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1. ADAMU MUHAMMAD
2. MALLAM MANU TANKA
3. MUHAMMED BATURE
4. MUHAMMED USMAN
5. ALIABUBAKAR

} APPELLANTS

AND

1. INSPECTOR GENERAL OF POLICE
2. NIGERIA POLICE FORCE
3. ACP ALIYU (HEAD IGP)
(SPECIAL INVESTIGATION UNIT)

} RESPONDENTS

SC. 122/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 16TH FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI
MUSADATTIJO MUHAMMAD
KUMAI BAYANGAKAAHS
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE

JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT

ACTION: Preliminary objection – Purpose – Or. 2 Rule 9(1) Supreme Court Rules – Applicable only against the hearing of an appeal – Whether not appropriate for objecting to the competence of a ground of appeal – Relevant considerations thereof.

ACTION: Preliminary objection – Procedure thereof – Or. 2 Rule 9(1) of Supreme Court Rules 1985 (as amended) – Relevant considerations thereof.

APPEAL: Concurrent findings of fact – Where two lower courts were wrong to refuse awarding damages which a party is entitled – Whether this constitutes exceptional circumstance in which the Supreme Court can interfere.

COURT: Award of damages – Reasons for the Court's decision – Whether necessary for court to state its reasons thereof – Relevant considerations.

COURT: Court of Appeal – Powers – S. 15 of the Court of Appeal Act – Whether empowers the court to give reasons and make orders which were not made by the trial court – Relevant considerations thereof.

COURT: Preliminary objection – Consideration thereof – Approach of court thereto – Rationale.

JUDGMENT AND ORDERS: Award of general damages – General principles thereof.

PRACTICE AND PROCEDURE: Award of damages – Where the substantive claim succeeds – Whether the party is not automatically entitled to award of damage – Need to prove entitlement to damages.

RULES: Or. 4 Rule 3 Court of Appeal Rules – Import and Imperatives thereof.

Issues for Determination

- 1. Whether the Justices of Court of Appeal was (sic were) right to base their reason for refusal to award the damages sought by the appellants against the respondents on an issue that was not considered by the trial court in its judgment nor raised by the parties to the appeal before them.**
- 2. Whether the justices at the Court of Appeal was (sic were) right to refuse to award the damages sought by the appellants when they**

agreed with the findings of the trial court that the appellants constitutional rights were indeed breached by the respondents”.

Facts of the Matter

By a motion ex-parte dated and filed on the 28th December 2006, the appellants herein sought for and were granted leave by the High Court of the Federal Capital Territory Abuja, to enforce their fundamental rights against the respondents. They claimed against the respondents, the following reliefs:

- (a) A declaration that the arrest and detention of the applicants on or about the 10th day of April, 2006 is unlawful illegal and unconstitutional.**
- (b) A declaration that the confinement, detention of the applicants by the respondents at F.C.I.D. cell, Area 10 Gariki, Abuja from their time of arrest, a period of about 8 months without trial is unconstitutional, unlawful, illegal, null and void.**
- (c) An order releasing the applicants from unlawful detention forth with.**
- (d) N500,000.00 damages for unlawful detention.**

The leave granted to the appellants along with their claims and the relevant documents attached to a motion on notice were served on the respondents, who reacted by filing a joint counter affidavit on the 8/3/2007.

The appellants filed a further and better affidavit while the respondents also filed a further and better counter affidavit. Issues having been joined, the case was finally set down for hearing.

Learned counsel for the parties were heard. In a reserved and considered ruling delivered on the 10th of May, 2007, the trial court held:

“It is my considered view that by the combined effect of the provisions of section 35(1), (4), and (5) of the 1999 Constitution, the detention of the applicants by the respondents from 10/4/2006 till 6/3/2007 when they were arraigned before the Federal High Court, Abuja is a violation of their rights to personal liberty guaranteed by the 1999 Constitution. Since the Federal High Court, Abuja has granted the applicants bail; it will serve no useful purpose for this court to make the order sought by the applicants for their release from unlawful detention. I will also not award the damages claimed”.

The appellants were dissatisfied with the decision of the trial court. Being aggrieved they appealed to the Court of Appeal, Abuja Division, which dismissed their appeal, thus this further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal in part)*

1. *The nature, aim and purpose of a preliminary objection*
Before I venture into the consideration of the appeal, I will like to deal with the preliminary objection raised by the respondent first. For the law is settled that where a notice of preliminary objection is filled and moved before a court of law, that court is duty bound to consider the preliminary objection before venturing into the main or cross-appeal. For the aim of a preliminary objection is to terminate a case in limine, without dissipating unnecessary energy in considering unworthy or fruitless matters in the court proceedings. See Yaro vs. Arewa Construction Ltd. (2007) 17 NWLR (pt. 1063) 333, Agbareh vs. Mimra (2008) 2 NWLR (pt. 1071) 378, Onyekwuluje vs. Animashaun (1996) 3 NWLR (pt. 439) 637, Onyemeh vs. Egbuchulam (1996) 5 NWLR (pt. 448) 255, Efet vs. I.N.E.C. (2011) 17 NWLR (pt. 1247) 423. (Pp 19–20 Paras G–B).

2. *The procedure of a preliminary objection in the Supreme Court*
The respondents' preliminary objection attacks only the 3rd ground of appeal and the 1st issue for determination of this appeal which arises from the said 3rd ground of appeal. There are three grounds of appeal as I have stated and same have been reproduced elsewhere in this judgment. For all intents and purposes the 1st and 2nd grounds of appeal against which there is no complaint can sustain this appeal successfully.

Order 2 Rule 9(1) of the Supreme Court Rules provides as follows:

“A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time”. (Underlining is mine).

Per Galinje (JSC)

“This court has had an opportunity to state the purpose of preliminary objections in S.P.D.C.N. Ltd vs. Amadi (2011) 14 NWLR (pt. 1266) 157 at 183 paras D-F in the following words:

“Order 2 Rule 9 of the Supreme Court rules provide for the filing of preliminary objections. Preliminary objections are filed against the hearing of an appeal and so once it succeeds, the appeal no longer exists. All too often we see preliminary objections filed against one or more grounds of appeal. Once there are other grounds that can sustain the appeal, a preliminary objection should not be filed. Instead, a notice of motion seeking to strike out the defective grounds of appeal should be filed”.

A preliminary objection is the procedure to be adopted where a respondent objects to the hearing of an appeal. The purpose of preliminary objection is to terminate the appeal in limine.

Order 2 Rule 9(1) of the Supreme Court Rules therefore is a procedure adopted only against the hearing of an appeal and not for any other purpose. See Adelekan vs. Ecu-Line NV (2006) 12 NWLR (pt. 993) 33; Auto Import and Export vs. Adebayo (2002) 18 NWLR (pt. 799) 554; Amadi vs. NNPC (2000) 10 NWLR (pt. 674) 76, Adigun vs. Ayinde (1993) 8 NWLR (pt. 313) 516.

For the reasons I have set out herein above, the preliminary objection is not a suitable method of challenging the competence of a ground of appeal which when upheld cannot terminate the appeal. The preliminary objection is therefore incompetent and it is struck out". (Pp 20--21 Paras B–D).

3. *The application of S. 15 of Court of Appeal Act.*

The question now is whether the lower court could advance reasons to justify the trial court's refusal to award damages to the appellant? I think the lower court was entitled in law to give reasons and make orders which were not made by the trial court to justify its decision. This is by virtue of section 15 of the Court of Appeal Act which empowers the Court of Appeal to rehear in whole or in part any case that is brought before it on appeal and give such direction(s) as it deems fit. (P 22 Paras G–I).

4. *Power of court of Appeal under Or. 4 Rule 3 Court of Appeal Rules*
Order 4 Rules 3 and 4 of the Court of Appeal Rules provides as follows:

“4 (3) The court shall have power to draw inferences of fact and to give any judgment and make any order, which ought to have been given or made,

and to make such further or other order(s) as the case may require, including any order as to costs.

- (4) The powers of the court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal for affirming or varying the decision of that court is not specified in such a notice and the court may make any order, on such terms as the court thinks just, to ensure the determination of the merits of the real question in controversy between the parties”.**

(Pp 22 – 23 Paras I–E).

5. *It is necessary for court to give reasons for its decision on the award of damages*

A grant or refusal to award damages is a decision that must be based on sound reasons. In *Umunna vs. Okwuraiwe* (1978) 6-7 SC 1, this court held inter alia as follows:

“It is not enough for the court to simply award damages in unliquidated pecuniary damages claimed without giving any reason as to how it arrived at what opinion amounted to reasonable damage”. See *Olurotimi vs. Felicia Ige* (1993) 8 NWLR (pt. 311) 257 at 266.

Per Galinje (JSC)

It follows therefore that where a claim for damage is properly set out before a court, that asked this court to determine whether the trial

court was right when it refused to award damages to the appellant. The lower court came to conclusion that the trial court was right not to award damage. As an appellate court, it would have been wrong if it upheld such decision without giving reasons why it agreed with the lower court. I find nothing wrong with the proceedings at the lower court, when it proffered reasons for agreeing with the trial court and cited authorities to support its reasons”. (Pp 23–24 Paras F–A).

6. *A party who succeeds in the substantive claim is not automatically awarded damages*

It is not the law that where substantive claim succeeds, the subsidiary claim of damages must be awarded automatically. This is made very clear Oke vs. Ayedun (1986) 2 NWLR (pt. 23) 548, cited in the judgment of the lower court. In that case at page 565, Aniagolu JSC said:

“It is a principle of pleadings, that which is not denied is deemed to have been admitted and if a plaintiff filed a statement of claim and the defendant failed or refused to file a statement of defence in answer thereto, he clearly, will be deemed to have admitted the statement of claim, leaving the trial court with the authority to peremptorily enter judgment for the plaintiff without hearing evidence. An exception to that would obviously be in respect of a claim for damages, damages are always said to be in issue, requiring the plaintiff to prove them”. (Under lining is mine). (Pp 24–25 Paras F–A).

7. *The principles of award of general damages*

The appellants claim is for damages for unlawful detention. In my respectful view it is in the nature of general damages, as the unlawful detention complained of cannot be quantified in terms of monetary value. There are two types of damages. Where a party claims special

damages, he must specially plead and strictly prove same. General damages are averred under specific heads of claim, presumed in law to be the direct and natural consequence of the act complained of and are awarded at large. General damages are always made as a claim at large. The quantum need not be pleaded and proved specifically. The award is quantified by what, in the opinion of a reasonable person, is considered adequate loss or inconvenience which flows naturally, as generally presumed by law from the act of the defendant.

It does not depend upon calculation made and figure arrived at from specific items. Where general damages are sought on the basis of unlawful detention, they would represent payment for the tort of trespass to the appellants' bodies. See *Rockonoh Property Co. Ltd vs. Nigeria Telecommunication Plc & Anor.* (2001) 14 NWLR (pt. 733) 468. A claim for unlawful detention is to be taken as compensation for violation of the appellants' right to liberty.

(P 25 Paras B–F).

Per Galinje (JSC):

Both the trial court and the lower court ruled that the appellants are not entitled to damages. The attitude of this court is that it does not interfere with the concurrent findings of facts by the High Court and the Court of Appeal unless there exist special and exceptional circumstances that will allow such question of fact to be reopened. See *Lokoyi & Anor vs. Olojo* (1983) 14 NSCC 386, *Mogo Chinwendu vs. Mbamali* (1980) 3 SC Ibodo & *Ors. vs. Enarofia & Ors.* (1980) 5-7 SC 42 at 55, *Ibrahim vs. Shagari & Anor.* (1983) 14 NSCC 431, *Aroyewron vs. Adediran* (2004) 7 SCNJ 240 at 246. In the instant case, both the trial court and the court of appeal found that the detention of the appellant without trial is unlawful. Clearly the detention is a claim for general damages that does not require specific proof.

Even though the lower court has the power under S. 15 of the Court of Appeal Act and Order 4 Rules 3 and 4 of the Court of Appeal Rules 2011 to do what it did, the lower court is wrong to have upheld the ruling of the trial court in which it refused to award the damages claimed by the appellants. I am of the firm view that the appellants are entitled to the damages claimed against the respondents". (Pp 25–26 Paras F–B).

Per Odili (JSC)

The Court of Appeal had concluded by declaring that the detention of the appellants by the respondents at the Force CID Cell Area 10 Gariki, Abuja from 10/4/2006 till 6/3/2007 without trial was unlawful and unconstitutional. This was as found by the trial court also but the Court of Appeal did not award the N500,000.00 damages claimed by the appellants just like the trial court and the court below said the ground was that the claim was not proved by evidence.

It must be said that the court below after the declaration just like the court of trial that the liberty of the appellants had been infringed upon, then abdicated their powers to do the follow up which is to award the damages sought by the appellants. This is because a person or persons whose fundamental rights have been infringed upon can validly sue for damages in monetary form as the appellants did. The Court of Appeal ought to have interfered with the failure of the trial court in the improper exercise of its discretion to award the damages of N500,000.00 prayed for and there lay the miscarriage of justice. See; Dokubo Asari vs. FGN (2007) 12 NWLR (pt. 1048) 320 at 349; Nzeribe vs. Dave Engineering Co. Ltd. (1994) 4 NWLR (pt. 361) 124; University of Lagos vs. Aigoro (1985) 1 NWLR (pt. 12) 143 Minister of Internal Affairs vs. Shugaba Abdudul Rahman Darrmai (1982) 3 NCLR.

What I am laboring to say is that I agree with the concurrent findings of the two courts below that the rights to liberty of the

appellants were infringed upon but the two courts below fell short of what is expected of the courts within the express provision of Section 35(6) CFRN 1999 which has to be read together with Section 35(5) (a) (b) in order to give meaning, purpose and value to Section 35 (a) and (b) and proceeded to grant the damages sought which need not be proved to be given effect to. (Pp 34–35 Paras F–D)

Per Akaahs (JSC)

The principles guiding the award of damages is that damages will flow from the wrong suffered to a complainant. Any grant of general damages is intended to assuage the natural loss and painful mental feelings suffered by the claimant and caused by the defendant. The relief claimed in such situations has no mathematical exactitude. The common law principles of assessment on award of damages do not apply to matters brought under the Fundamental Rights (Enforcement Procedure) Rules. By virtue of the provision of Section 35(6) of the 1999 Constitution, any person who is unlawfully arrested or detained is entitled to compensation and public apology from the appropriate authority or person specified by law. And so a person who has proved that he was unlawfully arrested and detained is automatically entitled to award of compensation. See *Jim Jaja vs. C.O.P. River State* 2013 6 NWLR pt. 1350 225. I fully endorse the sentiment expressed by Georgewill JCA in *IGP vs. Ikpila* (2016) 9 NWLR (pt. 1517) 236 that the time has come for the courts in this country to not only condemn and deprecate abuses of the fundamental rights of the citizen but also to make abuse of these rights by agents of the State and or individuals or organizations very unattractive by awarding exemplary damages in deserving cases. This court decided in *Jim-Jaja vs. C.O.P. Rivers State* (supra) that in an application for the enforcement of his fundamental right the onus is on the applicant to show that he was unlawfully arrested and detained and if that is proved, he would be entitled to compensation and apology, where no specific amount is claimed. Where a specific

amount is claimed, it is for the court to consider the claim and if in its opinion, the amount that would be justified to compensate the victim of the breach. (P 37 Paras A–G).

8. *Appellants are entitled to their claims*
The reliefs that are sought from this court by the appellants at paragraph 4 of the notice of appeal are as follows:

“An order setting aside the decision of the Court of Appeal contained in the judgment delivered by Jimi Olukayode Bada JCA dated 17/3/2010 and award damages of N500,000.00 in favour of the appellants against the respondents for infringement of their fundamental rights”.

The N500,000.00 claimed by the appellant is not too high considering the value of the local currency. I am of the firm view that the appellants are entitled to their claim as they have made out their case on balance of probability.

The second issue is resolved in favour of the appellants.

The judgment of the lower court is set aside as it affects the award of damages to the appellants. In its place, the appellants are entitled to the claim of N500,000.00, which I hereby award to them.

(P 26 Paras B–G).

9. *No leave of court is required to appeal on grounds under fundamental Rights Enforcement Procedure*
In this matter of the need for leave to appeal there is no distinction when it is either an interlocutory appeal or one on a final decision in respect to questions of fact or law.

Also to be stated is that in instances such as the present where what is at stake are under the fundamental rights enforcement procedure no leave of court is required to appeal Section 241 CFRN

subsection (1) (f) (i) provides that no leave is required as the appeal from trial court to Court of Appeal is of right where the liberty of a person or the custody of an infant is concerned.

The same provision is in place for appeal to the Supreme Court in that regard. See Section 233 (1) (1)(a)-(d) of the 1999 CRN which is *impair* material with Section 213 (22) (a)-(d) of 1979 CRN. See also: *Oteki vs. A.G. Bendel State* (1986) 2 NWLR (pt. 24) 648 at 656; *Ohuka vs. State (No.1)* (1988) 1 NWLR (Pt. 72) 539. (Pp 31–32 Paras F–A).

Per Odili (JSC)

“Clearly what is in dispute before the court arises from whether or not fundamental rights of the appellant have been infringed upon and in that case there is no necessity for leave of court to appeal being specially provided for under Section 233 of the 1999 Constitution and so this preliminary objection just cannot fly being not grounded on anything upon which it can be favourably considered. Infact the objection is occupying and beclouding the space for the proper adjudication of the merits of the appeal and it will not be allowed to remain in that realm which is clearly technical and even then is not supportable. It is only right that I dispose of it without more so one can face the main issue before the court.

The preliminary objection is therefore dismissed as lacking in merit. (P 32 Paras A–D)

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Adigun vs. Ayinde (1993) 8 NWLR (pt. 313) 516.
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Onyemeh vs. Egbuchulam (1996) 5 NWLR (pt. 448) 255,
Oteki vs. A.G. Bendel State (1986) 2 NWLR (pt. 24) 648;
Rockonoh Property Co. Ltd vs. Nigeria Telecommunication Plc & Anor. (2001) 14 NWLR (pt. 733) 468
S.P.D.C.N. Ltd vs. Amadi (2011) 14 NWLR (pt. 1266) 157
University of Lagos vs. Aigoro (1985) 1 NWLR (pt. 1) 143
Yaro vs. Arewa Construction Ltd. (2007) 17 NWLR (pt. 1063) 333,

Nigerian Statutes Cited

1979 CRN Section 213 (22) (a)-(d)

The 1999 CRN Section 233 (1) (1)(a)-(d); Section 241; Section 35(6)

Representation

ADEKOLA MUSTAPHA (ESQ.) with him M. I. Komolafe Esq. for the appellants.

MURITALA ABDUL-RASHEED (ESQ.) with Mary Joy Sampson for the respondents.

- A ADAMU GALINJE, (JSC) (Delivering the Lead Judgment):** By a motion ex-parte dated and filed on the 28th December 2006, the appellants herein sought for and were granted leave by the High Court of the Federal Capital Territory Abuja, to enforce their fundamental right against the respondents. They claimed against the respondents, the following reliefs:
- B**
- (a) A declaration that the arrest and detention of the applicants on or about the 10th day of April, 2006 is unlawful illegal and unconstitutional.**
 - (b) A declaration that the confinement, detention of the applicants by the respondents at F.C.I.D. cell, Area 10 Gariki, Abuja from their time of arrest, a period of about 8 months without trial is unconstitutional, unlawful, illegal, null and void.**
 - (c) An order releasing the applicants from unlawful detention forth with.**
 - (D) N500,000.00 damages for unlawful detention.**
- C**
- D**
- E**

The leave granted to the appellants along with their claims and the relevant documents attached to a motion on notice were served on the respondents, who reacted by filing a joint counter affidavit on the 8/3/2007.

The appellants filed a further and better affidavit while the respondents also filed a further and better counter affidavit. Issues having been joined, the case was finally set down for hearing.

Learned counsel for the parties were heard. In a reserved and considered ruling delivered on the 10th May, 2007, the trial court held:

“It is my considered view that by the combined effect of the provisions of section 35(1), (4), and (5) of the 1999 Constitution, the detention of the applicants by the respondents from 10/4/2006 till 6/3/2007 when they were arraigned before the Federal High Court, Abuja is a violation of their rights to personal liberty guaranteed by

A the 1999 Constitution. Since the Federal High Court, Abuja has granted the applicants bail; it will serve no useful purpose for this court to make the order sought by the applicants for their release from unlawful detention. I will also not award the damages claimed”.

The appellants were dissatisfied with the decision of the trial of the court. Being aggrieved they appealed to the Court of Appeal, Abuja Division.

C Their notice of appeal filed on the 18/05/2007 contained one ground of appeal, which I reproduce hereunder without its particulars thus:

D “The learned trial judge erred in law by refusing to award damages in favour of the appellants after declaring that their detention by the respondents from 10/4/2006 to 6/3/2007 without trial was a violation of their Constitutional rights”.

E From this ground, the sole issue submitted by the appellants for the determination of the appeal by the lower court reads as follows:

F “Whether the learned trial judge was right to refuse to award damages in favour of the appellants having found out that their detention by the respondents without trial for a period of almost one year without trial is unconstitutional and unlawful”.

G

The lower court heard the appeal on the appellants' brief alone, as the respondents failed to file a brief of argument. In a reserved and considered judgment delivered on the 17th March 2010, the lower court dismissed the appellants' appeal and set out reasons and authorities in support of the trial court's refusal to award damages. Once again the appellants are dissatisfied with the decision of the lower court and they have brought this appeal. Their notice of appeal dated 26th March 2010 and filed on the 30th March, 2010 contains three grounds of appeal. I hereunder reproduce the

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I

A three grounds of appeal without their particulars as follows:

“1. The learned Justices of the Court of Appeal erred in law and on the facts when they held thus:

B

“In this case under consideration, the learned counsel for the appellant should have gone a step further to call evidence especially in support of the N500,000.00 damages for unlawful detention in view of the tacit denial by the counter affidavit of the averment relief upon by the appellant in the affidavit in support of application before the lower court”.

C

D

2. The learned Justices of the Court of Appeal erred in law by holding that for un-liquidated damages to be awarded in favour of the appellants whose fundamental rights have been found to have been infringed by the court must be proved.

E

F

3. The learned Justices of the Court of Appeal erred in law when they refused to award damage in avour of the appellants”.

G Parties filed and exchanged briefs of argument. The appellants' brief of argument settled by Adekola Mustapha is dated 24th August 2010 and filed on the 25th August 2010. At pages 4-5 of the appellants' brief of argument; two issues have been formulate for determination of this appeal. They read as follows:

H

”(1). Whether the Justices of Court of Appeal was (sic were) right to base their reason for refusal to award the damages sought by the appellants against the

I

A **respondents on an issue that was not considered by the trial court in its judgment nor raised by the parties to the appeal before them.**

B **(2) Whether the justices at the Court of Appeal was (sic were) right to refuse to award the damages sought by the appellants when they agreed with the findings of the trial court that the appellants constitutional rights were indeed breached by the respondents”.**

D Issue one is said to arise from the 1st and 2nd grounds of appeal, while the 2nd issue is said to arise from the 3rd ground of appeal.

E The respondents' brief of argument settled by Muritala Abdul-Rasheed Esq., of Counsel to the respondent is dated 20th November, 2017, and filed on the 22nd November 2017, but deemed properly filed and served on the 27th November 2017 At pages 5-6 of the said brief, the respondent issued a preliminary objection in the following terms:

F **“NOTICE IS HEREBY GIVEN that the respondents will at, or before the hearing of this appeal, challenge by way of preliminary objection, the competence of this appeal on the following grounds:**

G **(i) Ground 3 of the Notice and Grounds of appeal raises the issue of assessment and award of damages.**

H **(ii) Assessment of an award of damages is a question of mixed law and facts.**

(iii) The appellants ought to obtain the leave of the Court of Appeal or of the Supreme Court to appeal on questions of mixed law and facts.

I **(iv) The appellants neither sought nor obtained the said leave.**

- A** **(v) Particular 1 of Ground 3 does not flow from the complaint in Ground 3.**
- (vi) Particulars of error must be ancillary to the complaint in the grounds of appeal.**
- B** **(vii) Issue No. 1 formulated by the appellants does not arise from Grounds 1 and 3 of the Notice of Appeal.**
- (viii) The said Issue 1 ought to be struck out”.**

C Learned counsel for the respondent argued the preliminary objection at pages 6-10 of the respondents' brief of argument and thereafter formulated two issues for determination of this appeal, in case the preliminary objection fails. The two issues are reproduced hereunder as follows:

- D**
- “(i) Whether in view of the serious conflict in the affidavit evidence before the trial court, the Court of Appeal was right in holding that the appellants ought to have led evidence to establish their case?**
- E**
- (ii) Whether the Court of Appeal was right in upholding the decision of the learned trial judge not to award damages to the appellants?”**
- F**

Issue 1 is formulated from the 1st and 2nd grounds of appeal, while Issue 2 is formulated from the 3rd ground of appeal.

G The appellants reply brief settled by Adekola Mustapha of Counsel to the appellant is dated 30th December, 2010 and filed on 31st December 2010, but deemed properly filed and served on the 27th November, 2017.

H Before I venture into the consideration of the appeal, I will like to deal with the preliminary objection raised by the respondent first. For the law is settled that where a notice of preliminary objection is filled and moved before a court of law, that court is duty bound to consider the preliminary objection before venturing into the main or cross appeal. For

I the aim of a preliminary objection is to terminate a case in limine, without dissipating unnecessary energy in considering unworthy or fruitless matter

A in the courts proceedings. See **Yaro vs. Arewa Construction Ltd. (2007) 17 NWLR (pt. 1063) 333, Agbareh vs. Mimra (2008) 2 NWLR (pt. 1071) 378, Onyekwuluje vs. Animashaun (1996) 3 NWLR (pt. 439) 637, Onyemeh vs. Egbuchulam Chulum (1996) 5 NWLR (pt. 448) 255, Efet vs. I.N.E.C. (2011) 17 NWLR (pt. 1247) 423.**

B Now, the respondents' preliminary objection attacks only the 3rd ground of the appeal and the 1st issue for determination of this appeal which arises from the said 3rd ground of appeal. There are three grounds of appeal as I have stated and same have been reproduced elsewhere in this judgment. **C** For all intents and purposes the 1st and 2nd grounds of appeal against which there is no complaint can sustain this appeal successfully.

Order 2 Rule 9(1) of the Supreme Court Rules provides as follows:

D

“A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time”. (Underlining is mine).

E

F This court has had an opportunity to state the purpose of preliminary objections in **S.P.D.C.N. Ltd vs. Amadi (2011) 14 NWLR (pt. 126) 157 at 183 paras D-F** in the following words:

G

“Order 2 Rule 9 of the Supreme Court rules provide for the filing of preliminary objections. Preliminary objections are filed against the hearing of an appeal and so once it succeeds, the appeal no longer exists. All too often we see preliminary objections filed against one or more grounds of appeal. Since there are other grounds that can sustain the appeal, a preliminary objection should not be filed. Instead, a notice of motion seeking to strike out the defective grounds of appeal should be filed”.

I

A A preliminary objection is the procedure to be adopted where a respondent objects to the hearing of an appeal. The purpose of preliminary objection is to terminate the appeal in limine.

B Order 2 Rule 9(1) of the Supreme Court Rules therefore is a procedure adopted only against the hearing of an appeal and not for any other purpose. See **Adelekan vs. Ecu-Line Nv (2006) 12 NWLR (pt. 993) 33; Auto Import and Export vs. Adebayo (2002) 18 NWLR (pt. 799) 554; Amadi vs. NNPC (2000) 10 NWLR (pt. 674) 76, Adigun vs. Ayinde (1993) 8 NWLR (pt. 313) 516.**

C For the reasons I have set out herein above, the preliminary objection is not a suitable method of challenging the competence of a ground of appeal which when upheld cannot terminate the appeal. The preliminary objection is therefore incompetent and it is struck out.

D On the appeal, the issues formulated by the parties are similar. The appellants being the complainants, the issues formulated by them represent their grievances. I will therefore adopt the two issues formulated by them in the determination of this appeal. In doing so, I will consider the issues in the order in which they have been argued.

E On the first issue, learned counsel for the appellant submitted that the lower court was wrong when it held that the trial court declined to award damages to the appellant because there was lack of proof or sufficient proof. According to the learned counsel, the trial court did not rule that the appellants did not prove their entitlement to the claim of damages. It is learned counsel's submission that the lower court substituted its own view for the decision of the trial court, as the issue of proof of damages was not contained in the judgment of the trial court that was submitted to it for review. Relying on the authorities in **N.D.I.C. vs. Okem Ent. Ltd (2004) 10 NWLR (pt. 880) 107 at 207 paras F-G, Overseas Const. Co. (Nig) Ltd vs. Greek Ent. (Nig) Ltd (1985) 3 NWLR (pt. 13) 407 and Katto vs. CBN (1999) 6 NWLR (pt. 607) 390 at 411 paras D-E**, Learned Counsel submitted that an appellate court must not substitute its own supposition for the decision of a lower court not contained in the judgment submitted before it for review as it can only hear and decide on issues raised on the grounds of appeal filed before it. Also cited in aid is the authority in

A Management Enterprises Ltd vs. Otusanya (1987) 2 NWLR (pt. 55) 179.

In his argument, learned counsel for the respondent submitted that there was serious conflict between the appellants' affidavit and the respondents' counter affidavit, and the only way to resolve the conflicts was for the appellants to call evidence in order to establish their claim to damages. In aid learned counsel sought refuse in **Annamco vs. Fist Marina Trust Ltd (2000) 1 NWLR (pt. 640) 309 at 316 paras D-E, Afribank (Nig.) Plc vs. Adigun (2009) 11 NWLR (pt. 1152) 329 at 350 paras G-H and Chairman, NPC vs. Chairman Ikere L.G. (2001) 13 NWLR (pt. 731) 540 at 556 para H.**

In their reply brief, learned counsel for the appellant submitted that the trial court did not say that there was conflict between the appellants' affidavit and that of the respondents in its judgment, and that once again the respondents were arguing on the issue that was not part of the judgment against which this appeal lies.

After having heard the parties, the lower court held:

“In this case under consideration, the learned counsel for the appellants should have gone a step further to call evidence especially in support of the N500,000.00 (Five Hundred Thousand Naira) damages for unlawful detention in view of the tacit denial by the counter affidavit of the averment relied upon by the appellants in the affidavit in support of the application before the lower court”.

The question now is whether the lower court could advanced reasons to justify the trial court's refusal to award damages to the appellant? I think the lower court was entitled in law to give reasons and make orders which were not made by the trial court to justify its decision. This is by virtue of section 15 of the Court of Appeal Act which empowers the Court of Appeal to rehear in whole or in part any case that is brought before it on appeal and give such direction(s) as it deems fit. Order 4 Rules 3 and 4 of the Court of

A Appeal Rules provides as follows:

B “4 (3) The court shall have power to draw inferences of fact and to give any judgment and make any order, which ought to have been given or made, and to make such further or other order(s) as the case may require, including any order as to costs.

C (4) The powers of the court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of decision of the court below, or by
D any particular party to the proceedings in that court, or that any ground for allowing the appeal for affirming or varying the decision of that court is not specified in such a notice and the court may make
E any order on such terms as the court thinks just, to ensure the determination of the merits of the real question in controversy between the parties”.

F A grant or refusal to award damages is a decision that must be based on sound reasons. In **Umunna vs. Okwuraiwe (1978) 6-7 SC 1**, this court held inter alia as follows:

G “It is not enough for the court to simply award damages in unliquidated pecuniary damages claimed without giving any reason as to how it arrived at what in its opinion amounted to reasonable damage”. See **Olurotimi vs. Felicia Ige (1993) 8 NWLR (pt. 311) 25 at 266**.
H

I It follows therefore that where a claim for damage is properly set out before a court, that asked the court to determine whether the trial court was right when it refused to award damages to the appellant. The lower court came to conclusion that the lower court was right not to award damage. As an

A appellate court, it would have been wrong if it upheld such decision without giving reasons why it agreed with the lower court. I find nothing wrong with the proceedings at the lower court, when it proffered reasons for agreeing with the trial court and cited authorities to support its reasons.

B The first issue for determination of this appeal is therefore resolved against the appellant and in favour of the respondent.

C The second issue for determination of this appeal is whether the justices of the Court of Appeal were right to refuse to award the damages sought by the appellants when they agreed with the findings of the trial court that the appellants' constitutional rights indeed breached by the respondents.

D In arguing this issue, learned counsel for the appellants submitted that it is the injury complained of that gave rise to the cause of action and not the damages claimed. According to the learned counsel, where infringement of fundamental right is established, a learned counsel referred to the Indian case of **Sheri Basu & Anor vs. State of West Bengal of India (2005) (case on Human Right) 131 at 164 and Lord Deving's Lecture in 1949** and contended that even if the appellants did not lead any evidence in support of the damages claimed, the court, having found that the appellants' fundamental rights have been breached is bound to award damages as compensation.

E It is not the law that where substantive claim succeeds, the subsidiary claim of damages must be awarded automatically. This is made very clear in **Oke vs. Ayedun (1986) 2 NWLR (pt. 23) 543**, cited in the judgment of the lower court. In that case at page 565, Aniagolu JSC said:

H **“It is a principle of pleadings, that which is not denied is deemed to have been admitted and if a plaintiff filed a statement of claim and the defendant failed or refused to file a statement of defense in answer thereto, he clearly, will be deemed to have admitted the statement of claim, leaving the trial court with the authority to peremptorily enter judgment for the plaintiff without hearing evidence.**

I **An exception to that would obviously be in respect of a**

- A** claim for damages, for damages are always said to be in issue, requiring the plaintiff to prove them". (Under lining is mine).
- B** The appellants claim is for damages for unlawful detention. In my respectful view it is in the nature of general damages, as the unlawful detention complained of cannot be quantified in terms of monetary value.
- C** There are two types of damages. Where a party claims special damages, he must specially plead and strictly prove same. General damages are averred under specific heads of claim, presumed in law to be the direct and natural consequence of the act complained of and are awarded at large. General damages are always made as a claim at large. The quantum need not be
- D** pleaded and proved specifically. The award is quantified by what, in the opinion of a reasonable person, is considered adequate loss or inconvenience which flows naturally, as generally presumed by law from the act of the defendant.
- E** It does not depend upon calculation made and figure arrived at from specific items. Where general damages are sought on the basis of unlawful detention, they would represent payment for the tort of trespass to the appellants' bodies. See **Rockonoh Property Co. Ltd vs. Nigeria Telecommunication Plc & Anor. (2001) 14 NWLR (pt. 733) 468.**
- F** A claim for unlawful detention is to be taken as compensation for violation of the appellants' right to liberty.
- G** Both the trial court and the lower court ruled that the appellants are not entitled to damages. The attitude of this court is that it does not interfere with the concurrent findings of facts by the High Court and the Court of Appeal unless there exist special and exceptional circumstances that will allow such question of fact to be reopened. See **Lokoyi & Anor vs. Olojo (1983) 14 NSCC 386, Mogo Chinwendu vs. Mbamali (1980) 3 SC. Ibodo & Ors. vs. Enarofia & Ors. (1980) 5-7 SC 42 at 55, Ibrahim vs. Shagari & Anor. (1983) 14 NSCC 431, Aroyewron vs. Adediran (2004) 7 SCNJ 240 at 246.**
- H** In the instant case, both the trial court and the court of appeal found that the detention of the appellant without trial is unlawful.
- I** Clearly the detention is a claim for general damages that does not require

A specific proof.

Even though the lower court has the power under S. 15 of the Court of Appeal Act and order 4 Rules 3 and 4 of the Court of Appeal Rules 2011 to do what it did, the lower court is wrong to have upheld the ruling of the

B trial court in which it refused to award the damages claimed by the appellants. I am of the firm view that the appellants are entitled to the damages claimed against the respondents.

C The reliefs that are sought from this court by the appellants at paragraph 4 of the notice of appeal are as follows:

D **“An order setting aside the decision of the Court of Appeal contained in the lead judgment delivered by Jimi Olukayode Bada JCA dated 17/3/2010 and award damages of N500,000.00 in favour of the appellants against the respondents for infringement of their fundamental rights”.**

E The N500,000.00 claimed by the appellant is not too high considering the value of the local currency. I am of the firm view that the appellants are entitled to their claim as they have made out their case on balance of probability.

F The second issue is resolved in favour of the appellants.

G The judgment of the lower court is set aside as it affects the award of damages to the appellants. In its place, the appellants are entitled to the claim of N500,000.00, which I hereby award to them. The appellants are also entitled to cost of prosecuting this appeal which I assess at N400,000.00.

Appeal allowed in part.

H **Paul Adamu Galinje**
Justice, Supreme Court

I **PETER-ODILI, (JSC):** I am in total agreement with the judgment just delivered by my learned brother Paul Adamu Galinje JSC and to underscore that support for the reasoning I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Abuja

A Division or court below or lower court delivered on the 17th March 2010, Croam: R. D Muhammad, Uwani Musa Abba Aji, Jimi Olukayode Bodde JJCA and dismissed the appeal. The appellants dissatisfied have come before the Supreme Court to ventilate their grievance.

B

FACTS BRIEFLY STATED

C The appellant commenced this action as applicants at the High Court of the Federal Capital Territory under the Fundamental Right (Enforcement Procedure) Rules 1979 seeking a declaration that their arrest and detention by the respondents for about 8 months without trial was unconstitutional, an order for their release from detention and Five Hundred Thousand Naira (N500,000.00) as damages for unlawful detention.

D The appellants based their claims on facts disclosed in an affidavit filed in support of the appellants' application.

E The case of the appellants before the trial court was that one Bokolo, a brother to he 3rd appellant, was about to board a vehicle at Lokoja when live cartridges were found in his bag together with a diary containing the names of the appellants their addresses and telephones numbers. The said Bokolo escaped before he could be arrested by the police. The appellant alleged that they were arrested instead of the said Bokolo as a result of his escape.

F The appellants deposed in their affidavit that after their arrests they were kept in police custody without trial for about 8 months. While in police custody, the 1st and 4th appellants developed rashes all over their bodies, the 2nd and 5th appellants almost lost the use of their sight while the 3rd appellant who had a surgical operation before his arrest was not allowed to see his medical doctor. The appellants further alleged that the 3rd appellant who was then a student of the Federal Polytechnic Bida, Niger State had lost one academic semester as a result of his detention.

G The respondents on the other hand, denied the allegations contained in the supporting affidavit in their counter-affidavit. They alleged that the appellants were arrested for criminal conspiracy and being in possession of firearms without a license. The appellants had been charged to the Federal

- A** High Court for the offences alleged against them and the charge sheet was annexed to the counter-affidavit and marked as Exhibit “A”. The respondents further deposed, in their counter-affidavit, that the appellants did not suffer any of the ailments mentioned in the affidavit as they had
- B** lived in good health during their detention. The appellants, in response to the issues raised in the respondents' counter-affidavit, were compelled to file a further and better affidavit (without leave of court; contrary to Order 2 Rule 2 of the Fundamental Rights (Enforcement Procedure, rules 1979).
- C** The respondents filed a further and better counter-affidavit.

The parties addressed the trial court and the court in its judgment, found that the detention of the appellants was unlawful but declined to award the damages claimed on the basis that the appellants had already

D been charged and released on bail by the Federal Court Abuja.

- The appellants were dissatisfied with the refusal of the learned trial judge to award damages sought by them and appealed to the Court of Appeal. The respondents did not appear before the Court of Appeal and the
- E** appeal was heard on the appellants' brief only. In a considered judgment, the learned justices of the Court of Appeal found that the affidavit evidence before the trial court were in conflict and it became necessary therefore for the appellants to call oral evidence to establish their case. Since no evidence
- F** was adduced at the trial court, the Court of Appeal held that the learned trial judge was right not to award damages to the appellants. The Court of Appeal consequently dismissed the appellants' appeal and affirmed the decision of the learned trial judge, per Sylvanus Orji J.

- G** On the 27/11/17 date of hearing, learned counsel for the appellant, Adekola Mustapha adopted the appellants' brief of argument; two issues for determination were formulated and they are thus:

- H** **1. Whether the justices of the Court of Appeal was**
- I** **right to base their reason for refusal to award the**
- damages sought by the appellants against the**
- respondents on an issue that was not considered by**
- the trial court in its judgment nor raised by the**

A parties to the appeal before them. (Distilled from Ground 1 and 3).

2. Whether the justices of the Court of Appeal were right to refuse to award the damages sought by the

B appellants when they agreed with the findings of the trial court that the appellants' constitutional rights were indeed breached by the respondents. (Distilled from Ground 2).

C

Murital Abdul-Rasheed Esq., learned counsel for the respondent adopted the brief of argument settled by Ayotunde Ogunleye Esq. In it was raised and argued a notice of preliminary objection and the brief filed on the **D** 22/11/2017 titled amended respondents' brief of argument and deemed filed on the 27/11/17. He identified two issues for determination in the event that the preliminary object failed and the issues are thus:

E 1. Whether, in view of the serious conflict in the affidavit evidence before the trial court, the Court of Appeal was right in holding that the appellants ought to have led evidence to establish their case? (Grounds 1 and 2 of the notice and grounds of appeal).

F

2. Whether the Court of Appeal was right in upholding the decision of the learned trial judge not to award damages to the appellants? (Ground 3 of the Notice and Grounds of Appeal).

G

H It is stating the obvious that the preliminary objection would be tackled before anything else.

NOTICE OF PRELIMINARY OBJECTION

I Notice is hereby given that the respondents will at, or before the hearing of this appeal, challenge by way of preliminary objection, the competence of this appeal on the following grounds:

- A** **i. Ground 3 of the notice and grounds of appeal raises the issues of assessment and award of damages.**
- ii. Assessment of and award of damages is a question of mixed law and facts.**
- B** **iii. The appellants ought to obtain the leave of the Court of Appeal or of the Supreme Court to appeal on questions of mixed law and facts.**
- iv. The appellants neither sought nor obtained the said leave.**
- C** **v. Particular 1 of Ground 3 does not flow from the complaint in Ground 3.**
- vi. Particulars of error must be ancillary to the complaint in the Grounds of Appeal.**
- D** **vii. Issue No. 1 formulated by the appellants does not arise from Grounds 1 and 3 of the Notice of Appeal.**
- viii. The said issue 1 ought to be struck out.**

E

Learned counsel for the respondent/objector contended that Ground 3 of the appellants' grounds of challenging the refusal of the Court of Appeal to award damages to the appellant are grounds of facts or mixed law and fact and leave of court ought to have been obtained and in the absence of that the ground fails.

F

That Issue 2 which stemmed from that incompetent ground would fail. Also that Issue No. 1 did not arise from any ground and so the two issues should be struck out and the implication is that the appeal is incompetent. He cited **NNSC Ltd vs. Establishment Sima of Vaduz (1990) 3 NSCC 528; Oforkire vs. Maduiké & Ors (2003) 1 SCNJ 440 at 446; Thor Ltd vs. F.C.M.B. Ltd (2002) 2 SSCNJ 65 at 95; Ibe vs. State (1992) 6 SCNJ (pt. 11) 172 at 176; Awosile vs. Sotunbo (1992) 6 SCNJ 182 at 197 etc.**

G

H

Responding, learned counsel for the appellant contended that under the fundamental rights enforcement provisions, no leave of court is required to appeal. He cited **Oteki vs. A.G. Bendel State (1985) 2 NWLR (pt. 24) 648 at 656 Section 213 (2) (a) (d) of the 1979 Constitution now**

I

A reproduced in Section 233 (1) (a) (d) of 1999 Constitution Ohuka vs. State (1988) 1 NWLR 539.

That damages that would arise is one in a character of general damages and arising from inference need no proof of evidence. He cited

B Incer Motos vs. Benson (1979) 3 SC 117.

In this preliminary objection, a reference to Section 233 (1) (2) (c) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) is called for and it provides thus:

C

“233

(1) The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeal from the Court of Appeal.

D

(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following circumstances.

E

(3) Decision in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this constitution has been, is being or is likely to be contravened in relation to any person”.

F

On this matter of the need for leave to appeal there is no distinction when it is either an interlocutory appeal or one on a final decision in respect to questions of fact or law.

G

Also to be stated is that in instances such as the present where what is at stake are under the fundamental rights enforcement procedure no leave of court is required to appeal. Section 241 CFRN Subsection (1) (f) (1) provides that no leave is required as the appeal from trial court to Court of Appeal is of right where the liberty of a person or the custody of an infant is concerned.

H

The same provision is in place for appeal to the Supreme Court in that regard. See Section 233 (1) (1)(a)-(d) of the 1999 CRN which is *impair*

I

A *material* with Section 213 (22) (a)-(d) of 1979 CRN. See also: **Oteki vs. A.G. Bendel State (1986) 2 NWLR (pt. 24) 648 at 656; Ohuka vs. State (1988) 1 NWLR 539.**

Clearly what is in dispute before the court arises from whether or not
B fundamental rights of the appellant have been infringed upon and in that case there is no necessity for leave of court to appeal being specially provided for under Section 233 of the 1999 Constitution and so this preliminary objection just cannot fly being not grounded on anything upon
C which it can be favourably considered. Infact the objection is occupying and beclouding he space for the proper adjudication of the merits of the appeal and it will not be allowed to remain in that realm which is clearly technical and even then is not supportable. It is only right that I dispose of it
D without more so one can face the main issue before the court.

The preliminary objection is therefore dismissed as lacking in merit.

MAIN APPEAL

E For ease of reference I shall make use of the issues as distilled by the appellants which are not really different from those of the respondents.

ISSUES 1 AND 3

F

1. Whether the justices of the Court of Appeal were right to base their reason for refusal to award the damages sought by the appellants against the respondents on an issue that was not considered by the trial court in its judgment nor raised by the parties to the appeal before them.

G

2. Whether the justices of the Court of Appeal were right to refuse to award the damages sought by the appellants when they agreed with the findings of the trial court that the appellants' constitutional rights were indeed breached by the respondents.

H

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- A** Learned counsel for the appellant submitted that where infringement of fundamental right is established as in this case, a court cannot stop at giving a mere declaration as it must go further to give compensatory relief for the wrong done by award of damages due to breach of public duty by the state.
- B** That the trial court failed in that regard and the Court of Appeal ought not to have affirmed that abdication of the responsibility to do the needful. That this is an instance where the interference of the Court of Appeal was called for. He cited: **Minister of Internal Affairs vs. Shugaba Abdudul Rahman Darrmai (1982) 3 NCLR (CA); Dokubo Asari vs. FGN (2007) 12 NWLR (pt. 1048) 320 at 349; Nzeribe vs. Dave Engineering Co. Ltd. (1994) 4 NWLR (pt. 361) 124; University of Lagos vs. Aigoro (1985) 1 NWLR (pt. 1) 143 etc.**

- D** In response, learned counsel for the respondents submitted that there were conflicts in the affidavit evidence before the trial judge on a vital issue which had to be resolved by evidence and not for the suo motu resolution by the court. He referred **Anamco vs. First Marine Trust Ltd (2000) 1**
- E** **NWLR (pt. 640) 309 at 316; Africbank (Nig) Plc vs. Adigun (2009) 11 NWLR (pt. 1152) 329 at 350 (CA); Chairman, NPC vs. Chairman Ikere L. G. (2001) 13 NWLR (PT. 731) 640 AT 556.**

- F** That the Supreme Court should not interfere with the concurrent findings of the two courts below since there is no perversity leading to those findings. He cited **Aoryewun vs. Adediran (2004) 7 SCNJ 240 at 246.**

The Court of Appeal had held thus:

- G** **By this provision, the respondents either by themselves or by their agents have the constitutional power to arrest and detain the applicants as was done on 10/4/2006. However, the power to arrest and detain a person suspected to have committed a criminal offence is subject to the provisions of**
- H** **section 35 (4) of the 1999 Constitution which provides that any person who is arrested or detained in accordance with section 35 (1) © thereof shall be brought before a court within a reasonable time. The phrase “a reasonable time”**
- I** **is defined in section 35 (5) thereof as follows:**

- A (a) In the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometer, a period of one day and**
- B (b) In any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.**

C It is my considered view that by the combined effect of the provision of section 35 (1) (4) and (5) of the 1999 Constitution, the detention of the appellants by the respondents from 10/4/2006 till 6/3/2007 when they were arraigned before the Federal High Court Abuja is a violation of their rights to personal liberty guaranteed by the 1999 Constitution.

E Since the Federal High Court Abuja has granted the applicants bail, it will serve no useful purpose to make the order sought by the applicants for their release from unlawful detention, I will also not award the damages claimed”.

F The Court of Appeal had concluded by declaring that the detention of the appellants by the respondents at the Force CID Cell Area 10 Gariki, Abuja from 10/4/2006 till 6/3/2007 without trial was unlawful and

G unconstitutional. This was as found by the trial court also but the Court of Appeal did not award the N500,000.00 damages claimed by the appellants just like the trial court on the ground was that the claim was not proved by evidence.

H It must be said that the court below after the declaration just like the court of trial that the liberty of the appellants had been infringed upon, then abdicated their powers to do the follow up which is to award the damages sought by the appellants. This is because a person or persons whose fundamental rights have been infringed upon can validly sue for damages

I in monetary form as the appellants did. The Court of Appeal ought to have

- A** interfered with the failure of the trial court in the improper exercise of its discretion to award the damages of N500,000.00 prayed for and there lay the miscarriage of justice. See; **Dokubo Asari vs. FGN (2007) 12 NWLR (pt. 1048) 320 at 349; Nzeribe vs. Dave Engineering Co. Ltd. (1994) 4 NWLR (pt. 361) 124; University of Lagos vs. Aigoro (1995) 1 NWLR (pt. 1) 143; Minister of Internal Affairs vs. Shugaba Abdul Rahman Darrmai (1982) 3 NCLR.**

- C** What I am laboring to say is that I agree with the concurrent findings of the two courts below that the rights to liberty of the appellants were infringed upon but the two courts below fell short of what is expected of the court within the express provision of Section 35(6) CFRN 1999 which has to be read together with Section 35(5) (a) (b) in order to give meaning, purpose and value to Section 35 (5)(a) (b) and proceeded to grant the damages sought which need not be proved to be given effect to.

- D** From the foregoing and the better articulated lead judgment, this appeal is allowed in part in respect of the award of damages which is granted the appellants as set out in the said judgment of my learned brother.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

- F** **DATTIJO MUHAMMAD, (JSC):** On having a preview of the leading judgment of my learned brother PAUL ADAMU GALINJE, JSC just delivered and concluding that it represents my position on the issues raised in the appeal, I adopt same as mine in allowing the meritorious appeal. I abide by the consequential orders reflected in the leading judgment including the one on costs.

Musa Dattijo Muhammad
Justice, Supreme Court

- H** **BAYANG AKAAHS, (JSC):** My learned brother, Galinje, JSC, made available to me in draft, a copy of his leading judgment in which he allowed the appeal on the award of damages. I agree with him that the appeal is meritorious.

- A The trial judge at page 46 of the record of appeal held:
- “It is my considered view that by the combined effect of the provisions of Section 35 (1), (4) and (5) of the 1999 Constitution the detention of the applicants by the respondents from 10/4/2006 till 6/3/2007 when they were arraigned before the Federal High Court, Abuja is a violation of their rights to personal liberty guaranteed by the 1999 Constitution. Since the Federal High Court, Abuja has granted the applicants bail; it will serve no useful purpose for this court to make the order sought by the applicants for the release from unlawful detention. I will also not award the damages claimed”.**
- B
- C
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The respondents did not appeal against the finding that the applicants' detention from 10/4/2006 till 6/3/2007 is a violation of their rights to personal liberty guaranteed by the 1999 Constitution. It was the applicants/appellants who appealed against the refusal by the learned trial judge to award them damages without advancing any reason apart from stating that they had been granted bail.

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F In its judgment the court below found that even if the affidavit evidence was not challenged, the trial court was expected to examine whether or not the unchallenged evidence was sufficient to establish the claims made by the plaintiffs and held as follows on page 70 of the records.

- G **“It is settled that where the court has to quantify or assess the damages or loss, whether pecuniary or no pecuniary, the damages are unliquidated In this case under consideration the learned counsel for the appellants should have gone a step further to call evidence especially in support of the N500,000.00 (Five Hundred Thousand Naira) damages for unlawful detention in view of the tacit denial by the counter affidavit of the averment relied upon by the appellants in**
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A the affidavit in support of the application before the lower court”.

- B** The principles guiding the award of damages is that damages will flow from the wrong suffered to a complainant. Any grant of general damages is intended to assuage the natural loss and painful mental feelings suffered by the claimant and caused by the defendant. The relief claimed in such situations has no mathematical exactitude. The common law principles of assessment on award of damages do not apply to matters brought under the Fundamental Rights (Enforcement Procedure) Rules. By virtue of the provision of Section 35(6) of the 1999 Constitution, any person who is unlawfully arrested or detained is entitled to compensation and public apology from the appropriate authority or person specified by law. And so a person who has proved that he was unlawfully arrested and detained is automatically entitled to award of compensation. See **Jim Jaja vs. C.O.P. River State 2013 6 NWLR (Pt.1350) 225**. I fully endorse the sentiment expressed by Georgewill JCA in **IGP vs. Ikpila (2016) 9 NWLR (pt. 1517) 236** that the time has come for the courts in this country to not only condemn and deprecate abuses of the fundamental rights of the citizen but also to make abuse of these rights by agents of the State and or individuals or organizations very unattractive by awarding exemplary damages in deserving cases. This court decided in **Jim-Jaja vs. C.O.P. Rivers State (supra)** that in an application for the enforcement of his fundamental right the onus is on the applicant to show that he was unlawfully arrested and detained and if that is proved, he would be entitled to compensation and apology, where no specific amount is claimed. Where a specific amount is claimed, it is for the court to consider the claim and it its opinion, the amount that would be justified to compensate the victim of the breach.
- G**
- H** The arrest and detention of the appellants from 10/4/2006 till 6/3/2007 was established. Although the respondents deposed to a counter-affidavit stating that the arrest of the appellants was lawful and in accordance with the law of the land and they have been charged with criminal conspiracy and unlawful possession of ammunitions without licence or permit, the records show that the charge against the appellants
- I**

A was signed on 20 February, 2007 and the matter was first mentioned in court on 22/2/2007 and adjourned to 5 March, 2007 (See page 34 of the records).

B Learned counsel for the appellants addressed the court on 20 March, 2007 and stated as follows:

C **“I humbly remind the court that I had moved my application before the respondents filed a counter affidavit which necessitated our filling a further affidavit**

D **in an attempt of the respondents to justify the unlawful detention of the applicants, they ran to court. This was after 9 months of detention. The arraignment of the applicants cannot derogate from the fact that their rights have been infringed upon by the respondents”.** (See p. 39 of the records).

E The counter-affidavit filed by the respondents did not contradict the facts which learned counsel for the appellants stated in his address. There was no need to call for oral evidence since there was no conflict in the affidavits filed and the respondents are deemed to have admitted the facts contained in the affidavit in support of the motion. See **Arm vs. Nwobodo (2013) 10 NWLR (pt. 1362) 374**. The view by the court below that even if the affidavit evidence was not challenged, the trial court was expected to examine whether or not the unchallenged evidence was sufficient to establish the claims of the plaintiffs does not reflect the true legal position and it is therefore erroneous. The appellants were entitled to award of compensation once they established that they were unlawfully arrested and detained. It was wrong for the lower court to insist on the appellants proving that they were entitled to N500,000.00 which they claimed for the illegal arrest and detention which they suffered.

I My learned brother Galinje JSC addressed the issue about the award of damages to the appellants. I entirely agree that they are entitled to the N500,000.00 and even more. This is an appropriate case in which the trial judge should have awarded exemplary damages to the

A applicants/appellants. It is for this reason and the more explicit reasons contained in the judgment of my learned brother, Galnje JSC that I found the appeal to be meritorious and consequently allowed it. I abide by the order on costs contained in the leading judgment.

B I wish to observe in passing that we cannot be heard to complain of ill-treatment of our nationals outside this country if our law enforcement agencies behave as an army of occupation towards the citizens of this country and within our borders.

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K. B. AKA' AHS
Justice, Supreme Court

D **ADAMU AUGIE, (JSC):** I have had a preview of the judgment just handed out by my learned brother – Galinje, JSC. For the above reasons and of course the detailed ones carefully set out in the lead judgment, I, too agree that the appellants are entitled to the claim of N500,000.00 and also N400,000.00 being cost of prosecuting this appeal. Appeal allowed in part.

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Amina Adamu Augie, JSC
Justice, Supreme Court.

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**ADEYEMO ABIODUN
AND
FEDERAL REPUBLIC OF NIGERIA
SC.531/2016**

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 2ND FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

**OLUKAYODE ARIWOOLA
KUMAI BAYANGAKA' AHS
AMINA ADAMU AUGIE
EJEMBI EKO
PAUL ADAMU GALINJE**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

APPEAL: Brief writing – Reply brief – Purpose

COURT: Dispensation of justice – Whether substantial justice cannot be done by reliance on technicalities – Proper approach of court to doing justice.

COURT: Documents in custody of court – Whether entitled to look into such documents in its record to determine the justice of the case.

COURT: Power of Court of Appeal to evaluate evidence – S.15 Court of Appeal Act – Whether Supreme Court cannot interfere with deductions made by the Court of Appeal from its evaluation of evidence.

CRIMINAL LAW AND PROCEDURE: Offence under counterfeit and fake drugs and unwholesome processed food (Miscellaneous Provision) Act 2004 – Elements – What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: Proof of 'intention' under Miscellaneous offences Act Cap M17 LFN 2004 – Onus of proof – How discharged.

EVIDENCE: Expert evidence – Nature and purport.

PRACTICE AND PROCEDURE: Exercise of judicial discretion – Attitude of an appellate court thereto – Guiding principles.

WORDS AND PHRASES: Intention – Meaning – S. 1(18)(a)(ii) of Miscellaneous Offences Act.

Issue for Determination

- (1) Whether the reliance of the lower court on grounds other than those contained within the judgment of the trial court in affirming the conviction of the appellant for sale of dangerous drugs amounts to a denial of the appellant's right of fair hearing.**
- (2) Whether the lower court relied on unproven assumptions and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name “my pikin” are the ones manufactured by the 3rd accused; thereby occasioning a miscarriage of justice.**
- (3) Whether the lower court was right, in affirming the trial court's exercise of discretion, imposing an excessive prison sentence on the appellant, in the absence of any reason or basis for the discretion.**
- (4) Whether the lower court failed to consider the issues properly canvassed before them, and thereby occasioned a miscarriage of justice.**
- (5) Whether the lower court erred in arriving at the conclusion that the unsworn statement of DW1 amounted to an admission of guilt.**
- (6) Whether the lower court erred in finding the appellant liable for sale of dangerous drugs despites reversing the decision of the trial court which found the appellant guilty of conspiracy to sell dangerous drug.**

Facts of the Matter

The appellant herein along with one other accused person and Barewa Pharmaceutical Limited were arraigned before the Federal High Court, Lagos on a six counts amended charge for various offences under Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C 34 Laws of the Federation of Nigeria 2004, and Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004. The appellant and his co-accused pleaded not guilty to the charge, in order to prove its case the prosecution called seven witnesses and tendered several documents that were admitted in evidence. The appellant who was the 2nd accused person at the trial court was the only witness called by the defence and he testified as DW1. At the end of the trial, and in a reserved and considered judgment, delivered on the 17th May, 2013, Okeke J found the appellant and the two other accused persons guilty of the offence under counts 3 and 4 of the amended charge and they were all convicted accordingly. Appellant and the 2nd convict were sentenced to seven (7) years imprisonment on each of the two counts, and the sentences were ordered to run concurrently. The 3rd convict being a company was sentenced as charged and it was ordered to be wound up and its assets forfeited to the Federal Government of Nigeria. They were however acquitted and discharged from the remaining counts.

Being aggrieved with the decision of the trial court, the appellant appealed to the Court of Appeal. The appeal was heard and in a reserved and considered judgment delivered on the 31st of May, 2016, the conviction and sentence of the appellant on count 3 were set aside while the conviction and sentence on count 4 were affirmed. Once again the appellant is dissatisfied with the affirmation of the conviction and sentence on count 4 and has further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Element of the offence of counterfeit and fake drug*
For the prosecution to succeed in establishing the offence under the

section referred to above, it must prove beyond reasonable doubt the following ingredients:

- 1. That the accused dealt in, sold, offered for sale or exposed any of the products mentioned in the section aforesaid which is not of the quality substance, nature or efficacy which he represents it to be.**
- 2. That the accused compromised in the manufacture and/or processing those products which are represented by the sellers as the authentic products which they ought to be.**
- 3. That because of the compromising attitude of the accused in the manufacturing or processing of the products, they have been rendered noxious, dangerous or unfit for human use.**

Count 4 under which the appellant stands convicted and sentenced does not accuse the appellant of manufacturing or processing of the drugs. The 2nd and 3rd ingredients of the offences for which the appellant were arraigned before the trial court as enumerated above are irrelevant in the circumstances of this appeal.

The respondent neither cross appealed against the decision of the trial court when it discharged the appellant from all other charges, except counts 3 and 4 nor did it appeal against the decision of the lower court. The narrow issues left for this court to determine is whether the conviction of the appellant on count 4 as confirmed by the lower court is proper in the circumstance. (Pp 54–55 Paras G–F)

2. *The purpose of a reply brief*

The reply brief is a repeat of the appellant's argument in his brief of argument. It is therefore needless to consider it as the essence of a reply brief is to give the appellant an opportunity to react to new issues in the respondent's brief of argument. (P 56 Paras G–F)

3. *The lower court did not rely on the evidence of Pw1*
I wish to start by saying that there is nowhere in the judgment of the lower court where reliance was placed on the evidence of PW1 in considering the findings/decision of the trial court. The lower court merely stated that the evidence of PW1 was unchallenged and it was a background information to the problems of the appellant. This comment did not amount to placing reliance on the evidence of PW1. The fact that the lower court made reference to the evidence of PW1 is part of its responsibility to look into any document in its record in order to support established facts. The lower court's consideration as to whether the finding of fact by the trial court that the drug, "My Pikin Baby Teething Mixture Batch 02008" was indeed dangerous was based on the lower court's assessment of the evidence of PW4, PW5, PW6 and PW7. This is clearly demonstrated in the judgment of the court.
(Pp 56–57 Paras H–C)
4. *Court entitled to look into any document in its custody in order to arrive at a just decision*
The lower court was entitled to look into any document in its record and make use of it in order to arrive at a just decision. When a document is in the record of the court, it cannot be a new issue on which a judge is precluded from looking at. This court has in a number of decided cases held that a court of law is entitled to look into its record and make use of any document it considers relevant in determining issues before it. See *Fumudoh vs. Aboro* (1991) 9 NWLR (Pt. 214) 2010 at 229; *Agbareh&Anor vs. Mimra& 2 Ors* (2008) 2 NWLR (Pt. 1071) 378 at 411 – 412; *Badejo vs. Minister of Education* (1996) 9-10 SCNJ 51. *(Pp 57–58 Paras G–A)*.
5. *Power of Court of Appeal to evaluate evidence under S.15 of Court of Appeal Act.*
I do not agree with the learned counsel that the lower court went beyond the scope of its jurisdiction. By Section 15 of the Court of Appeal Act, the lower court had full jurisdiction over the whole

proceedings in this matter as if the proceedings had been instituted before it as a court of first instance, and by doing so, a conclusion arrived at on the strength of the evidence before the trial court, cannot be said to be a new case. In the course of evaluation of evidence, a court of law is entitled to make deductions from the evidence before the court which deduction may result in conclusions based on proper appraisal of that evidence. Where deductions are based on the evidence before the trial court by the lower court this court has no reasons to interfere with such deductions. See *Cyracus Nnadozie & Ors vs. Nze Ogbunelu Mgbagwu* (2008) 3 NWLR (Pt. 1074) 363 at 387. The deduction by the lower court that PW4 could only collect what he had supplied to the distributors accord with common sense and was based on the evidence before the court. I am therefore of the firm view that the lower court was right in its pronouncements as highlighted at pages 788 789 of the record. (Pp 59–60 Paras H–D)

6. *The inference made by the lower court is proper*
On Exhibit M, the fact that Barewa Pharmaceutical Ltd had given instruction through Exhibit M for the withdrawal of the drug “My Pikin” is a clear admission that there was something wrong with the drug. The inference by the lower court to that effect was well founded as the letter Exhibit M was written and dispatched before the instruction from PW2. (P 60 Paras D–E)

7. *Minor discrepancies that did not occasion miscarriage of justice*
Per Galinje (JSC)

“The contradiction highlighted in the testimony of PW7 and the actual drug that was presented for analysis is human. In absence of any discrepancies in the testimonies of witnesses it will be presumed that the witnesses are tutored to give such evidence.

For such contradiction to affect the credibility of a case, it must be shown that it is weighty and same has occasioned a miscarriage of justice. The overwhelming evidence has clearly shown that the drug that was packaged and sent for analysis was “My Pikin Teething Mixture.” Learned counsel in presentation of the appellant's case seems to rely on pieces of extracts from the decision of the lower court. I am of the firm view that the procedure adopted by the learned counsel cannot help his client. The case before the trial court that has rolled up to this court is that the appellant sold drug that was dangerous to the public. No amount of hiding under legal technicality, by finding fault with the discrepancies in the procedure before the lower court can change the course of this case. The dictates of justice command that the guilty be punished and the innocent be set free after a fair hearing under procedural regularity which does not permit the acquittal of an otherwise guilty person upon fanciful errors contained in the proceedings. The law always aims at substantial justice. The court is more interested in substance than in form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See *Ogbomor vs. State* (1985) 1 NWLR (Pt. 2) 223; *State vs. Gwonto* (1983) 1 SCNLR 142; *Bature vs. State* (1994) 1 NWLR (Pt. 320) 267; *State vs. Salawu* (2011) 1 NWLR (Pt. 1279) 883. (Pp 60–61 Paras F–C).

8. *Appellants failed to discharge onus of proof*

The overwhelming evidence before the trial court showed that the drug “My Pikin Teething Mixture” is a product manufactured by Barewa Pharmaceutical Ltd, which has sole ownership of the name.

The responsibility to establish that other companies or individuals can share in the brand name of the drug rested with the appellant and his co-accused. Appellant's failure to do so, had removed any unwarranted speculation that the drug received at NAFDAC laboratory was a counterfeited version of the 3rd

respondent's product. I am also of the view that the lower court never made a case for the parties. The 2nd issue is therefore resolved against the appellant and in favour of the respondent.

(P 61 Paras C–F).

9. *Appellant indicted in the sale of dangerous drug*

The evidence before the trial court clearly shows that Barewa Pharmaceutical Company Ltd did sell the drug “My Pikin Teething Mixture” to Roca Pharmacy for consumption by the public. Laboratory analysis shows that the drug contained Diethylene Glycol which according to expert is dangerous.

Laboratory analysis were carried out by PW6 and PW7 who gave their qualifications and their pieces of evidence were believed by the trial Judge and such belief was confirmed by the Court of Appeal. *(P 62 Paras D–F)*

10. *The nature and purport of expert evidence*

PW6 and PW7 were called as expert witnesses. An expert is a person who is specially skilled in the field which he is giving evidence, and whether or not a witness can be regarded as an expert is a question of law for the judge to decide. Expert opinion is only necessary where the expert can furnish the court with scientific or other information of a technical nature that is likely to be outside the experience and knowledge of the Judge. The evidence of PW6 and PW7 is very clear. The drug My Pikin Teething Mixture is dangerous.

(P 62 Paras F–H)

Per Galinje (JSC):

“In selling the drug to Roca Pharmacy, was the appellant under any duty of care at all to observe the quality of the product it was selling, if he was under a duty of care did he observe the standard required in the circumstances of the case. Was there evidence of trial of the

drug before releasing same to the public for consumption? In the instant case the appellant's failure to state the kind of precautions it took to avoid selling contaminated drug to Roca Pharmacy amount to a breach of duty. The appellant has failed to show that he had no intention to sell adulterated drug for public consumption.

Learned counsel for the appellant cited Section 1(18)(a)(ii) of the Miscellaneous Offences Act and submitted that there was no proof that the appellant had any intention to sell adulterated drugs to the public. Section 1(18)(b)(i) of the Act provides as follows:

“When ever any person is charged under the preceding paragraph (a) (ii), it shall be a defence if he can establish that he did not know or had no reason to know or believe that, petroleum product, food, drink, drug, medical preparation or manufactured or processed product has been adulterated or otherwise rendered noxious dangerous or unfit”. (Pp 62–63 Paras H–D)

11. *Meaning of intention and how proved*

Intention is defined by the Black's Law Dictionary 6th Edition as a determination to act in a certain way or to do a certain thing. A state of mind in which a person seeks to accomplish a given result through a course of action. Intention therefore is a mental attitude which can seldom be proved by direct evidence but can be proved by circumstances from which it may be inferred. Section 1(18)(b)(i) of the Act places the burden of proof of lack of intention on the person that is charged with the offence. The appellant throughout has failed to show that he had no intention to sell adulterated drug to Roca Pharmacy for public consumption. The lower court in my view rightly upheld the decision of the trial court on the grounds that the prosecution proved its case beyond reasonable doubt. This issue is resolved in favour of the respondent and against the appellant. (P 63 Parass E–H)

12. *Attitude of an appellate court to exercise of discretion by the trial court*
The law is settled that where the decision of a trial court is substantially based on the exercise of discretion, an appellate court will not interfere with the discretion unless the trial court failed to exercise its discretion judiciously or judicially.

In the instant case, the exercise of trial court's discretion with regard to the sentence it passed was neither frivolous nor arbitrary. Since discretion is always unfettered, this court cannot take steps to fetter such discretion, except for good and substantial reasons. See *Ache Builders Ltd vs. K.S.W.B* (1999) 2 NWLR (Pt. 590) 288; *Chigbu vs. Tonimas (Nig) Ltd* (1999) 32 NWLR (Pt. 593) 115; *University of Lagos vs. Olaniyan (No. 1)* (1985) 1 NWLR (Pt. 1) 156; *Hamza vs. Kure* (2010) 10 NWLR (Pt. 1203) 630. For the reasons I have alluded to herein, I decline to interfere with the sentence imposed on the appellant. (P 65 Paras C–F)

13. *Attitude of the Supreme Court to concurrent findings*
The appeal herein is against the concurrent findings of the trial court and the Court of Appeal with respect to the 4th count of the charge upon which the appellant was tried and convicted. It is therefore not in the character of this court to interfere with such findings. Issues 4 and 5 have been subsumed into my consideration of other issues and I do not need to repeat myself.

Having resolved the vital issues against the appellant, this appeal shall be and it is hereby dismissed. The judgment of the trial court with respect to the 4th count of the charge, as affirmed by the Court of Appeal is further affirmed by me. (P p 65–66 Paras G–A)

Nigerian Cases Cited

Ache Builders Ltd vs. K.S.W.B (1999) 2 NWLR (Pt. 590) 288;
Agbareh & Anor vs. Mimra & 2 Ors (2008) 2 NWLR (Pt. 1071) 378;
Badejo vs. Minister of Education (1996) 9-10 SCNJ 51.
Bature vs. State (1994) 1 NWLR (Pt. 320) 267;
Chigbu vs. Tonimas (Nig) Ltd (1999) 32 NWLR (Pt. 593) 115;

- A** *Cyracus Nnadozie & Ors vs. Nze Ogbunelu Mgbagwu (2008) 3 NWLR (Pt. 1074) 363.*
Fumudoh vs. Aboro (1991) 9 NWLR (Pt. 214) 2010;
Hamza vs. Kure (2010) 10 NWLR (Pt. 1203) 630.
- B** *Ogbomor vs. State (1985) 1 NWLR (Pt. 2) 223;*
State vs. Gwonto (1983) 1 SCNLR 142;
State vs. Salawu (2011) 1 NWLR (Pt. 1279) 883.
University of Lagos vs. Olaniyan (No. 1) (1985) 1 NWLR (Pt. 1) 156;

C

Nigerian Statutes Cited

Court of Appeal Act Section 15

The Miscellaneous Offences Act 2004 Section 1(18)(a)(ii)

D Representation

MR. OSARO EGHOBAMIEN, (SAN) and Mr. Pius Owhoavwodua for the appellant.

CHIEF MIKE OZEKHOME (SAN) with Godwin Iyinbor (Esq.);

E Kasiemobi Oramigo (Esq.); Harrison Obi (Esq) and Miss Uche Oluchi Vivian for the respondent.

- ADAMU GALINJE, (JSC) (Delivering the Lead judgment):** The
- F** appellant herein along with one other accused person and Barewa Pharmaceutical Limited were arraigned before the Federal High Court, Lagos on a six counts amended charge for various offences under Counterfeit and Fake Drugs and Unwholesome Processed Foods
- G** (Miscellaneous Provisions) Act Cap C 34 Laws of the Federation of Nigeria 2004, and Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004. The appellant and his co-accused pleaded not guilty to the charge, in order to prove its case the prosecution called seven
- H** witnesses and tendered several documents that were admitted in evidence. The appellant who was the 2nd accused person at the trial court was the only witness called by the defence and he testified as DW1. At the end of the trial, and in a reserved and considered judgment, delivered on the 17th May,
- I** 2013, Okeke J found the appellant and the two other accused persons guilty of the offence under counts 3 and 4 of the amended charge and they were all

A convicted accordingly. Appellant and the 2nd convict were sentenced to seven (7) years imprisonment on each of the two counts, and the sentences were ordered to run concurrently. The 3rd convict being a company was sentenced as charged and it was ordered to be wound up and its assets

B forfeited to the Federal Government of Nigeria. They were however acquitted and discharged from the remaining counts.

Being aggrieved with the decision of the trial court, the appellant appealed to the Court of Appeal. The appeal was heard and in a reserved and considered judgment delivered on the 31st of May, 2016, the conviction and sentence of the appellant on count 3 were set aside while the conviction and sentence on count 4 were affirmed. Once again the appellant is dissatisfied with the affirmation of the conviction and sentence on count 4.

D Being aggrieved, he has brought this appeal. His notice of appeal at pages 815 to 826 dated 20th June, 2016 and filed on the 21st of June, 2016 contains 17 grounds of appeal.

Parties filed and exchanged briefs of argument. The appellant's amended brief of argument settled by **OGHENERO E.L IDEH ESQ** of counsel to the appellant is dated and filed on the 16th January, 2017, but deemed filed on the 9th of February, 2017. Learned appellant's counsel submitted six issues for determination of this appeal, and they read as follows:

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- (1) Whether the reliance of the lower court on grounds other than those contained within the judgment of the trial court in affirming the conviction of the appellant for sale of dangerous drugs amounts to a denial of the appellant's right of fair hearing.**
- (2) Whether the lower court relied on unproven assumptions and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name "my pikin" are the ones manufactured by the 3rd accused; thereby occasioning a miscarriage of justice.**
- G**
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- A** **(3) Whether the lower court was right, in affirming the trial court's exercise of discretion, imposing an excessive prison sentence on the appellant, in the absence of any reason or basis for the discretion.**
- B** **(4) Whether the lower court failed to consider the issues properly canvassed before them, and thereby occasioned a miscarriage of justice.**
- C** **(5) Whether the lower court erred in arriving at the conclusion that the unsworn statement of DW1 amounted to an admission of guilt.**
- (6) Whether the lower court erred in finding the appellant liable for sale of dangerous drugs despites reversing the decision of the trial court which found the appellant guilty of conspiracy to sell dangerous drug.**
- D**
- E** The respondent's brief of argument settled by **Chief Mike Ozekhome, SAN OFR, FCIArb, LLD**, learned senior counsel for the respondent is dated and filed on the 24th March, 2017, but deemed filed on the 6th April, 2017. Learned senior counsel equally formulated six issues for
- F** determination of this appeal. I reproduced these issues hereunder as follows:
- G** **1. Whether there were reliance on other grounds by the lower court other than those contained in the judgment of the trial court in affirming the conviction of the appellant for sale of dangerous drugs, such as can be said to amount to a denial of fair hearing.**
- H** **2. Whether from the facts and circumstances of the case the lower court went beyond the scope of its jurisdiction to rely on the testimony of W4 in reaching the conclusion that the products with the brand name 'my pikin' were those manufactured by**
- I**

- A** **the 3rd accused.**
- B** **3. Whether arising from the facts and circumstances of this case the lower court was right in affirming the trial court's exercise of discretion in imposing a seven years sentence on the appellant upon his conviction on count 4 of the charge sheet and if same was excessive, and is the plea of mistake available to the appellant.**
- C** **4. Whether the lower court failed to consider the issues properly canvassed before it to have occasioned a miscarriage of justice.**
- D** **5. Whether the lower court erred in arriving at the conclusion that the unsworn statement of DW1 amounted to an admission of guilt.**
- E** **6. Whether the lower court was right in finding the appellant liable for sale of dangerous drugs despite reversing the decision of the trial court which found the appellant guilty of conspiracy to sell the same drugs.**
- F** Learned counsel for the appellant prepared a reply brief dated and filed on the 5th of April, 2017.
- G** The issues distilled by both parties for determination of this appeal are similar. It is the appellant who is complaining against the judgment of the lower court. It is therefore proper that I consider this appeal on the basis of the issues submitted by the appellant. Accordingly I will adopt the issues formulated for the appellant in the determination of this appeal. Before I do that I will set out in brief the facts of this case in the context of the count 4 for
- H** which the appellant stands convicted. That count 4 reads:
- I** **“That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1 5 Olugbo Close, Shasha Road Akuwonjo, Lagos State within the jurisdiction of this Honourable Court on or about October,**

A 2008 sold dangerous drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos which did not represent the quality you represented it to be and you thereby committed an offence contrary to Section 1 (18) (a) (ii) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004.”

C The appellant who was the 2nd accused person at the trial court is a management staff of Barewa Pharmaceutical Limited that was the 3rd accused at the trial court. The appellant and the remaining accused persons were accused of selling dangerous drugs called **My Pikin** to Roca Pharmacy for distribution to the public knowing fully well that the quality of the drugs did not represent what they claimed it to be. Section 1 (18) (a)(ii) under which the appellant was convicted and sentenced to seven (7) years imprisonment provides as follows:

E Any person who deals in, sell, offers for sale or otherwise expose for sale any petroleum product, food, drink, drug, medical preparation or manufactured or processed product which is not of the quality, substance, nature or efficacy expected of the product or preparation, or is not of the quality substance, nature or efficacy which the seller represents it to be, or has in any way been rendered or has become noxious, dangerous or unfit, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding ten (10) years.”

H For the prosecution to succeed in establishing the offence under the section referred to above, it must prove beyond reasonable doubt the following ingredients:

I 1. That the accused dealt in, sold, offered for sale or exposed any of the products mentioned in the section

- A** aforesaid which is not of the quality, substance, nature or efficacy which he represents it to be.
- B** 2. That the accused compromised in the manufacture and/or processing those products which are represented by the sellers as the authentic products which they ought to be.
- C** 3. That because of the compromising attitude of the accused in the manufacturing or processing of the products, they have been rendered noxious, dangerous or unfit for human use.

D Count 4 under which the appellant stands convicted and sentenced does not accuse the appellant of manufacturing or processing of the drugs. The 2nd and 3rd ingredients of the offences for which the appellant were arraigned before the trial court as enumerated above are irrelevant in the circumstances of this appeal.

E The respondent neither cross appealed against the decision of the trial court when it discharged the appellant from all other charges, except counts 3 and 4 nor did it appeal against the decision of the lower court. The narrow issues left for this court to determine is whether the conviction of the appellant on count 4 as confirmed by the lower court is proper in the circumstance.

F On the first issue for determination of this appeal, learned counsel's quarrel is against the finding of the lower court at pages 788 of the printed record of this appeal where it held thus:

G

H **"I read carefully the cross examination of PW1 which is at pages 140 to 151 of the printed record. Her evidence was unchallenged. The genesis of the problems of the appellant and his co-accused are consequently as set out in the evidence of PW1. With that background information we can now go on to consider whether the finding of fact by the lower court that the drug My Pikin Baby Teething Mixture batch 02008 was indeed dangerous can be faulted."**

I

- A** According to the learned counsel, the lower court fell into a grave error in relying on the evidence of **PW1** in considering the decision of the trial court when the trial court declined to rely on the evidence of **PW1** in arriving at its decision. It is learned counsel's contention that the lower court's reliance
- B** on the evidence that was not relied upon by the trial court was a new issue which was raised by the lower court *suo motu* and parties were required to address the court on the new issue. In aid learned counsel cited **Bhojsons Plc vs. Daniel Kalio (2006) 5 NWLR (Pt. 973) 330 at 351; Aermacchi SPA vs. A.I.C. Ltd (1986) 2 NWLR (Pt. 23) 443 at 449; Kuti vs. Balogun (1978) 1 Sc 53 at 60; Iri vs. Erhurhobara (1991) 2 NWLR (Pt. 173) 252 at 265; Ndiwe vs. Okocha (1992) 7 NWLR (Pt. 252) 129 at 139; Iyaji vs. Eyrgebe (1987) NWLR(Pt. 61) 523; Victino Fixed Odds Ltd vs. Ojo (2010) 8 NWLR (Pt.1197) 487.**

Finally learned counsel urged this court to hold that the appellant was denied fair their hearing by the lower court, when he was not invited to address the court on its reliance on the evidence of **Pw1**.

- E** In reply, learned senior counsel for the respondent submitted that there was no reliance on other grounds by the lower court in affirming the conviction of the appellant for the sale of dangerous drugs other than those contained in the judgment of the trial court. Learned senior counsel on the
- F** authorities of **Ado Ibrahim & Company Ltd vs. Bendel Cement Co. Ltd (2007) 7 LPELR 188 (SC) and Estisione Nig. Ltd & Anor vs. Osun State Government & Anor (2012) LPELR – 7938 (CA)** submitted that the evidence of **PW1** was part of the record of the lower court and as such it was
- G** entitled to look into its record and make use of any document it considers relevant in determining the issue before it.

The reply brief is a repeat of the appellant's argument in his brief of argument. It is therefore needless to consider it as the essence of a reply

H brief is to give the appellant an opportunity to react to new issues in the respondent's brief of argument.

- I wish to start by saying that there is nowhere in the judgment of the lower court where reliance was placed on the evidence of **PW1** in
- I** considering the findings/decision of the trial court. The lower court merely stated that the evidence of **PW1** was unchallenged and it was a background

- A** information to the problems of the appellant. This comment did not amount to placing reliance on the evidence of **PW1**. The fact that the lower court made reference to the evidence of **PW1** is part of its responsibility to look into any document in its record in order to support established facts.
- B** The lower court's consideration as to whether the finding of fact by the trial court that the drug, “**My Pikin Baby Teething Mixture Batch 02008**” was indeed dangerous was based on the lower court's assessment of the evidence of **PW4, PW5, PW6** and **PW7**. This is clearly demonstrated in
- C** the judgment of the court at page 788 of the record in the following words:-

- “With that background information we can now go on to consider whether the finding of fact by the lower court, that the drug “My Pikin Teething Mixture batch 02008 was indeed dangerous can be faulted. It was argued for the appellant that the lower court in convicting the appellant on counts 3 and 4 relied on the evidence of PW4, PW5, PW6 and PW7 when their evidence failed to meet the required scientific standard for such conviction.”**
- D**
- E**

- The testimonies of **PW4 – PW7** were reproduced and after a thorough
- F** consideration, the lower court came to conclusion that the sample of batch 02008 of the drug “**My Pikin Teething Mixture,**” was contaminated with the contaminant Diethylene Glycol. I therefore agree with learned senior counsel for the respondent that there was no reliance on other grounds or
- G** the evidence of **PW1** by the lower court in affirming the conviction of the appellant for sale of dangerous drugs other than those contained in the judgment of the lower court and the issues raised before it.

- The lower court was entitled to look into any document in its record
- H** and make use of it in order to arrive at a just decision. When a document is in the record of the court, it cannot be a new issue on which a judge is precluded from looking at. This court has in a number of decided cases held that a court of law is entitled to look into its record and make use of any
- I** document it considers relevant in determining issues before it. See **Fumodoh vs. Aboro (1991) 9 NWLR (Pt. 214) 2010 at 229; Agbareh &**

A Anor vs. Mimra & 2 Ors (2008) 2 NWLR (Pt. 1011) 378 at 411 – 412; Badejo vs. Minister of Education (1996) 9-10 SCNJ 51.

The pagination of the record of appeal is so disjointed. The testimony of **PW1** is found at pages 134- 151. It is therefore part of the record of

B appeal and the lower court only made use of it to support the fact of the case. The first issue is accordingly resolved against the appellant. The 1st, 2nd, 3rd and 16th grounds of appeal upon which the issue is formulated are hereby dismissed.

C The 2nd issue is whether the lower court relied on unproven assumptions and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name “**MY PIKIN**” are the ones manufactured by the 3rd accused, thereby

D occasioning a miscarriage of justice. In arguing this issue, learned counsel for the appellant made reference to several extracts from the judgment of the lower court and concluded as follows:

- E** (1) **That the lower court acted as a trial court.**
- (2) **That the lower court misdirected itself with respect to Exhibit M, which was a letter written by Barewa Pharmaceuticals Ltd in which it instructed Roca Pharmacy to stop the sale of my Pikin baby teething mixture.**
- F** (3) **That the lower court's finding that the appellant did not deny manufacturing and sale of the drug runs contrary to the record of appeal, where the trial court never considered the evidence of Dw1.**
- G** (4) **That the lower court had erred first of all in speculating and affirming the integrity of the products retrieved from “wholesalers around in the absence of any pronouncement or finding to that effect by the learned trial judge.**
- H** (5) **That there was mistaken identity of 'My Pikin'.**
- I** (6) **That the holding of the court that the accused**

A **persons did not present their own set of drug sample to contradict or disprove the authenticity and accuracy of Exhibit R is contrary to the records before it.**

B

Finally on this issue learned counsel submitted that the learned justices of the Court of Appeal failed to avert their minds to the fact that they are bound by the records of appeal, and where an issue was not in contest between the parties at the lower court, the appellate court cannot open a new issues in its judgment, particularly where the parties were not given an opportunity to address the court on such issue.

C The passages quoted by learned counsel for the appellant have to do with the analysis of the evidence of **PW4**, where the lower court made the following observations at pages 789 – 790 of the record as follows:

E **“Five cartons of batch 02008 were amongst the drugs retrieved by PW4 from wholesalers around to whom they had supplied the drug. It is obviously unlikely that PW4 will collect what he did not supply, and equally unlikely that the wholesalers would release to PW4 goods not purchased from him. There is no reason for a trader to offer up to PW4 drugs not purchased from PW4.... The company alone manufactures products with the brand name no other pharmaceutical company in Nigeria manufacturers products bearing that brand name.**

G **.....The identities of the wholesalers and individual sampling of what was retrieved from them are consequently irrelevant under the circumstances.”**

H These are the passages which learned counsel for the appellant accused the lower court of acting as a trial court and delved into needles speculation. I do not agree with the learned counsel that the lower court went beyond the scope of its jurisdiction. By Section 15 of the Court of Appeal Act, the

- A** lower court had full jurisdiction over the whole proceedings in this matter as if the proceedings had been instituted before it as a court of first instance, and by doing so, a conclusion arrived at on the strength of the evidence before the trial court, cannot be said to be a new case. In the course of
- B** evaluation of evidence, a court of law is entitled to make deductions from the evidence before the court which deduction may result in conclusions based on proper appraisal of that evidence. Where deductions are based on the evidence before the trial court by the lower court this court has no
- C** reasons to interfere with such deductions. See **Cyracus Nnadozie & Ors vs. Nze Ogbunelu Mgbagwu (2008) 3 NWLR (Pt. 1074) 363 at 387**. The deduction by the lower court that **PW4** could only collect what he had supplied to the distributors accord with common sense and was based on
- D** the evidence before the court. I am therefore of the firm view that the lower court was right in its pronouncements as highlighted at pages 788 – 789 of the record.

E On **Exhibit M**, the fact that Barewa Pharmaceutical Ltd had given instruction through **Exhibit M** for the withdrawal of the drug “**My Pikin**” is a clear admission that there was something wrong with the drug. The inference by the lower court to that effect was well founded as the letter **Exhibit M** was written and dispatched before the instruction from **Pw2**.

F The contradiction highlighted in the testimony of **PW7** and the actual drug that was presented for analysis is human. In absence of any discrepancies in the testimonies of witnesses it will be presumed that the witnesses are tutored to give such evidence.

G For such contradiction to affect the credibility of a case, it must be shown that it is weighty and same has occasioned a miscarriage of justice. The overwhelming evidence has clearly shown that the drug that was packaged and sent for analysis was “**My Pikin Teething Mixture.**”

H Learned counsel in presentation of the appellant's case seem to rely on pieces of extracts from the decision of the lower court. I am of the firm view that the procedure adopted by the learned counsel cannot help his client. The case before the trial court that has rolled up to this court is that

I the appellant sold drug that was dangerous to the public. No amount of hiding under legal technicality, by finding fault with the discrepancies in

- A** the procedure before the lower court can change the course of this case. The dictates of justice command that the guilty be punished and the innocent be set free after a fair hearing under procedural regularity which does not permit the acquittal of an otherwise guilty person upon fanciful errors
- B** contained in the proceedings. The law always aims at substantial justice. The court is more interested in substance than in form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See **Ogbomor vs. State (1985) 1 NWLR (Pt. 2) 223; State vs. Gonto (1983) 1 SCNLR 142; Bature vs. State (1994) 1 NWLR (Pt. 320) 267; State vs. Salawu (2011) 1 NWLR (Pt. 1279).**

C Finally on this issue, the overwhelming evidence before the trial court showed that the drug “**My Pikin Teething Mixture**” is a product

D manufactured by Barewa Pharmaceutical Ltd, which has sole ownership of the name.

The responsibility to establish that other companies or individuals can share in the brand name of the drug rested with the appellant and his co-

E accused. Appellant's failure to do so, had removed any unwarranted speculation that the drug received at NAFDAC laboratory was a counterfeited version of the 3rd respondent's product. I am also of the view that the lower court never made a case for the parties. The 2nd issue is

F therefore resolved against the appellant and in favour of the respondent.

The next issue I wish to consider is the 6th issue for determination of this appeal. Learned counsel for the appellant submitted that the appellant and the other persons that were charged along with him had no intention to

G sell dangerous drug to the public. According to the learned counsel for an accused to be found liable under Section 1(18)(a)(ii) of the miscellaneous Offences Act it must be shown that he intended to commit the offences enumerated under that section.

H In reply, learned senior counsel for the respondent enumerated the ingredients of the offence for which the appellant was charged, tried and convicted and submitted that intention to sell the drug, subject matter of this case is not an ingredients of the substantive offence for which the appellant

I was convicted. The three ingredients as enumerated by learned counsel are:

- A** **1. Proof that the drug was contaminated.**
 2. Proof that the appellant sold the adulterated drug.
 3. Proof that the product is not of the quality, expected
B **of the producer or is not of the quality, substance,**
 nature or efficacy which the seller represents it to be,
 or has in anyway been rendered or has become
 noxious, dangerous or unfit.

- C** It is learned senior counsel's contention that the prosecution has proved all the ingredients of the offence and the lower court was right when it affirmed the decision of the trial court with respect to the charge of selling dangerous drug to the public. Learned senior counsel urged this court to dismiss the
D appeal.

- The evidence before the trial court clearly shows that Barewa Pharmaceutical Company Ltd did sell the drug “**My Pikin Teething Mixture**” to **Roca Pharmacy** for consumption by the public. Laboratory
E analysis shows that the drug contained **Diethylene Glycol** which according to expert is dangerous.

- Laboratory analysis were carried out by **PW6** and **PW7** who gave their qualifications and their pieces of evidence were believed by the trial
F Judge and such belief was confirmed by the Court of Appeal. **PW6** and **PW7** were called as expert witnesses. An expert is a person who is specially skilled in the field which he is giving evidence, and whether or not a witness can be regarded as an expert is a question of law for the judge to
G decide. Expert opinion is only necessary where the expert can furnish the court with scientific or other information of a technical nature that is likely to be outside the experience and knowledge of the Judge. The evidence of **PW6** and **PW7** is very clear. The drug **My Pikin Teething Mixture** is
H dangerous.

- In selling the drug to Roca Pharmacy, was the appellant under any duty of care at all to observe the quality of the product it was selling, if he was under a duty of care did he observe the standard required in the
I circumstances of the case. Was there evidence of trial of the drug before releasing same to the public for consumption? In the instant case the

A appellant's failure to state the kind of precautions it took to avoid selling contaminated drug to Roca Pharmacy amount to a breach of duty. The appellant has failed to show that he had no intention to sell adulterated drug for public consumption.

B Learned counsel for the appellant cited Section 1(18)(a)(ii) of the Miscellaneous Offences Act and submitted that there was no proof that the appellant had any intention to sell adulterated drugs to the public. Section 1(18)(b)(i) of the Act provides as follows:

C

“Whenever any person is charged under the preceding paragraph (a) (ii), it shall be a defence if he can establish that he did not know or had no reason to know or believe that, petroleum product, food, drink, drug, medical preparation or manufactured or processed product has been adulterated or otherwise rendered noxious dangerous or unfit”.

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Intention is defined by the Black's Law Dictionary 6th Edition as a determination to act in a certain way or to do a certain thing. A state of mind in which a person seeks to accomplish a given result through a course of action. Intention therefore is a mental attitude which can seldom be proved by direct evidence but can be proved by circumstances from which it may be inferred. Section 1(18)(b)(i) of the Act places the burden of proof of lack of intention on the person that is charged with the offence. The appellant

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throughout has failed to show that he had no intention to sell adulterated drug to Roca Pharmacy for public consumption. The lower court in my view rightly upheld the decision of the trial court on the grounds that the prosecution proved its case beyond reasonable doubt. This issue is

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resolved in favour of the respondent and against the appellant.

On issue three, learned counsel for the appellant's quarrel is that the sentence imposed on the appellant is excessive. According to the learned counsel, the facts on record clearly show:

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- A** 1. **There were no wholly exceptional circumstances demanding the imposition of an almost maximum sentence prescribed by the applicable statute.**
- B** 2. **There were substantial mitigating circumstances which ought to, but which appeared not to have been taken into consideration in the exercise of the court's discretion.**

C

Learned counsel insists that the discharge of the appellant by the trial court and the Court of Appeal from more serious charges of manufacturing the drug **My Pikin** and causing death, is enough mitigating factor that would have brought about the reduction in the number of years of imprisonment the appellant is sentenced to. In **Omokunwajo vs. FRN (2013) LPELR 20184** which was cited and relied upon by learned counsel for the respondent, this court said:

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“.....the general rule is that sentencing is a matter completely at the discretion of the trial court provided the discretion is exercised judicially and judiciously within the law.

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An appellate court consequently will not interfere with the exercise of discretion by the lower court unless the sentence imposed is manifestly excessive in the circumstances or wrong in principle.”

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The charge for which the appellant was convicted carries a sentence of not more than 10 years. The trial court imposed a sentence that is less than 10 years imprisonment. This sentence is surely within the provision of the law. It is on the basis of the fact that the sentence is within the law, that the lower court upheld same in the following words:

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A **“Learned counsel for the appellant has raised no valid**
B **point as to why we should interfere with the lower**
C **court's discretion in imposing a sentence of seven years**
on count 4. The fact that the appellant is a first offender
may be one of the reasons taken into consideration by
the lower court in the exercise of its discretion to impose
the sentence of seven years instead of the maximum ten
years. I find no reasons whatsoever to interfere with the
lower court's exercise of discretion in imposing a
sentence of seven years with respect to count 4.”

D The law is settled that where the decision of a trial court is substantially
based on the exercise of discretion, an appellate court will not interfere with
the discretion unless the trial court failed to exercise its discretion
judiciously or judicially.

E In the instant case, the exercise of trial court's discretion with regard
to the sentence it passed was neither frivolous nor arbitrary. Since
discretion is always unfettered, this court cannot take steps to fetter such
discretion, except for good and substantial reasons. See **ACME Builders**
F **Ltd vs. K.S.W.B (1999) 2 NWLR (Pt. 590) 288; Chigbu vs. Tonimas**
(Nig) Ltd (1999) 3 NWLR (Pt. 593) 115; University of Lagos vs.
Olaniyan (No. 1) (1985) 1 NWLR (Pt. 1) 156; Hamza vs. Kure (2010)
10 NWLR (Pt. 1203) 630. For the reasons I have alluded to herein, I
decline to interfere with the sentence imposed on the appellant.

G The appeal herein is against the concurrent findings of the trial court
and the Court of Appeal with respect to the 4th count of the charge upon
which the appellant was tried and convicted. It is therefore not in the
character of this court to interfere with such findings. Issues 4 and 5 have
H been subsumed into my consideration of other issues and I do not need to
repeat myself.

I Having resolved the vital issues against the appellant, this appeal
shall be and it is hereby dismissed. The judgment of the trial court with
respect to the 4th count of the charge, as affirmed by the Court of Appeal is

A further affirmed by me.
Appeal dismissed.

Paul Adamu Galinje
Justice, Supreme Court

B
C **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 lacks merit and should be dismissed. I too will dismiss the appeal.

Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

D **BAYANG AKAAHS, (JSC):** I was privileged to have read in draft the judgment of my learned brother, Galinje JSC dismissing the appeal for lacking in merit.

E This appellant was the 2nd accused in the amended Charge No. FHC IL//70c/2009 and he was convicted and sentenced along with the 2nd accused on amended counts 3 and 4 but on appeal to the Court of Appeal, the conviction on count 3 was set aside but the conviction and sentence affirmed on count 4. What I have stated in SC.529/2016 Egbele Austin Eromoselevs. Federal Republic of Nigeria applies mutatis mutandis to this appeal. The appeal is unmeritorious and is hereby dismissed.

K. B. Aka'ahs
Justice, Supreme Court

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H **ADAMU AUGIE, (JSC):** I have had the privilege of reading in draft the judgment handed out by my learned brother – Galinje, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the conviction and sentence of the appellant imposed by the trial court is affirmed by the Court of Appeal is further affirmed by this court. I hereby dismissed the Appeal.

I
Amina Adamu Augie,
Justice, Supreme Court

A EJEMBI EKO, (JSC): My learned brother, Paul Adamu Galinje, **JSC**, had before now graciously availed me, in draft, a copy of the judgment just delivered. On all the issues resolved therein in this appeal I am in complete agreement with him. Accordingly, I adopt the judgment.

B I wish, for emphasis only, to add that the intention to commit the offence is not one of the elements of the offence created by Section 1(18)(a)(ii) of the Miscellaneous Offences Act, Cap M17 LFN 2004, the offence in respect of which the appellant was tried, convicted and sentenced. Such intent to commit the offence, the *mensrea* or guilty mind, cannot be read into the penal statute without doing damage of placing a gloss on the express letters of the statute. The provisions of Section 1(18)(a)(ii) of the Act Cap M17 LFN 2004 being very clear and unambiguous the words used therein or the language of the statutory provisions must be given their natural, simple and ordinary meaning without venturing to introduce into the provisions extraneous matters. Doing so leads to circumventing the provisions, and the legislative intent of the lawmakers: **UNIPETROL vs. E.S.B.I.R(2006) ALL FWLR (Pt. 317) 413 at 423**. The legislative intention of Section 1(18)(a)(ii) of the Act Cap M17 LFN 2004 and its purpose are clearly to punish any person who sells products that are substandard, unfit or injurious. Ours, as the Judex, is only to identify the legitimate object or purpose of the legislation and give effect to it: **RABIU vs. KANO STATE (1950) LPELR 2936 (SC)**.

The intent to commit that offence is conspicuously absent in the wordings of the provision.

G Section 1(18)(a)(ii) of the Act Cap M17 LFN, 2004, the subject of Count 4 the appellant stands convicted and sentenced, provides *inter alia*:

H **Any person who deals in, sells, offers for sale or otherwise for sale any drug, medical preparation or manufactured or processed product which is not of the quality, substance, nature or efficacy expected of the product or preparation, or is not of the quality, substance, nature or efficacy which the seller represents it to be, or has in anyway been rendered or has become noxious, dangerous or unfit, shall be guilty of an**

I

A **offence and liable on conviction to imprisonment for a term not exceeding ten (10) years.** [underlinings supplied for emphasis]

B The available evidence proved beyond reasonable doubt that the appellant not only dealt in, he offered for sale and indeed sold a chemical preparation, a pediatric syrup called “MY PIKIN BABY MIXTURE” to Roca Pharmacy for distribution and sale to ultimate consumers. The prosecution called PW's 4 -7, experts in their own rights. They testified that upon their thorough analyses of MY PIKIN BABY TEETHING MIXTURE BATCH 02008”, the drug MY PIKIN TEETHING MIXTURE was found to have been contaminated with “diethylene glycol”, a chemical substance that renders the said MY PIKIN BABY TEETHING MIXTURE dangerous for human beings, the toddlers the infant teething mixture was intended.

D The prosecution had proved beyond reasonable doubt the elements of the offence, the subject of Count 4, the appellant was tried, convicted and duly sentenced for. I have no cause therefore to disturb the conviction and sentence of the appellant imposed by the trial court and duly affirmed by the Court of Appeal. I find no substance in the appeal, which I hereby dismiss.

E **Ejembi Eko**
Justice, Supreme Court

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**AIMUAMWEHI FRIDAY OSAREREN
AND
FEDERAL REPUBLIC OF NIGERIA**

SC. 670/2014

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY 23RD FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
EJEMBI EKO
SIDIDAUDABAGE**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

APPEAL: Issues for determination – How to formulate competent issues – Power of court to discountenance incompetent issues – Whether in such circumstance it does not amount to occasioning any miscarriage of justice.

CASE LAW: Principles in Menakaya v. Menakaya (2001) 9 – 10 S.C. 1 – Estoppel by conduct – Applications thereof.

COURT: Consideration of all issues – Whether the Court of Appeal is duly bound to consider all issues placed before it – Whether there is an exception thereto.

COURT: Defect in competence – Whether renders its proceedings void.

COURT: Revocation of bail – Where court suo motu revokes bail of accused – Whether such conduct is arbitrary – Whether the decision to revoke bail is appellable Under S. 318 of CFRN 1999 – Relevant considerations

thereof.

COURT: The position of courts – Whether hallowed chambers of justice – Implications thereof.

CRIMINAL LAW AND PROCEDURE: Amendment of charge – Leave of court to amend charge – Whether there is no requirement of a formal leave to be obtained before a charge is amended.

CRIMINAL LAW AND PROCEDURE: Conspiracy – Nature – How established.

CRIMINAL LAW AND PROCEDURE: Leave to amend charge – Objection – Failure of court to grant leave – No evidence of miscarriage of justice – Whether objection a mere technicality – Court not to countenance objection on mere technicality – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Objection to a charge – Appropriate time thereof – S. 167 Criminal Procedure Act – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Plea to charge – Whether failure of accused to plead to charge renders entire proceedings void – S. 164 of Criminal Procedure Act.

CRIMINAL LAW AND PROCEDURE: Technical justice and substantial justice – Distinctions thereof – Relevant principles thereof.

CRIMINAL LAW AND PROCEDURE: Testimony of complainant – Where the complainant was not called to give evidence – Effect – Whether it is not in all cases that the complainant must testify in order to discharge the onus of proof.

EQUITY: Waiver of right – Party insisting on a right he has waived – Whether it is not equitable to do so – Relevant principles.

EVIDENCE: Estoppels by conduct – S.169 of Evidence Act, 2011 – Whether does not apply to public or statutory right.

EVIDENCE: Hearsay – Where police officers give evidence of their investigatory roles – Whether such evidence is not hearsay – S.126 of the Evidence Act 2011 – Relevant consideration thereof.

EVIDENCE: Presumption of regularity – Where a judicial act is shown to have been done in a manner substantially regular – Whether it will be presumed that all formal requisites for its validity have been complied – S.168(1) of the Evidence Act 2011 – Relevant considerations thereof.

LEGAL PRACTITIONERS: Attack on judges – Where a party alleges that a judge introduced a new matter not before him – Whether a serious allegation – Admonition on counsel to show restrain as judges do not have any forum to defend themselves.

PRACTICE AND PROCEDURE: Error or mistake – Whether not every error or mistake of a trial court will result in allowing an appeal – Relevant considerations thereof.

PRACTICE AND PROCEDURE: Sentiments – Whether do not have any place in judicial deliberations – Relevant considerations thereof.

STATUTE: Interpretation and consideration – S. 168(1) of the Evidence Act 2011 – Relevant considerations thereof.

Issue for Determination

- 1. Whether the decision of the court below is not marred by unfairness and lack of fair hearing by their deliberate refusal to countenance**

- and determine various germane issues laid before them by the appellant. [from grounds 1, 2 & 3].**
- 2. Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 8 – 11 of the charge? [from ground 6].**
 - 3. Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 1-7 of the charge? [from grounds 7 & 8].**
 - 4. Whether the learned justices of the court below were right in refusing to declare the trial of the appellant a nullity since the amended charge upon which it was based is an abuse of court's process. [from grounds 4 & 5].**

Facts of the Matter

The appellant was the 1st accused person in the charge No. FHC/B/57C/2011 before the Federal High Court, Benin City. The eleven (11) count charge alleged that the appellant and two others conspired to commit the offence of obtaining money from an American, Cynthia Taylor (F), by false pretences, and that they committed various offences of obtaining by false pretences various sums of money on diverse dates between May and December, 2008. The appellant and two others pleaded not guilty to the charges. Thereafter two witnesses testified and tendered several documents. At the close of the prosecution's case, and before the accused persons opened their defence, the prosecution submitted amended charge to which the three accused persons, each, pleaded "not guilty" afresh to each of the 11 charges. Thereafter the accused persons, particularly the appellant as the 1st accused, each entered his defence.

At the close of the defence and the final addresses of the respective counsel for the prosecution and the defence the trial Federal High Court reserved its judgment to 13th June, 2016. It delivered the reserved judgment on the said 13th June, 2013. The three accused persons were all convicted and sentenced to various terms of imprisonment. Finding that the prosecution had

proved their case against the appellant herein, as the 1st accused, on each of the 11 charges, the trial court convicted him on all the 11 charges.

The appellant's appeal was heard by the Court of Appeal. It was, on 16th July, 2014, dismissed in its entirety. The appellant's conviction and sentence were affirmed by the Court of Appeal: hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal).*

1. *Proceedings of a court are void where there is defect in its competence*
The implication of a defect in the competency of the court is that any defect in the competence of the court is fatal. It renders the proceedings a nullity no matter how well conducted the proceedings were: MADUKOLU vs. NKEMDILIM (1962) 1 ALL NLR (Pt. 4) 587; EGUNJOBI vs. F.R.N (2013) 3 NWLR (Pt. 1342) 534. (P 94 Paras D–E).

2. *A party cannot insist on a right he has waived*
It is against this same procedure he acquiesced in that the appellant is making so much fuss about. Equity follows the law and will not allow a party to approbate and reprobate on the same issue. Equity, acting in *personam*, will forbid anything that is unconscionable to do. Thus it restrains a party from insisting on a right he had waived. If by his conduct he had made another person to assume that he could act in the way he had acted, it would therefore be unconscionable for the same party to renege on his words and insist on his legal right as doing so will prejudice the party who had so acted. (Pp 95–96 Paras I–B).

3. *Whether estoppel by conduct does not apply to the waiver of statutory rights*
I am aware that this court in MENAKAYA vs. MENAKAYA (2001) 9 10 SC 1; (2001) 16 NWLR (Pt. 738) 203 had stated that this specie of

estoppel by conduct does not apply to statutory rights but only to personal rights. The MENAKAYA situation is distinguishable. In the instant case the appellant can waive all niceties ensuring the protection of his personal right. He waived them.

Since the MENAKAYA case, the principle of *estoppel* by conduct had been codified and made statutory by virtue of Section 169 of the Evidence Act, 2011. In MENAKAYA case the parties and their counsel gave the trial judge, in a divorce Petition, their consent that the judgment be delivered in chambers instead of open court. The law enjoins, in order to demonstrate that justice is not only done but seen manifestly to be done, that trials and delivery of judgment shall be done in open. That is what makes it a public right. (P96 Paras B–F).

4. *The appellant has not suffered any miscarriage of justice because of the failure of court to formally grant leave to amend charge.*

I do not, from the peculiar facts of this case, think that the appellant has suffered any prejudice by the failure of the trial court to formally grant leave to the prosecutor to file the amended charge. It is clear to me, from the proceedings, that the trial court and the parties, through their respective counsel, had approved the amendment and given the nod to the prosecutor file the amended charge. The parties, including the appellant, were in no way misled. The insistence of the appellant's counsel on the learned trial judge failing “to formally grant leave for the amendment” is nothing but sheer insistence on crass or arcane technicality. Thus, as Aderemi, JSC stated in YUSUF vs. ADEGOKE (2007) 6 SC (Pt. 1) 126; (2007) 11 NWLR (Pt. 1045) 332, a technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of case. In other words, it arises when a party holds or relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned, like Shylock in the Merchant of Venice, the rules must be followed to the

last sentence, the last word and the last letter. The party emphasising on technicality has little or no regard to the justice that would be sacrificed, or injustice that would be caused to the opponent. The attitude of the courts, these days, is to enthrone substantial justice without undue adherence to technicalities. Justice can only be done, as stated by *Edozie JSC* in *ADELUSOLA vs. AKINDE* (2004) 18 NSCQR 371; (2004) 12 NWLR (Pt. 887) 295, if the substance of the matter is examined. I have examined the substance of this complaint. The justice of it does not avail the appellant. (*Pp 96–97 Paras F–C*).

5. *When to properly take objection to a charge*

In any case, the appellant, being very vociferous about the learned trial judge not formally granting leave to the prosecutor, under Section 102 CPA, to file the amended charge, was completely oblivious of the principle or rule of law in Section 167 of the same CPA to the effect that any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge had been read over to the accused and not later. This objection at this appellate stage to the amended charge is no doubt belated. It is mere appeal to arcane or crass technicality. Since equity follows the law, and takes as done that which ought to be done; the fact that the learned trial judge drew from the consent of the defence counsel to the prosecutor “to draft a new charge” and proceeded to read and explain “the newly amended charge” to the accused persons, including the appellant herein, and immediately thereafter took their respective pleas thereto, suggest his defacto and substantial permission or approval to prosecutor to file the amended charge. (*P97 Paras C–G*).

6. *Application of S. 168(1) of Evidence Act 2011.*

This being a court of justice as well and not only of law, I shall invoke Section 168(1) of the Evidence Act, 2011 to take as granted to the

prosecutor the formal leave to file the amended charge. It is enacted in Section 168(1) of the Evidence Act (supra) that when a judicial act is shown to have been done in a manner substantially regular, it is presumed that all formal requisites for its validity were complied. The justice of the matter demands that his formal act be taken as done as it ought to have been done. Coming, as I do, to this conclusion issue 4 is hereby resolved against the appellant and I hereby declare that the learned justices of the court below were right in refusing to declare the trial of the appellant, founded on the amended charge, a nullity. (Pp 97–98 Paras G–A).

7. *Court of Appeal bound to consider all issues placed before it.*
As a general principle, the intermediate court, as the court below, is duty bound to consider all issues raised and or placed before it. It does not have the liberty to decline a consideration of the issues before it, unless it intends to order a retrial and the further consideration of the issues in the case will prejudice the fresh hearing being ordered: EDEM vs. CANON BALLS LTD (2005) 6 SC (Pt. II) 16; (2005) 12 NWLR (Pt. 938) 27. If the court failed to consider issues raised and placed before it without any valid reason, then it would have failed in its judicial duty and there is a failure of justice: EDEM vs. CANON BALLS LTD (supra) IKPEAZU Vs. OTTI & ORS (2016) LPELR- 4005 (SC); OKONJI vs. NJOKANNA (supra); CHUKWU vs. SOLELBONEH (supra). (P 99 Paras D–G).

8. *Not every error will result in allowing an appeal*
Let me, from the onset, restate the law that not every error or mistake in the judgment results in allowing an appeal. The appeal court will only interfere when the error or mistake is shown to have occasioned a miscarriage of justice ABUBAKAR vs. B.O & A.P LTD (2007) 2 SC 48; (2007) 18 NWLR (Pt. 1066) 319; UNITY BANK PLC vs. BOUARI (2008) 2- 3 SC (Pt. 1) 1; (2008) 7 NWLR (Pt. 1086) 372.

Because miscarriage of justice varies from case to case; the facts and circumstances of the case, where miscarriage of justice is alleged, must be examined: ABUBAKAR ABUBAKAR& ORS vs. SAIDU USMAN NASAMU & ORS (2011) LPELR – 1831 (SC). In effect the error resulting in miscarriage of justice is the mistake or error that is prejudicial or inconsistent with the right of a party: OLADOJA SANUSI vs. OREITAN I. AMEYOGUN (1992) 4 NWLR (Pt. 237) 237 at 527. A wrongful conviction based on a failure of the process of trial, no doubt, constitutes a miscarriage of justice. That is because a grossly unfair outcome in a judicial proceeding constitutes a miscarriage of justice. (Pp 99–100 Paras G–B).

9. *Evidence of Investigating police officers not hearsay*
The PW1 and PW2, at the trial court, testified to their investigatory roles including their recording statements of the accused persons, recovery of real evidence including documents, tracing the transfers of money and receipt of payments through Western Union Money Transfers. I do not think, or agree with the appellant, that the oral evidence of the PW1 and PW2 based on their investigatory roles are hearsay. Their oral evidence do not offend any principle of the Evidence Act on hearsay. Rather, they are in accord with Section 126 of the Evidence Act, 2011 that enjoins the witness to give direct evidence as to what he saw, heard, perceived or did.

Per Eko (JSC)

The learned appellant's counsel appears to me to have misconceived the purport of Exhibits A, C1–5 and D1-6 when he submits that they are documentary hearsay evidence. The learned counsel never showed where and how the trial court used their contents to convict the appellant. These documents were put into the evidence through the PW1, an investigator, who gave the circumstances of their

recovery in the course of the investigation. Exhibit A, for instance, is the petition that spurred the PW1 and other agents of the Economic and Financial Crimes Commission (EFCC) into investigation. Exhibits C1-4, said to be scam mails were recovered in the course of the investigation. It appears, from page 70 of the record, that they were tendered and received in evidence without objection as real evidence. Ditto for Exhibits D1-6. It was the defence counsel (see page 82) who caused the PW2, under cross-examination, to read out the contents of Exhibits C2 and C3.

The learned trial judge, at page 167 of the record, merely recounted how, from the evidence of PW1 and PW2, the appellant, as the 1st accused, was arrested and Exhibits A, B, C1-4, D1-6, E, F, I1-3 were recovered in the course of their investigation. I cannot see how and where Exhibits A, C1-4 and D1-6, said to be hearsay documentary evidence, formed the basis of the judgment of the trial court convicting the appellant. I also cannot see how the court below affirmed the conviction of the appellant on those bases.

(P 101 Paras A–H).

10. *How to formulate competent issues for determination*
Competent issues for determination of an appeal are formulated or raised from competent ground(s) of appeal, which also flow directly from the reasons for the decision appealed. A valid ground of appeal attacks the decision of the court on an issue decided by that court: F.M.B.N vs. N.D.I.C (1999) 2 NWLR (Pt. 591) 333. An issue for the determination of an appeal, like the appellant's issue 3 at the court below, which does not arise from the decision appealed is incompetent. An appellant, whose incompetent issue is allegedly ignored cannot complain of an miscarriage of justice.
(Pp 101–102 Paras H–B).

11. *The trial court did not scuttle the trial-within-trial*
The unfairness of the failure of the trial court not ordering a trial-within-trial to determine the voluntariness of the appellant's extra-

judicial confessions is said to be the substance of the appellant's issue 5 at the court below. The PW1, who recorded the extra-judicial statements of the appellant, the 1st accused, was testifying when the prosecutor sought to tender the statements, appellant's counsel objection to their admissibility on grounds of involuntariness of their making. It appears, from page 73 of the record, that all the counsel agreed that trial-within-trial be conducted to determine the voluntariness of the statements.

The trial court did not actually scuttle or jettison the idea or propriety of the trial-within-trial. Continuation of the proceedings was adjourned to 3rd May, 2012 for that purpose. Before the adjournment the trial court, observing that “there is likelihood the case will take longer time and (that) we cannot guarantee accused persons bail till then”, *suo motu* revoked the bail of the accused person.

When the trial court re-convened on 3rd May, 2012, Mr. Afolabi of counsel to the appellant announced dramatically that they were withdrawing their “objection (to) the tendering (of) the 1st and 2nd accused's statements in evidence”. That was how the trial-within-trial was aborted. (*P 102 Paras B–F*).

12. *It is an arbitrary act for court to suo motu revoke bail*

The order of the trial court *suo motu* revoking the bail of the appellant appears arbitrary and wrong. It was also an appealable order, by virtue of Section 318 of the Constitution, that was not appealed.

It is not true, *ex facie* the minutes of the proceedings in the printed record, that “even though the prosecutor conceded to the ordering of a trial-within-trial in order to determine the voluntariness or otherwise of the said purported confessional statements, the learned trial judge refused to order a trial-within-trial”. This sheer falsehood contived by the learned counsel for the appellant in support of this issue is completely suppositious. It is a

lie full of sound and fury and yet signifies nothing. The printed record does not support and substantiate the rather unethical conduct of the learned counsel, Charles Ihua-Maduenyi, Esq., who settled this appellant's brief. Based on this blatant falsehood, the learned counsel submits that the appellant was constrained to withdraw his objection to the admissibility of his confessional statements, the learned trial judge having instilled fear on the appellant and intimidated him. (Pp 102 – 103 Paras G – B).

Per Eko (JSC)

“The PW1, who recorded the confessional statement of the appellant under caution, testified that on 5th April, 2011 the appellant, as the 1st accused, “Confessed (that he was) the brain behind the scam scandal and (that) he started as pen-pal to Cynthia Taylor before he introduced (the) loan scam”. PW1 testified further that the appellant admitted that 'he promised to help (Cynthia Taylor) obtain or secure a loan from a bank in Nigeria and asked for advance fee for processing”, that he (the appellant) continued his scam until he was ready for his Youth Service before he handed it to his friend, the 2nd accused”, and that on 6th April, 2011 the appellant led the investigators to the 2nd accused and he was arrested.

The PW1 and PW2, on 3rd May, 2012 after the vexed revocation of bail of the appellant *suo motu* by the trial court, were cross-examined. No attempt, albeit feeble, was made by the appellant's counsel to discredit their evidence either as to the fact of the appellant's admission or as to the voluntariness of the appellant's confessional statements in Exhibits I1-3, written personally by the appellant. (P 103 Paras B – F).

13. *Courts are hallowed chambers of justice*
Learned appellant's counsel submits on authority of AHMED vs. COMMISSIONER OF POLICE, BAUCHI (2012) 9 NWLR (Pt.

1304) 104 at 133, correctly, that courts are recognized as hallowed chambers of justice, not where fear is meted out to citizens standing trials thereat. The facts of this case do not warrant this principle. Courts of justice are also not theatres where lawyers enjoy the luxury of maligning judges with blatant lies crafted skillfully to win cases at all costs.

The unchallenged evidence of PW1 and PW2 establishing the oral confession of the appellant, standing on its own, is a strong evidence pointing in the direction of complicity of the appellant in alleged offences. It also corroborates the appellant's confessions in Exhibits I1-3. (P 103 Paras F–I).

14. *The nature and purpose of counts 8–11 on the charge and the defence of appellant thereto*

Counts 8-11 in the amended charge are not really about obtaining by false pretences. Rather, they allege that the appellant was in possession of scam e-mails. The scam e-mails that the appellant was allegedly in possession of are Exhibits C1-4. The defence of the appellant to counts 8-11, as found at page 105 of the record, is that: *Exhibits C1-4 were documents (sent) to Chi-Egwe by Cynthia Taylor (the lawyer who write the petition to EFCC). These documents were not found in my possession.*

The PW1, through whom Exhibits C1-4 were tendered in evidence, never testified that Exhibits C1-4 were found in possession, or recovered from the possession, of the appellant. He merely averred in his evidence at page 70 of record, that “some scam mails were recovered during investigation”. He thereafter identified Exhibits C1-4 as the scam mails. PW2 also did not aver that Exhibits C1-4 were in the possession of the appellant. However, based on the appellant's confessional statements the trial court found that Exhibits C1-4 were found in the possession of the appellant and recovered therefrom. The court below however took its time to consider this before it affirmed the finding.

This same issue was issue 4 considered by the court below at pages 302-309 of the record. The substance of appellant's issue 6 at the court below, subsumed in issue 4, was considered by the court below. (P 104 Paras A–F).

15. *It was proved that Exhibits C¹-4 were found in appellant's possession. I did touch, under issue 1 just resolved, some salient points on whether the scam mails, Exhibits C1-4 were found in the possession of the appellant and recovered therefrom. Exhibits C1-4 are the subject of counts 8-11 the amended charge. The trial court and the court below made concurrent findings of facts that the appellant was in possession of Exhibits C1-4. The trial court predicated this finding on the confessions of the appellant. The learned appellant's counsel preferred not to attack this finding. He left the said finding of fact inviolate. The court below also addressed the point before affirming the finding of fact. Again, rather than offering a frontal attack, the learned counsel merely submits, incorrectly, that the trial judge and the justice shut their eyes to the admission of the PW1. Allegedly, that they “found or recovered” Exhibits C1-4 from the e-mails sent to EFCC by Barrister Chi-Obi Igwe, Cynthia Taylor's lawyer. Page 67 to which learned counsel pointed as the factual sources of this submission does not bear him out. Lines 9 and 10 of the page 67 of record to wit:*

We went through the additional documents sent to us by the complainant among which are SCAM Mails, have been clearly misconceived or twisted by the learned counsel. The scam mails alluded to here have not been linked to, or identified as, Exhibits C1-4. When the PW1 was cross-examined no such effort was so made. The opportunity was missed and wasted. (Pp 104–105 Paras G–E).

16. *Where arguments were inappropriate*
Appellant's issue 3 before us here is supposed to have sprung from his grounds 7 and 8 of the grounds of appeal, which shorn of their

particulars complain that:

- 1. The learned justices of the Court of Appeal erred in law in affirming the conviction and sentence of the appellant in counts 1-7 of the charge when the same was never proved beyond reasonable doubt.**
- 2. The leaned justices of the Court of Appeal erred in law in failing to come to the conclusion that the finding of the appellant guilty in counts 2, 6 and 7 of the charge by the learned trial judge who had earlier discharged the appellant's co-accused on the same was erroneous and perverse.**

The issue formulated from the two grounds is: whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 1-7 of the charge? It is difficult to find that this issue, distilled from grounds 7 and 8, above reproduced, has its focus on attacking the very facts on which concurrent findings of fact on which the conviction and sentence rested. Learned appellant's counsel cannot therefore use the issue to spring attacks on admissibility of Exhibits A, C1-4 and D1-6 on the grounds that they are documentary hearsay evidence. He cannot use the issues as a basis to insist that the appellant's confessional statements were made involuntarily and therefore inadmissible. (Pp 105 – 106 Paras E – C).

Per Eko (JSC)

“The trial court and the court below having found concurrently that the respondent, the prosecutor, had proved the guilt of the appellant beyond reasonable doubt on facts as regards counts 1-7, the duty of the appellant's counsel in this further appeal is to demonstrate how perverse and unreasonable those concurrent findings of facts were. That burden is not discharged by whining and whimpering.

The appeal on this issue is clearly predicated on the question of facts requiring proof by empirical evidence. The attitude of this court, on concurrent findings of facts by the trial court and the intermediate court, has since fossilized. Unless the appellant shows that there are special circumstances: that is that the conclusions reached were wrong or perverse, this court will not readily interfere with the concurrent findings: IBRAHIM vs. OSUNDE & ORS (2009) 6 NWLR (Pt. 1137) 383 (SC); OMOTOLA & ORS vs. THE STATE (2009) 7 NWLR (Pt. 1139) 148 (SC). I do not think the appellant has satisfactorily shown why the concurrent findings of facts by the trial court and the intermediate court should be interfered with to warrant my venturing to interfere with the findings". (P 106 Paras C–G).

17. *What constitutes proof of counts 1-7 of the charge.*

The *viva voce* confession of the appellant which the PW1 testified to, read with the confessions in Exhibit I1-3, amount to the appellant's conclusive admission of his guilt of the offences in counts 1-7 of the amended charge.

The defence put up by the appellant at pages 103-108 of the record were completely prevaricatory and unreliable. For instance, at page 107 of the record, he made this ambivalent explanation of the \$2,000 USD he admitted receiving from Cynthia Taylor to effect that the \$2000 USD was "not only for my personal upkeep". But also for what? He did not say.(Pp 106–107 Paras G–A).

18. *The nature of the false pretence which was evidenced by appellant's admissions*

The operative false pretence in counts 1- 7 is the false representation made to Cynthia Taylor that the appellant and his co-accused were in a position to help her obtain or secure loan from a Nigerian bank. This representation was factually a hoax from the totality of the prosecution's evidence, including the confessional statements of the

appellant made under his own hand, Exhibits I1-3. The appellant, testifying as DW1 at pages 103-108 of the record, interestingly never once alluded to the damaging evidence that he falsely represented to Cynthia Taylor that himself and his co-accused were in a position to give or secure loan to her from a Nigerian bank and in furtherance of that asked her “for an advance fee for processing” of the loan. Cross-examined the appellant, DW1, admitted that he “gave statements to EFCC” and that he was not a loan lender. He offered no iota of evidence in rebuttal of the prosecution's evidence on the operative false pretence. Thus, the appellant failed to discharge the evidential burden on him to cast any reasonable doubt on this crucial operative false pretence. I cannot, therefore, fault the holding of the trial court as a matter of fact that the confession of the appellant. “Exhibits I1-3 were admitted in evidence with no objection” and that the Exhibits are consistent with the knowledge, acts and intentions of the appellant. In dismissing the appellant's appeal and affirming the conviction of the appellant, the court below found “that the prosecution has proved beyond reasonable doubt” the offences of criminal conspiracy to obtain money from Cynthia Taylor by false pretences, and obtaining various sums of money from the said Cynthia Taylor by false pretence. (P 107 Paras A–G).

Per Eko (JSC)

“It is an established judicial policy of this court that it will not readily and ordinarily interfere with the concurrent findings of facts by courts below it, unless the appellant satisfactorily shows or establishes that the said current findings are perverse, unreasonable and not supported by facts in the printed record: BASHAYA vs. THE STATE (1998) 4 SC 199; (1998) 5 NWLR (Pt. 550) 351; OGBU vs. THE STATE (1992) 10 SCNJ 88; (1992) NWLR (Pt., 259) 255; OGUNDIYAN vs. THE STATE (1991) 4 SCNJ 44, (1991) 3 SC 100. The appellant herein has not satisfactorily shown why this judicial

policy shall not be followed in this case. In what appears an appeal to mere sentiments, the appellant's counsel submits that since the trial court had held that counts 2, 3, 6 and 7 were not proved against the 2nd and 3rd accused persons, the trial court could not offer any reason which made it to adjudge the appellant guilty on those same counts. Sentiments, it must be borne in mind, command no place in judicial deliberations: EZEUGO vs. OHANYERE (1979) 6 SC 17; MOHAMMED IDIRISU vs. MODUPE OBAFEMI (2004) 11 NWLR (Pt. 884) 396; ORJI UZOR KALU vs. F.R.N & ORS (2016) LPELR 40108 (SC). On this note, I hereby dismiss this issue, and resolve it against the appellant". (Pp 107–108 Paras G–D).

19. *There is no formal requirement for leave to amend charge*
When it is the desire of a prosecutor to amend the charge or file a fresh charge, he files the process in the registry and serves a copy of the process on the defence counsel.

Leave means permission.

An informal oral application is made to the trial judge in open court to amend or file fresh charge/s and leave to amend is not formally granted by the judge. It is implied that leave has been granted when the accused person is called upon to plead to the amended charge or fresh charge. The fact that the accused person pleads to the amended charge is indicative of the fact that leave was obtained. (P 111 Paras C–F).

20. *Implication of failure to plead to an amended charge*
Failure of the accused person to plead to the amended or fresh charge as provided by section 164 of the Criminal Procedure Act renders the entire proceedings null and void. See *R vs. Eronini* (1953) 14 WACA P. 366, *Adisa vs. AG Western Nigeria* (1965) 1 AL NLR P. 412.

There was strict compliance with section 164 of the Criminal Procedure Act, when the charge was amended, in that the appellant

pleaded to the amended charge. The amended charge was not an abuse of process and the trial is not a nullity. (P 111 Paras F–H).

21. *The nature of the offence of conspiracy and prove thereof*

On the offence of conspiracy, it is to be noted that it is an offence with the unique feature of being an offence usually concealed and often hatched in secret by the conspirators and so make it difficult to establish the physical contact among the persons who are said to have agreed to carry out an illegal act or perform a legal act through illegal means. Most of the essential elements of the offence of conspiracy are made through circumstantial evidence or by inference from an overt act of the conspirators or one of them. The offence of conspiracy is complete when two or more persons have agreed to do something at the moment of the agreement or even in the future. It is of no moment that something was done or omitted to be done beyond the stage of the agreement between those persons who have agreed to prosecute the act. To expatiate further, it is to be said that the moment the meeting of the mind has been reached and thereafter one of the conspirators reneges, repents, acquires cold feet and stops interaction with the others or may no longer have opportunity to participate or carry out his role in the agreement the offence has been already committed. (P 117 Paras B–F).

Per Peter-Odili (JSC)

“Again to be stated in this queer offence is that the conspirators need not know each other or meet at any point in time and this could mean their living in different towns, cities or even countries. It is enough that the conspirators have communicated at any point. For a fact it is an offence with damning features and a later change of mind at any given stage matters not. See *Erim vs. The State* (1994) 5 NWLR (Pt. 346) 522 at 524; *Omotola vs. FRN* (1999) 12 NWLR (Pt. 682) 483 at 501-502.

Taking the matter of conspiracy further, the point has to be made that where two or more persons acting in concert and in furtherance of their common intention, each and every one of them is taken as liable for the consequence of the act that ensues. It is irrelevant which of the accused did what.

Stated differently, where two or more persons act in concert in committing an offence any of them can be convicted for that offence. I rely on David Idiok vs. State (2006) 12 NWLR (Pt. 993) 1.

Situating the essential ingredients or elements of the offence of conspiracy as stated above to the facts of the present case where the appellant was charged with the offence of conspiracy to commit felony to wit; obtaining money under false pretence with two other accused persons. The appellant who was 1st accused at the trial court admitted that he introduced the 2nd accused person, Omorede Darlington to one Cynthia Taylor to act as a bank manager for the purpose of giving her loan. This was stated in his extra-judicial statement, Exhibit “F1”.

After that introduction the 2nd accused sending e-mails to Cynthia Taylor on obtaining for her the loan purportedly to be given to her from his bank. Then the 2nd accused introduced the 3rd accused persons Iyokho Nosa into the act and both 2nd and 3rd accused went on sending e-mails to Cynthia Taylor with intent to defraud her knowing that the information they were pushing to her were false. Then the 2nd accused demanded money from Cynthia Taylor for the processing of the purported loan which money she sent to him through western union in the name of the 3rd accused person which name had been sent to her by the appellant and the 2nd accused person. In evidence is that the 3rd accused handed the money to the 2nd accused and the money shared among the three of them, appellant inclusive.

Clearly the agreement and the meeting of the minds were established and the appellant cannot claim not to be involved in the conspiracy because he did not carry out any part of the transaction.

Therefore the court below saw as the trial court did that the links or connections between the appellant and his cohorts were glaringly in sight. The offence of conspiracy was proved beyond reasonable doubt against the appellant. (Pp 117–118 Paras F–G).

22. *The nature of the false pretence*

From the admission of the appellant in that statement to the police and as shown in evidence the appellant knew he had not the capacity to give a loan to the victim and knew of the falsity of his claim and did not believe in the truth of the claim even as he put it across to the victim and based on that claim of being who he was not the said Cynthia Taylor made available various sums of money. (P 120 Paras A–B).

Per Peter-Odili (JSC)

“The appellant had raised a lot of dust over the non appearance of the complainant/victim, Cynthia Taylor, an American national to testify at the trial court which appellant posits is fatal to the case of the prosecution as her testimony was necessary in order to prove the case. That is in my humble view a generalization taken too far as while the evidence of such a witness could on its own settle the case of the prosecution, it does not translate to the fact that in its absence and while other avenues exist for the prosecution to carry out its bounden duty to prove its case beyond reasonable doubt that the alternative route or angle cannot suffice. The reason is that the law has not prescribed the category or the total number of witnesses the prosecution is obligated to call in order to prove its case. The choice of how to go about proving its case resides squarely on the prosecution and it is at liberty to conduct its case as it thinks best so long as what the prosecution proffered satisfies the standard expected in establishing the essential ingredients of a stated offence. It is not in all instances that the testimony of the complainant is

necessary. Come to think of it, in a murder trial the victim dies and not in a position to speak for himself as to stating how things happened but murder trials are conducted successfully without even the body of the victim seen. If the prevailing circumstances are such that proof can be made in a criminal trial with or without the victim, so be it. See Nwaeze vs. State (1996) 2 NWLR (Pt. 428) 1 at 6; Nwankwo vs. FRN (2003) 4 NWLR (Pt. 809) 1 at 34 & 94.

It was for the appellant to produce such evidence to prop up his case and not for it to dictate who must testify for the prosecution for appellant's guilt to be established. I rely on Adeyemo vs. State (2015) 16 NWLR (Pt. 1485) 311 at 325; Busari vs. State (2015) All FWLR (Pt. 777) 715 at 734; Nigerian Air Force vs. Obiosa (2003) 4 NWLR (Pt. 810) 233 at 276. (P 121 Paras A – G).

23. *The unjustified attack of counsel on the trial judge*

Clearly there was no basis for the attack of counsel to the appellant on the learned trial judge save for a desperate intention to score a cheap point and win the case for his client at all cost with distorted facts even if it meant destroying the reputation and standing of a defenceless judge, carrying out his sworn duty. The conduct of counsel is deprecated and counsel is advised to desist from such. See Abdullahi vs. FRN (2016) All FWLR (Pt. 848) 1770 at 1794; Duru vs. State (2017) All FWLR (Pt. 893) 1243 at 1282 – 1283; In Matthew Okechukwu Enekwe vs. Int'l Merchant Bank of Nig. Ltd & Ors (2006) 19 NWLR (Pt. 1013) 146 at 174; Tobi JSC cried out thus:

“Judges have no forum to defend themselves in the judicial process for positions they take in their judgments. They cannot speak one more word outside their judgments in defence of the positions they have taken. Let parties be slow in pouring venom on them. It is a serious attack on a judge to say that he introduced in the case, new matters which were not before the court.

So much is involved as so much could be read into or out of the allegation. I will stop here, hoping that counsel will have some sympathy for judges, their partners in the smooth and successful administration of justice. It is only when judges and counsel are in some form of 'romance' that their joint partnership in the crusade for building the best justice system will be achieved in our legal system.” See also, *Bolanle vs. Abeke* (2007) 9 NWLR (Pt. 1040) 411 at 432. (P 123 Paras B–H)

Nigerian Cases Cited

Abdullahi vs. FRN (2016) All FWLR (Pt. 848) 1770;
Abubakar Abubakar & Ors vs. Saidu Usman Nasamu & ORS (2011) LPELR 1831 (SC).
Abubakar vs. B.O & A.PLTD (2007) 2 SC 48; (2007); 18 NWLR (Pt. 1066) 319;
Adelusola vs. Akinde (2004) 18 NSCQR 371; (2004) 12 NWLR (Pt. 887) 295.
Adeyemo vs. State (2015) 16 NWLR (Pt. 1485) 311;
Adisa vs. AG Western Nigeria (1965) 1 ALNLR P. 412.
Ahmed vs. Commissioner of Police, Bauchi (2012) 9 NWLR (Pt. 1304) 104.
Bashaya vs. The State (1998) 4 SC 199; (1998) 5 NWLR (Pt. 550) 351;
Bolanle vs. Abeke (2007) 9 NWLR (Pt. 1040) 411.
Busari vs. State (2015) All FWLR (Pt. 777) 715;
David Idiok vs. State (2006) 12 NWLR (Pt. 993) 1.
Duru vs. State (2017) All FWLR (Pt. 893) 1243;
Edem vs. Canon Balls Ltd (2005) 6 SC (Pt. II) 16; (2005) 12 NWLR (Pt. 938) 27.
Egunjobi vs. F.R.N (2013) 3 NWLR (Pt. 1342) 534.
Erim vs. The State (1994) 5 NWLR (Pt. 346) 522 at 524;
Ezeugo vs. Ohanyere (1979) 6 SC 17;
F.M.B.N vs. N.D.I.C (1999) 2 NWLR (Pt. 591) 333.
Ibrahim vs. Osunde & ORS (2009) 6 NWLR (Pt. 1137) 382 (SC);
Ikpeazu vs. Otti & ORS (2016) LPELR- 4005 (SC)
Madukolu vs. Nkemdilim (1962) 1 ALLNLR (Pt. 4) 581;
Matthew Okechukwu Enekwe vs. Int'l Merchant Bank of Nig. Ltd & Ors (2006) 19 NWLR (Pt. 1013) 146 at 174;

- A** *Menakaya vs. Menakaya* (2001) 9 – b10 SC 1; (2001) 16 NWLR (Pt. 738) 203.
Mohammed Idirisu vs. Modupe Obafemi (2004) 11 NWLR (Pt. 884) 396;
Nigerian Air Force vs. Obiosa (2003) 4 NWLR (Pt. 810) 233.
- B** *Nwaeze vs. State* (1996) 2 NWLR (Pt. 428) 1;
Nwankwo vs. FRN (2003) 4 NWLR (Pt. 809) 1.
Ogbu vs. The State (1992) 10 SCNJ 88; (1992) NWLR (Pt., 259) 255;
Ogundiyin vs. The State (1991) 4 SCNJ 44, (1991) 3 SC 100.
- C** *Oladoja Sanusi vs. Oreitan I. Ameyogun* (1992) 4 NWLR (Pt. 237) 237
Omotola & Ors vs. The State (2009) 7 NWLR (Pt. 1139) 148.
Omotola vs. FRN (1999) 12 NWLR (Pt. 682) 483.
Orji Uzor Kalu vs. F.R.N & ORS (2016) LPELR 40108 (SC).
- D** *R vs. Eronini* (1953) 14 WACAP. 366,
Unity Bank Plc vs. Bouari (2008) 2- 3 SC (Pt. 1) 1; (2008) 7 NWLR (Pt. 1086) 372.
Yusuf vs. Adegoke (2007) 6 SC (Pt. 1) 126; (2007) 11 NWLR (Pt. 1045) 332,

E**Nigerian Statutes Cited**

The Evidence Act, 2011 Section 126; 168(1)

The Constitution Section 318

F**APPEARANCES:**

Olayiwola Afolabi (Esq.), with A.I. Tsado, (Esq.), E.C. Abednego (Esq.), M.O. Asuma, (Esq.), and Noma Ogbodu (Esq.), for the Appellant.

- G** Ifeanyi Agwu, (Esq.), Legal Officer (EFCC) for the Respondent.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment): The appellant was the 1st accused person in the charge No. FHC/B/57C/2011 before the

- H** Federal High Court, Benin City. The eleven (11) count charge alleged that the appellant and two others conspired to commit the offence of obtaining money from an American, Cynthia Taylor (F), by false pretences, and that they committed various offences of obtaining by false pretences various
- I** sums of money on diverse dates between May and December, 2008. The appellant and two others pleaded not guilty to the charges. Thereafter two

- A** witnesses testified and tendered several documents. At the close of the prosecution's case, and before the accused persons opened their defence, the prosecution submitted amended charge to which the three accused persons, each, pleaded “not guilty” afresh to each of the 11 charges.
- B** Thereafter the accused persons, particularly the appellant as the 1st accused, each entered his defence.

At the close of the defence and the final addresses of the respective counsel for the prosecution and the defence the trial Federal High Court reserved its judgment to 13th June, 2013. It delivered the reserved judgment on the said 13th June, 2013. The three accused persons were all convicted and sentenced to various terms of imprisonment. Finding that the prosecution had proved their case against the appellant herein, as the 1st accused, on each of the 11 charges, the trial court convicted him on all the 11 charges. The appellant lodged his appeal against his conviction on 20th June, 2013, on five grounds to the Court of Appeal (hereinafter called the “court below”). The notice of appeal was subsequently amended with the grounds of appeal increased from 5 to 12 in the amended notice of appeal at the court below.

The appellant's appeal was heard by the court below. It was, on 16th July, 2014, dismissed in its entirety. The appellant's conviction and sentence were affirmed by the court below: hence this further appeal. The notice of appeal, filed on 3rd September, 2014, has 8 grounds of appeal. From these 8 grounds of appeal, the appellant's counsel has formulated 4 issues for the determination of the appeal. They are:

- G**
- 1. Whether the decision of the court below is not marred by unfairness and lack of fair hearing by their deliberate refusal to countenance and determine various germane issues laid before them by the appellant. [from grounds 1, 2 & 3]**
- H**
- 2. Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 8 – 11 of the charge? [from ground 6]**
- I**

- A** **3. Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 1-7 of the charge? [from grounds 7 & 8]**
- B** **4. Whether the learned justices of the court below were right in refusing to declare the trial of the appellant a nullity since the amended charge upon which it was based is an abuse of court's process. [from grounds 4 & 5]**

C

Issue 4, raising issue of the competence or otherwise of the processings of the trial court culminating in the conviction and sentence of the appellant, shall be given its deserved prominence and precedence over the other

D

issues. The implication of a defect in the competency of the court is that any defect in the competence of the court is fatal. It renders the proceedings a nullity no matter how well conducted the proceedings were: **MADUKOLU vs. NKEMDILIM** (1962) 1 ALL NLR (Pt. 4) 587;

E

EGUNJOBI vs. F.R.N (2013) 3 NWLR (Pt. 1342) 257.

Appellant's counsel submits that the amended charge before the trial court, not initiated by due process of the law, was a nullity or void *ab initio*; and that the jurisdiction of the trial court over it and him, on the basis of which the trial of the appellant proceeded was legally ousted, as such the proceedings are void *ab initio*. He called in aid **OKORO vs. THE STATE** 14 WACA 370; **ORUCHE vs. C.O.P** (1963) 1 ALL NLR 262; **THE STATE vs. CHIEF MAGISTRATE ABOH MBAISE** (1978) 1 LRN 316.

G

Learned counsel argues that the effect of Sections 162 and 163 of the Criminal Procedure Act (CPA) is that every amendment to the charge after the accused had taken his plea to it shall be upon leave sought and granted; that the leave of court for the prosecutor to amend the charge is a condition

H

precedent to the validity of the amended charge; and that if the prosecutor proceeded to file amended charge without leave of court first sought and obtained, the amended charge is fundamentally defective and invalid.

I

This objection, appearing to be posthumous, is predicated on the following facts. The original charge was filed on 15th July, 2011. The

A appellant, as the 1st accused, took his plea to it on 18th July, 2011. The PW1 and PW2, the only witnesses called by the prosecution, concluded their testimonies on 3rd May, 2012 and they were discharged. The case was then adjourned to 26th June, 2012 for continuation of the hearing. However, on

B 25th June, 2012, the prosecutor filed the amended charge. In substance, the amendment affected only the original count 6. Therefrom Intercontinental Bank Plc was inserted. Apart from this, the 11 counts in amended charge remain *ipssimaverba* with the 11 counts in the original charge. The

C prosecuting counsel brought this to the attention of the trial court in the presence of the defence counsel. From all indications the defence counsel nudged and encouraged the prosecution to undertake this course. The minutes of the proceedings at pages 97 98 are as follows:

D

EDOBOR: **We discovered that there is a need to amend the charge in count six (6) instead of Skye Bank in place of Intercontinental Bank. I discussed this with the defence counsel but he preferred a new charge drafted to replace the present one and I have done so.**

E

F

OYAKHIRE: **We are not opposing the amendment.**

USIFOR: **No opposition to the amendment.**

G

COURT: **The newly amended charge of 25. 6. 2012 is read and explained to each of the accused persons and each appeared to have understood satisfactorily and pleaded as follows.**

H

The 3 accused persons, this appellant inclusive, all pleaded NOT GUILTY to each of the 11 counts. Thereafter the prosecutor closed his case.

I

It is against this same procedure he acquiesced in that the appellant is making so much fuss about. Equity follows the law and will not allow a

A party to approbate and reprobate on the same issue. Equity, acting in *personam*, will forbid anything that is unconscionable to do. Thus it restrains a party from insisting on a right he had waived. If by his conduct he had made another person to assume that he could act in the way he had

B acted, it would therefore be unconscionable for the same party to renege on his words and insist on his legal right as doing so will prejudice the party who had so acted.

I am aware that this court in **MENAKAYA vs. MENAKAYA** (2001) 9 10 SC 1; (2001) 16 NWLR (Pt. 738) 203 had stated that this specie of estoppel by conduct does not apply to statutory rights but only to personal rights. The **MENAKAYA** situation is distinguishable. In the instant case the appellant can waive all niceties ensuring the protection of his personal

D right. He waived them.

Since the **MENAKAYA** case, the principle of *estoppel* by conduct had been codified and made statutory by virtue of Section 169 of the Evidence Act, 2011. In **MENAKAYA** case the parties and their counsel

E gave the trial judge, in a divorce

Petition, their consent that the judgment be delivered in chambers instead of open court. The law enjoins, in order to demonstrate that justice is not only done but seen manifestly to be done, that trials and delivery of

F judgment shall be done in open. That is what makes it a public right.

I do not, from the peculiar facts of this case, think that the appellant has suffered any prejudice by the failure of the trial court to formally grant leave to the prosecutor to file the amended charge. It is clear to me, from

G the proceedings, that the trial court and the parties, through their respective counsel, had approved the amendment and given the nod to the prosecutor file the amended charge. The parties, including the appellant, were in no way misled. The insistence of the appellant's counsel on the learned trial

H judge failing "to formally grant leave for the amendment" is nothing but sheer insistence on crass or arcane technicality. Thus, as Aderemi, JSC stated in **YUSUF vs. ADEGOKE** (2007) 6 SC (Pt. 1) 126; (2007) 11 NWLR (Pt. 1045) 332, a technicality in a matter could arise if a party is

I relying on abstract or inordinate legalism to becloud or drown the merits of case. In other words, it arises when a party holds or relies tenaciously unto

A the rules of court with little or no regard to the justice of the matter. As far as he is concerned, like Shylock in the Merchant of Venice, the rules must be followed to the last sentence, the last word and the last letter. The party emphasising on technicality has little or no regard to the justice that would

B be sacrificed, or injustice that would be caused to the opponent. The attitude of the courts, these days, is to enthrone substantial justice without undue adherence to technicalities. Justice can only be done, as stated by *Edozie JSC* in **ADELUSOLA vs. AKINDE** (2004) 18 NSCQR 371;

C (2004) 12 NWLR (Pt. 887) 295, if the substance of the matter is examined. I have examined the substance of this complaint. The justice of it does not avail the appellant.

In any case, the appellant, being very vociferous about the learned

D trial judge not formally granting leave to the prosecutor, under Section 102 CPA, to file the amended charge, was completely oblivious of the principle or rule of law in Section 167 of the same CPA to the effect that any objection to a charge for any formal defect on the face thereof shall be taken

E immediately after the charge had been read over to the accused and not later. This objection at this appellate stage to the amended charge is no doubt belated. It is mere appeal to arcane or crass technicality. Since equity follows the law, and takes as done that which ought to be done; the fact that

F the learned trial judge drew from the consent of the defence counsel to the prosecutor “to draft a new charge” and proceeded to read and explain “the newly amended charge” to the accused persons, including the appellant herein, and immediately thereafter took their respective pleas thereto,

G suggest his defacto and substantial permission or approval to prosecutor to file the amended charge.

This being a court of justice as well and not only of law, I shall invoke

H Section 168(1) of the Evidence Act, 2011 to take as granted to the prosecutor the formal leave to file the amended charge. It is enacted in Section 168(1) of the Evidence Act (*supra*) that when a judicial act is shown to have been done in a manner substantially regular, it is presumed that all formal requisites for its validity were complied. The justice of the matter

I demands that his formal act be taken as done as it ought to have been done. Coming, as I do, to this conclusion issue 4 is hereby resolved against the

A appellant and I hereby declare that the learned justices of the court below were right in refusing to declare the trial of the appellant, founded on the amended charge, a nullity.

At the court below the appellant had raised issues 3, 5 & 6 thus:

B

1. Whether the learned trial judge was right in relying on hearsay evidence, both oral and documentary, to adjudge the appellant guilty of the offences charged?

C

D

2. Whether the appellant whose bail was revoked by the lower court for daring to challenge the voluntariness of some confessional statements sought to be tendered against him could be said to have had fair trial at the lower court which ultimately culminated in his conviction and sentence?

E

F

3. Whether the failure of the learned trial judge to consider the defences of the appellant before adjudging him guilty of the offences charged and to subject his purported confessional statements to the appropriate test laid down by law before proceeding to rely on them to the prejudice of the appellant do not occasion substantial miscarriage of justice against the appellant?

G

H Learned counsel for the appellant submits that the failure, one way or the other, of the court below to consider these issues submitted to them for the determination of the appellant's before them had undermined the appellant's right to fair hearing, particularly as the court below offered no reason for their failure to consider these three (3) issues. The cases:

I **OKONJI vs. NJOKANMA** (1991) 7 NWLR (Pt. 202) 131; **OWODUNNI**

A vs. REGISTERED TRUSTEES CELESTAL CHURCH OF CHRIST (2000) 10 NWLR (Pt. 675) 315; **ABIOLA vs. F.R.N** (2015) 7 NWLR (1457) 125 at 135 – 136; **OVUNWO vs. WOKO** (2011) 17 NWLR (Pt. 1277) 522 at 533 and 548 – 549 are cited to buttress the submission.

B It is further submitted for the appellant that while the court below could reframe the issues formulated by the appellant, it could not justifiably, totally, ignore and abandon the core issue in the appeal. And that as an intermediate court, the court below has a duty, on the authority of **C ODUNAYO vs. THE STATE** (1972) 8- 9 SC 290 at 296; **IFEANYI CHUKWU (OSUNDU) LTD vs. SOLEL BONEH LTD** (2000) 5 NWLR (Pt. 656) 322 at 338 – 339; **A.G, FEDERATION vs. A.I.C LTD** (2000) 10 NWLR (Pt. 675) 293 at 300 & 308; **ADEOGUN vs. FASOGBON** (2011) 8 **D NWLR** (Pt. 1250) 427 at 437 – 438 & 448; to consider and decide on all issues submitted to it for determination.

As a general principle, the intermediate court, as the court below, is duty bound to consider all issues raised and or placed before it. It does not **E** have the liberty to decline a consideration of the issues before it, unless it intends to order a retrial and the further consideration of the issues in the case will prejudice the fresh hearing being ordered: **EDEM vs. CANON BALLS LTD** (2005) 6 SC (Pt. II) 16; (2005) 12 NWLR (Pt. 938) 27. If the **F** court failed to consider issues raised and placed it before it without any valid reason, then it would have failed in its judicial duty and there is a failure of justice: **EDEM vs. CANON BALLS LTD** (supra) **IKPEAZU vs. OTTI & ORS** (2016) LPELR- 4005 (SC); **OKONJI vs. NJOKANNA** **G** (supra); **CHUKWU vs. SOLEL BONEH** (supra).

Let me, from the onset, restate the law that not every error or mistake in the judgment results in allowing an appeal. The appeal court will only interfere when the error or mistake is shown to have occasioned a **H** miscarriage of justice **ABUBAKAR vs. B.O & A.P LTD** (2007) 2 SC 48; (2007) 18 NWLR (Pt. 1066) 319; **UNITY BANK PLC vs. BOUARI** (2008) 2- 3 SC (Pt. 1) 1; (2008) 7 NWLR (Pt. 1086) 372. Because miscarriage of justice varies from case to case; the facts and circumstances **I** of the case, where miscarriage of justice is alleged, must be examined:

- A ABUBAKAR ABUBAKAR & ORS vs. SAIDU USMAN NASAMU & ORS** (2011) LPELR – 1831 (SC). In effect the error resulting in miscarriage of justice is the mistake or error that is prejudicial or inconsistent with the right of a party: **OLADIJA SANUSI vs. OREITAN**
- B I. AMEVOGUN** (1992) 4 NWLR (Pt. 237) 237 at 527. A wrongful conviction based on a failure of the process of trial, no doubt, constitutes a miscarriage of justice. That is because a grossly unfair outcome in a judicial proceeding constitutes a miscarriage of justice: **BLACKS LAW**
- C DICTIONARY.**

The summary of issues 3, 5 & 6 the appellant raised at the court below is:

- D I. Issue 3 challenged the admissibility of the evidence of the PW1 and PW2 at the trial court. The evidence of the two witnesses are said to be hearsay.**
- E II. Issue 5 raised the issue of the unfairness of the trial court not ordering trial-within-trial to determine the voluntariness of the extra-judicial statements of the appellant herein.**
- F III. In Issue 6, it was contended that the trial court shut its eyes to the defence of the appellant, as the 1st accused.**

- G** The appellant's six issues at the court below are reproduced in the judgment of the said court at page 289 of the record. The respondent's 3 issues are also reproduced in the said judgment at page 290 of the record. The court
- H** below gave its reasons for preferring to adopt the appellant's issue 1 and the respondents three (3) issues. The reasons are stated at page 290 of the record. It is therefore not correct as stated robustly, albeit misleading, that “the learned justices of the court below (did) not offer any reason for their
- I** failure to consider and determine these issues one way or the other”.

A The PW1 and PW2, at the trial court, testified to their investigatory roles including their recording statements of the accused persons, recovery of real evidence including documents, tracing the transfers of money and receipt of payments through Western Union Money Transfers. I do not
B think, or agree with the appellant, that the oral evidence of the PW1 and PW2 based on their investigatory roles are hearsay. Their oral evidence do not offend any principle of the Evidence Act on hearsay. Rather, they are in accord with Section 126 of the Evidence Act, 2011 that enjoins the witness
C to give direct evidence as to what he saw, heard, perceived or did.

The learned appellant's counsel appears to me to have misconceived the purport of Exhibits A, C1 – 5 and D1-6 when he submits that they are documentary hearsay evidence. The learned counsel never showed where
D and how the trial court used their contents to convict the appellant. These documents were put into the evidence through the PW1, an investigator, who gave the circumstances of their recovery in the course of the investigation. Exhibit A, for instance, is the petition that spurred the PW1
E and other agents of the Economic and Financial Crimes Commission (EFCC) into investigation. Exhibits C1-4, said to be scam mails were recovered in the course of the investigation. It appears, from page 70 of the record, that they were tendered and received in evidence without objection
F as real evidence. Ditto for Exhibits D1-6. It was the defence counsel (see page 82) who caused the PW2, under cross-examination, to read out the contents of Exhibits C2 and C3.

The learned trial judge, at page 167 of the record, merely recounted
G how, from the evidence of PW1 and PW2, the appellant, as the 1st accused, was arrested and Exhibits A, B, C1-4, D1-6, E, F, I1-3 were recovered in the course of their investigation. I cannot see how and where Exhibits A, C1-4 and D1-6, said to be hearsay documentary evidence, formed the basis of the
H judgment of the trial court convicting the appellant. I also cannot see how the court below affirmed the conviction of the appellant on those bases.

Competent issues for determination of an appeal are formulated or raised from competent ground(s) of appeal, which also flow directly from
I the reasons for the decision appealed. A valid ground of appeal attacks the decision of the court on an issue decided by that court: **F.M.B.N vs.**

A **N.D.I.C** (1999) 2 NWLR (Pt. 591) 333. An issue for the determination of an appeal, like the appellant's issue 3 at the court below, which does not arise from the decision appealed is incompetent. An appellant, whose incompetent issue is allegedly ignored cannot complain of miscarriage of justice.

B The unfairness of the failure of the trial court not ordering a trial-within-trial to determine the voluntariness of the appellant's extra-judicial confessions is said to be the substance of the appellant's issue 5 at the court below. The PW1, who recorded the extra-judicial statements of the appellant, the 1st accused, was testifying when the prosecutor sought to tender the statements, appellant's counsel objection to their admissibility on grounds of involuntariness of their making. It appears, from page 73 of the record, that all the counsel agreed that trial-within-trial be conducted to determine the voluntariness of the statements.

C The trial court did not actually scuttle or jettison the idea or propriety of the trial-within-trial. Continuation of the proceedings was adjourned to 3rd May, 2012 for that purpose. Before the adjournment the trial court, observing that "there is likelihood the case will take longer time and (that) we cannot guarantee accused persons bail till then", *suo motu* revoked the bail of the accused person.

D When the trial court re-convened on 3rd May, 2012, Mr. Afolabi of counsel to the appellant announced dramatically that they were withdrawing their "objection (to) the tendering (of) the 1st and 2nd accused's statements in evidence". That was how the trial-within-trial was aborted.

E The order of the trial court *suo motu* revoking the bail of the appellant appears arbitrary and wrong. It was also an appealable order, by virtue of Section 318 of the Constitution, that was not appealed.

F It is not true, *ex facie* the minutes of the proceedings in the printed record, that "even though the prosecutor conceded to the ordering of a trial-within-trial in order to determine the voluntariness or otherwise of the said purported confessional statements, the learned trial judge refused to order a trial-within-trial". This sheer falsehood contrived by the learned counsel for the appellant in support of this issue is completely suppositious. It is a lie full of sound and fury and yet signifies nothing. The printed record does

- A** not support and substantiate the rather unethical conduct of the learned counsel, Charles Ihua-Maduenyi, Esq., who settled this appellant's brief. Based on this blatant falsehood, the learned counsel submits that the appellant was constrained to withdraw his objection to the admissibility of
- B** his confessional statements, the learned trial judge having instilled fear on the appellant and intimidated him.

- The PW1, who recorded the confessional statement of the appellant under caution, testified that on 5th April, 2011 the appellant, as the 1st
- C** accused, "Confessed (that he was) the brain behind the scam scandal and (that) he started as pen-pal to Cynthia Taylor before he introduced (the) loan scam". PW1 testified further that the appellant admitted that 'he promised to help (Cynthia Taylor) obtain or secure a loan from a bank in Nigeria and
- D** asked for advance fee for processing", that he (the appellant) continued his scam until he was ready for his Youth Service before he handed it to his friend, the 2nd accused", and that on 6th April, 2011 the appellant led the investigators to the 2nd accused and he was arrested.

- E** The PW1 and PW2, on 3rd May, 2012 after the vexed revocation of bail of the appellant *suo motu* by the trial court, were cross-examined. No attempt, albeit feeble, was made by the appellant's counsel to discredit their evidence either as to the fact of the appellant's admission or as to the
- F** voluntariness of the appellant's confessional statements in Exhibits I1-3, written personally by the appellant.

- Learned appellant's counsel submits on authority of **AHMED vs. COMMISSIONER OF POLICE, BAUCHI** (2012) 9 NWLR (Pt. 1304)
- G** 104 at 133, correctly, that courts are recognized as hallowed chambers of justice, not where fear is meted out to citizens standing trials thereat. The facts of this case do not warrant this principle. Courts of justice are also not theatres where lawyers enjoy the luxury of maligning judges with blatant
- H** lies crafted skillfully to win cases at all costs.

- The unchallenged evidence of PW1 and PW2 establishing the oral confession of the appellant, standing on its own, is a strong evidence pointing in the direction of complicity of the appellant in alleged offences.
- I** It also corroborates the appellant's confessions in Exhibits I1-3.

A Counts 8-11 in the amended charge are not really about obtaining by false pretences. Rather, they allege that the appellant was in possession of scam e-mails. The scam e-mails that the appellant was allegedly in possession of are Exhibits C1-4. The defence of the appellant to counts 8-
B 11, as found at page 105 of the record, is that:

C **Exhibits C1-4 were documents (sent) to Chi-Egwe by Cynthia Taylor (the lawyer who write the petition to EFCC). These documents were not found in my possession.**

D The PW1, through whom Exhibits C1-4 were tendered in evidence, never testified that Exhibits C1-4 were found in possession, or recovered from the possession, of the appellant. He merely averred in his evidence at page 70 of record, that “some scam mails were recovered during investigation”. He thereafter identified Exhibits C1-4 as the scam mails. PW2 also did not aver
E that Exhibits C1-4 were in the possession of the appellant. However, based on the appellant's confessional statements the trial court found that Exhibits C1-4 were found in the possession of the appellant and recovered therefrom. The court below however took its time to consider this before it
F affirmed the finding.

This same issue was issue 4 considered by the court below at pages 302-309 of the record. The substance of appellant's issue 6 at the court below, subsumed in issue 4, was considered by the court below.

G Having demonstrated that the appellant's issues 3, 5 and 6 at the court below were considered by the court below I hereby resolve issue 1 before us against the appellant.

H I did touch, under issue 1 just resolved, some salient points on whether the scam mails, Exhibits C1-4 were found in the possession of the appellant and recovered therefrom. Exhibits C1-4 are the subject of counts 8-11 the amended charge. The trial court and the court below made concurrent findings of facts that the appellant was in possession of Exhibits
I C1-4. The trial court predicated this finding on the confessions of the

A appellant. The learned appellant's counsel preferred not to attack this finding. He left the said finding of fact inviolate. The court below also addressed the point before affirming the finding of fact. Again, rather than offering a frontal attack, the learned counsel merely submits, incorrectly, B that the trial judge and the justice shut their eyes to the admission of the PW1. Allegedly, that they “found or recovered” Exhibits C1-4 from the e-mails sent to EFCC by Barrister Chi-Obi Igwe, Cynthia Taylor's lawyer. Page 67 to which learned counsel pointed as the factual sources of this C submission does not bear him out. Lines 9 and 10 of the page 67 of record to wit:

D **“We went through the additional documents sent to us by the complainant among which are SCAM Mails”. have been clearly misconceived or twisted by the learned counsel. The scam mails alluded to here have not been linked to, or identified as, Exhibits C1-4. When the PW1 E was cross-examined no such effort was so made. The opportunity was missed and wasted.**

F Appellant's issue 3 before us here is supposed to have sprung from his grounds 7 and 8 of the grounds of appeal, which shorn of their particulars complain that:

- G 1. **The learned justice of the Court of Appeal erred in law in affirming the conviction and sentence of the appellant in counts 1-7 of the charge when the same was never proved beyond reasonable doubt.**
- H 2. **The leaned justices of the Court of Appeal erred in law in failing to come to the conclusion that the finding of the appellant guilty in counts 2, 6 and 7 of the charge by the learned trial judge who had earlier discharged the appellant's co-accused on the same I was erroneous and perverse.**

- A** The issue formulated from the two grounds is: whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 1-7 of the charge? It is difficult to find that this issue, distilled from grounds 7 and 8, above reproduced, has its focus on attacking the very facts
- B** on which concurrent findings of fact on which the conviction and sentence rested. Learned appellant's counsel cannot therefore use the issue to spring attacks on admissibility of Exhibits A, C1-4 and D1-6 on the grounds that they are documentary hearsay evidence. He cannot use the issues as a basis
- C** to insist that the appellant's confessional statements were made involuntarily and therefore inadmissible.

The trial court and the court below having found concurrently that the respondent, the prosecutor, had proved the guilt of the appellant beyond

D reasonable doubt on facts as regards counts 1-7, the duty of the appellant's counsel in this further appeal is to demonstrate how perverse and unreasonable those concurrent findings of facts were. That burden is not discharged by whining and whimpering.

- E** The appeal on this issue is clearly predicated on the question of facts requiring proof by empirical evidence. The attitude of this court, on concurrent findings of facts by the trial court and the intermediate court, has since fossilized. Unless the appellant shows that there are special
- F** circumstances: that is that the conclusions reached were wrong or perverse, this court will not readily interfere with the concurrent findings:
- G** **IBRAHIM vs. OSUNDE & ORS** (2009) 6 NWLR (Pt. 1137) 383 (SC); **OMOTOLA & ORS vs. THE STATE** (2009) 7 NWLR (Pt. 1139) 148 (SC). I do not think the appellant has satisfactorily shown why the concurrent findings of facts by the trial court and the intermediate court should be interfered with to warrant my venturing to interfere with the findings. The *viva voce* confession of the appellant which the PW1
- H** testified to, read with the confessions in Exhibit I1-3, amount to the appellant's conclusive admission of his guilt of the offences in counts 1-7 of the amended charge.

- The defence put up by the appellant at pages 103-108 of the record
- I** were completely prevaricatory and unreliable. For instance, at page 107 of

A the record, he made this ambivalent explanation of the \$2,000 USD he admitted receiving from Cynthia Taylor to the effect that the \$2000 USD was “not only for my personal upkeep”. But also for what? He did not say.

The operative false pretence in counts 1- 7 is the false representation
B made to Cynthia Taylor that the appellant and his co-accused were in a position to help her obtain or secure loan from a Nigerian bank. This representation was factually a hoax from the totality of the prosecution's evidence, including the confessional statements of the appellant made
C under his own hand, Exhibits I1-3. The appellant, testifying as DW1 at pages 103-108 of the record, interestingly never once alluded to the damaging evidence that he falsely represented to Cynthia Taylor that himself and his co-accused were in a position to give or secure loan to her
D from a Nigerian bank and in furtherance of that asked her “for an advance fee for processing” of the loan. Cross-examined the appellant, DW1, admitted that he “gave statements to EFCC” and that he was not a loan lender. He offered no iota of evidence in rebuttal of the prosecution's
E evidence on the operative false pretence. Thus, the appellant failed to discharge the evidential burden on him to cast any reasonable doubt on this crucial operative false pretence. I cannot, therefore, fault the holding of the trial court as a matter of fact that the confession of the appellant. “”Exhibits
F I1-3 were admitted in evidence with no objection” and that the Exhibits are consistent with the knowledge, acts and intentions of the appellant. In dismissing the appellant's appeal and affirming the conviction of the appellant, the court below found “that the prosecution has proved beyond
G reasonable doubt” the offences of criminal conspiracy to obtain money from Cynthia Taylor by false pretences, and obtaining various sums of money from the said Cynthia Taylor by false pretence.

It is an established judicial policy of this court that it will not readily
H and ordinarily interfere with the concurrent findings of facts by courts below it, unless the appellant satisfactorily shows or establishes that the said current findings are perverse, unreasonable and not supported by facts in the printed record: **BASHAYA vs. THE STATE** (1998) 4 SC 199;
I (1998) 5 NWLR (Pt. 550) 351; **OGBU vs. THE STATE** (1992) 10 SCNJ

A 88; (1992) NWLR (Pt., 259) 255; **OGUNDIYAN vs. THE STATE** (1991) 4 SCNJ 44, (1991) 3 SC 100. The appellant herein has not satisfactorily shown why this judicial policy shall not be followed in this case. In what appears an appeal to mere sentiments, the appellant's counsel submits that
B since the trial court had held that counts 2, 3, 6 and 7 were not proved against the 2nd and 3rd accused persons, the trial court could not offer any reason which made it to adjudge the appellant guilty on those same counts. Sentiments, it must be borne in mind, command no place in judicial
C deliberations: **EZEUGO vs. OHANYERE** (1979) 6 SC 17; **MOHAMMED IDRISU vs. MODUPE OBAFEMI** (2004) 11 NWLR (Pt. 884) 396; **ORJI UZOR KALU vs. F.R.N & ORS** (2016) LPELR 40108 (SC). On this note, I hereby dismiss this issue, and resolve it against
D the appellant.

On the whole, I find no substance in this appeal. It is hereby dismissed in its entirety.

E The decision of the Court of Appeal in the appeal No. CA/B/349AC/2013 affirming the conviction and sentence of the appellant by the Federal High Court in the charge No. FHC/57C/2011 is hereby affirmed.

F **Ejembi Eko**
Justice, Supreme Court

G **RHODES-VIVOURE, (JSC):** I have had the privilege of reading in draft the leading judgment of my learned brother, **Ejembi Eko, JSC**. I am in full agreement with his lordship reasoning and conclusions. In view of the importance of the jurisdictional point in particular I have decided to add a few paragraphs of my own.

Issue No. 4 reads:

H **“Whether the learned justices of the court below were right in refusing to declare the trial of the appellant a nullity since the amended charge upon which it was based**
I **is an abuse of courts process?”**

- A** The substance of the complaint is that since the learned trial judge did not formally grant leave to the prosecutor before the amended charge was filed, the subsequent trial founded on the amended charge is a nullity as the jurisdiction of the trial court over such proceedings is ousted, and the proceedings null and void.

B The simple issue is:

- C** **“Whether leave must be obtained before a charge is amended.**

Sections 162, 163, 164 of the Criminal Procedure Act must be considered. Section 162 states that:

- D** **”162. When any person is arraigned for trial on an imperfect or erroneous charge the court may permit or direct the framing of a new charge or add to or otherwise alter the original charge.**

- E** The above is applicable where an imperfect charge is before the court. The court may direct the prosecutor to frame a new charge if he has not done so already. The judge has jurisdiction to direct the prosecutor to frame a fresh charge when a charge is faulty.

Section 163 states that:

- G** **“163. Any court may alter or add to any charge at any time before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused.**

- H** The power to alter a charge includes the power to substitute a fresh charge. A charge may be amended after closing speeches but before judgment is delivered provided that section 164 of the Criminal Procedure Act is complied with.
- I** Any amendment can be made provided that there is no

A injustice to the accused person. See *R vs. Kano & Arisah (1951) 20 NLR p. 32, Okwechima vs. Police (1956) 1 FSC p. 73.*

Section 164 of the Criminal Procedure Act provides for the alteration of a charge. It states that:

B

“164 (1). If a new charge is framed or alternation made to a charge under the provisions of section 162 or section 163 that court shall forth with call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge.

C

(2) If the accused declares that he is not ready the court shall consider the reasons he may give and if proceeding immediately with the trial is not likely in the opinion of the court to prejudice the accused in his defence or the prosecutor in his conduct of the case the court may proceed with the trial as if the new or altered charge had been the original charge.

D

E

(3) If the new or altered charge is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor the court may either direct a new trial or adjourn the trial for such period as the court may consider necessary.

F

G

(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 purpose of all proceedings in connection therewith as having been filed in the amended form.

H

Relevant extracts from the record of proceedings in the trial court show that the charge was amended as follows:

I

“Prosecutor: We discovered that there is a need to amend the charge in count six (6) instead of Skye Bank in

A place of Intercontinental bank. I discussed this with the defence counsel but he preferred a new charge drafted to replace the present one and I have done so.

B Defence Counsel: We are not opposing the amendment.

C Court: The newly amended charge of 25/6/2012 is read and explained to each of the accused persons and each appeared to have understood satisfactorily and pleaded as follows.....”

D When it is the desire of a prosecutor to amend the charge or file a fresh charge, he files the process in the registry and serves a copy of the process on the defence counsel.

Leave means permission.

E An informal oral application is made to the trial judge in open court to amend or file fresh charge/s and leave to amend is not formally granted by the judge. It is implied that leave has been granted when the accused person is called upon to plead to the amended charge or fresh charge. The fact that the accused person pleads to the amended charge is indicative of the fact that leave was obtained.

F Failure of the accused person to plead to the amended or fresh charge as provided by section 164 of the Criminal Procedure Act renders the entire proceedings null and void. See *R vs. Eronini (1953) 14 WACA P. 366*, *G Adisa vs. AG Western Ngeria (1965) 1 ALNLR P. 412*.

H There was strict compliance with section 164 of the Criminal Procedure Act, when the charge was amended, in that the appellant pleaded to the amended charge. The amended charge was not an abuse of process and the trial is not a nullity. It is for these observations that I too, find no merit in this appeal.

Appeal dismissed.

I **Olabode Rhodes-vivour**
Justice, Supreme Court

A PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Ejembi Eko JSC and to register the support I have for the reasonings, I shall make some comments.

B This is an appeal against the decision of the Benin Division of the Court of Appeal or court below or lower court delivered on the 16th day of July, 2014 which affirmed the conviction and sentence of the appellant by the Federal High Court sitting at Benin per Adamu Hobon J on the 13th day of June, 2013.

C The facts leading to this appeal are well captured in the lead judgment and so there is no point repeating them unless when the occasion arises for a use of any part of those facts.

D On the 29th day of November 2017 date of hearing, learned counsel for the appellant, Charles Ihua-Maduenyi Esq. adopted the brief of argument filed on 27/9/17 and deemed filed on 8/11/17 wherein were crafted four issues for determination, which are as follows:

- E** 1. **Whether the decision of the court below is not marred by unfairness and lack of fair hearing by their deliberate refusal to countenance and determine various germane issues laid before them by the appellant.**
- F** 2. **Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 8-11 of the charge.**
- G** 3. **Whether the court below was right in affirming the conviction and sentence of the appellant in respect of counts 1-7 of the charge.**
- H** 4. **Whether the learned justices of the court below were right in refusing to declare the trial of the appellant a nullity since the amended charge upon which it was based is an abuse of process.**

I Ifeanyi Agwu Esq., legal officer of EFCC for the respondent adopted its brief of argument filed on 1/11/17 and deemed filed on 8/11/17 and in it

A were raised three questions for determination, which are thus:

- (1) **Whether the respondent/prosecution has proved beyond reasonable doubt the offence of conspiracy against the appellant.**
- B (2) **Whether the respondent/prosecution has proved beyond reasonable doubt the offence of obtaining money under false pretence in count three to seven (3-7) against the appellant.**
- C (3) **Whether the respondent/prosecution has proved the offence of being in possession of documents (scam mails) containing false pretence against the appellant beyond reasonable doubt.**
- D

E I see it would be easier to collapse all the issues as crafted on either side into one issue and coined in the way that would be easy to utilize in the determination of the appeal and that is thus:

SOLE ISSUE

F **Whether the court below was right in affirming the conviction and sentence of the appellant in respect of all the counts of the charge relating to the appellant.**

G Learned counsel for the appellant stated that appellant at the court below filed and relied on 12 grounds of appeal from which six issues for determination were canvassed and argued but that the court adopted appellant's Issue 1 and respondents 1, 2, and 3 upon which it based its judgment. That in none of the issues did the court below subsume the appellant's conviction and the court below did not proffer any reason for not considering and determining those issues one way or the other. That this was an infraction of Section 36 of the Constitution of the Federal Republic of 1999 (as amended) (CFRN). He cited **Okonji vs. Njokanma**(1991) 7 NWLR (Pt. 202) 131; **Owodunmi vs. Registered Trustees, Celestial**

A Church of Christ (2000) 10 NWLR (Pt. 675) 315; **Abiola vs. FRN** (2015) 7 NWLR (Pt. 1457) 125 at 135 – 136; **Ovunwo vs. Woko** (2011) 17 NWLR (Pt. 1277) 522 at 533.

He referred to appellant's issues 3, 5, and 6 at the court below for emphasis and stated that the court below ignored them and failed to consider them which was against the proper practice in the determination of an appeal. He cited **Odunayo vs. State** (1972) 8 9 SC 290 at 296; **IfeanyiChukwu (Osondu) Ltd vs. Soleh Boneh Ltd** (2000) 5 NWLR (Pt. 656) 322 at 338 339; **A.G. Federation vs. A.I.C. Ltd** (2000) 10 NWLR (Pt. 675) 293 at 308; **Adeogun vs. Fasogbon** (2011) 8 NWLR (Pt. 1250) 427 at 437 – 438,

That the manner with which the bail of the appellant was revoked showed a level of inducement on which the appellant retracted his objection to his extra-judicial statement and this is an area which the court below ought to have considered. That the failure to do so led to a miscarriage of justice for which there is necessity for the intervention of this court. He referred to **Idakwo vs. Ejuga** (2002) 13 NWLR (Pt. 783) 156; **Ibori vs. FRN** (2009) All FWLR (Pt. 487) 159 at 163-164; **Ahmed vs. COP, Bauchi** (2012) 9 NWLR (Pt. 1304) 104 at 133.

For the appellant, learned counsel raised the fact that appellant was charged with the offence of being in possession of fraudulent or scam e-mails contrary to Sections 6 and 8 (b) of the Advance Fee Fraud and Other Related Offences, Act, 2006 and punishable under Section 1 (3) of the same Act. That to prove the guilt of an accused person under Section 6 aforesaid, the prosecution must establish that the offensive document or fraudulent or scam e-mails was found in the possession of the accused. He cited **Odiawa vs. FRN** (2008) All FWLR (Pt. 436 – 439) 436 at 448.

That failure to prove this all – important ingredient entitles the appellant to an acquittal and discharge. He cited **Okoro vs. The State** (1988) 7 NWLR (Pt. 94) 255; **Alabi vs. The State** (1993) 7 NWLR (Pt. 307) 511; **Abiodun vs. FRN** (2009) All FWLR (Pt. 4830) 1260 at 1365 – 1366; **Ubanatu vs COP** (1959) WNLR 230 at 231; **Omonga vs. State** (2006) 14 NWLR (Pt. 1000) 532.

A Mr. Ihua-Maduenyi of counsel contended for the appellant that since PW1 and PW2 were not eye witnesses, their testimonies were hearsay and inadmissible. He relied on **Odogwu vs. State** (2013) 14 NWLR (Pt. 1373) 74 at 80-81; **Ekpo vs. State** (2001) FWLR (Pt. 55) 454 at 458; **Okoro vs. State** (1998) 12 SCNJ 84 etc.

B That Exhibits C1-4 being computer generated documents are inadmissible hearsay evidence since the prosecution failed to comply with the provisions of Section 84 of the Evidence Act 2011 which is fatal to their case. He cited **Kubor vs. Dickson** (2013) 4 NWLR (Pt. 1345) 534 at 549 – 550.

C Learned counsel for the appellant submitted that Cynthia Taylor was a vital witness and the failure of the prosecution to call her to testify was fatal to their case. He cited **Ashake vs. Army Council** (2007) 1 NWLR (Pt. 1015) 408 at 416 at 426; **Opeyemi vs. State** (1985) 2 NWLR (Pt. 5) 101 etc.

D It was further stated for the appellant that the trial at the court of first instance ought to have been declared a nullity as the amended charge upon which the conviction and sentence were based on was an abuse of court process. He cited **Egunjobi vs. FRN** (2013) 3 NWLR (Pt. 1342) 534 at 540; **Ugwu vs. State** (2013) 14 NWLR (Pt. 1374) 257 at 264.

E That leave of court was not obtained after the appellant took plea and the charge thereafter amended contrary to Sections 162 and 163 of the Criminal Procedure Act. He cited **Ekpenyong vs. Nyong** (1975) 2 SC 71 at 81 – 82; **COP vs Alao** (1959) WRVLR 39 etc.

F That when the charge is an abuse of court process the jurisdiction of the court over it is ousted and everything done on it amounts to a nullity. The cases of **Okafor vs. State** (1976) 5 SC 13; **Ezeze vs. State** (2004) 14 NWLR (Pt. 894) 491; **Fawehinmi vs. A.G. Lagos State** (No. 1) (1989) 3 NWLR (Pt. 112) 707 etc.

G Responding, learned counsel for the respondent submitted that the meeting of the minds, agreement between the accused to carry out a common intention were captured in the evidence before court and so the necessary ingredients of the offence of conspiracy established. He cited **Etim vs. The State** (1994) 5 NWLR (Pt. 345) 522 at 524; **Omotola vs.**

A **FRN** (1999) 12 NWLR (pt. 682) 483 at 501-502; **David Idiok vs. State** (2006) 12 NWLR (Pt. 993) 1.

In respect of the offence of obtaining money under false pretence, learned counsel for the respondent stated that the essential ingredients of the offence were made out beyond reasonable doubt. He referred to **Odiawa vs. FRN** (2008) ALL FWLR (Pt. 439) 436 at 447; **Onwudiwe vs. FRN** (2006) ALL FWLR (Pt. 319) 774 at 779-780.

That there was no objection from the appellant or counsel as to the admissibility of the statements which clearly were voluntarily made and were confessional aided the proof of the offence. He cited **Stanley Idugiun Egboghonome vs. The State** (1993) 7 NWLR (Pt. 306) 383; **Ayo vs. State** (2009) 8 WRN 134 at 139; **Stephen vs. State** (2013) 3-4 MJSC (Pt. 1) 137 at 142 etc.

Learned counsel for the respondent contended that the prosecution is not expected to call a large number of witnesses in proof of its case and it is enough if one or more witnesses called sufficiently established the case of the prosecution, the absence of a particular witness would not change the situation. Therefore that the said Cynthia Taylor, the complainant was not called did not damage the case of the prosecution. He cited **Nwaeze vs. State** (1996) 2 NWLR (Pt. 428) 1 at 6, **Adeyemo vs. State** (2015) 16 NWLR (Pt. 1485) 311 at 325; **Busari vs. State** (2015) ALL FWLR (Pt. 777) 715 at 734; **Nigerian Air Force vs. Obiosa** (2003) 4 NWLR (Pt. 810) 233 at 276; **Nwankwo vs. FRN** (2003) 4 NWLR (Pt. 809) 1 at 37 & 94.

For the respondent it was contended that there is nothing in evidence suggesting the strong arm tactics which appellant's counsel alludes to that pushed the appellant into withdrawing his objection to the tendering of his confessional statement and the statement properly admitted therefore. He cited **Abdullahi vs. FRN** (2016) ALL FWLR (Pt. 843) 1770 at 1794; **Duru vs. State** (2017) ALL FWLR (Pt. 893) 1243 at 1282-1283; **Mathew Okechukwu Enekwe vs. Int'l Merchant Bank of Nig Ltd & Ors** (2006) 19 NWLR (Pt. 1031) 146 at 174 etc.

Continuing further, learned counsel for the respondent submitted that the appellant had knowledge of the scam documents, authored some

A and had control of the said documents and so the ingredients of the offence were established.

That the court below had power to reformulate issues and that cannot be taken as not considering issues raised by the appellant. He cited many

B authorities.

On the offence of conspiracy, it is to be noted that it is an offence with the unique feature of being an offence usually concealed and often hatched in secret by the conspirators and so make it difficult to establish the physical
C contact among the persons who are said to have agreed to carry out an illegal act or perform a legal act through illegal means. Most of the essential elements of the offence of conspiracy are made through circumstantial evidence or by inference from an overt act of the conspirators or one of
D them. The offence of conspiracy is complete when two or more persons have agreed to do something at the moment of the agreement or even in the future. It is of no moment that something was done or omitted to be done beyond the stage of the agreement between those persons who have agreed
E to prosecute the act. To expatiate further, it is to be said that the moment the meeting of the mind has been reached and thereafter one of the conspirators reneges, repents, acquires cold feet and stops interaction with the others or may no longer have opportunity to participate or carry out his role in the
F agreement the offence has been already committed.

Again to be stated in this queer offence is that the conspirators need not know each other or meet at any point in time and this could mean their living in different towns, cities or even countries. It is enough that the
G conspirators have communicated at any point. For a fact it is an offence with damning features and a later change of mind at any given stage matters not. See **Erim vs. The State** (1994) 5 NWLR (Pt. 345) 522 at 524; **Omotola vs. FRN** (1999) 12 NWLR (Pt. 682) 483 at 501-502.

H Taking the matter of conspiracy further, the point has to be made that where two or more persons acting in concert and in furtherance of their common intention, each and every one of them is taken as liable for the consequence of the act that ensues. It is irrelevant which of the accused did
I what.

A Stated differently, where two or more persons act in concert in committing an offence any of them can be convicted for that offence. I rely on **David Idiok vs. State** (2006) 12 NWLR (Pt. 993) 1.

B Situating the essential ingredients or elements of the offence of conspiracy as stated above to the facts of the present case where the appellant was charged with the offence of conspiracy to commit felony to wit; obtaining money under false pretence with two other accused persons. The appellant who was 1st accused at the trial court admitted that he introduced the 2nd accused person, Omorede Darlington to one Cynthia Taylor to act as a bank manager for the purpose of giving her loan. This was stated in his extra-judicial statement, Exhibit “F1”.

C After that introduction the 2nd accused sending e-mails to Cynthia Taylor on obtaining for her the loan purportedly to be given to her from his bank. Then the 2nd accused introduced the 3rd accused persons Iyokho Nosa into the act and both 2nd and 3rd accused went on sending e-mails to Cynthia Taylor with intent to defraud her knowing that the information they were pushing to her were false. Then the 2nd accused demanded money from Cynthia Taylor for the processing of the purported loan which money she sent to him through western union in the name of the 3rd accused person which name had been sent to her by the appellant and the 2nd accused person.

D In evidence is that the 3rd accused handed the money to the 2nd accused and the money shared among the three of them, appellant inclusive.

E Clearly the agreement and the meeting of the minds were established and the appellant cannot claim not to be involved in the conspiracy because he did not carry out any part of the transaction. Therefore the court below saw as the trial court did that the links or connections between the appellant and his cohorts were glaringly in sight. The offence of conspiracy was proved beyond reasonable doubt against the appellant.

F In respect to the offence of obtaining money under false pretence in counts three to seven against the appellant I shall first cite the relevant statutory provisions thus:

I

A Section 1 (1) (a) of the Advance Fee Fraud and other Fraud Related Offences Act 2006, states thus:

B “Notwithstanding anything contained in any other enactment or law, any person who by any false pretence and with intend to defraud...

C (a) Obtain from any person, in Nigeria or in any other country, for himself or any other person..... Any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by false pretence, is guilty of an offence under this Act”.

D

On the essential elements of the offence of obtaining by false pretence for which the appellant was charged, this court in **Odiawa vs. FRN (2008)** ALL FWLR (Pt. 439) 436 at 447 laid down what could constitute the said offence.

E A look at the extra-judicial statement of the appellant would be of assistance. Exhibit “F1”, the appellant stated thus:

F “... I have seen the copies of the papers before me i.e. First Bank savings account identity card. I agree that the picture on it is mine. I used the identity card to collect the sum of \$1000 from Cynthia Taylor through Western Union. The Cynthia Taylor sent me the money because I told her I was a loan agent. I told her I give out loan as a loan agent and she get paid the fee for getting the loan. The fee I told her was \$250 which she paid and I again told her to pay a sum of one hundred dollars as clearance fee which she did. The Cynthia Taylor also paid a sum of two hundred dollars as bank transfer charges for transferring the loan....”

G

H

I

- A** From the admission of the appellant in that statement to the police and as shown in evidence the appellant knew he had not the capacity to give a loan to the victim and knew of the falsity of his claim and did not believe in the truth of the claim even as he put it across to the victim and based on that
- B** claim of being who he was not the said Cynthia Taylor made available various sums of money. In its finding in that regard the court below held as follows:

- C** **“In the present case, it is in evidence that the appellant had presented himself to the victim Cynthia Taylor that he was a loan agent capable of giving out loans to clients. The appellant had also proceeded to obtain various sums of**
- D** **money from the said Cynthia according to the appellant, to process the loan for her. The said pretence was however contained in the various emails sent to her which means communication constitutes an offence under the said law.**
- E** **Again, the various sums of money sent to the appellant were monies or items capable of being stolen and that the appellant had carried on these acts with intent to defraud, Cynthia Taylor”.**

- F** From the extra-judicial statement which was admitted without objection the respondent had been able to positively establish also through credible evidence that the appellant committed the offences in counts 2, 3, 4, 5, 6 and
- G** 7 of the charge. See **Stanley Idigun Egboghonome vs. The State** (1993) 7 NWLR (Pt. 306) 838.

- H** The purported attempt at retracting the extra-judicial statement did not affect the admissibility and so that statement taken alongside other pieces of evidence demonstrated the link between appellant and the acts culminating in the offences charged. See **Ayo vs. State** (2009) 8 WRN 134 at 139.

- I** Indeed, that Exhibit F1 alone would have been sufficient to ground the conviction of the appellant being voluntarily made, cogent and direct and it was easy for the court to accept it as true. See **Stephen vs. State**

A (2013) Vol. 3 – 4 MJSC (Pt. 1) 137 at 1423.

The appellant had raised a lot of dust over the non appearance of the complainant/victim, Cynthia Taylor, an American national to testify at the trial court which appellant posits is fatal to the case of the prosecution as her testimony was necessary in order to prove the case. That is in my humble view a generalization taken too far as while the evidence of such a witness could on its own settle the case of the prosecution, it does not translate to the fact that in its absence and while other avenues exist for the prosecution to carry out its burden duty to prove its case beyond reasonable doubt that the alternative route or angle cannot suffice. The reason is that the law has not prescribed the category or the total number of witnesses the prosecution is obligated to call in order to prove its case. The choice of how to go about proving its case resides squarely on the prosecution and it is at liberty to conduct its case as it thinks best so long as what the prosecution proffered satisfies the standard expected in establishing the essential ingredients of a stated offence. It is not in all instances that the testimony of the complainant is necessary. Come to think of it, in a murder trial the victim dies and not in a position to speak for himself as to stating how things happened but murder trials are conducted successfully without even the body of the victim seen. If the prevailing circumstances are such that proof can be made in a criminal trial with or without the victim, so be it. See **Nwaeze vs. State** (1996) 2 NWLR (Pt. 428) 1 at 6; **Nwankwo vs. FRN** (2003) 4 NWLR (Pt. 809) 1 at 34 & 94.

It was for the appellant to produce such evidence to prop up his case and not for it to dictate who must testify for the prosecution for appellant's guilt to be established. I rely on **Adeyemo vs. State** (2015) 16 NWLR (Pt. 1485) 311 at 325; **Busari vs. State** (2015) All FWLR (Pt. 777) 715 at 734; **Nigerian Air Force vs. Obiosa** (2003) 4 NWLR (Pt. 810) 233 at 276.

Again the appellant had sought to impugn the integrity of the trial court on the learned trial judge's revocation of the bail of the appellant which learned counsel now alludes to being the reason learned counsel withdraw his objection to the tendering of the confessional statement of the appellant which was slated for the mini trial or trial within trial. It must be noted that what propelled the learned counsel withdrawing his objection to

- A** the voluntariness of the statement remained in his bosom, unstated to the court and so far no evidence has been elicited to show that the revocation of the bail of the appellant was the strong arm tactics that forced the hand of the defence. This is because when the appellant's counsel withdrew the
- B** objection he gave no reasons for it and none was required, therefore it is too late in the day at this stage to push forward this reason of coercion from the trial court without proof or whiff of a reason. It therefore calls to mind a similar scenario in the case of **Stephen vs. State** (2013) Vol. 3-4 MJSC (Pt. 1) 137 at 142 where the Supreme Court held thus:
- C**

- D** **“State counsel, we seek to tender the statement of the accused as exhibit. Mr. Atirene defence counsel I object to the admissibility of the statement of the accused on the ground that it is not voluntarily made. I am withdrawing the objection. I pray that substantial justice be done in this case. Court, cautionary statement of the accused is admitted and marked as Exhibit 5. It is clear to my mind from the proceedings that the appellant's confessional statement is true since there was no objection from the appellant at the stage when it was tendered as an exhibit. Both courts below were correct to be satisfied with that fact.”**
- E**
- F**

- On the withdrawing of the objection to the tendering of the statement which the learned counsel for the appellant is at this apex court building up a case of bias and denial of fair hearing against the learned trial judge especially where there is nothing really on which to hang the insinuations being propped up at this level. The Court of Appeal on the withdrawal of the
- G** objection had this to say in its finding, viz:
- H**

- I** **“It is worthy of note that learned counsel for the appellant did not give any reason for withdrawing his objection to tendering the appellant's statement in evidence which gave graphic (sic) details of his communication with the victim....**

- A** **The accused person has corroborated this assertion when learned counsel withdrew his objection to the admissibility of the document which was tendered as Exhibit “F1”.**
- B** Clearly there was no basis for the attack of counsel to the appellant on the learned trial judge save for a desperate intention to score a cheap point and win the case for his client at all cost with distorted facts even if it meant destroying the reputation and standing of a defenceless judge, carrying out his sworn duty. The conduct of counsel is deprecated and counsel is advised to desist from such. See **Abdullahi vs. FRN** (2016) All FWLR (Pt. 848) 1770 at 1794; **Duru vs. State** (2017) All FWLR (Pt. 893) 1243 at 1282 – 1283; In **Matthew Okechukwu Enekwe vs. Int’l Merchant Bank of Nig. Ltd & Ors** (2006) 19 NWLR (Pt. 1301) 146 at 174; Tobi JSC cried out thus:
- E** **“Judges have no forum to defend themselves in the judicial process for positions they take in their judgments. They cannot speak one more word outside their judgments in defence of the positions they have taken. Let parties be slow in pouring venom on them. It is a serious attack on a judge to say that he introduced in the case, new matters which were not before the court. So much is involved as so much could be read into or out of the allegation. I will stop here, hoping that counsel will have some sympathy for judges, their partners in the smooth and successful administration of justice. It is only when judges and counsel are in some form of 'romance' that their joint partnership in the crusade for building the best justice system will be achieved in our legal system.”** See also, **Bolanle vs. Abeke** (2007) 9 NWLR (Pt. 1040) 411 at 432 paras B-E.
- F**
- G**
- H**
- I** My lords, we are constantly reminded that proof beyond reasonable doubt required of the prosecution in proof of a criminal offence against an

- A** accused is not the same as proof beyond the shadow of a doubt and in the case at hand the prosecution has duly acquitted itself of this burden of proof in the offences charged including the one of possession of documents containing false pretence contrary to Section 6 and 8 (b) of the Advance Fee
- B** Fraud and Other Fraud Related Offences Act 2006 as in the confessional statement, Exhibit “F1” the appellant stated as follows:

C **“The e-mail address I used in communicating with her was silviojean.lender@gimail.com. The other ones are silviojean11@yahoo.com and silviojean@yahoo.com.”**

- The prosecution carried out its function creditably and as expected by law.
- D** See **Dibie vs. The State** (2007) 9 NWLR (Pt. 1038) 30; **Odiawa vs. FRN** (2008) All FWLR (Pt. 436-4390) 436 at 448.

The concurrent findings of the two courts below are without fault and there is no foundation or base on which this court can upset or interfere with those findings. See **Nkebisi vs. State** (2010) 5 NWLR (Pt. 1188) 471; **Afolabi vs. State** (2010) 16 NWLR (Pt. 1220) 534.

- From the foregoing and the fuller and better reasoning in the lead judgment, I too dismiss this appeal which lacks merit. I abide by the consequential orders made.
- F**

Mary Ukaego Peter-odili
Justice, Supreme Court

G **CLARA BATA OGUNBIYI (JSC):** I have had the privilege of reading in draft the leading judgment of my learned brother Eko, JSC just delivered. I agree that the concurrent judgments of the two lower courts are unassailable.

H My brother has dealt adequately with all the issues raised in this appeal. I agree with the reasoning and conclusion arrived thereat and I adopt his judgment as mine. I find no merit in this appeal and in terms of the lead judgment, I hereby also dismiss same.

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

A DAUDABAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Ejembi Eko**, 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 hereby dismissed.

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Sidi Dauda Bage
Justice, Supreme Court

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I

**ALHAJI SAHEED IBRAHIM MASSALA
AND
INSPECTOR GENERAL OF POLICE**

SC/578/2015

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 16TH FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
MUSADATTIJO MUHAMMAD
KUMAI BAYANGAKAAHS
AMINA ADAMU AUGIE
PAUL ADAMU GALINJE**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

CASE LAW: The Principles in FRN v. Wabara (2013) 5 NWLR (Pt. 1347) 331.

COURT: Application to the High Court for leave to prefer a charge – Discretionary power of court to grant – Whether an appellate court cannot properly substitute such discretion.

COURT: Nigerian courts – Power to utilize foreign judicial authorities – Whether Nigerian courts have power to utilize foreign judicial authorities where helpful.

CRIMINAL LAW AND PROCEDURE: A case to answer – Where there is shown to be enough evidence from which the accused can make a clarifying response – Whether it does not mean that what is placed as evidence the accused person without more is guilty – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Application for leave of the High Court to prefer a charge – Criminal Procedure (Application for leave of the High Court to prefer a charge) Rules 1970 – Requirements therein.

CRIMINAL LAW AND PROCEDURE: Application for leave to prefer a charge S. 185(b) of Criminal Procedure Code and Or. 3 Rules 1 and 2(a) and (b) – Whether the annexure of witnesses statements to the application is not made a necessary requirement.

CRIMINAL LAW AND PROCEDURE: Application to the High Court for leave to prefer a charge – Service of statements of witnesses to accused – Whether accused not entitled to the service of statements at this stage.

CRIMINAL LAW AND PROCEDURE: Application to the High Court for leave to prefer a charge – Nature of application – Essence – Requirements.

CRIMINAL LAW AND PROCEDURE: Proof of evidence – Nature – Whether should only disclose prima facie evidence – Meaning thereof.

EVIDENCE: Presumption of formal requisites of validity – Where something constitutes both judicial and official act – Presumption that all formal requisites for its validity were complied with – S. 150(4) of Evidence Act.

STATUTE: Criminal Procedure Code – S. 185(b) – Meaning and Interpretation – Relevant considerations thereof.

WORDS AND PHRASES: “Substantial” – Meaning

WORDS AND PHRASES: Proof of evidence – Meaning – Whether it does not mean statement of witnesses.

Issues for Determination

- a. Whether having held that the respondent did not comply with Section 158(b) of the Criminal Procedure Code and Rule 3(2) of the Criminal Procedure (application for Leave to Prefer a Charge in the High Court) Rules 1970 by failing to state the reason why it is desired to prefer a charge without taking proceedings under chapter XVII of the Criminal Procedure Code, the court below was right in failing or refusing to quash the charge against the appellant for want of compliance with Section 158(b) of the CPC and the Rules which are mandatory. (Distilled from ground 1).**
- b. Whether the court below was right to have placed reliance on English Cases of R vs. LAMINIG 90 CR APPR. 450 and SEAL vs. CHIEF CONSTABLE OF WALES POLICE 2005 1 WLR 3183 to hold that Section 185(b) of the criminal Procedure Code is discretionary or permissive when the Supreme Court has already held that, that section is mandatory. (Distilled from ground 2).**
- c. Whether having regard to the fact that the proof of evidence disclosed group forgery and did not contain the resolution paper containing the alleged forgery or the forensic report of expert, the court below was right to hold that the proof of evidence discloses a prima facie case of the offence charged and a probable link between the appellant and the offence. (Distilled from ground 3).**

Facts of the Matter

The accused/appellant was charged for forgery contrary to Section 364 of the Criminal Code Act in Charge No. CR/36/12. Upon service on him of the charge, the appellant through counsel raised a preliminary objection seeking to quash the charge on grounds of lack of jurisdiction for non compliance with Section 185(B) of the Criminal Procedure Code, non disclosure of offence in

the proof of evidence against the accused/appellant and abuse of process.

The learned trial judge in a considered ruling after listening to the parties dismissed the objection holding that he had jurisdiction to try the appellant charged.

Dissatisfied, the appellant appealed to the Court of Appeal or court below or lower court against the decision of the trial court vide the notice of appeal filed on 21st February, 2013. The Court of Appeal dismissed the appeal, hence this approach to the Supreme Court.

Held: *(unanimously dismissing the appeal)*

1. *The nature and purport of S. 185(b) of Criminal Procedure Code*
In this instant case, the offence was committed in the Northern part of Nigeria and the applicable law as at the time of the offence is Section 185(b) precisely which provides thus:

“185 –

- (a) No person shall be tried by the High Court unless**
- (b) A charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court.”**

The interpretation to Section 185(b) of the Criminal Procedure Code (CPC) and Criminal Procedure (application for leave to prefer a charge in the High Court) Rules 1970 given by the Supreme Court would give the clear view useful for our purpose. See **Ohwovoriole vs. FRN (2003) 2 NWLR (Pt.803) 176 at 190** per Kalgo (JSC) who stated as follows:

“It must also be understood that the provisions of Section 185(b) of the CPC must be read with those contained in the rules governing the application to prefer a charge, as in this case, and any application to quash the charge preferred by leave

of the High Court must necessarily involve the consideration of those provisions.”

(Pp 141–142 Paras H–E)

2. *Procedure for leave to prefer a charge is determined by interpreting S. 185(b) together with other relevant rules thereto*

Also in the case of **FRN vs. Wabara (2013) 5 NWLR (Pt.1347) 331 at 348 349** per Muhammad JSC stated thus:

“The records therefore bear out the respondents that the witnesses' statements have not been attached to the appellants application for leave. But this fact does not mean that learned counsel are correct in supporting the lower courts finding that the appellants failure to annex the statement of witnesses is fatal... A community reading of the clear and unambiguous provisions of Section 185(b) of the Criminal Procedure Code and Order 3 Rules (1) and (2)(a) and (b) reveals clearly that the application has complied with the criteria and applicant is required to fulfill to be entitled to the leave he seeks. Nowhere in the applicable Rules has the annexure of witnesses Statements to the application for leave been made a necessary requirement.”

The learned JSC continued at para. H:

“Learned counsel for the respondent's contention that there is the necessity to attach statements of witnesses and serve same on the respondent is therefore misconceived.”

The learned justice of the Supreme Court then concluded thus at page 348 B – C:

“The respondents appealed to the court below has been the assertion, and same has been upheld by the court, that since the appellant has not met the criteria stipulated under Order 3 Rules (1)(2) of the relevant Rules of the trial court regarding its application, the leave necessary for the preferment of the charges against the respondents is improperly acquired. Competent proceedings against the respondents is impossible as both the improperly acquired leave and the illegally preferred charges against them must be quashed.” (Pp 142–143 Paras F–F)

3. *Procedure to apply for leave to prefer a charge Requirements thereof*
It is to be noted that the procedure to obtain leave from a judge of a High Court to prefer charge are provided for under the Criminal Procedure (application for leave to prefer a charge in the High Court) Rules 1970 is a discretionary power of the judge. When the application is made and it must be supported by the following:
 - (a) **The charge in respect of which leave is sought.**
 - (b) **Affidavit by the applicant that the statement contained in the application are true.**
 - (c) **A statement on whether or not any proceeding have been undertaken under chapter XVII of the Criminal Procedure Code, and**
 - (d) **The result of such application or proceeding if any.***(Pp 143–144 Paras G–A)*

4. *Accused not entitled at the stage of application to statement of witnesses*
The Court of Appeal held that the proof of evidence links the applicant to the offence.

I shall refer to what this apex court said on this point of leave to prefer a charge. See *Gaju vs. The State* (1975) NWLR (Pt.98)112:

“Judges who exercise the power of granting leave under the provision of Section 185(b) of the Criminal Procedure Code should ask for and insist on seeing the proof of evidence which it is intended to urge in support of the prosecution. It is not open at that stage to an accused person to be invited into the scene and moreover to be supplied with copies of the statement of potential witness.” (P 144 Paras D–G)

5. *The nature and purport of application to apply for leave to prefer a charge*

In *FRN vs. Wabara* (supra) at page 349 thus:

“The leave granted the appellant by the trial court must be appreciated, is on the basis of applicant's ex parte application to the court, respondents are not put on notice. The extant procedure put in place only require the appellant to provide the court with adequate materials from which to infer whether or not it is just to put respondent on trial. The court has insisted that it is oppressive and unconstitutional to put a person on trial unless the court approach to grant the leave is satisfied that the material accompanying the application disclose enough facts to warrant a trial, learned counsel for the respondent's contention that there is the necessity to attach statement of witness and serve same on the respondent is therefore misconceived. It is worth to know that proofs of evidence are not the same

as statement of the witness the appellant would call at the trial. Proofs of evidence are summaries of the statement of the witness to be called at the trial by the appellant.

It is for that reason that the rules require an affidavit from the appellant the evidence against the respondents as summarized in the proof of evidence prepared by the appellant will be evidence against the respondents in respect of whose trial the court is urged to grant leave to prefer a charge. Even at the trial, the respondents on the authorities are only entitled to access the statements of the prosecution's witness on the fulfillment of certain conditions.”

The requirement of “*prima facie*” evidence in the proof of evidence.

Fabiyi JSC in **FRN vs. WAGBARA** (supra) stated at page 38 as follows:

“It has been variously held by this court that proof of evidence should only disclose prima facie case which literally means evidence on its face value. See the case of **ABOGEDE vs. THE STATE (1996) 5 NWLR (Pt.448) 270; **AJIDAGBA vs. IGP** (1958) SCNLR 60.**

The proof of evidence and the statements of the respondents annexed to the application constitute prima facie case as dictated by the law, read along with the applicable rules.....” (Pp 144–146 Paras G–A).

There is no requirement to annex statements of prosecution witnesses in the proof.

The Supreme Court in **FRN vs. Wabara** (supra) commenting on the case of **Ohirovoriole vs. FRN** (supra); **Abacha vs. State (2002) 11 NWLR (Pt.779)**.

The Supreme Court further stated as follows:

“From the foregoing it is thus not the decision of this court in the two cases that leave pursuant to an application under and by virtue of Section 185 of the criminal procedure code and Order 3 Rules 1, 2(a) and (b) of the 1970 rules succeeds only where, in addition to other requirements the applicant has annexed to the application, the statement of the prosecution witness. The court only insists that before the leave is granted, the judge to whom the application is made must ensure that the materials before him justify putting the person in respect of whose prosecution the leave in being sought to trial. In the case at hand, from the proof of evidence and the cautionary statement of the respondent, the appellant annexed to its application, it must be reiterated the applicant law fulfilled the conditions the law placed on it”

(P 146 Paras A – F)

Per Peter Odili (JSC)

“I am in total agreement with the respondent that the lower court granted leave to prefer a charge based on the fact and the law presented before it. The fact and the law were properly placed before it. The lower court properly exercised its discretion and it is not for the appeal court to substitute its views for that of the lower court which it comes to substitute its views to the exercise of its discretions. See **HADMOR PRODUCTION LTD. vs. HAMILTION**

(1983) 1 AC 191 at 120; SACANKE vs. AJIBOLA (1969) 1 NWLR 253; OYEYEMI vs. IKE WOLE LOCAL GOVERNMENT (1993) 1 NWLR (Pt.270) 462. (P 146 Paras F–I)

Further requirements in an application for leave. ARIWOOLA JSC in **UGWU vs. STATE (2013) 14 NWLR (Pt.1374) 257 at 276** stated as follows:

“The application for leave of court must also contain information to the court that no application for such leave has been made previously in the case and no preliminary inquiry is being conducted in the matter by any Magistrate Court. Upon receipt of the application by virtue of the rules, the trial judge has the discretion to grant or refuse the application. See OHWOVORIOH vs. FRN & others (2003) 2 NWLR (Pt.803) page 176 at 189....” (Pp 146–147 Paras I–B).

6. *Power to grant leave to prefer a charge is both a judicial and official act which requires the application of S. 150(4) of the Evidence Act.* ARIWOOLA JSC in **UGWU vs. STATE** (supra) at 278 stated thus:

“Perhaps my lord, it must be clearly stated again that the act of applying for and the grant of leave to prefer a charge against an accused person is both an official and judicial act. In this respect Section 150(4) of the Evidence Act provides as follows:

“When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that former requisites for its validity were complied with.” (P 147 Paras C–F)

7. *Power of Nigerian Courts to utilize foreign judicial authorities*
Also to be said our courts are at liberty to utilize foreign judicial authorities where they are helpful to the court.

There is no gainsaying that the issues 1 and 2 are resolved against the appellant. (P 147 Paras F–G)

8. *The meaning of an accused having a case to answer*

From the proof of evidence at this instance, it is clear that there is a prima facie case of the offence of forgery and same has a chance to be established if the trial is done. There is evidence in the ruling of the court below where the witness denied in the proof of evidence being the owner of the said signature.

For a fact from the proof of evidence, there is shown enough from which the appellant can make a clarifying response. That is what I see as having a case to answer to. It does not mean that by what is placed in the proof of evidence the accused/appellant without more is guilty but what is needed is that there should be sufficient material therein necessitating the appellant to say something to dispel the said allegation or failing which would be seen that he really had nothing to put across in exculpation. I refer to some Court of Appeal cases which dealt effectively with the issue whether the evidence disclosed a prima facie, when if uncontroverted and believed will be sufficient to prove a case against the accused person. See *Adewale vs. Olaifa* (2012) 17 NWLR (Pt. 1330) 478 at 521; *Trade Bank vs. Chami* (2003) 13 NWLR (Pt.836) 158 at 207; *Yav vs. State* (2005) 5 NWLR (Pt.917) 1 at 22; *Aminu vs. State* (2005) 2 NWLR (Pt.909) 180 at 191 per Galadima JCA (as he then was).

(P 149 Paras B–F)

9. *The meaning of substantial*

I do not hesitate to say that the lower court was right when it stated that the respondent had substantially complied with the relevant rule to enable him to grant the leave to prefer a charge. Indeed substantial compliance means considerable compliance and that it is enough to satisfy the provisions of the rules. The word “substantial” was defined to mean having substance, being a substance, essential, actually existing, material, solid and ample massy and stable. See *Olujimi vs. E. S. H. A* (2009) 11 NWLR (Pt.1153) 464 at 482 per Nweze JCA (as he then was) applying the Supreme Court case of *Angbazo vs. Ebye* (1993) 1 NWLR (Pt.268) 133. (P 149 Paras G–I)

Nigerian Cases Cited

Abacha vs. State (2002) 11 NWLR (Pt. 779).
Abogede vs. The State (1996) 5 NWLR (Pt. 448) 270;
Adewale vs. Olaifa (2012) 17 NWLR (Pt. 1330) 478 at 521;
AJIDAGBA vs. IGP (1958) SCNLR 60
Aminu vs. State (2005) 2 NWLR (Pt. 909) 180 at 191 per Galadima JCA
Angbazo vs. Ebye (1993) 1 NWLR (Pt. 268) 133.
FRN vs. Wabara (2013) 5 NWLR (Pt. 1347) 331 at 348 349
Gaju vs. The State (1975) NWLR (Pt. 98) 112:
Ohworiole vs. FRN (2003) 2 NWLR (Pt. 803) 176
OHWOVORIOH vs. FRN & others (2003) 2 NWLR (Pt. 803) page 176
Olujimi vs. E. S. H. A (2009) 11 NWLR (Pt. 1153) 464
OYEYEMI vs. IKE WOLE LOCAL GOVERNMENT (1993) 1 NWLR (Pt. 462) 262.
R vs. LAMINIG 90 CR APP R. 450 and SEAL vs. CHIEF CONSTABLE OF WALES POLICE 2005 1 WLR 3183
SACANKE vs. AJIBOLA (1969) 1 NWLR 253;
Trade Bank vs. Chami (2003) 13 NWLR (Pt. 836) 158;
UGWU vs. STATE (2013) 14 NWLR (Pt. 1374) 257
Yav vs. State (2005) 5 NWLR (Pt. 917) 1;

A *Foreign Cases Cited*

HADMOR PRODUCTION LTD. vs. HAMILTION (1983) 1 C 191;

Nigerian Statutes Cited

B *The Evidence Act Section 150(4)*

The Criminal Procedure Code and Rule 3(2) of the Criminal Procedure Section 158(b); Section 185(b)

C *Representation*

OGECHUKWU ONWUGBUFU (ESQ.) for the Appellant and with her is Gerald Ajoku.

EMMANUELI. ESENE for Respondent and with him is Ambrose Okhiria.

D

PETER-ODILI, (JSC) (Delivering the Lead Judgment): The accused/appellant was charged for forgery contrary to Section 364 of the Criminal Code Act in Charge No. CR/36/12. Upon service on him of the

E charge, the appellant through counsel raised a preliminary objection seeking to quash the charge on grounds of lack of jurisdiction for non compliance with Section 185(B) of the Criminal Procedure Code, non disclosure of offence in the proof of evidence against the accused/appellant and abuse of process.

F

The learned trial judge in a considered ruling after listening to the parties dismissed the objection holding that he had jurisdiction to try the appellant charged.

G

Dissatisfied, the appellant appealed to the Court of Appeal or court below or lower court against the decision of the trial court vide the notice of appeal filed on 21st February, 2013. The court below dismissed the appeal, hence this approach to the Supreme Court vide notice of appeal filed on 7th

H

day of August, 2015.

I

On the 27th day of November, 2017 date of hearing, learned counsel for the appellant, Ogechukwu Onwugbufor Esq. adopted appellant's brief of argument filed on 27/10/15 and a reply brief filed on 11/2/2016 and deemed filed on 27/11/17. In the brief of argument, the appellant distilled three issues for determination which are thus:

- A** **a.** **Whether having held that the respondent did not comply with Section 158(b) of the Criminal Procedure Code and Rule 3(2) of the Criminal Procedure (application for Leave to Prefer a Charge in the High Court's) Rules 1970 by failing to state the reason why it is desired to prefer a charge without taking proceedings under chapter XVII of the Criminal Procedure Code, the court below was right in failing or refusing to quash the charge against the appellant for want of compliance with Section 158(b) of the CPC and the Rules which are mandatory. (Distilled from ground 1).**
- B**
- C**
- D** **b.** **Whether the court below was right to have placed reliance on English Cases of R vs. LAMINIG 90 CR APPR. 450 and SEAL vs. CHIEF CONSTABLE OF WALES POLICE 2005 1 WLR 3183 to hold that Section 185(b) of the criminal Procedure Code is discretionary or permissive when the Supreme Court has already held that, that section is mandatory. (Distilled from ground 2).**
- E**
- F** **c.** **Whether having regards to the fact that the proof of evidence disclosed group forgery and did not contain the resolution paper containing the alleged forgery or the forensic report of expert, the court below was right to hold that the proof of evidence discloses a prima facie case of the offence charged and a probable link between the appellant and the offence. (Distilled from ground 3).**
- G**
- H**
- I** Learned counsel for the respondent, Emmanuel Esene Esq. adopted his brief of argument filed on 23/12/15 and deemed filed on 12/4/17. He also adopted the issues as formulated by the appellant which are apt and I shall utilize them in the determination of this appeal.

A ISSUES 1 AND 2

- 1. Whether having held that the respondent did not comply with Section 185(b) of the Criminal Procedure Code and (Rule 3(2) of the Criminal Procedure Code (Application for leave to prefer a charge in the High Court's) Rules 1970 by failing to state the reason why it is desired to prefer a charge without taking proceedings under chapter XVII of the Criminal Procedure Code, the court below was right in failing or refusing to quash the charge against the appellant for want of compliance with Section 185(b) of the CPC as the rules which are mandatory. (Distilled from ground 1).**
- 2. Whether the court below was right to have placed reliance on English Cases R vs. LAMINIG 90 CR APP R. 450 and SEAL vs. CHIEF CONSTABLE OF WALES POLICE 2005 1 WLR 3183 to hold that 185(b) of the Criminal Procedure Code is discretionary or permissive when the Supreme Court has already held that the section is mandatory. (Distilled from ground 2).**

Learned counsel for the appellant submitted that the court below was in grave error when it failed to quash the charge against the appellant since the non compliance amounts to an infraction of Section 185(B) of the CPA. That the court below was wrong not to have quashed the charge after finding that respondent did not comply with Rule 3(2) of the Criminal Procedure (application for leave to prefer a charge in the High Court Rules) 1970. He cited **Owhoriele vs. FRN (2002) 2 NWLR (Pt.176) 189; Ugwu vs. State (2013) 14 NWLR (Pt.1374) 257; FRN vs. Wabara (2013) 5 NWLR (Pt.1347) 331 at 348 – 349.**

That the provisions of Section 185(b) CPC and Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules 1970 on the judicial authorities cited above are mandatory and requires total compliance before leave to prefer a charge is granted by the High Court. That Rule 3 provides for particular methods, requirements or conditions every application for leave to prefer a charge in the High must comply with.

A That where a statute provides for a particular method of performing an act or duty regulated by law, that method and no other method must be adopted in the performance of that act or duty. He relied on **Amoshima vs. State (2011) 14 NWLR (Pt.1268) 530 at 554; C.C.B. (Nig.) Plc. vs. A.G.**

B Anambra State (1992) 8 NWLR (Pt.261) 528 etc.

Learned counsel for the appellant stated that the reasons adduced or relied on by the court below to refuse or decline to quash the charge by reason of non compliance with Rule 3(2) of the rules are tenuous and misconceived. That the charge is incompetent having regard that leave was granted by the trial court in violation of the mandatory provisions of Rule 3 of the rules in which case no competent proceedings should have commenced against the appellant.

D In responding, learned counsel for the respondent contended that the respondent has complied with Section 185(b) of the CPC and Order 3 Rules (1) and (2)(a) and (b) and proof of evidence. He cited **FRN vs. Wagbara (2013) 5 NWLR (Pt.1347) 331 at 349**. That the trial court granted the leave to prefer the charge based on the facts and law presented before it and so that discretion having been properly exercised it is not for the Court of Appeal to change it by substituting its own views over those of the court of first instance. He referred to **Hadmor Production Ltd. vs. Hamilton (1983) 1 AC 191 at 120; Oyeyemi vs. Ike Wole Local Government (1993) 1 NWLR (Pt.270) 262; Ugwu vs. State (2013) 14 NWLR (Pt.1374) 257 at 276.**

G The stance of the appellant is that the court below was wrong in refusing to quash the charge by reason of non compliance with Rule 3(2) of the Rules as the charge was incompetent.

Respondent's opposing position is that the lower court properly exercised its discretion and granted leave to the prosecution to prefer a charge against the appellant and so this appeal holds no substance.

H In this instant case, the offence was committed in the Northern part of Nigeria and the applicable law as at the time of the offence and trial the purport of S. 185(b) of Criminal Procedure Code and Section 185(b) precisely which provides thus:

I

- A** **“185–**
(a) No person shall be tried by the High Court unless
(b) A charge is preferred against him without the
B **holding of a preliminary inquiry by leave of a judge**
of the High Court.”

C The interpretation to Section 185(b) of the Criminal Procedure Code (CPC) and Criminal Procedure (application for leave to prefer a charge in the High Court) Rules 1970 given by the Supreme Court would give the clear view useful for our purpose. See **Ohworiola vs. FRN (2003) 2 NWLR (Pt.803) 176 at 190** per Kalgo (JSC) who stated as follows:

- D** **“It must also be understood that the provisions of Section**
185(b) of the CPC must be read with those contained in the
E **rules governing the application to prefer a charge, as in this**
case, and any application to quash the charge preferred by
leave of the High Court must necessarily involve the
consideration of those provisions.”

F Also in the case of **FRN vs. Wagbara (2013) 5 NWLR (Pt.1347) 331 at 348 – 349** per Muhammad JSC stated thus:

- G** **“The records therefore bear out the respondents that the**
witnesses' statements have not been attached to the
appellants application for leave. But this fact does not
mean that learned counsel are correct in supporting the
H **lower courts finding that the appellants failure to annex**
the statement of witnesses is fatal... A community reading
of the clear and unambiguous provisions of Section 185(b)
of the Criminal Procedure Code and Order 3 Rules (1) and
(2)(a) and (b) reveals clearly that the application has
I **complied with the criteria and applicant is required to**
fulfill to be entitled to the leave he seeks. Nowhere in the

A applicable Rules has the annexure of witnesses Statements to the application for leave been made a necessary requirement.

B The learned JSC continued at para. H:

C “Learned counsel for the respondent's contention that there is the necessity to attach statements of witnesses and serve same on the respondent is therefore misconceived.”

The learned justice of the Supreme Court then concluded thus at page 348 B – C:

D “The respondents appealed to the court below has been the assertion, and same has been upheld by the court, that since the appellant has not met the criteria stipulated under Order 3 Rules (1)(2) of the relevant Rules of the trial court regarding its application, the leave necessary for the preferment of the charges against the respondents is improperly acquired. Competent proceedings against the respondents is impossible as both the improperly acquired leave and the illegally preferred charges against them must be quashed.”

G It is to be noted that the procedure to obtain leave from a judge of a High Court to prefer charge are provided for under the Criminal Procedure (application for leave to prefer a charge in the High Court) Rules 1970 is a discretionary power of the judge. When the application is made and it must be supported by the following:

- H (a) The charge in respect of which leave is sought.**
I (b) Affidavit by the applicant that the statement contained in the application are true.
(c) A statement on whether or not any proceeding have

- A** **been undertaken under chapter XVII of the Criminal Procedure Code, and**
- (d) The result of such application or proceeding if any.**
- B** On whether or not the applicant complied with the provisions of the said Rules the court below had this to say in the affirmative, thus:
- C** **“It is my view that even though the complainant/ applicant did not give reasons why he did not go by way of preliminary objection inquiring he nevertheless has complied substantially with Rule 3 of the application to prefer a charge in the High Court Rules 1970.”**
- D** The Court of Appeal held that the proof of evidence links the applicant to the offence.
I shall refer to what this apex court said on this point of leave to prefer
- E** a charge. See **Gaju vs. The State (1975) NWLR (Pt.98)112:**
- F** **“Judges who exercise the power of granting leave under the provision of Section 185(b) of the Criminal Procedure Code should ask for and insist on seeing the proof of evidence which it is intended to urge in support of the prosecution. It is not open at that stage to an accused person to be invited into the scene and moreover to be supplied with copies of**
- G** **the statement of potential witness.”**
- In **FRN vs. Wagbara (supra)** at page 349 thus:
- H** **“The leave granted the appellant by the trial court must be appreciated, is on the basis of applicant's ex parte application to the court, respondents are not put on notice. The extant procedure put in place only require the**
- I** **appellant to provide the court with adequate materials from which to infer whether or not it is just to put**

A **respondent on trial. The court has insisted that it is**
oppressive and unconstitutional to put a person on trial
B **unless the court approach to grant the leave is satisfied that**
the material accompanying the application disclose
C **enough facts to warrant a trial, learned counsel for the**
respondent's contention that there is the necessity to attach
D **statement of witness and serve same on the respondent is**
therefore misconceived. It is worth to know that proofs of
E **evidence are not the same as statement of the witness the**
appellant would call at the trial. Proofs of evidence are
F **summaries of the statement of the witness to be called at**
the trial by the appellant.

D **It is for that reason that the rules require an affidavit from**
E **the appellant the evidence against the respondents as**
F **summarized in the proof of evidence prepared by the**
G **appellant will be evidence against the respondents in**
H **respect of whose trial the court is urged to grant leave to**
I **prefer a charge. Even at the trial, the respondents on the**
authorities are only entitled to access the statements of the
prosecution's witness on the fulfillment of certain
conditions.”

Fabiyi JSC in **FRN vs. WAGBARA** (supra) stated at page 38 as follows:

G **“It has been variously held by this court that proof of**
H **evidence should only disclose prima facie case which**
I **literally means evidence on its face value. See the case of**
ABOJEDE vs. THE STATE (1996) 5 NWLR (Pt.448) 378;
AJIDAGBA vs. IGP (1958) SCNLR 60.

I **The proof of evidence and the statements of the**
respondents annexed to the application constitute prima
facie case as dictated by the law, read along with the

A applicable rules.....”

The Supreme Court in **FRN vs. Wagbara** (supra) commenting on the case of **Ohirovoriole vs. FRN** (supra); **Abacha vs. State (2002) 11 NWLR (Pt.779)**.

B

The Supreme Court further stated as follows:

C

“From the foregoing it is thus not the decision of this court in the two cases that leave pursuant to an application under and by virtue of Section 185 of the criminal procedure code and Order 3 Rules 1, 2(a) and (b) of the 1970 rules succeeds only where, in addition to other requirements the applicant has annexed to the application, the statement of the prosecution witness. The court only insists that before the leave is granted, the judge to whom the application is made must ensure that the materials before him justify putting the person in respect of whose prosecution the leave in being sought to trial. In the case at hand, from the proof of evidence and the cautionary statement of the respondent, the appellant annexed to its application, it must be reiterated the applicant law fulfilled the conditions the law placed on it”

D

E

F

I am in total agreement with the respondent that the lower court granted leave to prefer a charge based on the fact and the law presented before it. The fact and the law were properly placed before it. The lower court properly exercised its discretion and it is not for the appeal court to substitute its views for that of the lower court which it comes to substitute its views to the exercise of its discretions. See **HADMOR PRODUCTION LTD. vs. HAMILTION (1983) 1 C 191 at 120; SACANKE vs. AJIBOLA (1969) 1 NWLR 253; OYEYEMI vs. IKE WOLE LOCAL GOVERNMENT (1993) 1 NWLR (Pt.270) 262.**

G

H

I

ARIWOOLA JSC in UGWU vs. STATE (2013) 14 NWLR (Pt.1374) 257 at 276 stated as follows:

- A** Learned counsel for the appellant contended that the proof of evidence shows the statements of the witnesses who stated that the said forgery was committed by a group which they referred to as “Massalla and Co”, or Massalla and group”, “Massalla and Cohorts” or “dissident members of
- B** APGA” and there was no witness who stated who forged what. That notwithstanding the above deficiencies and lapses contained in the proof of evidence the court below dismissed the appellant's application holding that the proof of evidence disclosed a prima facie offence of forgery against the
- C** appellant and that the appellant was linked with the offence charged.

He stated that since the resolution paper containing the forgery and the police forensic report to establish the nexus between the signature of the accused and the signature(s) of the accused as contained the resolution

- D** paper were not included in the proof of evidence the offence of forgery has not been established. He relied on **Abacha vs. State (2002) 11 NWLR (Pt.779) 437 at 480 etc.**

- E** That the materials before the court are insufficient and cannot establish the element of forgery and cannot therefore establish a prima facie case against the accused/appellant because the evidence and materials before the court at the time of granting the leave is such that if uncontradicted and if believed, the evidence is not sufficient to prove the
- F** case against the appellant. That what is available leads to speculation as to the involvement of the appellant in the offence. He cited **Uwagboe vs. State (2008) 12 NWLR (Pt.1102) 621 at 647; U.T.B (Nig.) vs. Ozoemena (2007) 3 NWLR (Pt.1022) 448 at 487.**

- G** In response, learned counsel for the respondent said from the proof of evidence it is a prima facie case of the offence of forgery and same can be established if trial is done. That the respondent substantially complied with the relevant rule to enable him be granted the leave to prefer a charge. He
- H** cited **Nyame vs. FRN (2010) 1 NWLR (Pt.1193) 344; Awuse vs. Odili (2004) 8 NWLR (Pt. 876) 481 etc.**

- I** The posture espoused by the appellant is that from the proof of evidence, document and statement attached to the proof of evidence no prima facie offence of forgery was disclosed against the appellant. Also as stated by the appellant, a mere witness statement that an accused person

A forged a document without more if evidence cannot provide a prima facie evidence of forgery in the absence of forensic report of an expert and the resolution containing the alleged forgery.

The respondent disagreed with that stance of the appellant taking a
B contrary stand.

From the proof of evidence at this instance, it is clear that there is a prima facie case of the offence of forgery and same has a chance to be established if the trial is done. There is evidence in the ruling of the court
C below where the witness denied in the proof of evidence being the owner of the said signature.

For a fact from the proof of evidence, there is shown enough from which the appellant can make a clarifying response. That is what I see as
D having a case to answer to. It does not mean that by what is placed in the proof of evidence the accused/appellant without more is guilty but what is needed is that there should be sufficient material therein necessitating the appellant to say something to dispel the said allegation or failing which
E would be seen that he really had nothing to put across in exculpation. I refer to some Court of Appeal cases which dealt effectively with the issue whether the evidence disclosed a prima facie, when if uncontroverted and believed will be sufficient to prove a case against the accused person. See
F **Adewale vs. Olaifa (2012) 17 NWLR (Pt. 1330) 498 at 521; Trade Bank vs. Chami (2003) 13 NWLR (Pt.836) 158 at 207; Yau vs. State (2003) 5 NWLR (Pt.917) 1 at 22; Aminu vs. State (2000) 2 NWLR (Pt.909) 180 at 191 per Galadima JCA (as he then was).**

G I do not hesitate to say that the lower court was right when it stated that the respondent had substantially complied with the relevant rule to enable him to grant the leave to prefer a charge. Indeed substantial compliance means considerable compliance and that it is enough to satisfy
H the provisions of the rules. The word “substantial” was defined to mean having substance, being a substance, essential, actually existing, material, solid and ample massy and stable. See **Olujimi vs. E. S. A. A (2009) 11 NWLR (Pt.1153) 464 at 482** per Nweze JCA (as he then was) applying the
I Supreme Court case of **Angbazo vs. Ebye (1993) 1 NWLR (Pt.268) 133.**

A From the foregoing it is clear that there is no merit in this appeal and I have no difficulty in dismissing the appeal as I uphold the judgment of the Court of Appeal, affirming the decision of High Court in refusing the quash of the charge against the appellant.

B Appeal Dismissed.

Mary Ukaego Peter-odili
Justice, Supreme Court

C DATTIJO MUHAMMAD, (JSC): I read in draft the lead judgment just delivered by my learned brother **MARY UKAEGO PETER-ODILI JSC** and I agree with the reasoning and conclusion therein that the appeal being bereft of any merit be dismissed, I dismiss same and endorse all the consequential orders made therein.

Musa Dattijo Muhammad,
Justice, Supreme Court.

E ADAMU AUGIE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother – Peter-Odili, JSC. I, too, agree with the reasons and conclusion that the appeal lacks merit and should be dismissed. I abide by the consequential orders therein contained;

F inclusive of that relating to cost.

Amina Adamu Augie, Jsc
Justice, Supreme Court.

G ADAMU GALINJE, (JSC): I have had a preview of the judgment just delivered by my learned brother Peter-Odili JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

The appeal is devoid of any merit and deserves to be dismissed. I

H dismiss same and endorse all the consequential Orders made therein.

Paul Adamu Galinje
Justice, Supreme Court.

I

**ANAMELECHI ITEOGU
AND
LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE
SC.190/2006**

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 23RD FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
AMIRU SANUSI
EJEMBI EKO**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT**

*CASE LAW: Principles in Amalgamated Trustees Ltd v. Discount House Ltd
(2007) 15 NWLR (Pt. 1056) 118.*

*CASE LAW: Principles in Chukwuka & Ors v. Ezulike & Ors (1986) 5 NWLR
(Pt. 45) 892.*

*COURT: Delivery of judgment – Where a court delivers its judgment – It
becomes functus officio – Whether there are exceptions thereto –
Relevant principles thereof.*

*COURT: Jurisdiction – Fundamental nature thereof – Whether cannot be
raised some years after – Relevant considerations.*

*COURT: Power to set aside its own judgment – Discretionary nature of – How
exercised.*

COURT: Supreme Court – Appellate jurisdiction – Section 235 of the 1999 constitution – Whether cannot sit on appeal over its own decisions – The principle in Eleazor Obioha vs. Innocent Ibearo & Anor (1994) 1 NWLR (pt. 322) 503.

COURT: Supreme Court – Power to review its previous decisions – No jurisdiction to that effect – Whether there are exceptions thereto – Relevant considerations thereof.

COURT: Supreme Court – Power to set aside its previous decisions – Relevant conditions for the exercise of power.

COURT: Supreme Court – Power to set aside its previous decisions – Requirements for the exercise of jurisdiction – Whether application has to be brought within a reasonable time – Considerations of Or. 2 Rule 29(1) Supreme Court Rules 1985 (as amended).

COURT: Supreme Court – Power to set aside its previous judgment – Or. 8 Rule 16 Supreme Court Rules 1985 (as amended) – Relevant principles thereto.

RULES OF COURT: Supreme Court – Or. 8 Rule 16 thereof – Whether judgment of the Supreme Court can be set aside in certain cases under certain conditions – Principles in Amalgamated Trustee Ltd v. Discount House Ltd (2007) 15 NWLR (Pt. 1956) 126.

Issues for Determination

- 1. Whether this honourable court should set aside its judgment in this case.**
- 2. Whether the applicant's invitation to this court to overrule itself on its earlier decision of 4th December 2009 is justiciable.**

Facts of the Matter

The appellant, who is now applicant filed a motion on notice on 20th of August 2014 seeking an order of this court which he couched as below:-

“An order of this honourable court setting aside the judgment of this honourable court dated 4th December 2009 made by their lordship: ALLOYSIUS IYORGYER KASTINA ALU JSC (as he then was), MAHMUD MOHAMMED JSC, WALTER NKANU ONNOGHEN JSC; CHRISTOPHER MICTHEL; CHUKWUMA ENEH JSC (as he then was) and MUHAMMED SAIFULLHI MUNTAKH COOMASSI JSC, reported as ANAMELECHI ITEOGU vs. LPDC (2009) 17 NWLR (Pt 117) 614”

The motion had three other prayers which the learned counsel for the applicant chose to withdraw and same were thereupon struck out, leaving the above prayer only for this court's determination.

The motion was brought pursuant to section 22 of the Supreme Court Act, Cap 15 Laws of the Federation 2004; Order 3 Rule 15 and Order 8, Rule 16 of the Supreme Court Rules 2011 and under the inherent jurisdiction of the Supreme Court of Nigeria

The grounds upon which the application was brought include the followings:

- (a) The appeal was from a decision of the legal practitioners Disciplinary Committee of the supreme court**
- (b) The Supreme Court entertained the appeal and delivered its Judgment on 4th December, 2009.**
- (c) The Supreme Court has no Jurisdiction to entertain an appeal from the Legal Practitioners Disciplinary Committee as decided by the court in the under listed cases**

- (i) ALADEJOBI vs. NIGERIA BAR ASSOCIATION (2013) 15 NWLR (Pt.1367) 66 and**
- (ii) ROTIMI WILLIAMS AKINTOKUN vs. LPDC (Unreported Suit No SC 111/2014 delivered on 16th May 2014**
- (d) In the circumstances the Judgment of this court dated 4th December 2009 was entered without Jurisdiction and the appellant/applicant affected by the Judgment is ex debito justitiae entitled to apply to set aside the said Judgment.**
- (e) Given the length of time between the delivery of the said Judgment and the application, it is necessary ex abundanciautela to seek leave of court and extension of time to bring the application.**

The applicant supported his application with a twenty one paragraph affidavit .He also annexed the underlisted exhibits:

- (i) A Written address in support of the motion dated 20/8/2014.**
- (ii) Certified true copy of the judgment of this court delivered on 4th day of December 2009, and**
- (iii) A photo-copy of a receipt for the production of the said judgment**

The appellant/applicant had also on 4/10/17 filed an appellant/applicant's reply brief in response to the respondent's Reply address to the motion on notice.

On its part, the respondent filed a counter affidavit of nine (9) paragraphs dated 18th April 2017 in opposition to the motion under consideration. He also filed written brief on 10/5/2017 in opposing the applicant's application.

Held: *(Unanimously dismissing the application)*

1. *Issue of jurisdiction although fundamental cannot be raised some years after judgment*

It is worthy of note that when the appellant, now applicant, presented his appeal before this court the issue of jurisdiction was never raised. I am not unmindful of the fact that issue of jurisdiction can be raised at any time even before the Supreme Court, but to my mind that issue of jurisdiction can only be raised during the pendency of the relevant proceedings and certainly not some years after the court had already delivered its judgment and parties' disputes were settled or determined or their fates were decided. It is an elementary principle of law, that once a court delivers its judgment, in a given case, it thereupon becomes *functus officio* and can therefore not reopen it in whatever guise, except of course, in the event that there was circumstances where the doctrine of SLIP RULE applies or to correct mistake. (P 170 Paras A–D).

2. *Power of court to set aside its own judgment under certain circumstances*

A court can set aside its own judgment only in exceptional circumstances or conditions which I will furnish presently in this ruling. Even then, the discretion of court to set aside its earlier judgment must always be exercised judiciously and judicially and must also be applied sparingly to avoid causing injustice or to breach public interest or possible public uproar. (P 170 Paras D–E).

3. *Supreme Court lacks jurisdiction to review its earlier judgment*

This court also lacks the jurisdiction to review its earlier decision or judgment. Once decisions or judgments have been delivered by this court, such decision has air or force of finality and cannot be appealed against or reviewed by it except in the exceptional circumstances I will explain below. (P 170 Paras E–F)

Per Sanusi (JSC):

“It is evident from the fact and circumstance of this application as I posited above, that the applicant herein filed this instant application seeking the indulgence of this court to set aside the judgment it has since delivered on 4th of December 2009 in the case of Anamelechi Iteogu vs. Legal Practitioners Disciplinary Committee, now reported in (2009) 17 NWLR (Pt.1171) 614 for want of jurisdiction. There is no gain to say that when arguing that appeal before this court, the applicant did not raise issue of jurisdiction before this court for it to decide. Admittedly, this court had earlier in the cases of Rotimi Williams Akintokun vs. LPDC, appeal No. SC 11/2006 now reported in (2014) LPELR 22941 (SC) and the case of Aladejobi vs. Nigerian Bar Association (2013) 15 NWLR (pt.1376), had departed from its earlier decision in ANAMELECHI's case (supra) wherein, it held that this court had jurisdiction to entertain appeal directly from the decision of the Legal Practitioners Disciplinary Committee (respondent) without same routing through its appeal committee. (Pp 170–171 Paras F–A).

Per Sanusi (JSC)

“There is no doubt that honourable justices of this court are human beings and therefore not infallible. They can make mistakes or commit errors at any time like any other mortals. That is why the law allows for correction of errors in its judgment when called upon so to do, for instance, in SLIP RULE or PENCIL RULE. In other words, in deserved situations or circumstances, this court when invited, can revisit the judgments it delivered earlier or previously, if such judgments are seen not to be in accord with desired justice by setting same aside, or varying same or even overruling such judgment. See Order 8 Rule 16 of Supreme Court Rules 1985. I must however stress here, that generally, once a court delivers its

judgment, it becomes *functus officio*. It goes without saying therefore, that in the exercise of setting aside of its previous judgment, this court and indeed every other court must do so only in the interest of justice which is indeed the preoccupation of all courts. The courts when faced with an application to set aside its own judgment, it must guard against possible instability crippling into the corpus of our laws. (P 171 Paras A–E)

4. *Conditions for setting aside previous judgments of the Supreme Court.*
In fact, this court in plethora of its decided authorities had set out some conditions which must be considered to have existed in the previous judgment sought to be set aside, and these conditions include the followings;

- (a) That the previous judgment was given per incuriam, or**
- (b) That the judgment was erroneous in law; or**
- (c) That the previous judgment is contrary to public policy or is occasioning miscarriage of justice or perpetuating injustice.**

See AG Federation vs. Guardian Newspaper Ltd. (1999) 9 NWLR (Pt.618)187; Aminu Tanko vs. The State LPELR 3136 (SC); (2009) 14 WRN 1 (2009) 4 NWLR (Pt.1131) 430. (P 171 Paras E–I)

Per Sanusi (JSC)

“As I highlighted above, judgments of this court are delivered with air of finality and cannot be reviewed, varied or set aside except on the conditions I highlighted above. The consideration made by this court in deciding the cases of Akintokun vs. LPDC (supra) and Aladejobi vs. LPDC (supra) relied on by the applicant had admitted been a departure by this court of its earlier stance on its jurisdiction, contrary to its earlier position in Anamelechi's case. To my mind, if this court grants' the order of setting aside its earlier judgment as

sought in this instant application, it will open a flood gate for litigants with similar complaints or grouse to be greeting this court with multiplicity of applications or suits which may in the long run open a chain of reactions the consequence of which nobody can foretell. In the case *Adegoke Motors Ltd vs. Adesanya & Anor* (1989)3 NWLR (Pt.109)250; Oputa JSC at page 274 stated that:

“We are final not because we are infallible, rather we are infallible because we are final”. (P 172 Paras A–D).

5. *This application to set aside was not brought within a reasonable time. Again, by the provisions of Order 2 Rule 29 (1) of the Supreme Court Rules this court shall only entertain application to set aside its judgment if only such application for setting aside is brought before it within a reasonable time. The instant application is seeking the setting aside of a decision delivered by this court more than eight years ago. Such period cannot be regarded as “reasonable time” from which ever angle one looks at it. It will be rather absurd to indulge the applicant's requests which in my view, is brought at the 23rd hour of the day.*

Having stated the above, I see no basis for me to invoke the provision of Order 6 Rule 5 (4) of the Supreme Court Rules to set aside the earlier decision given by this court on 4th December 2009 in *Anamelechi Iteogu Esq vs. LPDC* reprinted in (2009) 17 NWLR (Pt.1171) 614. As a corollary, I adjudge this application unmeritorious and it is therefore hereby refused and accordingly dismissed by me. (P 172 Paras E–H).

Per Peter Odili (JSC):

“The situation thrown up clearly necessitates a foray into the 1999 Constitution and the relevant Rules of court that apply when the court is called up to look at any judgment once delivered since the court is not generally empowered to review a judgment once

delivered and the only exception being where there is a need to correct any clerical mistake or same error arising from accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. This exception to the general principles is known as the “slip rule”

Also embedded in these constitutional provisions and Rules of court is a total prohibition from review of a judgment which correctly represents what the court decided and so cannot be varied. The third component of those provisions is that the operative and substantive part of a judgment shall not be varied and a different form substituted. I rely on Adefulu vs. Okulaja (1990) 5 NWLR (Pt. 550) 435.

The implication of the provisions referred to is that once this court has come to a decision and delivered it the court becomes *functus officio* and cannot reopen the matter.

For clarity I shall quote the constitutional provisions and the Rules of court referred to as follows:

Section 235 CFRN:

“Without prejudice to the powers of the President or of the Governor of a State with respect to the prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.” It is relevant to refer also to the provisions of Section 233(6) of the 1999 Constitution (as amended) which states thus:

“Any right to appeal to the Supreme Court from the decision of the (Federal) Court of Appeal conferred by this section shall, subject to Section 216 of this Constitution, be exercised in accordance with any Act of the National Assembly and rules of court for the

time being in force regulating the powers, practice and procedure of the Supreme Court.” (Pp 177–178 Paras D–D).

6. *The purport of Or. 8 Rule 16 of Supreme Court Rules (Supra)*
Order 8 Rule 16 of the Rules of the Supreme Court 1985 (as amended) thus:

“The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substituted.”

It follows that this court having held at the time in 2009 that it had jurisdiction to consider appeals from the Legal Practitioners Disciplinary Committee (LPDC) that decision is final and cannot be set aside on the ground that a new thinking had taken place to which an opposite result is the effect. The point has to be made that this court has the right to depart from its earlier decision in subsequent cases and thereby overrule itself, it does not however mean that the previous decisions in those earlier cases differently decided would be given a new lease of life on account of this new development. The reason for this is self evident as Oputa JSC stated in *Adegoke Motors Ltd. vs. Adesanya & Anor* (1989) 5 SC 113; (1989) 3 NWLR (Pt. 109) 250 at 274 thus:

“We are final not because we are infallible, rather we are infallible because we are final.” (Pp 178–179 Paras E–B)..

Per Odili (JC)

“Indeed to explain the situation in its raw and I dare say, morbid form the position is akin to asking a doctor to bring up a corpse of a person who died years ago of a disease which at the time of the demise of the person was incurable merely because new drugs have emerged for the cure of anyone suffering a similar disease so as to administer the drug, an impossibility which analogy is similar to what this court is called upon to do. The judgment earlier given with the jurisdiction of the court available at the time would not be reviewed when the court has made an about turn to its understanding and decision of the law. The earlier decision with the attendant fall outs are overtaken by events, unfortunate as it may be, there is no remedy.

For a fact this court is not enticed by the invocation by learned counsel for the appellant urging it to exercise its inherent jurisdiction to set aside the case of the applicant decided on merit with the court assuming jurisdiction in what the appellant's counsel terms interest of justice. It is now trite law that the judgment of this court validly constituted as to the number of its justices and jurisdiction of the subject matter is final and there is no right of appeal to any person or authority except as provided under Section 235, CFRN 1999 and that is not evident here”. (P 179 Paras C – G).

7. *The Supreme Court cannot sit on appeal over its own decision*
Explaining this situation the court in the case of Eleazar Obioha vs. Innocent Ibero & Anor (1994) 1 NWLR (Pt. 322) 503 held thus:

“By Section 235 of the 1999 Constitution (as amended), the Supreme Court cannot sit on appeal over it's own judgment. The provision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment

of the court by itself. Indeed there can be no appeal questioning the decision of the Supreme Court to itself or anybody or person as there must be a finality to litigation. Hence, the appellate jurisdiction of the Supreme Court is limited by Section 233 (2) of the 1999 Constitution (as amended) of hearing appeals from the Court of Appeal only and no one.” See also Alhaji Also vs. African Continental Bank Ltd. (2000) 9 NWLR (Pt. 672) 264 at 283. (Pp 179–180 Paras H–C)

8. *The Supreme Court has no jurisdiction to sit on appeal over its pervious decision no matter how manifestly wrong the decision may be*
This position can also be found in the decision of Chukwuma & Ors vs. Ezulike & Ors (1986) 5 NWLR (Pt. 45) 892, where Uwais, JSC (as he then was) on the finality of the decision of this court, stated thus:

“There is no appeal in this court against the decision of 12th November, 1985, and it is obvious that there cannot be such an appeal since no jurisdiction has been conferred upon this court to sit on appeal over its own decision, no matter how manifestly wrong the decision may be. See Paul Cardoso vs. John Bankole, Daniel & Ors (1986) 2 NWLR (Pt. 20) 1 at 28”. (P 180 Paras C–F)

9. *The purport and implications of or. 8 Rule 16 of the Supreme Court Rules 1985 (as amended)*
This court in Amalgamated Trustees Limited vs. Associated Discount House Limited (2007) 15 NWLR (Pt. 1056) 118 @ 11 page 126-127 per Belgore, JSC (as he then was) where it was held thus:

“The Supreme Court can set aside its judgment, in appropriate cases, when certain things are shown. Otherwise, its decision is final. As a matter of fact, Order 8 Rule 16 of the Supreme Court Rules, 1985 and

the three principles enshrined therein demonstrate, unequivocally, a clear prohibition on the interference subsequently with the operative and substantive judgment of a Supreme Court or any part thereof except under the “Slip Rule” it is therefore now firmly settled that the judgment of the Supreme Court cannot be reviewed. In other words, the Supreme Court generally enjoys finality of its decisions. Except for clerical mistakes or accidental slips or omissions, it seldom re-visits its decision by way of review, variation or setting aside. Once the Supreme Court has entered judgment in a case, that decision is final and will remain so forever. The law may in future be amended to affect future issues on the same subject, but for cases decided, that is the end of the matter.”

The decisions I have referred to above with their dicta have in effect settled the question raised in this application and for the avoidance of doubt the judgment of this court delivered on the 4th of December, 2009 is final and for all time and there is nothing that can be done on it as the application lacks merit and in line with the lead judgment, I too dismiss it. (Pp 180–181 Paras F–E)

Per Eko (JSC):

“The Supreme Court lacks jurisdiction to hear appeals from the directions of the Legal Practitioners Disciplinary Committee of the Body of Benchers.

The applicant had apparently accepted the judgment in the appeal No. SC. 190/2006. He now seeks the review of that judgment years after this court had apparently departed from the stance it took in his appeal No. SC 190/2006 in the circumstances prevailing then. He now seeks the indulgence of this court to set aside the judgment in the appeal No. 190/2006. He needs, firstly, to scale the

hurdles on his way placed by Order 2 Rule 29(1) and Order 8 Rule 16 of the extant Rules of this Court.

Order 2 Rule 29 (1) of the Supreme Court Rules 1985 provides, *inter alia*, that an application to set aside any judgment or proceedings of this court “shall only be entertained by the court if it is made within a reasonable time.” This application brought after 8 years since 4th December, 2009 to set aside the judgment delivered on 4th December, 2009 has not, in my view been brought within a reasonable time. A period of over 8 years of inaction is rather inordinate in the circumstance. Equity follows the law. Delay also defeats equity. Whatever justice there may be in this application has been defeated by the inordinate delay of over 8 years by the applicant to take this step to set aside the judgment delivered on 4th December 2009 on grounds of it being *per incuriam* or jurisdictional ultra vires.

Order 8 Rule 16 of the Supreme Court Rules, 1985, unambiguously or in clear terms, prohibits this court from reviewing “any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission.” The court becomes *functus officio* once it gives and delivers any judgment. It cannot vary the judgment afterwards so as to give effect to its meaning or intention. This is what the applicant seeks this court to do in this application. He has not called upon the court to correct any clerical mistake or some error arising from any accidental slip or omission. I should think clerical or error arising from any accidental slip or omission is distinct from intellectual error of assuming jurisdiction to entertain a matter the court lacks jurisdiction to entertain in the first place. The latter calls for review; the former does not.

Let me make myself clear. I do not foreclose a situation where the court has been called upon either to depart from earlier stance on point of law, or to set aside its decision on grounds of it being *ex debito justitiae*. Order 2 Rule 29(1) of the Rules of the court seems to contemplate an application to set aside any proceedings or judgment

on grounds that the proceedings or judgment were rendered *ex debito justitiae*. The power of the court in this regard, or right of the applicant to invoke this power, must be exercised or invoked within a reasonable time.

The applicant has no doubt, apparently, misconceived the purport of Order 6 Rule 5 (4) of the Supreme Court Rules, 1985. When parties invite the court to depart from one of its decisions, they invite the court to do so in a subsequent appeal or application that is extrinsic and subsequent to the decision they want the court to depart from. It is not the same thing as asking the court to set aside its own judgment in view or in the light of another decision given or delivered subsequent to the decision they seek to set aside.
(Pp 183 – 184 Paras A – E).

Nigerian Cases Cited:

Adefulu vs. Okulaja (1990) 5 NWLR (Pt. 550) 435.
Adegoke Motors Ltd vs. Adesanya & Anor (1989) 3 NWLR (Pt.109)250
Adegoke Motors Ltd. vs. Adesanya & Anor (1989) 5 SC 113; (1989) 3 NWLR (Pt. 109) 250
AG Federation vs. Guardian Newspaper Ltd. (1999) 9 NWLR (Pt.618)187;
Aladejobi vs. Nigerian Bar Association (2013) 15 NWLR (pt.1376),
Alhaji Also vs. African Continental Bank Ltd. (2000) 9 NWLR (Pt. 672).
Amalgamated Trustees Limited vs. Associated Discount House Limited (2007) 15 NWLR (Pt. 1056) 118 page 126-127
Aminu Tanko vs. The State LPELR 3136 (SC); (2009) 14 WRN 1 (2009)4 NWLR (Pt.1131)430
Anamelechi Iteogu Esq. vs. LPDC reprinted in (2009) 17 NWLR (Pt.1171) 614.
Chukwuka & Ors vs. Ezulike & Ors (1986) 5 NWLR (Pt. 45) 892
Eleazar Obioha vs. Innocent Ibero & Anor (1994) 1 NWLR (Pt. 322) 503
Paul Cardoso vs. John Bankole, Daniel & Ors (1986) 2 NWLR (Pt. 20) 1 at 28”

Nigerian Statute Cited

The 1999 Constitution (as amended)Section 233(6); Section 235

A Representation

U.K. Epuchie for the appellant.

P.B. Dauda (Esq.) ,with **H.M. Ibega (Esq.)** and **A. Abu (Esq.)** for the respondent.

B

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): The appellant, who is now applicant filed a motion on notice on 20th of August 2014 seeking an order of this court which he couched as below:

C

“An order of this honourable court setting aside the judgment of this honourable court dated 4th December 2009 made by their lordship: ALLOYSIUS IYORGYER KASTINA ALU JSC (as he then was), MAHMUD MOHAMMED JSC, WALTER NKANU ONNOGHEN JSC; CHRISTOPHER MICTHEL CHUKWUMA ENEH JSC (as he then was) and MUHAMMED SAIFULLHI MUNTAKH COOMASSI JSC, reported as ANAMELECHI ITOGUVs LPDC (2009) 17 NWLR (Pt 117) 614”

D

E

F The motion had three other prayers which the learned counsel for the applicant chose to withdraw and same were thereupon struck out, leaving the above prayer only for this court's determination.

G The motion was brought pursuant to section 22 of the Supreme Court Act, Cap 15 Laws of the Federation 2004; Order 3 Rule 15 and Order 8, Rule 16 of the Supreme Court Rules 2011 and under the inherent jurisdiction of the Supreme Court of Nigeria.

H The grounds upon which the application was brought include the followings:

I (a) The appeal was from a decision of the legal practitioners Disciplinary Committee of the Supreme Court.

- A** **(b) The Supreme Court entertained the appeal and delivered its Judgment on 4th December, 2009.**
- (c) The Supreme Court has no Jurisdiction to entertain an appeal from the Legal Practitioners Disciplinary Committee as decided by the court in the under listed cases.**
- B**
- (i) ALADEJOBI vs. NIGERIA BAR ASSOCIATION (2013) 15 NWLR (Pt.1367) 66**
- C** **and**
- (ii) ROTIMI WILLIAMS AKINTOKUN vs. LPDC (Unreported Suit No SC 111/2014 delivered on 16th May 2014.**
- D** **(d) In the circumstances the Judgment of this court dated 4th December 2009 was entered without Jurisdiction and the appellant/applicant affected by the Judgment is ex debito justitiae entitled to apply to set aside the said Judgment.**
- E**
- (f) Given the length of time between the delivery of the said Judgment and the application, it is necessary ex abundant cautela to seek leave of court and extension of time to bring the application.**
- F**

The applicant supported his application with a twenty one paragraph affidavit. He also annexed the underlisted exhibit:

- G** **(i) A Written address in support of the motion dated 20/8/2014.**
- (ii) Certified true copy of the judgment of this court delivered on 4th day of December 2009, and**
- H** **(iii) A photo-copy of a receipt for the production of the said judgment**
- I** The appellant/applicant had also on 4/10/17 filed an appellant/applicant's reply brief in response to the respondent's Reply address to the motion on

A notice.

On its part, the respondent filed a counter affidavit of nine (9) paragraphs dated 18th April 2017 in opposition to the motion under consideration. He also filed written brief on 10/5/2017 in opposing the

B applicant's application.

As I stated supra, the appellant/applicant had earlier withdrawn the three prayers in this motion, thus leaving only one prayer which has to do with seeking the indulgence of this court to set aside the Judgment it had

C earlier delivered on 4th day of December 2009 in appeal No SC 190/2016 in the case of **Anamelechi Iteogu Esq. vs. The Legal Practitioners Disciplinary Committee now reported in (2009) 17 NWLR (Pt 117) 614.**

D When arguing the motion before us on 4/12/2017, the parties adopted their Written Addresses. It was submitted by the learned applicant's counsel, that the only extant issue for determination is simply thus:

E **“Whether this honourable court should set aside its judgment in this case:**

The appellant/applicant argued that this court had no jurisdiction to entertain the appeal as at the time the case was decided. He referred to the decision of the Supreme Court in the case of **Nwodike vs. LPDC (2005) ALL FWLR (Pt 266) 1176 and Aladejobi vs. Nigeria Bar Association (2013) 15 NWLR (Pt 1376) 66**, where it was held that appeal from LPDC ought to go first before the Appeal Committee of the Body of Benchers. He therefore submitted that as at 2009 when the Supreme Court delivered judgment in this appeal, it had no jurisdiction to do so. He then urged this court to resolve this issue in favour of the appellant/applicant

H In his response, the learned counsel for the respondent submitted that he was not unmindful of the inherent jurisdiction of the Supreme Court to set aside its own decision in very limited circumstances, particularly where the said Judgment is a nullity.

I He argued that the learned counsel to the applicant appears to have misunderstood and misconceived the scope of the exercise of the inherent jurisdiction of the court to set aside its own decision *ex debito justitia*. He

A cited the case of **Amalgamated Trustees Limited vs. Associated Discount House Ltd (2007) 15 NWLR (Pt 1056) page 126-127.**

He contended that if the application is granted, it will certainly open a flood gate to already decided cases by the Supreme Court with litigants **B** challenging the decisions of the Supreme Court under the guise of reviewing the judgments under the Slip Rule. He urged his court to dismiss the application in its entirety, as it is not justiciable to reopen already concluded issues relating to the Judgment of the court dated 4th December, **C** 2009.

My lords, before going into the merit or otherwise of this application, it will not be out of place, to give brief facts which gave rise to the present application. In the year 2006, the Nigerian Bar Association lodged a **D** complaint to the respondent herein, against the present applicant, accusing him of professional misconducts. The respondent (hereinafter) referred to as “the Committee”) gave its direction on 7/6/2006 which the appellant/applicant, a legal practitioner was found liable of professional **E** misconduct, contrary to Rules 24 and 49 (a) (b) of the Rules of Professional Conduct in the Legal Profession, punishable under Section 12 of Legal Practitioners Act, Cap 2007 Laws of the Federation of Nigeria 2015 (as amended). Thereupon, the appellant was ordered to pay a sum of **F** (N9,500,000) (Nine Million, Five Hundred Thousand Naira only) to his client one Bishop Ndarake James Antigha who had earlier petitioned against the appellant/applicant. It was also ordered that the appellant's name should be struck off the Roll of legal practitioners.

G Pique by the decision of the Committee, the appellant herein, appealed to the Supreme Court and this court on 4th December 2009 dismissed the appeal and affirmed the decision of the Committee.

By the present motion, the appellant/applicant is now challenging this **H** court's judgment delivered on 4th December 2009 which was reported as **Anamelechi Iteogu vs. Legal Practitioners Disciplinary Committee (2009) 17 NWLR (pt.1171) 614** on the simple ground that the judgment was given by this court without jurisdiction. The appellant/applicant by his **I** sole prayer is now seeking the order of this court to set aside that judgment which was delivered by this court on 4th December 2009 because according

- A** to him, this court lacked jurisdiction when it delivered the judgment under reference. It is worthy of note that when the appellant, now applicant, presented his appeal before this court the issue of jurisdiction was never raised. I am not unmindful of the fact that issue of jurisdiction can be raised
- B** at any time even before the Supreme Court, but to my mind that issue of jurisdiction can only be raised during the pendency of the relevant proceedings and certainly not some years after the court had already delivered its judgment and parties' disputes were settled or determined or
- C** their fates were decided. It is an elementary principle of law, that once a court delivers its judgment, in a given case, it thereupon becomes *functus officio* and can therefore not reopen it in whatever guise, except of course, in the event that there was circumstances where the doctrine of SLIP RULE
- D** applies or to correct mistake. That notwithstanding however, a court can set aside its own judgment only in exceptional circumstances or conditions which I will furnish presently in this ruling. Even then, the discretion of court to set aside its earlier judgment must always be exercised judiciously
- E** and judicially and must also be applied sparingly to avoid causing injustice or to breach public interest or possible public uproar. This court also lacks the jurisdiction to review its earlier decision or judgment. Once decisions or judgments have been delivered by this court, such decision has air or force
- F** of finality and cannot be appealed against or reviewed by it except in the exceptional circumstances I will explain below.

- It is evident from the fact and circumstance of this application as I posited above, that the applicant herein filed this instant application
- G** seeking the indulgence of this court to set aside the judgment it has since delivered on 4th of December 2009 in the case of **Anamelechi Iteogu vs. Legal Practitioners Disciplinary Committee**, now reported in (2009) 17 NWLR (Pt.1171) 614 for want of jurisdiction. There is no gain to say that
- H** when arguing that appeal before this court, the applicant did not raise issue of jurisdiction before this court for it to decide. Admittedly, this court had earlier in the cases of **Rotimi Williams Akintokun vs. LPDC**, appeal No. SC 11/2006 now reported in (2014) LPELR 22941 (SC) and the case of
- I** **Aladejobi vs. Nigerian Bar Association (2013) 15 NWLR (pt.1376)**, had departed from its earlier decision in ANAMELECHI's case (supra)

A wherein, it held that this court had jurisdiction to entertain appeal directly from the decision of the Legal Practitioners Disciplinary Committee (respondent) without same routing through its appeal committee.

B There is no doubt that honourable justices of this court are human beings and therefore not infallible. They can make mistakes or commit errors at any time like any other mortals. That is why the law allows for correction of errors in its judgment when called upon so to do, for instance, in SLIP RULE or PENCIL RULE. In other words, in deserved situations or circumstances, this court when invited, can revisit the judgments it delivered earlier or previously, if such judgments are seen not to be in accord with desired justice by setting same aside, or varying same or even overruling such judgment. See Order 8 Rule 16 of Supreme Court Rules 1985. I must however stress here, that generally, once a court delivers its judgment, it becomes *functus officio*. It goes without saying therefore, that in the exercise of setting aside of its previous judgment, this court and indeed every other court must do so only in the interest of justice which is indeed the preoccupation of all courts. The courts when faced with an application to set aside its own judgment, it must guard against possible instability crippling into the corpus of our laws. In fact, this court in plethora of its decided authorities had set out some conditions which must be considered to have existed in the previous judgment sought to be set aside, and these conditions include the followings;

- G**
- (a) **That the previous judgment was given per incuriam, or**
 - (b) **That the judgment was erroneous in law; or**
 - (c) **That the previous judgment is contrary to public policy or is occasioning miscarriage of justice or perpetuating injustice.**
- H**

I See **AG Federation vs. Guardian Newspaper Ltd. (1999)9 NWLR (Pt.618) 187; Aminu Tanko vs. The State LPELR 3136 (SC); (2009) 14 WRN 1 (2009)4 NWLR (Pt.1131)430.**

- A** As I highlighted above, judgments of this court are delivered with air of finality and cannot be reviewed, varied or set aside except on the conditions I highlighted above. The consideration made by this court in deciding the cases of **Akintokun vs. LPDC (supra) and Aladejobi vs. LPDC (supra)**
- B** relied on by the applicant had admitted been a departure by this court of its earlier stance on its jurisdiction, contrary to its earlier position in Anamelechi's case. To my mind, if this court grants' the order of setting aside its earlier judgment as sought in this instant application, it will open a
- C** flood gate for litigants with similar complaints or grouse to be greeting this court with multiplicity of applications or suits which may in the long run open a chain of reactions the consequence of which nobody can foretell. In the case **Adegoke Motors Ltd vs. Adesanya & Anor (1989)3**
- D** **NWLR(Pt.109)250**; Oputa JSC at page 274 stated that:

“We are final not because we are infallible, rather we are infallible because we are final”

- E** Again, by the provisions of Order 2 Rule 29 (1) of the Supreme Court Rules this court shall only entertain application to set aside its judgment if only such application for setting aside is brought before it within a reasonable
- F** time. The instant application is seeking the setting aside of a decision delivered by this court more than eight years ago. Such period can not be regarded as “reasonable time” from which ever angle one looks at it. It will be rather absurd to indulge the applicant's requests which in my view, is
- G** brought at the 23rd hour of the day.

- Having stated the above, I see no basis for me to invoke the provision of Order 6 Rule 5 (4) of the Supreme Court Rules to set aside the earlier decision given by this court on 4th December 2009 in **Anamelechi Iteogu**
- H** **Esq vs. LPDC reprinted in (2009) 17 NWLR (Pt.1171) 614**. As a corollary, I adjudge this application unmeritorious and it is therefore hereby refused and accordingly dismissed by me.

I

Amiru Sanusi
Justice, Supreme Court

A RHODES-VIVOUR, (JSC): I have had the advantage of reading the leading Ruling of my learned brother, Sanusi, JSC. I agree with the reasoning and conclusion that the application lacks merit. I, too dismiss the application.

B **Olabode Rhodes-vivour**
Justice Supreme Court

C PETER-ODILI, (JSC): I agree with the ruling just delivered by my learned brother, Amiru Sanusi JSC and to underscore my support for the reasoning from which the decision came about, I shall make some remarks.

The motion was filed on the 20th August, 2014 in which the prayer sought is for an order setting aside the judgment of this court dated 4th December 2009 made by their lordships: Alloysius Iyorgyer Katsina-Alu JSC (as he then was) Mahmud Mohammed JSC (as he then was), Walter Samuel Nkanu Onnoghen JSC (as he then was), Christopher Mitchel Chukwuma-Eneh JSC and Muhammed Saifullahi Muntaka-Coomassi JSC, reported as **Anamelechi Iteogu vs.L.P.D.C. (2009) 17 NWLR (Pt.1171)614.**

F The ground on which the application is set are five in number and they are thus:

- G 1. The appeal was from a direction of the Legal Practitioners Disciplinary Committee to the Supreme Court**
- H 2. The supreme court entertained the appeal delivered its judgment on 4th December, 2009.**
- I 3. The Supreme Court has no jurisdiction to entertain an appeal from the Legal Practitioners Disciplinary Committee as decided by that court in Aladejobi vs. Nigeria Bar Association (2013) 15 NWLR (Pt.1376) 66, Rotimi Williams Akintokun vs. L.P.D.C.**
- 4. In the circumstances the judgment of this court dated 4th December, 2009 was entered without**

A jurisdiction and the appellant/applicant affected by the judgment is *ex debito justitiae* entitled to apply to set aside the said judgment.

B 5. Given the length of time between the delivery of the said judgment and this application it is necessary *ex abundante cautela* to seek leave of court and extension of time to bring this application.

C The application is supported by a 22 paragraph affidavit deposed to by the applicant himself.

On the 4th day of December 2017 date of hearing, U. K. Ekpuchie Esq. of counsel adopted his written address filed along with the motion and a reply on the 4/10/17.

D Learned counsel for the respondent, P.D. Daudu Esq. adopted its Brief in opposition of the application and it was filed on 10/5/17. A counter affidavit of 9 paragraphs had been filed on 19/4/2017 which learned **E** counsel for respondent also adopted.

The applicant raised two issues for determination which are thus:

- F**
1. Whether this honourable court should set aside its judgment in this case.
 2. Whether this court should exercise its discretion to grant the appellant/applicant leave to bring this application and extension of time to bring this application.
- G**

Respondent on the other hand crafted a single issue which is as follows:

H Whether the applicant's invitation to this court to overrule itself on its earlier decision of 4th December 2009 is justiciable.

I This sole issue of the respondent covers the grounds of this application and I shall make use of it in the determination of this application.

A SOLE ISSUE

Whether the applicant's invitation to this court to overrule itself on its earlier decision of 4th December 2009 is justiciable.

B Learned counsel of the applicant contended that an applicant praying the court to set aside its previous judgment must show that the facts and circumstances of his application fall into any of the following categories which are thus:

C

- (a) **Where the judgment was obtained by fraud;**
- (b) **When the judgment is a nullity such as when the court itself was not competent;**

D

- (c) **When the court was misled into giving judgment under a mistaken belief that the parties have consented to it;**

- (d) **When the judgment was given without jurisdiction;**

E

- (e) **When the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.**

F He cited **Edeh & Anor vs. Mba & Ors (2011)18 NWLR (Pt. 1278) 236; Alao vs. A.C.B. Ltd. (2009) 9 NWLR (Pt. 672) 264; Igwe vs. Kalu (2002) 14 NWLR (Pt. 787) 435; CITEC Int'l Estates Ltd. vs. Francis (2014) 8 NWLR (Pt. 1408) 139; A.T. Ltd. vs. A.D.H. Ltd. (2007) 15 NWLR (Pt.**

G 1056) 118.

He stated that a party affected by a null order of court is entitled *ex debito justitiae* to apply to that court to set the said judgment aside. He referred to **Adegoke Motors Ltd. vs. Adesanya & Anor (1989) 3 NWLR**

H (Pt. 109) 250 at 273-275; Aladejobi vs. N.B.A. (2013) 15 NWLR (Pt. 1376) 66.

He further stated that the applicant's affidavit has eloquently and truthfully explained why this application was brought out of time. That the applicant's understanding of the legal position was the reason.

I

- A** Learned counsel for the respondent in response stated that there is no right of appeal to any person or authority except as provided under Section 235 of the 1999 Constitution. That the provisions for the correction of accidental mistakes or slip under Order 8 Rule 16 of the Rules of Supreme
- B** Court to bring it in line with the intention of the judgment has not made any provision for setting aside the judgment or for a rehearing of the appeal. That although this is a court of last resort, it is a court of appellate jurisdiction.
- C** Learned counsel for the respondent submitted further that except for the original jurisdiction given in Section 232 of the 1999 Constitution its jurisdiction is appellate only, with incidental original jurisdiction conferred by subsection (6) (a) of the Section 6 of the Constitution, for the purpose of
- D** exercising that appellate jurisdiction. That the Supreme Court is statutory and cannot therefore, for the sake of doing justice confer on itself a jurisdiction that is not given it by the constitution or by any statute. That it is in the public interest that there should be an end to litigation and the finality
- E** of the Supreme Court's judgment are not to be played around with in an attempt at review except in exceptional circumstances. He referred to Section 235 of 1999 CFRN, Order 8 Rule 16 of the Rules of the Supreme Court 1985 (as amended); **Adefulu vs. Okulaja (1990) 5 NWLR (Pt. 550)**
- F 435.**
- He said this court's judgment of 4th December 2009 cannot be a nullity merely because this court in subsequent decisions of **Aladejobi vs. Nigeria Bar Association (2013) 15 NWLR (Pt. 1376); Rotimi Williams**
- G Akintokun vs. L.P.D.C. (supra)** has departed from its original position in the previous case, the appeal of the applicant inclusive. He cited **Adegoke Motors Ltd. vs. Adesanya & Anor (1989) 5 SC 113; Eleazar Obioha vs. Innocent Ibero & Anor. (1994) 1 NWLR (Pt. 322) 503 etc.**
- H** In a nutshell, the applicant is asking for this court revisiting its case concerning the applicant which was decided on the 4th day of December, 2009 against a direction of the respondent which appeal this court dismissed on the merit. The basis for this prayer for revisitation stems from
- I** the fact that on the 12th July 2013 and 13th May, 2014 respectively, the

- A** Supreme Court held in the cases of **Aladejobi vs. NBA (2013) 15 NWLR (Pt. 1376) 66** and **Rotimi Williams Akintokun vs. Legal Practitioners' Disciplinary Committee** in Suit No. Sc 111/2006 in which the court held it has no jurisdiction to entertain an appeal directly from the Legal Practitioners Disciplinary Committee. The applicant's posture herein is that by these later decisions, the Supreme Court lacks jurisdiction to entertain appeals from the Legal Practitioner's Committee Directions directly and so the need to revisit ANAMELECHI ITEOGU'S case and declare that the decision or judgment of this court in 2009 was without vires and so set it aside and have the status of legal practitioners of the applicant restored.

- The respondent counters the position of the appellant on the ground that the policy is that there must be an end to litigation and the application constitutes a gross abuse of the process of this court and the application should be dismissed.

- The situation thrown up clearly necessitates a foray into the 1999 Constitution and the relevant rules of court that apply when the court is called up to look at any judgment once delivered since the court is not generally empowered to review a judgment once delivered and the only exception being where there is a need to correct any clerical mistake or same error arising from accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. This exception to the general principles is known as the "slip rule".

- Also embedded in these constitutional provisions and rules of court is a total prohibition from review of a judgment which correctly represents what the court decided and so cannot be varied. The third component of those provisions is that the operative and substantive part of a judgment shall not be varied and a different form substituted. I rely on **Adefulu vs. Okulaja (1990) 5 NWLR (Pt. 550) 435**.

- The implication of the provisions referred to is that once this court has come to a decision and delivered it the court becomes *functus officio* and cannot reopen the matter.

- For clarity I shall quote the constitutional provisions and the rules of court referred to as follows:

A Section 235 CFRN:

B “Without prejudice to the powers of the President or of the Governor of a State with respect to the prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.” It is relevant to refer also to the provisions of Section 233(6) of the 1999 Constitution (as amended) which states thus:

C “Any right to appeal to the Supreme Court from the decision of the (Federal) Court of Appeal conferred by this section shall, subject to Section 216 of this Constitution, be exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Supreme Court.”

E Order 8 Rule 16 of the Rules of the Supreme Court 1985 (as amended) thus:

F “The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substituted.”

H It follows that this court having held at the time in 2009 that it had jurisdiction to consider appeals from the Legal Practitioners Disciplinary Committee (LPDC) that decision is final and cannot be set aside on the ground that a new thinking had taken place to which an opposite result is the effect. The point has to be made that this court has the right to depart from its earlier decision in subsequent cases and thereby overrule itself, it does

- A** not however mean that the previous decisions in those earlier cases differently decided would be given a new lease of life on account of this new development. The reason for this is self evident as Oputa JSC stated in **Adegoke Motors Ltd. vs. Adesanya & Anor (1989) 5 SC 113; (1989) 3**
- B** **NWLR (Pt. 109) 250 at 274 thus:**

“We are final not because we are infallible, rather we are infallible because we are final.”

- C** Indeed to explain the situation in its raw and I dare say, morbid form the position is akin to asking a doctor to bring up a corpse of a person who died years ago of a disease which at the time of the demise of the person was
- D** incurable merely because new drugs have emerged for the cure of anyone suffering a similar disease so as to administer the drug, an impossibility which analogy is similar to what this court is called upon to do. The judgment earlier given with the jurisdiction of the court available at the time
- E** would not be reviewed when the court has made an about turn to its understanding and decision of the law. The earlier decision with the attendant fall outs are overtaken by events, unfortunate as it may be, there is no remedy.
- F** For a fact this court is not enticed by the invocation by learned counsel for the appellant urging it to exercise its inherent jurisdiction to set aside the case of the applicant decided on merit with the court assuming jurisdiction in what the appellant's counsel terms interest of justice. It is
- G** now trite law that the judgment of this court validly constituted as to the number of its justices and jurisdiction of the subject matter is final and there is no right of appeal to any person or authority except as provided under Section 235, CFRN 1999 and that is not evident here.
- H** Explaining this situation the court in the case of **Eleazar Obioha vs. Innocent Ibero & Anor (1994) 1 NWLR (Pt. 322) 503** held thus:

- I** **“By Section 235 of the 1999 Constitution (as amended), the Supreme Court cannot sit on appeal over it's own judgment. The provision gives a stamp of finality to any**

- A** decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the court by itself. Indeed there can be no appeal questioning the decision of the Supreme Court to itself or anybody or
- B** person as there must be a finality to litigation. Hence, the appellate jurisdiction of the Supreme Court is limited by Section 233 (2) of the 1999 Constitution (as amended) of hearing appeals from the Court of Appeal only and no
- C** one.” *See also Alhaji Alao vs. African Continental Bank Ltd. (2000) 9 NWLR (Pt. 672) 264 at 283.*

- This position can also be found in the decision of **Chukwuma & Ors vs. Ezulike & Ors (1986) 5 NWLR (Pt. 45) 892**, where Uwais, JSC (as he then was) on the finality of the decision of this court, stated thus:
- D**

- E** “There is no appeal in this court against the decision of 12th November, 1985, and it is obvious that there cannot be such an appeal since no jurisdiction has been conferred upon this court to sit on appeal over its own decision, no matter how manifestly wrong the decision may be. See
- F** **Paul Cardoso vs. John Bankole, Daniel & Ors (1986) 2 NWLR (Pt. 20) 1 at 28.**

- This court in **Amalgamated Trustees Limited vs. Associated Discount House Limited (2007) 15 NWLR (Pt. 1956) page 126-127** per Belgore, JSC (as he then was) where it was held thus:
- G**

- H** “The Supreme Court can set aside its judgment, in appropriate cases, when certain things are shown. Otherwise, its decision is final. As a matter of fact, Order 8 Rule 16 of the Supreme Court Rules, 1985 and the three principle enshrined therein demonstrate, unequivocally, a
- I** clear prohibition on the interference subsequently with the operative and substantive judgment of a Supreme

- A** Court or any part thereof except under the “Slip Rule” it is therefore now firmly settled that the judgment of the Supreme Court cannot be reviewed. In other words, the Supreme Court enjoys finality of its decisions. Except for clerical mistakes or accidental slips or omissions, it seldom re-visits its decision by way of review, variation or setting aside. Once the Supreme Court has entered judgment in a case, that decision is final and will remain so forever.
- B** The law may in the future be amended to affect future matters on the same subject, but for cases decided, that is the end of the matter.”
- C** The decisions I have referred to above with their dicta have in effect settled the question raised in this application and for the avoidance of doubt the judgment of this court delivered on the 4th of December, 2009 is final and for all time and there is nothing that can be done on it as the application lacks merit and in line with the lead judgment, I too dismiss it.
- D** I abide by the consequential orders made.
- Mary Ukaego Peter-odili**
Justice, Supreme Court
- F** **BATA OGUNBIYI, (JSC):** I have had the privilege of reading in draft the lead Ruling of my learned brother Amiru Sanusi, JSC just delivered.
- G** In my opinion, the application at hand has no place or merit taking into consideration the reasons advanced by my brother in his ruling.
- In the same vein and conclusion as the lead ruling therefore, I also refuse the application as it lacks merit.
- Clara Bata Ogunbiyi**
Justice, Supreme Court
- H** **EJEMBI EKO, (JSC):** I read in draft the Ruling just delivered in this application by my learned brother, AMIRU SANUSI, JSC. The application seeks in the main an order setting aside the decision of this court delivered on 4th December, 2009-SC. 190/2006-**Anamelechi Iteogu, Esq.,**
- I**

A vs. L.P.D.C. In the application, it was erroneously stated that the said judgment of this court was reported as **Anamelechi Iteogu vs. LPDC (2009) 17 NWLR (Pt. 1171) 614**. There is no such report. I however found that the judgment was reported as **Anamelechi Iteogu vs. LPDC (2009) 12 SC. (Pt.1)1**.

B At the petition of one Bishop Ndarake James Antigha the applicant was charged before the Legal Practitioners Disciplinary Committee (L.P.D.C.) for professional misconduct. The applicant was tried and convicted for professional misconduct by the LPDC and on the direction of the LPDC the applicant's name was struck off the roll of Legal Practitioners. He was in addition ordered to pay the sum of N9,500,000.00 to the complainant. The applicant aggrieved by the decision, direction and orders of the LPDC appealed to this court. His appeal was unanimously dismissed by this court for lacking in substance. The order dismissing this appeal was handed down since 4th December, 2009. The decision, direction and orders of the LPDC were all affirmed by this court.

C Eight years after the decision reported as (2009) 12 SC (Pt. 1)1, the applicant had brought this application praying this court to set aside its judgment in the said appeal No. SC. 190/2006 delivered on 4th December, 2009. The grounds for this application include the fact that:

- D**
- E**
- F**
- G**
- H**
- I**
- (1) **The Supreme Court has no jurisdiction to entertain an appeal from the Legal Practitioners Disciplinary Committee as decided by the Court in the underlisted cases:**
 - (i) **Aladejobi vs. Nigeria Bar Association (2013) 13 NWLR (Pt. 1376) 66; and**
 - (ii) **Rotimi Williams Akintokun vs. LPDC (unreported Suit No. SC. 111/2014 delivered on 16th May, 2014.**

Agreed, in **Aladejobi vs. NBA (supra) at page 101** this court stated:

A The Supreme Court lacks jurisdiction to hear appeals from the directions of the Legal Practitioners Disciplinary Committee of the Body of Benchers.

B The applicant had apparently accepted the judgment in the appeal No. SC. 190/2006. He now seeks the review of that judgment years after this court had apparently departed from the stance it took in his appeal No. SC 190/2006 in the circumstances prevailing then. He now seeks the indulgence of this court to set aside the judgment in the appeal No. C 190/2006. He needs, firstly, to scale the hurdles on his way placed by Order 2 Rule 29(1) and Order 8 Rule 16 of the extant Rules of this Court.

Order 2 Rule 29 (1) of the Supreme Court Rules 1985 provides, *inter alia*, that an application to set aside any judgment or proceedings of this court “shall only be entertained by the court if it is made within a reasonable time.” This application brought after 8 years since 4th December, 2009 to set aside the judgment delivered on 4th December, 2009 has not, in my view **E** been brought within a reasonable time. A period of over 8 years of inaction is rather inordinate in the circumstance. Equity follows the law. Delay also defeats equity. Whatever justice there may be in this application has been defeated by the inordinate delay of over 8 years by the applicant to take this **F** step to set aside the judgment delivered on 4th December 2009 on grounds of it being *per incuriam* or jurisdictional ultra vires.

Order 8 Rule 16 of the Supreme Court Rules, 1985, unambiguously or in clear terms, prohibits this court from reviewing “any judgment once **G** given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission.” The court becomes *functus officio* once it gives and delivers any judgment. It cannot vary the judgment afterwards so as to give effect to its meaning or intention. This is what the **H** applicant seeks this court to do in this application. He has not called upon the court to correct any clerical mistake or some error arising from any clerical mistake or some error arising from any accidental slip or omission. I should think clerical or error arising from any accidental slip or **I** omission distinct from intellectual error of assuming jurisdiction to entertain a matter the court lacks jurisdiction to entertain in the first place.

A The latter calls for review; the former does not.

Let me make myself clear. I do not foreclose a situation where the court has been called upon either to depart from earlier stance on point of law, or to set aside its decision on grounds of it being *ex debito justitiae*.

B Order 2 Rule 29(1) of the Rules of the court seems to contemplate an application to set aside any proceedings or judgment on grounds that the proceedings or judgment were rendered *ex debito justitiae*. The power of the court in this regard, or right of the applicant to invoke this power, must be exercised or invoked within a reasonable time.

C The applicant has no doubt, apparently, misconceived the purport of Order 6 Rule 5 (4) of the Supreme Court Rules, 1985. When parties invite the court to depart from one of its decisions, they invite the court to do so in a subsequent appeal or application that is extrinsic and subsequent to the decision they want the court to depart from. It is not the same thing as asking the court to set aside its own judgment in view or in the light of another decision given or delivered subsequent to the decision they seek to set aside.

D I find no substance in this application. I hereby concur in the Ruling of my brother, Amiru Sanusi, JSC, and refuse this application. Application dismissed.

E **Ejembi Eko**
Justice, Supreme Court

F

G

H

I

**ANDREW AYEDATIWOR
AND
THE STATE**

SC. 356/2014

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA**

FRIDAY, 2ND FEBRUARY, 2018

BEFORE THEIR LORDSHIPS

| | |
|------------------------------|-------------------------------|
| OLUKAYODE ARIWOOLA | 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: Concurrent findings of two lower courts – Attitude of the Supreme Court thereto.

CRIMINAL LAW AND PROCEDURE: Guilt of accused – How established – Procedure thereof.

CRIMINAL LAW AND PROCEDURE: Proof – Murder – What prosecution must prove – How discharged.

CRIMINAL LAW: Murder – Definition.

Issue for Determination

Whether the prosecution proved its case beyond reasonable doubt to warrant the affirmation of the appellant's conviction for murder by the court below. (Distilled from the two Grounds of Appeal).

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Calabar Division, Coram: Ndukwe – Anyanwu, JCA, C.C. Nweze, JCA; and O. A. Otisi, JCA; delivered on 21st day of May, 2014, which affirmed the appellant's conviction and sentence for the offence of murder by the trial court, handed down on 27th October, 2009 by Charles U, Ekpe, J. of the Akwa Ibom State High Court, Oron Judicial Division.

The appellant and one Segun Akinlolu had been charged before the High Court of Akwa Ibom State, Oron Judicial Division on one count of murder.

Upon their arraignment before the trial court, the accused pleaded not guilty to the charge and the case later proceeded to trial. The prosecution called two witnesses and tendered two documents marked exhibits 1 & 2 respectively.

PW1 – Edward Agabi was the investigating police officer (IPO). He testified that he was serving at Ewang, Mbo Local Government Area when the incident in question took place and he was detailed to investigate the case against the two accused persons and one other who later died. The case of murder was originally reported at Oron Police Station but later transferred to Ewang Divisional Police Station for investigation. Having contacted the complainant, one John Effiong (alias Bassey John), he visited the police station on 5th October, 1993 to inform him that he received information that those who stole the engine boat which led to the alleged murder of Okon Uyeh had been arrested and were been detained in Abonima. He proceeded to Abonima Mame police post where he met the accused persons. They made statements and admitted that they stole the outboard engine and boat. The complainant had earlier identified the accused persons as those who attacked him and others on the high sea and then seized their boat and stabbed the deceased. The matter was later transferred to the police headquarters, Uyo

At the police headquarters, he rearrested the accused persons, cautioned them in English language and each volunteered a statement in English language which he recorded. He read the said statement over to each of them and each signed his respective statement as correct. He countersigned as recorder. The case was that, the accused persons were passengers in a speed boat driven with the deceased Okon Uyeh, in the high sea. The accused attacked the deceased

and other occupants of the said speed boat. The deceased was stabbed and thrown into the sea with one Eteyen and later carted away the speed boat. The complainant had, upon seeing what was happening, by himself jumped into the sea along with another passenger of the boat. The two were later rescued by the fishermen on the sea. The said sea boat was being powered by a 75 horse outboard engine. The corpse of the deceased Okon Uyeh and Eteyen were later recovered and deposited at the hospital where a post mortem examination was carried out on the corpse. The post mortem report was tendered and admitted as ID.1 by the trial court. The statement of the 1st accused was produced and tendered in evidence but an objection was raised by the defence. The trial court later conducted a trial within trial to determine the admissibility and voluntariness of the statement. In a considered ruling of the trial court on 14th February 2007, the objection was overruled and the statement was held to be voluntary confession of the 1st accused Segun Akinlolu and same was admitted in evidence and marked Exhibit 1.

On the 28th February, 2007 when the trial proceeded, the statement of the appellant was tendered by the IPO and there was no objection, same was admitted in evidence and marked Exhibit 2. PW1 however admitted under cross examination that he did not take the accused persons before superior police officer after obtaining their respective confessional statements.

PW2, one John Effiong, alias Bassey John was the complainant. He was a trader, selling clothing materials in Cameroun. He was returning from Cameroun on 25th September, 1993 and had boarded a flying boat where he acted as conductor to the boat. With two other persons and the driver they were four persons in the boat.

Somewhere on the high sea, the 1st accused person had asked the boat operator to slow down for him to urinate. As the boat slowed down, the 1st accused brought out a knife from his body and stabbed the operator and pushed him into the sea. The appellant stabbed the deceased Okon Uyeh and also threw him into the sea. Whilst the attack was going on, PW2 and one other passenger jumped into the sea, where they remained until they were rescued by the fishermen in the evening of the same day.

The appellant and the co-accused were said to have made away with the

boat and the sum of N20,000 in the boat, the property of one of the passengers.

The appellant testified in his defence but called no other witness. At the conclusion of the hearing, in its reserved judgment, the trial court found the appellant guilty as charged. He was convicted and sentenced to death by hanging until pronounced dead.

Being aggrieved by the judgment of the trial court, the appellant appealed to the Court of Appeal. In its considered unanimous judgment delivered on 21st May, 2014, the appeal was found unmeritorious and was accordingly dismissed, leading to the instant appeal.

Held: *(Unanimously dismissing the appeal)*

1. *Definition of murder*

Murder has long been defined as, 'the taking of human life by a person who either:

- (a) has a malicious and willful intent to kill or do grievous bodily harm or;**
- (b) is wickedly reckless as to the consequences of his act upon his victims."**

Therefore, for murder, the suspect must have an evil intent, that is, a criminal intent, although, it is not necessary that there should be an intent to kill. See: R. vs. Viockers (1957) 2 A; ER 741 at 744; Yekini Afosi vs. The State (2013) 12 SCM (Pt. 2) 28' (2013) 13 NWLR (Pt. 1371) 329; (2013) 6-7 SC (Pt. 111) 37; (2013) 6 SCNJ (Pt. 1) 1, (2014) All FWLR (Pt. 725) 268. (Pp 203 – 204 Paras H – B)

2. *What prosecution must prove beyond reasonable doubt in a charge of murder*

It is trite law and settled, that for the prosecution to secure conviction for a charge of murder, the following must be proved beyond reasonable doubt:

- (a) That the deceased had died;**

- (b) That the death of the person was caused by the accused person;**
- (c) That the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.**

See: **Edwin Ogba vs. The State** (1992) 2 NWLR (Pt. 222) 164; (1992) 02 SCNJ 100; **Uchenna Nwachukwu vs. The State** (2002) 7 S.C. (Pt. 1) 124; **Okolo Ochemaje vs. The State** (2008) 15 NWLR (Pt. 1109) 57 SCM 103; (2008) 6-7 SC (Pt. 11) 1; (2008) LPELR 2198.

In the trial court, in order to secure conviction, the prosecution called two witnesses and tendered two documents marked as Exhibits 1 and 2 respectively. PW1 was the investigation police officer (IPO) who investigated the case and PW2 was an eye witness in whose presence the alleged act that led to the death of the deceased was carried out. (P 204 Paras C–H)

3. *How to establish the guilt of an accused person in a charge*
In law, it is trite that the guilt of an accused who is charged with the commission of a crime can be proved by way of the following:

- (a) Confessional statement of the accused which has passed the requirement of the law;**
- (b) Evidence of eye witness who saw or witnessed the commission of the alleged crime; or**
- (c) Circumstantial evidence which links the accused and no other person with the commission of the crime or the offence charged.**

See; **Joseph Lori & Anor vs. The State** (1980) 8-11 SC (Reprint) 52; (1980) LPELR R-1794.

In this case, the appellant was said to have made a statement to

the police, which statement, when tendered in court was not objected to by the defence and same was admitted and marked Exhibit 2. The said statement of the appellant was adjudged by the trial judge as confessional and that it was voluntarily made to the police. After reviewing the evidence adduced by the prosecution, the trial judge, inter alia, came to the following conclusion:

“..... from all the circumstances of this case and the evidence tendered, the prosecution has proved its case beyond all reasonable doubt.”

The above conclusion finally led to the conviction and sentence of the appellant. (Pp 204–205 Paras H–F)

Per Ariwola (JSC)

“On record, it is clear that the appellant was said to have made a confessional statement linking him to the charge, and PW2 was an eye witness in whose presence the act that led to the death of the deceased was carried out.

Ordinarily, and the law is trite on the point that, a man may be convicted on his own confession alone even without corroboration and there is no law against it. The position of the law is that if a suspect makes a free and voluntary confession in his extra judicial statement to the police, which confession is found to be direct and positive and the court is satisfied with its truth, such confessional statement alone is sufficient to ground conviction without corroboration. See: *Asimiyu Alarape & Ors vs. The State* (2001) 2 NWLR (Pt. 705) 79; (2001) 2 SC 114; (2001) LPELR 412; *Ozana Ubierho vs. The State* (2005) 5 NWLR (Pt. 919) 644; (2005) 2 SC (Pt. 1) 18; (2005) LPELR-3283. There is certainly no evidence stronger than a person's own admission or confession. The confession is admissible. See; *Akeem Agboola vs. The State* (2013) 11 NWLR (Pt. 1366) 619; (2013) 8 SCM, 157; (2013) All FWLR (Pt. 704) 139; (2013)

LPELR-20652.

In Exhibit 2, which was admitted without objection from the defence, the appellant had admitted throwing the deceased into the sea from the boat with others in the boat but that they threw life bouy at them with which to swim to safety”.(Pp 205 – 2-6 Paras F – C.)

4. *The appellant made a confessional statement*

The trial court also considered the statement (Exhibit 2) allegedly made to the police by the appellant and found it to be a confession of what he and the co-accused did on the fateful day the deceased was said to have been thrown into the sea. I have also read the said statement. It gave a graphic description of what happened on the day in question, and corroborates the testimony of PW2, who was an eye witness of the whole episode. (P 208 Paras B – C)

5. *Attitude of Supreme Court to concurrent findings*

The law is trite that where there are concurrent findings of fact by two lower courts, as happened in this case, this court will not readily interfere with such findings made unless and except there is some miscarriage of justice, or it has been shown that the said concurrent findings of fact as they are, would lead to a miscarriage of justice or were perverse and special circumstances have been shown to that effect. See: Lokoyi & Anor vs. Obi T. N. Adigwu (1985) NWLR (Pt. 4) 694; (1985) 5 SC 144; (1985) LPELR 2480; Prince Eyinade Ojo & Ors vs. A.G of Oyo State or Ors (2008) 15 NWLR (Pt. 1110) 577; (2008) 6-7 SC (Pt. 11) 54; (2008) 12 SCM (Pt. 2) 669; (2008) LPELR-2379. (P 209 Paras B – D)

Per Ariwola (JSC):

“There is no doubt that there were concurrent findings of facts in this case and the appellant did not show that they were perverse. This court will therefore not interfere with the concurrent findings of facts of the two courts below. In other words, the prosecution

proved the three ingredients it was required to establish to secure conviction for murder. The deceased, Okon Uyeh was proved to have died when recovered from the sea where he was thrown into. That the death resulted from the act of the appellant which act was intentionally done.

As done by this court in the erudite judgment of my learned brother, Nweze, JSC in the appeal by the 1st accused before the trial court, who was co-accused to the appellant, and who were both found guilty and convicted by trial court for the murder of the deceased, Okon Uyeh, as reported in Segun Akinlolu vs. The State (2015) 11-12 SCM 1; (2015) 12 SC (Pt. 1); (2015) LPELR 25986; I endorse the concurrent findings of the unanimous decision of the court below and the trial court. The sole issue is therefore resolved against the appellant. Without any further ado, I hold that the court below was correct in affirming the decision of the trial court that the prosecution proved its case beyond reasonable doubt, and that the appellant was correctly convicted for murder of Okon Uyeh. Accordingly, I hereby affirm the judgment of the court below, which had affirmed the conviction and sentence of the appellant, for the murder of Okon Uyeh, in its judgment of 21st day of May, 2014. This appeal is unmeritorious and deserves to be dismissed. It is, accordingly dismissed. (Pp 209–210 Paras D–B)

Nigerian Cases Cited

Akeem Agboola vs. The State (2013) 11 NWLR (Pt. 1366) 619; (2013) 8 SCM, 157; (2013) All FWLR (Pt. 704) 139; (2013) LPELR-20652
Asimiyu Alarape & Ors vs. The State (2001) 2 NWLR (Pt. 705) 79; (2001) 2 SC 114; (2001) LPELR 412;
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Lokoyi & Anor vs. Obi T. N. Adigwu (1985) NWLR (Pt. 4) 694; (1985) 5 SC 144; (1985) LPELR 2480;
Okolo Ochemaje vs. The State (2008) 15 NWLR (Pt. 1109) 10 SCM 103; (2008)

- A** 6-7 SC (Pt. 11) 1; (2008) LPELR 2198.
Ozana Ubierho vs. The State (2005) 5 NWLR (Pt. 919) 644; (2005) 2 SC (Pt. 1) 18; (2005) LPELR-3283.
Prince Eyinade Ojo & Ors vs. A.G of Oyo State or Ors (2008) 15 NWLR (Pt. 1110) 577; (2008) 6-7 SC (Pt. 11) 54; (2008) 12 SCM (Pt. 2) 669; (2008) LPELR-2379.
- B** *Segun Akinlolu vs. The State* (2015) 11-12 SCM 1; (2015) 12 SC (Pt. 1); (2015) LPELR 25986
- C** *Uchenna Nwachukwu vs. The State* (2002) 7 SC (Pt. 1) 124.
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D**Foreign Cases Cited**

R. vs. Viockers (1957) 2 A; ER 741;

E Representation

M.A. Ebute, (Esq.) for the appellant.

Uwemedimo Nwoko, (Esq.) A.G Akwa Ibom State with Uduak Eyo-Nsa (Esq.) DPP, Godwin Udom, (Esq.) SSC for the respondent.

F

OLU ARIWOOLA, (JSC) (Delivering the Lead judgment): This is an appeal against the judgment of the Court of Appeal, Calabar Division, hereinafter referred to as “court below” or “lower court”, Coram: Ndukwe

- G** Anyanwu, JCA, C.C. Nweze, JCA; and O. A. Otisi, JCA; delivered on 21st day of May, 2014, which affirmed the appellant's conviction and sentence for the offence of murder by the trial court, handed down on 27th October, 2009 by Charles U, Ekpe, J. of the Akwa Ibom State High Court, Oron
- H** Judicial Division, hereinafter referred to as “trial court”.

The appellant and one Segun Akinlolu had been charged before the High Court of Akwa Ibom State, Oron Judicial Division on one count of murder.

- I** Upon their arraignment before the trial court, the accused pleaded not guilty to the charge and the case later proceeded to trial. The

A prosecution called two witnesses and tendered two documents marked exhibits 1 & 2 respectively.

PW1 – Edward Agabi was the investigating police officer (IPO). He testified that he was serving at Ewang, Mbo Local Government Area
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C contacted the complainant, one John Effiong (alias Bassey John), he visited the police station on 5th October, 1993 to inform him that he received information that those who stole the engine boat which led to the alleged murder of Okon Uyeh had been arrested and were been detained in
D Abonima. He proceeded to Abonima Mame police post where he met the accused persons. They made statements and admitted that they stole the outboard engine and boat. The complainant had earlier identified the accused persons as those who attacked him and others on the high sea and
E then seized their boat and stabbed the deceased. The matter was later transferred to the police headquarters, Uyo.

At the police headquarters, he rearrested the accused persons, cautioned them in English language and each volunteered a statement in
F English language which he recorded. He read the said statement over to each of them and each signed his respective statement as correct. He countersigned as recorder. The case was that, the accused persons were passengers in a speed boat driven with the deceased Okon Uyeh, in the
G high sea. The accused attacked the deceased and other occupants of the said speed boat. The deceased was stabbed and thrown into the sea with one Eteyen and later carted away the speed boat. The complainant had, upon seeing what was happening, by himself jumped into the sea along
H with another passenger of the boat. The two were later rescued by the fishermen on the sea. The said sea boat was being powered by a 75 horse outboard engine. The corpses of the deceased Okon Uyeh and Eteyen were later recovered and deposited at the hospital where a post mortem
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A accused was produced and tendered in evidence but an objection was raised by the defence. The trial court later conducted a trial within trial to determine the admissibility and voluntariness of the statement. In a considered ruling of the trial court on 14th February 2007, the objection was

B overruled and the statement was held to be voluntary confession of the 1st accused – Segun Akinlolu and same was admitted in evidence and marked Exhibit 1.

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D PW2, one John Effiong, alias Bassey John was the complainant. He was a trader, selling clothing materials in Cameroun. He was returning from Cameroun on 25th September, 1993 and had boarded a flying boat where he acted as conductor to the boat. With two other persons and the

E driver they were four persons in the boat.

F Somewhere on the high sea, the 1st accused person had asked the boat operator to slow down for him to urinate. As the boat slowed down, the 1st accused brought out a knife from his body and stabbed the operator and pushed him into the sea. The appellant stabbed the deceased Okon Uyeh and also threw him into the sea. Whilst the attack was going on, PW2 and one other passenger jumped into the sea, where they remained until they were rescued by the fishermen in the evening of the same day.

G The appellant and the co-accused were said to have made away with the boat and the sum of N20,000 in the boat, the property of one of the passengers.

H The appellant testified in his defence but called no other witness. At the conclusion of the hearing, in its reserved judgment, the trial court found the appellant guilty as charged. He was convicted and sentenced to death by hanging until pronounced dead.

I Being aggrieved by the judgment of the trial court, the appellant appealed to the court below. In its considered unanimous judgment

A delivered on 21st May, 2014, the appeal was found unmeritorious and was accordingly dismissed, leading to the instant appeal.

The notice of appeal to this court was filed on 27th May, 2014 containing two grounds of appeal. The appeal was later heard on

B 09/11/2017.

When arguing the appeal, learned counsel for the appellant, M.A. Ebute, Esq., relied on the brief of argument earlier filed on 3/11/2017 out of time but was deemed properly filed and served on 09/11/2017. In the said

C appellant's brief of argument, he distilled the following sole issue for determination:

D **“Whether the prosecution proved its case beyond reasonable doubt to warrant the affirmation of the appellant's conviction for murder by the court below. (Distilled from the two Grounds of Appeal.)”**

E Learned counsel referred to the three ingredients the prosecution is required to prove or establish in order to secure conviction. He relied on a number of decided cases, including **Ogba vs. The State** (1992) 2 NWLR (Pt. 22) 164;

F **Monday Nweze vs. The State** (1996) 4 NWLR (Pt. 143) 375; **Gira vs. The State** (1996) 4 NWLR (Pt. 443) 375.

Learned counsel contended that, in criminal cases, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and unless the prosecution has discharged that onus, it is not entitled to

G succeed. He submitted that on a calm evaluation of the evidence led by the prosecution at the trial, it failed to prove beyond reasonable doubt the offence of murder allegedly committed by the appellant and the learned trial judge was wrong to have convicted the appellant on the basis of the

H inconclusive and contradictory evidence. He submitted further that the court below was therefore wrong to have affirmed the judgment of the trial court.

I Learned counsel evaluated the judgment of the court below applying the three ingredients earlier alluded to. He referred to the observation of the court on page 208 paragraphs 1 and 2 of the record and contended that the

- A** finding is erroneous. He contended that the burden was on the prosecution to prove conclusively by cogent and credible evidence, that Okon Uyeh is dead. He contended that there was no evidence that Okon Uyeh is dead, as there was no evidence that the recovered corpse was that of Okon Uyeh.
- B** Learned counsel contended that the evidence on record as to the identity of the recovered corpses is shrouded in confusion. And it is less than satisfactory and utterly fell short of the requisite standard in discharge of the onus on the prosecution.
- C** He reviewed the testimony of PW1, the IPO of the case, at pages 40 lines 27-28; 57 lines 20-23 and 58 lines 7-9 and 14-15 respectively of the record. He contended that the testimony of PW1 that Okon Uyeh is dead should be rejected, being hearsay evidence. He contended that PW1 was
- D** not at the scene of the alleged crime and did not witness the actual killing of the deceased. He contended further that the police officer at Abanima who gave PW1 the information was not called to testify. He relied on Section 37 and 38 of the Evidence Act and **Subramanian vs. DPP** (1956) WLR 965.
- E** He submitted that, in law, evidence of a person who did not personally witness an incident is hearsay. And that such evidence is unhelpful and worthless. He relied on **Ojo vs. Gharoro** (2006) 10 NWLR (Pt. 987) 173.
- He referred to the testimonies of both PW1 and PW2 on the recovery
- F** of the corpses of those allegedly thrown into the sea and contended that the court below was wrong to have found the evidence of PW1 on the recovery of the corpse as unchallenged and accurate. He submitted that it is not, as the prosecution's evidence on the recovery of corpses is materially and
- G** inherently contradictory. He submitted that the testimony of PW2 is hopelessly hearsay and inadmissible.
- Learned counsel contended that proof of identity of the corpse of a deceased person is vital to a successful prosecution of the offence charged.
- H** The corpse is to be identified by a person who knew the deceased while he was alive. He relied on **Princewell vs. State** (1994) 6 NWLR (Pt. 145) 469.
- Learned counsel contended that in this case no one was called, who identified the corpse as that of Okon Uyeh. And that it was not in dispute
- I** that PW1 did not know the deceased prior to his death, he could therefore not possibly have identified the deceased without assistance by someone

A who knew the deceased while he was alive. He contended further that, to the detriment of the prosecution's case, no medical evidence was given regarding the identity of the recovered corpse. The doctor who performed the autopsy, was not called to testify, for him to have testified on who

B identified the corpse to him, neither was the post mortem report admitted in evidence. He submitted that there is nothing positive and conclusive to show that the recovered corpse was that of Okon Uyeh – the deceased.

Learned counsel reviewed the testimony of PW2 on the identity of

C the corpse of the deceased, Okon Uyeh and contended that even though the law is that an accused person may be convicted of murder where the corpse has not been found and where there is compelling circumstantial evidence to lead to the inference that the person has been killed, he submitted that the

D principle is not applicable to the instant case, since the recovered corpse was not positively identified as that of Okon Uyeh – the deceased. As a result, he submitted that the prosecution has failed to prove that Okon Uyeh is dead and he urged the court to so hold.

E On the second ingredient, he contended that the prosecution was under obligation to prove beyond reasonable doubt that the death of the deceased was caused by the accused. He contended further that there must be a nexus or link between the act of the accused and the death of the

F deceased. Was it the appellant that caused the death of the deceased, Okon Uyeh? He referred to the testimony of PW2 on page 61 lines 16-25 of the record on how the deceased was stabbed by the appellant and thrown into the sea. Learned counsel referred to the finding of the trial judge on the said

G testimony at pages 128, 129 and 130 of the record and contended that it is evident that the learned trial judge rightly found that the prosecution did not establish the cause of death, and this finding, he further contended was not disturbed by the court below, hence it remains binding.

H Learned counsel contended that in disregard of the earlier findings of the trial court, that the cause of death may not have been established, the learned trial judge subsequently held that the appellant caused the death of the deceased by throwing him into the sea. He referred to the decision of

I the court below in affirming the subsequent findings of the trial court at pages 209-210 of the record. He submitted that the conclusion of the court

A below, that the appellant threw the deceased into the sea was perverse.

Learned counsel referred to the testimony of PW2 again on how the deceased and others were thrown into the sea and how he remained in the sea until he was rescued by a fishing boat. He contended that it was wrong

B of the court below to find that the deceased was thrown into the sea, whether stabbed or not and was later found dead, and that the unfortunate death of the deceased was caused by the appellant.

Learned counsel contended that having disbelieved the testimony of
C PW2 on the stabbings, it was no longer open to the learned trial judge to believe the portion of PW2's testimony that the appellant threw the deceased into the ocean, for the reason that, the totality of the testimony of PW2 was not credible. And it was wrong of the court below to have
D affirmed the finding.

Learned counsel contended further, that there was not a grate of evidence suggestive of the fact that the presumed throwing of the deceased into the sea was the direct and immediate cause of his death. In other words,
E that there is no nexus or link between the death of the deceased and the act of the appellant. He contended further that it is apparent that both courts below proceeded on the mistaken assumption that, to throw a person into the sea, without more, is sufficient to cause the person's death. He
F submitted that the cause of death must be directly traceable to the act of the appellant. But that in this case the prosecution failed to show with certainty that the deceased died as a direct result of the act of the appellant. He submitted that the prosecution failed to prove that the appellant caused the
G death of the deceased and urged the court to so hold.

On the third ingredient of the offence of murder, learned counsel contended that the prosecution was expected to prove that the act or omission of the appellant which caused the death of the deceased was
H intentional with knowledge that death or grievous bodily harm has its applicable consequence.

He referred to the findings of the trial judge that by throwing the deceased into the sea, the appellant intended to cause the death of the
I deceased. He contended that the mere fact that the deceased was thrown into the sea, was not sufficient basis to infer that the appellant intended to

A cause the death of the deceased. He contended further that in making the above finding that the appellant caused the death of the deceased intentionally, the court below, among others, relied on the confessional statement of the co-accused – Segun Akinlolu, to hold that there was

B evidence outside the Exhibit 2 that confirms or corroborates the contents of Exhibits 2. He submitted that it was wrong of the court below to have relied on Exhibit 1, when same was not adopted by the appellant. He further submitted that it is settled law that the confessional statement of a co-

C accused is not evidence against a person who has not adopted the statement. He relied on Section 29 (4) of the Evidence Act, 2011.

He contended that the law is that there must be some evidence, no matter how slight, outside the confession which makes it probable that it

D was true. He submitted that since there was no evidence outside the confession that confirms the truth of the confessional statement, the court below erred in anchoring the conviction of the appellant on Exhibit 2.

He finally submitted that the prosecution has failed to show that the

E appellant intended to cause the death of the deceased or knew that death would be a probable consequence of his action. He urged the court to reverse the decision of the court below because the prosecution failed woefully to prove any or all the ingredients of the offence of murder against

F the appellant beyond reasonable doubt, as required by law.

In the respondent's brief of argument, settled by Uwemedimo Nwoko Esq., learned Attorney General and Commissioner for Justice of Akwa Ibom State, filed on 11/10/2016 but which was deemed properly

G filed and served on 9/11/2017, the respondent distilled a sole issue for determination of the appeal from the two Grounds of Appeal filed by the appellant. The said issue is the same with the sole issue formulated by the appellant, though slightly differently couched.

H The respondent stated that it is instructive to note that the appellant in the instant appeal was the 2nd accused person in the trial that culminated to this appeal. And that the 1st accused – Segun Akinlolu, who was convicted and sentenced along with the appellant had earlier appealed the same

I judgment of the court below to this court. In the judgment of this court delivered on 11th December, 2015, the appeal was unanimously dismissed.

- A** Learned Attorney General referred to the ingredients of the offence of murder which the prosecution is required to prove to secure conviction. He submitted that the prosecution, in the instant case, indeed proved the basic ingredients beyond reasonable doubt.
- B** He gave three ways by which the guilt of an accused person can be established, viz:
- (a) The confessional statement of the accused person;
 - (b) Circumstantial evidence;
 - (c) Evidence of witnesses.

Learned counsel contended that the prosecution adopted a three pronged measure of all the available modes to prove the guilt of the appellant.

D Firstly, the confessional statement of the appellant; secondly the circumstance of the case which mathematically pointed at the appellant, as being one of the persons that murdered the deceased and thirdly the uncontroverted eye witness evidence of PW2.

E He submitted that the prosecution has proved the basic ingredients of the offence of murder against the appellant beyond any measure of doubt.

F On the death of the deceased, he referred to the testimony of PW2 at pages 61-63 of the record, that one Okon Uyeh had died. He also referred to the testimony of PW1, the IPO of the case and the findings of the trial court on the use to which the prosecution put the autopsy report. Learned Attorney General contended that, identification of the corpse of the victim of murder charge, is only required where a medical evidence is essential and not otherwise. He also relied on **Enewoh vs. State** (1990) 4 NWLR (Pt. 145) 469.

H He submitted that it is no longer a valid legal argument that a medical report and, ipso facto, the person who identified the corpse to the medical doctor for the purpose of autopsy, must be before the court in proof of the death or the identity of the deceased, where both the identity of the corpse and the cause of death can be inferred from the evidence and circumstances of the case. He relied on **Ogumo vs. The State** (2011) 7 NQLR (Pt. 1246)

A 314 at 330. He contended that from the combined evidence of both PW1 and PW2, the fact of Okon Uyeh's death and the recovery of his corpse by a search party of his relatives remain uncontroverted.

Learned counsel contended that notwithstanding the fact that the autopsy report was not tendered and the prosecution did not place evidential reliance on it, there is some evidence before the court, appreciated by the trial judge, on the fact of the deceased's identity. He referred to page 117 of the record on the finding of the trial court on the evidence of identity of the deceased Okon Uyeh, mentioned in the charge. The trial court was emphatic that the medical report pursuant to the post mortem examination notwithstanding, having not been tendered beyond identification, the evidence of the PW1 and PW2 are sufficient to establish that Okon Uyeh had died.

On the death of the deceased, Okon Uyeh, being caused by the appellant, it was contended by the appellant that the cause of death was not traceable to him because the learned trial judge had held at pages 128-129 of the record, pursuant to the assertion of PW2 that the accused persons first stabbed their victims before throwing them into the sea “and the denial of the accused persons of stabbing the deceased first before throwing him or them into the sea....” Therefore, “It would appear that the cause of death may not have been established.” However, learned counsel referred to the further findings of the trial judge on the same point on page 130 of the record, and concluded that the consequence of the act of the appellant in throwing the deceased, an old man, into the sea, obviously frightened by the criminal conduct of the appellant, as testified to by PW2 is the tragic recovery of his corpse by the relatives and PW1 as reflected in the testimony of PW1. Learned counsel contended that this finding was not challenged by the appellant neither did he testify to the contrary and the said finding was accepted and upheld by the court below.

Learned counsel contended that unless the appellant has a contrary story to tell, as to how the deceased died, the pieces of evidence establishing the nexus between the criminal conduct of the appellant and the death of the deceased, Okon Uyeh remain inviolable.

A On the contention of the learned counsel for the appellant that the confessional statement of a co-accused is not evidence against a person who has not adopted the statement, learned Attorney General contended that it is not the current position of the law. As the law is that the evidence or

B statement to the police of a co-accused can without more be used against him. He submitted that an accused can be convicted on the evidence of a co-accused or an accomplice and such evidence is not illegal under Section 198 (i) of Evidence Act, 2011. He relied on **Nwankwoala & Anor vs. The State** (Vol. 3) CAC, 254 at 265.

C He referred to the appellant's own confessional statement, Exhibit 2 made on October 13, 1993, in which he detailed his involvement with the murder of the deceased, and the finding of the court below on page 190 of

D the record. He urged the court to affirm the concurrent findings of fact by the trial court and the court below that the appellant intended to cause the death of the deceased or knew that death would be a probable consequence of throwing the aged deceased into the sea which the deceased actually

E died.

He finally urged the court to uphold the decision of the court below and dismiss the appeal.

F As earlier noted, the appellant was charged along with a co-accused, one Segun Akinlolu with the murder of Okon Uyeh. Both of them were found guilty, convicted and sentenced to death by the trial court, as charged. The co-accused had unsuccessfully appealed, up to this court, against the same judgment.

G The issue for determination of this appeal is, whether the prosecution proved its case beyond reasonable doubt to warrant the affirmation of the appellant's conviction for murder, by the court below. The sole issue was distilled from the two grounds of appeal filed by the appellant.

H Murder has long been defined as, 'the taking of human life by a person who either:

I (a) **has a malicious and willful intent to kill or do grievous bodily harm or;**

A (b) is wickedly reckless as to the consequences of his act upon his victims.”

B Therefore, for murder, the suspect must have an evil intent, that is, a criminal intent, although, it is not necessary that there should be an intent to kill. See: **R. vs. Viockers** (1957) 2 A; ER 741 at 744; **Yekini Afosi vs. The State** (2013) 12 SCM (Pt. 2) 28' (2013) 12 NWLR (Pt. 1371) 329; (2013) 6-7 SC (Pt. 111) 37; (2013) 6 SCNJ (Pt. 1) 1, (2014) All FWLR (Pt. 725) 268.

C It is trite law and settled, that for the prosecution to secure conviction for charge of murder, the following must be proved beyond reasonable doubt:

- D (a) That the deceased had died;**
(b) That the death of the person was caused by the accused person;
(c) That the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.
- E**

F See: **Edwor Ogba vs. The State** (1992) 2 NWLR (Pt. 222) 164; (1992) 02 SCNJ 100; **Uchenna Nwachukwu vs. The State** (2002) 12 SC 50 143 **Okolo Ochemaje vs. The State** (2008) 15 NWLR (Pt. 1109) 10 SCM 103; (2008) 6-7 SC (Pt. 11) 1; (2008) LPELR 2198.

G In the trial court, in order to secure conviction, the prosecution called two witnesses and tendered two documents marked as Exhibits 1 and 2 respectively. PW1 was the investigation police officer (IPO) who investigated the case and PW2 was an eye witness in whose presence the alleged act that led to the death of the deceased was carried out.

H

In law, it is trite that the guilt of an accused who is charged with the commission of a crime can be proved by way of the following:

- I (a) Confessional statement of the accused which has passed the requirement of the law;**

- A** **(b) Evidence of eye witness who saw or witnessed the commission of the alleged crime; or**
(c) Circumstantial evidence which links the accused and no other person with the commission of the crime or the offence charged.
- B**

See; **Joseph Lori & Anor vs. The State** (1980) 8-11 SC (Reprint) 52; (1980) LPELR R-1794.

- C** In this case, the appellant was said to have made a statement to the police, which statement, when tendered in court was not objected to by the defence and same was admitted and marked Exhibit 2. The said statement of the appellant was adjudged by the trial judge as confessional and that it
- D** was voluntarily made to the police. After reviewing the evidence adduced by the prosecution, the trial judge, inter alia, came to the following conclusion:-

- E** **“..... from all the circumstances of this case and the evidence tendered, the prosecution has proved its case beyond all reasonable doubt.”**

- F** The above conclusion finally led to the conviction and sentenced of the appellant.

- G** On record, it is clear that the appellant was said to have made a confessional statement linking him to the charge, and PW2 was an eye witness in whose presence the act that led to the death of the deceased was carried out.

- H** Ordinarily, and the law is trite on the point that, a man may be convicted on his own confession alone even without corroboration and there is no law against it. The position of the law is that if a suspect makes a free and voluntary confession in his extra judicial statement to the police, which confession is found to be direct and positive and the court is satisfied with its truth, such confessional statement alone is sufficient to ground
- I** conviction without corroboration. See: **Asimiyu Alarape & Ors vs. The**

- A State** (2001) 2 NWLR (Pt. 705) 79; (2001) 2 SC 114; (2001) LPELR 412; **Ozana Ubierho vs. The State** (2005) 5 NWLR (Pt. 919) 644; (2005) 2 SC (Pt. 1) 18; (2005) LPELR-3283. There is certainly no evidence stronger than a person's own admission or confession. The confession is
- B** admissible. See; **Akeem Agboola vs. The State** (2013) 11 NWLR (Pt. 1366) 619; (2013) 8 SCM, 157; (2013) All FWLR (Pt. 704) 139; (2013) LPELR-20652.

C In Exhibit 2, which was admitted without objection from the defence, the appellant had admitted throwing the deceased into the sea from the boat with others in the boat but that they threw life bouy at them with which to swim to safety.

On this point, the trial judge opined as follows:

- D**
- E**
- F**
- G**
- “I need not say and it needs no persuasion to believe that to throw a man into an open sea is an act most likely to endanger human life with death as a probable consequence. I disbelieve any statement to the effect that the accused persons threw into the water life bouy with which the victims would use to swim. Their intention and plan was to permanently deprive the owners of the boat of their property and to sell same. They never intended the owners to stay alive and come after them for the recovery of their gain. Indeed, the PW2 said the 1st and 2nd accused persons were surprised to see him alive and they expressed their shock openly.”**

See pages 129-130 of the record.

- H** The second prosecution witness (PW2) had testified before the trial court, inter alia, as follows:

- I** **“On 29th September, 1993 we were returning from Cameroun by flying boat. We were together with my driver while I was the conductor. There was also an Igbo boy whom**

A I took to Cameroun. My boat driver was by name Eteyen. We branched Abana to look for passengers. There we saw three passengers who said they wanted to go to Oron. The two accused persons here in the dock and one other person

B where (sic) these 3 passengers. They knew me very well. I have not seen the third person. They said he has died. These three passengers priced me N100.00 each to come to Oron and they entered the boat. Coming on the mid sea, the 1st

C accused person said he wanted to urinate, that I should slow down the boat. When the driver slowed down, the 1st accused brought out a knife and stabbed my driver. I was in front. My driver shouted. The 2nd accused person was staying close

D to me. Immediately the 1st accused person stabbed the driver that is now reported dead, the person held me and threw me into the water. There was one old man whom we also carried. The 2nd accused person stabbed that man.

E Infact, when that other man held me I had to jump into the water. Two people were stabled and thrown into the water, that my driver and the old man named Mr. Okon Uyeh”.

F See page 61 of the record.

On the ingredients of the offence of murder, the trial court had referred to the testimony of PW2 and had found as follows:

G “There was evidence by PW2 who said this man by name Okon Uyeh travelled in the same boat with them on the fateful day. He saw him in the boat but when, according to

H him, they were assailed by the accused person, Okon Uyeh was one of the two persons stabbed and thrown into the river by the accused persons. The PW1 said the corpse of Okon Uyeh was later recovered and a post mortem examination conducted thereon. The medical report on

I the corpse was only tendered for identification purposes

**A and was not tendered as an exhibit. It can therefore not be
used. However, the evidence of the PW1 said he met the
relatives of the deceased who helped in the search party
and they eventually recovered the corpse of the deceased
B which he took to hospital for autopsy.”**

The trial court also considered the statement (Exhibit 2) allegedly made to the police by the appellant and found it to be a confession of what he and the
C co-accused did on the fateful day the deceased was said to have been
thrown into the sea. I have also read the said statement. It gave a graphic
description of what happened on the day in question, and corroborates the
testimony of PW2, who was an eye witness of the whole episode.

D The court below on appeal had found as follows:

**E “There was no medical report on the precise cause of death
of the deceased. But it is well settled law that where a victim
dies in circumstances in which there is abundant evidence
of the manner of death, medical evidence can be dispensed
with. See: Awopejo vs. The State (supra); Oyuno vs. The
State (supra). The deceased was thrown into the sea,
F whether stabbed or not and he was later found dead.
Therefore, death of the deceased was caused by the action
of the appellant.”**

G The court below on page 217 of the record had further found as follows:

**H “From the uncontradicted evidence of both PW2, the eye
witness, and of PW1, the confession of the appellant is
consistent with other facts which have been ascertained
and proved. Although the statement was later retracted
by the appellant, the learned trial judge considered other
evidence proffered and was satisfied that the appellant
I acted intentionally.”**

- A** The court below later held that the prosecution proved the offence of murder contrary to Section 319 (1) of the Criminal Code Law, Cap 31, Vol. 13, Laws of Cross River State, as applicable in Akwa Ibom State of Nigeria against the appellant. The appeal was adjudged unmeritorious and
- B** dismissed.

- The law is trite that where there are concurrent findings of fact by two lower courts, as happened in this case, this court will not readily interfere with such findings made unless and except there is some miscarriage of justice, or it has been shown that the said concurrent findings of fact as they are, would lead to a miscarriage of justice or were perverse and special circumstances have been shown to that effect. See: **Lokoyi & Anor vs. Obi T. N. Adigwu** (1985) NWLR (Pt. 4) 694; (1985) 5 SC 144; (1985) LPELR 2480; **Prince Eyinade Ojo & Ors vs. A.G of Oyo State or Ors** (2008) 15 NWLR (Pt. 1110) 577; (2008) 6-7 SC (Pt. 11) 54; (2008) 12 SCM (Pt. 2) 669; (2008) LPELR-2379.

- There is no doubt that there were concurrent findings of facts in this case and the appellant did not show that they were perverse. This court will therefore not interfere with the concurrent findings of facts of the two courts below. In other words, the prosecution proved the three ingredients it was required to establish to secure conviction for murder. The deceased, Okon
- E** Uyeh was proved to have died when recovered from the sea where he was
- F** thrown into. That the death resulted from the act of the appellant which act was intentional done.

- As done by this court in the erudite judgment of my learned brother,
- G** **Nweze, JSC** in the appeal by the 1st accused before the trial court, who was co-accused to the appellant, and who were both found guilty and convicted by trial court for the murder of the deceased, Okon Uyeh, as reported in **Segun Akinlolu vs. The State** (2015) 11-12 SCM 1; (2015) 12 SC (Pt. 1);
- H** (2015) LPELR 25986; I endorse the concurrent findings of the unanimous decision of the court below and the trial court. The sole issue is therefore resolved against the appellant. Without any further ado, I hold that the court below was correct in affirming the decision of the trial court that the
- I** prosecution proved its case beyond reasonable doubt, and that the appellant

- A** was correctly convicted for murder of Okon Uyeh. Accordingly, I hereby affirm the judgment of the court below, which had affirmed the conviction and sentence of the appellant, for the murder of Okon Uyeh, in its judgment of 21st day of May, 2014. This appeal is unmeritorious and deserves to be
- B** dismissed. It is, accordingly dismissed.

Olu Ariwoola
Justice, Supreme Court

- C BAYANG AKAAHS, (JSC):** My learned brother, Ariwoola JSC, obliged me with a copy of his judgment, a preview of which I had read before now. I am in total agreement that the appeal lacks merit and should be dismissed. The plank on which learned counsel has argued this appeal is that the
- D** prosecution failed to prove the ingredients of the offence namely:

- (a) That the deceased is dead**
- (b) That the death of the deceased was caused by the**
- E accused person;**
- (c) That the act or omission of the accused which caused**
- F the death of the deceased was intentional with the**
- knowledge that death or grievous bodily harm was**
- its probable consequence.**

- See: *Ogba vs. State* (1992) 2 NWLR (Pt. 222) 164; *Ochemaje vs. State* (2008) 15 NWLR (Pt. 1109) 57. PW2 gave an eye witness account on how
- G** they were attacked while at sea and dispossessed of the flying boat in which they were traveling from Cameroun. They stopped at Abana to carry passengers to Oron. It was Abana that the accused embarked and while the boat was at mid sea, the lot accused requested that the pilot of the boat
- H** should slow down so that he could urinate. It was when the pilot slowed down that the accused attacked them, threw them into the water and made away with the boat. They were arrested in Abonnema with the moth. The corpse of the deceased was found some days after the attack. PW2 later
- I** identified the accused in the police cell at Abonnema.

A The evidence of PW2 and the confessional statement of the appellant was tendered by PW1 without objection and admitted as Exhibit 2.

The appellant testified as DW2 in which he denied committing the offence. He also denied making any statement or knowledge of the murder charge.

B The learned trial judge disbelieved the evidence of the accused. He said that even though the accused retracted their confession, only the accused person could have known the details contained in their statement which they supplied. Although they claimed they did not know each other, both of them were arrested coincidentally at Abonnema. He rejected the claim by 1st accused that they were arrested in Abonnema in August 1993 and kept in custody waiting for the incident to happen on 25 September 1993 before they were informed of their offence.

C The recovery of the stolen boat and the evidence of PW2 corroborated the retracted confessional statements of the 1st accused and the appellant. Although the autopsy report of the deceased was not tendered by the prosecution what caused the death of the deceased was not material since he was thrown into the water and his corpse was recovered from the water about four days after the attack.

D The appellant was properly convicted and sentenced to death together with the 1st accused who was his partner in crime. The 1st accused who had earlier appealed against his conviction and sentence to this court had the appeal dismissed on 11 December, 2015 and the case is reported as Segun Akinlolu vs. State (2015) LPELR 25986 (SC) The appellant in this appeal deserves a similar fate. His appeal to the Court of Appeal, Calabar which was dismissed on 21 May, 2014 lacks any merit and it is hereby dismissed by this court and the judgment of the lower court is further affirmed by me. Appeal is accordingly dismissed.

E **H** **K. B. Akaahs**
Justice, Supreme Court

I **ADAMU AUGIE, (JSC):** I have had a preview of the judgment just handed out by my learned brother Ariwoola, JSC. The facts of the matter relating to this appeal have been carefully set out in the lead judgment. I

A agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and deserves an order of dismissal.

Amina Adamu Augie, Jsc
Justice, Supreme Court

B

ADAMU GALINJE, (JSC): I have had the privilege 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.

C

The appellant in his statement Exhibit 2 admitted throwing the deceased into the sea from the boat. There is evidence that the deceased was thrown into the sea by the appellant who rowed the boat away and left him to be drowned. Clearly by leaving a man in the open sea without any means of getting him floated is a clear testimony of intention to kill him. From the pieces of evidence available. I am of the firm view that the prosecution did prove its case beyond reasonable doubt. The lower court was right in affirming the decision of the trial court that found the appellant guilty as charged and sentence him to death. I have no reason to disturb the concurrent finding of the High Court and the Court of Appeal. My learned brother has as usual treated all the issues submitted for resolution of this appeal. I agree entirely that the appeal lacks merit and should be dismissed. Accordingly, same is dismissed. The decision of trial court which was affirmed by the lower court, is further affirmed by me.

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Paul Adamu Galinje
Justice, Supreme Court

G

DAUDABAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Olukayode Ariwoola, JSC**, just delivered.

H

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.

I

Sidi Dauda Bage,
Justice, Supreme Court