputed. But the appellant's contention is that the Court of Appeal dismissed its appeal on the ground that the said **OPL 246** had expired without hearing parties on the effect of the said expiration on the appeal.

It is one thing to have the fact replete in the court processes that the expiration date of **OPL 246** is **28/3/2008;** it is another thing to dismiss the appeal because the said **OPL** expired a few days after the appeal was argued, when the appellant and the first respondent who argued the appeal, and the court itself, never mentioned or raised the issue of the effect of the said expiration on the appeal.

The Court of Appeal heard the appeal; it reserved judgment, and in its Judgment delivered on **29/4/2008,** it dismissed the appeal on the ground that the **OPL** had expired. The parties never adverted to this issue at the court of appeal or in their briefs of argument.

The first respondent also argued that the appellant failed to show that the decision would have been different if the Court had invited the parties to address it on the issue, and so, it failed to show that the alleged error by the court occasioned a miscarriage of Justice.

But, as I pointed out earlier, the position of the law is that if a principle of natural justices is violated, it does not matter whether if the proper thing was done, the decision would have been the same, the proceeding will still be null and void, therefore, "the decision must be declared to be no decision" see **Salu vs. Egeibon** (supra).

In effect, as Eso, JSC, said in **Adigun vs. A. – G Oyo State** (supra), once an appellant shows an infringement of the principle of natural justice against him, he needs show nothing more. The finding that there is such an

A infringement is sufficient to grant him remedy.

In this case, the "alleged error" as the first respondent put it, is a violation of the appellant's right to fair hearing, which is enough to grant him a remedy. It does not need to show that the decision would have been
B different if parties had been heard on the issue. They were not heard; particularly on the issue that put the last nail on the appeal's coffin. The appellant is right; the Court of Appeal ought to have recalled the parties, after it had reserved judgment and discovered that the **OPL 246** had
C expired, to address it on the deleterious effect of the expiration of the **OPL 246** on the appeal.

In the circumstances, this appeal succeeds, and the matter is sent back to the Court of Appeal to decide the issues between the parties and any
D other issues that it may decide to raise in the appeal. I make no other as to costs.

Aminu Adamu Augie,
Justice, Supreme Court

E **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Amina Augie, JSC,** just delivered. I agree entirely with the reasoning and conclusion that the appeal is meritorious and should be allowed. I too will allow it.

F Appeal allowed.

I also make no orders as to costs.

Olu Ariwoola
Justice, Supreme Court

G

BAYANG AKAAHS (JSC): I read in advance the judgment of my learned brother, Augie JSC. My Lord captured the essence of the dispute namely the refusal by the Federal Government to accede to the appellant's request for
H the conversion of the eastern portion of Oil Prospecting License (OPL) 246 to an Oil Minning License (OML) but offered the said unconverted portion of OPL 246 for sale to other third parties including the 2nd and 3rd respondents.

I It is to be noted that the appellant was granted OPL 246 to explore and prospect for petroleum covering an area of 1000 square miles. When it

struck oil in commercial quantity it applied for the conversion of OPL 246 into an OML and was granted OML 130 covering an area of 500 square miles. The policy of the Federal Government is that upon the grant of an OML, the holder of an OPL would be taken to have relinquished the residue of the OPL to the Government. When the appellant applied for the conversion of the remaining 500 square miles of OPL 246 into an OML, the application was turned down and in the letter of 21/3/2005, the appellant was told that:

> **"The Honourable Minister of State for Petroleum Resources has not approved your request for additional OML from the relinquished portion of OPL 246. Consequently, the relinquished portion of the OPL reverts to Government in line with existing Petroleum Regulations".**

The appellant was of the view that the lifespan of OPL 246 ran till March, 2008 since it was granted an extension of 5 years on 12/11/2002 and the letter granting OML 130 written on 12/2/2002 did not contain any specific conditions pertaining to the relinquishment of the remaining portion of OPL 246.

The appellant failed to convince the Government of its right to continue prospecting on OPL 246 and in May 2006 the Department of Petroleum Resources offered for sale the unconverted portion of OPL 246 to other parties including the 2nd and 3rd respondents.

The appellant then applied ex parte to Federal High Court for a judicial review and on 10/5/2006 filed an originating motion seeking for declaratory and injunctive reliefs to the effect that its rights and interest in OPL 246 remained extant until March 2008 notwithstanding the grant of OML 130 out of OPL 246. The Federal High Court refused to grant the reliefs the appellant sought in the originating Motion. The appellant was aggrieved by the decision of the Federal High Court and appealed to the Court of Appeal. When the appeal was set down for hearing, the 2nd and 3rd respondents applied to be joined as interested parties since they had been awarded the unconverted portion of OPL 246 which was now changed to

OPL 297. Their application for joinder was granted. At the hearing of the appeal there was no mention of the effect of the expiration date of OPL 246 but its judgment delivered on 29/4/2008, the Court of Appeal held that since OPL 246 expired on 28/3/2008, there was no live issue left in the appeal. And this is what prompted this appeal.

The Court of Appeal ought to have invited the parties, most especially the appellant, who would be adversely affected by dismissal of appeal to address the court on the propriety of pursuing the appeal.

The appellant's right to be heard before an adverse order is made against it is enshrined in section 36(6) of the 1999 Constitution (as amended). No matter how obvious the answer would appear to be, since the lower court was going to base its decision on the appeal becoming spent and therefore academic, it was incumbent on the lower court to call on the appellant to address it on the effect of the appeal becoming stale. The rule of fair hearing has been breached and the appeal per force succeeds and must be allowed. It is on account of this and the more exhaustive reasons given by my learned brother, Augie JSC that I too allowed the appeal. I make an order remitting Appeal No. CA/L/712/2006 and other issues the parties may deem appropriate to raise for hearing in the appeal to the Court of Appeal, Lagos.

K.b. Aka'ahs
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother Augie, JSC and I agree entirely with the reasoning contained therein and the conclusion arrived thereat. My learned brother has treated all the issues germane to this appeal in such a way that I have nothing useful to add. For the same reasoning articulated in the lead judgment, which I adopt as mine, this appeal shall be and is hereby allowed. I endorse all the consequential orders made in the lead judgment, including order as to costs.

Paul Adamu Galinje
Justice, Supreme Court

TERLUMEN GIKI
AND
THE STATE

SC. 235/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Presumption of innocence of accused – Implication on burden of proof – Whether it is permissible for an accused to prove his innocence.

COURT: Concurrent findings – When Supreme Court may disturb – Relevant principles.

COURT: Trial within – Trial – When obligatory upon court – Failure to conduct where necessary – Effect.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Elements – Onus on prosecution to prove beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Inadmissible confessional statement – Where confessional statement is expunged – Whether court can rely on

other pieces of evidence to sustain the conviction of accused.

CRIMINAL LAW AND PROCEDURE: Modes of establishing guilt of accused – The three means of proof required to secure conviction.

CRIMINAL LAW AND PROCEDURE: Proof in criminal cases – Whether prosecution can rely on the evidence of a sole witness to secure conviction – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Tendering of weapons – Where weapons used in armed robbery were not tendered – Whether such failure is fatal to the case of prosecution.

EVIDENCE: Burden of Proof – When shifts to the accused to prove his innocence – S. 138(3) of the Evidence Act 2011 – Relevant considerations thereof.

EVIDENCE: Relevancy – Where facts not otherwise relevant may by themselves in connection with the facts make a fact in issue probable – S. 9(b) of the Evidence Act 2011 – Relevant principles thereof.

EVIDENCE: Standard of proof in criminal cases – Proof beyond reasonable doubt – S. 138 Evidence Act 2011 – Relevant considerations thereof.

WORDS AND PHRASES: Armed robbery – Meaning.

Issue for Determination

"Was the court below right to affirm the judgment of the trial court on the ground that the prosecution proved its case beyond reasonable doubt?"

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Calabar Division ("the lower court" for short) delivered on the 12th day of February 2014, which affirmed the decision of the High Court of Cross River State, (the trial court), convicting and sentencing the appellant to death on the offence of armed robbery on 12th day of October, 2009, contrary to Section 1 (2) (a) (b) of the Robbery and Firearms (Special Provision) Act, cap R 11 Laws of Federation of Nigeria 2004.

The facts giving rise to this appeal as could be gleaned from the record of appeal are simply as follows. On 15th December, 2005 one Victor Ogbaji Ogar, a motor cyclist who testified at the trial as PW1 dropped a passenger at the boundary of Benue State and Cross River State and wanted to head to his home town. On his way home, he suddenly reached a road block mounted by armed robbers which comprised the appellant and three other co-accused persons who were masked and armed with guns and dagger. The gang of armed robbers attacked him and robbed him of a sum of N31,700.00 after tying his hands to the back with rope and forced him later to lead them to Osina Wafe Village for another robbery operations.

On getting to that village, the victim shouted for help and his shouts attracted people around, hence the armed robbers took to their heels firing gun shots in the air and the shot hit and injured a girl called Rosemary Omagu who later testified at the trial as PW2. Unfortunately for the appellant, he was caught or arrested by the villagers and was unmasked. Even though one of the robbers by name Sunday Makai escaped two other members of the robbery gang namely Mannasseh Jiwunde and Aondowase Sougo were arrested hence the appellant and the two others arrested were jointly charged, tried together and convicted of offence of armed robbery.

At the trial the prosecution called three witnesses and tendered ten exhibits, whereas the appellant, as accused person, testified on his own behalf without calling any witness to testify for his defence. In the end the learned trial judge found the appellant guilty as charged and convicted him of the offence of armed robbery and sentenced him to death. Naturally aggrieved by his conviction and sentence by the trial court, he appealed to the lower court which

dismissed his appeal and affirmed the conviction and sentence in its judgment delivered on 12th February, 2014. Still dissatisfied with the judgment of the Court of Appeal, the appellant further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The principle of presumption of innocence*
The time honoured principle of law is that an accused person is presumed innocent until he is proved guilty. It is not for the accused to prove his innocence before the law court. The burden of proving the guilt of an accused person squarely rests on the prosecution and such burden does not shift. See Section 138 (1) of the Evidence Act 2011 as amended. *(P 372 Paras D – E)*

2. *Standard of proof in criminal cases*
Also, the prosecution, in order to obtain conviction must prove its case beyond reasonable doubt. Where there exists any doubt in the prosecution's case, such doubt must be resolved in favour of the accused person. See Igabele vs. State (2006) 6 NWLR (pt. 975) 100; Agbo vs. State (2006) 6 NWLR (pt. 977) 545; Miller vs. Ministry of Pension (1947) 2 AER 372. *(P 372 Paras E – F)*

3. *When burden of proof shifts to the accused to prove his innocence*
However, I must state here, that even though the burden of proof of the guilt of an accused person lies on the prosecution, where the prosecution had adduced adequate evidence which shows that the accused person had actually committed the offence charged the burden of proving that he is innocent shifts to the accused in view of the provisions of Section 138 (3) of the Evidence Act 2011 as amended See Nasiru vs. State (1999) 2 NWLR (pt. 589) 87 at 89.
(P 372 Paras F – H)

4. *Modes of establishing guilt of accused*
For the prosecution to establish an offence against an accused person, it must present or adduce credible evidence in any of the following modes, namely:

(a) Through testimony or testimonies of eye witness or witnesses, and/or

(b) Through confessional statement, voluntarily made by the accused person; and/or

(c) Through circumstantial evidence which clearly point to the sole fact that the accused person and no other person committed the offence charged.

(Pp 372 – 373 Paras H – B)

5. *Meaning of Armed robbery*

In a nut-shell the offence of armed robbery simply means stealing plus or accompanied with violence or threat of injury or death. See Aruna vs. The State (1990) 6 NWLR (pt. 155) 125; Tanko vs. The State (2009) 2 SCNJ 19; Ani vs. The State (2009) 6 SCNJ 105; Bozun vs. State (1985) 2 NWLR (pt. 8) 465; Okori vs. A.G. Bendel State (1989) 1 NWLR (pt. 100) 442; Nwachukwu vs. State (1985) 1 NWLR (pt. 11) 218. *(Pp 373 – 374 Paras H – A)*

6. *When to admit extra-judicial statement objected to on grounds of involuntariness*

Per Sanusi (JSC):

I had in the fore paragraphs of this discourse mentioned the modes of proof in criminal cases by the prosecution. In this instant case, the issue of an extra judicial statement made by the accused/appellant which was tendered by the prosecution in the course of the proceeding was admitted and marked Exhibit 9. It is important to note as shown in the record of proceedings, that when the appellant's extra judicial statement was tendered during the trial, the defence objected to the admissibility of the said statement on the ground that the appellant, as an accused at the trial court did not make such statement voluntarily because he was

> **tortured to sign the statement. The defence thereupon urged the trial court to conduct a trial within trial which said call made by the defence counsel was not objected to by the prosecution. The learned trial judge however overruled and rejected the call for trial within trial when he stated thus:**
>
> > **Court: "I had just ruled on the same objection admitting the statement of the 1st accused. For the prosecution to say that he is also out for a trial within trial speaks of lack of understanding. In the result I recall my earlier ruling and standing by it. I over rule the trial within trial and mark the document Exhibit "9"**

(See page 37 of the Record or Appeal)

To support his stance on his refusal to conduct trial within trial, the learned trial judge further stated at pages 84-87 of the record as follows:

> **"Trial within trial is not available at the wishful beck and call of an accused person. It must be predicated on an objective conviction that the confession was manufactured by the police and foisted on the accused person or forced down his throat"**

To my mind, the above observation or opinion should have at best, been made after testing the veracity of the allegation that the statement was actually not made voluntarily after conducting trial within trial or mini trial in order to ascertain the allegation that it was really voluntarily made by the accused appellant.
(Pp 374 – 375 Paras A – B)

7. *When necessary for court to conduct trial within trial and effect of failure to do so*

The position of the law is that when an accused person retracts a confessional statement on the ground that it was not voluntarily made by him, the trial court has a duty to try the issue of the voluntariness or otherwise of such statement through the conduct of a trial within trial. See Gbadamasi vs. State (1992) 9 NWLR (pt. 266); R vs. Onabayo (1936) 3 WACA 41; R vs. Igive (1960) SCNLR 158; Olayinka vs. The State (2007) 4 SCNJ 66-67. Failure of a trial court to conduct trial within trial where issue of voluntariness of a confessional statement is raised renders such statement inadmissible. See Obideozo vs. State (1987) 4 NWLR (pt. 67) 48; See also Emeka vs. The State (2001) 6 SCNJ 267 (2001) 14 NWLR (pt. 734) 666 where Ogwuegbu JSC stated as below:

> **"The law is that where an accused person contends that a confessional statement sought to be tendered in evidence was not made by him voluntarily, it is the duty of the judge to test the confession by conducting a trial within trial in order to determine whether in fact, the statement was voluntarily made.**

Therefore, by refusing to conduct trial within trial in the circumstance of this instant case, the trial court was wrong and it was also wrong for it to admit the statement in question in evidence. *(P 375 Paras B – G)*

8. *Other pieces of evidence can be relied where confessional statement is expunged*

This question is apt because even if there is no confessional statement relied on in proof of its case against an appellant, the prosecution can still rely on other evidence, be they eye witness account or circumstantial evidence. See Onyeye vs. State (2012) 1 LPELR 7866 (SC); Emeka vs. State (supra).

There is no gain saying, that in the present case the prosecution had called and relied on the testimonies of PW1, PW2 and PW3. PW1 and PW2 are eye witness to the commission of the offence of armed robbery by the accused/appellant and his fellow co-conspirators.

By the provision of Section 138 (1) prosecution has the burden to prove its case beyond reasonable doubt. Such burden can be discharged through the testimony of even a single eye witness account of the commission of the crime by an accused person once such testimony is credible and is believed by the trial court. See Abouge vs. G.P (1959) SCNLR 576; Fotoyunbo vs. A-G of Western Nigeria (1966) WNLR 4; The State vs. Afolabi (2010) 43 NSCQ 256.
(Pp 375 – 376 Paras H – C)

Per Sanusi (JSC):

"In his testimony for instance, PW1 revealed how he was attacked by five masked armed men on his way back home at the boundary between Cross River and Benue States, where his money i.e. N31,700.00 was robbed from him, after of course, he was thoroughly beaten and stabbed with a knife. That attack according to him, took place at around 10 p.m. Then, PW2 testified that she was injured by a stray bullet at Osina when she came out after she heard the alert shouts that some robbers were within the vicinity. She said the incident took place at around 1.30hrs even though she said she was not wearing her wrist watch. PW1 further testified that he was forced by the robbers to accompany them to Osina village some distance away from the place he was robbed, for further operations. Evidence abounds that when alarm was raised, the appellant was arrested and unmasked. PW1 and indeed all other persons who arrested the appellant had duly identified the appellant hence his identity was

not of any doubt at all. Moreover, PW1 had a long encounter with the robbers (including the appellant), hence the appellant's identity was not in dispute at all. It is my firm view therefore that the appellant was really fixed at the scene of the crime. Also the minor disparity on the actual time and the place the armed robbery took place are not material contradictions as would raise some dust on the prosecution case hence the trial court's finding rightly been endorsed or affirmed by the lower court". *(P 376 Paras C –H)*

9. *Learned appellant's Counsel misconceived the facts*

The learned counsel for the appellant tried to raise some reservations on what had happened at the border of Cross River and Benue States, where the PW1 was robbed and on what happened at Osina village, stating that no robbery operation took place at Osina village. I think the learned counsel had misconceived the entire episode because it is not in doubt that the PW1 was robbed at the border and was injured. He was taken hostage and forced to lead them to Osina village where the appellant was arrested. To my mind therefore, the robbery operation became a continuous process right from the border up to Osina Village since PW1 remained a captive until when the appellant was finally arrested at Osina village. The argument that there was no robbery at Osina village is of no moment and is a ruse.

It is also not in dispute that during the robbery operation one or some of the robbers were armed with guns and other dangerous weapons. The learned appellant's counsel then frowns at the prosecution's failure to tender the weapons used during the robbery operation as fatal to the prosecution's case. Such view held by the learned appellant's counsel is misplaced. *(Pp 376 – 377 Paras I – D)*

10. *Effect of failure to tender weapons*

It is trite law that failure to tender the offensive weapon used during a robbery operation can not result in the acquittal of the accused

person to destroy, throw or do away with the offensive weapons after the commission of the crime in order to exculpate himself from criminal responsibility. See Olayinka vs. State (2007) 9 NWLR (pt. 1040) 561; Okosi vs. AG Bendel State (supra) In fact, there is no principle of law, that insists that the prosecution must always tender weapons used during robbery operations in order to obtain conviction. See Olajuka vs. State (supra). *(P 377 Paras D – F)*

11. *Where the evidence establishing the guilt of accused is not challenged*
A dispassionate and close consideration of the testimonies; the evidence adduced by the prosecution in my opinion were not controverter or contradicted or challenged in any material particular as would be fatal to the case presented by the prosecution at the trial court. The pieces of evidence adduced had duly proved beyond reasonable doubt that the appellant did commit the offence of armed robbery of which he was charged tried, convicted and sentenced. The evidence adduced through the three witnesses called by the prosecution had really established the guilt of the appellant beyond reasonable doubt and he was therefore rightly convicted by the trial court. The lower court had also rightly affirmed the conviction and sentence of the accused/appellant with their unperverse findings of the two lower courts. This court is therefore hesitant to disturb or reverse those findings since they are not perverse and there was no misapplication of law shown. See Alh. Isah Tsokwa vs. Joseph Dakukpougbo & others (2008) 33 NSCQR 612. *(Pp 377 – 378 Paras F – A)*

Per Peter Odili (JSC):

> **"In refreshment of the memory to what has become trite in law that in criminal trials the guilt of an accused person can be established by any or all of the following:**
> **(a) Confessional Statement of the accused,**

(b) Circumstantial evidence
(c) Evidence of an eye witness. See State vs. Usman Isah (2013) 8 NCC 320 at 325; Igabele vs. State (2006) 5 MJSC 96 at 100.

In this case, the PW1 testified and stated in evidence that he was robbed of N31,700 by the appellant and his co-accused persons and that was not controverted. Also the other parts of PW1's evidence was corroborated by facts of the surrounding circumstances such as the block of wood sighted by PW3 when he visited the scene of crime which was allegedly used by the accused persons in blocking the road. Again to buttress the testimony of PW1 is the mask, Exhibit 6 obtained from the appellant by the villagers when he was arrested by them and his identity disclosed. Also to be noted as part of the confirming circumstances is the appellant being caught at Osina soon after, in the quest to continue the robbery operation as stated by PW1 and the PW1 said in evidence that he looked at the faces of the culprits when they were unmasked and they were the 2nd and 3rd accused and the 2nd accused being the appellant.

Though the confessional statement was expunged the court below had no difficulty in finding that the other pieces of evidence were overwhelming and the trial court right to convicted for robbery. That in the face of what the court below did not to accept as discrepancies material enough to shake the weight of evidence proffered by the prosecution and so the conviction was supported by the material evidence on ground that there was a robbery. I rely on Adekoya vs. State (2012) 7 NCC 1 at 9; Basil Akpa vs. State (2008) 2 NSCQR 1250 at 1271. *(P 382 Paras A – H)*

12. *How armed robbery was inferred*
On the matter of whether or not the robbers were armed, the evidence of PW1 in that regard corroborated by the testimony of PW2 and seen in the scar or wound sustained by her when the appellant and co-accused fired in the air at Osina village where they had taken their victim PW1 in continuation of the robbery operation

even though nothing occurred at Osina where they were accosted and arrested. In this regard the prosecution's case is supported by Section 9(b) of the Evidence Act, 2011 as amended which provides thus:

> **"Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any facts in issue or relevant fact probable or improbable".**

Anchoring on Section 9(b) of the Evidence Act, 2011 as stated above it is safe to say that the shooting in the air at Osina village makes the fact of the robbery more plausible and that the robbers were armed more probable. Probability induces belief while improbability points to an untruth. See Oteki vs. State (1986) All NLR 371 at 392.
(Pp 382 – 383 Paras I – E)

13. *How to establish the offence of armed robbery*
I am at one with the submission put across by the respondent that PW1 need not be dead from the stab wounds or show proof of severe injury to be done him or also proof of medical treatment received for the offence of armed robbery to be proved. It is correct that it is enough to establish that there was a robbery done with violence and the persons were armed. In this, it suffices to establish armed robbery with damning evidence even if the weapon is not produced in evidence. See Olayinka vs. State (2007) 2 NCC 505; Gbadamosi vs. State (1992) 9 NWLR (pt. 266) 464 at 480.

The appellant's attempt to persuade the court to hold that it is unsafe to rely on the evidence of PW1 who was sole witness to the offence gathered no moss as it is now settled law that courts can convict on the evidence of a single witness provided his testimony is cogent and unequivocal and believed by the court. That is the situation to this case in hand particularly where the testimony of the appellant in his defence that he was in Osina to buy palm wine when arrested by the vigilante on a suspicion of stealing was dismissed by the court below rightly as not having "the ring of truth" placed side by side the evidence of PW1 and other witnesses of the prosecution. I rely on Adelumola vs. State (1988) 1 NSCC 165.

In conclusion and reiteration the prosecution needs not prove beyond the shadow of doubt but rather beyond reasonable doubt and that is precisely what the prosecution/respondent has done here in its proof of all the ingredients of the offence of armed robbery. See Ugwuanyi vs. FRN (2012) 7 NCC 105. *(Pp 383 – 384 Paras E – A)*

Nigerian Cases Cited

Abouge vs. G.P (1959) SCNLR 576;
Adekoya vs. State (2012) 7 NCC 1
Adelumola vs. State (1988) 1 NSCC 165.
Agbo vs. State (2006) 6 NWLR (pt. 977) 545;
Alh. Isah Tsokwa vs. Joseph Dakukpougbo & others (2008) 33 NSCQR 612.
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Emeka vs. The State (2001) 6 SCNJ 267 (2001) 14 NWLR (pt. 734) 666
Fotoyunbo vs. A-G of Western Nigeria (1966) WNLR 4;
Gbadamasi vs. State (1992) 9 NWLR (pt. 266);
Gbadamosi vs. State (1992) 9 NWLR (pt. 266) 464
Igabele vs. State (2006) 5 MJSC 96
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Miller vs. Ministry of Pension (1947) 2 AER 372.
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Nwachukwu vs. State (1985) 1 NWLR (pt. 11) 218.
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Onyeye vs. State (2012) 1 LPELR 7866 (SC);
Oteki vs. State (1986) All NLR 371
R vs. Igive (1960) SCNLR 158;

A *R vs. Onabayo (1936) 3 WACA 41;*
State vs. Usman Isah (2013) 8 NCC 320
Tanko vs. The State (2009) 2 SCNJ 19;
The State vs. Afolabi (2010) 43 NSCQ 256.
B *Ugwuanyi vs. FRN (2012) 7 NCC 105.*

Nigerian Statutes Cited
Robbery and Firearms (special provision) Act, cap R 11 Laws of Federation
C of Nigeria 2004. Section 1 (2) (a) (b)
Evidence Act 2011 as amended - Section 138 (1)
Evidence Act, 2011- Section 9(b)

D **Representation**
Chinwe Godwin Omuka Esq. for the Appellant, with him, Deinma Kalama
Joseph Abang Oshie Hon A.G. Cross River State for Respondent with him,
Greg Okem D. P. P. Godwin Onah, Rechard Akpanke, Fidelis Bisong, Ekok
E Okpokam; Florence Nso, Nehemiah Abang.

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal, Calabar Division ("the
F lower court" for short) delivered on the 12th day of February 2014, which affirmed the decision of the High Court of Cross River State, (the trial court), convicting and sentencing the appellant to death on the offence of armed robbery on 12th day of October, 2009, contrary to Section 1 (2) (a) (b)
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I other co-accused persons who were masked and armed with guns and dagger. The gang of armed robbers attacked him and robbed him of a sum

of N31,700.00 after tying his hands to the back with rope and forced him later to lead them to Osina Wafe Village for another robbery operations.

On getting to that village, the victim shouted for help and his shouts attracted people around, hence the armed robbers took to their heels firing gun shots in the air and the shot hit and injured a girl called Rosemary Omagu who later testified at the trial as PW2. Unfortunately for the appellant, he was caught or arrested by the villagers and was unmasked. Even though one of the robbers by name Sunday Makai escaped two other members of the robbery gang namely Mannasseh Jiwunde and Aondowase Sougo were arrested hence the appellant and the two others arrested were jointly charged, tried together and convicted of offence of armed robbery.

At the trial the prosecution called three witnesses and tendered ten exhibits, whereas the appellant, as accused person, testified on his own behalf without calling any witness to testify for his defence. In the end the learned trial judge found the appellant guilty as charged and convicted him of the offence of armed robbery and sentenced him to death. Naturally aggrieved by his conviction and sentence by the trial court, he appealed to the lower court which dismissed his appeal and affirmed the conviction and sentence in its judgment delivered on 12th February, 2014. Still dissatisfied with the judgment of the lower court, the appellant further appealed to this court.

Parties filed and exchanged briefs of argument in compliance with the rules and practice applicable in this court. The appellant's brief of argument settled by one Chinwe Godwin Omoaka Esq. was filed on 20th October 2017 but deemed filed on 26th October 2017. The respondent herein, upon being served with the appellant's brief of argument filed his brief of argument on 12th September 2014 which was also deemed filed on the same 26/10/2017. In the appellant's brief of argument lone issue was distilled for determination from the grounds of appeal contained in the notice of appeal which reads this:

"Was the court below right to affirm the judgment of the trial court on the ground that the prosecution proved its case beyond reasonable doubt?"

The above lone issue for determination was adopted by the learned counsel for the respondent as the only issue calling for the determination of this appeal without more.

In arguing the lone issue for determination, the learned counsel for the appellant submitted that failure of the court below to take into consideration the case put forward by the appellant is fatal and should have led to a reversal of the decision of the trial court. He pointed out that the appellant testified that on the day of the incident i.e. 15th of December, 2005, he went to Osina to buy palm wine and while he was engaged in discussion with the seller, the vigilante group members pounced on him and accused him of committing robbery. He then argued that the lower court did not advert its mind to the evidence of the appellant in affirming the trial court's finding that PW1 was robbed. He argued that PW1 gave conflicting evidence as to the amount stolen from him as he put the amount variously at N31,000.00 and N31,200.00 in Exhibit 1 and 2 i.e. his statements to the police.

On the evidence as to the time of the robbery he pointed out that PW1 stated that he was robbed between 10 and 11 p.m. at the boundary between Benue and Cross River States and that it is not possible that the robbers would have asked him to lead them to Osima village for another round of robbery operation at about 9 p.m. in Osima village as for another round of robbery operation at about 9 p.m. in Osima village which would have culminated in firing a stray bullet hitting PW2 which the said PW2 stated in her evidence to have occurred at about 9 p.m. He argued that the event at Osina was not the subject of the charge but on an earlier armed robbery that allegedly took place in the forest reserve in Ahfokpa and that the appellant was not arrested in connection with that armed robbery that earlier took place, but in connection with the alleged attempted armed robbery that took place in Osina village. He argued that the court should have invoked Section 167 of the evidence Act to hold.

(i) that the PW1 did not die

(ii) the absence of evidence showing that he sustained injury to his fore head.

(iii) lack of medical evidence that he was treated for injury sustained as a result of stabbing clearly suggests that the appellant and his co-accused were not armed.

He submitted that in the absence of any evidence from the prosecution showing clearly that offensive weapon was found in possession of the appellant and the gang member at the time of their arrest at Osina raised significant doubt as to the veracity of PW1's assertion, that he was robbed by gun wilding by armed robbers. He also argued that the appellant did not take part in the robbery because the alleged robbery that took place and the event at Osina village are two different incidents which must be kept separately. He argued that arresting and unmasking the robbers are not pointer that they were the persons who robbed PW1. He urged this court to hold that the prosecution has failed to prove the ingredients of the offence of armed robbery and to allow the appeal.

In his response to the above appellant's counsel's submissions the respondent's learned counsel pointed out that in the charge of armed robbery, the following ingredients must be proved by the prosecution in order to obtain conviction to wit.

(i) that there was a robbery or series of robberies.
(ii) that the robbers were armed
(iii) that the accused was one of the robbers or was one who took part in the armed robbery.

He submitted that the guilt of an accused person can be established through confession, circumstantial evidence or e evidence of eye witness. He referred to the judgment of the trial court at page 83 and that of the court below at page 169 of the record and argued that the PW1's evidence is corroborated by the following circumstances i.e. the recovery of the mask, the appellant being caught at Osina Village soon after, in his quest to continue with the robbery as disclosed by Pw1 can also be said to be good evidence to be relied upon by the trial court.

A On the issue of conflicting evidence as to how much was stolen from PW1, the learned counsel for the respondent argued that the contention of the appellant's counsel on this point does not go to the root of the matter and can thus be seen as a minor discrepancies and therefore not fatal to the B prosecution's case. He referred to Section 9(b) of the Evidence Act and submitted that the shooting at Osina village makes the fact of robbery more plausible and probable. He argued also that the appellant did not deny the presence of mark to show that there was a stabbing on PW1's forehead. He C concluded his arguments by submitting that the prosecution had proved all the ingredients of the offence of armed robbery and then urged this court to dismiss the appeal and affirm the concurrent decisions of the two courts below.

D The time honoured principle of law is that an accused person is presumed innocent until he is proved guilty. It is not for the accused to prove his innocence before the law court. The burden of proving the guilt of an accused person squarely rests on the prosecution and such burden does E not shift. See Section 138 (1) of the Evidence Act 2011 as amended. Also, the prosecution, in order to obtain conviction must prove its case beyond reasonable doubt. Where there exists any doubt in the prosecution's case, such doubt must be resolved in favour of the accused person. See **Igabele** F **vs. State (2006) 6 NWLR (pt. 975) 100; Agbo vs. State (2006) 6 NWLR (pt. 977) 545; Miller vs. Ministry of Pension (1947) 2 AER 372.**

However, I must state here, that even though the burden of proof of the guilt of an accused person lies on the prosecution, where the G prosecution had adduced adequate evidence which shows that the accused person had actually committed the offence charged the burden of proving that he is innocent shifts to the accused in view of the provisions of Section 138 (3) of the Evidence Act 2011 as amended See **Nasiru vs. State (1999) 2** H **NWLR (pt. 589) 87 at 89.**

For the prosecution to establish an offence against an accused person, it must present or adduce credible evidence in any of the following modes, namely:

I

(a) Through testimony or testimonies of eye witness or witnesses, and/or

(b) Through confessional statement, voluntarily made by the accused person; and/or

(c) Through circumstantial evidence which clearly point to the sole fact that the accused person and no other person committed the offence charged.

For the prosecution to obtain conviction on the offence of armed robbery, it has a duty to establish the following elements beyond reasonable doubt to wit:

(i) that the accused person in the process had committed theft

(ii) that the accused person and/or person(s) he was in company of had caused hurt, wrongful restraint or caused some fear or appreciation of death or hurt or injury on their victim or victims

(iii) that the acts complained of were done in the process of committing the theft or in order to commit the theft and/or carry away the property obtained by the theft

(iv) that the accused person did the acts complained of voluntarily, and

(v) that the accused person or any one in his company was/were armed with dangerous weapons at the time of committing the offence in question during the robbery.

See **Abdullahi vs. The State (2008) 5 SCNJ 210/211.** In a nut-shell the offence of armed robbery simply means stealing plus or accompanied with violence or threat of injury or death. See **Aruna vs. The State (1990) 6 NWLR (pt. 155) 125; Tanko vs. The State (2009) 2 SCNJ 19; Ani vs. The State (2009) 6 SCNJ 105; Bozun vs. State (1985) 2 NWLR (pt. 8)**

465; Okori vs. A.G. Bendel State (1989) 1 NWLR (pt. 100) 442; Nwachukwu vs. State (1985) 1 NWLR (pt. 11) 218.

I had in the fore paragraphs of this discourse mentioned the modes of proof in criminal cases by the prosecution. In this instant case, the issue of an extra judicial statement made by the accused/appellant which was tendered by the prosecution in the course of the proceeding was admitted and marked Exhibit 9. It is important to note as shown in the record of proceedings, that when the appellant's extra judicial statement was tendered during the trial, the defence objected to the admissibility of the said statement on the ground that the appellant, as an accused at the trial court did not make such statement voluntarily because he was tortured to sign the statement. The defence thereupon urged the trial court to conduct a trial within trial which said call made by the defence counsel was not objected to by the prosecution. The learned trial judge however overruled and rejected the call for trial within trial when he stated thus:

> **Court:- "I had just ruled on the same objection admitting the statement of the 1st accused. For the prosecution to say that he is also out for a trial within trial speaks of lack of understanding. In the result I recall my earlier ruling and standing by it. I over rule the trial within trial and mark the document Exhibit "9"**

(See page 37 of the Record or Appeal)

To support his stance on his refusal to conduct trial within trial, the learned trial judge further stated at pages 84-87 of the record as follows:

> **"Trial within trial is not available at the wishful beck and call of an accused person. It must be predicated on an objective conviction that the confession was manufactured by the police and foisted on the accused person or forced down his throat"**

To my mind, the above observation or opinion should have at best, been made after testing the veracity of the allegation that the statement was actually not made voluntarily after conducting trial within trial or mini trial in order to ascertain the allegation that it was really voluntarily made by the accused appellant. The position of the law is that when an accused person retracts a confessional statement on the ground that it was not voluntarily made by him, the trial court has a duty to try the issue of the voluntariness or otherwise of such statement through the conduct of a trial within trial. See **Gbadamasi vs. State (1992) 9 NWLR (pt. 266); R vs. Onabayo (1936) 3 WACA 41; R vs. Igive (1960) SCNLR 158; Olayinka vs. The State (2007) 4 SCNJ 66-67.** Failure of a trial court to conduct trial within trial where issue of voluntariness of a confessional statement is raised renders such statement inadmissible. See **Obideozo vs. State (1987) 4 NWLR (pt. 67) 48;** See also **Emeka vs. The State (2001) 6 SCNJ 267 (2001) 14 NWLR (pt. 734) 666 where Ogwuegbu JSC** stated as below:

> **"The law is that where an accused person contends that a confessional statement sought to be tendered in evidence was not made by him voluntarily, it is the duty of the judge to test the confession by conducting a trial within trial in order to determine whether in fact, the statement was voluntarily made.**

Therefore, by refusing to conduct trial within trial in the circumstance of this instant case, the trial court was wrong and it was also wrong for it to admit the statement in question in evidence.

Now the next question to consider is whether the prosecution had adduced credible and cogent evidence in proof of the offence of armed robbery against the accused/appellant independent of or apart from the confessional statement wrongly admitted? This question is apt because even if there is no confessional statement relied on in proof of its case against an appellant, the prosecution can still rely on other evidence, be they eye witness account or circumstantial evidence. See **Onyeye vs. State (2012) 1 LPELR 7866 (SC); Emeka vs State (supra).**

A There is no gain saying, that in the present case the prosecution had called and relied on the testimonies of PW1, PW2 and PW3. PW1 and PW2 are eye witness to the commission of the offence of armed robbery by the accused/appellant and his fellow co-conspirators.

B By the provision of Section 138 (1) prosecution has the burden to prove its case beyond reasonable doubt. Such burden can be discharged through the testimony of even a single eye witness account of the commission of the crime by an accused person once such testimony is C credible and is believed by the trial court. See **Abouge vs. G.P (1959) SCNLR 576; Fotoyunbo vs. A-G of Western Nigeria (1966) WNLR 4; The State vs. Afolabi (2010) 43 NSCQ 256.**

In his testimony for instance, PW1 revealed how he was attacked by D five masked armed men on his way back home at the boundary between Cross River and Benue States, where his money i.e. N31,700.00 was robbed from him, after of course, he was thoroughly beaten and stabbed with a knife. That attack according to him, took place at around 10 p.m. E Then, PW2 testified that she was injured by a stray bullet at Osina when she come out after she heard the alert shouts that some robbers were within the vicinity. She said the incident took place at around 1.30hrs even though she said she was not wearing her wrist watch. PW1 further testified that he was F forced by the robbers to accompany them to Osina village some distance away from the place he was robbed, for further operations. Evidence abounds that when alarm was raised, the appellant was arrested and unmasked. PW1 and indeed all other persons who arrested the appellant G had duly identified the appellant hence his identity was not of any doubt at all. Moreover, PW1 had a long encounter with the robbers (including the appellant), hence the appellant's identity was not in dispute at all. It is my firm view therefore that the appellant was really fixed at the scene of the H crime. Also the minor disparity on the actual time and the place the armed robbery took place are not material contradictions as would raise some dust on the prosecution case hence the trial court's finding rightly been endorsed or affirmed by the lower court.

I The learned counsel for the appellant tried to raise some reservations on what had happened at the border of Cross River and Benue States, where

the PW1 was robbed and on what happened at Osina village, stating that no robbery operation took place at Osina village. I think the learned counsel had misconceived the entire episode because it is not in doubt that the PW1 was robbed at the border and was injured. He was taken hostage and forced to lead them to Osina village where the appellant was arrested. To my mind therefore, the robbery operation became a continuous process right from the border up to Osina Village since PW1 remained a captive until when the appellant was finally arrested at Osina village. The argument that there was no robbery at Osina village is of no moment and is a ruse.

It is also not in dispute that during the robbery operation one or some of the robbers were armed with guns and other dangerous weapons. The learned appellant's counsel then frowns at the prosecution's failure to tender the weapons used during the robbery operation as fatal to the prosecution's case. Such view held by the learned appellant's counsel is misplaced. It is trite law that failure to tender the offensive weapon used during a robbery operation can not result in the acquittal of the accused person to destroy, throw or do away with the offensive weapons after the commission of the crime in order to exculpate himself from criminal responsibility. See **Olayinka vs. State (2007) 9 NWLR (pt. 1040) 561; Okosi vs. AG Bendel State (supra)** In fact, there is no principle of law, that insists that the prosecution must always tender weapons used during robbery operations in order to obtain conviction. See **Olajuka vs. State (supra).**

A dispationate and close consideration of the testimonies**;** the evidence adduced by the prosecution in my opinion were not controverter or contradicted or challenged in any material particular as would be fatal to the case presented by the prosecution at the trial court. The pieces of evidence adduced had duly proved beyond reasonable doubt that the appellant did commit the offence of armed robbery of which he was charged**,** tried, convicted and sentenced. The evidence adduced through the three witnesses called by the prosecution had really established the guilt of the appellant beyond reasonable doubt and he was therefore rightly convicted by the trial court. The lower court had also rightly affirmed the conviction and sentence of the accused/appellant with their unperverse

findings of the two lower courts. This court is therefore hesitant to disturb or reverse those findings since they are not perverse and there was no misapplication of law shown. See **Alh. Isah Tsokwa vs. Joseph Dakukpougbo & others (2008) 33 NSCQR 612.**

In the result, I adjudge this appeal to be unmeritorious. It is accordingly dismissed by me. I affirm the judgment of the Court of Appeal which had earlier affirmed the conviction and sentence of the appellant of the offence of armed robbery. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I read in draft the leading judgment delivered by my learned brother, **Sanusi JSC.** I agreed that the Court of Appeal was correct to affirm the judgment of the trial court, which convicted and sentenced the appellant to death for armed robbery, contrary to section 1 (2) (a) of the Robbery and Firearms Act.

Appeal dismissed.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amiru Sanusi JSC and to register my support I shall make some remarks.

This is an appeal against the decision of the Court of Appeal, Calabar Division or court below or lower court delivered on 12th February, 2014 in which the court below affirmed the judgment of the Cross-River State High Court, Ogoja Division per Michael Edem J. which convicted the accused/appellant of the offence of armed robbery and sentenced him to death.

BACKGROUND FATS

At about 1.30 a.m. on 15th day of December, 2005, the appellant and three others while armed with offensive weapons-two locally made pistols and a dagger were alleged to have robbed one Ogbaji Pius Ogar (PW1) of the sum of N31,700.00 at Alifokpa in Yala Local Government Area of Cross-River State.

A Ogbaji Pius, Ogar, a motor cyclist, went to drop a passenger at Wuese, a village located on the boundary between Benue and Cross River State. On his way back, he came across a road block allegedly mounted by the appellant and the three co-accused persons.

B As PW1 was about to reverse his motor cycle, the robbers emerged from the bush armed with pistols and a dagger. They robbed PW1 of the sum of N31,700.00, tied his two hands behind his back and ordered him to accompany them to Osina, some thirty minutes away, for further robbery C operations.

On getting to Osina village, PW1 raised a alarm. The villagers came to his aid and rescued him from the robbers who fled into the bush.

In the process of trying to escape, the robbers shot indiscriminately. D As a result, a stray bullet hit a girl, PW2 (Rose Omagu) on the forehead. She was injured and had to be rushed to the local hospital for treatment.

The robbers were eventually arrested even though one of them, Sunday Makai managed to escape arrest.

E The appellant and two of the robbes, Manaseh Jiwunde and Aondowase Songo were jointly charged and tried for the offence of armed robbery contrary to Sections 1 (2)(a) and (b) of the Robbery and Firearms (Special Provisions) Act, Cap. R. 11, Laws of the Federation of Nigeria, F 2004 ("L.F.N.") ("the Robbery Act") .

Manaseh Juwunde was the first accused person at the trial. The appellant was the second accused while Aondawase was the third accused.

The appellant denied the charge in every respect. In response, he said G that he went to buy palm wine in Osina for the burial of a classmate. As he was making enquiries about the palm wine, he was accosted by a vigilante group, beaten, arrested and handed over to the police on suspicion of stealing.

H In proof of the case at the trial the prosecution called three witnesses and tendered 10 Exhibits while the appellant testified for himself. At the end the learned trial judge convicted the appellant of the offence of armed robbery and sentenced him to death. Dissatisfied the appellant approached I the court below on appeal which appeal was dismissed and further aggrieved the appellant has come before the Supreme Court to ventilate

A that grievance.

Learned counsel for the appellant, Chinwe Godwin Omoaka on the 26/10/17 date of hearing, adopted the brief of the appellant filed on 20/10/17 and deemed filed on the 26/10/17 in which was identified a sole
B issue for determination, viz:

Was the court below right to affirm the judgment of the trial court on the ground that the prosecution proved its
C **case beyond reasonable doubt.**

The Attorney-General of Cross River State, Josph Oshie Abang of counsel for the respondent, adopted the brief of the respondent settled by Attah
D Ochinke Esq. the then Attorney General Which brief of argument was filed on 12/9/2014 and deemed filed on 26/10/17. He equally adopted the single issue as crafted by the appellant.

E **SOLE ISSUE**

This question as taken on by the counsel on either side and which I see as comprehensive and I shall use it asks if the court below was right to affirm the judgment of the trial court on the ground that the prosecution proved its
F case beyond reasonable doubt.

Learned counsel for the appellant contended that the court below was wrong primarily because its finding of guilt on the appellant was not supported by the evidence and therefore manifestly perverse. That the
G prosecution had failed to prove beyond reasonable doubt the ingredients of the offence of armed robbery. He cited **Bozin vs. State (1985) 1 NWLR (pt. 8) 465; State vs. Salawu (2011) 8 NWLR (pt. 1279) 580; Bello vs. State (2007) 10 NWLR (pt. 1043) 564.**

H That in evaluating the evidence, the court below failed or omitted to completely consider the evidence adduced by the appellant which is an obvious misdirection and this failure is fatal and warrants the setting aside of the decision of the court below. He referred to the cases of **Umar vs.**
I **Bayeor University (1998) 4 NWLR (pt. 86) 85; Oyo State vs. Fairlakes Hotels Ltd (No. 2) (1989) 5 NWLR (pt.121) 255.**

Learned counsel for the appellant contended that in the absence of any evidence from the prosecution showing that no offensive weapon was found on the appellant and his gang at the time of their arrest at Osina, it raised significant doubt as to the veracity of PW1's assertion that he was robbed by gun wielding armed robbers. That it is important to note that the robbery subject of the charge is separate and distinct from the later incident at Osina and must be kept as such. He stated that the events that took place at Osina cannot be the basis for convicting the appellant of the offence charged as the alleged robbery of the appellant and the Osina events are two separate incidents and must be kept in separate compartments. That the offence had not been proved beyond reasonable doubt. He cited **Agbacham vs. State (1970) 1 All NLA 69; Okpulor vs. State (1990) 7 NWLR (pt. 164) 581; Alabi vs. State (1993) 7 NWLR (pt. 307) 511 at 523.**

In response, learned counsel for the respondent stated that the prosecution proved all the ingredients of the offence of armed robbery beyond reasonable doubt. That even from the evidence of the appellant as 2nd accused, he was caught in the act and was among the five-man gang that robbed PW1 in the bush while armed and then took him to Osina village for him to hire other victims for more robbery. He cited Section 9 (b) of the Evidence Act, 2011; **Ugwuanyi vs. FRN (2012) 7 NCC 105; Olayinka vs. State (2007) 2 NCC 505; Gbadamosi vs. State (1992) 9 NWLR (pt. 266) 464 at 480.**

In a nutshell, the appellant posits that the prosecution failed to prove any of the three ingredients of the offence of robbery and therefore failed to prove the commission of the offence beyond reasonable doubt. That posture the respondent rejects stating that the prosecution discharged the burden of proof beyond reasonable doubt.

The court below per Otisi JCA stated thus:

> **"Having regard, therefore to the evidence of the prosecution witnesses and in particular to the direct unchallenged evidence of PW1, the victim, I hold that the prosecution had proved the offence of armed robbery as**

charged against the appellant beyond reasonable doubt".

In refreshment of the memory to what has become trite in law that in criminal trials the guilt of an accused person can be established by any or all of the following:

(a) Confessional Statement of the accused,
(b) Circumstantial evidence
(c) Evidence of an eye witness. See State vs. Usman Isah (2013) 8 NCC 320 at 325; Igabele vs. State (2006) 5 MJSC 96 at 100.

In this case, the PW1 testified and stated in evidence that he was robbed of N31,700 by the appellant and his co-accused persons and that was not controverted. Also the other parts of PW1's evidence was corroborated by facts of the surrounding circumstances such as the block of wood sighted by PW3 when he visited the scene of crime which was allegedly used by the accused persons in blocking the road. Again to buttress the testimony of PW1 is the mask, Exhibit 6 obtained from the appellant by the villagers when he was arrested by them and his identity disclosed. Also to be noted as part of the confirming circumstances is the appellant being caught at Osina soon after, in the quest to continue the robbery operation as stated by PW1 and the PW1 said in evidence that he looked at the faces of the culprits when they were unmasked and they were the 2nd and 3rd accused and the 2nd accused being the appellant.

Though the confessional statement was expunged the court below had no difficulty in finding that the other pieces of evidence were overwhelming and the trial court was right to convicted for robbery. That in the face of what the court below did not to accept as discrepancies material enough to shake the weight of evidence proffered by the prosecution and so the conviction was supported by the material evidence on ground that there was a robbery. I rely on **Adekoya vs. State (2012) 7 NCC 1 at 9; Basil Akpa vs. State (2008) 2 NSCQR 1250 at 1271.**

On the matter of whether or not the robbers were armed, the evidence

of PW1 in that regard corroborated by the testimony of PW2 and seen in the scar or wound sustained by her when the appellant and co-accused fired in the air at Osina village where they had taken their victim PW1 in continuation of the robbery operation even though nothing occurred at Osina where they were accosted and arrested. In this regard the prosecution's case is supported by Section 9(b) of the Evidence Act, 2011 as amended which provides thus:

> **"Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any facts in issue or relevant fact probable or improbable".**

Anchoring on Section 9(b) of the Evidence Act, 2011 as stated above it is safe to say that the shooting in the air at Osina village makes the fact of the robbery more plausible and that the robbers were armed more probable. Probability induces belief while improbability points to an untruth. See **Oteki vs. State (1986) All NLR 371 at 392.**

I am at one with the submission put across by the respondent that PW1 need not be dead from the stab wounds or show proof of severe injury to be done him or also proof of medical treatment received for the offence of armed robbery to be proved. It is correct that it is enough to establish that there was a robbery done with violence and the persons were armed. In this, it suffices to establish armed robbery with damning evidence even if the weapon is not produced in evidence. See **Olayinka vs. State (2007) 2 NCC 505; Gbadamosi vs. State (1992) 9 NWLR (pt. 266) 464 at 480.**

The appellant's attempt to persuade the court to hold that it is unsafe to rely on the evidence of PW1 who was sole witness to the offence gathered no moss as it is now settled law that courts can convict on the evidence of a single witness provided his testimony is cogent and unequivocal and believed by the court. That is the situation to this case in hand particularly where the testimony of the appellant in his defence that he was in Osina to buy palm wine when arrested by the vigilante on a suspicion of stealing was dismissed by the court below rightly as not having "the ring

of truth" placed side by side the evidence of PW1 and other witnesses of the prosecution. I rely on **Adelumola vs. State (1988) 1 NSCC 165.**

In conclusion and reiteration the prosecution needs not prove beyond the shadow of doubt but rather beyond reasonable doubt and that is precisely what the prosecution/respondent has done here in its proof of all the ingredients of the offence of armed robbery. See **Ugwuanyi vs. FRN (2012) 7 NCC 105.**

From the foregoing and the better and fuller reasoning in the lead judgment, I find no merit in this appeal and I too dismiss the appeal.

I abide by the consequential orders as made.

Mary Ukaego Peter-odili
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I have had the privilege of reading in draft the lead judgment of my learned brother Sanusi, JSC just delivered. I agree that the appeal is lacking in merit and I also dismiss same in terms of the lead judgment of my brother.

Appeal is dismissed.

Clara Bata Ogunbiyi
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage,
Justice, Supreme Court

THE STATE
AND
ABDULLAHI SANI

SC. 491/2011

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Issues for determination – Whether an appellate court can adopt or reformulate issues for determination – Relevant considerations.

CONSTITUTIONAL LAW: Right to fair hearing – Counsel to the accused acquiesced to irregular procedure that resulted in a breach of accused right of fair hearing – Whether right of fair hearing in Criminal Proceedings can be waived.

COURT: Issues for determination – Powers of appellate courts thereto – Relevant principles.

COURT: Review of evidence of identification – Duty on trial court to carefully review evidence of identification – Need to ensure that the person charged was the person who committed the offence.

COURT: Where there are blunders in the case presented by prosecution – Attitude of court towards the guilt of accused.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Elements – What prosecution must prove – How onus on prosecution is discharged.

CRIMINAL LAW AND PROCEDURE: Identification – Where accused was not identified as one of the robbers – Whether it can be said that prosecution has proved its case beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Identification – Where victims of crime did not identify the accused – No evidence linking the accused to the scene except his alleged confessional statement – Effect on standard of proof.

CRIMINAL LAW AND PROCEDURE: Procedure for trial within trial – Trial within trial merged with main trial – Propriety of – Implication to right of fair hearing of accused.

EVIDENCE: Confessional Statement – When challenged – Nature of objection determines procedure to be adopted thereto.

EVIDENCE: Standard of proof in criminal cases – S.135 of Evidence Act 2011 – Extent and scope.

JUDGMENT AND ORDERS: Perverse judgment or finding – When arises – Attitude of appellate courts thereto – Conditions for interference.

STATUTE: Construction of – S. 135 of Evidence Act 2011 – Relevant considerations thereof.

Issues for Determination

1. **Whether the learned Honourable Justices of the Court of Appeal, were right when they held that they had the powers to reformulate, and indeed, reformulated the defective issues for determination set before them by the appellant, at the court below.**
2. **Whether the learned Honourable Justices were right when they held that the judgment of the High Court was not supported by evidence, when the record of proceeding showed otherwise.**
3. **Whether the Honourable Justices of the Court of Appeal were right when they held that the process/procedure adopted by the trial judge compromised the respondent's right to fair hearing.**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Kaduna Division delivered on 22nd December, 2010 in which the court below set aside the judgment of Abdullahi Yusuf J. of the Katsina State High Court, Daura delivered on 7th May, 2007. The court below further quashed the conviction and sentence of the respondent and acquitted and discharged the respondent.

In dissatisfaction with the decision of the Court of Appeal, the appellant has come before the Supreme Court on a three ground notice of appeal filed on the 14th January, 2011.

The facts relevant to this appeal are that the respondent herein and one Babangida Gambo were charged before the High Court of Katsina State, Daura Judicial Division on a two (2) count charge bordering on armed robbery punishable with death contrary to Section 1(2) (a) of the Robbery and Fire Arms Act Cap 398 Laws of the Federation of Nigeria 2004.

The respondent in the course of trial retracted his confessional statement and the court went into a mini-trial. The learned trial judge conducted the mini-trial together with the main trial and at the end of the mini trial admitted the respondent's confessional statement despite he and his co-accused alleging that the statement was obtained under duress. At the close of the trial, the respondent was convicted and sentenced to death by hanging by the learned

trial court. His appeal to the Court of Appeal was successful hence this appeal to the Supreme Court by the State.

Held: *(Unanimously dismissing the appeal)*

1. *Appellate courts have power to adopt or reformulate issues for determination*
Indeed this court has in innumerable cases made it abundantly clear that this court or the Court of Appeal can adopt or reformulate issues. In *Abiola & Sons Bottling Co Ltd vs. 7 Up Bottling Co Ltd (2012) 7 SC (Pt. ii) P. 83,* I said that:

> **"An appeal court may adopt or even formulate issues for determination that would serve the interest of justice, or/and address the real grievance in an appeal".**

In Okere vs. State (2016) LPELR-26057, Peter-Odili (JSC) said that:

> **".....the court has the leeway to redraft such issues in a manner to show the light to what is really in controversy in the interest of justice and so the court seeking accuracy, clarity and brevity would design the issues to suit the purpose on ground:** *(Pp 405 – 406 Paras H – C)*

Per Rhodes Vivour (JSC):

"In Kayode vs. State (2016) LPELR-40028, Ariwoola (JSC) said:

> **"..... the court is not only obliged but entitled to reframe or reformulate issues from the competent grounds of appeal filed by the appellant for the purpose of clarity and precision and to lead to a proper determination of an appeal."**

See Latunde & anor vs. B. Lajinfin (1989) 5 SC P. 67, Awojugbagbe Light Industries Ltd vs. P.N. Chinakwe & anor (1995) 4 NWLR (Pt.

390) P. 379. Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt. 452) P. 15.

It must be abundantly clear that an appeal court has discretion to reformulate issues for determination by both sides in the interest of justice. Where as in this case there is a complaint that the Court of Appeal by reformulating issues has taken over the duty of counsel and handled the case for them, the burden lies on the party complaining to show that fresh issues do not better address the real grievance in the appeal and is not geared towards achieving substantial justice. Issue one is easily resolved against the appellant since learned counsel for the appellant never discharged the burden in his brief. By no stretch of imagination does the reformulation of issues by the judge amount to the judge taking over the job of counsel, rather it is the duty of the judge at all times to seek substantial justice and this can only be achieved if issues that address the real grievance in the appeal are considered by the court. In this way an appeal would be determined correctly and the justice system would be highly commended rather than derided".
(Pp 406 – 407 Paras D – A)

2. *Fundamental need to do substantial justice*

Clearly what was at the focus of the court below was substantial justice which that court was not prepared to sacrifice for technical justice. Also within sight was the fact that an infraction which obviously was due to mistake of counsel cannot have its repercussion visited on a hapless client who is fighting for his liberty and life. Stated another way is that the court of all cadres should be mindful of the paramount interest of justice and the right of a litigant to be protected even in the face of an improperly crafted process presented in a clumsy inarticulate way. Therefore the court has to bring out with clarity what it is dealing even if it means reformulating the issues so long as they are not outside the facts/issues presented in a clumsy inarticulate way. Therefore the court has to bring out with clarity even if it means reformulating the issues so long as they are not outside the grounds of appeal or the court can use the issues

crafted by one side if it fits the bill. The important thing is that the issues utilized arise from valid grounds of appeal and the dispute is brought to light for consideration whereby the substantial justice is carried out. See Akinpelu vs. Adegbore (2008) 10 NWLR (Pt. 1096) 531 at 557; Salaeh vs. Munguna (2006) ALL FWLR (Pt. 332) 1411 at 1439-1440; Jev vs. Iyortom & Ors (2015) LPELR-24420 SC; Okere vs. State (2016) LPELR-26057 (SC). *(Pp 420 – 421 Paras F – B)*

Per Sanusi (JSC)

> **"The law is trite, that an appellate court has the right or duty where appropriate, to formulate, re-formulate or reframe issue or issues for determination of an appeal especially in a situation where it is of the opinion that the issue(s) as formulated by learned counsel to any of the parties did not encompass the actual points in controversy in the appeal. In doing so however, the issue(s) to be re-formulated by the appellant court must be consistent with the ground(s) of appeal. In the instant appeal, it is noted by me, that it is not the complaint of the learned counsel for the appellant that the issues so formulated by the lower court did not arise from his grounds of appeal. See Yades (Nig) Ltd vs. G. Nig Ltd (2007) 14 NWLR (Pt. 1055) 584 or (2007) 4-5 SC 236. Again, I must say that the grouse of the counsel of the appellant that the lower court did not consider the issue he raised is of no moment since the issues framed by the lower court had encapsulated all the issues raised by him and all the points raised in his submissions were well attended to and duly considered. No miscarriage of justice was occasioned to it at all and also no rules of fair hearing was infringed or violated.**
> *(P 425 Paras D – H).*

3. *Where accused persons were not identified by victims of robbery nor any evidence linking them to the robbery*

The respondent and B. Gambo were tried by a Katisna State High Court on a two count charge of armed robbery punishable with death, contrary to section 1(2)(a) of the Robbery and Firearms Act. He was accused of being one of the five armed robbers that raided the home of PW3 and PW4 and carted away their belongings. Both victims of the armed robbery did not identify the respondent as one of the armed robbers and no evidence connecting the respondent with the armed robbery except a statement allegedly made by him confessing that he was one of the armed robbers.

After a mini trial was conducted the learned trial judge was satisfied that the confession was free and voluntary and convicted the appellant on it.*(Pp 407 – 408 Paras H – B)*

4. *Where the identity of the accused was not established as one of the robbers*

If ever there was an armed robbery case that needs an identification parade to be conducted to identify who actually were the armed robbers on the night of July 22, 2004 at the home of PW3 and PW4, this is it. Nobody has come to this court to say that the appellant was among the armed robbers that robbed PW3 and PW4. The two victims of the armed robbery, PW3 and PW4 never said that the appellant was one of the armed robbers, but they positively identified the 1st accused person as one of the armed robbers. There was definitely a robbery at the home of PW3 and PW4 on 22 July, 2004. The robbery appears to have been carried out with offensive weapons, there is no direct oral evidence by or from the victims of the robbery (i.e. PW3 and PW4) that the appellant participated as one of the armed robbers. The offence of armed robbery punishable under section 1(2)(a) of the Robbery and Firearms Act was not proved beyond reasonable doubt since the identity of the appellant as one of the robbers was not established by the testimony of PW3 and Pw4. *(Pp 409 – 410 Paras F – A).*

5. *What prosecution must prove to establish the offence of armed robbery*

To succeed the prosecution must prove the following elements of the

offence of armed robbery under section 1(2) (a) of the Robbery and Firearms Act beyond reasonable doubt.

(a) There was a robbery or series of robberies;
(b) The robbery or series of robberies were carried out with offensive weapons;
(c) The accused person participated in the robbery. See Ogudo vs. State (2011) 18 NWLR (Pt. 1278) P.1, Bello vs. State (2007) 10 NWLR (Pt. 1043) P. 564, Alabi vs. State (1993) 7 NWLR (Pt. 307) p. 511, Suberu vs. State (2010) 8 NWLR (Pt. 1197) P. 586.

It must be said again and again that in all criminal trials the prosecution must prove its case beyond reasonable doubt and this burden is discharged by the prosecution calling witnesses to give compelling evidence against the accused person with relevant exhibits to lend credence to oral evidence.

In this way the elements of the offence (a) (b) and (c) are established and no reasonable person would be in doubt that the accused person committed the offence for which he is charged.

The Court of Appeal reviewed the evidence adduced before the trial court and concluded that the prosecution failed to establish the ingredients of the offence. *(P 408 Paras B – H)*

6. *Duty of trial court to carefully review the evidence of identification*
A trial judge must be very sure that the accused person standing in the dock is indeed the armed robber, and so must be extra careful when examining evidence of the prosecution and defence especially on the issue of the identity of the accused person. The accused person must properly be identified before a conviction is sustained on appeal. An accused person should always be entitled to the benefit of doubt. *(P 410 Paras A – B).*

7. *Principles guiding admisibility of confessional statements*
The Court of Appeal condemned the procedure adopted by the trial

court for the trial within trial. It is very well settled practice in this country that where on the production of a confessional statement it is challenged on the ground that the accused person did not make it at all, the question of whether he made it or not is a matter to be decided by the learned trial judge in the course of preparing the judgment. In such circumstances objection made by counsel should be disregarded by the judge as such objection does not affect the admissibility of the statement and so the statement should be admitted as the issue of voluntariness of the statement does not arise for a decision. But where the admissibility of the statement in evidence is objected to on the ground that it was not voluntary in that the confession was beaten out of the accused person, what is attacked is the admissibility in evidence of the confessional statement and a trial within trial or mini trial must be held. See *Queen vs. Igwe (1960) 5 FSC P. 55, Ikpasa vs. Bendel State (1981) 12 NSCCP p. 300.* The sole purpose of a trial within the main trial is to test whether the confessional statement to be tendered by the prosecution was made voluntarily by the accused person or whether he was forced or induced to make it. *(Pp 413 – 414 Paras H – D)*

8. Proper procedure in trial within trial

Once a trial within trial is ordered by the trial judge the main trial is suspended until the conclusion of the trial within trial.

The trial within trial commences with the state calling witnesses, usually police officers who would be examined under oath by the state and cross-examined by the defence. The witnesses for the state are to satisfy the court that the accused person made the confessional statement voluntarily while the defence counsel is to show the contrary ie that the accused person was forced or induced to make the statement.

After the state concludes its evidence the accused person goes into the witness box to explain to the court how he was forced, or induced to make the statement. He may call witnesses, but they can only be called after he has given evidence,

I have reproduced extracts from proceedings in the trial court on the mini trial. It is so clear that the learned trial judge made no

attempt to follow well laid down procedure in conducting the trial within trial.

It was wrong for proceedings in the trial within trial and the main trial to be taken together, and allowing the accused person no time whatsoever after the ruling on the trial within trial was delivered before delivery of judgment in the main trial. Such a procedure is unknown to criminal procedure and prejudicial to the accused person even if his counsel consents to such strange procedure.

The overall interest of justice is clearly in question. Lumping the trial within trial with the main trial clearly compromised the respondent's right to a fair hearing as he was denied the opportunity after the ruling to decide how to go about his defence before judgment was delivered. The accused person should not be denied that right even if his counsel acquiesced to this irregular procedure. This is premised on the position of the law that fair hearing in a criminal trial cannot be waived. *(Pp 414 – 415 Paras D – B)*

9. The dictates of substantial justice in criminal trials

It must never be forgotten that this is a criminal trial that carries the death penalty. Substantial justice must be seen to be done. Reliance on technicalities would definitely lead to injustice.

An accused person must always be given the benefit of the doubt when there are blunders in the case of the prosecution. None compliance with well laid down procedure would never result in the court achieving substantial justice.

We are not satisfied with the procedure adopted by the learned trial judge in the conduct of the trial within trial. The trial within trial is accordingly declared a nullity. Exhibit F and F1 which were admitted in evidence in the trial within trial were wrongly admitted as the procedure adopted was wrong. After considering all the arguments we think that the Court of Appeal could have come to no other conclusion, and that the appeal must be dismissed.
(P 415 Paras C – F)

Per Peter-Odili (JSC):

10. Power of appellate court to review evidence
Per Peter-Odili (JSC)
"It has to be said that the Court of Appeal had the competence and indeed the power to review evidence adduced before the trial court and in doing so had come up with the appropriate findings different from that of the trial court which not being supported by the evidence on ground had to have the findings reversed. In other words the evidence adduced at the trial cannot sustain the establishment of the ingredients of the offence of armed robbery which are:

(a) That there was a robbery or series of robberies
(b) That the robbery or each robbery was an armed robbery
(c) That the accused took part in the armed robbery or robberies. See Abba vs. Ogodo (1984) ISC NLR 372; Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586 at 614-615. *(P 422 Paras A – D)*

11. Standard of proof in Criminal Proceedings
A reiteration is necessary here and that has to do with the prescription under Section 135 of the Evidence Act on the Standard of Proof in a criminal proceeding and it is thus:

Section 135:

1. If the commission of a crime by party to any proceeding is directly in issue in any proceeding civil or criminal first must be proved beyond reasonable doubt.

2. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts

it whether the commission of such act is or is not directly in issue in the action.

3. If the prosecution proves the commission of the crime beyond reasonable doubt the burden of proving reasonable doubt is shifted to the defendant.

This court had interpreted that section in Chukwuma vs. FRN (2011) 12 NWLR (Pt. 1264) 391 at page 408 where this honourable court per Muhammad JSC (as he then was) at page 408; paras D-H expounded thus:

> **"The burden of proof in our adversarial system of criminal justice is for the prosecution to prove its case beyond reasonable doubt. In the process the requirement of the law is that the prosecution has the duty to prove all the essential elements of an offence as contained in the charge. The law places the burden on the prosecution to produce vital material evidence and witnesses to testify during the proceedings before a trial court comes to the conclusion that an offence had been committed by an accused person.** ***The prosecution does not require a magic wand in order to attain to its proof to be beyond reasonable doubt". All the prosecution is required to do simply is to put forward to the court evidence which is so strong, compelling and convincing against the accused such that it leaves no reasonable man in doubt as to the probability of the accused person committing the alleged offence"*** **(*Italics mine).**

The yardstick on the standard of proof well set out in the law and as expatiated in the case of Chukwuma vs. FRN (supra) above and situated in context here with the available evidence where the PW3

and PW4, victims of the crime who had difficulty with identifying the appellant as one of the assailants on the night of robbery. That linkage between the appellant and the offence being absent it can be said that an essential element of the offence of armed robbery is missing and it is fatal to the case of the prosecution now appellant. I place reliance on Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586 at 614-615; Abokokuyanro vs. The State (2016) LPELR-40107 (SC); Osuagwu vs. The State (2016) LPELR-4086 (SC); State vs. Danjuma (1997) 5 NWLR (Pt. 506) 512; Fatoyibo vs. A.G. Western Nigeria (1966) WNLR 4; People of Lagos State vs. Umaru (2014) LPELR-22466 (SC). *(Pp 422 – 424 Paras E – A)*

12. *An appellate court can interfere where the findings of a lower court are perverse.*

Now coming to the final question, if the trial court's judgment was perverse and the decision of the court below so identifying is correct. In answer to that question it has to be stated that a finding of fact or decision which runs counter to pleadings and evidence on record or where the court whose finding or decision on being reviewed is seen to take into account irrelevant matters or matters outside of what has been presented before that court as borne on the record. That is where by the finding or decision it is clear the court shut its eyes to the obvious and the follow up being a decision that has occasioned a miscarriage of justice or found to be perverse then an appellate court such as the court below was right to remedy the anomaly and for this court to tow that line of rectitude which is what is at play now. See Sapo vs. Sunmonu (2010) 5 SCNJ 1 at 25; Odom vs. PDP (2015) 5 NWLR (Pt. 1456) 527 at 559 – 560; Joseph vs. State (2011) 16 NWLR (Pt. 1273) 226 at 250. *(P 424 Paras B – E)*

Nigerian Cases Cited

Abba vs. Ogodo (1984) ISC NLR 372;
Abiola & Sons Bottling Co Ltd vs. 7 Up Bottling Co Ltd (2012) 7 Sc (Pt. ii) P. 83, I
Abokokuyanro vs. The State (2016) LPELR-40107 (SC);

Akinpelu vs. Adegbore (2008) 10 NWLR (Pt. 1096) 531;
Alabi vs. State (1993) 7 NWLR (Pt. 307) p. 511,
Awojugbagbe Light Industries Ltd vs. P.N. Chinakwe & anor (1995) 4 NWLR (Pt. 390) P. 379.
Bello vs. State (2007) 10 NWLR (Pt. 1043) P. 564,
Chukwuma vs. FRN (2011) 12 NWLR (Pt. 1264) 391
Fatoyibo vs. A.G. Western Nigeria (1966) WNLR 4;
Ikpasa vs. Bendel State (1981) 12 NSCCP p. 300.
Jev vs. Iyortom & Ors (2015) LPELR-24420 SC;
Joseph vs. State (2011) 16 NWLR (Pt. 1273) 226
Kayode vs. State (2016) LPELR-40028
Latunde & anor vs. B. Lajinfin (1989) 5 SC P. 67,
Odom vs. PDP (2015) 5 NWLR (Pt. 1456) 527;
Ogudo vs. State (2011) 18 NWLR (Pt. 1278) P.1,
Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt. 452) P. 15.
Okere vs. State (2016) LPELR-26057 (SC).
Osuagwu vs. The State (2016) LPELR-4086 (SC);
People of Lagos State vs. Umaru (2014) LPELR-22466 (SC).
Queen vs. Igwe (1960) 5 FSC P. 55,
Salaeh vs. Munguna (2006) ALL FWLR (Pt. 332) 1411
Sapo vs. Sunmonu (2010) 5 SCNJ 1;
State vs. Danjuma (1997) 5 NWLR (Pt. 506) 512;
Suberu vs. State (2010) 8 NWLR (Pt. 1197) P. 586.
Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586.

Nigerian Statutes Cited
Evidence Act Section 135
Robbery and the Fire Arms Act Cap 398 Laws of the Federation of Nigeria 2004 – S. 1 (2) (a)

Representation
B. NWAOKENYE for the **Appellant** F. Bissong with him
A.A. Malik for the **Respondent** C. Onumonu, N.I. Nta, G.E. Ejemai

RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment). The respondent as the 2nd accused person was arraigned before a Katsina State High Court on two counts which reads:

COUNT ONE

That you 1. Babangida Gambo 2. Abdullahi Sani on or about the 22 July 2004 around 2.50 hours at Tsame quarters in Daura, Daura Local Government Area of Katsina State committed the offence of robbery by breaking into the house of one Salisu Lawal while armed with dangerous weapons to wit:

Sticks, Knives, Sword, Gun, attacked the said Salisu Lawal and members of his family, threatened to kill him and robbed him of the sum of 108,000.100 France and other valuables including one Radio Cassette recorder, two transistor Radio, one Toshiba Video machine, one Philips pressing iron, two pairs of caftan and Trousers, and thereby committe an offence punishable under section 1(2)(a) of the Robbery and Firearms Act, Cap 398 Laws of the Federation of Nigeria 1990.

COUNT TWO

That you 1. Babangida Gambo 2. Abdullahi Sani on or about the 22 July 2004 around 2.50 hours at Tsame quarters in Daura, Daura Local Government Area of Katsina State committed the offence of robbery by breaking into the house of one Hadiza Salisu while armed with dangerous weapons to wit:

Sticks, Knives, Sword, Gun, attacked her and robbed her of four bundles of wrappers valued at N11,200.00, two women sewn cloths valued at N400,00, a Roll of Toilet Soap valued N150 and thereby committed an offence punishable under section 1(2)(a) of the Robbery and Firearms Act, Cap 398 Laws of the Federation of Nigeria 1990.

The respondent as the 2nd accused person entered not guilty pleas to both counts. In proof of its case the prosecution called its first witness on 27 July, 2005 and ended up calling five witnesses. The appellant gave evidence in his defence but did not call any witness. A trial within trial was conducted but a strange procedure was adopted by the learned trial judge. This procedure would be addressed later on in this judgment. In a ruling delivered on the trial within trial the appellant's statements were admitted as exhibits F and F1.

Aside from exhibits F and F1, exhibit A, Stick, exhibit B, Sword, exhibit C. Stick and exhibit D Hoe handle, exhibit E and E1 statement of 1st accused person were tendered, but none of these exhibits were linked to the appellant.

In a considered judgment the learned trial judge sentenced the respondent and his co-accused to death. His lordship's said:

"This court has considered the confessional statements of the accused persons and hold that it accord with what the prosecution proved before this court. The inability to impeach the testimony of PW5 who was among the team who brought the 1st accused back to Daura to the scene of the said robbery goes to prove the active participation of the two standing trial before this court. The 1st accused confirmed the participation of the 2nd accused and the 2nd accused in his statement also confirm how the 1st accused invite him to participate in the robbery.

In view of the foregoing I hold that the prosecution has proved its case beyond reasonable doubt and the accused persons ought to be found guilty as charged and I hereby hold that the accused are hereby guilty as per the charge which they had been standing trial."

Dissatisfied with the judgment of the trial court, the respondent filed an appeal. It was heard by the Court of Appeal (Kaduna Division). That court in a judgment delivered on 22, December, 2010 upset the judgment of the trial court. The penultimate paragraph of the judgment read:

"…….Hence, having resolved all the three issues in the appellant's favour, I have no hesitation whatsoever in coming to the inevitable conclusion that the instant appeal is meritorious, and same is hereby allowed by me.

The judgment of the court below delivered on May 7, 2007 is hereby set aside. The conviction and sentence passed upon each appellant are also hereby quashed.

Consequently, both appellants are hereby acquitted and discharged."

This appeal is against the judgment. Briefs were filed and exchanged by counsel. An amended appellant's brief was filed on 23, October 2017, but deemed properly filed and served on 26, October 2017.

An amended respondent's brief was filed on 25 July 2017 but deemed properly filed and served on 26, October, 2017.

Learned counsel for the appellant B. Nwaokenye esq. distilled three issues from his notice of appeal.

ISSUE 1
Whether the learned Honourable Justices of the Court of Appeal, were right when they held that they had the powers to reformulate, and indeed, reformulated the defective issues for determination set before them by the appellant, at the court below.

ISSUE 2
Whether the learned Honourable Justices were right when they held that the judgment of the High Court was not supported by evidence, when the record of proceeding showed otherwise.

ISSUE 3
Whether the Honourable Justices of the Court of Appeal were right when they held that the process/procedure adopted by the trial judge compromised the respondent's right to fair hearing.

Learned counsel for the respondent A,A, Malik esq., adopted the issues formulated by the appellant's learned counsel.

At the hearing of the appeal on 26 October 2017 both counsel simply adopted their briefs. Learned counsel for the appellant urged the court to allow the appeal while learned counsel for the respondent urged the court to dismiss the appeal.

The Facts

Salisu Lawal, PW3 lives with his wife Hadiza Ibrahim, PW4 in Nasarawa Central in Daura. On Thursday July 22, 2004 at about 3 a.m. he was asleep with his wife at home. They woke up when they heard some persons who turned out to be robbers opening the door of their room. Five persons eventually entered the room armed with knives, sticks, gun and a sword. They searched for valuables and carted away VCD, Video, Iron, Radio N100,000 and proceeded to PW4's room where they stole two bundles of wrappers, lace, shoes, two bottle of perfume and left without harming anyone. They spent about two hours ransacking PW3's home. They made their escape thereafter. The appellant was not arrested at the scene of the

crime neither were any of the robbers. The 2nd accused/appellant was arrested after the 1st accused person implicated him as one of the armed robbers. The appellant made a confessional statement. On these facts the appellant and the 1st accused person were charged for armed robbery contrary to section 1(2) (a) of the Robbery and Firearms Act. The other nocturnal robbers were never arrested except the 1st and 2nd accused persons. In light of the fact that learned counsel for the respondent adopts the issues formulated by the appellant's learned counsel, the three issues formulated by the appellant's learned counsel would be considered in resolving this appeal.

ISSUE 1

Whether the learned Justices of the Court of Appeal were right when they held that they had the powers to reformulate and indeed reformulated the defective issues for determination set before them by the appellant at the court below.

Learned counsel for the appellant observed that in the conduct of any trial, the parties are to handle and prosecute their matter as they deem fit, and not the duty of the judge to take over the job of either party. He submitted that by reformulating the issues for determination the Court of Appeal took over counsel job and handled it for them. Relying on ***Uso vs. Police (1972) 11 SC P. 37, Oceanic Bank Int (Nig) Ltd vs. Chitex Ind Ltd (2006) 6 NWLR (Pt. 661) P. 494.***

He submitted that this court should hold that the Court of Appeal was wrong to reformulate the defective issues for determination in the respondent's (appellant in Court of Appeal) brief, contending that the brief ought to have been struck out.

Learned counsel for the respondent observed that an appeal court is empowered to redraft, reword, or recouch issues for determination in a brief of argument in order to give the appeal a bearing that will berth its ship at the port of justice. Relying on ***Okere vs. State (2016) LPELR-26057 African International Bank Ltd vs. Integrated Dimensional System Ltd & ors (2012) 11 SC P. 1, FRN vs. Borishade (2015) LPELR-24301.***

A He urged the court to discountenance the arguments canvassed by the appellant and resolve this issue in favour of the respondent.

The issues formulated by the appellant in his brief (now the respondent) in the Court of Appeal reads as follows:

B

1. Whether it is mandatory for a trial judge to weigh the cases of both the prosecution and defence on an imaginary scale during judgment.

C

2. Whether it is correct, fair and right for a trial judge to lump the ruling of a trial within trial with final judgment.

D

3. Whether it is right in law for a trial judge to convict without ascertaining the status of the weapon used.

The Court of Appeal reformulated the issues above to read:

E

1. Whether the learned trial judge had rightly weighed the cases of both the prosecution and the defence on the imaginary scale of justice in the judgment.

F

2. Whether the learned trial judge was right when he lumped the ruling, in the trial within trial, with the final judgment resulting in the conviction and sentencing to death of both appellants'.

G

3. Whether the learned trial judge was right in convicting the two appellants' inspite of the prosecution's failure to prove its case beyond reasonable doubt against them.

H

Why did the Court of Appeal reformulate issues? The court explained :

I **"However, the appellant's learned counsel failure to relate the issues formulated in the brief to any of the three**

grounds of appeal is not withstanding.

Having carefully appraised the said grounds of appeal, there is every reason to appreciate the fact that (i) issue No 1 relates to ground 1. of the grounds of appeal, (ii) issue No. 2 relates to ground 2, and (iii) issue No.3 relates to ground 3 respectively. I have taken into account of the very obvious fact that the instant appeal is criminal in nature, one that involves the question of life and death for that matter. The court, therefore has an onerous duty not to accord the so called technical justice a pride of place at the expense of substantial justice as seriously pontificated upon by this court not too long ago-".

Saulawa JCA continued:

The fundamental objective of grounds of appeal (vis-à-vis issues for determination) is to notify the other party of the nature of the case he would meet in the appellate court. Thus once what the appellant is appealing is discernible, it may not be necessary or desirable to strike out the grounds of appeal (or the issues as the case may be) as doing so may amount to denial of his right to appeal and fair hearing, cherishingly and duly enshrined in section 36 of the Constitution of the Federal Republic of Nigeria. The current trend in the Nigeria courts has been to ensure that substantial justice, as against technical is done to the parties at all times.

Indeed this court has in innumerable cases made it abundantly clear that this court or the Court of Appeal can adopt or reformulate issues. In ***Abiola & Sons Bottling Co Ltd vs. 7 Up Bottling Co Ltd (2012) 7 Sc (Pt. ii) P. 83,*** I said that:

"An appeal court may adopt or even formulate issues for determination that would serve the interest of justice, or/and address the real grievance in an appeal.

In **Okere vs. State (2016) LPELR-26057,** Peter-Odili (JSC) said that:

".....the court has the leeway to redraft such issues in a manner to show the light to what is really in controversy in the interest of justice and so the court seeking accuracy, clarity and brevity would design the issues to suit the purpose on ground:

In **Kayode vs. State (2016) LPELR-40028,** Ariwoola (JSC) said:

"..... the court is not only obliged but entitled to reframe or reformulate issues from the competent grounds of appeal filed by the appellant for the purpose of clarity and precision and to lead to a proper determination of an appeal."

See **Latunde & anor vs. B. Lajinfin (1989) 5 SC P. 67, Awojugbagbe Light Industries Ltd vs. P.N. Chinakwe & anor (1995) 4 NWLR (Pt. 390) P. 379. Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt. 452) P. 15.**

It must be abundantly clear that an appeal court has discretion to reformulate issues for determination by both sides in the interest of justice. Where as in this case there is a complaint that the Court of Appeal by reformulating issues has taken over the duty of counsel and handled the case for them, the burden lies on the party complaining to show that fresh issues do not better address the real grievance in the appeal and is not geared towards achieving substantial justice. Issue one is easily resolved against the appellant since learned counsel for the appellant never discharged the burden in his brief. By no stretch of imagination does the reformulation of issues by the judge amount to the judge taking over the job of counsel, rather it is the duty of the judge at all times to seek substantial justice and this can

only be achieved if issues that address the real grievance in the appeal are considered by the court. In this way an appeal would be determined correctly and the justice system would be highly commended rather than derided.

ISSUE 2

Whether the learned justices were right when they held that the judgment of the High Court was not supported by evidence, when the record of proceedings showed otherwise.

Learned counsel for the appellant observed that the evidence of PW3, PW4 as well as the confessional statement of the respondent established the three basic requirements in the charge of armed robbery. He submitted that the appellant/plaintiff proved the charge against the respondent beyond reasonable doubt. Relying on ***Bakare vs. State (1987) 1 NWLR (Pt. 52) P. 679. Abeke vs. State (2007) ALL FWLR (Pt. 366) P. 644.*** He urged the court to hold that the judgment of the trial court was properly supported by evidence.

Disagreeing with learned counsel for the appellant, learned counsel for the respondent observed that it is crystal clear that the prosecution failed to establish the ingredients of the offence. Reliance was placed on ***Suberu vs. State (2010) 8 NWLR (Pt. 1197) P. 586.***

He observed that the appellant was not identified as one of the armed robbers, contending that failure of the prosecution to prove the involvement of the respondent in the robbery is fatal and deals a substantial blow to its case. Reliance was placed on ***Abokokuiauro vs. State (2016) LPELR-40107.***

Concluding he submitted that the judgment of the Court of Appeal wherein it held that the trial court's judgment was not supported by evidence cannot be impugned or impeached.

The respondent and B. Gambo were tried by a Katisna State High Court on a two count charge of armed robbery punishable with death, contrary to section 1(2)(a) of the Robbery and Firearms Act. He was accused of being one of the five armed robbers that raided the home of PW3

and PW4 and carted away their belongings. Both victims of the armed robbery did not identify the respondent as one of the armed robbers and no evidence connecting the respondent with the armed robbery except a statement allegedly made by him confessing that he was one of the armed robbers.

After a mini trial was conducted the learned trial judge was satisfied that the confession was free and voluntary and convicted the appellant on it.

To succeed the prosecution must prove the following elements of the offence of armed robbery under section 1(2) (a) of the Robbery and Firearms Act beyond reasonable doubt.

(a) There was a robbery or series of robberies;
(b) The robbery or series of robberies were carried out with offensive weapons;
(c) The accused person participated in the robbery. See Ogudo vs. State (2011) 18 NWLR (Pt. 1278) P.1, Bello vs. State (2007) 10 NWLR (Pt. 1043) P. 564, Alabi vs. State (1993) 7 NWLR (Pt. 307) p. 511, Suberu vs. State (2010) 8 NWLR (Pt. 1197) P. 586.

It must be said again and again that in all criminal trials the prosecution must prove its case beyond reasonable doubt and this burden is discharged by the prosecution calling witnesses to give compelling evidence against the accused person with relevant exhibits to lend credence to oral evidence.

In this way the elements of the offence (a) (b) and (c) are established and no reasonable person would be in doubt that the accused person committed the offence for which he is charged.

The Court of Appeal reviewed the evidence adduced before the trial court and concluded that the prosecution failed to establish the ingredients of the offence. The court said:

"From the totality of the pieces of evidence highlighted above it appears rather unequivocally that the identity of the persons that actually attacked PW3 and his family on July 22, 2004 at around 3.00 a.m is undoubtedly shrouded

A **in mystery. Its evident that the finding of the lower court in the judgment, alluded to above, could not be supported by the evidence available in the record of appeal.**

B **From the facts and circumstances surrounding the case, it cannot certainly be safely said that the identity of any of the two appellants could be linked to the persons that attacked PW3 and PW4 and robbed them of their monies** **C** **and other valuable properties on July 22, 2004 in question.**

The fact that the identities of the robbers have not been established is not in doubt. And it is a well settled **D** **fundamental principle, that the guilt or innocence of an accused person in the charge of armed robbery as in the instant case depends entirely upon the evidence of identification……..**

E

In view of the above highlight the answer to issue No. 1 is inevitably in the negative and same is resolved in favour of the appellants.

F

If ever there was an armed robbery case that needs an identification parade to be conducted to identify who actually were the armed robbers on the night of July 22, 2004 at the home of PW3 and PW4, this is it. Nobody has **G** come to this court to say that the appellant was among the armed robbers that robbed PW3 and PW4. The two victims of the armed robbery, PW3 and PW4 never said that the appellant was one of the armed robbers, but they positively identified the 1st accused person as one of the armed robbers. **H** There was definitely a robbery at the home of PW3 and PW4 on 22 July, 2004. The robbery appears to have been carried out with offensive weapons, there is no direct oral evidence by or from the victims of the robbery (i.e. PW3 and PW4) that the appellant participated as one of the **I** armed robbers. The offence of armed robbery punishable under section 1(2)(a) of the Robbery and Firearms Act was not proved beyond reasonable

doubt since the identity of the appellant as one of the robbers was not established by the testimony of PW3 and PW4.

A trial judge must be very sure that the accused person standing in the dock is indeed the armed robber, and so must be extra careful when examining evidence of the prosecution and defence especially on the issue of the identity of the accused person. The accused person must properly be identified before a conviction is sustained on appeal. An accused person should always be entitled to the benefit of doubt.

ISSUE 3

Whether the Honourable Justices of the Court of Appeal were right when they held that the process/procedure adopted by the trial judge compromised the respondent's right of fair hearing.

Learned counsel for the appellant submitted that the constitutional safeguard under section 36 of the Constitution was observed during the conduct of the trial within trial. Relying on ***Olabode vs. State (2009) ALL FWLR (Pt. 500) p. 607. Padawa & Sons vs. Jatau (2003) FWLR (Pt. 164) 228.***

He urged this court to hold that the procedure adopted by the trial court did not in any way compromise the right to fair hearing of the respondent. He urged this court to hold that the judgment of the Court of Appeal was reached in error, and that the appeal should be allowed.

Learned counsel for the appellant observed that at the Court of Appeal the respondent's (who was the appellant in the Court of Appeal) submission was that the procedure adopted by the trial court in the conduct of the trial within trial compromised the respondent's right to fair hearing. Learned counsel for the respondent urged this court to discountenance the arguments canvassed by the appellant and resolve this issue in favour of the respondent.

The Court of Appeal agreed with the submission above and said that:

"In the instant case, it's quite evident from the record of appeal that the proceedings regarding both the trial within

trial and this main trial were actually lumped together. The appellants closed their defence on 27 December 2008. On 12 February, 2008, both counsel informed the court that they had filed their respective joint written address for both trial within trial and the main trial……..”

The Court of Appeal continued:

“……..By virtue of the totality of the evidence adduced in the irregular proceeding adopted by the learned trial judge, there's no doubt that the appellants have been subjected to a great disadvantage, this compromising the well cherished fundamental right to fair hearing thereof …….. The circumstances surrounding the entire trial of the appellant have resulted in an unfortunate travesty of justice, and this outrageous ……Thus both issues 2 and 3 are hereby resolved in favour of the appellant's (respondent in this court).

I must seriously comment on the conduct of a trial within trial (mini trial). Babangida Gambo the 1st accused person and the appellant were charged on two counts of armed robbery. On 27 July 2005 Cpl Abu Musa gave evidence as PW1. The confessional statement of the 1st accused person was to be tendered through him when counsel for the 1st accused person objected on the ground that the statement was made after threat and intimidation.

Mr. Sabi'u counsel for the prosecution applied for trial within trial. The learned trial judge ordered that trial within trial will be conducted on the next adjourned date.

Mr. Sabi'u – I will stop this witness until the trial within trial is conducted then he will conclude his testimony.

The court stopped hearing testimony from PW1 and started hearing testimony from PW2. PW2 concluded his testimony on 27 July 2005 and further hearing was adjourned to 26 September 2005 and again to 19

October 2005 with no evidence taken.

On 19 October 2005 PW3 gave evidence. The trial was adjourned to 7 November 2005 for continuation of hearing in trial within trial. (it must be noted that trial within trial had not commenced).

The first witness in the trial within trial gave evidence on 7 November 2005. He was Cpl Abu Musa, who gave evidence as PW1. He gave evidence in the trial within trial as PWA. After he gave evidence PWB, DSP Adamu A. Chibok also gave evidence on 7 November 2005 and concluded on the same day. The case was adjourned to 12 December 2005 for continuation of hearing. PW4 then testified and concluded his evidence. Thereafter the case dragged on beset with several adjournments due to absence of witnesses, absence of accused persons and or counsel.

There were adjournments from 19 January 2006 to 14 February 2006, to 21 March 2006, to 17 April 2006, to 10 May 2006 and to 5 June 2006, to 10 July 2006, 27 September 2006, 4 October 2006, 18 October 2006 and then to 22 November 2006 when PW5 was taken. It was he who took the statement of the appellant.

In an attempt to tender the appellant's statement there was objection from appellant counsel that the statement was obtained under duress.

Mr. Sabi'u applied for trial within trial to determine the voluntariness or otherwise. He applied and was granted permission to take PW5 as first witness for trial within trial. PW5 gave evidence as PWA. PWB was then called on 18 December 2006. After he concluded evidence further hearing was adjourned to 27 December 2006. On that day Mr. Sabi'u informed the court that he had called all his witnesses in the trial within trial and that he had only one witness to call in the main trial. The learned trial judge ordered the defence to open defence in trial within trial. The 1st accused person gave evidence as DWA. DWB (i.e. the appellant gave evidence) DWC and DWD also gave evidence.

At the end the learned trial judge ordered that the testimony of DWA, DWB, DWC and DWD be and is hereby adopted as the testimony of DW1, DW2, DW3 and DW4. Then DW4 was taken (see page 73) after DW4 concluded her testimony this is what transpired.

Court: When do you wish to exchange your address for adoption.

There was no answer from counsel, yet the trial judge adjourned to 31 January 2007. (see page 73). Then on 12 February 2007 learned counsel for the accused persons told the court:

"We have filed our written addresses in both the main trial and trial within trial and the prosecution has been duly served. We wish to adopt same.

Court: It is noted that the defence have adopted their written addresses for the main trial and the trial within trial this case is now adjourned to 21 February 2007 for adoption of written address by counsel to the prosecution.

There is no record of proceedings on 21 February 2007, 12 March 2007 and 19 March 2007, but on 20 April 2007 a ruling on the no case submission was delivered. The penultimate paragraph reads:

This court will consider the said statement in the course of writing its judgment and that is when it will accord the said statements probative value if any. In the meantime they are hereby admitted in evidence as exhibit E and E1 and exhibit F and F1 for the 1st accused Babangida Gambo and the 2nd accused Abdullahi Sani respectively.

After the ruling was read, learned counsel for the prosecution, Mr. Sabi'u adopted his address in the main trial. Judgment in the main trial was delivered a week later, i.e on 7 May 2007.

The Court of Appeal condemned the procedure adopted by the trial court for the trial within trial. It is very well settled practice in this country that where on the production of a confessional statement it is challenged on

the ground that the accused person did not make it at all, the question of whether he made it or not is a matter to be decided by the learned trial judge in the course of preparing the judgment. In such circumstances objection made by counsel should be disregarded by the judge as such objection does not affect the admissibility of the statement and so the statement should be admitted as the issue of voluntariness of the statement does not arise for a decision. But where the admissibility of the statement in evidence is objected to on the ground that it was not voluntary in that the confession was beaten out of the accused person, what is attacked is the admissibility in evidence of the confessional statement and a trial within trial or mini trial must be held. See ***Queen vs. Igwe (1960) 5 FSC P. 55, Ikpasa vs. Bendel State (1981) 12 NSCCP p. 300.*** The sole purpose of a trial within the main trial is to test whether the confessional statement to be tendered by the prosecution was made voluntarily by the accused person or whether he was forced or induced to make it. Once a trial within trial is ordered by the trial judge the main trial is suspended until the conclusion of the trial within trial.

The trial within trial commences with the state calling witnesses, usually police officers who would be examined under oath by the state and cross-examined by the defence. The witnesses for the state are to satisfy the court that the accused person made the confessional statement voluntarily while the defence counsel is to show the contrary ie that the accused person was forced or induced to make the statement.

After the state concludes its evidence the accused person goes into the witness box to explain to the court how he was forced, or induced to make the statement. He may call witnesses, but they can only be called after he has given evidence,

I have reproduced extracts from proceedings in the trial court on the mini trial. It is so clear that the learned trial judge made no attempt to follow well laid down procedure in conducting the trial within trial.

It was wrong for proceedings in the trial within trial and the main trial to be taken together, and allowing the accused person no time whatsoever after the ruling on the trial within trial was delivered before delivery of judgment in the main trial. Such a procedure is unknown to criminal procedure and prejudicial to the accused person even if his counsel consents

to such strange procedure.

The overall interest of justice is clearly in question. Lumping the trial within trial with the main trial clearly compromised the respondent's right to a fair hearing as he was denied the opportunity after the ruling to decide how to go about his defence before judgment was delivered. The accused person should not be denied that right even if his counsel acquiesced to this irregular procedure. This is premised on the position of the law that fair hearing in a criminal trial cannot be waived.

It must never be forgotten that this is a criminal trial that carries the death penalty. Substantial justice must be seen to be done. Reliance on technicalities would definitely lead to injustice.

An accused person must always be given the benefit of the doubt when there are blunders in the case of the prosecution. None compliance with well laid down procedure would never result in the court achieving substantial justice.

We are not satisfied with the procedure adopted by the learned trial judge in the conduct of the trial within trial. The trial within trial is accordingly declared a nullity. Exhibit F and F1 which were admitted in evidence in the trial within trial were wrongly admitted as the procedure adopted was wrong. After considering all the arguments we think that the Court of Appeal could have come to no other conclusion, and that the appeal must be dismissed.

This appeal is hereby dismissed. The judgment of the Court of Appeal is affirmed. This in effect means that the appellant is acquitted on both counts and discharged from court.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Olabode Rhodes-Vivour (JSC) and to place on record that support I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Kaduna Division delivered on 22nd December, 2010 in which the court below set aside the judgment of Abdullahi Yusuf J. of the Katsina State High

Court, Daura delivered on 7th May, 2007. The court below further quashed the conviction and sentence of the respondent and acquitted and discharged the respondent.

In dissatisfaction with the decision of the Court of Appeal, the appellant has come before the Supreme Court on a three ground notice of appeal filed on the 14th January, 2011.

FACTS STATED BRIEFLY

The facts relevant to this appeal are that the respondent herein and one Babangida Gambo were charged before the High Court of Katsina State, Daura Judicial Division on a two (2) count charge bordering on Armed Robbery punishable with death contrary to Section 1(2) (a) of the Robbery and the Fire Arms Act Cap 398 Laws of the Federation of Nigeria 2004.

The respondent in the course of trial retracted his confessional statement and the court went into a mini-trial. The learned trial judge conducted the mini-trial together with the main trial and at the end of the mini trial admitted the respondent's confessional statement despite he and his co-accused alleging that the statement was obtained under duress. At the close of the trial, the respondent was convicted and sentenced to death by hanging by the learned trial court.

The fuller background details are well set out in the lead judgment and so no need restating them here save for when the occasion calls for a reference to any part of those facts.

On the 26th October, 2017 date of hearing, learned counsel for the appellant, Benjamin Nwaokenye Esq adopted the amended appellant's brief of argument settled by Emeka Ozoani Esq. filed on 23/10/17 and deemed filed on 26/10/17. In it were distilled three issues for determination, viz:

1. **Whether the learned Honourable Justices of the Court of Appeal were right when they held that they had the power to, and indeed reformulated the defective issues for determination set before them by the appellant at the court below.**

A

2. Whether the learned Honourable Justices were right when they held that the judgment of the High Court was not supported by evidence when in actual fact, the record of appeal show otherwise.

B

3. Whether the learned Honourable Justices were right when they held that the process/procedure adopted by the trial judge compromised the respondent's right to fair hearing.

C

A.A. Malik Esq. of counsel for the respondent adopted the amended respondent's brief of argument filed on 25/7/17 and deemed filed on 26/10/17. He adopted the issues as formulated by the appellant which are
D also good enough for my use in the consideration and determination of this appeal.

ISSUE 1, 2 & 3

E

1. Whether the learned justices of the Court of Appeal were right when they held that they had the power to reformulate the defective issues for determination set before them by the appellant qua respondent (Ground 1).

F

2. Whether the learned justices of the lower court were right when they held that the judgment of the High Court was not supported by evidence (Ground 2).

G

3. Whether the learned justices of the lower court were right in holding that the judgment of the trial court was perverse for not considering the respondent's evidence laid before it and thus constituted a breach of his right to fair hearing (Ground 3).

H

Canvassing the position of the appellant, learned counsel contended that the duty of the court is to arbitrate and direct the course of proceedings according to the law and it is not for the judge to take over the job of either
I party. That by reformulating the issues for determination, the court below

took over their job and handled the same for them. He cited **Uso vs. Police** (1972) ii SC 37.

That it is not for the court to grant reliefs not before them and conduct the proceedings in a way as to show a tilt to one of the parties. That Order 17 Rule 3 of the Court of Appeal Rules 2007 is clear and apt with regard to what a brief of argument should contain and in the event of a defect in the appliance of the rules of court, the court's only option is to discountenance the brief and strike it out. He cited **Benneth N. Okere vs. Prince O.D. Amadi & Org.** (2006) SC 289; **Oceanic Bank Int. (Nig) Ltd vs. Chetex Ind. Ltd** (2006) 6 NWLR (Pt. 661) 494; **Dada vs. Dosunmu** (2006) 18 NWLR (Pt. 1010) 134; **Animashaun vs. UCH** (1996) 10 NWLR (Pt. 476) 65.

Learned counsel for the appellant further submitted that Section 132 of the Evidence Act provides that the burden of proof in a proceeding is on that party who fails if no evidence was given on either side which is akin to the principle that he who asserts must prove, failure of which leads to the loss of the case. That the onus of proof in this criminal trial on the prosecution is proof beyond reasonable doubt which the prosecution provided in this case at hand at the court of trial. He referred to the cases of **Miller vs. Minister of Pensions** (1947) 2 ALL ER 372; **Bakare vs. State** (1987) 1 NWLR (Pt. 52) 679; **Abeke vs. State** (2007) ALL NWLR (Pt. 366) 644 at 659.

For the appellant it was contended that contrary to the stance of the other side that the respondent was given an opportunity of hearing according to the law at the trial court and so this allegation of a breach of fair hearing was not sustainable. The cases of **Padawa & Sons vs. Jatau** (2003) FWLR (Pt. 164) 228; **Kotoye vs. CBN** (1989) 1 NWLR (Pt. 98) 419 referred to.

For the respondent, it was contended that the court below did not falter or/commit an error at law when they utilized the respondent's (appellant therein) brief in arriving at their judgment and acted in order in reformulating the issues in the determination of the appeal before them. That the appellant is pandering to whims of technicalities which cannot take the place of substantive justice. It was cited the following cases: **Akinpelu**

vs. Adegbore (2008) 10 NWLR (Pt. 1096) 531 at 557; **Bello vs. Oyo State** (1985) NWLR (Pt. 45) 828 at 838; **Jev vs. Iyortom & Ors** (2015) LPELR-24420 SC; **Okere vs. State** (2016) LPELR-26057 (SC) etc.

Learned counsel for the respondent submitted that an appellate court has the competence and indeed the power to review evidence adduced before the trial court and make appropriate findings therefrom where as in this case the trial court's findings of fact are perverse. He cited: **Abba vs. Ogodo** (1984) 1 SCNLR 372; **Idundun vs. Okumagba** (1976) 1 NMLR 200; **Suberu vs. State** (2010) 8 NWLR (Pt. 1197) 586.

He further stated that the evidence led by the respondent now appellant at the trial court failed to meet the required standard of proof which is proof beyond reasonable doubt. He cited **Chukwuma vs. FRN** (2011) 12 NWLR (Pt. 1264) 391 at 408; **Abokokuyanra vs. The State** (2016) LPELR-40107 (SC); **Osuagwu vs. The State** (2016) LPELR-4086 (SC) etc.

That the law remains that where the trial court reached a decision contrary to the evidence before it, the appellate court cannot close its eyes to such a perverse decision and should reverse it. He cite **Sapo vs. Sunmonu (2010) 5 SCNJ 1 at 25; Joseph vs. The State (2011) 16NWLR (Pt. 1273) 226 at 250.**

The main grouse of the appellant is that the issues framed by them were not attended to and that this being a major error by court should make the Supreme Court reverse the decision arrived at by that perceived error of the court below.

The court below in redesigning the issues as crafted by the appellant before it, who is now the respondent had given the reasons for so doing thus:

> **"However, the appellant's learned counsel's failure to relate the issues formulated in the brief to any of the three grounds of appeal is notwithstanding. Having carefully appraised the said grounds of appeal, there is every reason to appreciate the fact that (1) issues (sic) No. 1 relates to ground 1 of the grounds of appeal; (11) issue No. 2 relate to**

A ground 2; and (111) issue No 3 relate to ground 3, respectively. I have taken into an account the very obvious fact that the instant appeal is criminal in nature; one that involves the question of life and death for that matter. The B court therefore has an onerous duty not to accord the so called technical justice a pride of place, at the expense of substantial justice seriously pontificated upon by this court not too long (sic) ago".

C

The fundamental objective of the grounds of appeal (vis-à-vis) issues for determination) is to notify the other party of the nature of the case he would meet in the appellate court. D (Thus) Once what the appellant is appealing is discernible, it may not be necessary or desirable to strike out the grounds of appeal (or the issues as the case may be) as doing so may amount to denial of his right of appeal and E fair hearing cherishingly and duly enshrined in Section 36 of the Constitution of the Federal Republic of Nigeria, 1999. The current trend in the Nigerian courts has been to assure that substantial justice as against technical justice is F done to the parties at all times."

Clearly what was at the focus of the court below was substantial justice which that court was not prepared to sacrifice for technical justice. Also **G** within sight was the fact that an infraction which obviously was due to mistake of counsel cannot have its repercussion visited on a hapless client who is fighting for his liberty and life. Stated another way is that the court of all cadres should be mindful of the paramount interest of justice and the **H** right of a litigant to be protected even in the face of an improperly crafted process presented in a clumsy inarticulate way. Therefore the court has to bring out with clarity what it is dealing even if it means reformulating the issues so long as they are not outside the issues presented in a clumsy **I** inarticulate way. Therefore the court has to bring out with clarity even if it

means reformulating the issues so long as they are not outside the grounds of appeal or the court can use the issues crafted by one side if it fits the bill. The important thing is that the issues utilized arise from valid grounds of appeal and the dispute is brought to light for consideration whereby the substantial justice is carried out. See **Akinpelu vs. Adegbore** (2008) 10 NWLR (Pt. 1096) 531 at 557; **Salaeh vs. Munguna (2006) ALL FWLR (Pt. 332) 1411 at 1439-1440; Jev vs. Iyortom & Ors** (2015) LPELR-24420 SC; **Okere vs. State** (2016) LPELR-26057 (SC).

The appellant urges this court to set aside the judgment of the court below while restoring the conviction and sentence of the trial High Court. The court below had deviated from the stance of the trial High Court on the ground that the decision was not borne out of the evidence before it. A recap of what the court below did would be helpful here and I quote thus:

> **"From the totality of the pieces of evidence highlighted above it appears rather unequivocally that the identity of the persons that actually attacked the PW3 and his family on the July 22, 2004 at around 3.00 am is undoubtedly shrouded in mystery. It's evident that the finding of the lower court below in the judgment, alluded to above, could not be supported by the evidence available in the record of appeal.**
>
> **From the facts and circumstances surrounding the case, it cannot certainly be safely said that the identity of any of the two appellants could be linked to the persons that attacked the PW3 and PW4 and robbed them of their and other valuable properties on July 22, 2004 in question.**
>
> **The fact that the identities of the robbers have not been established is not in doubt. And it is a well settled fundamental principle that the guilt or innocence of an accused person in the charge of armed robbery, as in the instant case, depends entirely upon the evidence of**

identification."

It has to be said that the Court of Appeal had the competence and indeed the power to review evidence adduced before the trial court and in doing so had come up with the appropriate findings different from that of the trial court which not being supported by the evidence on ground had to have the findings reversed. In other words the evidence adduced at the trial cannot sustain the establishment of the ingredients of the offence of armed robbery which are:

(a) That there was a robbery or series of robberies
(b) That the robbery or each robbery was an armed robbery
(c) That the accused took part in the armed robbery or robberies. See Abba vs. Ogodo (1984) ISC NLR 372; Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586 at 614-615.

A reiteration is necessary here and that has to do with the prescription under Section 135 of the Evidence Act on the Standard of Proof in a criminal proceeding and it is thus:

Section 135:

1. If the commission of a crime by party to any proceeding is directly in issue in any proceeding civil or criminal first must be proved beyond reasonable doubt.

2. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it whether the commission of such act is or is not directly in issue in the action.

3. If the prosecution proves the commission of

the crime beyond reasonable doubt the burden of proving reasonable doubt is shifted to the defendant.

This court had interpreted that section in **Chukwuma vs. FRN (2011) 12 NWLR (Pt. 1264) 391 at page 408** where this honourable court per Muhammad JSC (as he then was) at page 408; paras D-H expounded thus:

> **"The burden of proof in our adversarial system of criminal justice is for the prosecution to prove its case beyond reasonable doubt. In the process the requirement of the law is that the prosecution has the duty to prove all the essential elements of an offence as contained in the charge. The law places the burden on the prosecution to produce vital material evidence and witnesses to testify during the proceedings before a trial court comes to the conclusion that an offence had been committed by an accused person.** ***The prosecution does not require a magic wand in order to attain to its proof to be beyond reasonable doubt". All the prosecution is required to do simply is to put forward to the court evidence which is so strong, compelling and convincing against the accused such that it leaves no reasonable man in doubt as to the probability of the accused person committing the alleged offence"*** (Italics mine).

The yardstick on the standard of proof well set out in the law and as expatiated in the case of **Chukwuma vs. FRN** (supra) above and situated in context here with the available evidence where the PW3 and PW4, victims of the crime who had difficulty with identifying the appellant as one of the assailants on the night of robbery. That linkage between the appellant and the offence being absent it can be said that an essential element of the offence of armed robbery is missing and it is fatal to the case of the prosecution now appellant. I place reliance on **Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586 at 614-615; Abokokuyanro vs. The State**

(2016) LPELR-40107 (SC); Osuagwu vs. The State (2016) LPELR-4086 (SC); State vs. Danjuma (1997) 5 NWLR (Pt. 506) 512; Fatoyibo vs. A.G. Western Nigeria (1966) WNLR 4; People of Lagos State vs. Umaru (2014) LPELR-22466 (SC).

Now coming to the final question, if the trial court's judgment was perverse and the decision of the court below so identifying is correct. In answer to that question it has to be stated that a finding of fact or decision which runs counter to pleadings and evidence on record or where the court whose finding or decision on being reviewed is seen to take into account irrelevant matters or matters outside of what has been presented before that court as borne on the record. That is where by the finding or decision it is clear the court shut its eyes to the obvious and the follow up being a decision that has occasioned a miscarriage of justice or found to be perverse then an appellate court such as the court below was right to remedy the anomaly and for this court to tow that line of rectitude which is what is at play now. See **Sapo vs. Sunmonu** (2010) 5 SCNJ 1 at 25; **Odom vs. PDP** (2015) 5 NWLR (Pt. 1456) 527 at 559 – 560; **Joseph vs. State** (2011) 16 NWLR (Pt. 1273) 226 at 250.

In the light of the foregoing and the better reasoning in the lead judgment, I see no merit in this appeal which I too dismiss.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment of my learned brother, **Rhodes-Vivour, JSC** just delivered. I agree that the appeal is devoid of any merit and should be dismissed.

My brother has dealt adequately with all the issues raised and I endorse his judgment as mine. I have nothing useful to add.

The appeal is dismissed in terms of the lead judgment while the appellant is acquitted and discharged.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had the advantage of reading before now, the lead judgment just delivered by my learned brother Rhodes-Vivour (JSC) and wish to state that I entirely agree with his reasoning and the conclusion His lordship arrived at that this appeal is devoid of any merit and deserves to be dismissed. Even though I have no hesitation in dismissing the appeal, I however wish to advance some comments on some points in support of the judgment and or for purposes of emphasis. The facts giving rise to this appeal and the submission made by learned counsel to the parties have been admirably summarised in the lead judgment and therefore need no repetition here.

In one of his submissions, the learned appellant's counsel complained on the lower court's resolve to reformulate its own issues for determination. The law is trite, that an appellate court has the right or duty where appropriate, to formulate, re-formulate or reframe issue or issues for determination of an appeal especially in a situation where it is of the opinion that the issue(s) as formulated by learned counsel to any of the parties did not encompass the actual points in controversy in the appeal. In doing so however, the issue(s) to be re-formulated by the appellate court must be consistent with the ground(s) of appeal. In the instant appeal, it is noted by me, that it is not the complaint of the learned counsel for the appellant that the issues so formulated by the lower court did not arise from his grounds of appeal. See **Yades (Nig) Ltd vs. G. Nig Ltd (2007) 14 NWLR (Pt. 1055) 584 or (2007) 4-5 SC 236.** Again, I must say that the grouse of the counsel of the appellant that the lower court did not consider the issue he raised is of no moment since the issues framed by the lower court had encapsulated all the issues raised by him and all the points raised in his submissions were well attended to and duly considered. No miscarriage of justice was occasioned to it at all and also no rules of fair hearing was infringed or violated.

Thus, in view of the more detailed and fuller reasoning contained in the lead judgment of my learned brother Rhodes Vivour JSC, I also see no substance in this appeal. The appeal lacks merit and is therefore hereby dismissed by me. I endorse the consequential order made in the leading judgment.

A Appeal disallowed.

Amiru Sanusi
Justice, Supreme Court

B **DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother Olabode Rhodes-Vivour, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly **C** dismissed by me. Judgment of the Court of Appeal Kaduna Division is hereby affirmed.

Sidi Dauda Bage
Justice, Supreme Court

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