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Uluebeka vs. State (2000) 7 NWLR (Pt. 665) 404;
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Ulueboka vs. The State (2000) 7 NWLR (Pt 665) 404.
Hayatu Umar vs. The State (2018) JSCNLR (Vol. 2), 194 S.C.

UNIPETROL vs. E.S.B.I.R. (2006) ALL FWLR (Pt. 317) 413;
Ibrahim Shehu Shema vs. Federal Republic of Nigeria (2018) JSCNLR (Vol. 2), 299 S.C.

Unity Bank Plc vs. Edward Bouari (2008) 7 NWLR (pt. 1086) 372.
Hon. Adeyemi Sabit Ikuforiji vs. Federal Republic of Nigeria (2018) JSCNLR (Vol. 2), 222 S.C.

University of Lagos vs. Aigoro (198) 1 NWLR (Pt.1) 143.
Mr. Newman Ighedo vs. Power Holding Co. Nig Plc (2018) JSCNLR (Vol. 2), 458 S.C.

Uwagboe vs. State (2007) 6 NWLR (Pt. 1031) 606.
Felix Okpako vs. The State (2018) JSCNLR (Vol. 2), 1 S.C.

Uwe Idigbi Esai & Ors vs. The State (1976) 11 SC 39;
Gabriel Daudu vs. Federal Republic of Nigeria (2018) JSCNLR (Vol. 2), 97 S.C.

Wankey vs. State (1993) 5 NWLR (Pt. 759) 135.

Kehinde Ajumobi vs. The State (2018) JSCNLR (Vol. 2), 391 S.C.

Western Steel Works vs. Iron and Steel Workers Union (1987) 1 NWLR (Pt. 49) 28;
Ibrahim Shehu Shema vs. Federal Republic of Nigeria (2018) JSCNLR (Vol. 2), 299 S.C.

Yahaya vs The State (1986) 12 SC 282.
Lekan Olaoye vs. The State (2018) JSCNLR (Vol. 2), 413 S.C.

Yusuf vs. State (1976) 6 SC 167 at 173;
Ibrahim Kamila vs. The State (2018) JSCNLR (Vol. 2), 259 S.C.

Yusuf vs. State (1976) 6 SC 167;
Lekan Olaoye vs. The State (2018) JSCNLR (Vol. 2), 413 S.C.

FELIX OKPAKO
AND
THE STATE

SC. 505/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

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

APPEAL: Concurrent findings – When Supreme Court will not interfere.

CASE LAW: Principles in ***Sam vs. State (1991) 2 NWLR (Pt. 176) 699.***

COURT: Admissibility of confessional statement – Proper approach thereto.

COURT: Conviction of accused solely on his confessional statement – Imperatives.

CRIMINAL LAW AND PROCEDURE: Proof – Where there is no eye witness account – Whether circumstantial evidence can sustain conviction.

CRIMINAL LAW AND PROCEDURE: Where accused is to be convicted solely on his confessional statement – Requirements thereof.

CRIMINAL LAW: Murder – Ingredients – Relevant considerations thereof.

EVIDENCE: Admissibility of a confessional statement – Relevant considerations thereof.

EVIDENCE: Confessional statement – Tests to establish its truth – Principles in ***Ogundipe v. The Queen (1954) 14 WACA 458*** *– Relevant considerations thereof.*

EVIDENCE: Where a confessional statement is admitted in evidence – Implication – Duty on trial court.

EVIDENCE: Where a document is tendered and the conditions of admissibility are satisfied – Duty on trial court thereon.

Issue for Determination

Whether having regard to the totality of the evidence on record the lower court was right in upholding the decision of the trial court that the respondent proved the charge of murder against the appellant beyond reasonable doubt.

Facts of the Matter

The accused/appellant was arraigned before the High Court of Justice Delta State, Isiokolo Judicial Division on a 1 count charge of murder punishable under section 319(1) of the Criminal Code Cap. 48 Volume II, Laws of the defunct Bendel State 1976 as applicable to Delta State in Charge NO. HCI/IIC/2004. The Charge read as follows:

"STATEMENT OF OFFENCE"

Murder, punishable under section 319(1) of the Criminal Code Cap. 48 Volume II Laws of the defunct Bendel State 1976 as applicable to Delta State.

PARTICULARS OF OFFENCE
Felix Okpako (m) on the 11th day of October, 2002 at Oviore town within Isiokolo Judicial Division murdered one Eloho Okpako (f)

He entered a plea of not guilty to the charge and the prosecution called four witnesses to prove the case. In the course of his evidence PW4 sought to tender a statement which the accused was alleged to have made on 17th October, 2002 but the defence objected to its admissibility on the ground that it was made under duress and torture. The learned trial Judge ordered for trial within trial to be conducted and thereafter overruled the objection and admitted the statement as Exhibit "D". An earlier statement made by the accused/appellant on 13 October, 2002 was tendered without objection by PW1 and was admitted as Exhibit "A".

The accused/appellant testified but called no other evidence in his defence. In his evidence he said he was at home at Oviorie – Ovu on 11th October, 2002 and at about 6 p.m he and the deceased quarreled and he gave her a punch as a result of which she fell down on the ground. On seeing this he took to his heels and went to his sister's place in Warri. Three days later he learnt that the deceased had died. He said he did not expect she would die from the beating. He denied knowledge of the deceased sustaining a knife wound which led to her death. He also denied stabbing the deceased. He said he did not know who killed the deceased.

The learned trial Judge reviewed the evidence after learned counsel had presented their addresses. He found that it was the accused/appellant who inflicted the deceased with stab wound on the neck from which she bled to death. He arrived at his conclusion from Exhibit "D" the statement of the accused/appellant. He disbelieved the evidence of the appellant in court and held that it was an afterthought. He concluded that the accused/appellant intentionally killed the deceased. He thereby convicted the accused of the offence of murder and sentenced him to death based on circumstantial evidence.

The accused/appellant was dissatisfied and appealed against his conviction and sentence to the Court of Appeal, Benin Division. The appeal was dismissed and his conviction was affirmed by the lower court. The appellant was not satisfied with the decision of the Court of Appeal, Benin and appealed further to the Supreme Court

Held: *(Unanimously dismissing the appeal)*

1. *Approach of Court to the admissibility of a confessional statement.*
The learned trial Judge was satisfied that the appellant was not compelled to make the statement under threat or duress and so allowed

the prosecution to tender the statement under section 29(3) Evidence Act. It is not necessary that another person other than the accused should record the statement although in most cases accused persons usually decline to write their own statements but leave the recording of the statement to the police investigator. The admissibility of a statement made by an accused person is questioned when the accused alleges that the statement was not voluntary. Even when an accused does not own up to making the statement, the court can still admits the statement and later attach whatever weight it assesses the statement contains. It does not matter whether PW4 was cross-examined or not on the recording of Exhibit "D". The important thing is the weight the trial Judge attached to Exhibit "D" regard being had to the surrounding circumstances of the accused making the statement and not the truthfulness of the contents by the person who recorded it. To put it another way, the court will not consider how Exhibit "D" was obtained rather the court will take into consideration whether what is admitted is relevant to the issues being tried. See: Elias vs. Disu (1962) 1 SCNLR 361; (1962) 1 All NLR 214; Igbinovia vs. The State (1981) 2 SC 5. *(P 15 Paras B – F).*

2. *Accused can be convicted solely on his confessional statement*

The law is now settled that an accused person can be convicted solely on his confessional statement. It is however desirable to have, outside a confession, some evidence of circumstances which make it probable that the confession was true. The learned trial Judge found that Exhibit "D" was a voluntary confessional statement which was positive and direct. He found that PW2's evidence corroborated Exhibit D which made it probable that Exhibit "D" was true and correct. He therefore found that the accused intentionally killed the deceased, Eloho Okpako and held that the prosecution proved its case beyond reasonable doubt. Consequently he convicted and sentenced the accused to death by hanging.

The lower court found that the learned trial Judge dispassionately evaluated the totality of the evidence which the parties presented to him, both oral and documentary, before coming to the conclusion that Exhibit "D" could competently be used to convict the appellant and the respondent proved the charge of murder preferred against the appellant beyond reasonable doubt. Before arriving at this

conclusion the court below also evaluated the evidence of PW2 and Exhibit D. *(Pp 15 – 16 Paras F – A).*

3. *No eye witness account court relied on circumstantial evidence.*
It is true that there is no eye witness account that the appellant was the person who killed the deceased. It is in Exhibit "D" that he confessed to killing the deceased by stabbing her with a knife on the neck. PW2 in his evidence stated that when he performed the post mortem on Eloho Okpako (deceased) he established "the presence of a stab wound at the anteria aspect of the nucal region, cutting the left carotene artery and left jugular vein." Based on his findings he formed the opinion that the deceased died as a result of haemorrhage due to the cutting of both of the two mentioned blood vessels. The corroborative evidence of the PW2 is as to the injury sustained by the deceased which caused the death. *(P 16 Paras E – G).*

4. *The duty on trial court in respect of admitted evidence*
Learned counsel for the appellant is contending that Exhibit "A" which the appellant made on 13th October, 2002 is inconsistent with Exhibit "D" which he made on 17th October, 2002 and submitted that the trial Judge was duty bound to adopt an approach that was most favourable to the appellant as Exhibit "D" was highly suspicious and placed reliance on Sam vs. State (1991) 2 NWLR (Pt. 176) 699 at 707.

In Exhibit "A" the appellant admitted beating the deceased on the orders of their father Freeborn Okpako. He said he beat the deceased in annoyance and hit her on the chest and she collapsed and died. It is in Exhibit "D" that he said he was annoyed and he beat her and "I used kitchen knife to stab her on the neck and she started bleeding and fell on the ground".

These are facts ascertained and proved. Once the conditions for admissibility of a document are met by the trial court and the document is admissible as in the instant case, the trial court is bound to employ and use it against its maker, in the instant matter, the appellant. *(Pp 16 – 17; 17 Paras H – B; H – I).*

Per K.B Akaahs (JSC):

"Having perused through Exhibit "A', I cannot see how the said Exhibit "A" is inconsistent with Exhibit "D" to warrant adopting an approach that would be more favourable to the appellant as advocated by Katsina-Alu JCA (as he then was) in Sam vs. State supra at pages 707-708. In that case on appeal, Katsina-Alu JCA had found that the appellant made two statements which were received in evidence and marked as Exhibits "F" and "G". Exhibit "F" was made on 16/2/84 while Exhibit "G" which was earlier in time was made on 6th February, 1984. In Exhibit G, the appellant had stated she left for the farm in the morning of Friday, 3/2/84 leaving her husband who was hale and hearty in the house and on her return from the farm by about 2 p.m. she enquired from the children about the whereabouts of her husband who told her he was sleeping on the bed. She decided to go into the kitchen to cook a meal and after she had finished cooking, she sent her son Godwin to call his father from the room to come and eat but the son returned to inform her that the father did not respond. After waiting for a while she went into the room to call him but found that he had died. In Exhibit "F" which was made some 10 days later on 16/2/84 the appellant stated that on 3/2/84, she returned from the farm to meet her husband who beat her with a broom. In retaliation she used the matchet she carried to the farm to inflict injury on his head from where blood gushed out and he fell down on the ground. She later touched him and found that he had died. The learned trial Judge found that Exhibits "F" and "G" were confessional statements convicted her for the offence of murder. On appeal the Court of Appeal found that unlike Exhibit "F", Exhibit "G" was not a confessional statement and in his leading judgment, Katsina-Alu JCA held as follows:

> **"In Exhibit "F" the appellant confessed to killing her husband. As I have already pointed out the learned trial Judge believed and accepted both statements and convicted the appellant. The question I ask myself is whether he was right in doing so. I think not. I have shown that Exhibit "G" is not a confessional statement. Faced with Exhibit "F" and "G" which contradict each other, the learned Judge was in duty bound to adopt an approach that was most favourable to the appellant. Having believed and accepted Exhibit "G" the learned Judge had no basis whatsoever for believing Exhibit "F" in which she confessed to the killing".**

The same scenario did not play out in Exhibit "A" and "D" in the present appeal. As I have already pointed out the appellant admitted beating the deceased and then hit her on the chest where she collapsed and died and on noticing what had happened he took to his heels while in Exhibit "D" he confessed to stabbing the deceased on the neck where she bled to death. In both instances it was the act of the appellant that caused the death of the deceased. In the result it cannot be said as learned counsel for the appellant has argued that the concurrent findings of the trial court and the lower court are perverse and should be set aside. *(Pp 18 – 19 Paras A – C).*

5. *No reason to interfere with concurrent findings*
There is no reason why this court should interfere with those concurrent findings of fact because they were not reached as a result of wrong approach to or wrong application of a principle of either substantive or procedural laws. See: Oguonzee vs. State (1998) 5 NWLR (Pt. 551) 521. *(P 19 Paras C – D).*

6. *Tests which determine the truth of confessional statement*
Learned counsel for the appellant criticized the admission of Exhibit "D" on the evidence of a single witness in the trial within trial. The

learned trial Judge believed the sole evidence of the PW1 in the trial within trial before admitting Exhibit "D". If the conviction of the appellant had been based purely on his said confession without any corroborating evidence, the appeal might have stood a chance of succeeding but as the lower court pointed out, the trial court relied on the other independent evidence outside the confession which corroborated the story in it. The tests led out in Ogundipe vs. The Queen (1954) 14 WACA 458 were stringently applied to test the truth of the confession namely:

(a) Whether there is anything outside it to show that it is true.
(b) If there is corroboration.
(c) The facts stated in it are true as far as can be tested.
(d) The accused person had the opportunity of committing the offence.
(e) The accused person's confession is possible.
(f) The confession is consistent with the other facts ascertained and proved.

See: Dawa vs. State (1980) 8-11 SC 236; Udofia vs. State (1984) 12 SC 139; Ojegele vs. State (1988) 1 NWLR (Pt. 71) 414; Akpa vs. State (2007) 9 NWLR (Pt. 1019) 500 and **Uwagboe vs. State (2007) 6 NWLR (Pt. 1031) 606.** *(Pp 19 – 20 Paras E – A).*

7. Duty on trial court where a confessional statement is admitted in evidence
It is settled law that once a confessional statement is admitted in evidence, it becomes part of the case of the prosecution which probative value the trial Judge is bound to consider. See: Egboghonome vs. The State (1993) 7 NWLR (Pt. 306) 383; Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380. Once the confession by the accused person is direct and positive and the ingredients of the offence of murder have been proved beyond reasonable doubt, it can be used to convict the accused. See: Adio vs. State (1986) 2 NWLR (Pt. 24) 581; Uluebeka vs. State (2000) 7 NWLR (Pt. 665) 404; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Solola vs. State (2005) 11 NWLR (Pt. 937) 460. *(P 20 Paras B – D).*

8. The ingredient of murder

The ingredients of the offence namely:-

(a) The death of the deceased;

(b) It was caused by the act of the accused; and

(c) The act or omission of the accused causing the death was intentional with knowledge that death or grievous bodily harm was its probable consequence were all proved beyond reasonable doubt. The leaned trial Judge evaluated all the evidence before convicting the accused/appellant. On appeal to the Court of Appeal, the evidence was reviewed and concurrent findings of facts were made before dismissing the appeal. This Court has further considered the appeal and sees no reason whatsoever to interfere with the concurrent findings of the two lower courts. *(P 20 Paras D – G).*

Nigerian Cases Cited

Elias vs. Disu (1962) 1 SCNLR 361; (1962) 1 All NLR 214;
Igbinovia vs. The State (1981) 2 SC 5.
Sam vs. State (1991) 2 NWLR (Pt. 176) 699.
Oguonzee vs. State (1998) 5 NWLR (Pt. 551) 521.
Ogundipe vs. The Queen (1954) 14 WACA 458
Dawa vs. State (1980) 8-11 SC 236;
Udofia vs. State (1984) 12 SC 139;
Ojegele vs. State (1988) 1 NWLR (Pt. 71) 414;
Akpan vs. State (2007) 9 NWLR (Pt. 1019) 500
Uwagboe vs. State (2007) 6 NWLR (Pt. 1031) 606.
Egboghonome vs. The State (1993) 7 NWLR (Pt. 306) 383;
Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380.
Adio vs. State (1986) 2 NWLR (Pt. 24) 581;
Uluebeka vs. State (2000) 7 NWLR (Pt. 665) 404;
Alarape vs. State (2001) 5 NWLR (Pt. 705) 79;
Solola vs. State (2005) 11 NWLR (Pt. 937) 460.

Nigerian Statutes Cited

Evidence Act Section 29(3)

A The Criminal Code Cap. 48 Volume II, Laws of the defunct Bendel State 1976 Section 319(1)

Representation

B Ayo Asala (Esq.) for the Appellant. Appears with E. M. Odje (Esq.) Peter Mrakpor, Hon. Attorney-General and Commissioner for Justice, Delta State with him O. F. Enenmo, Director of Appeals, C. O. Agbagivu, Assistant Director and S.N. Nwanne (Esq.) for the Respondent.

C

BAYANG AKA'AHS, (JSC) (Delivering the Lead Judgment): The accused/appellant was arraigned before the High Court of Justice Delta State, Isiokolo Judicial Division on a 1 count charge of murder punishable under

D section 319(1) of the Criminal Code Cap. 48 Volume II, Laws of the defunct Bendel State 1976 as applicable to Delta State in Charge NO. HCI/IIC/2004. The Charge read as follows:-

E **"STATEMENT OF OFFENCE"**
Murder, punishable under section 319(1) of the Criminal Code Cap. 48 Volume II Laws of the defunct Bendel State 1976 as applicable to Delta State.

F **PARTICULARS OF OFFENCE**
Felix Okpako (m) on the 11th day of October, 2002 at Oviore town within Isiokolo Judicial Division murdered one Eloho Okpako (f)

He entered a plea of not guilty to the charge and the prosecution called

G four witnesses to prove the case. In the course of his evidence PW4 sought to tender a statement which the accused was alleged to have made on 17th October, 2002 but the defence objected to its admissibility on the ground that it was made under duress and torture. The learned trial Judge ordered for trial

H within trial to be conducted and thereafter overruled the objection and admitted the statement as Exhibit "D". An earlier statement made by the accused/appellant on 13 October, 2002 was tendered without objection by PW1 and was admitted as Exhibit "A".

I The accused/appellant testified but called no other evidence in his defence. In his evidence he said he was at home at Oviorie Ovu on 11th October, 2002 and at about 6 p.m he and the deceased quarreled and he gave

her a punch as a result of which she fell down on the ground. On seeing this he took to his heels and went to his sister's place in Warri. Three days later he learnt that the deceased had died. He said he did not expect she would die from the beating. He denied knowledge of the deceased sustaining a knife wound which led to her death. He also denied stabbing the deceased. He said he did not know who killed the deceased.

The learned trial Judge reviewed the evidence after learned counsel had presented their address. He found that it was the accused/appellant who inflicted the deceased with stab wound on the neck from which she bled to death. He arrived at his conclusion from Exhibit "D" the statement of the accused/appellant. He disbelieved the evidence of the appellant in court and held that it was an afterthought. He concluded that the accused/appellant intentionally killed the deceased. He thereby convicted the accused of the offence of murder and sentenced him to death based on circumstantial evidence.

The accused/appellant was dissatisfied and appealed against his conviction and sentence to the Court of Appeal, Benin Division. The appeal was dismissed and his conviction was affirmed by the lower court. The appellant was not satisfied with the decision of the Court of Appeal, Benin and appealed further to this Court in his Notice of Appeal dated 2nd August, 2012 containing three grounds of appeal from which Mr. Asala, learned counsel representing him distilled the following issue for determination:

Whether having regard to the totality of the evidence on record the lower court was right in upholding the decision of the trial court that the respondent proved the charge of murder against the appellant beyond reasonable doubt.

The respondent amended its brief of argument which was deemed filed on 19th October, 2017 just before the arguments in the appeal were taken. Mr. Mrakpor the learned Attorney-General of Delta State adopted the issue farmed by learned counsel for the appellant.

The appellant's arguments in this appeal are predicated on the fact that the respondent did not prove the charge of murder against him beyond reasonable doubt since the trial court relied heavily on Exhibit "D" as a

A confessional statement to find the appellant guilty of the offence charged. Learned counsel argued that there was no direct eye witness account as to the circumstances under which the deceased was killed as PW3 stated in his evidence that he did not see the accused stab the deceased. While conceding
B to the fact that if the only evidence available against an accused person is a confessional statement, the court ought to be very slow in convicting solely on such a confessional statement, learned counsel argued that since the appellant challenged the voluntariness of Exhibit D, the appellant could challenge the
C weight which was attached to Exhibit "D" for the following reasons:

The concurrent findings of the trial court and the lower court are perverse and should be set aside. He also submitted that both the trial court and the court below did not advert their minds to the tests laid down in
D **Kazeem vs. State (2009) All FWLR (Pt. 465) 1749 at 1776** in returning a verdict of guilty on the appellant. Although PW4 gave the impression that he recorded Exhibit D it turned out that he did not personally record Exhibit "D" and so the courts cannot consider the contents of Exhibit "D" as true without
E the person who obtained and thus authored it being called as witness. The veracity of the maker of Exhibit D could not be tested under cross-examination to ascertain the truthfulness of the contents. Again since appellant made Exhibit "A" earlier which is inconsistent with Exhibit "D" the
F trial Judge was duty bound to adopt an approach that was most favourable to the appellant. Reliance for this submission was placed on **Sam vs. State (1991) 2 NWLR (Pt. 176) 699 at 707.** He submitted that Exhibit "D" is highly suspicious because the prosecution refused to disclose the identity of the
G officer who obtained the statement inspite of the fact that the appellant challenged its contents. It was necessary for the person who recorded Exhibits A and D to be cross-examined by the appellant to test the veracity of Exhibit "D" in order to rule out the possibility of inducement or threat since in
H Exhibit "A" made on 13/10/2002 the appellant denied stabbing the deceased but in Exhibit D which was made on 17/10/2002, he admitted killing the deceased.

In the respondent's amended brief which was deemed filed on 19th
I October, 2017, learned counsel submitted that in a charge of murder punishable under section 319(1) of the Criminal Code Cap. 48 Volume II Laws of the defunct Bendel State of Nigeria 1976 as applicable to Delta State, the

prosecution is required to prove the following ingredients namely:

(a) The death of the deceased.

(b) That the death was caused by the act of the accused and

(c) That the act or omission of the accused causing the death was intentional with knowledge that death or grievous bodily harm was its possible consequence. He cited the following cases in support viz:

Durwode vs. The State (2001) FWLR (Pt. 36) 950 at 974-5; Idemudia vs. The State (2001) FWLR (Pt. 55) 549 at 364; Ubani vs. The State (2004) FWLR (Pt. 191) 1533 at 1546 and **Itu vs. State (2016) 5 NWLR (Pt. 1506) 443 at 465.**

He said in discharging the onus, the prosecution is allowed to present, a confessional statement, circumstantial evidence or evidence of an eye witness also referred to as direct evidence. At the trial of the appellant the prosecution presented both the confessional statement of the accused which was admitted as Exhibit "D" his extra judicial statements and the circumstantial evidence of the four prosecution witnesses. The learned trial Judge painstakingly evaluated the entire evidence before arriving at the conclusion that the prosecution had proved its case before convicting the appellant and the judgment of the learned trial Judge was affirmed by the lower court. He argued that where there are concurrent findings of fact by the two lower courts, the Supreme Court will not disturb such findings if they are not perverse and are borne out from available evidence. He relied on **Olalekan vs. The State (2002) FWLR (Pt. 91) 1605 at 1628** and **Amayo vs. The State (2001) 2 SC (Pt. 1) 1.** He contended that the appellant must establish special circumstance such as a miscarriage of justice has been occasioned or that there was a breach of either procedural or substantive law to warrant a reversal of the verdict reached in the concurrent finding of facts. He said the appellant failed to discharge the burden placed on him. He maintained that the argument of appellant's counsel that the trial court did not subject the confessional statement to the veracity test was misconceived since the concurrent findings by the courts below were well supported by abundant pieces of evidence as shown in the records of appeal and that it is settled law that a free and voluntary confession of guilt which is direct, positive and satisfactorily proved even without corroboration can ground the conviction of an accused person.

A The thrust of the complaint by learned counsel for the appellant is that the learned trial judge could not ascertain the veracity of Exhibit "D" since the recorder of the statement was not cross-examined. In the course of giving his evidence, PW4, Inspector Akpio Lyawa sought to tender the statement which
B was recorded by a team of investigators which he headed but learned counsel for the defence objected on the ground that the statement was made under duress and torture. (See page 28 lines 29-30). This prompted the court to conduct a trial within trial before the statement was admitted in evidence as
C Exhibit "D".

Section 29(1)(2) and (3) of the Evidence Act provides as follows:

"29-(1) In any proceeding, a confession made by a defendant
D **may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and it is not excluded by the court in pursuance of this section.**

E

(2) If, in any proceeding where the prosecution proposes to give in evidence a confession made by defendant, it is represented to the court that the confession was or may
F **have been obtained:**

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the
G **time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the**
H **prosecution proves beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.**

I

(3) in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the

court may of its own motion require the prosecution, as a condition of allowing it to do so to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of this section".

The learned trial judge was satisfied that the appellant was not compelled to make the statement under threat or duress and so allowed the prosecution to tender the statement under section 29(3) Evidence Act. It is not necessary that another person other than the accused should record the statement although in most cases accused persons usually decline to write their own statements but leave the recording of the statement to the police investigator. The admissibility of a statement made by an accused person is questioned when the accused alleges that the statement was not voluntary. Even when an accused does not own up to making the statement, the court can still admit the statement and later attach whatever weight it assesses the statement contains. It does not matter whether PW4 was cross-examined or not on the recording of Exhibit "D". The important thing is the weight the trial Judge attached to Exhibit "D" regard being had to the surrounding circumstances of the accused making the statement and not the truthfulness of the contents by the person who recorded it. To put it another way, the court will not consider how Exhibit "D" was obtained rather the court will take into consideration whether what is admitted is relevant to the issues being tried. See: **Elias vs. Disu (1962) 1 SCNLR 361; (1962) 1 All NLR 214; Igbinovia vs. The State (1981) 2 SC 5.**

The law is now settled that an accused person can be convicted solely on his confessional statement. It is however desirable to have, outside a confession, some evidence of circumstances which make it probable that the confession was true. The learned trial Judge found that Exhibit "D" was a voluntary confessional statement which was positive and direct. He found that PW2's evidence corroborated Exhibit D which made it probable that Exhibit "D" was true and correct. He therefore found that the accused intentionally killed the deceased, Eloho Okpako and held that the prosecution proved its case beyond reasonable doubt. Consequently he convicted and sentenced the accused to death by hanging.

The lower court found that the learned trial Judge dispassionately evaluated the totality of the evidence which the parties presented to him, both

A oral and documentary, before coming to the conclusion that Exhibit "D" could competently be used to convict the appellant and the respondent proved the charge of murder preferred against the appellant beyond reasonable doubt. Before arriving at this conclusion the court below also evaluated the evidence
B of PW2 and Exhibit D and found as follows at page 140 of the records:

> **"The fact that a stab wound was inflicted on the neck of the deceased and that the deceased was killed as a result of the**
> C **injury are true as far as can be tested. These are relevant facts contained in Exhibit "D". There is nothing to suggest that the appellant had no opportunity to commit the crime….. The confession is consistent with the discovery and**
> D **possibility of the confession is also demonstrated in the findings of PW2 as well as Exhibit A, the appellant's first statement to the Police. The appellant stated in Exhibit A that he beat and hit the deceased and when he saw that the**
> E **deceased had collapsed and died, he ran away to another location where he was eventually arrested by the police".**

It is true that there is no eye witness account that the appellant was the person
F who killed the deceased. It is in Exhibit "D" that he confessed to killing the deceased by stabbing her with a knife on the neck. PW2 in his evidence stated that when he performed the post mortem on Eloho Okpako (deceased) he established "the presence of a stab wound at the anteria aspect of the nucal
G region, cutting the left carotene artery and left jugular vein." Based on his findings he formed the opinion that the deceased died as a result of haemorrhage due to the cutting of both of the two mentioned blood vessels. The corroborative evidence of the PW2 is as to the injury sustained by the
H deceased which caused the death.

The concurrent findings by the courts below are well supported by the evidence the prosecution adduced including the extra judicial statements of the appellant which were received in evidence as Exhibits "A" and "D".

I Learned counsel for the appellant is contending that Exhibit "A" which the appellant made on 13th October, 2002 is inconsistent with Exhibit "D" which he made on 17th October, 2002 and submitted that the trial Judge was

duty bound to adopt an approach that was most favourable to the appellant as Exhibit "D" was highly suspicious and placed reliance on **Sam vs. State (1991) 2 NWLR (Pt. 176) 699 at 707.**

In Exhibit "A" the appellant admitted beating the deceased on the orders of their father Freeborn Okpako. He said he beat the deceased in annoyance and hit her on the chest and she collapsed and died. It is in Exhibit "D" that he said he was annoyed and he beat her and "I used kitchen knife to stab her on the neck and she started bleeding and fell on the ground".

The lower court in affirming the findings made by the learned trial Judge on the issue of corroborative evidence stated at pages 140-141 of the record:

> **"The trial 'court similarly relied on other independent evidence outside the confession, exhibit D, which corroborated the story in it. The evidence of PW2 corroborated the contents of Exhibit D. The fact that a stab wound was inflicted on the neck of the deceased and that the deceased was killed as a result of the injury are true as far as can be tested. These are relevant facts contained in Exhibit D. There is nothing to suggest that the appellant had no opportunity to commit the crime. He did not give evidence that he was not in the vicinity where the deceased was found dead in a pool of her blood in front of the house where the deceased, appellant and PW3, their father lived. The confession is consistent with the discovery and possibility of the confession is also demonstrated in the findings of PW2 as well as Exhibit A, the appellant's first statement to the police. The appellant stated in Exhibit A that he beat and hit the deceased and when he saw that the deceased had collapsed and died, he ran away to another location where he was eventually arrested by the police – (see page 62 of the record).**
>
> **These are facts ascertained and proved. Once the conditions for admissibility of a document are met by the trial court and the document is admissible as in the instant case, the trial court is bound to employ and use it against its maker, in the instant**

matter, the appellant".

Having perused through Exhibit "A', I cannot see how the said Exhibit "A" is inconsistent with Exhibit "D" to warrant adopting an approach that would be more favourable to the appellant as advocated by Katsina-Alu JCA (as he then was) in **Sam vs. State supra at pages 707-708.** In that case on appeal, Katsina-Alu JCA had found that the appellant made two statements which were received in evidence and marked as Exhibits "F" and "G". Exhibit "F" was made on 16/2/84 while Exhibit "G" which was earlier in time was made on 6th February, 1984. In Exhibit G, the appellant had stated she left for the farm in the morning of Friday, 3/2/84 leaving her husband who was hale and hearty in the house and on her return from the farm by about 2 p.m. she enquired from the children about the whereabouts of her husband who told her he was sleeping on the bed. She decided to go into the kitchen to cook a meal and after she had finished cooking, she sent her son Godwin to call his father from the room to come and eat but the son returned to inform her that the father did not respond. After waiting for a while she went into the room to call him but found that he had died. In Exhibit "F" which was made some 10 days later on 16/2/84 the appellant stated that on 3/2/84, she returned from the farm to meet her husband who beat her with a broom. In retaliation she used the matchet she carried to the farm to inflict injury on his head from where blood gushed out and he fell down on the ground. She later touched him and found that he had died. The learned trial Judge found that Exhibits "F" and "G" were confessional statements convicted her for the offence of murder. On appeal the Court of Appeal found that unlike Exhibit "F", Exhibit "G" was not a confessional statement and in his leading judgment, Katsina-Alu JCA held as follows:

> **"In Exhibit "F" the appellant confessed to killing her husband. As I have already pointed out the learned trial Judge believed and accepted both statements and convicted the appellant. The question I ask myself is whether he was right in doing so. I think not. I have shown that Exhibit "G" is not a confessional statement. Faced with Exhibit "F" and "G" which contradict each other, the learned Judge was in duty bound to adopt an approach that was most favourable to the appellant. Having**

believed and accepted Exhibit "G" the learned Judge had no basis whatsoever for believing Exhibit "F" in which she confessed to the killing".

The same scenario did not play out in Exhibit "A" and "D" in the present appeal. As I have already pointed out the appellant admitted beating the deceased and then hit her on the chest where she collapsed and died and on noticing what had happened he took to his heels while in Exhibit "D" he confessed to stabbing the deceased on the neck where she bled to death. In both instances it was the act of the appellant that caused the death of the deceased. In the result it cannot be said as learned counsel for the appellant has argued that the concurrent findings of the trial court and the lower court are perverse and should be set aside. There is no reason why this court should interfere with those concurrent findings of fact because they were not reached as a result of wrong approach to or wrong application of a principle of either substantive or procedural laws. See: **Oguonzee vs. State (1998) 5 NWLR (Pt. 551) 521.**

Learned counsel for the appellant criticized the admission of Exhibit "D" on the evidence of a single witness in the trial within trial. The learned trial Judge believed the sole evidence of the PW1 in the trial within trial before admitting Exhibit "D". If the conviction of the appellant had been based purely on his said confession without any corroborating evidence, the appeal might have stood a chance of succeeding but as the lower court pointed out, the trial court relied on the other independent evidence outside the confession which corroborated the story in it. The tests led out in **Ogundipe vs. The Queen (1954) 14 WACA 458** were stringently applied to test the truth of the confession namely:

(g) Whether there is anything outside it to show that it is true.
(h) If there is corroboration.
(i) The facts stated in it are true as far as can be tested.
(j) The accused person had the opportunity of committing the offence.
(k) The accused person's confession is possible.
(l) The confession is consistent with the other facts

ascertained and proved.

See: **Dawa vs. State (1980) 8-11 SC 236; Udofia vs. State (1984) 12 SC 139; Ojegele vs. State (1988) 1 NWLR (Pt. 71) 414; Akpan vs. State (2007) 9 NWLR (Pt. 1019) 500** and **Uwagboe vs. State (2007) 6 NWLR (Pt. 1031) 606.**

It is settled law that once a confessional statement is admitted in evidence, it becomes part of the case of the prosecution which probative value the trial Judge is bound to consider. See: **Egboghonome vs. The State (1993) 7 NWLR (Pt. 306) 383; Nwangbomu vs. State (1994) 2 NWLR (Pt. 327) 380.** Once the confession by the accused person is direct and positive and the ingredients of the offence of murder have been proved beyond reasonable doubt, it can be used to convict the accused. See: **Adio vs. State (1986) 2 NWLR (Pt. 24) 581; Uluebeka vs. State (2000) 7 NWLR (Pt. 665) 404; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Solola vs. State (2005) 11 NWLR (Pt. 937) 460.**

The ingredients of the offence namely:

(d) The death of the deceased;
(e) It was caused by the act of the accused; and
(f) The act or omission of the accused causing the death was intentional with knowledge that death or grievous bodily harm was its probable consequence

were all proved beyond reasonable doubt. The leaned trial Judge evaluated all the evidence before convicting the accused/appellant. On appeal to the Court of Appeal, the evidence was reviewed and concurrent findings of facts were made before dismissing the appeal. This court has further considered the appeal and sees no reason whatsoever to interfere with the concurrent findings of the two lower courts. Consequently the appeal is devoid of merit and is accordingly dismissed. The conviction and sentence of the appellant to death by hanging which was affirmed by the Court of Appeal, Benin Division on 12th July, 2012 in CA/B/318C/2006 is further affirmed by me. The appeal is accordingly dismissed.

K. B. AKAAHS
Justice, Supreme Court

I.T MUHAMMAD, (JSC): My learned brother, Aka'ahs, JSC, made a draft

A copy of the judgment just delivered, available to me, before now. The appeal is devoid of merit. I equally dismiss the appeal as done by my learned brother, Aka'ahs, JSC. I abide by consequential orders made in the leading judgment.

Ibrahim Tanko Muhammad,
B ***Justice, Supreme Court***

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

Appeal dismissed.

D **Olu Ariwoola**
Justice, Supreme Court

ADAMU AUGIE, (JSC): I had a preview of the lead Judgment just delivered
E by my learned brother, Akaahs, JSC, and I agree that the appeal totally lacks merit.

The appellant was tried, convicted and sentenced to death by the High Court of Delta State for the murder of one Eloho Okpako. The prosecution
F called four witnesses and tendered a confessional statement made by the appellant to the police that was admitted in evidence as **Exhibit D,** after a trial within trial. The appellant testified in his defence. He admitted that he and the deceased had quarreled; and that he punched her, whereupon she fell down on
G the ground.

He denied any knowledge of the knife wound that resulted in the death of the deceased and denied that he stabbed the deceased. But relying on the appellant's confessional Statement to the police, the trial court found that the
H appellant inflicted the said stab wound on the neck of the deceased, from which she had bled to death, and concluded that the appellant had intentionally killed the deceased.

The appellant's appeal to the Court of Appeal was dismissed. He
I appealed to this Court with a notice of appeal containing three grounds of appeal and his complaint basically is that the prosecution failed to prove the charge against him beyond reasonable doubt.

My learned brother dealt extensively with the issues canvassed, and I adopt his reasoning as mine. Although the appellant admitted he physically assaulted the deceased with his fists; the post-mortem report indicates that a sharp object was driven into her neck region. The court below, in affirming the decision of the trial Court, held:

> **The fact that a stab wound was inflicted on the neck of the deceased and that the deceased was killed as a result of the injury are true as far as can be tested. These are relevant facts contained in *Exhibit D.* There is nothing to suggest that the Appellant had no opportunity to commit the crime. The confession is consistent with the discovery and possibility of the confession is also demonstrated in the findings of *PW2,* as well as *Exhibit A,* the Appellant's first Statement to the Police. The Appellant stated in *Exhibit A* that he beat and hit the deceased and when he saw that the deceased had collapsed and died, he ran away to another location, where he was eventually arrested by the Police.**

Yes, there is no direct evidence that appellant killed the deceased, however, circumstantial evidence, which is evidence of surrounding circumstances of a case, *"is capable of proving a proposition with the accuracy of mathematics"* – **Lori vs. State** *(1980) NSCC (Vol. 12) 269.*

In this case, the only inference capable of being drawn from the surrounding circumstances of this case, as found by the lower courts, is that the appellant was responsible for the death of the deceased.

Besides, it is settled law that the appellant is deemed to intend the natural consequences of his act – see **Owhoruke vs. C.O.P.** *(2015) 15 NWLR (Pt. 1483) 557,* where this Court per Ogunbiyi, JSC, stated:

> **A man who stabs another on the neck region with a bottle is deemed to have intended to kill or cause grievous bodily harm.- The intention to kill or cause grievous harm can be inferred from the nature of the weapon used. The learned trial judge was, therefore, right in holding that**

the Prosecution proved its case against the appellant beyond reasonable doubt as the Judgment of the learned trial judge is supported by the evidence of record.

The above decision says it all. I also see no reason to interfere with concurrent findings of the lower Courts, and I too dismiss the appeal.

Amina Adamu Augie
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother AKA'AHS JSC and I agree entirely with the reasoning contained therein and the conclusion arrived thereat.

My learned brother has dealt exhaustively with all the issues submitted for resolution of this appeal in such a way that I have no useful thing to add. For the same reasoning articulated in the lead judgment, which I also adopt as mine, this appeal shall be and it is hereby dismissed. I make no order as costs.

Paul Adamu Galinje
Justice, Supreme Court

1. **FIRST BANK OF NIGERIA PLC**
2. **MR. KOFO MAJEKODUNMI**
3. **MR. OLAYIWOLA YAHAYA**
4. **FEMI BAKRE**
5. **KINGSLEY OBAKPOLOR**

AND

1. **ATTORNEY-GENERAL OF THE FEDERATION**
2. **NATIONAL INLAND WATERWAYS AUTHORITY (NIWA)**
3. **ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC)**
4. **ACP NUHU RIBADU**
5. **BALA CIROMA**

SC. 502/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Right of appeal – Breach of fundamental rights actions – Whether do lie as of right – Whether leave is not necessary in grounds of mixed law and fact or facts alone.

APPEAL: Ground of Appeal – Meaning.

APPEAL: Issues for determination of the appeal – Whether are not the same with issues for the determination of a preliminary objection – Distinctions thereto.

APPEAL: Brief writing – Respondent's brief who has cross appealed – Procedure thereof – Or. 6 Rule 6(2) Supreme Court's Rules 1985 (as amended) – Purport – Failure to comply therewith – Effect.

*CASE LAW: Principles in **Jim Jaja vs. Commissioner of Police, Rivers State** – Relevant considerations thereof.*

*CASE LAW: Principles in **Odogu vs. A-G. Federation** – Relevant considerations thereof.*

COURT: Award of exemplary damages – Guiding principles.

COURT: Ground of appeal – How determined – What court considers in this regard.

CRIMINAL LAW AND PROCEDURE: Arrest and detention – Whether it is impossible to physically arrest and detain a bank – Claims of damages in such circumstances – Legality thereof.

JUDGMENT AND ORDERS Award of damages – Claim of damages for breach of fundamental rights – S. 35(6) of CFRN 1999 – Principles relevant thereto.

PRACTICE AND PROCEDURE: Award of compensatory damages – Factors relevant thereto.

PRACTICE AND PROCEDURE: Award of damages – Attitude of appellate court thereto – Whether may interfere in certain situations – Relevant considerations thereof

WORDS AND PHRASES: 'Appeal' – Meaning.

WORDS AND PHRASES: 'Entitled' – Meaning.

Issues for Determination

1. **Whether or not the learned justices of the Court of Appeal were wrong when they held that the 1st appellant being a bank is an artificial person who cannot physically be arrested and detained and consequently was not entitled to damages.**

2. **Whether or not the learned justices of the Court of Appeal were wrong when they awarded just N750,000.00 as general damages in favour of the 2nd – 4th appellants having regard to the pleadings and evidence before the lower court.**

3. **Whether or not the learned justices of the Court of Appeal were wrong when they omitted and declined to award damages to 5th appellant thereby occasioning a miscarriage of justice.**

4. **Whether or not the learned justices of the Court of Appeal were wrong when they held that the appellants were not entitled to exemplary damages.**

Facts of the Matter

The application for the enforcement of their fundamental rights filed by the appellants at the Federal High Court, which led to this appeal, was triggered by a petition written by the second respondent to the third respondent [Economic and Financial Crimes Commission (**EFCC)** against the first appellant regarding a Bank Guarantee that it issued.

The second to fifth appellants were invited by the third respondent to a meeting at its office in Abuja; but tings did not go down well, and they were subsequently detained at the Laugbe Police Station and Airport Police Station both in Abuja from **9/9/2004** to **10/9/2004.**

Disgruntled by their detention under dehunmanizing conditions, appellants

sought and were granted leave by the Federal High Court to apply to enforce their fundamental rights, and pursuant thereto, they filed a motion on notice where they prayed for the following:

1. ***A DECLARATION*** **that the claim of the 2nd respondent to a refund of the sum of N600 million for an alleged non-performance by Julius Berger Nig. Plc. and Westminister Dredging and Marine Ltd., of a contract for the dredging of the lower River Niger under an Advance Payment Guarantee issued by the 1st applicant in spite of disputed claims of Julius Berger Nigeria Plc. and Nigerian Westminster Dredging and Marine Ltd., against the 2nd respondent is a dispute referable to the civil court only in accordance with the Constitution.**

2. ***A DECLARATION*** **that the 2nd respondent having returned the advance payment guarantee issued by the 1st applicant is no more entitled to ask the 1st applicant to refund any money.**

3. ***A DECLARATION*** **that the dispute as to who is owing as between the 2nd respondent and Julius Berger Nigeria Plc. and Nigerian Westminster Dredging and Marine Ltd., is a civil and not a criminal matter.**

4. ***A DECLARATION*** **that the 3rd – 5th respondents have no jurisdiction to arrest or detain the 2nd – 5th applicants over a contractual matter or at all.**

5. ***A DECLARATION*** **that the arrest and detention of 2nd – 5th applicants between 9th September and 10th September 2004 at Lugbe Police Station and the Airport Police Station, Abuja, by the 3rd – 5th respondents at the instance of the 2nd respondent constitutes a violation of the 3rd – 5th respondents' fundamental rights guaranteed under Section 34, 35 and 41 of the 1999 Constitution and Articles**

1, 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act Cap.10 Laws of the Federation of Nigeria, 1990 and is, therefore, illegal and unconstitutional.

6. ***A DECLARATION*** **that the action of the 3rd 5th respondents forcing the 2nd applicant to issue an undertaking the pay the sum of N600 Million within a month as a condition for bail of the 2nd 5th applicants after detaining them for two days is unknown to law, unconstitutional, null and void.**

7. ***AN ORDER*** **setting aside the understanding extracted forcefully and under duress from the 2nd applicant on 10/9/2004 by the 3rd 5th respondents as a condition for bail of the 2nd 5th applicants for being unknown to law, unconstitutional, irregular, null and void.**

8. ***AN ORDER*** **of injunction restraining respondents either by themselves, their agent, privies, assigns or anybody howsoever described from further arresting, detaining harassing or molesting the applicants over the contractual transaction between the 2nd respondent and the 1st applicant's customers or enforcing the undertaking issued by the 2nd applicant or demanding or further demanding from the 1st applicant.**

9. **Aggravated and exemplary damages against the respondents jointly and or severally in favour of each of the applicants as claimed in the Statement of Facts attached to this application.**

Upon being served, the second respondent entered a *CONDITIONAL* appearance and also filed a notice of preliminary objection praying that the action be struck out on the ground that it does not disclose a cause of action against it. In his judgment delivered on ***29/8/2005,*** the learned trial judge, B.F.M. Nyako, J., treated the preliminary objection as the second respondent's defence, and held as follows:

> **I must find that the claim has not been established against the 2nd respondent and the claims against him (sic) are not proved. He (sic) is struck out.**

As to the main application itself, the learned trial judge struck out the appellant's claims 1 to 3 and 6 to 8, and concluded as follows:

> **On claims 4 and 5, I find that the 3-5 (sic) have the power to arrest and investigate contract scam and as the arrest has not been shown to be unconditional, the 4 and 5 claims of the applicants fail and the action is accordingly dismissed.**

Dissatisfied, the respondents appealed to the Court of Appeal.

Dissatisfied with this part of the Court of Appeal's judgment, the appellants appealed to the Supreme Court with a notice of appeal that contains four grounds of appeal. The first respondent filed a notice of preliminary objection to the competency of *Ground 1* of the said ground of appeal, and the *Grounds* of the objection are that:

> **1. Ground 1 is not covered by, and/or did not emanate from the decision being challenged.**
> **2. Appeal is fought on the basis of the decision of the lower court and is not taken against an *obiter*.**

The second set of respondents, that is the third to fifth respondents, also filed a notice of preliminary objection to Grounds 1, 2, 3 and 4 of the grounds of appeal. *The grounds of the objection* are that:

> **(1) Ground one of the appellant's notice of appeal dated *7/5/2013* and filed same date does not constitute a challenge to the judgment of the lower court delivered on *7/2/2014*.**
> **(2) The particular of grounds two, three and four of the notice of appeal dated *7/5/2014* and filed on same date are issues**

of mixed law and facts.

(3) Grounds two, three and four of the notice of appeal dated *7/5/2014* and filed on the same date fall within Section 233(3) of the 1999 Constitution which states: "Subject to the provisions of subsection (2) of this Section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court."

(4) The statutory requirement of the leave of the lower court or this Hon. Court is mandatory in respect of the appellants' grounds of appeal which are of mixed and facts.

(5) The appellant failed to obtain the leave of the lower court or that of this court before filing the notice of appeal.

(6) This court has no jurisdiction to entertain ground Two, three and four of the appellants' notice of appeal for failure on the part of appellant to seek leave in view of the provisions of Section 233(3) of the 1999 Constitution (as amended).

Held: (*Unanimously partly allowing the appeal)*

1. Meaning of ground of appeal

Ground of appeal consists of error of law or fact alleged by an appellant as the defect in the judgment appealed against, which he relies on to set it aside – FMBN vs. NDIC *(1999) 2 NWLR (Pt. 591) 333.*

In Ground 1 of the grounds of appeal, which is being challenged by the two sets of respondents, the appellants complained as follows:

> **The learned justices of the Court of Appeal erred in law when their Lordships held that the 1st appellant was not entitled to damages because the 1st appellant being an artificial person cannot be physically arrested or detained.**

It is also settled that just as statements of claim supersede writs of

summons, issues for determination also displace grounds of appeal Macauley vs. NAL Merchant Bank Ltd. ***(1990) 4 NWLR (Pt. 144) 283.*** *(P 52 Paras A – B; F – I.)*

2. *Issues for determination are different from issues for the preliminary objection.*

In this case, the respondents jumbled up issues relating to their objections with issues for determination in the substantive appeal, which is wrong, because a determination of a preliminary objection is not a hearing of the appeal, which can only be considered based on issues for determination distilled from the grounds of appeal- see Odunze & Ors. vs. Nwosu & Ors ***(2007) 13 NWLR (Pt. 1050) 1 SC,*** **wherein Chukuma-Eneh, JSC, explained the difference, as follows:**

> **Issue for determination and preliminary objection under our rules do not have common meeting ground. How to initiate an objection against an appeal is fully covered in the rules. Preliminary objection runs counter to the intendment of issues for determination in the claims before the courts in the sense that it aborts, indeed forecloses the hearing of the case *in limine* and if upheld terminates the case; it automatically puts an end to the case without determining the rights of the parties thereto, while issue for determination presupposes that the case is, all things being equal, on course for hearing. An issue for determination is a combination of facts and the law on a particular point, which when decided, affects the fate of the appeal. It must relate to the grounds of appeal. The two are, more or less, strange bed fellows; and so for a preliminary objection to be dressed in the garb given to it here is strange and improper.**

In this case, contrary to this laid down principle, the first respondent formulated three issues for determination and its *Issue 1* questions:

Whether *Ground 1* contained in the appellant's notice of

appeal should be struck out for being incompetent.

The second set formulated four issues for determination; that is two issues for their preliminary objection and two issues for the appeal.

The second set of respondents' *Issue 1,* which raises a question regarding their objection to *Ground 1* of the grounds of appeal, is:

> **Whether Ground One of the applicant's notice of appeal is competent having regard to the fact that the said ground is neither part of, nor emanates from, the judgment delivered by the lower court on 7/2/2013 as set out in pages 346-394 of the record and whether same is not liable to be struck out by this Hon. Court.** *(Pp 53 – 54 Paras A – B)*

3. Significance of an appeal and relevance of a ground of appeal.

As it stands, the two sets of respondents stated the correct position of the law on the significance of ground(s) of appeal to an appeal.

However, I strongly feel that their objection to the said *Ground* is not only ill-thought-out and unmeritorious; it is also an attempt to filibuster the appeal, so to speak, and waste the time of this court.

An appeal is an invitation to a higher court to review a decision of a lower court, and grounds of appeal are basically highlights of the error of law or fact or mixed law and fact made by the lower court in the decision sought to be set aside on appeal. So, a ground of appeal must be related to the decision of the lower court, and must contain complaints that the appellant relies upon to succeed in setting aside the *ratio decidendi* of the judgment, and not just observations and any passing remarks of a judge in the course of writing a judgment – see Nwankwo vs. E.D.C.S.U.A. *(2007) 5 NWLR(Pt. 1027) 377 SC,* N.D.I.C. vs. Okem Ent. Ltd. *(supra)* and A.I.C. Ltd. vs. NNPC *(2005) 1 NWLR (Pt. 973) 563 SC,* where Edozie, JSC, explained as follows:

> **The *ratio decidendi* of a case represents the reasoning or principle or ground upon which a case is decided. *Obiter* simply means in passing, incidental, cursory. *Obiter dicta***

> **reflect, *inter alia*, the opinions of the judge, which do not embody the resolution of the court. The expression of the judge in a judgment must be taken with reference to the facts of the case, which he is deciding, the issues calling for decision and answers to those issues. These are what should be looked for in a judgment. The manner in which the judge chooses to argue the case is not an important thing. Rather it is the principle he is deciding.**
> *(P p 56 – 57 Paras C – A)*

Per Augie (JSC):

> **"In this case, the respondents argued that the Court of Appeal did not pronounce that the first appellant is not entitled to damages, therefore, the *Ground 1* of the appellants' grounds of appeal is incompetent.**

However, as this court noted in Akpan vs. Bob *(supra),* although authorities emphasize that a ground of appeal must stem from a text of the judgment [*ipsissima verba],* such decisions in no way limit the scope of a ground of appeal, which can arise *"from commissions or omissions by the court from which an appeal emanates, in either refusing to do or doing what it ought to do or doing what it ought not to do or even in overdoing the act complained of".* Meanwhile, Edozie JSC, hit the nail squarely on the head when he further stated as follows:

> ***The ideal thing is to have a pronouncement from the court from which the appeal emanates.***

In this case, the Court of Appeal may not have expressly said that the first appellant is not entitled to damages, but that is the import of its decision whereby it refused to award damages to the first appellant.
(P 57 Paras B – F)

4. Ground 1 of the appeal arises from the decision of the lower court.
In clear terms, the Court of Appeal held that although appellants are not entitled to exemplary damages because they did not prove same,

they were *"entitled to damages"* for unlawful arrest and detention, and awarded damages to the second, third and fourth respondents [its omission of the fifth respondent is an issue for the main appeal].

The word "entitled" means ""to give (a person or thing) a little, right or claim to something; furnish with grounds for laying claim" See dictionary.com. In this case, the Court of Appeal did not award damages to the first appellant for the reason that being a bank *"it is an artificial person, who cannot physically be arrested or detained."*

What does that say? It says clearly that the first appellant is not *"entitled"* to damages as it cannot be physically arrested or detained, and the complaint in the said *Ground 1* of the grounds of appeal is:

> **The leaned justices of the Court of Appeal erred in law when their lordships held that the 1st appellant was not entitled to damages because the 1st appellant being an artificial person cannot be physically arrested or detained.**

Obviously, the appellants are right; the said *Ground 1* flows directly from the decision appealed against and the objections are overruled. *(P 58 Paras B – G)*

5. *How a court determines the nature of a ground of appeal*

The position of the law on this issue is basically cut and dried; to determine whether a ground of appeal is a ground of law or fact requires examining it in terms of its particulars so as to determine the nature of the question the ground raised is complaining about – see Garuba vs. Omokhodon (2011) 6-7 SC (Pt. V) 90. The fact that a ground of appeal is described as one of fact or of law will not stop a court from looking into whether it is actually one of law or of mixed land and fact or of facts – See Ejiwunmi vs. Costain (W.A) Plc. (1988) 12 NWLR (Pt. 576) 146, Olojoun vs. Ozima (1985) 2 NWLR (Pt. 6) 167. *(Pp 60 – 61 Paras I – B)*

Per Augie (JSC):

"What is more, where a party intends to raise issues of

mixed law and fact, leave of court must be first sought for and obtained – See Garuba vs. Omokhodon *(supra),* where Rhodes-Vivour, JSC, said:

> **Leave means permissions. Before an appeal on ground of mixed fact and law or on facts can be entertained by this Hon. Court, the appellant must first seek and obtain leave from the Court of Appeal or this court. Failure to obtain leave renders the appeal incompetent and it will be thrown out.**

In this case, the second set of respondents say that Grounds 2 and 3 of the said grounds of appeal involve mixed law and facts because where a court of law is invited to exercise its discretion by an appellant, such appellant is only asking the court to examine the matter through its own peculiar circumstances by what are the facts disclosed in the affidavit to arrive at its discretion, thus, it is incumbent of the appellant to make sure that the leave of the court is first sought and obtained.

In Metal Const. (W.A) Ltd. vs. Migliore (supra) cited by respondents, which dealt with the issue of service, Karibi-Whyte, JSC, observed:

> **If a judge considers matters, which are not before him, and relies on them for the exercise of his discretion, he will be exercising his discretion on wrong principles and this will be a question of law. The chief objective for the exercise of discretion is to avoid injustice to the party, who would be prejudiced from the effect of the irregular decision. There is no doubt, therefore, that the question involved in such a ground of appeal is not only one of law, but an issue of law coupled with the exercise of discretion. There is the question of law in the observance of the judicial principles to be followed in setting aside of own decision, and the exercise of discretion in the factors to be taken into account and what weight to attach to the length and circumstances of delay in considering the application to set aside the decision. There is no doubt that length of delay is a question of fact. But the**

> **reasonableness in presenting the application to set aside the decision is a matter of opinion in the light of other circumstances surrounding the application.**
> *(Pp 61 – 62 Paras B – D)*

6 *The appeal seeks damages for breach of fundamental rights*
In this case, which deals with the enforcement of fundamental rights, it is clear that the second set of respondents did not fully grasp the core element of this appeal against the decision of the court below. Section 35(6) of the 1999 Constitution (as amended) provides that:

> **Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.**

As this court aptly observed in Jim-Jaja vs. COP, Rivers State *(supra),* fundamental rights matters are placed on a higher pedestal than the ordinary civil matters in which a claim for damages resulting from a proven injury has to be made specifically and proved. In this case, Jim-Jaja vs. COP *(supra),* Muntaka-Coomassie, JSC, had this to say:

> **The appellant's claim is in connection with the breach of his fundamental rights to his liberty by the respondents. The onus is on him to show that he was unlawfully arrested and detained i.e. that his fundamental right has been violated. If this is proved, by virtue of the provisions of section 35(6) of the Constitution, the complainant is entitled to compensation and apology, where on specific amount is claimed. Where a specific amount is claimed, it is for the court to consider the claim and in its opinion, the amount that would be justified to compensate the victim of the breach. In this respect, the common law principles on the award of damages do not apply to matters brought under the enforcement of fundamental rights procedure. The procedure for the enforcement of fundamental rights was specifically promulgated to protect the Nigerians'**

> **fundamental rights from abuse and violation by authorities and persons. When a breach of the right is proved, the victim is entitled to compensation, even if no specific amount is claimed.** *(Pp 62 – 63 Paras D – D)*

7. *Appeal is of right in actions complaining about breach of fundamental rights*

In Jim-Jaja's case *(supra),* this court overruled a similar objection by the respondents to the ground of appeal; Ogunbiyi, JSC, observed:

> ***With the nature of the claim subject of appeal seeking enforcement of fundamental rights, the appeal therefrom lies as of right and hence the question of mixed law and facts are not applicable.*** **The said ground of appeal as rightly submitted by the learned appellants counsel is a ground of law and which needed no prior leave to raise same.**

In this case, the court below fund that the arrest and detention of the appellants were *"unjustifiable"", "wrongful and unconstitutional",* and the appellants' complaint in *Ground 2* of the grounds of appeal is that the sum awarded as damages by the court below in favour of three of the appellants is too low in the circumstances of this case.

They also complained in *Ground 3 and 4* that the court below *"erred in law"* when it omitted to award damages to fifth appellant, who had been arrested and detained with the other appellants; and when it refused their claim for aggravated/exemplary damages.

These grounds of appeal cannot be viewed in the same light as grounds of appeal in ordinary civil matters because the constitution has elevated the enforcement of fundamental rights to another level. What is more, by section 233(1) (c) of the Constitution, any appeal against a decision of the Court of Appeal that touches on a question of whether any of the provisions of Chapter IV of the Constitution, dealing with Fundamental Rights, has been, is being or is likely to be, contravened in relation to any person, lies *"as of right"* to this court.

Thus, under whatever light the depiction is looked at; whether the appeal is as *of right* or whether the grounds of appeal are of law and not mixed law and facts, this objection must fall by the wayside as the

other objection to *Ground 1.* This objection is also overruled.
(P 63 – 64 Paras E – D)

8. *A bank cannot be arrested and detained*
In this case, it is physically impossible for the first appellant to be arrested and detained, and the Court of Appeal was standing on very firm ground when it refused to award damages to first appellant for the unlawful arrest and detention of second to fifth appellants. *Issue 1* definitely lacks merit and it is resolved against the appellants.
(P 66 Paras H – I)

9. *Procedure for brief where a respondent cross appeals*
However, there is no indication that the applications have been granted or that the respondents filed their notice of cross-appeal. Be that as it may, even if the notice of cross-appeal had been filed, it is settled that an appeal and a cross-appeal are separate appeals, therefore, the two sets of respondents have to comply with Order 2 rule 6 (2) of the Rules of this court by stating clearly that the briefs they filed in this appeal covered both the appeal and cross-appeal.

In this situation, where the respondents did not file a separate cross-appellants' briefs and did not state in their respondents' brief that the brief they filed is in respect of the appeal and cross-appeal, it goes without saying that arguments touching on the cross-appeal will be discountenanced, and this judgment is purely for the appeal.

Per Augie (JSC):

> **I must say that the appellants outlined the necessary framework for resolving this issue, one way or the other. As they rightly submitted, the following factors emanate from authorities they cited – Odogu vs. AG, Fed. (supra), Onwu vs. Nka (supra), Eliochin Ltd. vs. Mbadiwe (supra), ACB. Vs. Apugo (supra), UBN vs. Odusote Bookstores (supra), where this court will interfere and reverse compensatory damages:**
> **- The compensation should reflect not only the**

pecuniary loss of the victim but also the abhorrence of society and the law for gross violation of human rights.

- **Trivialization of a serious matter personal liberty by an inordinately low award should be avoided.**
- **Personal liberty of the individual is a commodity of inherently high value.**
- **Financial loss, which flowed directly from the appellants' prolonged incarceration, is a serious factor to be considered.**
- **Deprivation of liberty has consequential personal/ sentimental impact.**
- **Judicial notice of the value of the Naira vis-à-vis other currencies should be taken by our courts and is a relevant factor to be considered. Our courts should keep up with the time and economic trend in the country and in particular with the prevailing decline in the purchasing power of the Naira over the past years.**
- **The primary object of an award of damage is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm [exemplary damages].**
- **An award of damages can only be upset or interfered with by an appellate court if either the trial court acted or proceeded upon wrong principles of law or the amount awarded by the trial court is manifestly and extremely high or low.**
- **An appellate court will interfere where the trial court acted under a mistake of law or acted in disregard of principles or acted under a misapprehension of facts or took into account irrelevant matters or failed to take account of relevant matters or where injustice would result if**

the Appeal Court does not interfere/

- **An appellate court will reverse the amount of damages where the amount awarded was too extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damages to which the plaintiff is entitled or where the circumstances calling for such interference are shown to the appellate court.**

(Pp 71 – 72 Paras E – G)

10. Factors that should determine the award of compensation

In Odogu vs. A.-G. Fed. *(supra),* which the first respondent also cited, appellant was detained for about eight years but the trial court only awarded him a sum of N2,000.00 as damages. The Court of Appeal increased the amount of damages to N75,000.00. Still dissatisfied, the appellant appealed to this court for a review. This court allowed the appeal and increased the amount of damages to N200,000.00.

I must point out that the quotations from the judgment attributed by the appellants in their brief to this court is Odogu's case *(supra),* was made by the Court of Appeal in the judgment appealed against. Even so, this court agreed with the following passage by that court.

> **Whatever compensation is awarded should truly reflect not only the pecuniary loss of victim but also the abhorrence of society and the law for such gross violation of human rights, particularly the right of personal liberty, as in this case. An unwitting trivialization of a serious matter by an inordinately low award should be avoided. Personal liberty of the individual is a commodity of an inherently high value.**

In this case, the appellants cannot seriously equate their situation to that of Joseph Odogu, who had spent over eight years in detention; they admitted that they were detained for over 24 hours [30 hours].

However, I am struck by the observation of the Court of Appeal

in its judgment that this court approved of in Odogu's case *(supra),* which, in my view, resonates deeply or strikes a chord in this appeal. The said case also dealt with the enforcement of fundamental rights, and the Court of Appeal per Ayoola, JCA, as he then was) observed:

> **An unwitting trivialization of a serious matter by an inordinately low award should be avoided. Personal liberty of the individual is a commodity of an inherently high value.** *(Pp 72 – 73 Paras H – F)*

11. A reconsideration of damages awarded by the court of Appeal

In its judgment, the Court of Appeal held that the respondents failed to prove the allegation that there was a contract scam, which triggered the arrest and detention of the second to fifth appellants. If found that third to fifth respondents embarked on what it called *"recovery of debts",* which is *"definitely"* not part of their mandate, *"as there is no such provision under the EFCC Act".* It concludes that the arrest and detention of the appellants was unjustifiable; that it is *"wrongful and unconstitutional",* and that the *"3rd – 5th respondents are liable for the unlawful arrest and detention of the appellants".* But at the end of day, it awarded the sum of N750,000 as damages.

It is clear, as the appellants submitted, that the Court of Appeal awarded the said sum of N750,000 to be shared by three appellants, which by arithmetical calculation makes it N250,000 for each one. Despite the fact that they claimed damages for *"each"* one of them, the Court of Appeal omitted the word *"each"* from the Order made.

Obviously, having found that the third to fifth respondents had been on a frolic of their own, so to speak, when they arrested and detained the said appellants until they signed an undertaking to pay N600 million, a sum of N250,00.00 awarded as damages is too low.

It is a mere slap on the wrist in this case that came to the court via the Fundamental Human Rights [Enforcement Procedure] Rules. This court made it very clear in Jim-Jaja's Case *(supra)* that a person, who has established that he was unlawfully detained, as in this case, does not have to pray for compensation before he is awarded one. He is entitled to compensation automatically. But where he claims a specific amount, it is for the court to consider the claim and award, in its opinion, an amount that would be justified to compensate him.

I now ask – is the sum of N250,000 awarded by the court below as damages to an appellant a justifiable amount for depriving him of his personal liberty, which is a *commodity of inherently high value?* My answer is No. It found that the respondents went off track and were not acting according to law when they detained the appellants. In my view, to award such a miserable sum as damages screams out *trivialization of a serious matter,* and this court will have to interfere.
(Pp 73 – 74 Paras H – G)

12. *It was wrong to omit the 5th defendant in the award of damages*
Obviously, the omission of the fifth appellant as an awarded for damages by the court below is clearly an error that is easily righted, and I do not need to go into the details of the appellants' arguments.

The second to fourth respondents are the *Deputy Managing Director, Chief Legal Adviser/Company Secretary, General Manager in charge of all the Branches, Public Sector and Multilateral Agencies* respectively of the first appellant, while fifth appellant is *"Manager and Account Officer of the Head Branch"* of the first appellant Bank; and as much a "*key chief officer"* of the Bank as the other appellants.

The Court of Appeal found that they were unlawfully arrested and detained and were, therefore, entitled to damages. It expressly excluded the first appellant because it cannot be physically arrested, but made no mention of the fifth respondent in awarding damages, which is why I believe that the omission of the fifth respondent is an error that is easily corrected by this court and it will be so corrected. Issue 3 is, therefore, resolved in favour of the appellants as well.
(Pp 74 – 75 Paras H – C)

13. *Principles relevant to the award of exemplary damages*
Without much ado, I will quickly say that the Court of Appeal is right. What they did was wrong, however, I do not agree that the conduct of the third to fifth respondents is as described by the appellants to warrant or justify an award of exemplary damages to the appellants.

Such damages are awarded when a defendant's willful act was malicious, violent, oppressive, fraudulent, wanton or grossly reckless see *legal-dictionary thefreedictionary.com,* where it is also stated:

These damages are awarded both as a punishment and to set a public example. They reward the plaintiff for the horrible nature of what he/she went through or suffered. Although often requested, exemplary damages are seldom awarded.

See also Elochin (Nig.) Ltd. vs. Mbadiwe *(supra),* relied upon by the Court of Appeal, wherein this court per Obaseki, JSC, observed that:

The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for the conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit; exemplary damages, punitive damages, vindictive damages, even retributory damages and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like.

In this case, respondents were looking into an alleged contract scam, and may have acted beyond their mandate, but there is nothing to indicate that their conduct was actuated by malice or that they were propelled by ill-will to humiliate, disgrace or treat appellants badly. This issue is, therefore, resolved in favour of the respondents.
(Pp 75 – 76 Paras G – F)

14. Factors relevant in fixing damages for breach of fundamental human rights
In the final analysis, the decision of the Court of Appeal stands, but the award of N750,000 as damages must be reviewed upwards. What is the appropriate amount in the circumstances of this case?

In fixing an amount for the infringement of fundamental rights,

the following factors *inter alia* may be taken into consideration – see Arulogun vs. C.O.P., Lagos State & Ors.(2016) LPELR-40190 (CA):

(a) The frequency of the type of violation in recent times;
(b) The continually depreciating value of the Naira;
(c) The motivation for the violation;
(d) The Status of the applicant;
(e) The underserved embarrassment meted out to the applicant including pecuniary losses; and
(f) The conduct of the parties generally, particularly the respondent.

In this case, the second to fifth appellants, who are chief key officers of the first appellant; were arrested and detained for over 24 hours. There is nothing extraordinary to justify imposing a very high amount but the award of damages made by the court below is much too low. I take a middle ground and increase the amount to one million Naira each to the second, third, fourth and fifth appellants; and I so order.

This appeal is allowed in part. The decision of the court below is affirmed, however, the order for damages is set aside. In its place, an award of damages against the respondents, jointly and severally, in the sum of one million naira each to second to fifth appellants, who were unlawfully arrested, is entered as the Order of the Court.
(Pp 76 – 77 Paras F – D)

Per Peter-Odili (JSC):

It is now trite law that an artificial person is a juristic personality (persona-ficta known to law and accorded due rights under our laws and can only act through its agents or servants who are human beings. Therefore when the agents, servants or officers of such juristic persons are arrested and detained especially key officers like in the case at hand, then the juristic person is also arrested and detained and so the direct consequence is loss of reputation

and financial loss. The 2nd – 5th appellants occupied the offices and status in the 1st appellant as follows:
a. 2nd appellant is Deputy Managing Director of the 1st appellant.
b. 3rd appellant is the Chief Legal Adviser/Company Secretary of the 1st appellant.
c. 4th appellant is the General Manager in charge of all its branches, Public Sector and Multilateral Agencies.
d. 5th appellant is the manager and accounts officer of the head branch of the 1st appellant.

It is to be noted that all the appellants as applicants were well captured on record at the court of trial all laying claims jointly and so the strangeness that when the Court of Appeal made its findings that their fundamental rights were infringed upon by the respondents, they side lined 5th appellants and the explanation is not nearby.

The Court of Appeal found that there was breach of the right of the appellants pursuant to section 35(1) and (6) and 46 of the 1999 Constitution for (as amended) but it left out 1st appellant as an artificial person on the ground that it cannot suffer the same injuries as the human agents, that is correct but in respect to the human agents the court below omitted 5th appellant in the damages of N750,000 to each of 2nd – 4th appellants even though all the appellants without exception prayed for the aggravated damages. *(Pp 88 – 89 Paras E – C)*

Nigerian Cases Cited
A.C.B. vs. Apugo (1995) 6 NWLR (Pt. 399) 65
A.I.C. Ltd. vs. NNPC (2005) 1 NWLR (Pt. 973) 563 SC,
Arulogun vs. C.O.P., Lagos State & Ors.(2016) LPELR-40190 (CA)
Ejiwunmi vs. Costain (W.A) Plc. (1988) 12 NWLR (Pt. 576) 146,
Eliochin (Nig.) Ltd. vs. Mbadiwe (1986) 1 NWLR (Pt. 14) 47;
FMBN vs. NDIC (1999) 2 NWLR (Pt. 591) 333.
Garuba vs. Omokhodon (2011) 6-7 SC (Pt. V) 90.
Macauley vs. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283.
Nwankwo vs. E.D.C.S.U.A. (2007) 5 NWLR(Pt. 1027) 377 SC,

Odogu vs. A-G., Fed. (1996) 6 NWLR (Pt. 456) 508,
Odunze & Ors. vs. Nwosu & Ors (2007) 13 NWLR (Pt. 1050) 1 SC,
Olojoun vs. Ozima (1985) 2 NWLR (Pt. 6) 167.
Onwu vs. Nka (1996) 7 NWLR (Pt. 458) 19,
U.B.N. Ltd. Vs. Odusote Bookstores Ltd. (1995) 9 NWLR (421) 558

Nigerian Statutes Cited

1999 Constitution of the Federal Republic of Nigerian (as amended) - Sections 35(1) and (6) and 46

Representation

Afolabi Kuti, (Esq.), **with** Gospel Adams, (Esq.), for the **First Respondent.**
Adeyinka Aderemi, (Esq.), for the **Second Respondent.**

ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): The application for the enforcement of their fundamental rights filed by the appellants at the Federal High Court, which led to this appeal, was triggered by a petition written by the second respondent to the third respondent [Economic and Financial Crimes Commission (**EFCC)** against the first appellant regarding a Bank Guarantee that it issued.

The petition dated **5/7/2004**, and addressed to *"The Chairman, Economic and Financial Crimes Commission",* is headed as follows

COMPLAINT
FOR THE RECOVERY OF ADVANCE PAYMENT MADE BY GOVERNMENT TO CONTRACTORS THROUGH THEIR BANKERS/GUARANTORS-REGARDING THE LOWER RIVER NIGER DREDGING CONTRACT: 1998/1999

The second to fifth appellants were invited by the third respondent to a meeting at its office in Abuja; but tings did not go down well, and they were subsequently detained at the Laugbe Police Station and Airport Police Station both in Abuja from **9/9/2004** to **10/9/2004.**

Disgruntled by their detention under dehunmanizing conditions,

A appellants sought and were granted leave by the Federal High Court to apply to enforce their fundamental rights, and pursuant thereto, they filed a motion on notice where they prayed for the following:

B

10. *A DECLARATION* that the claim of the 2nd respondent to a refund of the sum of N600 million for an alleged non-performance by Julius Berger Nig. Plc. and Westminister Dredging and Marine Ltd., of a contract for the dredging of the lower River Niger under an Advance Payment Guarantee issued by the 1st applicant in spite of disputed claims of Julius Berger Nigeria Plc. and Ngerian Westminister Dredging and Marine Ltd., against the 2nd respondent is a dispute referable to the civil court only in accordance with the Constitution.

C

D

E

11. *A DECLARATION* that the 2nd respondent having returned the advance payment guarantee issued by the 1st applicant is no more entitled to ask the 1st applicant to refund any money.

F

12. *A DECLARATION* that the dispute as to who is owing as between the 2nd respondent and Julius Berger Nigeria Plc. and Nigerian Westminister Dredging and Marine Ltd., is a civil and not a criminal matter.

G

13. *A DECLARATION* that the 3rd – 5th respondents have no jurisdiction to arrest or detain the 2nd – 5th applicants over a contractual matter or at all.

H

14. *A DECLARATION* that the arrest and detention of 2nd 5th applicants between 9th September and 10th September 2004 at Lugbe Police Station and the Airport Police Station, Abuja, by the 3rd – 5th respondents at the instance of the 2nd respondent constitutes a violation of the 3rd – 5th respondents'

I

fundamental rights guaranteed under Sections 34, 35 and 41 of the 1999 Constitution and Articles 1, 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act Cap.10 Laws of the Federation of Nigeria, 1990 and is, therefore, illegal and unconstitutional.

15. ***D DECLARATION*** **that the action of the 3rd – 5th respondents forcing the 2nd applicant to issue an undertaking to pay the sum of N600 Million within a month as a condition for bail of the 2nd – 5th applicants after detaining them for two days is unknown to law, unconstitutional, null and void.**

16. ***AN ORDER*** **setting aside the understanding extracted forcefully and under duress from the 2nd applicant on 10/9/2004 by the 3rd – 5th respondents as a condition for bail of the 2nd – 5th applicants for being unknown to law, unconstitutional, irregular, null and void.**

17. ***AN ORDER*** **of injunction restraining respondents either by themselves, their agents, privies, assigns or anybody howsoever described from further arresting, detaining harassing or molesting the applicants over the contractual transaction between the 2nd respondent and the 1st applicant's customers or enforcing the undertaking issued by the 2nd applicant or demanding or further demanding from the 1st applicant.**

18. Aggravated and exemplary damages against the respondents jointly and or severally in favour of each of the applicants as claimed in the Statement of Facts attached to this application.

Upon being served, the second respondent entered a *CONDITIONAL* appearance and also filed a notice of preliminary objection praying that the action be struck out on the ground that it does not disclose a cause of action

against it. In his judgment delivered on **29/8/2005,** the learned trial judge, B.F.M. Nyako, J., treated the preliminary objection as the second respondent's defence, and held as follows

> **I must find that the claim has not been established against the 2nd respondent and the claims against him (sic) are not proved. He (sic) is struck out.**

As to the main application itself, the learned trial judge struck out the appellant's claims 1 to 3 and 6 to 8, and concluded as follows:

> **On claims 4 and 5, I find that the 3-5 (sic) have the power to arrest and investigate contract scam and as the arrest has not been shown to be unconditional, the 4 and 5 claims of the applicants fail and the action is accordingly dismissed.**

Dissatisfied, the respondents appealed to the Court of Appeal and in allowing the appeal *"save for relief 2",* the Court of Appeal held thus:

> **The issue at stake was in respect of an alleged breach of contract namely, advance payment guarantee and recovery of the said sum of N2.034 billion plus the accrued interest. Even though the 3rd – 5th respondents in paragraph 1 of their joint counter-affidavit stated that investigations revealed violation of *EFCC* legislation, none of such violation was mentioned. In fact, throughout the gamut of the depositions in the counter-affidavit of the 3rd- 5th respondents, before the lower court and submission of learned counsel to the respondents here before us, there was nowhere the section of the *EFCC* Act that was impugned that warranted the arrest of the appellants was mentioned. I do not perceive any such violation of the Act. It is not in doubt as rightly held by the trial judge at page 204 of the record that:**
>
> > **"By the *EFCC* Act they have power to investigate**

contract scam and to investigate any offence under the *EFCC* Act."

However, the respondents totally failed to prove there was any such contract scam to justify the arrest and detention of the appellants. The respondents merely paraded the case like that of contract scam without making any reference whatsoever to the violation of any law. Rather, from all the facts before the court, the mission of the 3rd – 5th respondents was to recover the said sum of N2.034 Billion being the alleged breach of advance payment guarantee. This led to the extraction from the appellants by the respondents of an undertaking to pay N600 million, which was subject to their release from detention. Recovery of debts is definitely not the mandate of 3rd – 5th respondents as there is no such provision in the *EFCC* Act. The arrest and detention of the appellants are therefore totally unjustifiable. It is wrongful and unconstitutional. 3rd – 5th respondents are liable for the unlawful arrest and detention of the appellants.

The Court of Appeal then awarded damages against the respondents *"jointly and severally in the sum of N750,000.00 in favour of the 2nd – 4th appellants";* it omitted the fifth appellant's name for damages; refused to award damages to first appellant; and refused to award aggravated and exemplary damages also claimed by the appellants.

Dissatisfied with this part of the Court of Appeal's judgment, the appellants appealed to this court with a notice of appeal that contains four grounds of appeal. The first respondent filed a notice of preliminary objection to the competency of ***Ground 1*** of the said ground of appeal, and the Grounds of the objection are that:

3. Ground 1 is not covered by, and/or did not emanate from the decision being challenged.

4. Appeal is fought on the basis of the decision of the lower court and is not taken against an *obiter*.

A

The second set of respondents, that is the third to fifth respondents, also filed a notice of preliminary objection to Grounds 1, 2, 3 and 4 of the grounds of appeal. *The grounds of the objection* are that:

B

(7) Ground one of the appellant's notice of appeal dated *7/5/2013* and filed same date does not constitute a challenge to the judgment of the lower court delivered on 7/2/2014.

C

(8) The particular*s* of grounds two, three and four of the notice of appeal dated *7/5/2014* and filed on same date are issues of mixed law and facts.

D

(9) Grounds two, three and four of the notice of appeal dated *7/5/2014* and filed on the same date fall within Section 233(3) of the 1999 Constitution which states: "Subject to the provisions of subsection (2) of this Section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court."

E

F

(10) The statutory requirement of the leave of the lower court or this Hon. Court is mandatory in respect of the appellants' grounds of appeal which are of mixed and facts.

G

(11) The appellant failed to obtain the leave of the lower court or that of this court before filing the notice of appeal.

H

(12) This court has no jurisdiction to entertain grounds Two, three and four of the appellants' notice of appeal for failure on the part of appellant to seek leave in view of the provisions of Section 233(3) of the 1999 Constitution (as amended).

I

Now, a ground of appeal consists of error of law or fact alleged by an appellant as the defect in the judgment appealed against, which he relies on to set it aside – **FMBN vs. NDIC (1999) 2 NWLR (Pt. 591) 333.**

In this case, the appellants appealed against the following part of the judgment of the Court of Appeal, wherein it observed as follows:

> **For a party to be entitled to exemplary damages, it is his duty to prove that the action of respondent is outrageously reprehensible, which has not been proved in this case. However, the appellants are entitled to damages for their unlawful arrest and detention. By virtue of Section 16 of the Court of Appeal Act, the Court of Appeal is empowered to exercise the powers and functions of the lower Court, which includes award of damages. In the circumstances, I hereby invoke the said power and award damages against the respondents jointly and severally in the sum of N750,000.00 in favour of the 2nd – 4th appellants, who were unlawfully arrested and detained. The 1st appellant, being a bank is an artificial person, who cannot physically be arrested and detained.**

In ***Ground 1*** of the grounds of appeal, which is being challenged by the two sets of respondents, the appellants complained as follows:

> **The learned justices of the Court of Appeal erred in law when their Lordships held that the 1st appellant was not entitled to damages because the 1st appellant being an artificial persons cannot be physically arrested or detained.**

It is also settled that just as statements of claim supersede writs of summons, issues for determination also displace grounds of appeal – **Macauley vs. NAL Merchant Bank Ltd.** *(1990) 4 NWLR (Pt. 144) 283.*

In this case, the respondents jumbled up issues relating to their objections with issues for determination in the substantive appeal, which is wrong, because a determination of a preliminary objection is not a hearing of

the appeal, which can only be considered based on issues for determination distilled from the grounds of appeal- see **Odunze & Ors. vs. Nwosu & Ors** *(2007) 13 NWLR (Pt. 1050) 1 SC,* wherein Chukuma-Eneh, JSC, explained the difference, as follows:

> **Issue for determination and preliminary objection under our rules do not have common meeting ground. How to initiate an objection against an appeal is fully covered in the rules. Preliminary objection runs counter to the intendment of issues for determination in the claims before the courts in the sense that it aborts, indeed forecloses the hearing of the case *in limine* and if upheld terminates the case; it automatically puts an end to the case without determining the rights of the parties thereto, while issue for determination presupposes that the case is, all things being equal, on course for hearing. An issue for determination is a combination of facts and the law on a particular point, which when decided, affects the fate of the appeal. It must relate to the grounds of appeal. The two are, more or less, strange bed fellows; and so for a preliminary objection to be dressed in the garb given to it here is strange and improper.**

In this case, contrary to this laid down principle, the first respondent formulated three issues for determination and its ***Issue 1*** questions

> **Whether *Ground 1* contained in the appellant's notice of appeal should be struck out for being incompetent.**

The second set formulated four issues for determination; that is two issues for their preliminary objection and two issues for the appeal.

The second set of respondents' ***Issue 1,*** which raises a question regarding their objection to ***Ground 1*** of the grounds of appeal, is:

> **Whether *Ground One* of the applicant's notice of appeal is competent having regard to the fact that the said ground is neither part of, nor emanates from, the judgment delivered**

by the lower court on 7/2/2013 as set out in pages 346-394 of the record and whether same is not liable to be struck out by this Hon. Court.

It is the contention of the two sets of respondents that ***Ground 1*** of the appellant's grounds of appeal is not borne out of the judgment of the Court of Appeal, so it is incompetent and must be struck out.

The first respondent submitted that ground(s) of appeal must be direct and must constitute a challenge to the *ratio decidendi* of a decision appealed against, and that the ground(s) of appeal not arising from a decision appealed against would be discountenanced. They referred this court to the following authorities on the subject:

Praying Band of C & S vs. Udokwu *(1991) 3 NWLR (Pt. 182) 716;*
Niger Construction vs. Okugbemi *(1987) 4 NWLR (Pt. 67) 787;*
Adegoroye vs. Ajayi AKA Little by Little *(2003) FWLR (Pt. 171) 1591;*
Dongote vs. C.S.C. Plateau State *(2001) 19 WRN 125;*
Chiorlu & Ors. vs. Akani & Ors. *(2001) FWLR (Pt. 71) 1781 at 1788;*
Mercantile Bank & Anor. vs. Nwobodo *(2005) 7 S.C. (Pt. 111) 1;*
Iobachie vs. Iloabachie *(2000) 5 NWLR (Pt. 626) 194 of 203; and*
MILAD, Akwa Ibom State & Ors. vs. Obong *(2001) FWLR (Pt. 60) 1456.*

Further, that appellants overlooked the law that a valid appeal must attack *rationes decidendi; not obiter dicta* – **NDIC vs. Okem Ent.** *(2004) 10 NWLR (Pt. 880) 107,* **State vs. Ogbubunjo** *(2001) 2 NWLR (Pt. 698) 576;* and that appellants' contention will not suffice as an issue in controversy in judgment that can lead itself as a valid ground of appeal – **Abacha vs. Fawehinmi** *(2006) 6 NWLR (Pt. 600) 228 SC.*

The second set of respondent submitted that ***Ground 1*** is a strange clause that *"dramatically and entirely alters the character as well as interpretation of that aspect and bearing of the judgment";* that appellants surreptitiously attempted to distort same to favour their position in this appeal and prejudice the mind of this court; and that it is unconscionable on their part

to attempt to import into the judgment what is not contained therein and to premise their appeal on a ground which does not form part of the lower court's decision, all in an attempt to influence the mind of this court in their favour.

Furthermore, that a ground of appeal and issue flowing therefrom must embody a resolution of the issue, not the opinion of the judge – **Onafowokan *vs. Wema Bank (2011) 12 NWLR (Pt. 1260) 4, CCB vs. Ekperi (2007) 3 NWLR (Pt. 1022) 493, Osuji vs. Ekeocha (2009) 16 NWLR (Pt. 1166) 81;*** and that an incompetent issue distilled from an incompetent ground of appeal is incompetent by virtue of its origin – **Olonade vs. Sowemino** *(2014) 5 S.C. (Pt. 11) 97.*

They further argued that the *ratio* of the lower court's decision, which appellants doctored to constitute **Ground 1**, cannot constitute a valid ground of appeal; that if there is anything that courts detest with a passion, it is quoting the dictum or the pronouncement of the justices out of the context in which those words are explored – **Adewale vs. Adegoke (1989) 3 NWLR(Pt. 109) 250;** and that it is ridiculous for the appellants in this case to formulate a ground of appeal contrary to the express decision arrived at by the lower court.

The appellants filed reply briefs to both respondent's briefs. They argued that the court below only said that though they were all entitled to damages, it is not awarding damages to first appellant because it is an artificial person, who cannot be physically arrested, therefore, they did not import, add to, subtract from or deduce the said ***Ground 1*** from *obiter dicta* as alleged by first respondent; or surreptitiously attempt to distort, craftily allege or deduce ***Ground 1*** from *obiter dicta* as alleged also by the third to fifth respondents; that in framing grounds of appeal, a party needs not quote verbatim from a judgment – **Ports & Cargo Holding Services Co.Ltd. vs. Migfo Ng. Ltd. (2013) 3 NWLR (Pt. 1333) 555; Ilori vs. Tella (2006) 18 NWLR (Pt. 1011) 267;** and that cases cited by respondents are irrelevant.

They also argued that it is settled that a ground of appeal can emanate from omission of a court refusing to do what it ought to do, and since this is an omission of the court below, refusing to do what it ought to do, they are permitted to appeal on same to this Court – **Azubuike vs. Diamond Bank PLc. (2014) 3 NWLR (Pt. 1393) 116.**

They cited **Akpan vs. Bob & 4 Ors. (2010) 4-7 SC (Pt. 11) 57, Ekikeme vs. Amaechi (1998) 3 NWLR (Pt. 542) 469,** and submitted that a

ground of appeal directed against an omission, relates to the court's judgment and constitutes a good and valid ground of appeal; that in holding as it did, the Court of Appeal was approbating and reprobating at the same time; and that it is trite that a court cannot approbate and reprobate – **FRN vs. Iweka (2011) 11-12 SC (Pt. 1) 109.**

There it is; arguments for and against the objection raised by the respondents to ***Ground 1*** of the appellants' grounds of appeal. As it stands, the two sets of respondents stated the correct position of the law on the significance of ground(s) of appeal to an appeal.

However, I strongly feel that their objection to the said ***Ground*** is not only ill-thought-out and unmeritorious; it is also an attempt to filibuster the appeal, so to speak, and waste the time of this court.

An appeal is an invitation to a higher court to review a decision of a lower court, and grounds of appeal are basically highlights of the error of law or fact or mixed law and fact made by the lower court in the decision sought to be set aside on appeal. So, a ground of appeal must be related to the decision of the lower court, and must contain complaints that the appellant relies upon to succeed in setting aside the *ratio decidendi* of the judgment, and not just observations and any passing remarks of a judge in the course of writing a judgment – see **Nwankwo vs. E.D.C.S.U.A. (2007) 5 NWLR(Pt. 1027) 377 SC, N.D.I.C. vs. Okem Ent. Ltd. (supra) and A.I.C. Ltd. vs. NNPC (2005) 1 NWLR (Pt. 973) 563 SC, where Edozie, JSC,** explained as follows:

> **The ratio *decidendi* of a case represents the reasoning or principle or ground upon which a case is decided. *Obiter* simply means in passing, incidental, cursory. *Obiter dicta* reflect, *inter alia,* the opinions of the judge, which do not embody the resolution of the court. The expression of the judge in a judgment must be taken with reference to the facts of the case, which he is deciding, the issues calling for decision and answers to those issues. These are what should be looked for in a judgment. The manner in which the judge chooses to argue the case is not an important thing. Rather it is the principle he is deciding --.**

A

In this case, the respondents argued that the Court of Appeal did not pronounce that the first appellant is not entitled to damages, therefore, the ***Ground 1*** of the appellants' grounds of appeal is incompetent.

B However, as this court noted in **Akpan vs. Bob** *(supra),* although authorities emphasize that a ground of appeal must stem from a text of the judgment [*ipsissima verba],* such decisions in no way limit the scope of a ground of appeal, which can arise *"from commissions or omissions by the*
C *court from which an appeal emanates, in either refusing to do or doing what it ought to do or doing what it ought not to do or even in overdoing the act complained of".* Muhammad Edozie, JSC, hit the nail squarely on the head when he further stated as follows:

D

> **The ideal thing is to have a pronouncement from the court from which the appeal emanates.**

E In this case, the Court of Appeal may not have expressly said that the first appellant is not entitled to damages, but that is the import of its decision whereby it refused to award damages to the first appellant.

The appellants claimed *"aggravated and exemplary damages",* and
F for ease of reference, I will repeat what Court of Appeal said i.e.

> **For a party to be entitled to exemplary damages, it is his duty to prove that the action of respondent is outrageously**
G **reprehensible, which has not been proved in this case. However, the appellants are entitled to damages for their unlawful arrest and detention. By virtue of section 16 of the Court of Appeal Act, the Court of Appeal is empowered to**
H **exercise the powers and functions of the lower court, which includes the award of damages. I hereby invoke the said power and award damages against the respondents jointly and severally in the sum of N750,000.00 in favour of the 2nd –**
I **4th appellants, who were unlawfully arrested and detained. The 1st appellant, being a bank is an artificial person, who cannot physically be arrested and detained.**

In clear terms, the Court of Appeal held that although appellants are not entitled to exemplary damages because they did not prove same, they were *"entitled to damages*" for unlawful arrest and detention, and awarded damages to the second, third and fourth respondents [its omission of the fifth respondent is an issue for the main appeal].

The word "entitled" means ""to give (a person or thing) a little, right or claim to something; furnish with grounds for laying claim" – See *dictionary.com.* In this case, the Court of Appeal did not award damages to the first appellant for the reason that being a bank *"it is an artificial person, who cannot physically be arrested or detained."*

What does that say? It says clearly that the first appellant is not *"entitled"* to damages as it cannot be physically arrested or detained, and the complaint in the said ***Ground 1*** of the grounds of appeal is:

> **The learned justices of the Court of Appeal erred in law when their lordships held that the 1st appellant was not entitled to damages because the 1st appellant being an artificial person cannot be physically arrested or detained.**

Obviously, the appellants are right; the said ***Ground 1*** flows directly from the decision appealed against and the objections are overruled.

The second set of respondents' ***Issue 2*** questions whether the appellants do not require leave of court to argue ***Grounds* 2, 3,** and **4** of their grounds of appeal, which contain the following complainants**:**

GROUND 2

The learned justices of the Court of Appeal erred in law when they awarded just N750,000.00 as general damages in favour of the 2nd – 4th appellants.

GROUND 3

The learned justices of the Court of Appeal erred in law when omitted to award general damages in favour of the 5th appellant.

GROUND 4

The learned justices of the Court of Appeal erred in law when they decided to award aggravated and exemplary damages against the 3rd – 5th respondents for the unlawful arrest and detention of the appellants and held that their action was excessive exuberance and for a party to be entitled to exemplary damages the action of the respondents must be outrageously reprehensible.

They contend that the grounds of appeal are of mixed law and facts, therefore, the appellants require leave of the court to raise them, pursuant to Section 233(3) of the 1999 Constitution (as amended). Citing **NNSC vs. E.S.V. (1990) 7 NWLR (Pt. 164) 526, Oluwole vs. L.S.D.P.C. (1983) 14 NSCC 179 & Metal Const. (W.A) Ltd. vs. Migliore (1990) 1 NWLR (Pt. 126) 299,** they submitted that the award of damages is discretionary based on the proven facts before Court; and where leave is not obtained, a notice of appeal is incompetent and should be struck out **– G.E.C. vs. Akande (2010) SC (Pt. IV) 75.**

They argued that **Particulars of Errors** (ii) and (iv) of **Ground 2** disclose questions of mixed law and facts; that **Particulars of Error (ii)** of **Ground 3** constitutes mixed law and fact; that **Particulars of Errors (iii)** of **Ground 4** is a direct attack against the findings of the Court of Appeal that respondents' conduct was not oppressive, arbitrary and unconstitutional and the appellants failed to prove the contrary; and that the award of exemplary or aggravated damages that constitutes Particulars (v) & (vi) of ***Ground 4,*** is an issue of law mixed with facts.

The appellants argued in their reply brief that the said ground are not of mixed law and facts because they constitute a challenge to a decision of the lower court as to breach of Chapter IV of the 1999 Constitution (as amended) and leave of this court is not required, which is in line with Section 233(2) (c) of the Constitution that says:

> **2. An appeal, shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases:**
>
> **(c) Decisions 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.

They submitted that the word *"shall"* is mandatory; that *"as of right"* means a party does not need the leave; *"decisions"* means a decision or judgment or recommendation of the court, thus, once there is a decision that deals with Chapter IV of the Constitution, whether it is mixed law or facts, exercise of discretion, award of damages, a party can appeal without leave – **Onochie vs. Odogwu (2006) 6 NWLR (Pt. 975) 65, CPC vs. INEC (2012) 13 NWLR (Pt. 1317) 260, Ilechukwu vs. Iwugo (1989) 2 NWLR (Pt. 101) 99, 105, Jim-Jaja vs. COP, Rivers State (2013) 6 NWLR (Pt. 1350) 225, Ashiru vs. Ayoade (2006) 6 NWLR (Pt. 976) 105 and Ifeajuna vs. Ifeajuna (1999) 1 NWLR (pt. 587) 492** cited.

Furthermore, that having found that appellants, including fifth appellant, were unlawfully arrested and detained, the court below ought to have awarded them damages, therefore, it misunderstood the law or misapplied the law to proved or admitted facts **– Jim-Jaja vs. COP, Rivers State** *(supra),* which makes **Ground 3** a ground of law.

They also argued that assuming without conceding that the said ***Grounds*** are of mixed law and facts and leave of court is required, they are not foreclosed from seeking leave to raise and argue them nor from amending their brief merely because the third to fifth respondents have filed a preliminary objection and the amendment is to correct the error thereof, citing **South Atlantic Petroleum Ltd. vs. Minister of Petroleum Resources (2014) 14 NWLR (Pt. 1396) 24 at 41-42, 44, Salisu vs. Mobolaji (2014) 4 NWLR (Pt. 1396) 1 at 17-18, and Nalsa & Team Associates vs. NNPC (1991) 8 NWLR (Pt. 212) 652.**

The position of the law on this issue is basically cut and dried; to determine whether a ground of appeal is a ground of law or fact requires examining it in terms of its particulars so as to determine the nature of the question the ground raised is complaining about – see **Garuba vs. Omokhodon (2011) 6-7 SC (Pt. V) 90.** The fact that a ground of appeal is described as one of fact or of law will not stop a court from looking into

whether it is actually one of law or of mixed law and fact or of facts – See **Ejiwunmi vs. Costain (W.A) Plc. (1988) 12 NWLR (Pt. 576) 146, Olojoun vs. Ozima (1985) 2 NWLR (Pt. 6) 167.**

What is more, where a party intends to raise issues of mixed law and fact, leave of court must be first sought for and obtained – See **Garuba vs. Omokhodon** *(supra),* where Rhodes-Vivour, JSC, said:

> **Leave means permissions. Before an appeal on ground of mixed fact and law or on facts can be entertained by this Hon. Court, the appellant must first seek and obtain leave from the Court of Appeal or this court. Failure to obtain leave renders the appeal incompetent and it will be thrown out.**

In this case, the second set of respondents say that Grounds 2 and 3 of the said grounds of appeal involve mixed law and facts because:

> **Where a court of law is invited to exercise its discretion by an appellant, such appellant is only asking the court to examine the matter through its own peculiar circumstances by what are the facts disclosed in the affidavit to arrive at its discretion, thus, it is incumbent of the appellant to make sure that the leave of the court is first sought and obtained.**

In **Metal Const. (W.A) Ltd. vs. Migliore** *(supra)* cited by respondents, which dealt with the issue of service, Karibi-Whyte, JSC, observed:

> **If a judge considers matters, which are not before him, and relies on them for the exercise of his discretion, he will be exercising his discretion on wrong principles and this will be a question of law. The chief objective for the exercise of discretion is to avoid injustice to the party, who would be prejudiced from the effect of the irregular decision. There is no doubt, therefore, that the question involved in such a ground of appeal is not only one of law, but an issue of law**

coupled with the exercise of discretion. There is the question of law in the observance of the judicial principles to be followed in setting aside of own decision, and the exercise of discretion in the factors to be taken into account and what weight to attach to the length and circumstances of delay in considering the application to set aside the decision. There is no doubt that length of delay is a question of fact. But the reasonableness in presenting the application to set aside the decision is a matter of opinion in the light of other circumstances surrounding the application.

In this case, which deals with the enforcement of fundamental rights, it is clear that the second set of respondents did not fully grasp the core element of this appeal against the decision of the court below. Section 35(6) of the 1999 Constitution (as amended) provides that:

Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.

As this court aptly observed in **Jim-Jaja vs. COP, Rivers State** *(supra),* fundamental rights matters are placed on a higher pedestal than the ordinary civil matters in which a claim for damages resulting from a proven injury has to be made specifically and proved. In this case, **Jim-Jaja vs. COP** *(supra),* Muntaka-Coomassie, JSC, had this to say:

The appellant's claim is in connection with the breach of his fundamental rights to his liberty by the respondents. The onus is on him to show that he was unlawfully arrested and detained i.e. that his fundamental right has been violated. If this is proved, by virtue of the provisions of section 35(6) of the Constitution, the complainant is entitled to compensation and apology, where on specific amount is

claimed. Where a specific amount is claimed, it is for the court to consider the claim and in its opinion, the amount that would be justified to compensate the victim of the breach. In this respect, the common law principles on the award of damages do not apply to matters brought under the enforcement of fundamental rights procedure. The procedure for the enforcement of fundamental rights was specifically promulgated to protect the Nigerians' fundamental rights from abuse and violation by authorities and persons. When a breach of the right is proved, the victim is entitled to compensation, even if no specific amount is claimed.

In **Jim-Jaja's case** *(supra),* this court overruled a similar objection by the respondents to the ground of appeal; Ogunbiyi, JSC, observed:

With the nature of the claim subject of appeal seeking enforcement of fundamental rights, the appeal lies as of right and hence the question of mixed law and facts are not applicable. **The said ground of appeal as rightly submitted by the learned appellants counsel is a ground of law and which needed no prior leave to raise same.**

In this case, the court below fund that the arrest and detention of the appellants were *"unjustifiable"", "wrongful and unconstitutional",* and the appellants' complaint in **Ground 2** of the grounds of appeal is that the sum awarded as damages by the court below in favour of three of the appellants is too low in the circumstances of this case.

They also complained in **Ground 3 and 4** that the court below *"erred in law"* when it omitted to award damages to fifth appellant, who had been arrested and detained with the other appellants; and when it refused their claim for aggravated/exemplary damages.

These grounds of appeal cannot be viewed in the same light as grounds of appeal in ordinary civil matters because the constitution has elevated the enforcement of fundamental rights to another level. What is more, by section

A 233(1) (c) of the Constitution, any appeal against a decision of the Court of Appeal that touches on a question of whether any of the provisions of **Chapter IV** of the Constitution, dealing with Fundamental Rights, has been, is being or is likely to be, contravened in relation to any person, lies *"as of right"* to this B court.

Thus, under whatever light the depiction is looked at; whether the appeal is as *of right* or whether the grounds of appeal are of law and not mixed law and facts, this objection must fall by the wayside as the other objections to C **Ground 1.** This objection is also overruled.

The coast is now cleared for the substantive appeal wherein the appellants formulated the following issues for determination:

D **1. Whether or not the learned justices of the Court of Appeal were wrong when they held that the 1st appellant being a bank is an artificial person who cannot physically be arrested and detained and** E **consequently was not entitled to damages.**

2. Whether or not the learned justices of the Court of Appeal were wrong when they awarded just F **N750,000.00 as general damages in favour of the 2nd – 4th appellants having regard to the pleadings and evidence before the lower court.**

G **3. Whether or not the learned justices of the Court of Appeal were wrong when they omitted and declined to award damages to 5th appellant thereby occasioning a miscarriage of justice.**

H **4. Whether or not the learned justices of the Court of Appeal were wrong when they held that the appellants were not entitled to exemplary damages.**

The Issues formulated by the first respondent for this appeal are:

I **(1) Whether, in the circumstance of this case, the amount of damages awarded by the lower court ought to be**

reviewed upward?

(2) Whether, having held that the respondents acted out of the misapprehension of the facts to the effect that there was a contract scam, the Court of Appeal was right in refusing to award exemplary and aggravated damages in favour of the appellants on the basis of the evidence on record?

The two issues formulated by the second set of respondents are:

(i) **Having regards to the relevant circumstances of this case, whether the amount of damages awarded by the lower court ought to be reviewed upwards or in favour of the 5th appellant.**

(ii) **Whether, having found that there was a contract scam, the Court of Appeal was right in refusing to award exemplary and aggravated damages in favour of appellants on the basis of evidence on record?**

Seeing as the respondents did not formulate any Issue from the said **Ground 1** of the grounds of appeal, which they had objected to, and which objection was overruled, I will adopt the appellant's issues in dealing with the substantive appeal since they cover all the angles.

Issue 1 distilled from the said **Ground 1** is about first appellant. The appellants' submitted that an artificial person is a *persona-ficta* (juristic personality) known to law, who can only act through agents or servants that are human beings, and when its agents, servants or officers are arrested and detained, it is also arrested and detained, and the direct consequence is loss of reputation and financial loss.

Furthermore, that by virtue of Section 46(1) of the Constitution (as amended) read with Section 18 of the Interpretation Act, Cap 123 LFN 2004, Fundamental Rights enure to Natural and Artificial persons – **Onyekwuluje vs. Benue State Govt.** *(2005) 8 NWLR (Pt. 928) 614;* since the second to fifth

appellants are key officers of the first appellant, the natural implication of their incarceration was financial loss and loss of reputation to the Bank in Millions of Naira; that their personal liberty is a commodity of high value to it as they are its directing mind as first appellant acts mainly through them – **Odogu vs. A-G Federation** *(1996) 6 NWLR (Pt. 456) 508;* therefore, such damages commensurate to their status should be awarded to it.

As it stands, the question that rears its head is whether a Bank, the first appellant, can be physically arrested and detained by **EFCC?** The appellants argued that it can be arrested and detained by proxy; that is since second to fifth respondents, who are key officers of the Bank, were arrested and detained, the Bank was also affected.

They contend that the implication of the incarceration of its key chief officers *"was financial loss and loss of reputation"* to the Bank. This line of argument, obviously, lacks merit. The first appellant has every right to seek redress for *"financial loss and loss of reputation",* occasioned by the arrest and detention of its said key chief officers; but it cannot do so through the procedure provided by law under the fundamental human rights [Enforcement procedure] Rules **1979;** the applicable Rules in this matter, and not the present **2009** Rules.

So, any claims touching on violation of rights to personal liberty guaranteed by the Constitution, are usually made before the court under fundamental human rights [Enforcement Procedure] Rules, enacted specifically to govern or regulate actions for enforcement or the protection of fundamental rights guaranteed by the Constitution – **Jack vs. University of Agriculture, Makurdi** *(2004) LPELR-1587 (SC).*

In this case, it is physically impossible for the first appellant to be arrested and detained, and the Court of Appeal was standing on very firm ground when it refused to award damages to first appellant for the unlawful arrest and detention of second to fifth appellants. **Issue 1** definitely lacks merit and it is resolved against the appellants.

Issue 2 raises the question of whether the amount of damages awarded ought to be reviewed upwards, as both respondents put it. At this juncture, it is necessary to sort out the status of cross-appeals referred to by the two sets of respondents in their respective briefs. The first respondent clearly stated as follows at page 6 of its brief:

A

> **The 1st respondent has also filed a notice of cross-appeal in challenge of some aspects or parts of the decision of the lower court. These aspects will be fully addressed in the**
B **ensuing brief of argument.**

It did not file any cross-appellant's brief; it made no mention of the cross-appeal at the hearing of the appeal; and never fully addressed any issue arising
C there-from in its brief but made comments like:

> **The lower court held that the arrest and detention of the appellants was unjustifiable. The holding, itself, is a subject**
D **matter of cross-appeal.**

It also stated as follows in its conclusions at page 16 of the brief:

> E **(a) In view of the 1st respondent's cross-appeal, the complaints of the appellants are not maintainable.**

The second set of respondents only filed **3rd-5th respondents' brief of**
F **argument;** they made no mention of a cross-appeal in the brief or at the hearing of the appeal. However, they faulted the decision of the Court of Appeal in the brief. The appellants, in their reply brief, referred the court to the notice of cross-appeal attached to their pending motion for leave to cross
G appeal and submitted that they *"smuggled in arguments regarding misapprehension of facts",* which is in breach of Order 6 rule 6 (2) of this Court's Rules that provides:

> H **Arguments in respect of a cross-appeal or in respect of a respondent's notice may be included by any party in his brief of the original appeal without special application. Such an inclusive brief shall clearly state that it is filed in**
I **respect of both the original appeal and cross-appeal or respondent's notice.**

I went through the main court file, and discovered that the two sets of respondents filed applications for extension of time within which to cross-appeal against the judgment of the Court of Appeal, etc. The first appellant's motion on notice was filed on **14/7/2014** and the motion of the third to fifth respondents was filed on **24/9/2013.**

However, there is no indication that the applications have been granted or that the respondents filed their notice of cross-appeal. Be that as it may, even if the notice of cross-appeals had been filed, it is settled that an appeal and a cross-appeal are separate appeals, therefore, the two sets of respondents have to comply with Order 2 rule 6 (2) of the Rules of this court by stating clearly that the briefs they filed in this appeal covered both the appeal and cross-appeal.

In this situation, where the respondents did not file a separate cross-appellants' briefs and did not state in their respondents' briefs that the brief they filed is in respect of the appeal and cross-appeal, it goes without saying that arguments touching on the cross-appeal will be discountenanced, and this judgment is purely for the appeal.

As I noted, **Issue 2** deals with the amount of damages awarded. Relying on **Odogu vs. A-G., Fed.** ***(1996) 6 NWLR (Pt. 456) 508,*** **Onwu vs. Nka** ***(1996) 7 NWLR (Pt. 458) 1,*** **Eliochin (Nig.) Ltd. Vs. Mbadiwe** ***(1986) 1 NWLR (Pt. 14) 47;*** **A.C.B. vs. Apugo** ***(1995) 6 NWLR (Pt. 399) 65*** **& U.B.N. Ltd. vs. Odusote Bookstores Ltd.** ***(1995) 9 NWLR (421) 558,*** the appellants submitted that the third respondent is *"notorious for arbitrary abuse of power during the tenure of fourth respondent",* and that this was gross violation of the human rights of key Chief Officers of one of the top banks over a purely civil matter, thus, the compensation should reflect not only the pecuniary loss but the abhorrence of the society and the law – *Nobody is above the law!*

Furthermore, that the amount awarded to be shared between the three appellants, 250,000 each, is too low; that the psychological impact, traumatic impact, financial loss, loss of reputation, wrongful deprivation of their liberty, and their status at the Bank were not taken into consideration by the court below; and that it is important for our courts to keep up with the times and present reality of today, and keep up with the depreciating value of the Naira vis-à-vis other currencies, as stated by Justice Iguh, JSC in **Onwu vs. Nka** *(supra).*

The first respondent submitted that the principle remains that an appellate court ought not to upset an award of damages merely because if it had tried the matter, it would have awarded a higher or lesser amount – **S.D.P,C. vs. Tiebo VII (1996) 4 NWLR (Pt. 445) 657; Ezekwe vs. Omomewo 91958) SCNLR 13; A.P. Ltd vs. Ciroma (1996) 1 NWLR (Pt. 43) 156; James vs. Mid-Motors (1978) 11-12 SC 31; Zik's Press vs. Alvan Ikoku (1951) 13 WACA 188; Williams vs. Daily Times (1990) I NWLR (Pt. 124) 1 and Onaga vs. Micho (1961) SCNLR 101.**

It argued that the court below also found that the respondents were not reckless but acted out of suspicion or misunderstanding that there was a contract scam, which does not show that it acted on some wrong principles of law; rather the potency is backed by law – ***Flint Vs. Lovell (*1935) 1 K.B. 354; Ojini vs. Ogo Oluwa Motors Nig. Ltd.** ***(1988) 1-2 SC*** [citation by appellants in their reply brief].

Furthermore, that appellants were detained on **9/9/2004** but were promptly released on **10/9/2004** when their sureties eventually showed up; that to justify a reversal, this court should be satisfied that the lower court acted on a wrong principle or made entirely erroneous estimate of the damages – **Sabru Motors Ltd.** ***vs. Rajab Ent. Ltd. (2002) 7 NWLR (Pt. 766) 243;*** that this case lies within the exception to the general guarantee of the right to personal liberty – **Abia State University vs. Anyaibe (1996) 3 NWLR (Pt. 439) 646;** and the facts do not justify a need to review the damages upward since there is a philosophy behind such an award, and it is not punitive.

The second set of respondents' submission on this Issue spans from pages 21-32 of their brief of argument but most of it boils down to justifying their arrest and detention of second to fifth appellants, and questioning the award of damages made by the court below, which is unacceptable, as this Issue is restricted to the appeal itself.

However, citing **Odogu vs. A.G. Fed.** *(supra),* the relevant aspects of their submissions are that damages awarded by the court below is neither manifestly too high or manifestly too low for the appellants, who were detained for less than 24 hours and were granted bail; and they have not shown that the award was based on a wrong principle, the basis for which they can pray the court to review the award – **Akinkugbe vs. Ewulum Holdings & Anor (2008) NWLR (Pt. 1098) 375.**

They argued that an award of general damages is discretionary and as such, precedent shows that interference by this court on this exercise of discretion is rare and must be founded on cogent reason, – **Siat S.A. Brussels & Ors. vs. Sanatone Securities Ltd.** *(2009) 17 NWLR (Pt. 1171) 525,* **Hamza vs. Kure** *(2010) 10 NWLR (Pt. 1203) 630;* that the appellants have failed to establish how the court below fall into any of the errors spelt out by this court in **Nyame vs. FRN** *(2010) 7 NWLR (Pt. 1193) 344,* therefore, this court needs not interfere with the lower court's discretion, as the appellants have not shown that it was exercised frivolously, and that *"the appellants having failed to demonstrate that the lower court exercised its discretion arbitrarily in this instance, sane discretion need not be altered by this court".*

The appellants countered that the first respondent's comment about appellate courts not upsetting an award of damages because if it tried a matter it would have awarded a higher or lesser amount is not the position regarding a breach of fundamental human rights; that it failed or omitted to cite all the relevant factors or principles and recent decisions of this court, including **Jim-Jaja's case** *(supra);* and that the position of the law is where there is a conflict between two Supreme Court decisions, the latter in time prevails, as decided by this court in **F.U.T.A. vs. Ajidahun** *(2012) 14 NWLR(Pt. 1321) 583.*

Furthermore, that the lower court never said that respondents were not reckless but acted out of suspicion or misunderstanding; that these are the words of first respondent and it is settled law that counsel cannot give evidence in his brief or plead facts or law not in his pleadings – **Unity Bank vs. Owie** *(2011) 5 NWLR (t. 1240) 273;* and that *Flint Vs. Lovell* (supra), **Ojini vs. Ogo Oluwa Motors** *(supra),* **Sabru Motors vs. Rajab Ent. Ltd.** *(supra)* and **Abia State University vs. Anyaibe** *(supra),* which the first respondent cited and relied upon, are distinguishable and they are, therefore, inapplicable to this case.

They proffered the same arguments in response to the third- fifth respondents' brief, and added that misapprehension of facts or the law is no excuse and even so, an appellate court will interfere to set aside the judgment – **Ceekay Traders vs. Gen. Motors** *(Pt. 222) 132 (sic),* **NAA vs. Okoro** *(1995) 6 NWLR (Pt. 403) 510;* **Nnadozie vs. Mbagwu** *(2008) 3 NWLR (Pt. 1074) 363* and **Jim-Jaja's case** *(supra).*

They contend that it is no excuse and not the law to argue that since the

court stated that there is misapprehension of facts that the respondents' conduct in arresting and detaining them is justified, therefore, the submissions of the said respondents in distinguishing **Jim-Jaja's case** *(supra)* is irrelevant to this case. Furthermore, that:

> **The evidence on record actually disclose that [they] were detained from 1.30pm on 9/9/2004 until 9.00pm the following day 10/9/2004 over 23 hours (30 hours plus) and treated like common criminals. They were denied food and water, not given the option of bail, [they] immediately provided responsible sureties but DSP Elieman insisted if they did not sign the undertaking to return the money, they should not be released.**

I must say that the appellants outlined the necessary framework for resolving this issue, one way or the other. As they rightly submitted, the following factors emanate from authorities they cited – **Odogu vs. AG, Fed.** *(supra),* **Onwu vs. Nka** *(supra),* **Eliochin Ltd. vs. Mbadiwe** *(supra),* **ACB. vs. Apugo** *(supra),* **UBN vs. Odusote Bookstores** *(supra),* where this court will interfere and reverse compensatory damages:

- **The compensation should reflect not only the pecuniary loss of the victim but also the abhorrence of society and the law for gross violation of human rights.**
- **Trivialization of a serious matter – personal liberty by an inordinately low award should be avoided.**
- **Personal liberty of the individual is a commodity of inherently high value.**
- **Financial loss, which flowed directly from the appellants' prolonged incarceration, is a serious factor to be considered.**
- **Deprivation of liberty has consequential personal/ sentimental impact.**
- **Judicial notice o the value of the Naira vis-à-vis other currencies should be taken by our courts and is a relevant factor to be considered. Our courts should**

keep up with the time and economic trend in the country and in particular with the prevailing decline in the purchasing power of the Naira over the past years.

- **The primary object of an award of damage is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm [exemplary damages].**
- **An award of damages can only be upset or interfered with by an appellate court if either the trial court acted or proceeded upon wrong principles of law or the amount awarded by the trial court is manifestly and extremely high or low.**
- **An appellate court will interfere where the trial court acted under a mistake of law or acted in disregard of principles or acted under a misapprehension of facts or took into account irrelevant matters or failed to take account of relevant matters or where injustice would result if the Appeal Court does not interfere.**
- **An appellate court will reverse the amount of damages where the amount awarded was too extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damages to which the plaintiff is entitled or where the circumstances calling for such interference are shown to the appellate court.**

In **Odogu vs. A.-G. Fed.** *(supra),* which the first respondent also cited, appellant was detained for about eight years but the trial court only awarded him a sum of N2,000.00 as damages. The Court of Appeal increased the amount of damages to N75,000.00. Still dissatisfied, the appellant appealed to this court for a review. This court allowed the appeal and increased the amount of damages to N200,000.00.

I must point out that the quotations from the judgment attributed by the appellants in their brief to this court in **Odogu's Case** *(supra),* was made by the Court of Appeal in the judgment appealed against. Even so, this coiurt agreed with the following passage by that court:

A **Whatever compensation is awarded should truly reflect not only the pecuniary loss of victim but also the abhorrence of society and the law for such gross violation of human rights, particularly the right of personal liberty, as in this case. An**
B **unwitting trivialization of a serious matter by an inordinately low award should be avoided. Personal liberty of the individual is a commodity of an inherently high value.**

C In this case, the appellants cannot seriously equate their situation to that of **Joseph Odogu**, who had spent over eight years in detention; they admitted that they were detained for over 24 hours [30 hours].

However, I am struck by the observation of the Court of Appeal in its
D judgment that this court approved of in **Odogu's case** *(supra),* which, in my view, resonates deeply or strikes a chord in this appeal. The said case also dealt with the enforcement of fundamental rights, and the Court of Appeal per Ayoola, JCA, as he then was) observed:

E

> **An unwitting trivialization of a serious matter by an inordinately low award should be avoided. Personal liberty of the individual is a commodity of an inherently high value.**

F

In this case, the appellants claimed a sum of ***"N50,000,000.00*** *being aggravated and exemplary damages against the respondents jointly and/or severally* ***in favour of each of the appellants*** *for the unlawful and*
G *unconstitutional arrest and/or detention of the applicants".*

In its judgment, the Court of Appeal held that the respondents failed to prove the allegation that there was a contract scam, which triggered the arrest and detention of the second to fifth appellants. If found that third to fifth
H respondents embarked on what it called *"recovery of debts",* which is *"definitely"* not part of their mandate, *"as there is no such provision under the EFCC Act".* It concludes that the arrest and detention of the appellants was unjustifiable; that it is *"wrongful and unconstitutional",* and that the *"3rd – 5th*
I *respondents are liable for the unlawful arrest and detention of the appellants".* But at the end of day, it awardaed the sum of N750,000 as damages.

It is clear, as the appellants submitted, that the Court of Appeal awarded the said sum of N750,000 to be shared by three appellants, which by arithmetical calculation makes it N250,000 for each one. Despite the fact that they claimed damages for *"each"* one of them, the Court of Appeal omitted the word *"each"* from the Order made.

Obviously, having found that the third to fifth respondents had been on a frolic of their own, so to speak, when they arrested and detained the said appellants until they signed an undertaking to pay N600 million, a sum of N250,00.00 awarded as damages is too low.

It is a mere slap on the wrist in this case that came to the court via the Fundamental Human Rights [Enforcement Procedure] Rules. This court make it very clear in **Jim-Jaja's case** *(supra)* that a person, who has established that he was unlawfully detained, as in this case, does not have to pray for compensation before he is awarded one. He is entitled to compensation automatically. But where he claims a specific amount, it is for the court to consider the claim and award, in its opinion, an amount that would be justified to compensate him.

I now ask – is the sum of N250,000 awarded by the court below as damages to an appellant a justifiable amount for depriving him of his personal liberty, which is a *commodity of inherently high value?* My answer is No. It found that the respondents went off track and were not acting according to law when they detained the appellants. In my view, to award such a miserable sum as damages screams out *trivialization of a serious matter,* and this court will have to interfere.

Obviously, the omission of the fifth appellant as an awardee for damages by the court below is clearly an error that is easily righted, and I do not need to go into the details of the appellants' arguments.

The second to fourth respondents are the *Deputy Managing Director, Chief Legal Adviser/Company Secretary, General Manager in charge of all the Branches, Public Sector and Multilateral Agencies* respectively of the first appellant, while fifth appellant is *"Manager and Account Officer of the Head Branch"* of the first appellant Bank; and as much a "*key chief officer"* of the Bank as the other appellants.

The Court of Appeal found that they were unlawfully arrested and detained and were, therefore, entitled to damages. It expressly excluded the

first appellant because it cannot be physically arrested, but made no mention of the fifth appellant in awarding damages, which is why I believe that the omission of the fifth appellant is an error that is easily corrected by this court and it will be so corrected. **Issue 3** is, therefore, resolved in favour of the appellants as well.

Issue 4 is whether the court below was wrong when it held that the appellants were not entitled to exemplary damages, as follows:

> **The appellants urged this Hon. Court to award exemplary damages because the conduct of the respondents disclose malice, fraud, cruelty, insolence and flagrant disregard of the law. I do not agree that the action of the respondents amount to such exaggerated description. In my view, the 3rd – 5th respondents acted out of misapprehension of the facts to the effect that there was a conduct scam. I will rather describe their action as executive exuberance. For a party to be entitled to exemplary damages it is his duty to prove that the action of respondent is outrageously reprehensible, which has not been so proved in this case.**

Without much ado, I will quickly say that the Court of Appeal is right. What they did was wrong, however, I do not agree that the conduct of the third to fifth respondents is as described by the appellants to warrant or justify an award of exemplary damages to the appellants.

Such damages are awarded when a defendant's willful act was malicious, violent, oppressive, fraudulent, wanton or grossly reckless – see *legal-dictionary thefreedictionary.com,* where it is also stated:

> **These damages are awarded both as a punishment and to set a public example. They reward the plaintiff for the horrible nature of what he/she went through or suffered. Although often requested, exemplary damages are seldom awarded.**

See also **Elochin (Nig.) Ltd. vs. Mbadiwe** *(supra),* relied upon by the Court of Appeal, wherein this court per Obaseki, JSC, observed that:

> **The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for the conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit; exemplary damages, punitive damages, vindictive damages, even retributory damages and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like.**

In this case, respondents were looking into an alleged contract scam, and may have acted beyond their mandate, but there is nothing to indicate that their conduct was actuated by malice or that they were propelled by ill-will to humiliate, disgrace or treat appellants badly. This issue is, therefore, resolved in favour of the respondents.

In the final analysis, the decision of the Court of Appeal stands, but the award of N750,000 as damages must be reviewed upwards. What is the appropriate amount in the circumstances of this case?

In fixing an amount for the infringement of fundamental rights, the following factors *inter alia* may be taken into consideration – see **Arulogun vs. C.O.P., Lagos State & Ors.***(2016) LPELR-40190 (CA):*

> **(g) The frequency of the type of violation in recent times;**
> **(h) The continually depreciating value of the Naira;**
> **(i) The motivation for the violation;**
> **(j) The Status of the applicant;**
> **(k) The underserved embarrassment meted out to the applicant including pecuniary losses; and**
> **(l) The conduct of the parties generally, particularly the respondent.**

In this case, the second to fifth appellants, who are chief key officers of the first

appellant; were arrested and detained for over 24 hours. There is nothing extraordinary to justify imposing a very high amount but the award of damages made by the court below is much too low. I take a middle ground and increase the amount to one million Naira each to the second, third, fourth and fifth appellants; and I so order.

This appeal is allowed in part. The decision of the court below is affirmed, however, the order for damages is set aside. In its place, an award of damages against the respondents, jointly and severally, in the sum of one million naira each to second to fifth appellants, who were unlawfully arrested, is entered as the Order of the Court.

Amina Adamu Augie
Justice, Supreme Court

PETER-ODILI, (JSC): I agreed with the judgment just delivered by Amina Adamu-Augie (JSC) and in support of the reasoning I shall make some remarks.

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

The appellants in this appeal were applicants in an action before the Federal High Court, Abuja Division where they sued the respondents as 1st – 5th respondents respectively for the following reliefs:

CLAIM

1. A declaration that the claim of the 2nd respondent to a refund of the sum N600 million for an alleged non performance by Julius Berger Nigeria Plc and Nigeria Westminister Dredging and Marine Limited of a contract for the dredging of the lower river Niger under an advance payment guarantee issued by the 1st applicant in spite of the disputed claims by Julius Berger Plc and Nigeria Westminister Dredging Marine Limited against the 2nd respondent is a dispute referable to the civil court only in accordance with the constitution.

A

2. A declaration that the 2nd respondent having returned the advance payment guarantee issued by the 1st applicant is no more entitled to ask the 1st applicant to refund any money.

B

3. A declaration that the dispute as to who is owing who as between the 2nd respondent and Julius Berger Nigeria Plc and Nigeria Westminister Dredging Marine Limited is a civil and not a criminal matter.

C

4. A declaration that the 3rd – 5th respondents have no jurisdiction to arrest or detain the 2nd 5th applicants over a contractual matter at all.

D

5. A declaration that the arrest and detention of the 2nd – 5th applicants between 9th September, 2004 at Lugbe Police Station, Abuja by the 3rd – 5th respondents at the instance of the 2nd respondent constitutes a violation of the 2nd – 5th applicants fundamental rights guaranteed under sections 34, 35 and 41 of the 1999 constitution and Articles 1, 4, 5, 6 and 12 of the African Charter on Human and People Rights (Ratification and Enforcement) Act Cap 10, Laws of the Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

E

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G

6. A declaration that the action of the 3rd – 5th respondents forcing the 2nd applicant to issue an undertaking to pay the sum of N600 million within a month as condition for bail of the 2nd – 5th applicants after detaining them for two days is unknown to law, unconstitutional, irregular, null and void.

H

7. An order setting aside the undertaking extracted forcefully and under duress from the 2nd applicant on the 10th September 2004 by the 3rd – 5th respondents as a condition for the bail of the 2nd – 5th applicants for

I

being unknown to law, unconstitutional, irregular, null and void.

8. An order of injunction restraining the respondents either by themselves, their agents, privies, assigns or anybody howsoever described from further arresting, detaining, threatening, harassing or molesting the applicants over the contractual transaction between the 2nd respondent and the 1st applicants customers or enforcing the undertakings issued by the 2nd applicant or demanding or further demanding from the 1st applicant.

9. N50,00,00.00 being aggravated and exemplary damages against the respondents jointly and or severally in favour of each of the applicants for the unlawful and unconstitutional arrest and/or detention of the applicants.

The 2nd respondent entered appearance and filed a preliminary objection asking for the striking out of the action against the 2nd respondent.

Counter-affidavit of the 3rd – 5th respondents: The 3rd – 5th respondents filed a 13 paragraphed counter affidavit opposing the suit on the merits.

The matter proceeded to hearing. The applicants opposed the notice of preliminary objection. Arguments were canvassed on the notice of preliminary objection as well as the applicants substantive application for enforcement of rights dated 20th September 2004. I refer to the court's proceedings of Monday, the 1st day of November 2004; Thursday the 24th day of February 2005 and Friday the 4th day of March 2005.

Judgment of the Federal High Court

The court upheld the 2nd respondent's preliminary objection and struck out its name from the suit. The learned trial judge also held that the substantive suit lacked merit; and, accordingly dismissed the same.

At the risk of repetition, but for the purpose of emphasis, it is important to state that the learned trial judge resolved the issues in his judgment

delivered on the 29th day of August, 2005, as follows:

1. **The court held that claim was not established against the 2nd respondent, and consequently struck out its name.**

2. **The court held that the declaratory reliefs sought on the contract cannot be redressed vide the Fundamental Rights Enforcement Procedure Rules.**

3. **The court further held that 3rd – 5th respondents have the power to arrest and investigate contract scam and as the arrest was not shown to be unconstitutional, the other claims of the applicants have failed and the action accordingly dismissed.**

The Court of Appeal

By a notice of appeal dated the 29th day of August 2005, the applicants, being aggrieved, appealed to the Court of Appeal on six grounds. The amended notice of appeal dated 16th day of April, 2012 of six grounds. The Court of Appeal delivered a judgment on 7th February 2013 in which it allowed the appeal in part.

The court below agreed with the appellants that the principal reliefs were for enforcement of Fundamental Human Rights and the ancillary reliefs which were not fundamental human rights reliefs could rightly be claimed along with the fundamental human rights reliefs and as such the suit was rightly commenced by Fundamental Human Rights procedure and reversed the judgment of the court below granting all the reliefs of the appellants except relief 2. Relief 2 was against the 2nd respondent and the lower court held that the trial judge was right when he upheld the preliminary objection of the 2nd respondent by striking out its name as there was no evidence to show that it actively caused the arrest and detention of the appellants.

However, in granting the reliefs, the court below awarded a low amount of N750,000.00 as general damages in favour of the 2nd 4th appellants who are the principal chief executive officers of the 1st appellant, omitted or declined to

award damages to the 5th appellants, declined to award damages to the 1st appellant because it is an artificial person and therefore according to the court below, could not be arrested and detained, and decline to award exemplary damages against the respondents because even though the court below held that they breached the Fundamental Human Rights of the appellants but it was according to the learned justice of the court below **"out of misapprehension of the facts to the effect that there was a contract scam. I will rather describe their action as executive exuberance".**

On the 1st November, 2017 date of hearing learned counsel for the appellants being absent, had their appellants' brief of argument settled by Tunder Babalola, filed on 15/11/13 and deemed filed on 24/4/17 was taken as argued as the party was served. However on the 9th November, 2017 learned counsel wrote explaining the lack of notice to him for which he could not personally attend court. Folabi Kuti of counel for the 1st respondent adopted his brief or argument filed on 14/7/14 and deemed filed on 24/4/17.

Adeyinka Adere, learned counsel for the 2nd respondent did not file any brief.

The brief of argument of the 3rd – 5th respondents was settled by Chief Godwin Obia (SAN) and in his absence even though served the brief filed on 19/5/15 was deemed as argued.

The appellants raised four issues for determination, viz:

1. **Whether or not the learned justices of the Court of Appeal were wrong when they held that the 1st appellant being a bank is an artificial person who cannot physically be arrested and detained and consequently was not entitled to damages (Ground 1).**

2. **Whether or not the learned justices of the Court of Appeal were wrong when they awarded just N750,000.00 (Seven hundred and fifty thousand Naira) as general damages in favour of the 2nd – 4th appellants having regard to the pleadings and evidence before the lower court. (Ground 2).**

3. **Whether or not the learned justices of the Court of**

A

Appeal were wrong when they omitted and/or declined to award damages to the 5th appellant thereby occasioning a miscarriage of justice. (Ground 3).

B

4. Whether or not the learned justices of the Court of Appeal were wrong when they held that the appellants were not entitled to exemplary damages (Ground 4)

C

The issues raised by the 1st respondent are as follows:

1. Whether in the circumstances of this case, the amount of damages by the lower court ought to be reviewed upward.

D

2. Whether having held that the respondent acted out of the misapprehension of the facts to the effect that there was a contract scam, the Court of Appeal was right in refusing to award exemplary and aggravated damages in favour of the appellants on the basis of the evidence on record.

E

F

The issues as identified by the 3rd – 5th respondents are stated hereunder, viz:

Issue 3 with regard to the substantive appeal:

G

Having regards to the relevant circumstances of this case, whether the amount of damages awarded by the lower court ought to be reviewed upward or in favour of the 5th appellant (Grounds 2 and 3)

H

Issue 4 with regard to the substantive Appeal:

I

Whether, having found that the respondents acted out of misapprehension of facts that there was a contract scam, the Court of Appeal was right in refusing to

award exemplary and aggravated damages in favour of the appellants on the basis of the evidence on record.

I shall make use of the issues as crafted by the appellants.

ISSUES 1-4

1. **Whether or not the learned Justices of the Court of Appeal were wrong when they held that the 1st appellant being a bank is an artificial person who cannot physically be arrested and detained and consequently was not entitled to damages (Ground 1).**

2. **Whether or not the learned Justices of the Court of Appeal were wrong when they awarded just N750,000.00 (Seven hundred and fifty thousand Naira) as general damages in favour of the 2nd – 4th appellants having regard to the pleadings and evidence before the lower court. (Ground 2)**

3. **Whether or not the learned Justices of the Court of Appeal were wrong when they omitted and/or declined to award damages to the 5th appellant thereby occasioning a miscarriage of justice.**

4. **Whether or not the learned Justices of the Court of Appeal were wrong when they held that the appellants were not entitled to exemplary damages.**

Learned counsel for the appellant, Tunde Babalola Esq. contended that it is trite that since the issue of exemplary damages was unchallenged and uncontroverted evidence before the court below it is deemed admitted and accepted by the respondents as the correct position. That it is manifestly clear from the evidence and pleadings that the 2nd – 5th appellants are the key officers of the 1st appellant and the natural implication of their incarceration was financial loss and loss of reputation to the 1st appellant in millions of naira.

Their personal liberty is a commodity of high value to the 1st appellant who acts through them. He cited **Odogu vs. A.G. Federation** (1996) 7 NWLR (Pt. 456) 508 at 518; **Onwu vs. Nka** (1996) 7 NWLR (Pt. 458) 19 etc.

That this court should reverse the award of N750,000.00 as general damages in favour of 2nd – 4th appellants as being manifestly low in the circumstances to the amount claimed.

Learned counsel for the appellants submitted that all the appellants' fundamental rights were breached but omitted or declined to award damages to the 5th appellant who is entitled to compensation and public apology. He referred to **Jim-Jaja vs. COP Rivers State** (2013) 6 NWLR (Pt. 1350) 225 at 243 – 245; **Udengwu vs. Uzuegbu** (2003) 12 NWLR (Pt. 836) 136 at 153.

That exemplary damages ought to be awarded here pursuant to section 35 (1) and (6) and Section 46 (2) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN).

In reaction learned counsel for the 1st respondent contended that this appeal is fought by the appellants on an obiter dictum and not on the ratio decidendi of the case and so this court should not oblige the appellants. That there is no basis for the interference of this court to the decision of the court below. He cited numerous judicial authorities such as **Onago vs. Micho** (1961) 2 SCNLR 101; **African Newspapers Ltd vs. Ciroma** (1996) 1 NWLR (Pt.423) 156.

That the affidavit evidence established the arrest and subsequently was sequel to a reasonable suspicion that they committed an offence.

That the instant case falls within the exception to the general guarantee of the right to personal liberty. He cited **Abia State University vs. Anyaibe** (1996) 3 NWLR (Pt. 439) 646 at 668.

That the award of damages is not justified in the circumstances and the law is settled that exemplary or aggravated damages will only be awarded as a expression of the court's disapproval and indignation at the wrongful conduct of the defendants now respondents and that is not applicable in the case at hand.

Learned counsel for the 3rd – 5th respondents contended that there was reasonable suspicion that the appellants committed an offence that led to their arrest and subsequent detention and there is no entitlement for the award of damages. He cited **Fawehinmi vs. IGP** (2002) 7 NWLR (Pt. 787) 699.

That the appellants have not shown that the award of damages was based on a wrong principle upon which they can pray for an upward review of the award of damages made by the court below. He referred to **Prof. Ajibayo Akinkugbe vs. Ewulum Holdings Nigeria Ltd & Anor.** (2008) NWLR (Pt. 1098) 375 at 398 – 399; **Siat S.A. Brussels vs. S. Sec. Ltd.** (2009) 17 NWLR pages 545 – 546; **Rabiu Hamza vs. Peter Kure** (2010) 10 NWLR (1303).

I have to state that the appellants also filed replies to the briefs of 1st respondent and 3rd – 5th respondents on 1/9/15 and deemed filed on 24/4/17 and that filed on 26/10/15 respectively. These reply briefs are so copious that they are a recasting of the appellant's brief of argument and it would really create more confusion utilizing them.

In a nutshell, the appellant posits that the 1st appellant being an artificial person is a persona-ficta which is capable of being arrested and detained and so entitled to an award of damages for breach of its fundamental human rights. That the award of N750,000.00 as general damages in favour of the 2nd – 4th appellants was manifestly low having regard to the pleadings and evidence before the lower court and that there was an omission in the court below failing to award damages to the 5th appellant even though it was held that his fundamental human rights was breached which amounted to a miscarriage of justice.

The stance of the 1st respondent is that the appeal should be dismissed and the court below right in refusing to award exemplary and aggravated damages in favour of the appellants.

The 3rd – 5th respondents were of the same position as the 1st respondents.

The appellants had sought the following reliefs at the trial court, thus:

> **"N50,000,000.00 (Fifty million Naira) being aggravated and exemplary damages against the respondents jointly and or severally in favour of each of the applicants for the unlawful and unconstitutional arrest and/or detention of the applicants".**

The Court of Appeal held thus:

Now, relief 9 for N50,000,000.00 (Fifty Million Naira) being aggravated and exemplary damages against the respondents is a consequential relief which was understandably abandoned by the trial court because of his erroneous conclusion that the arrest and detention of the appellants are constitutional. The appellants relying on Eliochim Nig. Ltd vs. Mbadiwe (1986) NWLR (Pt. 14) 47 have urged this court to award exemplary damages because the conduct of the respondents discloses malice, fraud, cruelty, insolence and flagrant disregard of the law. With due respect to the appellants, I do not agree that the action of the respondents amount to such exaggerated description. In my humble view, the 3rd – 5th respondents acted out of misapprehension of the facts to the effect that there was a contract scam. I will rather describe their action as executive exuberance.

For a party to be entitled to exemplary damages it is his duty to prove that the action of respondent is outrageously reprehensible, which has not been so proved in this case. However, the appellants are entitled to damages for their unlawful arrest and detention. By virtue of Section 16 of the Court of Appeal Act, the Court of Appeal is empowered to exercise the powers and functions of the lower court which includes the award of damages. In the circumstances+, I hereby invoke the said power and award damages against the respondents jointly and severally in the sum of N750,000.00 (Seven hundred and fifty thousand Naira) in favour of the 2nd - 4th appellants who were unlawfully arrested and detained. The 1st appellant being a bank is an artificial person, who cannot physically be arrested and detained.

That was on appeal from the judgment of the trial court which excerpts are here below thus:

"By the Police Act, they have the power to investigate complaints. By the EFCC Act, they have the powers of the

police by section 6(6) and Section 7 they have the power to investigate contract scam which the complaint is alleging and to investigate any offence under the EFCC Act."

On claims 4 and 5, I fund that the 3 5 (sic) have the power to arrest and investigate contract scam and as the arrest has not been shown to be unconstitutional, the 4 and 5 claims of the applicants fail and the action is accordingly dismissed.

For a recap of the background to where we are, the claims of the now appellants are captured below with none of the appellants excepting thus:

1. **"A declaration that the claim of the 2nd respondent to a refund of the sum of N600 million for an alleged non-performance by Julius Berger Nigeria Plc and Nigeria Westminister Dredging and Marine Limited of a contract for the dredging of the lower River Niger under an advance payment guarantee issued by the 1st applicant in spite of disputed claims of Julius Berger Nigeria Plc and Nigeria Westminister Dredging and Marine Limited against the 2nd respondent is a dispute referable to the civil court only in accordance with the constitution.**

2. **A declaration that the 2nd respondent having returned the advance payment guarantee issued by the 1st applicant is no more entitled to ask the 1st applicant to refund any money.**

3. **An order of injunction restraining the respondents either by themselves, their agents, privies, assigns or anybody howsoever described from further arresting, detaining, threatening, harassing or molesting the applicants over the contractual transaction between the 2nd respondent and the 1st**

applicant's customers or enforcing the undertaking issued by the 2nd applicant or demanding or further demanding from the 1st applicant.

4. Aggravated and exemplary damages against the respondents jointly and/or severally in favour of each of the applicants for the unlawful and unconstitutional arrest and/or detention of the applicants as claimed in the statement of facts attached to this application."

It is now trite law that an artificial person is a juristic personality (persona-ficta known to law and accorded due rights under our laws and can only act through its agents or servants who are human beings. Therefore when the agents, servants or officers of such juristic persons are arrested and detained especially key officers like in the case at hand, then the juristic person is also arrested and detained and so the direct consequence is loss of reputation and financial loss. The 2nd – 5th appellants occupied the offices and status in the 1st appellant as follows:

a. 2nd appellant is Deputy Managing Director of the 1st appellant.

b. 3rd appellant is the Chief Legal Adviser/Company Secretary of the 1st appellant.

c. 4th appellant is the General Manager in charge of all its branches, Public Sector and Multilateral Agencies.

c. 5th appellant is the manager and accounts officer of the head branch of the 1st appellant.

It is to be noted that all the appellants as applicants were well captured on record at the court of trial all laying claims jointly and so the strangeness that when the Court of Appeal made its findings that their fundamental rights were infringed upon by the respondents, they side lined 5th appellant and the explanation is not nearby.

The Court of Appeal found that there was breach of the rights of the

appellants pursuant to section 35(1) and (6) and 46 of the 1999 Constitution for (as amended) but it left out 1st appellant as an artificial person on the ground that it cannot suffer the same injuries as the human agents, that is correct but in respect to the human agents the court below omitted 5th appellant in the damages of N750,000 to each of 2nd – 4th appellants even though all the appellants without exception prayed for the aggravated damages. This court has in a long line of cases stated the policy for award of damages where the infringements of the fundamental rights of a claimant(s) are established. See ***Jim-Jaja vs. COP Rivers State*** *(2013) 6 NWLR (Pt. 1350) 225 at 243-245.*

"In the statement of facts in support of his application, the appellant, as applicant in the trial court, claimed inter alia:

"N2 million against the respondents for unlawful and illegal detention."

The claim was predicted on the fact that:

"Appellant arrest and detention since 23rd September, 2002 without any bail or charge is unlawful, illegal and ultra vires the powers of the respondents".

The above facts were not disputed nor can it be said that the appellant was arrested and detained on the allegation of forged certificate of occupancy. His arrest and detention was predicated on his failure to repay the loan he obtained from the 3rd respondent. If the appellant's arrest and detention resulted from the allegation of forgery, which is a crime, the appellant could not have been released on bail on a mere undertaking to repay the loan, a civil matter.

This claim by the 3rd respondent is in conflict with the fact as stated in the 3rd respondent's brief. The criminal allegation of forgery was a ploy by the respondents to settle a purely civil matter – the recovery of the loan obtained from the 3rd

respondent by the appellant. It is unfortunate that the 1st and 2nd respondents at the instance of the 3rd respondent, on the pretext of investigating a case of forgery, converted their office into a debt recovery outfit. There is no appeal against the finding of the lower court that the appellant's right was violated by the respondents thereby setting aside the contrary decision of the trial court. In any case, the 3rd respondent who did not cross-appeal nor did he file a respondent's notice cannot raise the issue of fraud which did not arise from the ground of appeal.

However, the court below erred when it refused to award damages on the ground that the appellant did not claim damages for two reasons:

1. **Appellant claimed the sum of N2 million as damages against the respondents for unlawful arrest and detention. That claim, verified on affidavit evidence was not really contested. It is the law that evidence that is relevant to the issue in controversy and is admissible, admitted and not successfully challenged, contradicted or discredited is good and reliable evidence to which probative value ought to be ascribed and which ought to influence the court in the determination of the dispute before it. See Chabasaye vs. Anwasi (2010) 3 – 5 SC 208, (2010) 10 NWLR (pt. (201) 163. Though the appellant did not specifically ask for exemplary damages for the violation of his right by the respondent, the court below ought to have awarded him the damages he claimed and proved.**
2. **Section 46 of the Constitution of FRN confers on a High Court special jurisdiction to deal with cases of violation of fundamental right of any person within the borders of this country. Section 46(2) provides:**

S. 46(2) – Subject to the provisions of this

A

> **Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provision of this section and give such directions as it may consider appropriate for the purpose of enforcing or-securing the enforcement within that state of any right to which the person who makes the application may be entitled under this chapter.**

B

C

The chapter referred to in the provision reproduced above is Chapter IV dealing with fundamental rights. Section 35 (1) guarantees to every person his/her personal liberty. The appellant's case does not fall within the exceptions numbered (a) – (f) in section 46 (2) of the constitution. The respondents did not attempt to bring their case within any of the exceptions. Section 35(6) provides:

D

E

> **"S.35(6): Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person…"**

F

A community reading of section 35(6) and 46 (2) of the Constitution (supra) will give effect to the principle of ubi jus ibi remedium. By section 35 and 46 of the Constitution, fundamental rights matters are placed on a higher pedestal than ordinary civil matters in which a claim for damages resulting from a proven injury has to be made specifically and proved. Once the appellant proved the violation of his fundamental right by the respondents, damages in form of compensation and even apology should have followed.

G

H

I

In my view and with profound respect to their Lordships, the justices of Court of Appeal, erred when, having

determined that the respondents violated the fundamental right of the appellant, they declined to award damages because none was claimed. I have demonstrated that the appellant claimed N2m as damages and even if the appellant did not so claim, he is entitled to compensation on proof of violation of his right by the respondent pursuant to S. 35(6) of the constitution.

Having rightly held that the appellant's fundamental right was violated by the respondents the court below was wrong to have denied him damages by relagating him to the status of a panhandler approaching the court for a handout.

In conclusion, I allow the appeal and pursuant to S. 22 of the Supreme Court Act and Order 8 r. 12 of the Supreme Court Rules, I order the respondents, jointly and severally to pay to the appellant the sum of N2m as damages/compensation for a violation of his fundamental right in arresting and detaining him unlawfully. No order as to cost."

I have quoted extensively the case of Jim-Jaja (supra) since it is opposite and all pours with what we are grapping with now.

I cannot resist the dicta of my learned brother, Muntaka-Coomassie JSC (of blessed memory) in the same Jim-Jaja supra thus:

"The lower court found as follows: per the lead judgment of Eko, JCA at pp 102-103 of the record. The appellant apparently was in police custody at the time his application for leave to enforce his fundamental right was filed on 8th October, 2002. Even if I believe that appellant was re-arrested on 26th September, 2002 for failing to pay back his debt to 3rd respondent; as the 3rd respondent wants it believed, this

admission further corroborates the malicious and capricious harassment of the appellant by the police at the instance of the 3rd respondent to break him down and compel him to pay his debts to the 3rd respondent. The learned trial Judge was clearly in error in holding as he did, that because the appellant suffered detention for less than 24hrs he was not unlawfully imprisoned.

For the monstrous and capricious behaviour exemplary damages would have been awarded to demonstrate that the law, indeed the fundamental rights provisions of the constitution cannot be broken with impunity. For this lawless and high handed conduct of the respondents one would (sic) invoke the principles for award of exemplary damages laid down in Rookers vs. Barnara (1964) 1 ALL ER 367 at 411 and applied in Drake vs. Evangelous (1978) 2 All ER 437."

I am at one with the appellants that the failure to award damages to the 5th appellant by the court below is an error of law and a miscarriage of justice needing the clear intervention of this court. That omission of award of damages to the 5th appellant was a mis-application of the law and a remediation is called for. See **Udengwu vs. Uzuegbu (2003) 13 NWLR (Pt. 836) 136 at 152.**

Having stated the above, I agree with the findings of the court below that there was breach of the fundamental human rights of the appellants but our area of departure are with the exclusion of 5th appellant in the award and the award of N750,000.00 is low and so the award of damages to each and every one of the appellants including the 5th would be set at N1,000,000.00 (One Million Naira).

In conclusion and from the foregoing and the better articulated lead judgment, this appeal is allowed in part as I abide by the consequential orders as made.

Mary Ukaego Peter-odili
Justice, Supreme Court

BAYANG AKAAHS, (JSC): My learned brother, Augie (JSC) obliged me in

A advance with a copy of the judgment. She resolved in a very admirable way the preliminary objection which was overruled as well as the main issues arising in the appeal. I entirely agree that the 1st appellant, being an artificial person cannot maintain an action for violation of its fundamental human rights
B because the 1st appellant is incapable of being arrested and detained. The 2nd – 5th appellants, being natural persons are the ones who can institute an action for the enforcement of their fundamental human rights.

C One of the factors which a court should take into consideration in the award of damages for unlawful arrest and detention is the behaviour displayed by the respondents in arresting the 2nd – 5th appellants on a suspicion of being involved in a contract scam which no doubt damages their reputation apart
D from being deprived of their liberty for a period of over 24 hours and before they could regain their liberty the 2nd appellant was forced to issue an undertaking to pay the sum of N600 million within a month as a condition of their bail. It turned out that the dispute between the 1st appellant and the 2nd
E respondent was an alleged breach of contract namely advance payment guarantee and recovery of N2.034 billion plus accrued interest for which the 2nd respondent could have instituted a civil action and upon getting judgment in its favour to proceed and levy execution for the recovery of the amount.

F Since the appeal is centred on the award of damages, another factor that an appellate court should consider before interfering with the award is if the award is manifestly and extremely high or low. See: **Odogwu vs. A-G Federation (1996) 6 NWLR (Pt. 456) 508; Onwu vs. Nka (1996) 7 NWLR**
G **(Pt. 458) 19.** It is obvious that the award of N750,000.00 as damages to 2nd, 3rd and 4th appellants and leaving out the 5th appellant which comes to N250,000.00 per person in abysmally low. If the primary object of an award of damages is to compensate the plaintiff for the harm done to him and
H secondly to punish the defendant for his conduct in inflicting that harm, then there is need to review the award upwards especially taking into consideration the depreciation in the purchasing power of the Niara. See: **Elochin (Nig.) Ltd vs. Madiwe (1986) 1 NSCC (Pt. 1) 42 at 55** per Obaseki JSC.

I I agree entirely with the assessment made by my Lord, Augie (JSC) in arriving at what is reasonable in the circumstances. Each of the 2nd – 5th appellants is entitled to N1,000,000 as damages against the respondents jointly and severally for the unlawful arrest and detention they suffered in the

A hands of the 3rd – 5th respondents.

Appeal is allowed in part.

K. B. AKAAHS
Justice, Supreme Court

B

INYANG OKORO, (JSC): I read in draft the judgment of my learned brother, **Amina Adamu Augie**, (JSC) just delivered. I am in agreement with the reasons adumbrated and the conclusion that this appeal succeeds in part.

C My learned brother has adequately resolved the salient issues submitted for the determination of this appeal and the views expressed therein accord with mine. However, I propose to make a few comments in support of the judgment only.

D Damages have been defined as ***"the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tot."*** It could also be expressed as ***"the recompense given by process of***

E ***law to a person for the wrong that another has done him."*** (See **Halsbury Laws of England: 3rd Edition Vol. 11 at 216); Machine Uumudje & anor vs. Shell BP Petroleum Development Company Nig. Ltd (1975) LPELR-3375 (SC), R.O, Iyere vs. Bendel Feed & Flour Mill Ltd. (2008) 18 NWLR**

F **(Pt. 1119) 300.**

In **Eliochin Nigeria Ltd & ors vs. Victor Ngozi Mbadiwe (1986) 1 NWLR (Pt. 14) P. 47,** this court held that the primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible

G secondary object which is to punish the defendant for his conduct in inflicting that harm. It was further held that such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit: exemplary damages, punitive damages, vindictive

H damages and even retributive damages. This comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like.

I In the instant appeal, the lower court adjudged the arrest and detention of the 2nd, 3rd, 4th and 5th appellants by the 3rd respondents as illegal and unlawful as the allegation of contract scam was not proved. I agree that the award of the

A sum of N250,000= to each of 2nd, 3rd and 4th appellants was grossly inadequate in view of the brazen disregard of the rule of law by the respondents. Having held that the "3rd – th respondents are liable for the wrongful arrest and detention of the appellants", the court below trivialized that decision by awarding a paltry sum of N750,000 to the 2nd – 4th appellants. Worst of all, the 5th appellant was left out of the award without any reason whatsoever. Since the lower court had held that the 5th appellant's arrest and detention was unlawful, he is also entitled to be compensated in damages.

Having said that, I agree with the learned brother in the lead judgment that the sum of money awarded the 2nd – 4th appellants be increased to N1m (one million naira) each. Also, the 5th appellant is also entitled to damages and he shall be paid the same sum as the other appellants. The respondents shall be jointly and severely liable to pay the said damages. The 1st appellant, not being a person capable of being arrested and detained, is not entitled to damages in the matter at hand. It may have its remedy elsewhere. This appeal succeeds in part.

John Inyang Okoro
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Amina Adamu Augie,** JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. I find merit in this appeal, it is hereby allowed by me. I abide by all the orders contained in the lead judgment.

Sidi Dauda Bage
Justice, Supreme Court

GABRIEL DAUDU
AND
FEDERAL REPUBLIC OF NIGERIA

SC.172/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**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 – Onus on the appellant thereto.

APPEAL: Specific findings – Appellant failed to appeal against adverse findings of a trial court – Implication.

CONSTITUTIONAL LAW: Presumption of innocence – S.36(5) of CFRN 1999 – Whether does not apply in proof of money laundering offences – S. 19 (3) of Money Laundering Act.

COURT: Evaluation of Evidence – Credibility of witness – Whether can be determined exclusively by the trial court – When an appellate court may interfere.

COURT RULES: Procedure rules – Where a person is charged – Whether court applies procedural rules relevant when accused was charged or procedural rules relevant when offence was committed – Relevant considerations

thereof.

CRIMINAL LAW: Money laundering – Nature and purpose

CRIMINAL LAW: Money laundering – Nature – Duties of EFCC – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Burden of proof – Money laundering – S. 19(3) of Money Laundering Act – Onus on accused to prove source of his lodgments.

CRIMINAL LAW AND PROCEDURE: Proof – Money laundering offence – Nature of proof – How discharged.

EVIDENCE: Admissibility – Computer print out – S. 84 of Evidence Act 2011 – Imperatives thereof.

EVIDENCE: Recovered exhibits – What determines their admissibility in evidence during criminal proceedings – Relevant principles thereof.

STATUTE: Applicability of statute – Whether it is not the substantive law in force when an offence is committed that will be applied when an accused is charged.

PRACTICE AND PROCEDURE: Party relying on computer printouts for his defence – Party urging court to expunge computer printouts for contravening S. 84 of Evidence Act 2011 – Whether party cannot approbate and reprobate.

Issues for Determination

1. Whether the Court of Appeal was right or correct in law to have in one breadth refused/struck out the respondent's preliminary objection and immediately thereafter to consider the same objection as issues being raised by the same court *suo motu* before striking out the

appellant's issues 3, 4, 6 and 7 which were predicated on grounds 4, 5, 8, 9 and 10 of the notice of appeal? (Issue No 1) (Ground 2 of the Notice of Appeal).

2. **Whether on the merit the court below was correct in eliminating issues 3, 4 and 7 from the case of the appellant? Issue No 2) (Grounds 3, 4 and 5 of the notice of appeal).**

3. **Whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court placing the onus of proving his innocence in the 75 counts of money laundering on the appellant? (Issue No 3) Grounds 6 and 7 of the notice of appeal).**

4. **Whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court that the prosecution had established all the ingredients of the offence of money laundering against the appellant? (Issue No 4) Grounds 1 and 8 of the notice of appeal).**

5. **Whether the court below was correct in law in affirming the decision of the trial Federal High Court that all the uncertified documents and bank generated documents are admissible in evidence and if answered in the negative what is the effect of their expurgation from the case? (Issue No. 5) Grounds 9, 10, 11 and 12).**

Facts of the Matter

On 30th October, 2014 the Economic and Financial Crimes Commission (EFCC) preferred a 208 counts charge against the accused/appellant before the Federal High Court, Lokoja in Charge No. FHC/LKJ4C/2011 presided over by I.E. Ekwo J. He pleaded not guilty to each of the counts. Hon. Albert Soje (then Majority Leader) of the Kogi State House of Assembly was also arraigned with accused/appellant on a two count charge but at the end of the trial he was acquitted and discharged.

The appellant was however convicted on 75 counts while he was acquitted and discharged on the remaining 133 counts. The appellant appeal against this decision to the Court of Appeal, Abuja in his notice of appeal dated 17th May, 2016 containing 11 grounds of appeal. A preliminary objection attacking grounds 4, 5, 6, 7, 8, 9 and 10 was raised and argued in the respondent's brief which was filed on 14th November, 2016. The lower court upheld the objection and struck out grounds 4, 5, 8, 9 and 10 of the notice of appeal as well as issue 1, 2 and 4. The appeal was dismissed and this prompted the further appeal to the Supreme Court.

Held: (Unanimously dismissing the appeal)

1. *The nature and purport of money laundering*
Money Laundering is a global scourge that affects countries worldwide, Nigeria not being an exception. It has been described as the washing of illegitimate money in a bid to make it appear clean or legitimate. It involves the process of transforming the proceeds of crime into ostensibly legitimate money or other assets.

The growth in drug trade, human and drug trafficking developments in technology which facilitated the transfer of proceeds of trade in ways hitherto unknown among others brought the attention of government to this menace. The government then started a clampdown on this offence by establishing different policies and also joining various international bodies aimed at combating money laundering.

The EFCC was established in 2004. One of its primary functions is to investigate allegations of money laundering. It was to strengthen the EFCC to fulfill its mandate that the 2004 Money Laundering (prohibition) Act was passed. The commission is invested with wide powers critical for carrying out this mandate, including the power to place bank accounts under surveillance and carry out other actions designed to assist investigators to identify the owners and locate the proceeds or properties derived from crimes, a power hitherto vested only in the National Drug Law Enforcement Agency (NDLEA).
(*P 113 Paras C – H)*

2. *The nature of proof required in money laundering offences*
Proving Money Laundering cases is a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK. Even though section 36(5) of the 1999 Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the burden of proof on the defendant. The section provides thus:
"36(5) Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts".

By Section 19(3) of the Money Laundering Act, if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source of income, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in narcotic drugs or psychotropic substances or of any illegal act.

To explain the point further, where A is a fixed salary earner and suddenly his account is credited with an amount beyond his income or has property which his legitimate income cannot afford, the burden shifts to him to explain how he got the money with which he bought the property or the legitimate transaction he was engaged in for which the account was credited. (*Pp 113 – 114 Paras I – G)*

3. *Appellant Court cannot interfere with finding of facts unless perverse*
At the trial court the prosecution called six witnesses and tendered several exhibits including investigation reports while the defence called seven witnesses. The appellant testified as DW7. PW1 stated that

two petitions written by Ogori/Magongo Legislative Council and Voice of Ogori/Magongo Local Government Area Home and Diaspora alleging fraudulent practices against the appellant and Hon. Albert Soje Adesina addressed to the Chairman of EFCC referred to his section for investigation. In the course of the investigations two letters were written to UBA and Oceanic Bank. The letter to the UBA requested for the statement of account of the Local Government Council and the statement of account of the 1st accused/appellant while the letter to Oceanic Bank requesting for the statement of the 1st accused. During the investigation one of the contractors Adamu Abbah was found to have been paid through the Local Government Account at UBA. Two payments were made to him i.e. N1.6 million and N2million by cheque. These two cheques were cleared by Adamu Abbah through his First bank account. After clearing, the same Adamu Abbah issued cheque of N2million to his son, Asi Abbah who cashed the cheque at First Bank and paid cash into the 1st accused account in Oceanic Bank in three tellers of N800,000.00, N800,000.00 and N400,000.00 the same day through tellers. There were other payments which were made into the Oceanic Bank account by the 1st accused and other people including one Louis Onifade a Council Official Staff. On 4 December, 2008, 1st accused paid the sum of N3.5 million into the account by cheque and on 5 December, 2008, he made payment of 9.2 million also through a cheque and N4.2million. In the month of June, 2009 he paid in a cheque of N5million by himself.

These findings of the learned trial judge went to the credibility of witnesses. An appellate court cannot interfere with such findings unless they are shown to be perverse. *See*: Lagga vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427; Agbakoba vs. I.N.E.C (2008) 18 NWLR (Pt. 1119) 489. (*Pp 114 – 115; 119 Paras G – D; D – E)*

4. The effect where appellant fails to appeal against specific findings adverse to him

There is no appeal against the findings made by the learned trial Judge and so the conclusion reached by the learned trial Judge that the oral testimony and documentary evidence of DW7 failed to address the lodgements in count 3 stands. The appellant therefore failed to give a satisfactory account of the monies which were lodged into his account

between 2008-2011 when he was the Chairman of Ogori/Magongo Local Government. (*P 119 Paras E – G)*

5. *Application of the substantive law when an offence was committed*
It is the substantive law in operation at the time an offence is said to have been committed that has to be referred to when a person is being charged to court. Thus if a person is charged with offence of Money laundering in 2010, it must be the Money Laundering Act as at 2010 that will be used and not the Money Laundering Act at the time he is finally arraigned for trial in court but the procedural law to be used would be the current one. Thus if the Evidence Act or the Criminal Procedure Law has been amended or replaced and a new one is in place at the time of trial, it is the amended or newly enacted Evidence Act/Criminal Procedure Code that will be used to guide the trial. Thus it is the Evidence Act 2011 that will be used in the trial or appeal taking place in 2018 notwithstanding that the offence was committed in 2008. The accused will however be charged with the criminal offence as contained in the Criminal Law in 2008.

Learned senior counsel for the appellant argued that the documents which were tendered in court were secondary evidence which were not certified by the Ogori/Magongo Local Government Council but by the EFCC but the trial court ruled that the documents which emanated from Ogori/Magongo Local Government Council were discountenanced by the Court and if that is so, the appellant has suffered no injury since the said documents were not considered when the offence was proved.

It is not the law as stated by the learned trial judge that since the charge was filed on 31st March, 2010, the Evidence Act 2011 will not apply because the law does not have retrospective effect. The statement only applies to substantive and not adjectival or procedural law. *See:* Federal Republic of Nigeria vs. Mike (2014) 1 SC (Pt.1) 27.
(*Pp120 – 121 Paras D – A)*

6. *Principles relevant to the admissibility of recovered Exhibits*
Learned counsel for the appellant attacked the admissibility of exhibits PW1-C2, PW1-CS, PW1-D1, PW1-E2, PW1-F, PW1-G, PW1-J, PW1-

J1, PW1-J2, PW1-J3, PW1-J4 and PW1-L which were recovered in the course of investigation. I agree with the learned trial judge that the custody of any document recovered in the course of investigation belongs to the body statutorily or constitutionally empowered to posses such documents upon recovery and their admissibility is determined by how relevant they are to the proceedings. At the end of the day it is the weight to be attached to such recovered evidence that should engage the mind of counsel. *See:* Nwabuoku vs. Onwordi (2006) LPELR SC. 344/2001; (2006) 5 SC. (Pt.II) 103; Musa Abubakar vs. EI Chuks (2007) 18 NWLR (Pt. 1066) 386. (*P 121 Paras B – D)*

7. *Presumption as to the contents of computer generated documents*
There is no doubt that the documents are computer generated which the EFCC got from the various banks during investigation. It is therefore presumed that before the banks surrendered them to the EFCC, they must have certified that the contents of the statement of accounts contained therein were correct. Even the appellant relied on the contents of the documents for his defence. The lower court pointed out that the appellant cannot approbate and reprobate. He cannot rely on the documents for his defence and at the same time ask that they be expunged from the records. The documents sought to be expunged were found to have been duly certified. (*P 123 Paras C – E)*

8. *Court did not revisit the issues raised in the preliminary objection already struck out.*
The appellant had also raised his concern that the grounds for which the preliminary objection was despatched was later used by the Court of Appeal in its consideration of the issues before it. That posture is not borne out of what transpired as showcased by the record as what the court below did in giving reasons for its findings and conclusions in the issues raised may have looked like a revisit to the preliminary objection and its related features, that did not remove the right of the court to state its reasons for the determination in the main appeal however similar those reasons may appear as the ones in the preliminary objection earlier struck out. This court had in the case of Agbanelo vs. UBN (2000) 7 NWLR (Pt. 666) 534 at 557 per Karibi-Whyte (JSC) stated that it is an elementary and essential ingredient of the judicial

function that reasons are to be given for decisions. That it is crucial or important where appeals lie from the decisions and it is to be said that the reasons for decisions enable the determination on appeal whether the decision was merely initiative and arbitrary or whether it is consistent with established applicable principles. It has to be stated and emphatically too that if a judgment is delivered without supporting reasons it is an irritation or arbitrariness, a rule akin to tossing the coin and whatever side shows up in the decision, a situation that would likely produce in judicial anarchy. The point has to be made that a judgment will not be set aside just because the reasons given were bad if the judgment itself is right.

Indeed from what the record shows, the court below stated its reasons and how it came by the findings and decisions it arrived at and I dare say elaborately too, it cannot be properly posited that the court below gave its decision without reasons. (*P 131 Paras A – G)*

9. *Onus of proof may in some circumstance shift to the accused.*

The stance of the appellant is that the court below shifted the burden of proof in a criminal trial to the appellant to prove his innocence instead of what is statutorily provided for the prosecution/respondent to prove the guilt of the accused beyond reasonable doubt. Of a fact is that the onus or burden of such proof in a criminal trial such as this is on the prosecution to establish the ingredients of the offence beyond reasonable doubt and when the prosecution has done that and in so doing so once the prosecution having placed sufficient evidence on the guilt of the appellant either by direct or circumstantial or presumptive evidence beyond reasonable doubt required by law. At that stage the onus is on the accused appellant to attack or rebut the evidence so presented by the prosecution by a contrary to what the prosecution has laid out. That is not tantamount to shifting the burden of the appellant to prove his innocence. *See:* Adeniji Vs. The State (2001) 25 WRN; Uwe Idigbi Esai & Ors Vs. The State (1976) 11 SC 39; Peter Nwachukwu Eze Vs. State (1976) 1 SC 125. (*P 135 Paras E – H)*

10. *Onus on appellant to disprove concurrent findings*

In this regard the concurrent findings of fact of the courts below cannot be faulted as the appellant did not push across any perversity in those

findings nor any wrong application of the law and so this court is loath to go like an elephant in a tea shop pushing down everything in its wake all in an effort to find a lapse in those findings of the two courts below that are just not there. Therefore the option open to this court is to let along those findings of facts based on what was placed before those courts and the sound reasoning those courts posited thereafter. (*P 138 Paras A – B)*

Nigerian Cases Cited

Adeniji vs. The State (2001) 25 WRN;
Agbakoba vs. I.N.E.C (2008) 18 NWLR (Pt. 1119) 489.
Agbanelo vs. UBN (2000) 7 NWLR (Pt. 666) 534
Federal Republic of Nigeria vs. Mike (2014) 1 SC (Pt.1) 27.
Lagga vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427;
Musa Abubakar vs. EI Chuks (2007) 18 NWLR (Pt. 1066) 386.
Nwabuoku vs. Onwordi (2006) LPELR SC. 344/2001; (2006) 5 SC. (Pt.II) 103;
Peter Nwachukwu Eze vs. State (1976) 1 SC 125.
Uwe Idigbi Esai & Ors vs. The State (1976) 11 SC 39;

Nigerian Statutes Cited

The 1999 Constitution – Section 36(5.
The Money Laundering Act – Section 19(3)

Representation

J.B. Daudu (SAN), E.C. Ukala (SAN) for appellant appearing with P. B. Daudu (Esq.) Adedayo Adedeji (Esq.) and C.E. Ogbozor (Esq.)

Wahab Shittu (Esq.) with Abdulwahab Muhammed (Esq.) A.A. Abdraheem (Esq.) and Rafat Olatunde (Esq.) for respondent.

BAYANG AKAAHS (JSC) (Delivering the Lead Judgment): On 30 October, 2014 the Economic and Financial Crimes Commission (EFCC) preferred a 208 counts charge against the accused/appellant before the Federal

High Court, Lokoja in Charge No. FHC/LKJ4C/2011 presided over by I.E. Ekwo J. He pleaded not guilty to each of the counts. Hon. Albert Soje (then Majority Leader) of the Kogi State House of Assembly was also arraigned with accused/appellant on a two count charge but at the end of the trial he was acquitted and discharged.

The appellant was however convicted on 75 counts while he was acquitted and discharged on the remaining 133 counts. The appellant appeal against this decision to the Court of Appeal, Abuja in his notice of appeal dated 17 May, 2016 containing 11 grounds of appeal. A preliminary objection attacking grounds 4, 5, 6, 7, 8, 9 and 10 was raised and argued in the respondent's brief which was filed on 14 November, 2016. The lower court upheld the objection and struck out grounds 4, 5, 8, 9 and 10 of the notice of appeal as well as issue 1, 2 and 4. The appeal was dismissed and this prompted the further appeal to this court. 12 grounds accompanied the notice of appeal filed on 14 March, 2017 from which Mr. J.B. Daudu (SAN) formulated the following five issues for determination:

1. **Whether the Court of Appeal was right or correct in law to have in one breadth refused/struck out the respondents preliminary objection and immediately thereafter to consider the same objection as issues being raised by the same court *suo motu* before striking out the appellant's issues 3, 4, 6 and 7 which were predicated on grounds 4, 5, 8, 9 and 10 of the notice of appeal? (Issue No 1) (Ground 2 of the Notice of Appeal).**

2. Whether on the merit the court below was correct in eliminating issues 3, 4 and 7 from the case of the appellant? Issue No 2) (Grounds 3, 4 and 5 of the notice of appeal).

3. Whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court

placing the onus of proving his innocence in the 75 counts of money laundering on the appellant? (Issue No 3) Grounds 6 and 7 of the notice of appeal).

4. **Whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court that the prosecution had established all the ingredients of the offence of money laundering against the appellant? (Issue No 4) Grounds 1 and 8 of the notice of appeal).**

5. **Whether the court below was correct in law in affirming the decision of the trial Federal High Court that all the uncertified documents and bank generated documents are admissible in evidence and if answered in the negative what is the effect of their expurgation from the case? (Issue No. 5) Grounds 9, 10, 11 and 12).**

The respondent who was represented by Wahab Shittu Esq. formulated two issues as follows:

1. **Whether there are provable fundamental jurisdictional issues vitiating the trial proceedings of the appellant?**
2. **Whether the prosecution has established the case against the appellant beyond reasonable doubt?**

Learned Senior Counsel filed an appellant's reply brief. Learned Senior Counsel argued issues 1 and 2 together. He also took issues 3 and 4 together before considering issue 5 separately.

On issues 1 and 2 learned senior counsel submitted that the Court of Appeal erred in law when in one breadth it dismissed the preliminary objection of the respondent to the appellant's grounds of appeal and in another breadth proceeded to deal with the same objection suo motu and then struck out grounds associated with issues 3, 5, 6 and 7.

Learned Counsel for the respondent argued that the Court of Appeal was right to have treated and dealt with the preliminary objection raised by the respondent separately from the issues raised in the appeal.

The preliminary objection was struck out because it was not the appropriate mode to complain about some of the grounds of appeal. The lower court stated its reasons for striking out the preliminary objection. It stated clearly that even if the objections were successful, hearing of the appeal on the remaining grounds would not be disturbed and the procedure which should have been adopted is to file a motion on notice to dispose of the matter before hearing the appeal, but not to come by way of preliminary objection. This reasoning is well grounded on the dictum of this court per Rhodes-Vivour (JSC) in **Adejumo vs. Olawaiye (2014) 12 NWLR (pt. 142) 252 at P. 279.**

Where he said:

> **"A preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal…… Where a preliminary objection would not be appropriate process to object or show to the court defects in processes before it, a motion on notice filed complaining of a few grounds or defects would suffice".**

I consider the merits of this appeal should be considered under issue 3 and 4 of the appellant's brief which is adequately covered under issue 2 in the respondent's brief. Learned senior counsel for the appellant in attacking the findings made by the learned trial judge contented that the onus fell on the appellant's shoulders to establish the lawfulness or legality of each and every lodgement he made into his accounts thus reversing the time honoured rule that the burden of proof in criminal matters lies on the prosecution. He said the Court of Appeal got it wrong and fell into the same error as did the Federal High Court by shifting the onus of proof onto the appellant and failed to ascertain whether the ingredients of the offence or Money Laundering was established beyond reasonable doubt by the prosecution. He argued that the court below in seeking to review the prosecution's evidence from pages 1828-1838 and that of the defence could not link any of the funds charged to the

Local Government funds but decided to shift the onus of proof to the appellant. It is Learned Senior counsel's arguments that all the counts revolved around the provisions of Section 14(1)(a) of the Money Laundering (Prohibition) Act, which required the proof by the prosecution of the predicate offence. Consequently, by shifting the burden of proof to the appellant, his presumption of innocence which is constitutionally guaranteed was breached by the trial court and the Court of Appeal. He submitted placing reliance on sections 131, 132 and 135 Evidence Act, 2011 that in all criminal cases, the onus of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt and the Supreme Court has interpreted the provisions of the Evidence Act in **Egbirika vs. State (2014) NWLR (Pt. 1398) 558 at 562; Kalu vs. FRN (2014) 1 NWLR (Pt. 1389) 479; Ozaki vs. State (1990) NWLR (Pt. 124) 92 at 98.** He further submitted that these statutory provisions are in alignment with the constitutional principle encapsulated in section 36 (5) of the 1999 Constitution as amended. It is argued that the Nigerian criminal jurisprudence puts the burden on the prosecution to prove that the appellant has committed a crime or illegal act i.e. misappropriation and conversion of the funds of the Ogori/Magongo Local Government Area which crime or illegal act has generated resources which the appellant has converted or transferred to his accounts with the aim of concealing or disguising the true or illicit origin thereof. The placement of the onus of explaining innocuous funds in his account, unrelated and untraceable to local government funds was colossal error on the two lower courts particularly the Court of Appeal.

Learned senior counsel maintained that the Money Laundering (Prohibition) Act 2004 and its successor legislations do not contain statutory exceptions as is the case in the UK counterpart legislations such as the English proceeds of Crime Act (POCA). It is argued that none of the witnesses called by the prosecution established anything close to money laundering against the appellant and so the prosecution failed in its primary duty to prove the ingredients of the offence of money laundering against the appellant in the 75 counts.

In responding to the arguments of Learned senior counsel for the appellant, Wahab Shittu Esq. Learned Counsel for the respondent submitted that the lower court did not reverse the onus of proof placed on the prosecution

to prove its case beyond reasonable doubt. He argued that a distinction should be drawn between the legal burden of proof beyond reasonable doubt which rests and stays with the prosecution in the criminal trial process, as opposed to the evidential burden of proof which constantly shifts from the prosecution to the defendant depending on where the pendulum of evidence swings in the proceedings, whether civil or criminal. He said that if the totality of evidence led in the proceedings before the trial court is examined, the prosecution proved its case beyond reasonable doubt.

He maintained that the prosecution placed sufficient evidence to prove the charge against the appellant beyond reasonable doubt as required by law and the onus shifted to the appellant to rebut the evidence presented by the prosecution and this did not translate to mean shifting of the burden of proof to the appellant. He gave an analogy that if in a given situation a huge lodgement of five billion Naira is found in the private account of a public officer whose total emoluments and entitlements during the period under reference should not exceed one million naira, it is the duty of the prosecution to show that the said five billion naira was found in the private account of the said public officer within the given period and also tender relevant statement of account of the public officer in proof of the said questionable lodgements, using that premise to hold that the public officer had come about the huge difference in his account from laundered funds or dirty money arising from illicit transactions. It is the duty of the affected public officer to provide explanations to show that the said amount lawfully came into his possession through his legitimate earnings and emoluments. This duty of explanation will not translate to a shifting of the burden of proof from the prosecution to the defendant, it will only mean the shifting of the evidential burden as opposed to the legal burden on the defendant to satisfactorily explain how he came about the humongous amount found in his private account.

Learned counsel for the respondent argued that it was a highly misplaced submission by learned senior counsel in stating that it was wrong to shift the burden of proof from the prosecution to the appellant pointing out that since the appellant was standing trial for money laundering, the fact that he is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his own known sources of income this may be proved and taken into consideration by the court as

corroborating the testimony of any witness in the trial and placed reliance for this submission on Section 19 of the Economic and Financial Crimes Commission (Establishment) Act 2004.

The whole of this case as I see it is built around this legal proposition enunciated by learned counsel for the respondent.

Sections 14 and 19(3) of the Money Laundering (Prohibition) Act provide as follows:

"14(1) Any Person who:

(a) Converts or transfers resources or property derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances or any illegal act, with the aim of either concealing or disguising the illicit origin of the resource or property, or aiding any person involved in the illicit traffic in narcotic drugs or psychotropic substances or any other crime or illegal act to evade the legal consequences of his action; or

(b) Collaborates in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property or rights thereto derived directly or indirectly from illicit traffic in narcotic drugs or psycho tropic substances or any other crime or illegal act commits an offence under this section and is liable on conviction to imprisonment for a term of not less than two years or more than three years.

(2) Any person who commits an offence under subsection (1) of this section shall be subject to the penalty specified in that subsection notwithstanding that the various acts constituting the offence were committed in different countries or places.

19(3) In any trial for an offence under this Act, the fact that an accused person is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his known source of income, or that he had at or about the time of the alleged offence obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the Federal High Court as corroborating any of the witness in such trial.

Money Laundering is a global scourge that affects countries worldwide, Nigeria not being an exception. It has been described as the washing of illegitimate money in a bid to make it appear clean or legitimate. It involves the process of transforming the proceeds of crime into ostensibly legitimate money or other assets.

The growth in drug trade, human and drug trafficking developments in technology which facilitated the transfer of proceeds of trade in ways hitherto unknown among others brought the attention of government to this menace. The government then started a clampdown on this offence by establishing different policies and also joining various international bodies aimed at combating money laundering.

The EFCC was established in 2004. One of its primary functions is to investigate allegations of money laundering. It was to strengthen the EFCC to fulfill its mandate that the 2004 Money Laundering (prohibition) Act was passed. The commission is invested with wide powers critical for carrying out this mandate, including the power to place bank accounts under surveillance and carry out other actions designed to assist investigators to identify the owners and locate the proceeds or properties derived from crimes, a power hitherto vested only in the National Drug Law Enforcement Agency (NDLEA).

Proving Money Laundering cases is a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem a remedy was introduced by statutorily inferring money laundering from not only the

A conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK. Even though section 36(5) of the 1999 Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the B burden of proof on the defendant. The section provides thus:

> **"36(5) Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts".**

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D By Section 19(3) of the Money Laundering Act, if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source of income, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he E made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in narcotic drugs or psychotropic substances or of any illegal act.

F To explain the point further, where A is a fixed salary earner and suddenly his account is credited with an amount beyond his income or has property which his legitimate income cannot afford, the burden shifts to him to explain how he got the money with which he bought the property or the G legitimate transaction he was engaged in for which the account was credited.

At the trial court the prosecution called six witnesses and tendered several exhibits including investigation reports while the defence called seven witnesses. The appellant testified as DW7. PW1 stated that two petitions H written by Ogori/Magongo Legislative Council and Voice of Ogori/Magongo Local Government Area Home and Diaspora alleging fraudulent practices against the appellant and Hon. Albert Soje Adesina addressed to the Chairman of EFCC referred to his section for investigation. In the course of the I investigations two letters were written to UBA and Oceanic Bank. The letter to the UBA requested for the statement of account of the Local Government Council and the statement of account of the 1st accused/appellant while the

letter to Oceanic Bank requesting for the statement of the 1st accused. During the investigation one of the contractors Adamu Abbah was found to have been paid through the Local Government Account at UBA. Two payments were made to him i.e. N1.6 million and N2million by cheques. These two cheques were cleared by Adamu Abbah through his First bank account. After clearing, the same Adamu Abbah issued cheque of N2million to his son, Asi Abbah who cashed the cheque at First Bank and paid cash into the 1st accused account in Oceanic Bank in three tellers of N800,000.00, N800,000.00 and N400,000.00 the same day through tellers. There were other payments which were made into the Oceanic Bank account by the 1st accused and other people including one Louis Onifade a Council Official Staff. On 4 December, 2008, 1st accused paid the sum of N3.5 million into the account by cheque and on 5 December, 2008, he made payment of 9.2 million also through a cheque and N4.2million. In the month of June, 2009 he paid in a cheque of N5million by himself.

One of the witnesses, Louis Olufade testified as DW3. In his evidence, he stated that the 1st accused was a businessman and a politician. He was into the business of dealership in fairly used vehicles. He DW3 was the person who managed the sales of the vehicles. He sold the cars and undertook banking transactions on behalf of the 1st accused. He also knew Adamu Abbah. He too is into sales of cars. He said they were keeping some of their cars in Adamu Abbah's car stand in Jos. After 1st accused became Chairman of Ogori/Magongo in 2004, he (PW3) started handling the business and he used to pay in money into 1st accused account in Oceanic Bank, UBA and Zenith Bank Plc.

Answering questions under cross-examination DW3 said:

> **"On 1st May, 2007 I deposited N2,350,000.00 into the personal account of the 1st accused person. I believe that the money came from the contract where we were refurbishing the National Library at Enugu. I do not have any evidence for this. On 13 February, 2007 I also deposited N900,000.00 into the personal account of the 1st accused person. The amount was for car sales. On 28 March I deposited N900,000.000. There are proceeds from the sales of vehicles. I do not have any evidence for this. On the**

same 29 March, 2008 I deposited another N900,000.00 and another N200,000.00 on 22nd May, 2008. These transactions can be found in Exhibits PW I- EI. It is not correct to say that I was assisting the 1st accused person in laundering looted fund. The name of the Company we used for the car business is Chief Adamu Abbah Motors. The lodgements of 28 March, 2008 as well as that of 22nd May, 2008 were made when the 1st accused person was serving as Chairman of Ogori/Magongo Local Government. I do not know that Chief Adamu Abbah with whom I was doing business was a contractor of Ogori/Magongo Local Government".

The 1st accused/appellant who testified as DW 7 stated:

"I did not award contracts to Adamu Abbah on phone as stated by the prosecution. During my tenure as the Caretaker/Chairman, we used to enhance internally generated revenue (IGR) of the Local Government…. In one of the Council Meetings we took a decision to boost the (IGR) by acquiring buses: At that time the Local Government did not have money to pay for such purchase and therefore we could not advertise the bidding so we call (sic) for bids by placing notices on the Notice Board. At that time too the Local Government did not have a Tenders Committee. The F and GPC was the body that took decision then. Since we did not give mobilization for supplies, suppliers were generally not interested. It was at this point that notification went out across the Local Government and Adamu Abbah showed interest and was ready to supply these busses pending when the Local Government was able to pay. He was awarded the contract to supply two busses which he did. They were fairly used buses at the rate of N3.6million each. He was paid by installments after supplies".

He had earlier identified exhibits Dw3 – A, C, D and E which are evidence of sales agreement and change of ownership for a vehicle sold by Adamu Abbah.

He said Olufade took over the business when he was appointed Caretaker Chairman in 2008. He said there were some vehicles under Olufade's care which he sold and remitted the payments into his (1st accused) account and that every other payment that Olufade made was from his (1st accused) income. He gave his income in the Local Government as consisting of his salary which was between N450,000.00 and N550,000.00 travelling allowance per day depending on the destination was between N25,000.00 and N50,000.00 security vote N1 million per month; furniture allowance which is N1.5million when he was Caretaker Chairman and 2.4 million as an Executive Chairman. He was entitled to entertainment allowance. He said that monies paid into his account by Olufade were within his means. Exhibits D14-D17 were tendered for Chairman's Security Vote dated 14 January, 2008, D15 (other charges dated 31 March, 2009) D16 (salaries and wages dated 28 February, 2008) and D17 Salaries and Wages dated 30 September, 2010).

1st accused also tendered Exhibits DW7 P; DW7 Q; DW7-R and DW7-S which are security vote of Local Government Chairman dated 14 January, 2008; other charges dated 31 March, 2009, Salaries and Wages dated 28th February, 2008 Salaries and Wages dated 30 September, 2010 respectively.

The learned trial Judge evaluated the evidence adduced by the prosecution and defence and found that there is no issue or allegation of illicit traffic in narcotic drugs or psychotropic substances in any of the counts in the charge and what the prosecution established is the fact of cash lodgments from undisclosed origin into the private bank account of the 1st defendant either in person or by using proxies during the time he was the Caretaker Chairman or Executive Chairman of the Ogori/Magongo Local Government Council there by leading to the conclusion that there is an intention to conceal the illicit origin of the cash in question. He then analyzed the evidence of the defence witnesses 1-7 and the documentary evidence they tendered to rebut the prosecution against the 1st defendant and found at pages 1575-1576 Vol. 11 of the records:

> **"Looking at the evidence of these witnesses, the only evidence which DW1 gave was in respect of the statement of account of Ogori/Magongo Local Government Area between 1st May and June 30 2009 in Skye Bank Plc was**

Exhibit DW1 A, DW2 from Zenith Bank Plc tendered the statement of account of the 1st Defendant (Exhibits DW2-A) and acknowledged the lodgement of N5,000,000.00 (Five Million Naira) only therein, DW3 testified of how he paid in money into the 1st Defendant's account in Oceanic Bank Plc, UBA Plc and Zenith Bank Plc which DW3 claims were proceeds from sales in the second hand car business of the 1st defendant.

DW3 sounded credible until cross examination. It is my finding that the evidence of DW3 was discredited during cross-examination when he acknowledged the lodgments he made into the personal bank accounts of the 1st Defendant in Exhibit PW1-EI, that is on 13 February, 2007, N900,000.00. On 28 March, 2008, N900,000.00. N 900,000.00 and another N200,000.00 on May, 2008. Upon scrutiny, I am unable to find any inherent features which authenticates the Exhibits tendered by DW3. I am minded to say that these documents are bereft of any evidential values and I so hold. Furthermore, DW3 testified that he was later employed by the 1st Defendant as Supervisor in the Local Government. With the kind of relationship existing between the 1st Defendant and DW3, the credibility of his testimony is evidently tainted and cannot be believed …. DW5 tendered various documents to find that the various lodgments he made into the bank accounts of the 1st Defendant which according to him are from legitimate business. He became inconsistent during cross-examination and made this Court to doubt his veracity. DW6 who says he was Head of Department (H.O.D) – Works of Ogori/Magongo Local Government Council from September, 2008 to August, 2011, member of Tenders Board and a member of finance and General Purpose Committee (F & GPC) He gave evidence on the projects executed during his tenure as (H.O.D, Works). During cross-examination he said he knew nothing

about the various lodgements into the personal bank accounts of the 1st Defendant when confronted with the facts therefore.

DW7 (1st Defendant) gave a very long testimony. He used Exhibits DW-7D, DW7-D1, DW7-2, DW7-E, DW7-F, DW7-G, DW7-H, DW7-1,DW7-J, DW7-K, DW7-L, DW7-M, DW7-N, DW7-O, DW7-P, DW7-Q, DW7-R, and DW7-S to justify his actions concerning the intervention Funds and Bank Loans taken by the Local Government during his tenure. In the opinion of this court, the shortfall in the oral testimony and documentary evidence of DW7 is that they fail to address the lodgements in count 3".

These findings of the learned trial judge went to the credibility of witnesses. An appellate court cannot interfere with such findings unless they are shown to be perverse. *See*: **Lagga vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427; Agbakoba vs. I.N.E.C (2008) 18 NWLR (Pt. 1119) 489.** There is no appeal against the findings made by the learned trial Judge and so the conclusion reached by the learned trial Judge that the oral testimony and documentary evidence of DW7 failed to address the lodgements in count 3 stands. The appellant therefore failed to give a satisfactory account of the monies which were lodged into his account between 2008-2011 when he was the Chairman of Ogori/Magongo Local Government.

Issues 3 and 4 are resolved against the appellant.

Issues 5 deals with whether the court below was correct to affirm the decision of the trial court that all the uncertified documents and Bank generated documents are admissible in evidence. Learned senior counsel argued that the appellant objected to the admissibility of all the documents that were tendered at the Federal High Court both at the time of tendering and at the address stage. He said the trial judge refused to expunge the documents emanating from the Ogori/Magongo Local Government Area in respect of Committee meetings, award and execution of contracts and computer generated documents such as bank statements. He said the documents were certified by the EFCC and not the Local Government concerned or the Banks

in issue in accordance with the provisions of the Evidence Act. He submitted that the wrongful admission of these documents was appealed against in the court below. He submitted that the certification of public documents must be done by the department or officer in custody of the original and not any other body who is not the issuing authority.

On the bank-generated documents admitted by the trial court and affirmed by the Court of Appeal, it is the Evidence Act 2011 that should guide their admissibility and not what the law was at the time the charge was filed.

Learned counsel for the respondent submitted that exhibits PW1G, PWJ, PWJ1, PWJ3, PWJ4 and PW1L which were obtained from the Ogori/Magongo Local Government Council were discountenanced by the trial court and their non certification by the appropriate authority did not affect the outcome of the case as the conviction of the appellant was not based on them.

Let me state straight-away that it is the substantive law in operation at the time an offence is said to have been committed that has to be referred to when a person is being charged to court. Thus if a person is charged with offence of Money laundering in 2010, it must be the Money Laundering Act as at 2010 that will be used and not the Money Laundering Act at the time he was finally arraigned for trial in court but the procedural law to be used would be the current one. Thus if the Evidence Act or the Criminal Procedure Law has been amended or replaced and a new one is in place at the time of trial, it is the amended or newly enacted Evidence Act/Criminal Procedure Code that will be used to guide the trial. Thus it is the Evidence Act 2011 that will be used in the trial or appeal taking place in 2018 notwithstanding that the offence was committed in 2008. The accused will however be charged with the criminal offence as contained in the Criminal Law in 2008.

Learned senior counsel for the appellant argued that the documents which were tendered in court were secondary evidence which were not certified by the Ogori/Magongo Local Government Council but by the EFCC but the trial court ruled that the documents which emanated from Ogori/Magongo Local Government Council were discountenanced by the Court and if that is so, the appellant has suffered no injury since the said documents were not considered when the offence was proved.

It is not the law as stated by the learned trial judge that since the charge

A was filed on 31 March, 2010, the Evidence Act 2011 will not apply because the law does not have retrospective effect. The statement only applies to substantive and not adjectival or procedural law. *See:* **Federal Republic of Nigeria vs. Mike (2014) 1 SC (Pt.1) 27.**

B Learned counsel for the appellant attacked the admissibility of exhibits PW1-C2, PW1-CS, PW1-D1, PW1-E2, PW1-F, PW1-G, PW1-J, PW1-J1, PW1-J2, PW1-J3, PW1-J4 and PW1-L which were recovered in the course of investigation. I agree with the learned trial judge that the custody of any C document recovered in the course of investigation belongs to the body statutorily or constitutionally empowered to posses such documents upon recovery and their admissibility is determined by how relevant they are to the proceedings. At the end of the day it is the weight to be attached to such D recovered evidence that should engage the mind of counsel. *See:* **Nwabuoku *v*s. Onwordi (2006) LPELR SC. 344/2001; (2006) 5 SC. (Pt.II) 103; Musa Abubakar vs. EI Chuks (2007) 18 NWLR (Pt. 1066) 386.**

The last argument of learned counsel for the appellant is that the E computer generated documents did not comply with the mandatory provisions of section 84(1)(2) and (4) of the Evidence Act before they were admitted in Evidence and therefore should be expunged from the records. Learned counsel argued that the statement of accounts exhibits PW1C2, F PW1D, PW1E2, and PW1F1 from UBA, Oceanic Bank, First Bank and Zenith Bank are caught by the admissibility requirements of section 84 of the Evidence Act 2011.

Section 84(1)(2) and (4) of the Evidence Act 2011 states:

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> **"84 (1) In any proceedings a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral** H **evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.**
>
> I **(2) The conditions referred to in subsection (1) of this section are:**

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a. that the document containing the statement was used regularly to store or process information for the purposes of any activities regularly carried out over that period, whether

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for profit or not, by anybody, whether corporate or not, or by an individual;

b. that over that period there was regularly supplied to the computer in the ordinary course

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of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived.

c. that throughout the material part of that

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period the computer was operating properly or if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as

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to affect the production of the document or the accuracy of its contents and

d. that the information contained in the statement reproduced or is derived from information

F

supplied to the computer in the ordinary course of those activities;

4. In any proceeding where it is desired to give a

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statement in evidence by virtue of this section a certificate:

a. identifying the document containing the statement and describing the manner in which

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it was produced.

b. giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the

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document was produced by the computer

i. dealing with any of the matters to which the conditions mentioned in subsection (2) above

relate; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it".

There is no doubt that the documents are computer generated which the EFCC got from the various banks during investigation. It is therefore presumed that before the banks surrendered them to the EFCC, they must have certified that the contents of the statement of accounts contained therein were correct. Even the appellant relied on the contents of the documents for his defence. The lower court pointed out that the appellant cannot approbate and reprobate. He cannot rely on the documents for his defence and at the same time ask that they be expunged from the records. The documents sought to be expunged were found to have been duly certified.

I find no merit in this appeal and it is accordingly dismissed.

I find that the prosecution made out a case under section 19(2) of the Money Laundering (Prohibition) Act 2004 since there was proof supplied by the defence that the appellant was in possession of pecuniary resources which are disproportionate to his known source of income which he could not satisfactorily account for.

Appeal is accordingly dismissed.

K.B. AKAAHS
Justice, Supreme Court

PETER-ODILI, (JSC): I am in agreement with the judgment and reasoning therefrom just delivered by my learned brother, Kumai Bayang Akaahs, JSC to register that support, I shall make some remarks.

This is an appeal from the judgment of the Abuja Division of the Court of Appeal or Court below delivered on the 1st day of March, 2017, Coram: A.D. Yahaya, Tani Hassan, M. Mustapha JJCA in which the court below

affirmed the decision of the Lokoja Division of the Federal High Court presided over by I.E. Ekwo J. wherein the appellant was found guilty, convicted and sentenced to a term of 2 years imprisonment per count on 75 out of the 210 counts in the final Amended Charge.

The background facts of the case are well set out in the lead judgment and there is no need repeating them here except for when the occasion for a reference thereof is called for.

On the 1st day of November, 2017 date of hearing, J.B. Daudu (SAN) and E.C. Ukala (SAN) of counsel of the appellant adopted the appellant's brief or argument filed on the 9th of June, 2017 and deemed filed on the 6th of July, 2017. In it were raised five issues for determination which are thus:

1. **Whether the Court of Appeal was right or correct in law to have in one breadth refused/struck out the respondent's preliminary objection and immediately thereafter to consider the same objection as issues being raised by the same court suo motu before striking out the appellant's issues 3, 4, 6, and 7 which were predicated on grounds 4, 5, 8, 9 and 10 of the notice of appeal? (Issue No 1) Ground 2 of the notice of appeal).**

2. **Whether on the merit the court below was correct in eliminating issues 3, 4, 6 and 7 from the case of the appellant? (Issues No 2) Ground 3, 4 and 5 of the notice of appeal).**

3. **Whether the Court of Appeal was right or correct in law when it affirmed the decision of the Federal High Court placing the onus of proving his innocence in the 75 counts of money laundering on the appellant? (Issue No 3) (Grounds 6 and 7 of the notice of appeal).**

4. **Whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court that**

the prosecution has established all the ingredients of the offence of money laundering against the appellant? (Issue No 4) (Grounds 1 and 8 of the notice of appeal).

5. Whether the court below was correct in law in affirming the decision of the FHC that all the uncertified documents and bank generated documents are admissible in evidence and if answered in the negative what is the effect of their expurgation from the case? (Issue No 5) (Ground 9, 10, 11, and 12).

Learned counsel for the respondent, Wahab Shittu Esq. adopted its brief of argument filed on 21st July, 2017 and utilized the issues as raised by the appellant.

The appellant through counsel had adopted his reply brief of argument filed on 4th August, 2017.

The issues as crafted are good enough for me in the determination of this appeal and I shall make use of them.

ISSUES 1 AND 2

These question the correctness of the act of the Court of Appeal in striking out the respondent's preliminary Objection and going on to consider the same objection in striking out issues 3, 4, 6 and 7 of the appellant.

Advancing the position of the appellant, learned senior counsel stated that the court below erred when in one breadth it dismissed the preliminary objection for incompetence and in another breadth proceeded to deal with the same objections suo motu and on that note struck out all the grounds associated with issues 3, 5, 6 and 7 of the appellant's brief of argument.

That having disposed of the preliminary objections the Court of Appeal lacked the vies to reconsider the same objections albeit suo motu. He cited th**e case of Dinginyadi & Anor vs. INEC (2011) 14 NWLR (Pt. 1255) 347 at**

393 per Adekeye JSC, Ekwiola vs. CBN & Anor (2013) 15 NWLR (Pt. 1377) 234 at 262.

He contended that there is no need to ask for leave of the Court of Appeal or Supreme Court before bringing up a point of jurisdiction for the first time on appeal. He cited **Obiako & Anor vs. The State (2002) 10 NWLR (Pt. 776) 612 at 626.**

That the matter of the validity of court process not signed by an enrolled legal practitioner has been settled by this court in **Okafor vs. Nweke (2007) 3 SCNJ 185 at 191; S.L.B. Consortium Ltd vs. NNPC (2011) 4 SCNJ 211 at 221-223; FBN Plc & Ors vs. Maiwada & Ors (2012) LPELR (SC) 204-2012.**

That the issue before the court below was a question of law. That the court below failed to consider and determine the appellant's complaint that the purported offences or counts in the charges were lumped together and the appellant prejudices and misled on account of the 208 counts and the provisions of section 156 of the Criminal Procedures Act and principles of fair hearing breached the trial court on duplicity of the 208 counts.

Mr. Wahab Shittu of counsel for the respondent submitted that the lower court effectively disposed of the issues raised in the preliminary objection and struck out the Objection and in doing so gave the reasons for so doing. He cited **Agbanelo vs. UBN (2000) 7 NWLR (Pt. 666) 534 at 557.**

That the fact that the court had dealt wit the preliminary objection did not preclude it from examining the merits of the same suit in the same proceedings. He referred to **Orhiommwon LG vs. Ogieva (1993) 4 NWLR (Pt. 288) 469 at 480; Senate President vs. Nzeribe (2004) 9 NWLR (Pt. 878) 251 at 274.**

The stance espoused by the appellant is that the Court of Appeal having misapprehended the complaint of the appellant about the striking out of the 133 counts by the trial court on account of defect based on duplicity failed to see that the said situation afflicted the remaining 75 counts that were used in convicting him. That the court below had not considered appellant complaints that the purported offences or counts in the charges were lumped together and the right to fair hearing of the appellant compromised since he was prejudiced and misled on the duplicatuous nature of 208 counts contrary to section 156 of Criminal Procedure Act.

A The position of the respondent is that the powers exercised by the Court of Appeal were in line with the general powers of that court as enshrined under section 15 of the Court of Appeal Act.

The Federal High Court per J. stated as follows:

B

"**On count 39, on the 4th of July, 2008 as reflected in the same EXHIBIT PW1-E1, the prosecution adduced evidence that there was a cash deposit of the sum of N400,000.00 by one** C **Abbah into the 1st Defendant's Oceanic Account No. 0291001004790 and 0791001007103 at IBB Way. The Source of the transaction leading to deposit into the Defendant's account is unknown and the factual situation reflects** D **laundered funds by the 1st Defendant. The first defendant did not explain the source of the transaction that gave rise to this deposit and how he came about the money leading to irrefutable conclusion that the amount involved was** E **converted by the 1st Defendant. This is corroborated by EXHIBITS PW1-C, PW1-C2, PW1-D1, PW1-C5, PW1-E1 and PW1-E2 that Abbah is the son of Adamu Abbah and it was the money withdrawn from Adamu Abbah's account** F **that was lodged into the 1st Defendant's Personal Account".**

In all said findings, the common hallmark are as follows:

G **(i) The source of the transaction leading to the deposit into the defendants bank account is unknown.**

(ii) That the factual situation, (which was not identified or disclosed by the trial court) reflects laundered funds H **by the appellant.**

(iii) That the 1st defendant did not explain the source of the transaction that gave rise to this deposit and how he came about the money leading to irrefutable conclusion that the amount involved was converted by I **the 1st defendant.**

(iv) That the irresistible conclusion from the foregoing is

A

that the amount involved was converted by the 1st defendant.

B The Federal High Court made many other findings and conclusions in the course of, with respect, its needlessly marathon judgment to the effect that the onus fell squarely on the appellant's shoulders to establish the lawfulness or legality of each and every lodgement he made into his accounts thus reversing the time-honoured rule that the burden of proof in criminal matters of this **C** nature lies on the prosecution. Even the latter i.e. prosecution was complicit in leading or urging the court below and trial court to convict the appellant on purely speculative and baseless evidence. My Lords, we respectfully refer to three excerpts of the respondent's submission in its brief of argument, which **D** demonstrates beyond a shadow of doubt that there was no scintilla of evidence brought by the prosecution to substantiate any or all of the ingredients or money laundering for which the appellant was standing trial:

E *See:* **Page 1762: On the 18th of December, 2008, there was another illegal cash withdrawal by the appellant of the sum of N10,600,000.00 and another illegal cash withdrawal of N11,600,000.00 all from the intervention fund".**

F

The Court below Per Hassan JCA stated thus:

G

"The allegations in the 75 counts against the appellant deal with conversion of the property of Ogori/Magongo Local Government Council Kogi State with intent to concealing its illicit origin contrary to section 14(1)(a) of the Money **H** **Laundering Prohibition Act 2004 punishable under section 14 of the same Act".**

I The court below engaged the next assignment which was to identify the ingredients of the offence and determine the complaint by the appellant one way or the other that the prosecution did not establish any of the ingredients against him. The court below at page 1824 opined as follows:

A **"Page 1824: To sustain a conviction under Section 14(1) of the Money Laundering (Prohibition) Act, 2004, the respondent must prove the following ingredients against the appellant.**

B **i. That Appellant converted or transferred resources.**

ii. That the resources in question are derived from illicit traffic in narcotic drugs or any other crime or illegal acts.

C **iii. The conversion or transfer was done purposely to conceal or disguise the illicit origin of the resources.**

In this case, it is clear that allegations of Money Laundering

D **are premised on conversion of resources derived directly or indirectly from illegal act. The presumption of innocence is a hallowed principle lying at the heart of criminal law. It ensures that until the defendant's guilt is proved beyond**

E **reasonable doubt, he or she is innocent. This is essential in commitment to fairness and justice.**

Going further the learned Justice of the Court Below stated thus:

F **"I have painstakingly gone through the evidence on record of the facts of conversion on the undisclosed origin of the payments giving rise to several lodgements into the private**

G **accounts of the appellant. See also page 1823 of the printed record where the court below found that it was alleged that the appellant as Executive Chairman of Ogori/Magongo Local Government of Kogi State misappropriated the sum**

H **of three hundred and twenty million naira intervention fund released to the local government in October 2008 and in typical EFCC vocabulary 'looted millions of Naira belonging to Ogori/Magongo Local Government, inflation of contracts and squandering of loan obtained in the name of**

I **the local government from UBA**

A The court of Appeal went on to state its further findings as follows:

"It is the tangible terms of enactments that would define the practical items or ingredients of actions or inaction that would constitute any offence prescribed in the provision. Going by the analysis of the learned silk of counsel for the 1st Defendant on the requirement of the provision, it is important to say that the universal definition of conversion is "the act of changing from one form to another or the process of being exchanged, See Bryan Garner, Black's Law Dictionary, 8th ed. P.201. In this case the aim of the conversion is either to conceal or disguise the illicit origin of the resources or property. Therefore, once the actus reus is established it would form the basis for conclusion on the existence of the mens rea. The ageless issue in establishing *mens rea,* is that a physical surgery to open the heart of an accused to see his intention is impracticable. It is therefore established where there is admission on the part of the accused or inferred from the evidence constitution the *actus reus.* In this case, I have to agree with the prosecution that the facts of conversion have been consistent in each and every count in being emphatic about the undisclosed origin of the transaction or payment giving rise to the several cash lodgements into the private bank accounts of the 1st Defendant either in person or by using proxies thereby leading to the conclusion that there is intention to conceal the illicit origin of the cash in question. See also page 1579: Now, going by the tenor of the relevant counts in the charge sheet, what the 1st Defendant needed to concentrate all his arsenal on was to rebut the allegation in each count so as to cast doubt on the case of the prosecution knowing that such doubts are normally resolved in favour of the defendant in criminal trials. This never happened.

B C D E F G H I

The appellant had also raised his concern that the grounds for which the preliminary objection was despatched was later used by the Court of Appeal in its consideration of the issues before it. That posture is not borne out of what transpired as showcased by the record as what the court below did in giving reasons for its findings and conclusions in the issues raised may have looked like a revisit to the preliminary objection and its related features, that did not remove the right of the court to state its reasons for the determination in the main appeal however similar those reasons may appear as the ones in the preliminary objection earlier struck out. This court had in the case of **Agbanelo vs. UBN (2000) 7 NWLR (Pt. 666) 534 at 557** per Karibi-Whyte JSC stated that it is an elementary and essential ingredient of the judicial function that reasons are to be given for decisions. That it is crucial or important where appeals lie from the decisions and it is to be said that the reasons for decisions enable the determination on appeal whether the decision was merely initiative and arbitrary or whether it is consistent with established applicable principles. It has to be stated and emphatically too that if a judgment is delivered without supporting reasons it is an irritation or arbitrariness, a rule akin to tossing the coin and whatever side shows up in the decision, a situation that would likely produce in judicial anarchy. The point has to be made that a judgment will not be set aside just because the reasons given were bad if the judgment itself is right.

Indeed from what the record shows, the court below stated its reasons and how it came by the findings and decisions it arrived at and I dare say elaborately too, it cannot be properly posited that the court below gave its decision without reasons. See excerpts of that decision as shown below, thus:

> **"The grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision. Grounds of appeal are formulated in nubibus. They must arise from a judgment otherwise they are baseless and liable to be struck out – Akeredolu Vs. Mimiko (2014) 1 NWLR (Pt. 1388) 402 at 420. *See* also Garuba vs. Omokhodion (2011) 1 NWLR (Pt. 1269) 145.**

From the record there are no findings by the trial court that the amended charge of 30th October, 2015 and final written address filed on 3rd December, 2015 were not signed by a legal practitioner in accordance with legal practitioners Act, 2004. Issue 3 of the appellant is abstract in nature and has been raised on non-existing premise. It has no nexus with the ratio decidendi of the trial's court decision in this matter. Ground 4 and 5 of the appellant upon which the issue was formulated are incompetent.

The appellant appeared to suggest by his argument that the grounds questioned the issues of jurisdiction. The submission with respect is misplaced and misconceived as it is founded on false premise of the record. Issue 3 is introduced to divert attention from the main issues in this appeal and so it is liable to be struck out. Grounds 4 and 5 and issue 3 of the appellant are struck out from being incompetent..”

Grounds 8 and 10 question findings of facts on exercise of discretion by the trial court a ground of appeal challenging the exercise of discretion of the court is a ground of mixed law and facts which requires leave before it is filed. *See* FBN vs. Abraham (2008) 18 NWLR (Pt. 1118) 172, and failure to obtain leave pursuant to section 242(1) of the 1999 Constitution of Nigeria (as amended) renders the grounds incompetent and liable to be struck out. Grounds 8 and 10 are therefore struck out.

Issues 5 and 7 formulated therefrom are also struck out.”

In the light of the separate reasons adduced by the court below for dismissing the preliminary objection on one hand and issues, 3, 5, 6 and 7 in the main appeal are clearly stated above, it will be misleading for learned silk to attempt to

lump the two separate/independent proceedings together and give impression that the lower court treated the separate proceedings as holistic proceedings in the circumstance.

The lower court is entitled to independently consider issues raised in the appeal independent of issues raised in the preliminary objection and pronounce separately on them in the efficient and effective manner it carried out the exercise, more so, when circumstances and situations given rise to the two separate/independent proceedings are not similar and the reasons for the treatments of each of the two situations were clearly different. Learned silk therefore missed the point and the distinguishing features when he submitted thus: "having disposed of the PA, the court below lacked the vires to re-consider the same objections, albeit suo motu".

I agree with learned counsel for the respondent that the Court of Appeal rightly utilized its powers under section 15 of the Court of Appeal Act in striking out those Issues 3, 5, 6 and 7. For effect I shall cite the same statutory provision.

The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquires or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may rehear the case in whole or in part or many remit it to the court below for the purposes of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that

court, or in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction".

From the foregoing it is clear that the two issues are resolved against the appellant.

ISSUES 3 & 4

Learned Senior Advocate for the appellant contended that on whether the Court of Appeal was correct in law when it affirmed the decision of the Federal High Court placing the onus of proving his innocence in the 75 counts of money laundering on the appellant, the prosecution had established all the ingredients of the offence against the appellant? He stated that the Federal High Court had laid the onus of proof on the appellant and in so doing reversed the time-honoured rule that the burden of proof in criminal matters of this nature lies on the prosecution. In this, the Court of Appeal got it wrong by affirming what the trial court did. He referred to section 131, 132, and 135 of the Evidence Act, 2011; Egbirika vs. State (2014) 4 NWLR (Pt.1398) 558 at 562; Kalu vs. FRN (2014) 1 NWLR (Pt. 1389) 179; Ozaki vs. State (1990) NWLR (Pt. 124) 92 at 98; Woolmington vs. DPP (1935) A.C. 462 etc.

Learned SAN went on to submit that the prosecution failed to establish the essential elements of the offence beyond reasonable doubts. He cited **Alabi vs. State (1993) 7 NWLR (Pt.307) 511 at 523, George vs. FRN (2014) 9 NWLR (Pt.1399) 1 at 25.**

Responding, learned counsel for the respondent submitted that there is a distinction between the legal burden of proof beyond reasonable doubts which rests and stays with the prosecution in the criminal trial process as opposed to the evidential burden of proof which constantly shifts from the prosecution to the defendant depending on where the pendulum of evidence

swings in the proceedings whether civil or criminal. He cited **Odunukwe vs. Ofomata (1999) 6 NWLR (Pt. 607) 416 at 425);** that learned silk on the other side may have failed to appreciate the evaluation of the totality of evidence led in the proceedings including oral testimonies of witnesses, strength of evidence, extracted during cross-examination and legally admissible evidential materials from the printed records of proceedings. He cited **Nasamu vs. State (1979) 6-9 SC 153 at 159; Ogunleye vs. Oni (1990) 2 NWLR (Pt. 135) 745; Amadi vs. Nwosu (1992) 5 NWLR (Pt. 241) 273-280; Sule vs. The State (1987) 4 NWLR (Pt. 67) 709.**

That the prosecution demonstrated through direct evidence and circumstantial evidence including inferences, a very strong linkage between the proceeds and the alleged offence in the court from which they are derived leading to the irresistible conclusion that the appellant indeed laundered the funds as reflected in the counts. That the proof beyond reasonable doubt was made out. He referred to **Adeniji vs. The State (2001)25 WRN 117 at 123 e.t.c**

The stance of the appellant is that the court below shifted the burden of proof in a criminal trial to the appellant to prove his innocence instead of what is statutorily provided for the prosecution/respondent to prove the guilt of the accused beyond reasonable doubt. Of a fact is that the onus or burden of such proof in a criminal trial such as this is on the prosecution to establish the ingredients of the offence beyond reasonable doubt and when the prosecution has done that and in so doing so once the prosecution having placed sufficient evidence on the guilt of the appellant either by direct or circumstantial or presumptive evidence beyond reasonable doubt required by law. At the stage the onus is on the accused appellant to attack or rebut the evidence so presented by the prosecution by a contrary to what the prosecution has laid out. That is not tantamount to shifting the burden of the appellant to prove his innocence. *See:* **Adeniji vs. The State (2001) 25 WRN; Uwe Idigbi Esai & Ors vs. The State (1976) 11 SC 39; Peter Nwachukwu Eze vs. State (1976) 1 SC 125.**

The above position of the court is strengthened by the provisions of section 19(5) of the Economic and Financial Crimes Commission (Establishment) Act 2004 which stipulates thus:

"In any trial for an offence under this Act, the fact that an accused person is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his known sources of income, of that he had at or about the time of the alleged offence obtained an accreditation to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and taken into consideration by the court as corroborating the testimony of any witness in the trial". See further section 19(2) of the MLA Act 2004) for similar provision).

Explaining the evidential burden of proof, Fidelis Nwadialo learned author of "**Modern Nigerian Law of Evidence"** second edition pages 401-402 stated the legal position as follows:

"Incidence of evidential burden of proof

This is the burden of adducing evidence to prove or disprove a particular fact. When a party wishes the court to believe any fact, then the burden of proof as to that fact rests on that party. The party bearing the legal burden of proof must first make out a prima facie case in his favour. This means that he has to adduce enough evidence which, if believed, may reasonably justify a finding that the facts he seeks to prove exist. But whether this burden has been discharged cannot be known until at the end of the trial and the court actually gives a verdict in his favour. If the court disbelieves his evidence then the burden is not discharged. However, making out such a case he has discharged the evidential burden cast on him because he has tendered the evidence basically necessary for the establishment of this case. It then becomes necessary for his opponent to call contrary evidence to challenge the case set up by the party. By the necessity to adduce this contrary evidence, the evidential

burden of proof is shifted into the opponent. Of course he is not bound to supply any evidence at all. But by so doing, he runs a great risk of the court finding against in denial of allegations of the allegations of the other party. The position is very well clarified by Denning J. (as he then was) in Dunn Vs. Dunn which was a petition for divorce on ground of desertion. "the legal burden" in the case, he states:

"was on the petitioner to prove that his wife deserted him without cause. In order to discharge that burden the petitioner relied on that fact that he asked her to join him and she refused. That is a fact from which the court might have inferred that she had deserted him without cause, but it is not bound to do so, once he proves the fact of refusal she might seek to rebut the inference of desertion by proving that she had just cause for her refusal and, indeed, it is usually wise for her to do so. But there is no legal burden on her to that effect. Even if she did not affirmatively prove just because the court had still at the end of the case, to ask itself, has the legal burden been discharged? In most cases, the party on whom the legal burden lies also bears the evidential burden at the outset of the trial for he has first to introduce evidence to establish a prima facie case: On the issue of incidence of evidential burden of proof, somewhat different considerations apply to the two types of proceedings, civil and criminal".

Following in the path of this guide as expatiated, the Court of trial stated thus:

"Now going by the tenor of the relevant counts in the charge sheet, what the appellant needed to concentrate all his arsenal on was to rebut the allegations in each court so as to cast doubt on the case of the prosecution knowing that such doubts are normally resolved in favour of the defendant in criminal trials. This never happened before".

In this regard the concurrent findings of fact of the court below cannot be faulted as the appellant did not push across any perversity in those findings nor any wrong application of the law and so this court is loath to go like an elephant in a tea shop pushing down everything in its wake all in an effort to find a lapse in those findings of the two court below that are just not there. Therefore the option open to this court is to let along those findings of facts based on what was placed before those court and the sound reasoning those courts deposited thereafter.

These two issues 3 and 4 are also resolved against the appellant.

ISSUES 5

This raises the question whether the court below was right in affirming the decision of the trial court that all the uncertified documents and bank generated documents are admissible in evidence and if the answer is in the negative what is the effect of their expurgation from the case.

Learned counsel for the appellant submitted that the law is that certification of public documents or officer in custody of the original and not any other body who is not the issuing authority and so when the reverse was done in this case, the trial court erred and the court below ought to have departed from that stance as the admitted documents were clearly inadmissible. He cited **Goodwill & Trust Ltd vs. Witt & Bush Ltd. (2011) ALL FWLR (Pt. 576) 517.**

That at the time all the computer generated documents were admitted in evidence it was the Evidence Act 2011 that was in force as 2004 version which had been repealed and so the trial court was in grave error when it failed to expunge all the disrupted documents that were tainted.

Learned counsel for the respondent submitted that the bank statement obtained in the course of investigating of EFCC being documents arising from the ordinary course of business is entitled to deliver such copies as custodian of same within the meaning and intendment of section 104(3) of the Evidence Act.

He referred to Section 104 (1) (2) (3) of the Evidence Act **Tabik Investment Ltd vs. GTB Plc (2011) ALL FWLR (Pt. 602) 1592; NBA vs. Kalejaiye (2016) 6 NWLR (Pt. 1508) 393 at 399; Narvidex limited vs. N.I.M.B. Limited (2001) 4 SCNJ 208 etc.**

A In this respect the court below stated thus:

"In referring to EXHIBITS PW1B, PW6A and PW6B, the submission of the appellant was exhibit PW64 and PW6B tendered and unsigned, thus worthless and inadmissible. That the exhibits PW6A and PW6B tendered by PW6 is documentary hearsay. Exhibits PW1B is the petition against the appellant. It is incorrect to say that the document was not signed. The documents was duly signed by the president, Benjamin Olaitan, the secretary, Makafan Lukman and the PRO Adamu Suleiman of the voice of Ogori/Magongo Local Governemnt people, home and diaspora, reflected at pages 35-36 of volume 1 of the record.

Ordinarily, admissibility of evidence is governed by section 6 of the Evidence Act. Once a piece of evidence is relevant, it is admissible in evidence, if other condition is satisfied. Both exhibits PW6A and PW6B, the interim report and final report respectively are relevant to the facts in issue in this case. The appellant both in his statement and in his Evidence in Chief made reference to the said documents. Documentary evidence being permanent in form, is more reliable than oral evidence and it is used as a hanger to test the credibility of oral evidence-C.D.C (Nig) Ltd vs. SCOA (Nig) Ltd. (2007) 6 NWLR (Pt. 1030) 300 and Ogbeide vs. Osifo (2007) ALL FWLR (Pt.365)458.

The admissibility of the exhibits is therefore proper. The submission of the appellant that PW6, not being a party to the documents could not tender them and that the documents amount to documentary hearsay was misplaced. ***See*** **Isibor vs. State (1970) 1 ALL NLR 248 and Ogbuanyinya vs. Okudo (1979) 1 ALL NLR 105."**

The Court of Appeal in holding that the exhibits were properly tendered held as follows:

> **"I have gone through the exhibits. They are correspondences between the EFCC and UBA, Oceanic bank, Zenith bank and First bank with statements of account of the appellant attached. Others are application for tender, letters of award of contract from Ogori/Magongo Local Government and acceptance of contract.**
>
> **It is not at all times that documentary evidence must be tendered by the maker. See Alaribe Vs. Okwuonu (2015) 1 NWLR (Pt.929) 547 and Ajakaiye vs. State (unreported), Appeal No. CA/A/OW/71C/2013 delivered on 05/12/2014. The Supreme Court in Omega V OBC (supra) said:**
>
> > **"It should not be understood as saying that documentary evidence cannot be admitted in absence of its maker."**
>
> **The law is trite that the Appellant cannot validly complain against the exhibits, when such documents were also referred by him in defence of his case. The appellant therefore cannot approbate and reprobate. He must be consistent in defence of this case. The evidence of DW1, DW2 and DW3 is to the effect that they were summoned to tender the statements of account of the appellant which was also the case of the Respondent. Where material foundation is laid, any contention as to the non-admissibility of the document on ground that it was no tendered by its maker will be of no movement-Olude vs. State (2014) 7 NWLR (Pt.1405) 89 at 95 and John vs. State (2011) 18 NWLR (Pt.1278) 353.**

In the instance case, PW1 land foundation that the exhibits were recovered in the course of investigation and he gave oral account of his investigation on documents. The documents were properly admitted by the trial court…"

The court below stated the law and practice in regard to admission of documents such as the ones under discourse and there is nothing else to say on that score as they stemmed from sound legal position. I cannot but agree more with the findings and conclusion of the courts below and find against them.

All the issues resolved against the appellant and from the foregoing and the well articulated lead judgment, I find no merit in this appeal and I dismiss it as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

ADAMU AUGIE, (JSC): I have had the advantage of reading in draft the judgment handed out by my learned brotherAkaahs, JSC. I, too, agree with the reasoning and conclusion therein.

For the above stated reasons and the detailed ones adumbrated in the lead judgment which I hereby adopt, I feel that the appeal should be dismissed. No costs awarded.

Amina Adamu Augie,
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the advantage of reading in draft the judgment just delivered by my learned brother **Aka'ahs**, JSC and I entirely agree with the reasoning and conclusion therein.

My learned brother has dealt with the issues exhaustively in such a way that I have nothing useful to add. For the same reasons articulated in the lead judgment, I hereby dismiss this appeal for lack of merit.
I abide by the consequential orders contained in the lead judgment, including order as to costs.

Paul Adamu Galinje
Justice, Supreme Court

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DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother **Kumai Bayang Akaahs,** JSC just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit and it is accordingly dismissed by me.

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Sidi Dauda Bage,
Justice, Supreme Court

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GUARANTY TRUST BANK PLC
AND
EST MASTER CONSTRUCTION LIMITED

SC. 744/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Extension of time within which to appeal to the Supreme Court – Relevant conditions thereto – Or. 2 Rule 31 Supreme Court Rules 1985 (as amended) – Imperatives.

APPEAL: Application for extension of time to appeal – Necessity for the Trinity prayers – Relevant considerations thereof

APPEAL: Ground for extension of time to appeal – Inadvertance of counsel – Whether an acceptable reason for failure to appeal within time – Qualifications thereof.

APPEAL: Ground for seeking leave to appeal out of time – Inadvertence of counsel – Whether acceptable in all cases – Distinction between "inadvertence" of counsel and "ineptitude" of counsel – Relevant considerations thereof.

APPEAL: Application for leave to appeal out of time – Grounds for the application – Onus on applicant to show grounds of appeal which prima facie show good cause why the appeal should be heard.

COURT: Application for extension of time to appeal – Need to consider nature of grounds of appeal – Whether this requirement entails delving into the substantive issues for determination.

PRACTICE AND PROCEDURE: Application for extension of time within which to appeal – Burden on applicant where Court of Appeal affirmed the findings of the trial court – Whether applicant must show exceptional circumstances – Or. 2 Rule 32 Supreme Court Rules 1985 (as amended).

WORDS AND PHRASES: Exceptional circumstance – Meaning.

Issues for Determination

(i) Whether in the present circumstances, the appellant is entitled to the exercise of the discretion of this court granting it (I) extension of time to file his appeal, (II) leave to appeal, and (III) extension of time to file his appeal, against the judgment of the lower court.

(ii) Whether the applicant has appropriately sought leave to raise fresh issue not argued at the lower court and which issue nullifies the garnishee order absolute.

(iii) Whether in the present circumstances, the grant of departure to compile, transmit record of appeal and directions on briefs of arguments will serve the interest of justice.

(iv) Whether in the present circumstances, it is in the interest of justice to stay the execution of the judgment of the lower court pending the determination of the appeal filed before this court.

Facts of the Matter

The respondent commenced garnishee proceedings at the High Court of Rivers State against the applicant and some other banks, to enforce the judgment sum of **N99,600,457.05** obtained against its customer, Admiralty Fleet Ltd. (Judgment Debtor). The trial court granted the motion *ex-parte* on **6/5/2013,** and made a Garnishee Order Nisi against the appellant, who was the first Garnishee, and other Garnishee Banks.

Upon being served, the Garnishee Banks filed their affidavits to show cause as to why the said Order Nisi should not be made absolute. In the applicant's affidavit deposed to by its external counsel based on information provided by one of its Legal Officers, Eddy Henshaw, it was averred that the judgment debtor had an account with the Bank, and that the sum of **N99,600,457.05** in the account had been blocked.

However, the applicant later filed a further and better affidavit, wherein it averred that the earlier affidavit was incorrect because the said *Eddy Henshaw* inadvertently lifted the judgment sum stated on the Order Nisi and mistakenly reproduced it as available in the judgment debtor's account. The affidavits were deposed to by same deponent.

On **13/1/2014**, *Eddy Henshaw* did not appear in court as ordered and the applicant's counsel informed the trial court that he was no longer in the applicant's employment. Learned counsel addressed the court, and in the Court Ruling delivered the same day **13/1/2014,** the learned trial judge, Georgewill, J. (as he then was) granted an order against the appellant.

The appellant's appeal to the Court of Appeal was dismissed but the applicant did not appeal against the decision to the Supreme Court within time, which is why it has now filed this application praying *inter alia* for extension of time to seek leave to appeal against the said judgment; leave to appeal; and extension of time to appeal against the judgment.

It also seeks the leave of this court to introduce and argue a fresh ground of appeal [**Relief 4**]; deeming prayers in respect of its notice of appeal already filed and the record of appeal already compiled and transmitted to this court [**Reliefs 5 & 6**]; abridgment of time to file briefs [**Relief 7**]; and stay of execution [**Relief 8**];, which it withdrew at the hearing of this application, and the said **Relief 8** was struck out.

Held: *(Unanimously dismissing the application)*

1. *Relevant conditions for extension of time within which to appeal to the Supreme Court.*
As the applicant said, there are two conditions spelt out by the law that must be satisfied before an application of this nature is granted see Order 2 rule 31 of the rules of this court, which provides:

> **(1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure in any other way when this is required in the interest of justice.**
>
> **(2) Every application for an enlargement of time in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal and to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit**
> **(a) A copy of the judgment from which it is intended to appeal.**
> **(b) A copy of other proceedings necessary to support the complaints against the judgment; and**
> **(c) Grounds of appeal which *prima facie* show good cause why the appeal should be heard.**
> *(P 161 Paras C– H)*

2. *Requirements of an application for extension of time need for the trinity prayer*
Where time within which to appeal has expired, the appellant may apply for extension of time to seek leave to appeal; and it is crucial that he files what are generally referred to as *"the Three-Legged Prayers", "Tripod Prayers"* or *"Trinity Prayer"* for (a) extension of time to seek leave to appeal; (b) leave to appeal; and (c) extension of time to appeal.

For there to be a valid appeal, the three reliefs must be granted by the court – See Odofin vs. Agu *(1992) 3 NWLR (Pt. 229) 350 at 375 SC.*

To this end, an applicant has to convince this court that the delay in bringing such an application is neither willful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period; and what is more, their grounds of appeal must *prima facie* show good cause why the appeal should be heard at all. The two conditions are conjunctive and not disjunctive, therefore, they must co-exist Nwora vs. Nwabueze *(2011) 15 NWLR (Pt. 1271) 467.* (*Pp 161 – 162 Paras H – C)*

3. *Where inadvertence of counsel will be a ground for extension of time within which to appeal*

In this case, the essence of the applicant's application is that the delay in filing the said application was due to inadvertence of counsel because after he filed the notice of appeal on 14/9/2015 within three months as provided for by Section 27 (2) of the Supreme court Act and the initial application for leave to appeal and stay filed on 19/10/2015, its counsel, while preparing for hearing of the application on 19/1/2017, found he omitted a prayer for extension of time to seek leave to appeal.

Inadvertence of counsel is a familiar refrain heard by this court in applications of this nature. It is true that inadvertence of counsel or counsel's error in judgment, if reasonable, is an acceptable explanation for delay in applying for leave to appeal. As this court pointed out in Shanu vs. Afribank (Nig.) Plc. *(2000) 13 NWLR (Pt. 684) 392/403:*

> **In Akinyede vs. The Appraiser (1971) All NLR 162 counsel's carelessness was held by this court to be good reason for failure to appeal within time, provided such carelessness is pardonable. In Doherty vs. Doherty (1964) 1 All NLR 299 and Bowaje vs. Adediwura (1976) 6 SC 143 pardonable inadvertence of counsel was accepted as good and substantial reason for the delay. In Alagbe vs. His Highness, S. Abimbola & Ors (1978) NSCC 84, (1978) 2 SC 39 where delay was partly due to counsel and his clerk, the delay was held to be satisfactorily explained.**
> *(P 162 Paras C – I)*

4. *Inadvertence of counsel is availing depending on the facts of every case.* **However, it is not yet uhuru, so to speak, because Nnaemeka-Agu, JSC, warned counsel in Iroegbu vs. Okwordu *(1990) 6 NWLR (Pt. 159) 643* that notwithstanding the decisions of this court on the said subject in Akinyede vs. The Appraiser *(supra),* Doherty vs. Doherty *(supra),* and the case of Ahmadu vs. Salawu *(1971) 1 All NLR (Pt. 2) 318***

> **The courts will not regard this as universal talisman, the waiver of which will act as panacea in all cases. The court must be satisfied that the allegation of the fault of counsel is true and genuine, but also that it is availing having regard to the circumstances of the particular case.**

The 1990 warning of Nnameka, JSC, in Iroegbu vs. Okwordu *(supra)* remained unheeded and because of the frequency of attributing almost all non-compliance with the law and rules of court on the *"mistake"* or *"inadvertence"* of counsel, the current trend in judicial practice is to distinguish inadvertence of counsel from the ineptitude of counsel – see a recent judgment of this court in Appeal No. SC. 113/2013-Malari & Ors vs. Leigh (unreported) delivered on 12/1/2018, where a similar application was refused; I.T. Muhammad, JSC, stated as follows:

> **This, I believe is one of the few instances where a party must take a quick, effective and spontaneous decision in relation to the way and manner/bear the consequence of the ineptitude, negligence of counsel handling his case Mistake, inadvertence and sickness of counsel can always be distinguished from ineptitude, complete ignorance or malfeasance exhibited by counsel.**

Thus, the rule that a litigant should not be punished for the mistake or inadvertence of counsel does not extend to a situation where his counsel has exhibited tardiness and incompetence. *(P 163 Paras A –H)*

5. *There was no ineptitude on the part of counsel*
The question in this case is whether inadvertence of counsel is within limits or has crossed the line to sheer ineptitude on the part of the applicant's counsel in this matter. In paragraphs 18 & 19 of its supporting affidavit, it was averred that:

> **1. The applicant had earlier filed an application for leave to appeal and stay of execution before this court on 19/10/15. The application was fixed for hearing on 23/1/17 but could not be taken as the respondent just filed its reply brief and same was not available in the court file. The application was accordingly adjourned till 27/6/17 for hearing.**
>
> **2. On 19/1/17, in the course of preparing for the hearing of the said application, the applicant's counsel discovered that he had filed the application after the mandatory statutory period of 3 months from the date of the Court of Appeal judgment without a prayer for an order for extension of time to seek leave in the application.**

The way I see it, this first condition is not a drawback to the application as the applicant had filed an initial application within time before the error in not including the first prayer to extend the time was discovered. Its counsel ought to have been more diligent, but in such circumstances, I do not think that the said error suggests ineptitude on counsel's part. *(Pp 163 – 164 Paras H – F)*

6. *There must be grounds which prima facice show good cause why the appeal should be heard.*
For an application of this nature to succeed, the applicant must also show that there are grounds which *prima facie* show good cause why the appeal should be heard. The two conditions go hand in hand – See Nwora vs. Nwabueze *(supra)* where it was held:

> **For an application for extension of time to appeal to succeed, the applicant must show to the court that the delay in bringing the application is neither willful nor inordinate; that there are good and substantial reasons for failure to appeal within the prescribed period; and there are grounds which *prima facie* show good cause why the appeal should be heard. The two conditions are held to co-exist. If one is non-existence the application must fail the two conditions are conjunctive not disjunctive.**
> *(P 164 Paras F – I)*

7. *Court not to delve into the substantive issues during an application for extension of time to appeal*

This court also stated in Nwora vs. Nwabueze *(supra),* this is not the time to enquire into the merit or otherwise of the case because that would surely amount to deciding the substantive matter in an interlocutory application, which the law absolutely frowns upon.

In this case, I agree with the applicant that the respondent's submission, and even the averments in its counter-affidavit, dwelt on the substantive issue for determination in the appeal, which is wrong, because as Ejiwunmi, JSC, also observed in CBN vs. Ahmed *(supra):*

> **The duty of the court in the consideration of grounds of appeal proposed by an applicant to support an application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. It is not the business of the court at this stage to decide upon the merits of such grounds as are filed in support of the application.**

See also Obikoya vs. Wema Bank Ltd. *(1989) 1 NWLR (Pt. 96) 157 at 178,* wherein this court per Obaseki, JSC, explained as follows:

> **The grounds of appeal required to be exhibited are only to show why the appeal should be heard. The rule does not require the grounds to show why the *appeal should be allowed.* Although in both cases, the grounds of appeal**

> **should be substantial, the certainty required in the latter case does not necessarily need to be present in the former case. A ground showing good cause why an appeal should be heard is a ground, which raises substantial issues of fact or law for the consideration of the court. It is a ground, which cannot be dismissed with a wave of the hand or totally lacking in substance. It is a ground, which evokes a serious debate as to the correctness of the decision of the court below. It is a ground, which taxes the intellect and reasoning faculties of the appeal judges. It is a ground, which is not frivolous.** *(P 165 Paras A – I)*

8. *Onus on appellant in an application for leave to appeal where the court of Appeal affirmed the findings of the trial court*

As the respondent rightly submitted, leave to appeal in this case where the Court of Appeal affirmed the findings of fact of the trial court can only be granted in exceptional circumstances. This is clearly spelt out in Order 2 rule 32 of the rules of this court, which provides that:

> **Where, in an appeal to the court from the court below, the court below has affirmed the findings of fact of the court of first instance, any application to the court in pursuance of its jurisdiction under section 233(3) of the Constitution for leave to appeal shall be granted only in exceptional circumstances.** *(P 168 Paras A – C)*

9. *Definition of the word exceptional*

The definition of the word *"exceptional"* is *"much greater than usual"* – see *Cambridge English Dictionary.* In other words, in this case where the Court of Appeal has affirmed the findings of fact of the trial court, the applicant has to jump through an extra hoop to convince this court to grant this application; how has it fare? Not very good, I must say.

There is nothing exceptional about the circumstances of this case to sway this court to grant this application in favour of the applicant. The rules of this court speak of grounds of appeal, which *prima facie,* show good cause why the appeal should be heard. *Prima facie* means *"on the face of it; on first appearance but subject to further evidence or*

information" **– see *Black's Law Dictionary, 9th Ed.* The applicant's four grounds of appeal must show, on the face of it, *"good cause"* why the appeal should be heard before this application can be granted. As I.T. Muhammad, JSC, aptly put it in Malari vs. Leigh *(supra):***

> **Even the ordinary man on the street knows what is good. In ordinary usage, it connotes a high standard or quality, which is opposite to bad or poor. Anything good in law is something, which is valid, sufficient, effectual, unobjectionable, sound and/or responsible. Thus, an application for extension of time within which to seek leave to appeal is not granted as a matter of cause.**
> *(P 168 Paras D – I)*

10. *Per K. B. Akaahs (JSC):*

> **"As pointed out in the leading ruling of my noble Lord Augie JSC, inadvertence of counsel is now being used as a good reason for failure to appeal within time. Where such inadvertence arises as a result of indolence or sheer negligence of counsel, the indulgence being sought should be refused. I wish to add that except for unforeseen situations such as sickness of counsel, the request should be refused. But even in the case of sickness, unless the counsel is the only legal practitioner in the chambers, an application for extension of time within which to seek leave to appeal should be refused except where the issues involved are novel issues of law which have not been pronounced upon.**
>
> **As a result of the liberal interpretation that this court has given to section 233(3) of the Constitution (as amended) the court is being inundated with all sorts of appeals which add little or nothing to the development of the law or justice. The appeals now constitute a clog in the wheel of justice.**

Looking at the proposed grounds of appeal, there is nothing exceptional to warrant the exercise of discretion by this court to grant the application. I therefore agree with my Lord, Augie JSC that the application lacks merit and it is accordingly dismissed". *(Pp 169 – 170 Paras H – C)*

Nigerian Cases Cited

Ahmadu vs. Salawu (1971) 1 All NLR (Pt. 2) 318
Alagbe vs. His Highness, S. Abimbola & Ors (1978) NSCC 84, (1978) 2 SC 39
Bowaje vs. Adediwura (1976) 6 SC 143;
Doherty vs. Doherty (1964) 1 All NLR 299
in Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643
Nwora Vs. Nwabueze (2011) 15 NWLR (Pt. 1271) 467.
Obikoya vs. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157
Odofin vs. Agu (1992) 3 NWLR (Pt. 229) 350 SC.
Shanu vs. Afribank (Nig.) Plc. (2000) 12 NWLR (Pt. 684) 392/403

Nigerian Statutes Cited

Constitution (as amended) Section 233(3)

Representation

Afolabi Kuti, (Esq.), **with** Pius Owhoavwodua, (Esq.), for the **Applicant.**
Mrs. Nonye Nzewi-Agbasi, (Esq.), for the **Respondent.**

ADAMU AUGIE, (JSC) (Delivering the Lead Judgment): The respondent commenced garnishee proceedings at the High Court of Rivers State against the applicant and some other banks, to enforce the judgment sum of *N99,600,457.05* obtained against its customer, Admiralty Fleet Ltd. (Judgment Debtor). The trial court granted the motion *ex-parte* on **6/5/2013,** and made a Garnishee Order Nisi against the appellant, who was the first Garnishee, and other Garnishee Banks.

Upon being served, the Garnishee Banks filed their affidavits to show cause as to why the said Order Nisi should not be made absolute. In the applicant's affidavit deposed to by its external counsel based on information

provided by one of its Legal Officers, Eddy Henshaw, it was averred that the judgment debtor had an account with the Bank, and that the sum of *N99,600,457.05* in the account had been blocked.

However, the applicant later filed a further and better affidavit, wherein it averred that the earlier affidavit was incorrect because the said *Eddy Henshaw* inadvertently lifted the judgment sum stated on the Order Nisi and mistakenly reproduced it as available in the judgment debtor's account. The affidavits were deposed to by same deponent. On ***7/1/2014,*** the trial court discharged three Garnishees and ordered:

> **In respect of the 1st Garnishee, Guaranty Trust Bank Plc., in view of the self-contradictory position taken by the said bank through its legal officer, Eddy Henshaw, he is hereby ordered to appear before this court on 13/1/2014 so that he may clarify his explanation on oath for the contradictory information supplied by him to the deponent, Joseph George, and precisely cross-examined by the Garnishor in this application. This case is adjourned to 13/1/2014 for Eddy Henshaw to appear before this court and for ruling on the Garnishee application in respect of the 1st Garnishee, GTB Plc.**

On **13/1/2014**, *Eddy Henshaw* did not appear in court as ordered and the applicant's counsel informed the trial court that he was no longer in the applicant's employment. Learned counsel addressed the court, and in the **Court Ruling** delivered the same day **13/1/2014,** the learned trial judge, Georgewill, J. (as he then was) concluded as follows:

> **GTB Plc.'s further affidavit, which has refused to utilize the opportunity offered to them by the court to clarify the contradictions is a complete afterthought and it is hereby discountenanced. I believe the affidavit to show cause to the effect that judgment debtor has in its account the judgment sum of which has been duly blocked by the GTB Plc., in due difference (sic) to the Order Nisi duly served on it. In the**

circumstances, therefore, there are no justifiable logical reasons or ground instituting against the making of the Order Nisi absolute against the 1st Garnishee, GTB Plc. Consequently, the Order Nisi made on *6/5/2013* by this court against the GTB Plc., to show cause is hereby made absolute.

The appellant's appeal to the Court of Appeal was dismissed but the applicant did not appeal against the decision to this court within time, which is why it has now filed this application praying *inter alia* for extension of time to seek leave to appeal against the said judgment; leave to appeal; and extension of time to appeal against the judgment.

It also seeks the leave of this court to introduce and argue a fresh ground of appeal ***[Relief 4]****;* deeming prayers in respect of its notice of appeal already filed and the record of appeal already compiled and transmitted to this court [**Reliefs 5 & 6**]; abridgment of time to file briefs [**Relief 7**]; and stay of execution [**Relief 8**], which it withdrew at the hearing of this application, and the said **Relief 8** was struck out.

The application is supported by a 35-paragraph affidavit and 12-paragraph further and better affidavit. In opposing the application, the respondent filed a 20-paragraph counter-affidavit with paragraph 8 of the counter affidavit having sub-paragraph *a. z.* and *aa. ff.* Both parties filed their respective written address, and the applicant formulated four Issues for determination in its own written address:

(i) Whether in the present circumstances, the appellant is entitled to the exercise of the discretion of this court granting it (I) extension of time to file his appeal, (II) leave to appeal, and (III) extension of time to file his appeal, against the judgment of the lower court.

(ii) Whether the applicant has appropriately sought leave to raise fresh issue not argued at the lower court and which issue nullifies the garnishee order absolute.

(iii) Whether in the present circumstances, the grant of departure to compile transmit record of appeal and directions on briefs of arguments will serve the interest of justice.

(iv) Whether in the present circumstances, it is in the interest of justice to stay the execution of the judgment of the lower court pending the determination of the appeal filed before this court.

The respondent adopted the four Issues for determination formulated by the applicant in its written address. I will also do same in dealing with this application. The applicant's contention under the first Issue is that it is entitled to the exercise of this court's discretion in granting **Reliefs 1, 2 and 3,** it referred the court to the position of the law on:

- **Requirement of leave to appeal on grounds other than of law alone: Section 233 (2) and (3) of the 1999 Constitution (as amended) and Akeredolu vs. Akinremi (1986) 2 NWLR (Pt. 25) 710 cited.**
- **Onus on Party seeking leave to appeal out of time: Order 2 Rule 31 (2) of the Supreme Court Rules, Re-Adewunmi (1988) 3 NWLR (Pt. 83) 483; Lamai vs. Orbih (1980) 12 NSCC 188, Co-operative and Commercial Bank Ltd. vs. Ogwuru (1993) 8 NWLR(Pt. 284) 630; Ibodo vs. Enarofia (1980) 5-7 Sc 42; and Ukwu vs. Bunge (1997) 8 NWLR (Pt. 518) 527 at 541 cited.**
- **Need to refrain from deciding upon the merits of the grounds of appeal when considering an application for leave to appeal: Observation of Udoma, JSC, in Holman Bros. (Nig.) Ltd vs. Kigo (Nig. Ltd. & Anor. (1980) 8-11 SC 43 at 62, and the statement of Ejiwunmi, JSC, in CBN vs. Ahmed (2001) 28 WRN 38; (2001) 11 NWLR (Pt. 724) 368 cited and quoted at pages 15-16.**

A It submitted that this court has the power to extend the statutory period for giving notice of appeal or notice of application for leave to appeal- Section 27(2) and (4) of the Supreme Court Act, Cap. S15, LFN 2004; and that this court's discretion must, however, be exercised judicially and judiciously after
B a consideration of the affidavit evidence, citing **Holman Bros. (Nigeria) Limited vs. Kigo (Nigeria) Limited** *(supra).*

As to its reasons for failing to appeal within time, it referred to paragraphs 13-21 of its affidavit where the deponent averred that:

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> **13. The appeal was subsequently heard and judgment delivered by the Court of Appeal on *16/6/15*. In the judgment dismissing the appeal, the Court of Appeal upheld the findings of the High Court and further held that the appellant/applicant allegedly withheld evidence for failure to produce Eddy Henshaw, despite evidence before the court that he was no longer in the appellant/applicant's employment.**
>
> **14. In affirming the ruling of the High Court, the Court of Appeal failed to consider that [it] relied on its further and better affidavit to which was attached the judgment debtor's statement of account, despite the two conflicting affidavits emanating from it on whether or not the judgment debtor had sufficient funds in its account to satisfy the judgment debt. [Copy of the judgment attached as *Exhibit OA2].***
>
> **15. Upon perusal of the Court of Appeal judgment, the applicant and its officials were dissatisfied with the findings and conclusion of the Court of Appeal in affirming the judgment of the High Court, and intend to challenge the judgment before this honourable court. [Copy of the said proposed notice of appeal attached thereto as *Exhibit OA3]***

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16. On *14/9/15* being dissatisfied with the judgment of the Court of Appeal, the applicant filed its notice of appeal to this honourable court against the said judgment within time. [Copy of the notice of appeal dated *11/9/15* attached as *Exhibit OA4]*

17. I know as a fact by virtue of my legal training and practice that the grounds of appeal contained in the notice of appeal involve questions of facts and/or mixed law and fact. The applicant requires the leave of this court to properly file the appeal, hence the instant application.

18. The applicant had earlier filed an application for leave to appeal and stay of execution before this court on *19/10/15.* The application was fixed for hearing on *23/1/17* but could not be taken as the respondent just filed its reply brief and same was not available in the court file. The application was accordingly adjourned till *27/6/17* for hearing.

19. On *19/1/17,* in the course of preparing for the hearing of the said application, the applicant's counsel discovered that he had filed the application after the mandatory statutory period of 3 months from the date of the Court of Appeal judgment without a prayer for an order for extension of time to seek leave in the application [the application for leave and stay dated *19/10/15* attached thereto as *Exhibit OA5].*

20. I know for a fact that the omission to include the prayer for extension of time to seek leave to appeal in *Exhibit OA5* is due to the mistake of the applicant's counsel, who had thought that the application for leave was filed within time, like the notice of appeal.

21. The applicant has now filed the instant application before this court for extension of time to seek leave to appeal, and extension of time to file its appeal, and to deem the notice of appeal as properly filed.

The applicant argued that by the above averments in the said affidavit, it provided good and substantial reasons for granting this application since the failure to file the application for leave to appeal within time was due to the omission of its counsel and not the fault of the applicant – **Lamai vs. Orbih** *(1980) 12 NSCC 188,* **Elobisi vs. Onyeonwu** *(1989) 5 NWLR (Pt. 120) 224.* It then urged this court to grant the application in the interest of justice as it "*indeed took steps to appeal within time, though wrongly taken by error* (and) *has now taken the proper steps to regularize the appeal already filed"*, especially as its affidavit evidence has amply demonstrated the reasons for failure to appeal and seek leave within time - **Ifebuzor vs. Nwabueze** *(1998) 8 NWLR (Pt. 560) 148.*

It also submitted that its ground of appeal *prima facie* show good cause why the appeal should be heard. It analyzed the grounds of appeal 1 and 2, and argued that the holding of the Court of Appeal that evidence of *"Eddy Henshaw"* would have been unfavourable to it, it mere speculation, which has no place in the adjudicatory process – **Olufeagba vs. Abdul-Raheem (2009) 18 NWLR (Pt. 1173) 384 at 439 and Archibong vs. Ita (2004) All FWLR (Pt. 197) 930 at 955 cited.**

Furthermore, that its contention under grounds 3 and 4 is that the court below was wrong to affirm the trial court's ruling when it failed to give reasons for believing facts in the affidavit as opposed to facts in the further and better affidavit, which is critical, and this court has emphasized that a court must give reasons for exercising its discretion, **Ekwunife vs. Wayne (W/A) Ltd.** *(1989) 5 NWLR (Pt. 122) 422 at 447* and **Olowolaramo vs. Umechukwu** *(2003) FWLR. (Pt.183) 109* cited.

It is, therefore, its contention that the said grounds 1 to 4 of the grounds of appeal show that the Court of Appeal failed to review the decision of trial court; and failed to properly evaluate the evidence and the findings of the trial court. It submitted that the grounds are not frivolous but raise substantial issues of fact or law for the consideration of this court; that they arise arguable

points of law on the propriety of the decision of the lower court affirming the ruling of the trial court, and it has shown good cause on why the appeal should be heard – **Obikoya vs. Wema Bank** *(1989) 1 NWLR (Pt. 96) 157 at 178* cited; and that a refusal of this application will have grave consequences on the applicant who has shown its readiness to diligently pursue the appeal.

The respondent also referred the court to the position of the law, citing **Minister, PMR vs. E.L. (Nig.) Ltd.** *(2010) 12 NWLR (Pt. 1208) 261 at 294,* **CPC vs.** *Nyako (2011) 17 NWLR (Pt. 1277) 451 at 471/2.* It contends that the said four grounds of appeal do not raise any issue of general importance or novel points of law and neither do they show a *prima facie* arguable appeal. It also analyzed the ground of appeal vis-à-vis the judgment of the Court of Appeal and argued that contrary to the applicant's contention, the Court of Appeal had considered all the facts and circumstances of the case before arriving at its decision.

As to grounds 3 and 4, it cited **Iloabachie vs. Iloabaewe** *(2000) 5 NWLR (Pt. 656) 178* and Order 2 rule 32 of the rules of this court, and submitted that where the Court of Appeal affirmed a finding of fact of the trial court, this court can only grant leave to appeal against same in exceptional circumstances, which is non-existent in the instant case.

The applicant countered in its **Reply on points of Law** that the respondent's submissions are entirely misconceived in that it suggests that a ground of appeal must disclose a likelihood of success as opposed to an arguable point before a relief sought can be granted, which is not the position of the law as ordained by this court in its decided cases; and that it is settled that a party, who seeks leave to appeal, must advance good reasons for failure to appeal within time, and the ground of appeal must show *prima facie* good cause why it should be heard – **Chime vs. Onwuegbu** *(2014) All FWLR (Pt. 723) 1874, 1884,* **Lamai vs. Orbih** *(supra),* **Co-operative and Commercial Bank vs. Ogwuru** *(supra),* **Ibodo vs. Enarofia** *(supra)* and **Ukwu vs. Bunge** *(supra)* cited.

It further submitted that contrary to the respondent's submission, it has, by its affidavit, shown satisfactory reasons why the application should be granted by the court; that the inadvertence of its counsel was honest and sincere and sufficient to entitle it to this court's discretion.

A On the second condition, it submitted that it set out its complaint against the judgment appealed against in this notice of appeal; and at paragraphs 22 to 25 of its supporting affidavit, it demonstrated the fact that the proposed grounds of appeal are arguable, so it has effectively and effectually
B satisfied the two conditions for the grant of the reliefs.

Furthermore, that by its submissions, the respondent is inviting this court to consider the merits of the appeal at this preliminary stage, which is wrong in law, because all that is required of it is to show that there are arguable
C grounds of appeal not necessarily grounds that may eventfully succeed – **CBN vs. Ahmed** *(2001) 11 NWLR (Pt. 724) 368.*

As the applicant said, there are two conditions spelt out by the law that must be satisfied before an application of this nature is granted – see ***Order 2 rule 31*** of the rules of this court, which provides:
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> **(1) The court may enlarge the time provided by these rules for the doing of anything to which these rules**
> E **apply, or may direct a departure in any other way when this is required in the interest of justice.**
>
> **(2 Every application for an enlargement of time in which**
> F **to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal and to apply for leave to appeal within the prescribed period. There shall be exhibited**
> G **or annexed to such affidavit**
> **(a) A copy of the judgment from which it is intended to appeal.**
> **(b) A copy of other proceedings necessary to support the complaints against the judgment; and**
> H **(*c*) Grounds of appeal which *prima facie* show good cause why the appeal should be heard.**

I So, where time within which to appeal has expired, the appellant may apply for extension of time to seek leave to appeal; and it is crucial that he files what are generally referred to as *"the Three-Legged Prayers", "Tripod Prayers"* or *"Trinity Prayer"* for (a) extension of time to seek leave to appeal; (b) leave

to appeal; and (c) extension of time to appeal. For there to be a valid appeal, the three reliefs must be granted by the court – see **Odofin vs. Agu** *(1992) 3 NWLR (Pt. 229) 350 at 375 SC.*

To this end, an applicant has to convince this court that the delay in bringing such an application is neither willful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period; and what is more, their grounds of appeal must *prima facie* show good cause why the appeal should be heard at all. The two conditions are conjunctive and not disjunctive, therefore, they must co-exist – **Nwora vs. Nwabueze** *(2011) 15 NWLR (Pt. 1271) 467.*

In this case, the essence of the applicant's application is that the delay in filing the said application was due to inadvertence of counsel because after he filed the notice of appeal on ***14/9/2015*** within three months as provided for by section 27 (2) of the Supreme court Act and the initial application for leave to appeal and stay filed on ***19/10/2015,*** its counsel, while preparing for hearing of the application on ***19/1/2017****,* found he omitted a prayer for extension of time to seek leave to appeal.

Inadvertence of counsel is a familiar refrain heard by this court in applications of this nature. It is true that inadvertence of counsel or counsel's error in judgment, if reasonable, is an acceptable explanation for delay in applying for leave to appeal. As this court pointed out in **Shanu vs. Afribank (Nig.) Plc.** *(2000) 12 NWLR (Pt. 684) 392/403:*

> **In Akinyede vs. The Appraiser (1971) All NLR 162 counsel's carelessness was held by this court to be good reason for failure to appeal within time, provided such carelessness is pardonable. In Doherty vs. Doherty (1964) 1 All NLR 299 and Bowaje vs. Adediwura (1976) 6 SC 143 pardonable inadvertence of counsel was accepted as good and substantial reason for the delay. In Alagbe vs. His Highness, S. Abimbola & Ors (1978) NSCC 84, (1978) 2 SC 39 where delay was party due to counsel and his clerk, the delay was held to be satisfactorily explained.**

A However, it is not yet uhuru, so to speak, because Nnaemeka-Agu, JSC, warned counsel in **Iroegbu vs. Okwordu** *(1990) 6 NWLR (Pt. 159) 643* that notwithstanding the decisions of this court on the said subject in **Akinyede vs. The Appraiser** *(supra),* **Doherty Vs. Doherty** *(supra),* and the case of B **Ahmadu vs. Salawu** *(1971) 1 All NLR (Pt. 2) 318:*

> **The courts will not regard this as universal talisman, the waiver of which will act as panacea in all cases. The court** C **must be satisfied that the allegation of the fault of counsel is true and genuine, but also that it is availing having regard to the circumstances of the particular case.**

D The **1990** warning of Nnameka, JSC, in **Iroegbu vs. Okwordu** *(supra)* remained unheeded and because of the frequency of attributing almost all non-compliance with the law and rules of court on the *"mistake"* or *"inadvertence"* of counsel, the current trend in judicial practice is to E distinguish inadvertence of counsel from the ineptitude of counsel see a recent judgment of this court in **Appeal No. SC. 113/2013-Malari & Ors vs. Leigh** (unreported) delivered on **12/1/2018**, where a similar application was refused; I.T. Muhammad, JSC, stated as follows:

F

> **This, I believe is one of the few instances where a party must take a quick, effective and spontaneous decision in relation to the way and manner/bear the consequence of the** G **ineptitude, negligence of counsel handling his case - - - Mistake, inadvertence and sickness of counsel can always be distinguished from ineptitude, complete ignorance or malfeasance exhibited by counsel.**

H

Thus, the rule that a litigant should not be punished for the mistake or inadvertence of counsel does not extent to a situation where his counsel has exhibited tardiness and incompetence. The question in this case is whether I inadvertence of counsel is within limits or has crossed the line to sheer ineptitude on the part of the applicant's counsel in this matter. In paragraphs 18 & 19 of its supporting affidavit, it was averred that:

A **1. The applicant had earlier filed an application for leave to appeal and stay of execution before this court on 19/10/15. The application was fixed for hearing on 23/1/17 but could not be taken as the respondent just**
B **filed its reply brief and same was not available in the court file. The application was accordingly adjourned till 27/6/17 for hearing.**

C **2. On 19/1/17, in the course of preparing for the hearing of the said application, the applicant's counsel discovered that he had filed the application after the mandatory statutory period of 3 months from the**
D **date of the Court of Appeal judgment without a prayer for an order for extension of time to seek leave in the application.**

E The way I see it, this first condition is not a drawback to the application as the applicant had filed an initial application within time before the error in not including the first prayer to extend the time was discovered. Its counsel ought to have been more diligent, but in such circumstances, I do not think that the
F said error suggests ineptitude on counsel's part.

But it is not over yet, for an application of this nature to succeed, the applicant must also show that there are grounds which *prima facie* show good cause why the appeal should be heard. The two conditions go hand in hand –
G see **Nwora vs. Nwabueze** *(supra)* where it was held:

For an application for extension of time to appeal to succeed, the applicant must show to the court that the delay in
H **bringing the application is neither willful nor inordinate; that there are good and substantial reasons for failure to appeal within the prescribed period; and there are grounds which *prima facie* show good cause why the appeal should be**
I **heard. The two conditions are held to co-exist. If one is non-existence the application must fail the two conditions are conjunctive not disjunctive.**

A However, as this court also stated in **Nwora vs. Nwabueze** *(supra),* this is not the time to enquire into the merit or otherwise of the case because that would surely amount to deciding the substantive matter in an interlocutory application, which the law absolutely frown upon.

B In this case, I agree with the applicant that the respondent's submission, and even the averments in its counter-affidavit, dwelt on the substantive issue for determination in the appeal, which is wrong, because as Ejiwunmi, JSC, also observed in **CBN vs. Ahmed** *(supra):*

C

> **The duty of the court in the consideration of grounds of appeal proposed by an application for leave to appeal is limited to whether the grounds of appeal are substantial and**
> D **reveal arguable grounds. It is not the business of the court at this stage to decide the merits of such grounds as are filed in support of the application.**

E See also **Obikoya vs. Wema Bank Ltd.** *(1989) 1 NWLR (Pt. 96) 157 at 178,* wherein this court per Obaseki, JSC, explained as follows:

> **The grounds of appeal required to be exhibited are only to**
> F **show why the appeal should be *heard.* The rule does not require the grounds to show why the *appeal should be allowed.* Although in both cases, the grounds of appeal should be substantial, the certainty required in the latter**
> G **case does not necessarily need to be present in the former case. A ground showing good cause why an appeal should be heard is a ground, which raises substantial issues of fact or law for the consideration of the court. It is a ground, which**
> H **cannot be dismissed with a wave of the hand or totally lacking in substance. It is a ground, which evokes a serious debate as to the correctness of the decision of the court below. It is a ground, which taxes the intellect and reasoning**
> I **faculties of the appeal judges. It is a ground, which is not frivolous.**

In this case, Oladipupo Abimbola, legal practitioner in the applicant's counsel's law firm, averred in paragraph 22 of applicant's affidavit:

> **I was informed by Mr. Folabi Kuti of counsel in our firm on 20/1/17 at about 11 a.m in our office of Duplex D3, Jima Plaza, Plot 1267, Ahmadu Bello Way, Garki, Abuja and I verily believe him (being one of the counsel directly involved in the handling of this appeal) as follows:**
>
> **(i) That the applicant has a good and arguable appeal in which the judgment of the Supreme court maybe decreed in its favour.**
>
> **(ii) The grounds of appeal show good cause why the appeal should be heard as they contain substantial issues of facts and law for the consideration of this Court on the propriety of the decision of the Court of Appeal.**
>
> **(iii) A refusal of the instant application for leave to appeal will have consequences on the applicant who has shown its readiness to diligently pursue the appeal, as it will be denied for all time to have the appeal heard on the merits.**
>
> **(iv) There are exceptional circumstances to justify the grant of leave to appeal sought herein, particularly that the applicant stands in an unfair position to pay a debt it does not owe.**
>
> **(v) That the applicant is not the judgment debtor, but one who through an error of judgment has been made to be answerable for the judgment debt and the analogy of not depriving the judgment creditor of the fruits of its judgment will not readily describe the applicant's unwillingness to meet the judgment debt.**

He further averred as follows in paragraph 23 of the said affidavit:

> **The applicant is desirous of challenging the judgment of the Court of Appeal before this court on the ground that the Court of Appeal ought to consider the failure of the High**

Court to provide reasons for choosing to believe the *'affidavit to show cause'* as opposed to the further and better *'affidavit to show cause',* though the said issue was not taken before the Court of Appeal.

The proposed grounds of appeal, without particulars, are as follows:

GROUND 1:
The learned justices of the Court of Appeal erred when they held at page 16 of the judgment as follows: "The learned counsel to the respondent was right in his submission that the appellant deliberately withheld the evidence of Eddy Henshaw because had they produced him, the evidence would be unfavourable to the appellant", and subsequently proceeded to affirm the finding of the trial court in this regard.

GROUND 2:
The learned justices of the Court of Appeal misdirected themselves when they equated the failure to produce Eddy Henshaw, the bank's officer, with the failure to produce the deponent of the affidavit and further affidavit to show cause.

GROUND 3:
The Court of Appeal erred in affirming the trial court's finding/position on the 'affidavit to show cause' as opposed to the 'Further and better affidavit to show cause'.

GROUND 4:
The learned justices of the Court of Appeal erred in law when they made an order dismissing the appeal with APPEAL NO: CA/PH/314/2014 – GTB Vs. MASTER CONSTRUCTION LIMITED on *16/6/2015* and made an order as to cost against the appellant in the sum of N100,000.00 only.

As the respondent rightly submitted, leave to appeal in this case where the Court of Appeal affirmed the findings of fact of the trail court can only be granted in exceptional circumstances. This is clearly spelt out in Order 2 rule 32 of the rules of this court, which provides that:

> **Where, in an appeal to the court from the court below, the court below has affirmed the findings of fact of the court of first instance, any application to the court in pursuance of its jurisdiction under section 233(3) of the Constitution for leave to appeal shall be granted only in exceptional circumstances.**

The definition of the word *"exceptional"* is *"much greater than usual"* – see **Cambridge English Dictionary.** In other words, in this case where the Court of Appeal has affirmed the findings of fact of the trial court, the applicant has to jump through an extra hoop to convince this court to grant this application; how has it fare? Not very good, I must say.

There is nothing exceptional about the circumstances of this case to sway this court to grant this application in favour of the applicant. The rules of this court speak of grounds of appeal, which *prima facie,* show good cause why the appeal should be heard. *Prima facie* means *"on the face of it; on first appearance but subject to further evidence or information"* – see **Black's Law Dictionary, 9th Ed.** The applicant's four grounds of appeal must show, on the face of it, *"good cause"* why the appeal should be heard before this application can be granted. As I.T. Muhammad, JSC, aptly put it in **Malari vs. Leigh** *(supra):*

> **Even the ordinary man on the street knows what is good. In ordinary usage, it connotes a high standard or quality, which is opposite to bad or poor. Anything good in law is something, which is valid, sufficient, effectual, unobjectionable, sound and/or responsible. Thus, an application for extension of time within which to seek leave to appeal is not granted as a matter of cause.**

A In this case, I do not see any redeeming features to warrant this court indulging the applicant by granting this application in its favour. Thus, the application lacks merit, and it is hereby dismissed. The applicant is ordered to pay the respondent costs assessed at N100,000.00.

B

Amina Adamu Augie,
Justice, Supreme Court

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

Application dismissed.

D I abide by the consequential orders including the order on costs.

Olu Ariwoola
Justice, Supreme Court

E **BAYANG AKAAHS, (JSC):** I read before now the ruling of my learned brother, Augie JSc refusing to grant the application for extension of time to seek leave to appeal against the judgment of the Court of Appeal Port-Harcourt delivered on June 16, 2015 in Appeal No. CA/PH/314/2014, leave to F appeal and extension of time to appeal against the said judgment. The applicant is also seeking the leave of this court to introduce and argue a fresh ground of appeal.

Before an application of this nature is granted, the applicant has to G convince this court that the delay in bringing such an application is neither willful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period and the grounds of appeal must prima facie be arguable grounds. See **Order 2 Rule 31 Supreme Court** H **Rules; Nwora vs. Nwabueze (2011) 15 NWLR (Pt. 1271) 465.**

As pointed out in the leading ruling of my noble Lord Augie JSC, inadvertence of counsel is now being used as a good reason for failure to appeal within time. Where such inadvertence arises as a result of indolence or I sheer negligence of counsel, the indulgence being sought should be refused. I wish to add that except for unforeseen situations such as sickness of counsel, the request should be refused. But even in the case of sickness, unless the

A counsel is the only legal practitioner in the chambers, an application for extension of time within which to seek leave to appeal should be refused except where the issues involved are novel issues of law which have not been pronounced upon.

B As a result of the liberal interpretation that this court has given to section 233(3) of the Constitution (as amended) the court is being inundated with all sorts of appeals which add little or nothing to the development of the law or justice. The appeals now constitute a clog in the wheel of justice.

C Looking at the proposed grounds of appeal, there is nothing exceptional to warrant the exercise of discretion by this court to grant the application. I therefore agree with my Lord, Augie JSC that the application lacks merit and it is accordingly dismissed. I also award costs assessed at D N100,000.00 against the applicant in favour of the respondent.

K. B. AKAAHS
Justice, Supreme Court

E **ADAMU GALINJE, (JSC):** I have had the privilege of reading in draft, the ruling just delivered by my learned brother, Augie JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. For the same reasoning as enunciated in the lead ruling, this application shall be and it is F hereby dismissed. I endorse all the consequential orders made therein including order as to costs.

Paul Adamu Galinje,
Justice, Supreme Court

G

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the ruling of my learned brother **Amina Adamu Augie**, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have H anything to add. The application lacks merit and it is accordingly dismissed by me.

Sidi Dauda Bage,
Justice, Supreme Court

I

HAJIYA AISHA BUHARI
Vs.
ALHAJI MANSUR MODI YABO
(SUBSTITUTED FOR ALHAJI
MOHAMMED MODI YABO (DECEASED)

SC. 234/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Classification of grounds of appeal – Whether a ground is of law, mixed law and fact or facts alone – Relevant principles thereto.

APPEAL: Filing of appellant's brief – Computation of time – Whether commences on receipt of record of appeal and not of supplementary record of appeal.

APPEAL: Filing of brief – Appellant's brief of argument – Failure to file within time – Effect – Or 18 Rule 10(1) Court of Appeal Rules 2002 – Relevant considerations thereof.

COURT: Interpretation of Statutes – Guiding Principles thereof.

PARTIES: Obligation to comply with provisions as to time for taking steps – Where party is out of time – Proper steps to take – Failure to comply within

time frame – Effect.

PRACTICE AND PROCEDURE: Filing of appellant's brief – Brief filed out of time – Respondent filed an application to dismiss appeal – What appellant should do – Failure to take appropriate steps – Effect.

PRACTICE AND PROCEDURE: Filing of appellant's brief – Where an appellant is out of time in filing his brief of argument – Proper steps to take – Or. 18 Rule 10(1) CAR 2002 – Relevant Considerations thereof.

RULES OF COURT: Or. 18 Rule 10(1) Court of Appeal Rules 2002 – Purport and significance.

Issue for Determination

Whether the Court of Appeal was right, in dismissing the appellant's appeal, under Order 6 Rule 10 of the Court of Appeal Rules, having failed to file her brief of argument within the time allowed by law.

Facts of the Matter

This is an appeal against the Judgment of the Court of Apeal, Abuja Division, delivered on the 23rd day of May, 2006, dismissing the appeal of the appellant.

This appeal stems from the judgment of the Court of Appeal, sequel to an appeal from two rulings of Hon. Justice I.U. Bello of the High Court of the Federal Capital Territory, Abuja, delivered on the 17th September 2003.

The respondent, as plaintiff before the trial court, brought an action against the appellant as defendant for the following:

1. **An order of ejection of the defendant from the property situate and known as Plot 35 Cairo Street, Wuse II, Abuja.**
2. **An order compelling the defendant to pay the plaintiff the sum of N2,040,000.00 (Two Million and forty thousand Naira) being the arrears of rent of this sum pro-rata until peaceable vacation from the property.**

3. **10% annual interest of this N2,040,000.00 (Two Million and forty Thousand Naira) commencing from the 17th day of February 2002 and thereafter until full liquidation.**
4. **An order compelling the defendant to pay all outstanding water, NEPA, Sanitary bills etc. from 1998 to date that may be found outstanding.**
5. **Cost of the Suit.**

The legal firm of Kabir Lau Chamber entered appearance, but did not file a Statement of defence. On 10/7/2003 the parties and their counsel were not in court. The trial judge struck out the case for want of prosecution.

On 17/7/2003 learned counsel for the plaintiff moved a motion on notice seeking the following:

1. **An order relisting the Suit.**
2. **An order entering final Judgment in favour of the plaintiff against the defendant for default of appearance and/or default of pleadings.**

The defendant was absent and unrepresented. In a ruling delivered on 17/7/2003 the trial Judge made the following orders:

"1. That the Suit earlier struck out is hereby relisted as prayed.
2. **That Judgment is hereby entered in favour of the plaintiff by virtue of Order 14 rule 3 Civil Procedure Rules of this Court, and against the defendant in the matter. All the reliefs as claimed therefore succeed as prayed."**

The legal firm of Kutigi and Co. appeared for the defendant and filed a motion on notice seeking orders setting aside the default Judgment, stay of execution and extension of time to file defence and deeming the Statement of defence annexed as properly filed and served.

Learned counsel for the plaintiff quickly filed a preliminary objection to the appearance of Kutigi and Co. appearing for the defendant without the former counsel properly withdrawing representation for the defendant, and that the

deputy sheriff should be a necessary party. This application was granted .

Dissatisfied, learned counsel for the defendant Kutigi & Co. filed two notices of appeal against the ruling delivered on 17/7/2003, and 30/7/2003.

Both appeals were ordered consolidated by the Court of Appeal on 14/9/2004 on an application filed by the legal firm Kutigi and Co.

It is against the decision of the Court of Appeal above, that the appellant has now appealed to this court.

In addition learned counsel for the respondent filed and argued a preliminary objection to the hearing of this appeal. The respondent raised and argued the preliminary objection challenging the competence of this appeal. The objection, which is grounded on the order of this Court to strike out all the 4(four) grounds of appeal as contained in the notice of appeal filed on 2nd June, 2006 for being contrary to Section 233(3) of the 1999 constitution as amended.

The main thrust are that, the four (4) grounds of appeal are grounds of mixed law and fact, and that no leave, was sought for, and, or, obtained from either this court, or of the lower court. On the alternative, an order of this court striking-out the four (4) grounds of appeal of the appellant as contained in the notice of appeal filed on the 2/6/2006 for being in contravention of Order 8 Rules 2(2), (3), (4) and (7) of the Supreme Court Rules 2002. Also for an order of this court striking-out issues one (1) and two (2) of the appellant's brief of argument as same was not distilled from any ground of appeal. Arguments canvassed for the objection. The appellant, replied the objection raised by the respondent in his reply brief of argument filed on the 27/10/2016 but was deemed as properly filed on the 27/2/2017, particularly page 6 and 7 thereof.

Held: *(Unanimously dismissing the appeal)*

1. Principles relevant to the classification of grounds of appeal

The preliminary objection of the respondent which raises questions and issues of mixed law and fact, this court, has set criteria for distinguishing a ground of law and that of mixed law and fact. Some of these principles can be summarized in the following manner.

(i) First is the thorough examination of the grounds of appeal in the case to see whether they reveal a

misunderstanding by lower court of the law, or a misapplication of the law to the facts already proved or admitted.

(ii) Where a ground complains of a misunderstanding by the lower court of the law or misapplication of the law to the facts already, Provided or admitted, it is a ground of law.

(iii) Where a ground of appeal questions the evaluation of facts before the application of the law, it is ground of mixed law and fact.

(iv) A ground which raises a question of pure fact is a ground of fact.

(v) Where the lower court finds that the particular events occurred although there is no admissible evidence before the court that the event did in fact occur, the ground is that of law.

(vi) Where admissible evidence has been led, the assessment of that evidence is entirely for the court, if there is a complaint about the assessment of the admissible evidence the ground is that of fact.

(vii) Where the lower court approached the construction of a legal term of Act in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

(viii) Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained Lawyer, this is a question of law.

(ix) Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the Appeal Court will assume that there has been a misconception of the law, this is a ground of law.

(x) Where the conclusion of the lower court is one of possible resolutions but one which the appeal court would not have reached if seissed of the issue, that

conclusion is not an error in law.

(xi) Where the Court of Appeal finds such application to be wrong and decides to make its own findings, such findings made by the Court of Appeal are issues of fact and not of law.

(xii) Where the Court of Appeal interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact.

(xiii) A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a Court of Appeal or a further Court of Appeal."

On this position of the court – See BOARD OF CUSTOMS AND EXCISE vs. BARAU (1982) 10 S.C. 48; OGBECHIE vs. ONOCHIE (1986) 3 S.C. 58-64, where this court interpreted the provisions of Sections 213(3) and 214(3) of the 1999 Constitution in *pari materia* with the instant provisions of Section 233(3) and 232(2)(a) of the said constitution.

This court took a thorough examination of the grounds of appeal as contained in the notice of appeal to this court. All the grounds thereof, are grounded in law, which requires no leave of this court, to be sought for, and obtained, before filing the present appeal. I did not find merit in the objection, and it is hereby dismissed.
(Pp 186 – 188 Para A – C)

2. *Effect of failure to file appellant brief of argument Or. 18 Rule 10(1) CAR 2002*

The dismissal order made by the lower court, for failure on the part of the appellant to file her brief of argument within the time allowed by

law, is correct. The order cited, Order 6 Rule 10 which is not the appropriate order to be made in such circumstance under the rules of the lower court. The appropriate order to be made in the circumstance is Order 18 Rule 10(1) Court of Appeal Rules. It provides as follows:

> **"Where an appellant fails to file his brief within the time provided for in Rule (2) (Rule 2 provides for 45 days of receipt of the record of appeal from the court below) or within the time extended by the court the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all to the new points or issues arising from the respondent's brief."**
> *(P 190 Paras D – H)*

3. *Interpretation of or. 18 Rule 10(1) (Supra)*
The wordings of Order 18 Rule 10(1) of the Court of Appeal Rules is very clear, it leaves no room for any conjecture or speculation, the settled position by this court is, where the words of a statute or constitution are clear and unambiguous they call for no interpretation, the duty of the court in such circumstance being to apply the words as used by the Legislature. See CALABAR COOPERATIVE LTD & 2 ORS vs. EKPO (2008) 1-2 S.C. 229; SHETTIMA & 3 ORS vs. GONI & 6 ORS (2011) 10 S.C. 92; THE NIGERIAN ARMY vs. LT. DODO (2012) 6 SC (Pt. 111) 77; DANGANA & ANOR vs. USMAN & 4 ORS (2012) 2 SC. (Pt. 111) 103.

In the context of the instant appeal, the appellant from the record before this court, filed her appeal five (5) months after the time allowed by law. The law provides that "the appellant shall within forty-five days." *(Pp 190 – 191 Paras I – C)*

4. *An appellant who failed to file his brief within time can apply for an extension of time*
The word "shall" used in this context makes it mandatory for compliance. However, the appellant still had the window to apply vide

a formal application for an extension of time to file the brief of argument outside the time allowed by law, the record before this Court did not bear that the appellant filed such an application before the lower court. The law also talks of receipt of record of appeal, and not of supplementary record of appeal as canvassed by the appellant.

The record before this court bears that the respondent had made an application before the lower court for the dismissal of the appellant's appeal for failure to file brief within the time allowed by law. In fact, and indeed, the coast was very clear, for the Court of Appeal to have dismissed the appellant's appeal at the time it did. This court, has no reason whatsoever, to interfere with this apt decision taken by the Court of Appeal. *(P 191 Paras C – F)*

5. *Parties must comply with provisions as to time within to take steps*

By way of emphasis, it must be restated that whenever the law prescribes time frame within which a step shall be taken, the step must be taken within the time the law stipulates unless, pursuant to leave sought and obtained, time has been extended by the court for taking the particular step. See Funduk Engineering Ltd vs. James Mcarthur & ors (1996) LPELR-1291 (SC), Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643 and Nigerian Ports Authority Plc vs. Lotus Plastics Ltd & anor (2005) LPELR-2028 (SC).

In the case at hand Order 18 Rule 10 (1) of the extant Court of Appeal rules provides thus:

> **"Where an appellant fails to file his brief within the time provided for in Rule (2) (Rule 2 provides for 45 days of receipt of the record of appeal from the court below) or within the time extended by the court the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues arising from the respondent's brief."**

The record of the appeal clearly shows that appellant's brief was filed on 29/9/2004 more than five months from the 31/3/2004 when the record of appeal was, following the lower court's order in that regard, deemed duly transmitted to the court. Yet, by Order 18 Rule 10(2) of the extant rules of the lower court, the appellant was required to file her brief within 45 days from the 31/3/2004 or within such time as extended by the lower court. And time, from the record of the appeal, has not been extended for the appellant. In the circumstances, the appellant, therefore, cannot be heard to contend that the lower court's decision dismissing her appeal under Order 18 Rule 10(2) of its rules is perverse. *(Pp 191 – 192 Paras I – H)*

Per K.B. Akaahs (JSC)

> **"As regards the main appeal, the appellant failed to file her brief within 45 days on receipt of the record of appeal from the trial court and no application for extension of time was made for the brief filed out of time to be deemed as properly filed. Since the respondent filed an application before the court below to have the appeal dismissed for failure to file the appellant's brief within time and the appellant failed to avail herself of the opportunity to regularize the filing of the brief, the lower court had no option but to invoke the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2004 and dismiss the appeal.** *(P 193 Paras C – E)*

Nigerian Cases Cited

Board of Customs and Excise vs. BARAU (1982) 10 S.C. 48;
Calabar Cooperative Ltd & 2 Ors vs. Ekpo (2008) 1-2 S.C. 229;
Dangana & Anor vs. Usman & 4 ORS (2012) 2 SC. (Pt. 111) 103.
Funduk Engineering Ltd vs. James Mcarthur & ors (1996) LPELR-1291 (SC),
Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643
Nigerian Ports Authority Plc vs. Lotus Plastics Ltd & anor (2005) LPELR-2028 (SC).

A *Ogbechie vs. Onochie (1986) 3 S.C. 58-64*
Shettima & 3 Ors vs GONI & 6 ORS (2011) 10 S.C. 92;
The Nigerian Army vs. Lt. Dodo (2012) 6 SC (Pt. 111) 77;

B **Nigerian Statutes cited**
1979 Constitution Sections 213(3) and 214(3)
Constitution of the Federal Republic of Nigeria 1999 Sections 233(3) and 232(2)(a).

C

Representation
Josiah Daniel Ebune with Aniete Udoh, for Appellant.
N.A. Obinna, for the Respondent.

D

DAUDA BAGE, (JSC) (Delivering the Lead Judgment): This is an appeal against the Judgment of the Court of Apeal, Abuja Division, delivered on the 23rd day of May, 2006, dismissing the appeal of the appellant.

E

STATEMENT OF FACTS
This appeal stems from the judgment of the Court of Appeal, sequel to an appeal from two rulings of Hon. Justice I.U. Bello of the High Court of the
F Federal Capital Territory, Abuja, delivered on the 17th September 2003.

The respondent, as plaintiff before the trial court, brought an action against the appellant as defendant for the following:

G **"1. An order of ejection of the defendant from the property situate and known as Plot 35 Cairo Street, Wuse II, Abuja.**

2. An order compelling the defendant to pay the
H **plaintiff the sum of N2,040,000.00 (Two Million and forty thousand Naira) being the arrears of rent of this sum pro-rata until peaceable vacation from the property.**

I **3. 10% annual interest of this N2,040,000.00 (Two Million and forty Thousand Naira) commencing from the 17th day of February 2002 and thereafter**

until full liquidation.

4. An order compelling the defendant to pay all outstanding water, NEPA, Sanitary bills etc. from 1998 to date that may be found outstanding.

5. Cost of the Suit."

The legal firm of Kabir Lau Chamber entered appearance, but did not file a Statement of defence. On 10/7/2003 the parties and their counsel were not in court. The trial Judge struck out the case for want of prosecution.

On 17/7/2003 learned counsel for the plaintiff moved a motion on notice seeking the following:

"1. An order relisting the Suit.

2. An order entering final Judgment in favour of the plaintiff against the defendant for default of appearance and/or default of pleadings."

The defendant was absent and unrepresented. In a ruling delivered on 17/7/2003 the trial judge made the following orders:

"1. That the Suit earlier struck out is hereby relisted as prayed.

2. That Judgment is hereby entered in favour of the plaintiff by virtue of Order 14 rule 3 Civil Procedure Rules of this Court, and against the defendant in the matter. All the reliefs as claimed therefore succeeds as prayed."

The legal firm of Kutigi and Co. appeared for the defendant and filed a motion on notice seeking orders setting aside the default Judgment, stay of execution and extension of time to file defence and deeming the Statement of defence annexed as properly filed and served.

Learned counsel for the plaintiff quickly filed a preliminary objection to the appearance of Kutigi and Co. appearing for the defendant without the former counsel properly withdrawing representation for the defendant, and

A that the deputy sheriff should be a necessary party.

In a ruling delivered on 30/7/2003 the trial Judge upheld the preliminary objection. The concluding part of the ruling reads:

B **"…… This means that Kutigi Esq. is in the circumstances not competent to stand in for the defendant and this equally means that the motion filed by him is incompetent as it is certainly devoid of the defendant's brief. The only competent**
C **person now in the eyes of the court is Kabir lau Esq. That being the case, I do not have to consider the issue of the non joinder of the deputy sheriff, as raised by the Applicant in their preliminary objection. The motion of the respondent is**
D **hereby dismissed on grounds of incompetence and for reasons discussed herein above."**

Dissatisfied, learned counsel for the defendant Kutigi & Co. filed two notices
E of appeal against the ruling delivered on 17/7/2003, and 30/7/2003.

Both appeals were ordered consolidated by the Court of Appeal on 14/9/2004 on an application filed by the legal firm Kutigi and Co.

The Court of Appeal on pages 220 to 223 stated as follows:

F

"By virtue of the provisions of Order 6 rule 2 of the Court of Appeal Rules 2002 the appellant shall within sixty days of the receipt of the record of appeal from the court below file his
G **brief in the Court of Appeal. Where the appellant is unable to file his brief within the time stipulated he must file an application for extension of time to file his brief and the affidavit in support shall set forth good and substantial**
H **reasons for failure to file his brief within the stated period. See Order 3 rule 4(1) of the Court of Appeal Rule 2002.**

Where on the other hand, as is the case here the appellant
I **seeks departure from the rules so that the appeal, may be heard on the record of appeal compiled by him time starts to run on the day the prayer is granted and if for any reason the**

applicant is unable to file his brief within sixty days for the appellant and, or forty five days for the respondent either party is at liberty to file her extension of time under Order 3 rule 4(1) of the Court of Appeal Rules 2002.

Where the appellant fails to file his brief within the time provided under Order 6 rule 2 supra the appeal would be dismissed under Order 6 rule 10 only if the respondent's counsel applies for a dismissal of the appeal. See:- OMOYINMI vs. OGUNSISIJI 2001 7 NWLR Pt. 711 p. 149; OLOWU vs. ABOLOR 1993 5 NWLR Pt. 293 p. 255.

And the dismissal of an appeal for failure of the appellant to file his brief with time under Order 6 Rule 10 is a final decision, and a party adversely affected can only appeal to the Supreme Court. See TSOKWA vs. U.T.C. NIGERIA LTD. 2000 7 NWLR Pt. 666 p.651 EKPETO vs. WANOHO 2001 8 NWLR Pt. 716 p. 665."

It is against the decision of the Court of Appeal above, that the appellant has now appealed to this court. The notice of appeal filed on the 2/6/2006 is contained on page 226 of the record of appeal. The said notice of appeal contains four (4) grounds. In keeping with the tradition of this court, parties filed, and exchanged pleadings. The amended appellant's brief of argument, filed on the 27/10/2016, and was settled by one Josiah Daniel Ebune Esq. of counsel. The appellant's amended reply brief of argument filed by the same counsel was filed on the 27/10/2016, but deemed as properly filed on the 27/2/2017.

From the amended appellant's brief of argument, two (2) issue were proposed for the determination of this appeal as follows:

"(1) Whether the decision of the lower court to dismiss the appellant's appeal under Order 6 Rule 10 of the Court of Appeal rules on the sole reason that the respondent had prayed for same, without more is correct, when the

time within which the appellant was to file her brief had not expired (Ground 2 and 3 of the notice of appeal).

(2) Whether assuming (without conceding) that the decision to dismiss the appeal under Order 6 rule 10 of the Court of Appeal Rules was correct; the lower court ought to have allowed the appeal by virtue of Order 7 Rule 3 and Section 16 of the Court of Appeal Act, the lower court having resolved the merits of the appeal as attached on the preliminary objection of the respondent in favour of the appellant. (Grounds 1 and 4 of the notice of appeal).”

The amended respondent's brief of argument, filed on the 19/1/2017, was settled by one Nwachukwu Obinna of counsel. Two (2) issues were proposed for the determination of the appeal as follows:

“(1) Whether an Order of accelerated hearing is the same as an order of extension of time to file appellant's brief of argument.

(2) Whether Order 6 Rule 10 of the Court of Appeal Rules 2002 is circumscribed by Order 7 Rules (2) & (3) of same Court of Appeal Rules.”

In addition learned counsel for the respondent filed and argued a preliminary objection to the hearing of this appeal. The respondent raised and argued the preliminary objection challenging the competence of this appeal. The objection, which is grounded on the order of this Court to strike out all the 4(four) grounds of appeal as contained in the notice of appeal filed on 2nd June, 2006 for being contrary to Section 233(3) of the 1999 constitution as amended.

The main thrust are that, the four (4) grounds of appeal are grounds of Mixed Law and fact, and that no leave, was sought for, and, or, obtained from either this court, or of the lower court. On the alternative, an order of this court

striking-out the four (4) grounds of appeal of the appellant as contained in the notice of appeal filed on the 2/6/2006 for being in contravention of Order 8 Rules 2(2), (3), (4) and (7) of the Supreme Court Rules 2002. Also for an order of this court striking-out issues one (1) and two (2) of the appellant's brief of argument as same was not distilled from any ground of appeal. Arguments canvassed for the objection. The appellant, replied the objection raised by the respondent in his reply brief of argument filed on the 27/10/2016 but was deemed as properly filed on the 27/2/2017, particularly page 6 and 7 thereof. The appellant urged this court to discountenance the objection raised for the following reasons:

"(i) The four grounds of appeal, taken individually or cumulatively deal with the question as to whether the provision of the law relating to Order 6 Rule 10 of the Rules of the court below were properly applied to the primary facts on the record relating to the filing of appellant's brief of argument before the court below having regard to the undisputed fact of the extended time by the court below:

(ii) The four grounds of appeal taken individually or cumulatively facts within the provisions of section 233 (1) (2) (a) and (c) of the constitution of the Federal Republic of Nigeria 1999 and no leave of the court below or this honourable court is required by the appellant to appeal to this court.

(iii) The four grounds of appeal have complied with the provisions of Order 8, Supreme Court Rules on the contents of a notice of appeal.

(iv) Under Order 8 Rule 6, the Supreme Court is not confined to the grounds set forth by an appellant."

A The preliminary objection of the respondent which raises questions and issues of mixed law and fact, this court, has set criteria for distinguishing a ground of law and that of mixed law and fact. Some of these principles can be summarized in the following manner.

B

"(i) First is the thorough examination of the grounds of appeal in the case to see whether they reveal a misunderstanding by lower court of the law, or a misapplication of the law to the facts already proved or admitted.

C

(ii) Where a ground complains of a misunderstanding by the lower court of the law or misapplication of the law to the facts already, provided or admitted, it is a ground of law.

D

(iii) Where a ground of appeal questions the evaluation of facts before the application of the law, it is ground of mixed law and fact.

E

(iv) A ground which raises a question of pure fact is a ground of fact.

F

(v) Where the lower court finds that the particular events occurred although there is no admissible evidence before the court that the event did in fact occur, the ground is that of law.

G

(vi) Where admissible evidence has been led, the assessment of that evidence is entirely for the court, if there is a complaint about the assessment of the admissible evidence the ground is that of fact.

H

(vii) Where the lower court approached the constitution of a legal term of Act in a statute on the erroneous basis

I

that the statutory wording bears its ordinary meaning, the ground is that of law.

(viii) Where tst is the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained Lawyer, this is a question of law.

(ix) Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the Appeal Court will assume that there has been a misconception of the law, this is a ground of law.

(x) Where the conclusion of the lower court is one of possible resolutions but one which the appeal court would not have reached if seissed of the issue, that conclusion is not an error in law.

(xi) Where the Court of Appeal finds such application to be wrong and decides to make its own findings, such findings made by the Court of Appeal are issues of fact and not of law.

(xii) Where the Court of Appeal interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact.

(xiii) A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a Court of Appeal or a further Court of Appeal."

On this position of the court, see: **BOARD OF CUSTOMS AND EXCISE vs BARAU** (1982) 10 S.C. 48; **OGBECHIE vs ONOCHIE** (1986) 3 S.C. 58-64, where this court interpreted the provisions of Sections 213(3) and 214(3) of the 1999 Constitution in ***pari material*** with the instant provisions of Section 233(3) and 232(2)(a) of the said constitution.

This court took a thorough examination of the grounds of appeal as contained in the notice of appeal to this court. All the grounds thereof, are grounded in law, which requires no leave of this court, to be sought for, and obtained, before filing the present appeal. I did not find merit in the objection, and it is hereby dismissed.

MAIN APPEAL

After a careful perusal at the two (2) sets of issues formulated by both the appellant and the respondent, the view of this court is that only a lone issue arise for the determination of this appeal to wit:

> **"Whether the Court of Appeal was right, in dismissing the appellant's appeal, under Order 6 Rule 10 of the Court of Appeal Rules, having failed to file her brief of argument within the time allowed by law."**

In arguing the appeal, learned counsel for the appellant submitted that, the court below which took the decision to dismiss the appeal as prayed by the respondent, did not take into consideration the antecedents of the case, particularly the conduct of the respondent who was largely responsible for the appeal to have dragged on until the time the brief of the appellant was filed (see pages 247 and 251 of the record of appeal). The record of the lower court is clear more than six months after the departure. Application was moved and granted and two clear weeks after the appellant had filed her brief pursuant to the order of 14th September, 2004, the court still had to deal with an application by the respondent to compile supplementary records dated 1st November 2004 but filed 10th November 2004, argued on 22nd March, 2005, contrary to the ruling dated 31st March 2004. It is therefore apparent from the record that the order of dismissal of the appellant's appeal under Order 6 Rule 10 is a nullity because of the lower court's order of 14th September, 2004, extending the time

within seven (7) days for the appellant to file her brief, there being no contrary evidence that the appellant filed her brief outside the seven (7) days extended 14th September 2004.

It is settled law that where time has not expired for filing of appellant's brief, the conditions precedent for the exercise of the power conferred under Order 6 Rule 10 of the Court of Appeal Rules, have not been met; and any order dismissing an appeal in such circumstances must therefore be adjudged defective and a nullity. See **AZEEZ vs. THE STATE** (1986) 2 NWLR (Pt.23) 541 at 545; **MADUKOLU vs. NKEDMILIM** (1962) 2 SCNLR 341; **NDUKWE vs. DOMSY INT. SALES CORP** (1991) 7 NWLR (Pt. 206) 680 at 689.

In reply to the submissions above, the learned counsel for the respondent, in the amended respondent's brief filed on the 19/1/2017 contended that, on the 24th of May 2004, the appellant filed a motion on notice in the lower court and prayed as follows:

> **"(1) An order consolidating the two appeals against the ruling dated 17th and 31st July 2003 respectively.**
> **(2) An order for accelerated hearing of the appeal herein;**
> **(3) For such further order."**

It is to this twin prayer application, of the appellant filed on 24/5/2004, for consolidation and acceleration of hearing, that the Court of Appeal granted in its ruling of 14th September 2004, and the counsel to the respondent not opposing same. There is no application filed by the appellant for extension of time for the appellant to file her brief of argument that was granted by the lower court.

The lower court on page 223 of the record of appeal stated as follows:-

> **"There is nothing ambiguous about it. It leaves no room for any conjecture or speculation. It was the appellant who prepared the notice of appeal. The prayer was granted by this court on 31/3/2004. The record of appeal was on that day before the court as an annexure to the appellants motion. Time started to run from 31/3/2004 or seven days after (see**

A **the order of court made on 31/3/2004).”**

The appellant filed his brief on 20/9/2004 and there was no application seeking extension of time to file his brief. He was
B **over five months out of time.**

On the authority of OMOYINMI vs OGUNSIJI (supra) this appeal is dismissed under Order 6 Rule 10 of the Court of
C **Appeal Rules in view of the fact that the respondent's counsel has applied for the dismissal of the appeal.**

In view of my findings this appeal is hereby dismissed.
D **Parties shall bear their own costs.”**

The dismissal order made by the lower court, for failure on the part of the appellant to file her brief of argument within the time allowed by law, is
E correct. The order cited, Order 6 Rule 10 which is not the appropriate order to be made in such circumstance under the rules of the lower court. The appropriate order to be made in the circumstance is Order 18 Rule 10(1) Court of Appeal Rules. It provides as follows:

F

“Where an appellant fails to file his brief within the time provided for in Rule (2) (Rule 2 provides for 45 days of receipt of the record of appeal from the court below) or within the
G **time extended by the court the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument where an appellant fails to file a reply brief**
H **within the time specified in Rule 5, he shall be deemed to have conceded all to the new points or issues arising from the respondent's brief.”**

I The wordings of Order 18 Rule 10(1) of the Court of Appeal Rules is very clear, it leaves no room for any conjecture or speculation, the settled position by this court is, where the words of a statute or constitution are clear and

A unambiguous they call for no interpretation, the duty of the court in such circumstance being to apply the words as used by the Legislature. See **CALABAR COOPERATIVE LTD & 2 ORS vs. EKPO** (2008) 1-2 S.C. 229; **SHETTIMA & 3 ORS vs. GONI & 6 ORS** (2011) 10 S.C. 92; **THE**
B **NIGERIAN ARMY vs. LT. DODO** (2012) 6 SC (Pt. 111) 77; **DANGANA & ANOR vs. USMAN & 4 ORS** (2012) 2 SC. (Pt. 111) 103.

In the context of the instant appeal, the appellant from the record before this court, filed her appeal five (5) months after the time allowed by law. The
C law provides that **"the appellant shall within forty-five days."**

The word **"shall"** used in this context makes it mandatory for compliance. However, the appellant still had the window to apply vide a formal application for an extension of time to file the brief of argument outside
D the time allowed by law, the record before this Court did not bear that the appellant filed such an application before the lower court. The law also talks of receipt of record of appeal, and not of supplementary record of appeal as canvassed by the appellant.

E The record before this court bears that the respondent had made an application before the lower court for the dismissal of the appellant's appeal for failure to file brief within the time allowed by law. In fact, and indeed, the coast was very clear, for the Court of Appeal to have dismissed the appellant's
F appeal at the time it did. This court, has no reason whatsoever, to interfere with this apt decision taken by the Court of Appeal.

The appeal is unmeritorious, and it is hereby dismissed by this court, Judgment of the lower court is hereby affirmed.

G Parties to bear their own costs.

Sidi Dauda Bage,
Justice, Supreme Court

H **DATTIJO MUHAMMAD, (JSC):** I read in draft the lead judgment of my learned brother **SIDI DAUDA BAGE (JSC)** just delivered and agree with the reasoning and conclusion therein that the appeal which lacks merit be dismissed.

I By way of emphasis, it must be restated that whenever the law prescribes time frame within which a step shall be taken, the step must be taken within the time the law stipulates unless, pursuant to leave sought and

obtained, time has been extended by the court for taking the particular step. See **Funduk Engineering Ltd vs. James Mcarthur & ors (1996) LPELR-1291 (SC), Iroegbu vs. Okwordu (1990) 6 NWLR (Pt. 159) 643** and **Nigerian Ports Authority Plc vs. Lotus Plastics Ltd & anor (2005) LPELR-2028 (SC).**

In the case at hand Order 18 Rule 10 (1) of the extant Court of Appeal rules provides thus:

> **"Where an appellant fails to file his brief within the time provided for in Rule (2) (Rule 2 provides for 45 days of receipt of the record of appeal from the court below) or within the time extended by the court the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues arising from the respondent's brief."**

The record of the appeal clearly shows that appellant's brief was filed on 29/9/2004 more than five months from the 31/3/2004 when the record of appeal was, following the lower court's order in that regard, deemed duly transmitted to the court. Yet, by Order 18 Rule 10(2) of the extant rules of the lower court, the appellant was required to file her brief within 45 days from the 31/3/2004 or within such time as extended by the lower court. And time, from the record of the appeal, has not been extended for the appellant. In the circumstances, the appellant, therefore, cannot be heard to contend that the lower court's decision dismissing her appeal under Order 18 Rule 10(2) of its rules is perverse. For this and moreso the fuller reasons advanced in the lead judgment, I also dismiss the appeal and abide by the consequential orders made therein.

Musa Dattijo Muhammad,
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I have had the advantage of reading in draft the judgment of my learned brother **Bage, JSC** in this appeal. I agree entirely with it and, for the reasons given therein, I too dismiss the appeal as it lacks merit. I also make no order as to costs.

Clara Bata Ogunbiyi
Justice, Supreme Court

BAYANG AKAAHS, (JSC): I read in draft the judgment of my learned brother, Bage JSC. I agree that the preliminary objection has no merit as the grounds of appeals being complained of are grounds of law. The preliminary objection fails and it is accordingly overruled.

As regards the main appeal, the appellant failed to file her brief within 45 days on receipt of the record of appeal from the trial court and no application for extension of time was made for the brief filed out of time to be deemed as properly filed. Since the respondent filed an application before the court below to have the appeal dismissed for failure to file the appellant's brief within time and the appellant failed to avail herself of the opportunity to regularize the filing of the brief, the lower court had no option but to invoke the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2004 and dismiss the appeal. I therefore find no merit in the appeal and it is accordingly dismissed. I make no order on costs.

K. B. Akaahs
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had a preview of the Judgment just delivered by my learned brother Bage (JSC). All the salient points canvassed by learned counsel in this appeal were duly and painstakingly addressed by my lord. Having properly perused the reasoning and the conclusion arrived at in the lead Judgment, I find myself in entire agreement with His lordship's that this appeal is lacking in merit and deserves to be dismissed. I accordingly dismiss the appeal and affirm the decision of the lower court without awarding any costs.

Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

HAYATU UMAR
AND
THE STATE

SC. 505/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Presumption of innocence – Whether any exception thereto – Consideration of the Doctrine of last seen – Onus on accused to explain the circumstances leading to the death of the deceased.

COURT: Doctrine of stare decisis – Meaning – Application.

COURT: Doctrine of stare dicesis – Decision of a lower Court – Whether Supreme Court bound to follow – Relevant principles thereto.

CRIMINAL LAW AND PROCEDURE: Address of counsel – Whether Counsel can rightly urge court to expunge evidence in his address – Evidence in issue duly admitted in the trial court without objection – Whether address of counsel can substitute legally admissible evidence.

CRIMINAL LAW AND PROCEDURE: Trial within trial – Whether necessary where the involuntariness of a confessional statement was not raised.

EVIDENCE: Confessional statement – The six ways of determining its veracity – Relevant considerations thereof.

EVIDENCE: Confessional statement – Where accused retracts same – Relevant principles applicable thereof.

EVIDENCE: Presumption – Principle of last seen – Meaning – Nature – Application.

WORDS AND PHRASES: Doctrine of stare decisis – Import.

Issues for Determination

1. **Whether in view of the contradictions between the retracted confessional statement of the appellant and the testimonies of the prosecution witnesses allegedly corroborating same, the court below was right to have affirmed the decision of the trial court? (Ground 1).**

2. **Whether the decision of the lower court that the prosecution successfully proved beyond reasonable doubt that the appellant is guilty of conspiracy, murder and robbery to warrant his conviction and sentence to death by hanging is supportable by the evidence adduced at the trial (Ground 3).**

3. **Whether the lower court was correct to hold that the circumstantial evidence before it was sufficient to establish the conspiracy to commit the alleged offences when same was not proved? (Ground 2).**

Facts of the Matter

This appeal is against the judgment of the Court of Appeal, Sokoto Division in Appeal No. CA/S/20C/2013 delivered on 28 March, 2014 which affirmed the conviction of the appellant for the offence of culpable homicide punishable with death by the Sokoto State High Court. The appellant was sentenced to death by hanging on 25 June, 2012 by Abass J. (as he then was) in Charge No. SS/18C/2010.

The facts leading to this appeal are as follows:

On 22 November 2009, which was a Sunday and Illela market day, the appellant went to the deceased's house thrice to look for him but did not meet him. On the 3rd occasion PW4 who is the deceased wife asked him why he was looking for her husband and he answered that someone wanted the deceased to use his camel to carry goods. On the fourth visit, the appellant met the deceased and they went out together on the camel. PW6 saw the appellant riding on the camel with the deceased. The deceased did not return to his house and an alarm was raised. On the next day which was Monday, PW5 who is a nephew of the deceased went in search of him and found his corpse in Wauru and the camel was nowhere to be found. He then reported the matter to the police and his friend also informed some influential people in the community. He was one of those who accompanied the police in a vehicle to the scene where the corpse lay and they carried it to the village and later to the hospital where autopsy was carried before the body was released for burial. In the course of the investigation PW3 recorded the appellant's statement in Hausa which he later translated into English. The statement recorded in Hausa and its English translation were tendered and admitted as Exhibit E and E1 respectively. Exhibit E turned out to be confessional statement but the appellant who testified as DW1 denied knowledge of anything. He said he was at his place of work when the police went and arrested him and took him to Gada Local Government Secretariat and from there to the police station located in the Local Government without informing him about any offence. He said he was beaten while protesting he received some injuries. He was so manhandled that he could not remember what he said. He denied knowing the 2nd accused or that he went looking for the deceased. He also told the court that he did not volunteer any statement to the police. When he was cross-examined about the deceased, he said it was in the police station in Gada Local Government that he heard about the

deceased's name and that he never knew him before. He said he had never met PW4 and it was only in court that he knew her.

The learned trial Judge considered the evidence presented to the court and found that the evidence against the accused was circumstantial and reasoned that since the deceased was last seen alive in the company of the 1st accused, he 1st accused had explanation to give as to what led to the death of the deceased and in the absence of such explanation, the court would be justified to draw the inference that he was the one who killed the deceased. The trial court convicted and sentenced all the accused persons to death based on their confessional statements for which corroboration was found in the evidence of the prosecution witnesses. Each of them was given 5 years imprisonment with hard labour for the robbery offence.

The appellant appealed to the Court of appeal Sokoto and it was dismissed. He felt aggrieved and further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Trial-within-trial not necessary where the issue of involuntariness was not raised.*

Although the appellant said he was beaten after his arrest and as a result of the injury he received he became unaware of what he was saying, this goes to show that he made a statement but he did not raise objection to the statement made as a result of torture and so the trial court could not order a trial within trial to be conducted before the statement was admitted in evidence. Admissibility was no longer an issue at the time the appellant testified. Before relying on the statement which was clearly a confession that he participated in the killing of the deceased, the trial judge had to examine the statement using the six way test to confirm its veracity.

See Oseni vs. State (2012) 5 NWLR (Pt. 1293) 351 and Adesina vs. State (2012) 14 NWLR (Pt. 1321) 429. *(Pp 212 – 213 Paras G – A)*

2. *The six ways to determine the veracity of a confessional statement*

The tests are:

(i) Is there anything outside the confession to show that it is true?

(ii) Is it corroborated?

(iii) Are the facts therein stated as true as far as can be tested?
(iv) Had the accused person the opportunity of committing the offence?
(v) Is the confession possible?
(vi) Is the confession consistent with other facts ascertained and proved?

The fact that Dangoma died is not in dispute. The deceased was last seen riding on his camel with the appellant by PW6 a day before PW5 discovered his dead body in Wauru village and there was an injury on the neck. The appellant had visited the deceased's house four times on the day the deceased disappeared and met PW4 at home. It was on his fourth visit that he met the deceased and the two of them went out with the deceased's camel. The corpse of the deceased was seen in the bush along Wauru village, the direction the PW6 saw the deceased and the appellant were going. The injury found on the neck of the deceased is consistent with the confessional statement of the appellant that he and Bello "march him on the ground and Ibrahim came and slaughter him with knife on his neck and mouth". *(P 213 Paras A – G)*

3. *Confessional statement of appellant was duly corroborated*
The lower court held that the statement is corroborated by the evidence of PW4 and PW6. I am of the firm view that the evidence of PW5 provided the highest corroboration because he said that when he learnt his uncle did not sleep at home the previous night he went in search of him and on reaching Wauru he met the deceased lying dead. He had an injury on his neck. When PW3 sought to tender the statement of the appellant, the objection which learned counsel raised on the admissibility of the document was on the date the statement was recorded but the objection was overruled since PW3 had stated that he recorded the statement on 18/12/2009 and not 8/11/2009 as put forward by learned counsel for the appellant. Learned counsel for the respondent had argued quite correctly that the only ground on which a statement would be rejected is when the statement was obtained under duress and the trial Judge agreed with this submission. The so called challenge which learned counsel made regarding the authenticity of the appellant's statement went to the weight to be attached to the

statement and certainly not its admissibility. *(Pp 213–214 Paras G – A)*

4. *Argument of counsel no matter how brilliant cannot replace evidence*
The submission made by learned counsel for the appellant that the evidence given by PW4 and Pw6 should be viewed with caution since the witnesses were related to the deceased and the said evidence contradicted rather than corroborated the confessional statement of the appellant cannot be taken seriously. The argument of counsel no matter how brilliant cannot replace evidence. See: Barr Orker Jev & Anor vs. Sekav Dzue Iyortyom & Ors. (2014) 14 NWLR (Pt. 1428) 575. In Exhibit E the appellant stated that after they had waylaid the deceased, Ibrahim hit him with the stick while the appellant and Bello strapped the deceased to the ground and Ibrahim used his knife to inflict injuries on the deceased's neck and mouth and they then took away the camel and went to Illela market leaving the deceased on the ground. *(P 214 Paras B – D).*

5. *Aspects of the confessional statement that were corroborated*
The aspects of the statement that were corroborated were the injury which was inflicted on the deceased's neck, the deceased being last seen with the appellant before his death and the disappearance of the camel.
The evidence given by PW4 and PW6 did not indicate any bias on the part of PW4 and PW6. PW4 was not cross-examined on her evidence and PW6 stated under cross-examination that he knew Barmo Dan-Gwamma, the deceased who used to carry goods for people on his camel for a fee. It was not suggested to them that they had a motive to serve which made them to testify. In the absence of any cross-examination to impugn their integrity, the submission by learned counsel that the trial Judge ought to have warned himself of the inherent danger of bias of such evidence is preposterous and merely speculative. *(P 214 Paras D – G)*

6. *Principle of last seen as a means of proof*
The principle of last seen was properly applied since the deceased was last seen alive when he was in the company of the appellant. What the principle propounds is that if Mr. A. was last seen alive with or in company of Mr. B and the next thing that happened was the

disappearance of Mr. A., the irresistible inference, is that Mr. A was or had been killed by Mr. B. and so the onus will be on Mr. B to offer an explanation for the purpose of showing that he was not the one who killed Mr. A. See Igho vs. State (1978) 3 SC 87; Gabriel vs. State (1989) 5 NWLR (Pt. 122) 457.

In Igabele vs. State (2006) 6 NWLR (Pt. 975) 100, this court per Katsina-Alu JSC (as he then was) in his contributory judgment said at page 123:

> **"No doubt the evidence against the appellant was circumstantial evidence. There was no direct evidence. However there is evidence that the deceased was last seen alive with the appellant. This was not in dispute. I think good sense and indeed common sense demands that the appellant should and must put forward some explanation as to what happened to the deceased. But no explanation was forthcoming.**

Oguntade (JSC) in his contribution adopted the reasoning of Eso (JSC) in Peter Igho vs. State (1978) 3 SC 61 (Reprint) at pages 62-63 thus:

> **"The complaint of learned counsel against the judgment is that the circumstantial evidence adduced in this case did not point irresistibly to the guilt of the appellant and also the evidence of the 3rd prosecution witness Philip Umukoro, should not have been accepted having regard to the fact that it took him eleven days before he came out with the information leading to the arrest of the appellant.**
>
> **But then, this is not the only evidence relied upon to convict the appellant. Apart from the evidence of Philip Umukoro, which has been criticised by the learned counsel for the appellant, there was the evidence of Ayeferherbe Okotie. She too saw the appellant carrying the deceased who was last seen alive with the appellant. The evidence was accepted by the learned trial Judge. He rejected the denial of the appellant. The only irresistible**

inference from the circumstances presented by the evidence in this case is that the appellant killed the deceased. We can find no other reasonable inference from the circumstances of the case.

The facts which were accepted by the learned trial Judge, amply supported by evidence before him, called for an explanation, and beyond the untrue denials of the appellant (as found by the learned trial Judge) none was forthcoming. See: R vs. Mary Anne Nash (1911) 6 CAR 225 at 228. Though this constitutes circumstantial evidence, it is proof beyond every reasonable doubt of the guilt of the appellant. For these reasons we dismiss the appeal". *(Pp 214 – 216 Paras G – B)*

Per C.C. Nweze (JSC):

As shown in the leading judgment, the deceased person was last seen riding on his camel with the appellant just a day before his dead body was discovered in Wauru village. Worse still, there was an injury on his neck. It was against this background that the learned AG, for the respondent, contended that the appellant had a duty to explain the circumstances of the death of the deceased person who was last seen with him [the appellant].

This submission by the learned Senior Advocate of Nigeria, the Sokoto State Attorney General, is unanswerable. As this court held in *Iliyasu vs. State* (2015) LPELR-24403 (SC) 44 -46; E-F, [per Nweze, JSC]:

The last seen doctrine, a doctrine of global application, *Madu vs. The State* (2012) LPELR-7867 (SC) 51-52; [2012] 15 NWLR (Pt. 1324) 405; [2012] 6 SCNJ 129; [2012] 6 SC (Pt.1) 50;[2012] 50 NSCQR 67, also, referred to as "the last seen theory, *Rajashkhanna vs. State of A.P* (2006) 10 SCC 172, is applied in homicide cases in

Nigeria, *Rabi Ismail vs. The* State [2011] MJSC 20, 77. It creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death, *Jua vs. The State* [2010] 2 MJSC 152, 186-187.

Thus, where an accused person was the last person to be seen in the company of the deceased person, he has a duty to give an explanation relating to how the latter met his or her death. In the absence of such an explanation, a trial court and even an appellate court will be justified in drawing the inference that he [the accused person] killed the deceased person, *Igabele vs. State* [2006] 6 NWLR (Pt. 975) 100; Obois vs. State (1965) NMLR 140; Nwaeze vs. The State (1996) 2 SCNJ 47, 61-62; *Gabriel vs. State* [1989] 3 NWLR (Pt. 122) 457; *Adeniji vs. State* (2001) 87 LRCN 1970; *Madu vs. The State* (supra); *Igho vs. The State* [1978] 3 SC 87, 254; 91978] 3 SC 61, 63.
In view of the said doctrine, therefore, it is the duty of the accused person to give an explanation relating to how the deceased met his or her death. Surely, in the absence of such an explanation, a trial court and even an appellate court, will be justified in drawing the inference that the accused person killed the deceased, *Igabele vs. The State* (supra); *Obosi vs. The State* (supra); *Adepeta vs. The State* [1998] 7 SCNJ 83; [1998] 9 NWLR (Pt. 565) 185; *Adeniji vs. The State* (supra); *Emeka vs. The State* [2001] 14 NWLR (pt. 734) 666, 683; [2001] 6 SCNJ 259; *Uguru vs. the State* [2002] 4 SCNJ 282, 293; [2002] 9 NWLR (Pt. 771) 90. *(Pp 220 – 221 Paras A – D)*

7. The doctrine of last seen is an exception to the constitutional provision on the innocence of the accused.

The doctrine has been held to be an exception to the watertight constitutional provision that a person is presumed innocent until

proved guilty, *Madu vs. The State* (supra) 84, A-D, citing *Igho vs. State* [1978] 35 SC 51, 62-63; *Igabele vs. State* (supra); Nwaeze vs. State (supra); Obosi vs. State (supra); Uguru vs. State (supra); *The State vs. Kalu* [1993] 7 SCNJ 112, 124-125; *Adepetu vs. The State* (supra); *Rabi Ismail vs. The State* [2011] MJSC 28, 77. *(P 221 Paras D – F)*

8. Per K.B Akaahs (JSC)

> **"In the instant case, the learned trial Judge after summing up the evidence led by the prosecution and defence found that there were no eye witnesses to the incidence that led to the death of the deceased but went on to consider PW6 evidence which was not controverted or discredited that he saw 1st accused with the deceased on a camel towards Wauru on the fateful day and was never found alive. He accepted and believed the evidence of PW6 to be true. He therefore held that in the absence of an explanation from the 1st accused, the court was justified to draw the inference the accused killed the deceased and so believed the evidence of PW4, PW5 and PW6 which remained uncontroverted. The learned trial Judge then took into account the extra-judicial statements of the 2nd and 3rd accused as to the role each of them played having made Exhibits A, A1 and B, B1. He reasoned that the confessional statements of the accused persons were not contested at the trial on the voluntariness but were retracted by the accused."**
> *(P 216 Paras C – F)*

The lower court had acquitted and discharged Bello Ibrahim and Ibrahim Dan Auta because of absence of corroboration of their retracted statements and as a result learned counsel argued that the appellant could not be guilty of conspiracy. This argument is faulty. The doctrine of judicial precedent is dependent on settled judicial hierarchy. This is because under the doctrine, decisions of courts higher up in hierarchy are generally binding on lower courts in the hierarchy.

Since October, 1963, the Supreme Court of Nigeria became the highest court in the country. Stare decisis or judicial precedent according to Blacks Law Dictionary 9th Edition page 1214 defines stare decisis or judicial precedent to mean standing by things decided and the courts must follow earlier judicial decisions when the same points arise again in litigation. In National Electric Power Authority vs. Onah (1997) 1 NWLR (Pt. 494 – 680 at 688 the term stare decisis was defined to mean to stand by your decision and the decisions of your predecessors, however wrong they are and whatever injustice they inflict. The Supreme Court is however not bound by the decisions of the lower courts but they are persuasive in nature. The premise under which the lower court allowed the appeals in Bello Ibrahim vs. State in Appeal No. CA/S/21c/2013 and Ibrahim Dan Auta vs. State Appeal No CA/S/22c/2013 which were decided on 30 June, 2014 was that the corroboration needed to find Bello Ibrahim and Ibrahim Dan Auta guilty on their retracted confessions was lacking. If the evidence of PW5 and PW6 is properly analysed it provides the required corroboration. The injury which PW5 saw on the deceased neck makes the retracted confessional statement of Bello Ibrahim true; so also does the disappearance of the deceased's camel corroborate the statement of Ibrahim Dan Auta. It is therefore not correct as the court below made the finding that evidence was lacking which would corroborate the retracted Exhibits A, A1 and Exhibit B, B1 thereby leading to the acquittal and discharge of the two people.
(Pp 217 – 218 Paras C – A)

9. *Appellant was properly convicted on the concurrent findings of two courts*
By way of emphasis, it must be noted that the admissibility of exhibit E1, the English translation of Exhibit E, the appellant's confessional statement, was never an issue during his trial. The evidence the respondent proffered through particularly PW4 and PW6 offers the corroboration any reasonable tribunal settles on to convict in such an instance. Combined, the evidence shows the appellant as being a party to the death of Dangoma, the deceased. He received N20,000,00k naira for doing so. The appellant has not convinced me that the concurrent decisions of the two courts based on the lawfully admitted evidence on record is perverse and need to be interfere with. See Ogundiyan vs.

State (1991) 3 NWLR (Pt.181) 519 and Omotola vs. The State (2009) 7 NWLR (Pt 1139) 148. *(P 218 Paras D – G)*

10. *Principles relating to a retracted confessional statement*
The retraction of the confessional statement by the appellant is of no moment. The law is well settled that an accused person can be safely convicted on his retracted confessional statement if the trial court is satisfied that the accused made that statement and as to the circumstances which gave credibility to the contents of the confession. It is however desirable, as in the instant case that before a conviction can be properly based on such retracted confessional statement, there should be some corroborative evidence outside the confession which would make it probable that the confessional statement was true. See Okoh vs. The State (2014) LPELR-22589 (SC) (2014) 8 NWLR (Pt 1410) 502, Iluebeka vs. The State (2000) 7 NWLR (Pt 665) 404.

As I said earlier, the evidence of PW5 and PW6 effectively corroborates the confessional statement of the appellant. I accept and agree with the decision of the two courts below that the appellant killed the deceased and stole his camel. *(P 219 Paras D – G).*

Nigerian Cases Cited

Adeniji vs. State (2001) 87 LRCN 1970;
Adepeta vs. The State [1998] 7 SCNJ 83; [1998] 9 NWLR (Pt. 565) 185;
Adesina vs. State (2012) 14 NWLR (Pt. 1321) 429.
Barr Orker Jev & Anor vs. Sekav Dzue Iyortyom & Ors. (2014) 14 NWLR (Pt. 1428) 575.
Emeka vs. The State [2001] 14 NWLR (pt. 734) 666, 683; [2001] 6 SCNJ 259;
Gabriel vs. State (1989) 5 NWLR (Pt. 122) 457.
Igabele vs. State (2006) NWLR (Pt. 975) 100,
Igabele vs. State [2006] 6 NWLR (Pt. 975) 100;
Igho vs. State (1978) 3 SC 87;
Igho vs. The State [1978] 3 SC 87, 254; 91978] 3 SC 61
Iliyasu vs. State (2015) LPELR-24403 (SC) 44 -46;
Jua vs, The State [2010] 2 MJSC 152, 186-187.
Madu vs. The State (2012) LPELR-7867 (SC) 51-52; [2012] 15 NWLR (Pt. 1324) 405; [2012] 6 SCNJ 129; [2012] 6 SC (Pt.1) 50;[2012] 50 NSCQR 67,

A *National Electric Power Authority vs. Onah (1997) 1 NWLR (Pt. 494 – 680.*
Nwaeze vs. The State (1996) 2 SCNJ 47
Obois vs. State (1965) NMLR 140;
Ogundiyan vs. State (1991) 3 NWLR (Pt.181) 519
B *Okoh vs. The State (2014) LPELR-22589 (SC) (2014) 8 NWLR (Pt 1410) 502,*
Uluebeka vs. The State (2000) 7 NWLR (Pt 665) 404.
Omotola vs. The State (2009) 7 NWLR (Pt 1139) 148.
Oseni vs. State (2012) 5 NWLR (Pt. 1293) 351
C *Peter Igho vs. State (1978) 3 SC 61*
Rabi Ismail vs. The State [2011] MJSC 20
Rabi Ismail vs. The State [2011] MJSC 28
The State vs. Kalu [1993] 7 SCNJ 112, 124-125;
D *Uguru vs. the State [2002] 4 SCNJ 282, 293; [2002] 9 NWLR (Pt. 771) 90*

Foreign Cases Cited
R vs. Mary Anne Nash (1911) 6 CAR 225
E *Rajashkhanna vs. State of A.P (2006) 10 SCC 172*

Representation
F. Bomo Alabi with M. Yunusa for appellant.
F Sulaiman Usman (SAN), Hon. Attorney-General, Sokoto State with Kabiru Haliru, Director Procurement Compliance, Sokoto State for respondent.

BAYANG AKAAHS, (JSC) (Delivering the Lead Judgment): This is a
G substantive appeal not interlocutory (as described in the introduction of the respondent's brief). It is against the judgment of the Court of Appeal, Sokoto Division in Appeal No. CA/S/20C/2013 delivered on 28 March, 2014 which affirmed the conviction of the appellant for the offence of culpable homicide
H punishable with death by the Sokoto State High Court. The appellant was sentenced to death by hanging on 25 June, 2012 by Abass J. (as he then was) in Charge No. SS/18C/2010.

The facts leading to this appeal are as follows:

I

On 22 November 2009, which was a Sunday and Illela market day, the appellant went to the deceased's house thrice to look for

A him but did not meet him. On the 3rd occasion PW4 who is the deceased wife asked him why he was looking for her husband and he answered that someone wanted the deceased to use his camel to carry goods. On the fourth visit, the appellant met the
B deceased and they went out together on the camel. PW6 saw the appellant riding on the camel with the deceased. The deceased did not return to his house and an alarm was raised. On the next day which was Monday, PW5 who is a nephew of the deceased
C went in search of him and found his corpse in Wauru and the camel was nowhere to be found. He then reported the matter to the police and his friend also informed some influential people in the community. He was one of those who accompanied the
D police in a vehicle to the scene where the corpse lay and they carried it to the village and later to the hospital where autopsy was carried before the body was released for burial. In the course of the investigation PW3 recorded the appellant's
E statement in Hausa which he later translated into English. The statement recorded in Hausa and its English translation were tendered and admitted as Exhibit E and E1 respectively. Exhibit E turned out to be confessional statement but the
F appellant who testified as DW1 denied knowledge of anything. He said he was at his place of work when the police went and arrested him and took him to Gada Local Government Secretariat and from there to the police station located in the
G Local Government without informing him about any offence. He said he was beaten while protesting he received some injuries. He was so manhandled that he could not remember what he said. He denied knowing the 2nd accused or that he went
H looking for the deceased. He also told the court that he did not volunteer any statement to the police. When he was cross-examined about the deceased, he said it was in the police station in Gada Local Government that he heard about the deceased's
I name and that he never knew him before. He said he had never met PW4 and it was only in court that he knew her.

The learned trial Judge considered the evidence presented to the court and found that the evidence against the accused was circumstantial and reasoned that since the deceased was last seen alive in the company of the 1st accused, he 1st accused had explanation to give as to what led to the death of the deceased and in the absence of such explanation, the court would be justified to draw the inference that he was the one who killed the deceased. The trial court convicted and sentenced all the accused persons to death based on their confessional statements for which corroboration was found in the evidence of the prosecution witnesses. Each of them was given 5 years imprisonment with hard labour for the robbery offence.

The appellant appealed to the Court of Appeal Sokoto and it was dismissed. He felt aggrieved and further appealed to this court and his counsel Boma Ozobia Esq raised three issues for determination as follows:

1. **Whether in view of the contradictions between the retracted confessional statement of the appellant and the testimonies of the prosecution witnesses allegedly corroborating same, the court below was right to have affirmed the decision of the trial court? Ground 1.**

2. **Whether the decision of the lower court that the prosecution successfully proved beyond reasonable doubt that the appellant is guilty of conspiracy, murder and robbery to warrant his conviction and sentence to death by hanging is supportable by the evidence adduced at the trial. Ground 3.**

3. **Whether the lower court was correct to hold that the circumstantial evidence before it was sufficient to establish the conspiracy to commit the alleged offences when same was not proved? Ground 2.**

On his part, Suleiman Usman Esq. the Attorney-General of Sokoto State who settled the brief of the respondent formulated a single issue for determination namely:

A Whether in the circumstances of this case, the court below was right in affirming the conviction and sentence of the appellant regard being had to the totality of the evidence adduced before the trial court.

The hub of the arguments of learned counsel of the appellant in B attacking the decision of the lower court which dismissed the appeal and affirmed the judgment of the learned trial Judge, Abass J. (as he then was) centers around the conviction being based on the retracted confessional statement which lacked independent corroboration since PW4 and PW6 were C closely related to the deceased and could not be said to have given unbiased evidence connecting the appellant with the offences for which he was convicted and sentenced. Leaned counsel argued that the confessional statement, Exhibit E and the English translation Exhibit E1 were challenged D both at the point of tendering and during the appellant's testimony and contended that the learned trial court ought to have made a finding as to whether in the circumstances the confessional statement was indeed made by the appellant.

E Learned counsel submitted that where a confessional statement had been retracted the statement must be corroborated to be able to sustain a conviction and referred to **Aremu & Anor vs. State (1991) & NWLR (Pt. 201) 1 at 21-22.** Learned counsel also cited **Oseni vs. State (2012) 5 NWLR** F **(Pt. 1293) 351 at 374** where this court per Ngwuta (JSC) reiterated that before a conviction based on a confessional statement is upheld it must pass satisfactorily the six tests that have been applied to ensure that there are other facts outside the statement that go to show that the confession was probable. It G was submitted by learned counsel that the prosecution failed to prove beyond reasonable doubt that the deceased died and furthermore the prosecution could not sufficiently fix the act or intention of killing the victim on the appellant as no nexus has been created between the appellant and victim of the H crime.

On the issue of conspiracy, learned counsel for the appellant argued that the appellant cannot be convicted when other co-accused have been discharged and acquitted. He submitted in paragraph 46 page 18 of the I appellant's brief that:

A **"the persons charged alongside the appellant at the court below viz:**

B **Bello Ibrahim vide judgment of 30 June, 2014 in Appeal No. CA/S/21C/2013 and Ibrahim Dan Auta vide judgment of 30 June, 2014 in Appeal No. CA/S/22C/2013 delivered by same Sokoto Judicial Division of the Court of Appeal had all been discharged**

C **and acquitted of the offence for which the appellant is said to have conspired with them to commit".**

He said it was fitting that this honourable court set aside the conviction for

D conspiracy in the circumstances.

Turning to the issue of the appellant being the person who was last seen with the deceased, learned counsel contended that it is not enough for the victim to have been last seen in the company of the appellant but that in

E addition there must be circumstantial evidence supporting the fact that within the period of appellant was with the victim he indeed killed him and that no other person could have intervened to kill the victim. He relied on the dictum of **Ariwoola (JSC) in Madu Vs. State (2012) 15 NWLR (Pt. 1324) 405 at**

F **447** where His Lordship expounded the principle thus:

G **"The last seen theory, comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible".**

H Mr. Sulaiman Usman, the learned Attorney-General of Sokoto State appearing for the respondent pointed to the fact that the burden of proof of guilt of the accused person lies with the prosecution and the standard required to ground conviction is proof beyond reasonable doubt. That burden may be

I discharged through the confessional statement of the accused person; evidence of an eye witness or circumstantial evidence. In the instant case, the accused (appellant) made a confessional statement, Exhibits E and E1. He

submitted that once a confessional statement of the accused person is admitted, the prosecution needs not prove the guilt of the accused person beyond reasonable doubt as the confessional statement ends the need to do so and relied on **Solola vs. State (2005) 11 NWLR (Pt. 937) 460 at 497-498.** He submitted that Exhibits E and E1 were the voluntary confessional statement of the appellant which the learned trial Judge relied on to convict him. He went further to submit that even though the appellant retracted the statement the court could still convict him on his confession notwithstanding its retraction, provided there is corroboration, citing **Ubierho vs. State (2005) 2 SCNJ 1.** He submitted that the necessary corroboration was provided by the evidence of PW4, PW5 and PW6 to the confessional statement of the appellant. He maintained that the circumstantial evidence adduced in this case is strong, cogent and sufficient to sustain the conviction of the appellant and relied on the following cases. **Emeka vs. State (2001) 14 NWLR (Pt. 734) 666 at 669; Ejiofor vs. State (2001) 9 NWLR (Pt. 718) 371; (2001)6 NSCQR 227-228.**

On the doctrine of last seen, learned counsel submitted that it is settled that the law presumes that the person last seen with deceased bears full responsibility for his death if it turns out that the person seen with him last is dead. He anchored his submission on **Moses Jua vs. State (2010) 4 NWLR (Pt. 1184) 217** and **Igabele vs. State (2006) 6 NWLR (Pt. 975) 100.**

Learned counsel argued that it behoves on the appellant to give explanation on the death of the deceased who was last seen alive with him and where such explanation is contained in the retracted confessional statement which was corroborated, the conviction of the appellant by the trial court and affirmed by the court below cannot be faulted.

THE EVIDENCE OF THE WITNESSES

The witnesses who testified in connection with the appellant were PW3, PW4 and PW6. PW3 was the one who recorded the appellant's statement in Hausa Language. PW4 was the deceased's wife and she recounted how the appellant visited her house four times in one day in search of the deceased. On the third visit, she asked the appellant what he wanted from the deceased and he replied that someone wanted to engage the deceased to use his camel to carry some goods. It was on the fourth visit that he met the deceased and the two of them went out with the camel but the deceased never

returned home alive. PW6 met the deceased and the appellant riding on the deceased's camel towards Wauru where the body of the deceased was found the next day. Meanwhile the camel had disappeared and could not be found.

In the statement of the appellant, Exhibit E the translation of which is Exhibit E1, the appellant was reported to have said:

> **"I could remember last month a week of big Sallah on Sunday I and two others, one Bello and Ibrahim all of the same address I went to Wairo to Rugar Ardo area of Gada Sokoto, we stopped (sic) one Dangoma on the road with his camel and one Ibrahim hit him with his stick and I and Bello we march him on the ground and Ibrahim came and slaughter him with knife on his neck and mouth and we collect his camel and we leave him there and we went to Illela market then Ibrahim gave us the sum of N40,000.00 and went away with the camel and I and Bello we divide the money N20,000.00 each, from there we left the market and went home and after Sallah I went to Dankurmi for a job. I was there the police came and arrested me. Truly we are the one who killed Dangoma in the bush and collected his camel and left there……".**

The appellant resiled from this statement when he testified in court as DW1. This is what he said:

> **"I did not give any statement to PW3 at all".**

Although the appellant said he was beaten after his arrest and as a result of the injury he received he became unaware of what he was saying, this goes to show that he made a statement but he did not raise objection to the statement made as a result of torture and so the trial court could not order a trial within trial to be conducted before the statement was admitted in evidence. Admissibility was no longer an issue at the time the appellant testified. Before relying on the statement which was clearly a confession that he participated in the killing of the deceased, the trial judge had to examine the statement using the six way test to confirm its veracity.

A See **Oseni vs. State (2012) 5 NWLR (Pt. 1293) 351** and **Adesina vs. State (2012) 14 NWLR (Pt. 1321) 429.** The tests are:

B
(i) Is there anything outside the confession to show that it is true?
(ii) Is it corroborated?
(iii) Are the facts therein stated as true as far as can be tested?
C **(iv) Had the accused person the opportunity of committing the offence?**
(v) Is the confession possible?
(vi) Is the confession consistent with other facts ascertained and proved?
D

The fact that Dangoma died is not in dispute. The deceased was last seen riding on his camel with the appellant by PW6 a day before PW5 discovered
E his dead body in Wauru village and there was an injury on the neck. The appellant had visited the deceased's house four times on the day the deceased disappeared and met PW4 at home. It was on his fourth visit that he met the deceased and the two of them went out with the deceased's camel. The corpse
F of the deceased was seen in the bush along Wauru village, the direction the PW6 saw the deceased and the appellant were going. The injury found on the neck of the deceased is consistent with the confessional statement of the appellant that he and Bello "march him on the ground and Ibrahim came and
G slaughter him with knife on his neck and mouth".

The lower court held that the statement is corroborated by the evidence of PW4 and PW6. I am of the firm view that the evidence of PW5 provided the highest corroboration because he said that when he learnt his uncle did not
H sleep at home the previous night he went in search of him and on reaching Wauru he met the deceased lying dead. He had an injury on his neck. When PW3 sought to tender the statement of the appellant, the objection which learned counsel raised on the admissibility of the document was on the date the
I statement was recorded but the objection was overruled since PW3 had stated that he recorded the statement on 18/12/2009 and not 8/11/2009 as put forward by learned counsel for the appellant. Learned counsel for the respondent had argued quite correctly that the only ground on which a statement would be

rejected is when the statement was obtained under duress and the trial Judge agreed with this submission. The so called challenge which learned counsel made regarding the authenticity of the appellant's statement went to the weight to be attached to the statement and certainly not its admissibility.

The submission made by learned counsel for the appellant that the evidence given by PW4 and Pw6 should be viewed with caution since the witnesses were related to the deceased and the said evidence contradicted rather than corroborated the confessional statement of the appellant cannot be taken seriously. The argument of counsel no matter how brilliant cannot replace evidence. See **Barr Orker Jev & Anor vs. Sekav Dzue Iyortyom & Ors. (2014) 14 NWLR (Pt. 1428) 575.** In Exhibit E the appellant stated that after they had waylaid the deceased, Ibrahim hit him with the stick while the appellant and Bello strapped the deceased to the ground and Ibrahim used his knife to inflict injuries on the deceased's neck and mouth and they then took away the camel and went to Illela market leaving the deceased on the ground.

The aspects of the statement that were corroborated were the injury which was inflicted on the deceased's neck, the deceased being last seen with the appellant before his death and the disappearance of the camel.

The evidence given by PW4 and PW6 did not indicate any bias on the part of PW4 and PW6. PW4 was not cross-examined on her evidence and PW6 stated under cross-examination that he knew Barmo Dan-Gwamma, the deceased who used to carry goods for people on his camel for a fee. It was not suggested to them that they had a motive to serve which made them to testify. In the absence of any cross-examination to impugn their integrity, the submission by learned counsel that the trial Judge ought to have warned himself of the inherent danger of bias of such evidence is preposterous and merely speculative.

The principle of last seen was properly applied since the deceased was last seen alive when he was in the company of the appellant. What the principle propounds is that if Mr. A. was last seen alive with or in company of Mr. B and the next thing that happened was the disappearance of Mr. A., the irresistible inference, is that Mr. A was or had been killed by Mr. B. and so the onus will be on Mr. B to offer an explanation for the purpose of showing that he was not the one who killed Mr.A. See **Igho vs. State (1978) 3 SC 87; Gabriel vs. State (1989) 5 NWLR (Pt. 122) 457.**

In **Igabele vs. State (2006) NWLR (Pt. 975) 100,** this court per Katsina-Alu JSC (as he then was) in his contributory judgment said at page 123:

> **"No doubt the evidence against the appellant was circumstantial evidence. There was no direct evidence. However there is evidence that the deceased was last seen alive with the appellant. This was not in dispute. I think good sense and indeed common sense demands that the appellant should and must put forward some explanation as to what happened to the deceased. But no explanation was forthcoming.**

Oguntade JSC in his contribution adopted the reasoning of Eso JSC in **Peter Igho vs. State (1978) 3 SC 61** (Reprint) at pages 62-63 thus:

> **"The complaint of learned counsel against the judgment is that the circumstantial evidence adduced in this case did not point irresistibly to the guilt of the appellant and also the evidence of the 3rd prosecution witness Philip Umukoro, should not have been accepted having regard to the fact that it took him eleven days before he came out with the information leading to the arrest of the appellant.**
>
> **But then, this is not the only evidence relied upon to convict the appellant. Apart from the evidence of Philip Umukoro, which has been criticised by the learned counsel for the appellant, there was the evidence of Ayeferherbe Okotie. She too saw the appellant carrying the deceased who was last seen alive with the appellant. The evidence was accepted by the learned trial Judge. He rejected the denial of the appellant. The only irresistible inference from the circumstances presented by the evidence in this case is that the appellant killed the deceased. We can find no other reasonable inference from the circumstances of the case.**

The facts which were accepted by the learned trial Judge, amply supported by evidence before him, called for an explanation, and beyond the untrue denials of the appellant (as found by the learned trial Judge) none was forthcoming. See: R vs. Mary Anne Nash (1911) 6 CAR 225 at 228. Though this constitutes circumstantial evidence, it is proof beyond every reasonable doubt of the guilt of the appellant. For these reasons we dismiss the appeal".

In the instant case, the learned trial Judge after summing up the evidence led by the prosecution and defence found that there were no eye witnesses to the incidence that led to the death of the deceased but went on to consider PW6 evidence which was not controverted or discredited that he saw 1st accused with the deceased on a camel towards Wauru on the fateful day and was never found alive. He accepted and believed the evidence of PW6 to be true. He therefore held that in the absence of an explanation from the 1st accused, the court was justified to draw the inference the accused killed the deceased and so believed the evidence of PW4, PW5 and PW6 which remained uncontroverted. The learned trial Judge then took into account the extra-judicial statements of the 2nd and 3rd accused as to the role each of them played having made Exhibits A, A1 and B, B1. He reasoned that the confessional statements of the accused persons were not contested at the trial on the voluntariness but were retracted by the accused. It is settled law that a voluntary confession or statement of an accused is deemed to be relevant and admissible against its maker and not against another. See **Durugo vs. The State (1992) 7 NWLR (Pt. 255) 524 at 541; Ikemson vs. The State (1989) 3 NWLR(Pt.110) 455 at 476** and **Solola vs. State supra at p. 484.**

Apart from the appellant who made Exhibits E and E1 where he admitted strapping the deceased to the ground and Ibrahim using a stick and knife to hit the deceased and thereafter cutting his neck, in the statement of the 2nd accused Ibrahim Bello, similar admission was made in Exhibit A, A1 wherein he slaughtered the deceased with the knife belonging to the appellant. The statement of the 3rd accused, Ibrahim Dan Auta admitted as Exhibit B, B1 was not direct. He said that on 22/11/2009 at about 8am he was in his house together with Bello Ibrahim when Hayatu met them. He overheard Hayatu

telling Bello Ibrahim that they should meet in the bush along Wauru road and that he would come with one man with his camel. Bello and himself then went to the bush and Hayatu met them with Dan Dwamma with his camel. It was there Hayatu hit Dan Gwamma and he fell down. After Hayatu had slaughtered Dan Gwamma, he (Ibrahim Dan Auta) took the camel to Tuhur village where he sold it to one Umaru Aliyu at the cost of N70,000.00 but did not collect the money but gave N8,000.00 to Bello Ibrahim and Hayatu.

The inference that can be drawn is that the appellant and the other two accused persons conspired to rob the deceased of his camel and in the process, they killed him.

The lower court had acquitted and discharged Bello Ibrahim and Ibrahim Dan Auta because of absence of corroboration of their retracted statements and as a result learned counsel argued that the appellant could not be guilty of conspiracy. This argument is faulty. The doctrine of judicial precedent is dependent on settled judicial hierarchy. This is because under the doctrine, decisions of courts higher up in hierarchy are generally binding on lower courts in the hierarchy.

Since October, 1963, the Supreme Court of Nigeria became the highest court in the country. Stare decisis or judicial precedent according to Blacks Law Dictionary 9th Edition page 1214 defines stare decisis or judicial precedent to mean standing by things decided and the courts must follow earlier judicial decisions when the same points arise again in litigation. In **National Electric Power Authority vs. Onah (1997) 1 NWLR (Pt. 494) 680 at 688** the term stare decisis was defined to mean to stand by your decision and the decisions of your predecessors, however wrong they are and whatever injustice they inflict. The Supreme Court is however not bound by the decisions of the lower courts but they are persuasive in nature. The premise under which the lower court allowed the appeals in **Bello Ibrahim vs. State in Appeal No. CA/S/21c/2013 and Ibrahim Dan Auta Vs. State Appeal No CA/S/22c/2013** which were decided on 30 June, 2014 was that the corroboration needed to find Bello Ibrahim and Ibrahim Dan Auta guilty on their retracted confessions was lacking. If the evidence of PW5 and PW6 is properly analysed it provides the required corroboration. The injury which PW5 saw on the deceased neck makes the retracted confessional statement of Bello Ibrahim true; so also does the disappearance of the deceased's camel

corroborate the statement of Ibrahim Dan Auta. It is therefore not correct as the court below made the finding that evidence was lacking which would corroborate the retracted Exhibits A, A1 and Exhibits B, B1 thereby leading to the acquittal and discharge of the two people.

The appeal lacks merit and it is hereby dismissed. The decision of the lower court confirming the conviction and sentence imposed on the appellant by the court below is further affirmed by this Court. The appeal is hereby dismissed.\

K. B. AKAAHS
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): Having read in draft the lead judgment of my learned brother ***KUMAI BAYANG AKAAHS (JSC)*** just delivered, I entirely agree that the appeal is bereft of merit and same should be dismissed.

By way of emphasis, it must be noted that the admissibility of exhibit E1, the English translation of Exhibit E, the appellant's confessional statement, was never an issue during his trial. The evidence the respondent proffered through particularly PW4 and PW6 offers the corroboration any reasonable tribunal settles on to convict in such an instance. Combined, the evidence shows the appellant as being a party to the death of Dangoma, the deceased. He received N20,000,00k naira for doing so. The appellant has not convinced me that the concurrent decisions of the two courts based on the lawfully admitted evidence on record is perverse and needs to be interfere with. See **Ogundiyan vs. State (1991) 3 NWLR (Pt.181) 519** and **Omotola vs. The State (2009) 7 NWLR (Pt 1139) 148.** It is for this and the fuller reasons stated in the lead judgment, that I also dismiss the appeal.

Musa Dattijo Muhammad,
Justice, Supreme Court

INYANG OKORO, (JSC): I read in draft the lead judgment just delivered by my learned brother, **Kumai Bayang Akaahs**, (JSC) with which I am in full agreement that this appeal lacks merit and deserves an order of dismissal. I propose to make a few comments in support of the judgment.

In **Moses Jua vs. The State (2010) LPELR-1637 (SC), (2010) 4 NWLR (Pt. 1184) 217**, this court held that in murder or culpable homicide

A cases, where the deceased was last seen with the accused, such an accused, like the appellant herein, has a duty to explain or show the whereabout of the deceased or how the deceased met his death, and where no explanation is forthcoming, the court has jurisdiction to draw conclusion that it was the
B accused that killed the deceased. See **Archibong vs. The State (2006) 14 NWLR (Pt 1000) 349 at 395, Adepetu vs. The State (1998) 7 SCNJ 83, Igabele vs. State (2006) LPELR-1441 (SC) Illiyasu vs. The State (2016) LPELR-24403 (SC).**

C In the instant case, the appellant was last seen riding on a camel with the deceased. So soon thereafter the deceased was gruesomely killed. Both the evidence of PW6 who saw the appellant and the deceased riding on the camel and that of PW5 who discovered the corpse along the area they went, coupled
D with the injury on the neck of the deceased corroborate the confessional statement of the appellant. The retraction of the confessional statement by the appellant is of no moment. The law is well settled that an accused person can be safely convicted on his retracted confessional statement if the trial court is
E satisfied that the accused made that statement and as to the circumstances which gave credibility to the contents of the confession. It is however desirable, as in the instant case that before a conviction can be properly based on such retracted confessional statement, there should be some corroborative
F evidence outside the confession which would make it probable that the confessional statement was true. See **Okoh vs. The State (2014) LPELR-22589 (SC) (2014) 8 NWLR (Pt 1410) 502, Ulueboka vs. The State (2000) 7 NWLR (Pt 665) 404.**

G As I said earlier, the evidence of PW5 and PW6 effectively corroborate the confessional statement of the appellant. I accept and agree with the decision of the two courts below that the appellant killed the deceased and stole his camel.

H Based on the above and the more elaborate reasons in the lead judgment, I agree that this appeal is devoid of merit. It is accordingly dismissed by me. Appeal dismissed.

John Inyang Okoro
I ***Justice, Supreme Court***

CENTUS NWEZE, (JSC): My Lord, Aka'ahs, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship that this appeal is, totally, devoid of merit and must be dismissed.

As shown in the leading judgment, the deceased person was last seen riding on his camel with the appellant just a day before his dead body was discovered in Wauru village. Worse still, there was an injury on his neck. It was against this background that the learned AG, for the respondent, contended that the appellant had a duty to explain the circumstances of the death of the deceased person who was last seen with him [the appellant].

This submission by the learned Senior Advocate of Nigeria, the Sokoto State Attorney General, is unanswerable. As this court held in **Iliyasu vs. State (2015) LPELR-24403 (SC) 44 -46; E-F, [per Nweze, JSC]:**

> **The last seen doctrine, a doctrine of global application, *Madu vs. The State* (2012) LPELR-7867 (SC) 51-52; [2012] 15 NWLR (Pt. 1324) 405; [2012] 6 SCNJ 129; [2012] 6 SC (Pt.1) 50;[2012] 50 NSCQR 67, also, referred to as "the last seen theory, *Rajashkhanna vs. State of A.P* (2006) 10 SCC 172, is applied in homicide cases in Nigeria, *Rabi Ismail vs. The* State [2011] MJSC 20, 77. It creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death, *Jua vs, The State* [2010] 2 MJSC 152, 186-187.**
>
> **Thus, where an accused person was the last person to be seen in the company of the deceased person, he has a duty to give an explanation relating to how the latter met his or her death. In the absence of such an explanation, a trial court and even an appellate court will be justified in drawing the inference that he [the accused person] killed the deceased person, *Igabele vs. State* [2006] 6 NWLR (Pt. 975) 100; Obois vs. State (1965) NMLR 140; Nwaeze vs. The State (1996) 2 SCNJ 47, 61-62; *Gabriel vs. State* [1989] 3 NWLR (Pt. 122) 457; *Adeniji vs. State* (2001) 87 LRCN 1970; *Madu vs. The State* (supra); *Igho s. The State* [1978] 3**

SC 87, 254; 91978] 3 SC 61, 63.

In view of the said doctrine, therefore, it is the duty of the accused person to give an explanation relating to how the deceased met his or her death. Surely, in the absence of such an explanation, a trial court and even an appellate court, will be justified in drawing the inference that the accused person killed the deceased, *Igabele vs. The State* (supra); *Obosi vs. The State* (supra); *Adepeta vs. The State* [1998] 7 SCNJ 83; [1998] 9 NWLR (Pt. 565) 185; *Adeniji vs. The State* (supra); *Emeka vs. The State* [2001] 14 NWLR (pt. 734) 666, 683; [2001] 6 SCNJ 259; *Uguru vs. the State* [2002] 4 SCNJ 282, 293; [2002] 9 NWLR (Pt. 771) 90.

The doctrine has been held to be an exception to the watertight constitutional provision that a person is presumed innocent until proved guilty, *Madu vs. The State* (supra) 84, A-D, citing *Igho vs. State* [1978] 35 SC 51, 62-63; Igabele vs. State (supra); Nwaeze vs. State (supra); Obosi vs. State (supra); Uguru vs. State (supra); The State vs. Kalu [1993] 7 SCNJ 112, 124-125; Adepetu vs. The State (supra); Rabi Ismail vs. The State [2011] MJSC 28, 77.

It is for these, and the more elaborate, reasons in the leading judgment that I, too, shall enter an order dismissing this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by my learned brother, K.B. AKA'AHS, **JSC.** The judgment represents my views in this appeal. I have nothing further and useful to add to it. Accordingly, I adopt it, including the consequential Orders made therein.

Ejembi Eko,
Justice, Supreme Court

HON. ADEYEMI SABIT IKUFORIJI
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 148/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Brief writing – Issues for determination – Whether it is proper for an appeal court to reframe issue for determination – Relevant Considerations thereof.

APPEAL: Brief writing – Proliferation of issues for determination – Attitude of appellate courts thereto – Guiding principles.

APPEAL: Issue for determination based on obiter – Determination amounts to academic exercise – Has no practical value.

COURT: Appeal Court – Power to reframe issues for determination – Source, extent and rationale.

COURT: Evaluation of evidence by court – Power of rehearing under S.15 of Court of Appeal Act 2004 – Whether can be invoked when reviewing a trial court's decision on a No case submission..

COURT: Interpretation of Statutes – Guiding Principles thereof.

COURT: Power of Court of Appeal under S.15 Court of Appeal Act, 2004 – Extent Purport, essence and Imperatives.

CRIMINAL LAW AND PROCEDURE: No case submission – Arguments on the defence of accused – Whether not necessary at the stage of No Case – Submission – Relevant principles.

CRIMINAL LAW AND PROCEDURE: No case submission – Prima facie case – Meaning – When established to warrant calling the accused – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: No case submission – When can be properly made and upheld – Principles in Cop. vs. Ibeziako (1963) 1 All NLR 61.

CRIMINAL LAW AND PROCEDURE: Proof of conspiracy – Requirements thereof.

CRIMINAL LAW: Essential elements of conspiracy – Considerations thereof.

CRIMINAL LAW: Offence of money laundering – Elements

EVIDENCE: Prima facie case – Nature – Relevance

PRACTICE AND PROCEDURE: Where a party raises an academic or hypothetical issue – Whether it has no practical or utilitarian value and amounts to abuse of court's process.

STATUTE: Interpretation – Relevant Principles thereof.

STATUTE: S. 1 of Money Laundering Prohibition Act of 2004 and S. 1 of Money Laundry Prohibition Act of 2011 – Purport, essence and imperatives – Whether strict liability provisions.

WORDS AND PHRASE: "Prima facie' – Meaning.

Issues for Determination

1. **Whether the Court of Appeal was right in evaluating or re-evaluating the evidence adduced by parties before the trial court when there is no appeal against the finding of facts made by the trial court or where the appeal thereto has been abandoned. (Distilled from Grounds 3, 4 and 7 of the Notice of Appeal).**

2. **Whether the Court of Appeal was right in holding that Section 1 of the Money Laundering Prohibition Act 2004 and 2011 create a strict liability offence (Distilled from Grounds 5 & 6 of the Notice of Appeal).**

3. **Whether the Court of Appeal was right in holding that proliferation of issues from the grounds of appeal is more technical rule rather than fundamental rule. (Distilled from Grounds 1 and 2 of the Notice of Appeal).**

4. **Whether the Court of Appeal was right in holding that the respondent has made out a prima facie case to warrant the appellant to enter a defence to the charge. (Distilled from Ground 8).**

Facts of the Matter

The appellant and one Mr. Oyebode Alade Atoyebi (2nd accused at the trial court) stood trial before the Federal High Court on a 54 amended count charge dated 4th June, 2013 for accepting various cash payments above the threshold set by the Money Laundering Prohibition Act 2004 (MLA 2004) and Money Laundering Prohibition Act 2011 (MLA 2011) without going through financial institution. The respondent called two witnesses and tendered exhibits P1 to P6. After the close of the respondent's case, the appellant made a No Case Submission which was upheld by the learned trial Judge.

Dissatisfied with the ruling, the respondent appealed to the Court of Appeal via Notice of Appeal dated 21st October, 2014. In a considered judgment delivered

on 4th November, 2016, the Court of Appeal set aside the decision of the trial court and held that the respondent made a prima facie case against the appellant requiring the appellant to enter his defence.

It is from the decision of the Court of Appeal that the appellant has appealed to the Supreme Court via a notice of appeal dated 17th January, 2017.

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

1. *Appeal courts have power to reframe issues for determination*
What prejudice or miscarriage of justice did the appellant suffer from the lower court's reframing of the issues(s)? So long as it does not lead to injustice to any party appeal courts possess that inherent power, in the interest of justice and for the purpose of narrowing down the issue(s) and making them clearer, accurate and apt in order to be properly addressed, to reject, modify or reframe any or all issues formulated by the parties. See AFRICAN INTERNATIONAL BANK LTD. vs. INTEGRATED DIMENSIONAL SYSTEM LTD. & ORS. (2012) LPELR – 9710 (SC). Where the issue(s) formulated by respondent is or are more elaborate, succinct, accurate and apt to the dispute than those formulated by the appellant the court is free to adopt such issue(s), unless doing so would lead to injustice or prejudice to the appellant. See MUSA SHA (JNR) & ANOR. vs. DA RAP KWAN & ORS. (2000) 6 SCNJ 101; (2000) 8 NWLR (pt. 670) 685.
(Pp 243 – 244 Paras I – D)

2. *Issue 3.3 is based on Obiter and its determination has no practical value*
This appellant's issue 3.3, distilled from grounds 1 & 2 does not seek to strike-down appeal in its entirety. It appears to me, that the appellant is only addressing academic postulations rather than his addressing any real practical utilitarian issues in the appeal. In other words, even if I resolve the issue in favour of the appellant, the appeal can still be determined on other issues, as the lower court did. It appears clear to me also, that the appellant's issue 3,3, distilled from his grounds 1 & 2, has been erected on mere *obiter dictum* of the lower court; the appeal in actuality having not been decided on the vexed issues 4 & 5 allegedly formulated, *inter alia,* from ground 6 of the grounds of appeal at the

lower court. The appeal, at the lower court, was determined only on issue 1 formulated by this appellant, as the respondent at the lower court. The said issue 1 and the disputed issue 5 (at the lower court) are almost *ipssima verba*. By this development, the complaint here that the issue 5 was incompetent had become a spent or moot point, and whatever comments the lower court made on it were merely *obiter*. *(P 244 Paras D – G)*

3. *Where an issue is academic or hypothetical whether amounts to abuse of court's process*

The appellant's counsel, graciously though against interest, has drawn our attention to AGBAKOBA vs. INEC (2008) 18 NWLR (pt. 1119) 489, ADEOGUN vs. FASHOGBON (2008) 17 NWLR (pt. 1115) 149 and PLATEAU STATE vs. A.G. FEDERATION (2006) 3 NWLR (pt. 967) 346 as for when an action or issue is academic or hypothetical. An issue or action is academic or hypothetical when it holds no live matter, or when it holds no practical or tangible value for any pronouncement on it. That is, when any pronouncement on it is a mere exercise in futility. The appellant, on this his issue 3.3, has raised a hypothetical and purely an academic issue. This is what makes his raising it an abuse of court's process. *(Pp 244 – 245 Paras H – A)*

4. *Attitude of courts to proliferation of issues for determination*

I agree, as submitted by the appellant's counsel relying on OKONOBOR vs. D. EDEGBE & SONS TRANSPORT CO. LTD. (2010) 17 NWLR (pt. 1221) 181, that appellate courts frown at proliferation of issues. Cite also UNITY BANK PLC vs. EDWARD BOUARI (2008) 7 NWLR (pt. 1086) 372. However, as recent decisions of this Court, particularly CPL DESMOND ONUJU vs. THE STATE (2013) LPELR – 20803 (SC); PATRICK MICHAEL & ORS. vs. BANK OF THE NORTH (2015) LPELR – 24690 (SC), demonstrate; the courts, in their discretion exercised in the interest of justice, when parties proliferate issues from valid grounds of appeal, still reframe issues and determine the appeal on such reframed issues. When the appellant proliferates issues from one ground of appeal, the appeal court can, in its discretion or at its liberty, elect to prefer and adopt the respondent's issue that is either not offensive or which is more succinct

and clear, as this Court did in PATRICK MICHAEL & SONS vs. BANK OF THE NORTH (supra). The purpose of formulating issues for determination of the appeal is merely to enable the parties narrow down the issues raised in the grounds of appeal. See LABIYI vs. ANRETIOLA (1992) 8 NWLR (pt. 258) 138 at 159.

It is not a rule that in every appeal the court must inevitably accept issues framed by the appellant as immutable. In appropriate cases, and we do it often, My Lords, the court may reframe the issues to reflect the substance of the issues formulated by the parties themselves from the grounds of appeal. See NEKA BBB CO. LTD. vs. ACB LTD. (2004) ALL FWLR (pt. 198) 1175 at 1188. Accordingly, where issues formulated by either the appellant or respondent do not reflect the complaint in the grounds of appeal, the appeal court can reframe issues from the grounds of appeal and determine the appeal on them. See JOEL OKUNRINBOYE EXPORT CO. LTD. vs. SKYE BANK PLC (2009) 6 NWLR (pt. 435) 518. *(P 245 Paras B – I)*

5. *Application of S.15 of the court of Appeal Act 2004*

The appeal at the lower court was governed by the Court of Appeal Rules, 2011. Order 6 Rule 2(1) thereof makes it clear that all appeals shall be by way of rehearing. Section 15 of the Court of Appeal Act, 2004, empowers the lower court to "have full jurisdiction over the whole proceedings as if the proceedings" were instituted before it "as a court of first instance and may re-hear the case in whole or part".
(P 246 Paras A – B)

6. *When a no case submission can properly be made and upheld*

As I earlier pointed out, the appeal was determined on issue 1 raised by this same appellant, as the respondent at the lower court. That issue sought a determination: Whether the trial court was right in upholding the No Case submission? It was on this issue that the appellant, as the respondent, submitted at the lower court on the authority of IBEZIAKO vs. COMM. OF POLICE (1963) 1 ALL NLR 61 at 68 – 69 that :

A submission that there is no case to answer may properly be made and upheld

(a) When *there has been no evidence to prove* the essential elements in the alleged offence.

(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could convict on it.

On this authority, there is no way the lower court, in considering the appeal against the ruling of the trial court upholding the appellant's no-case submission, can decide whether or not the no-case submission was properly or improperly upheld without considering the facts on which the No-case submission was predicated. *(P 246 Paras B– G)*

7. *The power of court of appeal to invoke S.15 when considering an appeal on the trial court's decision on no case submission.*

The issue, of course, calls for the invocation of the lower court's powers of rehearing under Section 15 of its enabling Act and Order 6 Rule 2(1) of its Rules, 2011. It, therefore, does not lie in the mouth of the appellant to submit, as he does, that the lower court does not have the power to re-evaluate the evidence produced at the trial by the respondent herein, as the prosecutor.

Since the issue was: whether the trial court, on the evidence before it, properly or improperly upheld the No-case submission it behooved the lower court, in the circumstance, to re-evaluate the evidence. In otherwords, the lower court was right in re-evaluating the evidence in the printed record before coming to its own conclusion that the trial court was wrong in holding that, on the evidence available on the record, the prosecutor, the present respondent, had by the evidence he proffered at the trial established a *prima facie* case warranting it to call upon the appellant as the accused/defendant to enter upon his defence. Accordingly, I do not agree with the appellant that the lower court was in error in reviewing and/or re-evaluating the facts against the elements of the offences charged viz-a-viz the findings of the trial court before it could safely determine if, on the facts, the decision appealed was proper or improper, reasonable or unreasonable.
(Pp 246 – 247 Paras G – C)

8. *When is a prima facie case made out Elements of offence of money laundering.*

The lower court had reversed the finding of the trial court that the appellant, from the case presented by the respondent, as the prosecutor, had no case to answer; hence this appeal. The appellant contends that the lower court was wrong in reversing the order of the trial court. The question is: when is a *prima facie* case said to have been made out by the prosecution to warrant the defendant being called to enter upon his defence?

The elements the prosecution must prove for the offences under Sections 1 of either the MLPA, 2004 or MLPA, 2011 are:

i. The defendant is a natural person, not a corporation.

ii. The defendant, an individual, made or accepted cash payment in excess of N500,000 in the charge under Section 1 MLPA, 2004. Or, in respect of the charge under Section 1 MLPA, 2011 the amount is N5,000,000.00. That is, if the defendant, an individual, made or accepted cash payment in excess of N5,000,000.00.

The elements were proved. *(P 247 Paras D – G)*

Per Eko (JSC):

"The prosecution led evidence through PW.1 and PW.2, and some documents in their effort to establish the allegations brought against the appellant under the MLPA, 2004 and MLPA, 2011. The PW.1 testified that his investigation team recovered cash registers from the Lagos State House of Assembly, including Exhibits P5, P6 and P7. That their analysis of the documents revealed that various amounts in excess of the prescribed statutory threshold were collected by the 2nd defendant, who was the personal assistant of the appellant, on behalf of the

appellant. The 2nd defendant, confronted with this discovery, allegedly admitted it. The PW.1 further testified that his team confronted the appellant with this same fact, upon the discovery, and that the appellant also confirmed his receiving the various cash payments in excess of the prescribed statutory threshold. Exhibits P1 and P2, said to be extra-judicial statements of the appellant admitting the said cash payments, were put in evidence through the PW.1. Exhibits P3 and P4, also the extra-judicial statements of the 2nd defendant on the receipt of these cash payments on behalf of the appellant, were also admitted in evidence. In their bid to establish that the appellant and his co-accused received cash payments in excess of the prescribed statutory threshold the prosecution also tendered in evidence Exhibits PS1, P6R, PTS and P6T, among other documents.

The various documents tendered, as well as the evidence of the PW.1 and PW.2, were all produced for one purpose. That is, to establish *prima facie* that the appellant has a case to answer in respect of the allegations that he violated the provisions of Sections 1, respectively, of MLPA 2004 and MLPA, 2011. *(Pp 247 – 248 Paras H – E)*

9. *Appellant did not contend that evidence was discredited*
I have read the appellant's brief of argument, and his reply brief. I have not been able to see where the appellant could claim that the evidence of the prosecution had been so badly discredited by their cross-examination to the extent that no reasonable tribunal could act on them. This is one of the reasons trial courts harp on to uphold No-case submissions. See IBEZIAKO vs. C.O.P (supra).
(P 248 Paras E – F)

10. *The essential elements of conspiracy*
The appellant, apart from the allegation that he received cash payments in excess of the prescribed statutory threshold, is also being prosecuted for conspiracy to commit the crime under Sections 1

respectively of MLPA 2004 and MLPA, 2011. The essential element of conspiracy is the agreement to do an unlawful act, or agreement to do a lawful act by an unlawful means. See DABOH & ANOR vs. THE STATE (1977) 2 NSCC 309; OKOSUN vs. A.G, BENDEL STATE (1985) 3 NWLR (pt. 12) 283 at 297; ABACHA vs. THE STATE (2002) 11 NWLR (pt. 779) 437 at 523. *(P 248 Paras F – H)*

11. *How to prove conspiracy*

It is now trite that the proof of conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties concerned, which acts are done in pursuance of an apparent criminal purpose that is in common between the conspirators. See DABOH & ANOR vs. THE STATE (supra) at 319. *(P 248 Paras H – I)*

12. *The meaning of prima facie case*

I have been able to set out the elements of the substantive offences under MLPA, 2004 and MLPA, 2011, and the criminal conspiracy that the respondent, as the prosecutor, is required to establish in order that a *prima facie* case would be said to have been established. *Prima facie* means "first appearance". The phrase, when it is applied to the rule on onus of proof in the law of evidence, means that the case is supported by such evidence, as are available, on every material issue of the offences charged that, if no rebuttal evidence is called' it is sufficient to establish the fact in issue. Thus, as it was stated in POLICE vs. AJIDAGBA 3 FSC 5; evidence discloses a *prima facie* case when the evidence is such that if, uncontradicted, and it is accepted, will be sufficient to prove the case against the accused person. Therefore, if at the close of the prosecution's case the evidence so far marshalled against the accused is such that if it could be presumed to be true in relation to the fact in issue, unless rebutted or disproved by some other evidence to the contrary; then, a *prima facie* case has been disclosed to warrant calling on the accused to offer his exculpatory defence. See ONAGORUWA vs. THE STATE (1993) 7 NWLR (pt. 303) 49; TONGO vs. THE STATE (2007) 30 NSCQR 180 at 192-193. *(P 249 Paras A – E)*

Per Eko (JSC):

> **"Putting it rather negatively, on the authority of FAGORIOLA vs. FRN (2013) 17 NWLR (pt. 1383) 322, the appellant's counsel submits that a *no case* submission connotes that there is no evidence on which the court will convict, even if the trial court believes the evidence adduced by the prosecution. The submission is correct in law. Juxtaposing the facts disclosed by the evidence of the PW.1 and PW.2, and the documentary evidence viz-a-viz the charges the appellant is defending at the trial court I am of the firm view that a *prima facie* case has been disclosed by the prosecution's evidence at the trial court to warrant the appellant being called upon to offer his defence. I bear in mind that at the stage of a no-case submission, the court is not called upon to express any opinion on the evidence before it, as to their probative value. All that the court is called upon to rule on, at this stage, is simply whether there exists legally admissible evidence linking the accused person with the commission of the alleged offence(s); and if the no-case submission is on the basis of some discredited evidence such discredited evidence must be on the face of the printed record and in respect of relevant and material facts. See DABOH & ORS vs. THE STATE (supra) at 315. As I earlier pointed out; in the instant case the no-case submission was made largely on the basis of there being no legally admissible evidence linking the appellant, with the commission of the alleged criminal offences.** *(Pp 249 – 250 Paras E – A)*

13. *Arguments on the defence of appellant are not relevant to no case proceedings.*

It is submitted by the appellant's counsel that the appellant did the act complained of in his capacity as the Speaker of Lagos State and that the acts "complained of were done legitimately within the ordinary

functions and duties of the office of the Speaker". This submission insinuates a corporate crime. That is, an organisational crime committed by a corporation's representative on behalf of the corporation. It is further submitted that, from the evidence of the PW.1 that "the monies collected were collected by the (appellant) in his capacity as the speaker and for the purpose of his office as speaker", and that, because of that official purpose, no *prima facie* case under Section 1 of MLPA 2004 and MLPA, 2011 has been disclosed against the appellant. It is further submitted that the office of the speaker "is a body corporate" and that unless the act or omission for which the appellant is being charged falls outside the ambit and duties of the speaker of Lagos State House of Assembly" the appellant cannot be criminally responsible for the acts or omission of the said corporate body. These are clearly the defence the appellant has to the allegations against him. Accordingly, I agree with the respondent that "these are ordinarily not arguments meant for a no case submission". I agree. That is the argument the defendant in KALU vs. F.R.N (2012) LPELR 9284 (CA) advanced. It was rejected as being premature as a defence at the stage of a No-case submission by the Court of Appeal. The Supreme Court in KALU vs. FRN (2016) 9 NWLR (pt. 1516)
(P 250 Paras A – F)

14. *The purport of money Laundering prohibition Act, 2004 and money Laundering Prohibition Act 2011.*
It appears that the purpose the cash received or accepted in excess of the prescribed threshold statutorily fixed by Section 1 MLPA 2004, or Section 1 MLPA, 2011 is immaterial. Let it not be forgotten that an agreement to do a lawful act unlawfully is also criminal offence. This point caught the attention of the lower court and at page 2410 of the record it stated the law thus:

> **(It) does appear to me that the court below missed the finer point that, the purpose of Section 1 of MLPA, 2004, before its repeal, and (Section 1 of MLPA) 2011 respectively is, in my view and I so hold, to clearly and strictly bar the payments and or acceptance of cash payments above the set threshold irrespective of the purpose and authorization for the payments. Every payment above the threshold amount**

stated in Section 1, with the coming into effect of MLPA 2004, before its repeal, and MLPA, 2011 must be made through a financial institution to be excluded from the operation of the MLPA. See NYAME vs. FRN (2010) 7 NWLR (pt. 1193) 344 at p. 399.

The purpose of paying the money and accepting the money cash in excess of the prescribed threshold may be, lawful in the defendant's wishful thinking. However, in the penal statute; the payment and or acceptance of cash in excess of the prescribed threshold is illegal or unlawful, if not done through a financial institution. The purpose for either the payment or receipt of cash in excess of the prescribed threshold is not a *mens rea* defence under the MLPA, 2004 or MLPA, 2011. *(Pp 250 – 251 Paras G – D)*

15. *Principles of interpretation of statutes*

Ours, as the judex, is to interpret the law and declare what it is. In interpreting a statute the object is to discover the intention of the legislature and bring it out. The intention of the statute is usually deduced from the language used in the statute. We cannot therefore go outside the words in the language of the statute. Therefore, as this Court held in MALLAM ABUBAR ABUKAR & ORS vs. SAIDU USMAN NASAMU & ORS (2012) LPELR 7826 (SC) – where the words used are clear and unambiguous they must be given their ordinary plain meaning, so as to avoid reading into the provisions meanings not intended by the lawmakers. See also ISHOLA vs. AJIBOYE (1995) 1 NWLR (pt. 352) 506; P. D. P. vs. C.P.C & ORS (2011) LPELR-2909 (SC). Accordingly, in its interpretative jurisdiction the court does not, and must not, interpret a statute by placing a gloss on the provisions by reading into the provisions words neither used, contemplated nor included therein. Thus, as I stated elsewhere in OBI vs. OJUKWU & ANOR (2009) LPELR 8511 (CA), when the words of a statute are plain and unambiguous; the plain duty of the court interpreting the statute, is to bring out its overriding objective. The court does not have inherent powers to say that the provisions, which are quite plain, mean what do not actually mean; nor

that the plain meaning should be ignored. The statute must be construed to mean what it means or to mean what it is intended to mean and not to mean what it does not clearly means. See VINOS vs. MARKS & SPENCER (2001) 3 ALL E.R 784. Fortunately, the courts, in their interpretative jurisdiction, have not yet imbibed the craft or art of "Double Speak", predicted in George Orwell's Nineteen Eighty Four: Where the Big Brother's Yes Means No, and His No means Yes.
(Pp 251 – 252 Paras E – B)

16. *Approach of court to a no case submission*
At the risk of flogging a settled legal principle I have to state that when a no case submission is made the trial court is not called upon to express an opinion on the evidence before it and the credibility of the witnesses is not in issue at this stage. What is expected of the trial court is to do one of two things:

(a) To determine whether or not there is any legally admissible evidence linking the accused person with the commission of the offence with which he is charged and if the answer is yes, the court dismisses the No Case Submission and tersely without saying more than that, there is a prima facie case for which the accused should enter his defence, or

(b) That there is indeed no case made by the prosecution for which he should be called upon to make his defence. The second option comes up where the court of trial is satisfied that the prosecution witnesses have been so discredited by cross examination that no reasonable tribunal would convict upon it. Also that there is no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. That is that there is no evidence to prove an essential ingredient of the offence. See Tongo vs. COP (2007) 12 NWLR (Pt. 1049) 525; Ekwunugo

vs. FRN (2008) 15 NWLR (Pt. 1111) 630; Edo Oko vs The State (2017) LPELR – 42267 (SC).

It needs be said that at this stage, which is after the prosecution has closed its case and the accused makes the no case submission, the court of trial is not required to evaluate or give weight to the evidence led by the prosecution or to give a lengthy Ruling if it is not upholding the no case submission. On the other hand if it is upholding the No Case Submission, the court considers that the witnesses as produced by the prosecution have been discredited under cross-examination so the testimonies so proffered would be of no use. The addition is that there is no linkage between the offences charged and the accused person. Either way a long drawn treatise is not expected since what is available is one side of the coin. Taking a cue to that caution, the little I say the better. The much I can venture is that there is evidence linking the accused/appellant to the offences charged for which a response from him is necessary to clear the air. What I am saying is that from the evidence proffered by the prosecution, the matter cannot just be waived off without a hearing from the accused appellant. See Duru vs. Nwosu (1989) 4 NWLR (Pt. 113) 24 at 43; Ajiboye vs State (1995) 8 NWLR (Pt. 414) 408; Odofin Bello vs State (1967) NMLR 1. 17.
(Pp 256 – 257 Paras G – I)

Nigerian Cases Cited
Abacha vs. The State (2002) 11 NWLR (pt. 779) 437 .
Adeogun vs. Fasogbun (2008) 17 NWLR (pt. 1115) 149
African International Bank Ltd. vs. Integrated Dimensional System Ltd. & Ors. (2012) LPELR – 9710 (SC).
Agbakoba vs. INEC (2008) 18 NWLR (pt. 1119) 489,
Ajiboye vs State (1995) 8 NWLR (Pt. 414) 408;
CPL Desmond Onuju vs. The State (2013) LPELR – 20803 (SC);
Daboh & Anor vs. The State (1977) 2 NSCC 309;
Duru vs Nwosu (1989) 1 NWLR (Pt. 113) 24;
Edo Oko vs The State (2017) LPELR – 42267 (SC).
Ekwunugo vs FRN (2008) 15 NWLR (Pt. 1111) 630;

Fagoriola vs. FRN (2013) 17 NWLR (pt. 1383) 322
Ibeziako vs. Comm. of Police (1963) 1 ALL NLR 61
Ishola vs. Ajiboye (1995) 1 NWLR (pt. 352) 506;
Joel Okunrinboye Export Co. Ltd. vs. Skye Bank Plc (2009) 6 NWLR (pt. 435) 518.
Kalu vs. F.R.N (2012) LPELR – 9284 (CA)
Kalu vs. FRN (2016) 9 NWLR (pt. 1516)
Labiyi vs. Anretiola (1992) 8 NWLR (pt. 258) 138;
Mallam Abubar Abukar & Ors vs. Saidu Usman Nasamu & Ors (2012) LPELR 7826 (SC)
Musa Sha (Jnr) & Anor. vs. Da Rap Kwan & Ors. (2000) 6 SCNJ 101; (2000) & NWLR (pt. 670) 685.
NEKA BBB CO. LTD. vs. ACB LTD. (2004) ALL FWLR (pt. 198) 1175.
Nyame vs. FRN (2010) 7 NWLR (pt. 1193) 344 .
Obi vs. Ojukwu & Anor (2009) LPELR 8511 (CA),
Odofin Bello vs State (1967) NMLR 1. 17.
Okonobor vs. D. Edegbe & Sons Transport CO. Ltd. (2010) 17 NWLR (pt. 1221) 181
Okosun vs. A.G, Bendel State (1985) 3 NWLR (pt. 12) 283;
Onagoruwa vs. The State (1993) 7 NWLR (pt. 303) 49
P. D. P. vs. C.P.C & ORS (2011) LPELR-2909 (SC).
Patrick Michael & Ors. vs. Bank of The North (2015) LPELR 24690 (SC),
Plateau State vs. A.G. Federation (2006) 3 NWLR (pt. 967) 346
Tongo vs COP (2007) 12 NWLR (Pt. 1049) 525;
Tongo vs. The State (2007) 30 NSCQR 180 .
Unity Bank Plc vs. Edward Bouari (2008) 7 NWLR (pt. 1086) 372.

Foreign Cases Cited
Vinos vs. Marks & Spencer (2001) 3 ALL E.R 784.

Nigerian Status cited
Money Laundering Prohibition Act 2004 (MLA 2004) and Money Laundering Prohibition Act 2011 (MLA 2011) Section 1
Court of Appeal Act, 2004 - Section 15

Representation
Oludele Adegboyega Adeogun, (Esq.), for the Appellant
E.E. Iheanacho, (Esq.), for the Respondent.

EJEMBI EKO. (JSC) (Delivering the Lead Judgment): At the Federal High Court, Lagos the appellant and one other person were being tried for criminal conspiracy and offences respectively under Sections 1 of the Money Laundering (Prohibition) Act, 2004 and Money Laundering (Prohibition) Act, 2011. The Charges were amended and increased to a total of 54 in the amended charges filed on 7th June, 2013 in the Charge **No. FHC/L/422C/2011.** The charges relate to acceptance of various cash payments from the Lagos State House of Assembly without going through financial institutions which under the Money Laundering (Prohibition) Act (MLPA) are, each criminal offences.

The prosecutor, the respondent herein, called two witnesses (PW.1 & PW.2). Through the witnesses several documents, Exhibits 1-6, were tendered. Thereafter the respondent closed its case. The appellant's counsel, having formed an opinion that the respondent's case disclosed no *prima facie* case, filed an application praying the trial court to hold that the appellant, from the respondent's case, had no case to answer. The application was heard.

The learned trial Judge after a lengthy, and in rather verbose, consideration ruled on 26th September, 2014, that the appellant had no case to answer. He stated in the ruling that the respondent failed to present a *prima facie* case warranting the appellant being called upon to enter upon his defence. Consequently, the appellant was discharged.

Respondent, as the prosecutor, promptly lodged his appeal against the no-case ruling to the Court of Appeal (the lower court). The notice of appeal filed on 22nd October, 2014 by Chief Godwin Obla, (SAN) had 14 grounds of appeal. The grounds, shorn of their particulars, are as follows:

GROUNDS OF APPEAL
Ground One
The learned trial judge erred in law when he held and concluded that counts 2-48 are incompetent because they were filed pursuant to Section 1(a) of the Money

Laundering (Prohibition) Act, 2004 which said law was repealed by the Money Laundering (Prohibition) Act 2011.

Ground Two
The learned trial Judge erred in law and came to a perverse decision when it held that in laying counts 2-52 the prosecution merely repeated the allegation in count 1.

Ground Three
The learned trial Judge misdirected himself in law and came to a wrong decision when he held:

Ground Four
The trial court misdirected itself in law and came to a perverse decision when it held thus:

Ground Five
The trial court erred in law when it held that evidence of PW2 shows that at all times material to each of the counts no offence was committed by the respondent.

Ground Six
The lower court erred in law and came to a perverse decision when it held thus: "In sum it is the considered opinion of this court that the prosecution on the no case submission has not made out a prima facie case and on the other constitutional issues argued. The prosecution has no answer to the submissions referred to in this ruling".

Ground Seven
The trial court erred in law and came to a perverse decision when it held that one of the ingredients of the offence under section 1 of the Money Laundering (Prohibition) Act 2011 which the prosecution must prove is that the parties

involved must be either natural persons, corporate bodies, or entities other than the office of the heads of any of the three arms of government.

Ground Eight
The lower court erred in law when it held that one of the ingredients of the offence contained in section 1 of the Money Laundering (Prohibition) Act 2004 and 2011 is that the Appellant must prove that the money involved in the cash payment was derived from money laundering or drug or human trafficking, terrorism financing, bribery and corruption or other illicit or illegal dealings or crimes.

Ground Nine
The trial court erred in law and came to a perverse decision in its interpretation of section 1 of the Money Laundering (Prohibition) Act 2004 and 2011 when it held that to constitute an offence under the said section there must be an involvement in a transaction as defined under the said law.

Ground Ten
The trial court erred in law when it refused to follow the decision of this honorable court in the case of KALU v. FEDERAL REPUBLIC OF NIGERIA (2014) 1 NWLR PT. 1389 479.

Ground Eleven
The lower court erred in law when it held that the Appellant by using the words "accepting various cash payments amounting to…. Without going through a financial institution" in the counts at the lower court had placed an extra burden of proof on the Appellant.

Ground Twelve
The lower court erred in law when it held and concluded

that the case of the prosecution witnesses supported the innocence of the Respondent.

Ground Thirteen

The learned trial judge erred in law when he upheld the no case submission of the Respondent and thereby occasioned a miscarriage of justice.

Ground Fourteen

The lower court erred in law when it held that Prosecution first witness (PW1) testified that he knew nothing about the case.

At the lower court, the respondent as the appellant, formulated five (5) issues for the determination of the appeal **No. CA/L/1046C/2014** thus"

1. **Whether or not the Counts at the trial court are competent in law (Covering grounds 1, 2, 3, 4, & 5 of the grounds of appeal).**

2. **Whether the trial court was correct when it arrived at the conclusion that the appellant did not answer or respond to the constitutional issues raised by the respondent in his no case application (Covering ground 6 of the grounds of appeal).**

3. **Whether the trial court was right in its interpretation of Section 1(a) of the Money Laundering (Prohibition) Act 2004 and the Money Laundering (Prohibition Act 2011 when it held that the said law does not apply to the Respondent who was then the Speaker of the Lagos State House of Assembly and that the prosecution must prove that the cash payment involved was derived from either drug trafficking or terrorism (Covering ground 7, 8 & 10 of the grounds of appeal).**

A

4. Whether the trial court was right when it held that the use of the words "cash payment amounting to" and "without going through a financial institution" in the counts placed an extra burden on the prosecution not

B

contemplated by Section 1 of the Money Laundering (Prohibition) Acts 2004 and 2011 (Covering grounds 9 & 11 of the grounds of appeal).

C

5. Whether the trial court was right when it arrived at the conclusion that no prima facie case has been made out against the respondent (Covering grounds 6, 12, 13 & 14 of the grounds of appeal).

D

The appellant herein was the respondent at the lower court. Upon his being served the appellant's brief, settled by Chief Godwin Obla, (SAN): the appellant, herein as the respondent, filed the respondent's brief, settled by Ikhide Ehighelua, Esq. wherein notice of preliminary objection to the hearing

E

of the appeal **No. CA/L/1046C/2014** was raised on the following four (4) grounds that:

F

1. Grounds 1, 2, 3 and 4 are all incompetent, being grounds based on and attacking *obiter dicta* rather than the *ratio decidendi* of the ruling appealed against.

G

2. The only grounds of appeal which challenge the *ratio decidendi* of the (Federal High) Court are grounds 5 - 14.

H

3. In the issues formulated by the appellant the only issues relating to the actual decision on the NO CASE SUBMISSION is issue 5 and that issue is bad for proliferation of issues as the ground 6 of the grounds of appeal has (sic) been split to argue issues 2 and 5 in the appellant's brief.

I

4. Without any competent ground or issue attacking the actual ruling on the no-case submission, every other

ground or issue is otiose and liable to be discountenanced.

The lower court, in its ruling on the preliminary objection, agreed with the objector, the present appellant, that grounds 1, 2, 3 & 4 of the grounds of appeal were incompetent. Those (4) grounds were in consequence, struck out. The other ten (10) grounds of appeal, that is, grounds 5, 6, 7, 8, 9, 10, 11, 12, 13 & 14, were held to be competent. The appeal, sustained by these 10 grounds of appeal, was adjudged competent. The preliminary objection was thus overruled in part.

Two (2) issues, 4 & 5, formulated by the present respondent, as the appellant at the lower court, were said to have been formulated, *inter alia,* from ground 6 of the grounds of appeal. This multiplicity of issues from one ground of appeal amounted to proliferation of issues. The lower court, apparently, reframing issue 5 had excised, therefrom, ground 6 of the grounds of appeal. Thus Issue, 5 as reframed, was taken as formulated from grounds 12, 13 & 14 of the grounds of appeal. Issue 2 formulated by the respondent, as the appellant, was formulated from only ground 6 of the grounds of appeal at the lower court. In embarking on this "blue pencil surgery" of issue 5 the lower court, at page 2393 of the record, had stated that the objection to issue 5 was leaning too much on technicality rather than paying more attention to doing substantial justice, which it did by excising ground 6 from issue 5.

In the present appeal, the appellant herein, has made an issue of that exercise of the lower court reframing issue 5 before it by excising therefrom ground 6 of the grounds of appeal. His issue 3.3 before us now is: whether the Court of Appeal was right in holding that proliferation of issues from the grounds of appeal is more a technical rule than a fundamental rule?

The appellant at the lower court is enjoined by Order 18 Rule 3(1) of the Court of Appeal Rules, 2011 to file his brief of argument which shall contain, ***inter alia,*** "what are, in the Appellant's view, the issues arising in the appeal as well as amended or additional grounds of appeal". There are no sanctions, in the said Order 18 or anywhere in the Court of Appeal Rules, for framing multiplicity or proliferation of issues from one ground of appeal. I have not seen any from my perusal of the said Rules.

Now, if I may ask: what prejudice or miscarriage of justice did the

A appellant suffer from the lower court's reframing of the issues(s)? So long as it does not lead to injustice to any party appeal courts possess that inherent power, in the interest of justice and for the purpose of narrowing down the Issue(s) and making them clearer, accurate and apt in order to be properly
B addressed, to reject, modify or reframe any or all issues formulated by the parties. See **AFRICAN INTERNATIONAL BANK LTD. vs. INTEGRATED DIMENSIONAL SYSTEM LTD. & ORS. (2012) LPELR – 9710 (SC).** Where the issue(s) formulated by respondent is or are
C more elaborate, succinct, accurate and apt to the dispute than those formulated by the appellant the court is free to adopt such issue(s), unless doing so would lead to injustice or prejudice to the appellant. See **MUSA SHA (JNR) & ANOR. vs. DA RAP KWAN & ORS. (2000) 6 SCNJ 101; (2000) & NWLR**
D **(pt. 670) 685.**

This appellant's issue 3.3, distilled from grounds 1 & 2 does not seek to strike-down appeal in its entirety. It appears to me, that the appellant is only addressing academic postulations rather than his addressing any real practical
E utilitarian issues in the appeal. In other words, even if I resolve the issue in favour of the appellant, the appeal can still be determined on other issues, as the lower court did. It appears clear to me also, that the appellant's issue 3,3, distilled from his grounds 1 & 2, has been erected on mere ***obiter dictum*** of the
F lower court; the appeal in actuality having not been decided on the vexed issues 4 & 5 allegedly formulated, *inter alia,* from ground 6 of the grounds of appeal at the lower court. The appeal, at the lower court, was determined only on issue 1 formulated by this appellant, as the respondent at the lower court.
G The said issue 1 and the disputed issue 5 (at the lower court) are almost ***ipssima verba*****.** By this development, the complaint here that the issue 5 was incompetent had become a spent or moot point, and whatever comments the lower court made on it were merely *obiter.*

H The appellant's counsel, graciously though against interest, has drawn our attention to **AGBAKOBA vs. INEC (2008) 18 NWLR (pt. 1119) 489, ADEOGUN vs. FASOGBUN (2008) 17 NWLR (pt. 1115) 149** and **PLATEAU STATE vs. A.G. FEDERATION (2006) 3 NWLR (pt. 67) 346**
I as authority for when an action or issue is academic or hypothetical. An issue or action is academic or hypothetical when it holds no live matter, or when it holds no practical or tangible value for any pronouncement on it. That is,

when any pronouncement on it is a mere exercise in futility. The appellant, on this his issue 3.3, has raised a hypothetical and purely an academic issue. This is what makes his raising it an abuse of court's process.

Be that as it may, I will still throw some light on the present appellant's Issue 3.3. I agree, as submitted by the appellant's counsel relying on **OKONOBOR vs. D. EDEGBE & SONS TRANSPORT CO. LTD. (2010) 17 NWLR (pt. 1221) 181,** that appellate courts frown at proliferation of issues. Cite also **UNITY BANK PLC vs. EDWARD BOUARI (2008) 7 NWLR (pt. 1086) 372.** However, as recent decisions of this Court, particularly **CPL DESMOND ONUJU vs. THE STATE (2013) LPELR – 20803 (SC); PATRICK MICHAEL & ORS. vs. BANK OF THE NORTH (2015) LPELR – 24690 (SC),** demonstrate; the courts, in their discretion exercised in the interest of justice, when parties proliferate issues from valid grounds of appeal, still reframe issues and determine the appeal on such reframed issues. When the appellant proliferates issues from one ground of appeal, the appeal court can, in its discretion or at its liberty, elect to prefer and adopt the respondent's issue that is either not offensive or which is more succinct and clear, as this Court did in **PATRICK MICHAEL & SONS v. BANK OF THE NORTH (supra).** The purpose of formulating issues for determination of the appeal is merely to enable the parties narrow down the issues raised in the grounds of appeal. See **LABIYI vs. ANRETIOLA (1992) 8 NWLR (pt. 258) 138 at 159; ADELAJA vs. SONOIKI (1992) 2 NWLR (pt. 131) 148.**

It is not a rule that in every appeal the court must inevitably accept issues framed by the appellant as immutable. In appropriate cases, and we do it often, My Lords, the Court may reframe the issues to reflect the substance of the issues formulated by the parties themselves from the grounds of appeal. See **NEKA BBB CO. LTD. vs. ACB LTD. (2004) ALL FWLR (pt. 198) 1175 at 1188.** Accordingly, where issues formulated by either the appellant or respondent do not reflect the complaint in the grounds of appeal, the appeal court can reframe issues from the grounds of appeal and determine the appeal on them. See **JOEL OKUNRINBOYE EXPORT CO. LTD. & ORS. vs. SKYE BANK PLC (2009) 6 NWLR (pt. 435) 518.**

This is the juncture to end all discourse of this issue 3.3 raised and argued by the appellant. It was clearly misconceived.

The appeal at the lower court was governed by the Court of Appeal Rules, 2011. Order 6 Rule 2(1) thereof makes it clear that all appeals shall be by way of rehearing. Section 15 of the Court of Appeal Act, 2004, empowers the lower court to "have full jurisdiction over the whole proceedings as if the proceedings" were instituted before it "as a court of first instance and may re-hear the case in whole or part".

As I earlier pointed out, the appeal was determined on issue 1 raised by this same appellant, as the respondent at the lower court. That issue sought a determination: Whether the trial court was right in upholding the No Case submission? It was on this issue that the appellant, as the respondent, submitted at the lower court on the authority of **IBEZIAKO vs. COMM. OF POLICE (1963) 1 ALL NLR 61 at 68 – 69** that:

> **A submission that there is no case to answer may properly be made and upheld:**
>
> **a) When *there has been no evidence to prove* the essential elements in the alleged offence.**
>
> **b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could convict on it.**

On this authority, there is no way the lower court, in considering the appeal against the ruling of the trial court upholding the appellant's no-case submission, can decide whether or not the no-case submission was properly or improperly upheld without considering the facts on which the No-case submission was predicated. The issue, of course, calls for the invocation of the lower court's powers of rehearing under Section 15 of its enabling Act and Order 6 Rule 2(1) of its Rules, 2011. It, therefore, does not lie in the mouth of the appellant to submit, as he does, that the lower court does not have the power to re-evaluate the evidence produced at the trial by the respondent herein, as the prosecutor.

Since the issue was: whether the trial court, on the evidence before it, properly or improperly upheld the No-case submission it behooved the lower court, in the circumstance, to re-evaluate the evidence. In other words, the

lower court was right in re-evaluating the evidence in the printed record before coming to its own conclusion that the trial court was wrong in holding that, on the evidence available on the record, the prosecutor, the present respondent, had by the evidence he proffered at the trial established a *prima facie* case warranting it to call upon the appellant as the accused/defendant to enter upon his defence. Accordingly, I do not agree with the appellant that the lower court was in error in reviewing and/or re-evaluating the facts against the elements of the offences charged viz-a-viz the findings of the trial court before it could safely determine if, on the facts, the decision appealed was proper or improper, reasonable or unreasonable.

I find no substance in issue 1 argued by the parties including the appellant herein.

The lower court had reversed the finding of the trial court that the appellant, from the case presented by the respondent, as the prosecutor, had no case to answer; hence this appeal. The appellant contends that the lower court was wrong in reversing the order of the trial court. The question is: when is a *prima facie* case said to have been made out by the prosecution to warrant the defendant being called to enter upon his defence?

The elements the prosecution must prove for the offences under Sections 1 of either the MLPA, 2004 or MLPA, 2011 are:

i. The defendant is a natural person, not a corporation.

ii. The defendant, an individual, made or accepted cash payment in excess of N500,000 in the charge under Section 1 MLPA, 2004. Or, in respect of the charge under Section 1 MLPA, 2011 the amount is N5,000,000.00. That is, if the defendant, an individual, made or accepted cash payment in excess of N5,000,000.00.

The prosecution led evidence through PW.1 and PW.2, and some documents in their effort to establish the allegations brought against the appellant under the MLPA, 2004 and MLPA, 2011. The PW.1 testified that his investigation team recovered cash registers from the Lagos State House of Assembly, including Exhibits P5, P6 and P7. That their analysis of the documents revealed that various amounts in excess of the prescribed statutory threshold

were collected by the 2nd defendant, who was the personal assistant of the appellant, on behalf of the appellant. The 2nd defendant, confronted with this discovery, allegedly admitted it. The PW.1 further testified that his team confronted the appellant with this same fact, upon the discovery, and that the appellant also confirmed his receiving the various cash payments in excess of the prescribed statutory threshold. Exhibits P1 and P2, said to be extra-judicial statements of the appellant admitting the said cash payments, were put in evidence through the PW.1. Exhibits P3 and P4, also the extra-judicial statements of the 2nd defendant on the receipt of these cash payments on behalf of the appellant, were also admitted in evidence. In their bid to establish that the appellant and his co-accused received cash payments in excess of the prescribed statutory threshold the prosecution also tendered in evidence Exhibits PS1, P6R, PTS and P6T, among other documents.

The various documents tendered, as well as the evidence of the PW.1 and PW.2, were all produced for one purpose. That is, to establish *prima facie* that the appellant has a case to answer in respect of the allegations that he violated the provisions of Sections 1, respectively, of MLPA 2004 and MLPA, 2011. I have read the appellant's brief of Argument, and his Reply Brief. I have not been able to see where the appellant could claim that the evidence of the prosecution had been so badly discredited by their cross-examination to the extent that no reasonable tribunal could act on them. This is one of the reasons trial courts harp on to uphold No-case submissions. See **IBEZIAKO vs. C.O.P (supra).**

The appellant, apart from the allegation that he received cash payments in excess of the prescribed statutory threshold, is also being prosecuted for conspiracy to commit the crime under Sections 1 respectively of MLPA 2004 and MLPS, 2011. The essential element of conspiracy is the agreement to do an unlawful act, or agreement to do a lawful act by an unlawful means. See **DABOH & ANOR vs. THE STATE (1977) 2 NSCC 309; OKOSUN vs. A.G, BENDEL STATE (1985) 3 NWLR (pt. 12) 283 at 297; ABACHA vs. THE STATE (2002) 11 NWLR (pt. 779) 437 at 523.** It is now trite that the proof of conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties concerned, which acts are done in pursuance of an apparent criminal purpose that is in common between the conspirators. See **DABOH & ANOR vs. THE STATE (supra) at 319.**

My Lords, I have been able to set out the elements of the substantive offences under MLPA, 2004 and MLPA, 2011, and the criminal conspiracy that the respondent, as the prosecutor, is required to establish in order that a ***prima facie*** case would be said to have been established. ***Prima facie*** means "first appearance". The phrase, when it is applied to the rule on onus of proof in the law of evidence, means that the case is supported by such evidence, as are available, on every material issue of the offences charged that, if no rebuttal evidence is called' it is sufficient to establish the fact in issue. Thus, as it was stated in **POLICE vs. AJIDAGBA 3 FSC 5;** evidence discloses a ***prima facie*** case when the evidence is such that if, uncontradicted, and it is accepted, will be sufficient to prove the case against the accused person. Therefore, if at the close of the prosecution's case the evidence so far marshalled against the accused is such that if it could be presumed to be true in relation to the fact in issue, unless rebutted or disproved by some other evidence to the contrary; then, a *prima facie* case has been disclosed to warrant calling on the accused to offer his exculpatory defence. See **ONAGORUWA vs. THE STATE (1993) 7 NWLR (pt. 303) 40 at 81-82; TONGO vs. THE STATE (2007) 30 NSCQR 180 at 192-193.**

Putting it rather negatively, on the authority of **FAGORIOLA vs. FRN (2013) 17 NWLR (pt. 1383) 322,** the appellant's counsel submits that a *no case* submission connotes that there is no evidence on which the court will convict, even if the trial court believes the evidence adduced by the prosecution. The submission is correct in law. Juxtaposing the facts disclosed by the evidence of the PW.1 and PW.2, and the documentary evidence viz-a-viz the charges the appellant is defending at the trial court I am of the firm view that a ***prima facie*** case has been disclosed by the prosecution's evidence at the trial court to warrant the appellant being called upon to offer his defence. I bear in mind that at the stage of a no-case submission, the court is not called upon to express any opinion on the evidence before it, as to their probative value. All that the court is called upon to rule on, at this stage, is simply whether there exist legally admissible evidence linking the accused person with the commission of the alleged offence(s); and if the no-case submission is on the basis of some discredited evidence such discredited evidence must be on the face of the printed record and in respect of relevant and material facts. See **DABOH & ORS vs. THE STATE (supra) at 315.** As I earlier pointed

A out; in the instant case the no-case submission was made largely on the basis of there being no legally admissible evidence linking the appellant, with the commission of the alleged criminal offences.

It is submitted by the appellant's counsel that the appellant did the act
B complained of in his capacity as the Speaker of Lagos State and that the acts "complained of were done legitimately within the ordinary function and duties of the office of the Speaker". This submission insinuates a corporate crime. That is, an organisational crime committed by a corporation's
C representative on behalf of the corporation. It is further submitted that, from the evidence of the PW.1 that "the monies collected were collected by the (appellant) in his capacity as the speaker and for the purpose of his office as speaker", and that, because of that official purpose, no ***prima facie*** case under
D Section 1 of MLPA 2004 and MLPA, 2011 has been disclosed against the appellant. It is further submitted that the office of the speaker "is a body corporate" and that unless the act or omission for which the Appellant is being charged falls outside the ambit and duties of the speaker of Lagos State House
E of Assembly" the appellant cannot be criminally responsible for the acts or omission of the said corporate body. These are clearly the defence the appellant has to the allegations against him. Accordingly, I agree with the respondent that "these are ordinarily not arguments meant for a no case
F submission". I agree. That is the argument the defendant in **KALU vs. F.R.N (2012) LPELR – 9284 (CA)** advanced. It was rejected as being premature as a defence at the stage of a No-case submission by the Court of Appeal. The Supreme Court in **KALU vs. FRN (2016) 9 NWLR (pt. 1516)** I affirmed the
G decision.

It appears that the purpose the cash received or accepted in excess of the prescribed threshold statutorily fixed by Section 1 MLPA 2004, or Section 1 MLPA, 2011 is immaterial. Let it not be forgotten that an agreement to do a
H lawful act unlawfully is also criminal offence. This point caught the attention of the lower court and at page 2410 of the record it stated the law thus:

> **(It) does appear to me that the court below missed the finer**
I **point that, the purpose of Section 1 of MLPA, 2004, before its repeal, and (Section 1 of MLPA) 2011 respectively is, in my view and I so hold, to clearly and strictly bar the payments**

and or acceptance of cash payments above the set threshold irrespective of the purpose and authorization for the payments. Every payment above the threshold amount stated in Section 1, with the coming into effect of MLPA 2004, before its repeal, and MLPA, 2011 must be made through a financial institution to be excluded from the operation of the MLPA. See NYAME vs. FRN (2010) 7 NWLR (pt. 1193) 344 at p. 399.

The purpose of paying the money and accepting the money cash in excess of the prescribed threshold may be, lawful in the defendant's wishful thinking. However, in the penal statute; the payment and or acceptance of cash in excess of the prescribed threshold is illegal or unlawful, if not done through a financial institution. The purpose for either the payment or receipt of cash in excess of the prescribed threshold is not a *mens rea* defence under the MLPA, 2004 or MLPA, 2011.

Ours, as the judex, is to interpret the law and declare what it is. In interpreting a statute the object is to discover the intention of the legislature and bring it out. The intention of the statute is usually deduced from the language used in the statute. We cannot therefore go outside the words in the language of the statute. Therefore, as this Court held in **MALLAM ABUBAR ABUKAR & ORS vs. SAIDU USMAN NASAMU & ORS (2012) LPELR – 7826 (SC)** – where the words used are clear and unambiguous they must be given their ordinary plain meaning, so as to avoid reading into the provisions meanings not intended by the lawmakers. See also **ISHOLA vs. AJIBOYE (1995) 1 NWLR (pt. 352) 506; P. D. P. vs. C.P.C & ORS (2011) LPELR-2909 (SC).** Accordingly, in its interpretative jurisdiction the court does not, and must not, interpret a statute by placing a gloss on the provisions by reading into the provisions words neither used, contemplated nor included therein. Thus, as I stated elsewhere in **OBI vs. OJUKWU & ANOR (2009) LPELR 8511 (CA),** when the words of a statute are plain and unambiguous; the plain duty of the court interpreting the statute, is to bring out its overriding objective. The court does not have inherent powers to say that the provisions, which are quite plain, mean what do not actually mean; nor that the plain meaning should be ignored. The statute must

be construed to mean what it means or to mean what it is intended to mean and not to mean what it clearly means. See **VINOS vs. MARKS & SPENCER (2001) 3 ALL E.R 784.** Fortunately, the courts, in their interpretative jurisdiction, have not yet imbibed the craft or art of "Double Speak", predicted in George Orwell's Nineteen Eighty Four: Where the Big Brother's Yes Means No, and His No means Yes.

On the basis of all I have been saying, or trying to say, I find no substance in this appeal. It is accordingly dismissed in its entirety. The decision of the Court of Appeal delivered in the appeal on 26th November, 2014 in the appeal **No. CA/L/1046A/2014** and consequently, the order made therein remitting the case "to the Chief Judge of the Federal High Court for reassignment to any Judge of the Federal High Court other than Buba J. for expeditious hearing and determination *de-novo"* are hereby affirmed.

Ejembi Eko,
Justice, Supreme Court.

PETER-ODILI, (JSC): I agree with the judgment delivered by my learned brother, Ejembi Eko JSC and to register the support for the reasoning I shall make some remarks.

This is an appeal brought by the appellant who was the respondent at the Court of Appeal, Lagos Division against the judgment of the trial High Court, Coram: Sidi Dauda Bage JCA (as he then was), Biobele Abraham Georgewill and Ugochukwu Anthony Ogakwu JJCA, delivered on the 4th november, 2016. The court below had set aside the decision of I.N. Buba J. of the Federal High Court, Ikoyi which judgement upheld the appellant's No Case Submission.

Background Facts

The appellant and one Mr. Oyebode Alade Atoyebi (2nd accused at the trial court) stood trial before the Federal High Court on a 54 amended count charge dated 4th June, 2013 for accepting various cash payments above the threshold set by the Money Laundering Prohibition Act 2004 (MLA 2004) and Money Laundering Prohibition Act 2011 (MLA 2011) without going through financial institution. The amended charge is at pages 1163 to 1191 of volume IV of the record of appeal. The respondent called two witnesses and tendered

A exhibits P1 to P6. After the close of the respondent's case, the appellant made a No Case Submission which was upheld by the learned trial Judge.

Dissatisfied with the\ ruling, the respondent appealed to the Court of Appeal via Notice of Appeal dated 21st October, 2014. In a well considered B judgment delivered on 4th November, 2016, the Court of Appeal set aside the decision of the trial court and held that the respondent made a prima facie case against the appellant requiring the appellant to enter his defence.

It is from the decision of the Court of Appeal that the appellant has C appealed to this Honourable Court via a Notice of Appeal dated 17th January, 2017.

The hearing was fixed for the 18th October, 2017 and on that day, Oludele Adegboyega Adeogun Esq. of counsel for the appellant adopted the D brief of argument filed on the 13/3/17 and a reply brief filed on 6/10/17 and deemed filed on 18/10/17. The appellant therein identified four issues for determination of the appeal which are thus:

E **1. Whether the Court of Appeal was right in evaluating or re-evaluating the evidence adduced by parties before the trial court when there is no appeal against the finding of facts made by the trial court or where the** F **appeal thereto has been abandoned. (Distilled from Grounds 3, 4 and 7 of the Notice of Appeal).**

2. Whether the Court of Appeal was right in holding that G **Section 1 of the Money Laundering Prohibition Act 2004 and 2011 create a strict liability offence (Distilled from Grounds 5 & 6 of the Notice of Appeal).**

3. Whether the Court of Appeal was right in holding that H **proliferation of issues from the grounds of appeal is more technical rule rather than fundamental rule. (Distilled from Grounds 1 and 2 of the Notice of Appeal).**

I **4. Whether the Court of Appeal was right in holding that the respondent has made out a prima facie case to warrant the appellant to**

enter a defence to the charge. (Distilled from Ground 8).

Learned counsel for the respondent. E.E. Iheanacho Esq. adopted the brief of the respondent filed on 27/9/17 and deemed filed on the 18/10/17. He raised three issues for determination which are as follows:

(i) Whether the Court of Appeal was not right in holding that Section 1 of the Money Laundering Prohibition Act 2004 and Section 1 of the Money Laundering Prohibition Act 2011 created strict liability offence (Distilled from Grounds 5 and 6 of the Notice of Appeal).

(ii) Whether the Court of Appeal was not right in holding that Issue 5 as formulated by the respondent was valid after striking out respondent's Issue 2 which was distilled solely from ground 6 notwithstanding that Issue 5 was distilled from Grounds 6, 12, 13 and 14 of the Notice of Appeal. (Distilled from Grounds 1 and 2 of the Notice of Appeal).

(iii) Whether the Court of Appeal was right or not in holding that the respondent made out a prima facie case warranting the appellant to enter his defence. (Distilled from Grounds 3, 4, 7, and 8 of the Notice of Appeal).

I shall confine myself to appellant's Issue 4 crafted another way by the respondent in its Issue 3 and that is thus:

ISSUE 3 OR 4

Whether the Court of Appeal was right or not in holding that the respondent has made out a prima facie case to warrant the appellant to enter a defence to the charge or not.

It was contended by Mr. Adeogun Esq. of counsel for the appellant that

A the court below erred in law when it reached the conclusion that the respondent made a prima facie case to warrant the appellant to enter a defence to the charge which error was premised on the belief that the offence for which the appellant was charged is a strict liability offence and that it has the power
B to review the findings made by the trial court when there is no appeal.

It was submitted that in deciding whether a prima facie case has been made out or not, the court will look at the evidence of the prosecution. That the unchallenged evaluation of the trial court regarding the evidence of PW1
C is that the evidence conveyed nothing and was highly unreliable. Also that the trial court had found that PW2's evidence constituted an admission against the prosecution. Learned counsel for the appellant stated that a look at the summary of the evidence of the prosecution showed clearly that the
D respondent had failed in making a prima facie case to establish the offence of money laundering under Section 1 of the Money Laundering Act, 2011 or MLA for short. He cited **Fagoriola vs. FRN (2013) 17 NWLR (Pt. 1383) 322.** That PW1 is not the maker of any of the cash registers and so reliance on
E the said cash register is subject to the provisions of Section 51 of the Evidence Act, 2011 and so the need to call the maker of the said cash register. He cited **Oguma vs. IBWA (2988) 1 NWLR (Pt. 73)) 658 at 679; Ozaki vs State (1990) 1 NWLR (Pt. 124) 92 at 113.**

F Mr. Adeogun further submitted for the appellant that the appellant based on the evidence before the court is neither a payer nor payee anticipated by or within the contemplation of Section 1 of MLA. That the word "Person" includes corporate or unincorporated under Section 18(1) of the MLA and that
G the word "or" in Section 1 should be read disjunctively. He referred to **Kabirikim vs. Emefor (2009) 14 NWLR (Pt. 1162) 602 at 623; Wilson vs. A.G. Bendel State (1985) 1 NSCC 191; FRN vs. Dariye (2011) 12 NWLR (Pt. 1265) 521.**

H Learned counsel canvassed by stating that the respondent failed to prove the essential ingredients of the offence for which the appellant was charged and that is court is urged to restore the decision of the trial court and discharge the appellant.

I Learned counsel for the respondent, E,E. Iheanacho Esq. contended that though an appellate court such as the court below has the power to interfere with the evaluation of evidence by the trial court in an appropriate

A case. He cited: **Ezekwesili vs Agbapuonwu (2003) 9 NWLR (Pt. 825) 337; Kamalu vs. Umunna & Ors (1997) LPELR – 1657 (SC).**

That in the case at hand the findings of the trial court were not based on the demeanour of the respondent's witnesses but rather the evidence received
B during trial were both documentary and oral showing that the appellant without passing through financial institutions accepted cash payments beyond the stipulated threshold. That evaluation of such evidence is not the exclusive preserve of the trial court as the appellate court is in as a good position as the
C trial court to evaluate the documentary evidence led in a case and draw its own conclusion or make its own findings. He relied on **S.S. GMBH vs TD. Ind.** Ltd (2010) 11 NWLR (Pt. 1206) 589; **Gonzee Nigeria Ltd vs Nigeria Educational Research & Development Council & Ors.** (2005) 6 SC. (Pt. 1)
D 25 at 35; **Chitra Knitting & Weaving Manufacturing Co. Ltd vs Akingbade** (2016) LPELR – 40437 (SC).

For the respondent it was submitted that the offences created by Section 1 of the MLA 2004 and 2011 are strict liability offences and the Court of Appeal
E correctly held that the respondent made out a case requiring the appellant to enter his defence.

This appeal stems from a Ruling on a No Case Submission made by the accused now appellant at this stage which the trial court upheld and proceeded
F to discharge the appellant. The court below did not tow the line and set aside what the court of first instance did, holding that the prosecution now respondent had made out a prima facie case to warrant the appellant entering his defence.

G At the risk of flogging a settled legal principle I have to state that when a no case submission is made the trial court is not called upon to express an opinion on the evidence before it and the credibility of the witnesses is not in issue at this stage. What is expected of the trial court is to do one of two things.

H

(a) To determine whether or not there is any legally admissible evidence linking the accused person with the commission of the offence with which he is charged
I **and if the answer is yes, the court dismisses the No Case Submission and tersely without saying more than that, there is a prima facie case for which the accused should**

enter his defence, or

(b) That there is indeed no case made by the prosecution for which he should be called upon to make his defence. The second option comes up where the court of trial is satisfied that the prosecution witnesses have been so discredited by cross examination that no reasonable tribunal would convict upon it. Also that there is no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. That is that there is no evidence to prove an essential ingredient of the offence. See Tongo vs COP (2007) 12 NWLR (Pt. 1049) 525; Ekwunugo vs FRN (2008) 15 NWLR (Pt. 1111) 630; Edo Oko vs The State (2017) LPELR – 42267 (SC).

It needs be said that at this stage, which is after the prosecution has closed its case and the accused makes the no case submission, the court of trial is not required to evaluate or give weight to the evidence led by the prosecution or to give a lengthy Ruling if it is not upholding the no case submission. On the other hand if it is upholding the No Case Submission, the court considers that the witnesses as produced by the prosecution have been discredited under cross-examination so the testimonies so proffered would be of no use. The addition is that there is no linkage between the offences charged and the accused persons. Either way a long drawn treatise is not expected since what is available is one side of the coin. Taking a cue to that caution, the little I say the better. The much I can venture is that there is evidence linking the accused/appellant to the offences charged for which a response from him is necessary to clear the air. What I am saying is that from the evidence proffered by the prosecution, the matter cannot just be waived off without a hearing from the accused/appellant. See **Duru vs Nwosu** (1989) 1 NWLR (Pt. 113) 24 at 43; **Ajiboye vs State** (1995) 8 NWLR (Pt. 414) 408; **Odofin Bello vs State** (1967) NMLR 1. 17.

Therefore, from the foregoing and the better reasoning I too dismiss the appeal.

A I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

B **BAYANG AKAAHS, (JSC):** I read before now the judgment of my learned brother, Eko JSC. I am in complete agreement with him that the appeal lacks merit and should be dismissed.

When the present respondent filed the appeal against the decision of
C the trial court upholding the no-case submission of the defendant (now appellant) to the Court of Appeal, that court was bound to re-evaluate the evidence adduced at the trial before arriving at its own conclusion that the trial court was wrong in holding that no prima facie case was made out to warrant
D calling on the appellant to enter into his defence. For this and the more elaborate reasons contained in the leading judgment of my learned brother, Eko JSC, I find no merit in the appeal. Accordingly, it is dismissed and the case is remitted to the Chief Judge of the Federal High Court for re-assignment
E to another Judge other than Buba J for trial de novo.

K. B. AKAAHS
Justice, Supreme Court

F **CENTUS NWEZE, (JSC):** My Lord, Eko, (SC), obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship that this appeal is, totally, devoid of merit and should be dismissed.

Appeal dismissed.

G

Chima Centus Nweze
Justice, Supreme Court

H

I

IBRAHIM KAMILA
AND
THE STATE

SC. 489/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Presumption of innocence of accused – Implication on burden of proof.

COURT: Attitude of the Supreme Court to concurrent findings – Guiding principles – Considerations thereof.

COURT: Concurrent findings supported by evidence borne out of the record – Whether Supreme Court will interfere.

COURT: Evaluation of evidence – Primary role of trial court – Whether an appellate court can interfere therewith.

CRIMINAL LAW AND PROCEDURE: identification – Purpose – How establish in criminal proceedings.

CRIMINAL LAW AND PROCEDURE: Identification – Where there is credible identification evidence – Whether an identification parade not necessary.

CRIMINAL LAW AND PROCEDURE: Proof – Burden of proof – Whether prosecution is not obliged to call host of witnesses in order to discharge burden of proof.

CRIMINAL LAW AND PROCEDURE: Proof of criminal cases – Modes thereof.

CRIMINAL LAW AND PROCEDURE: Trial within trial – Significance – Accused.

EVIDENCE: Admissibility of a reflated confessional statement – Guiding principles thereof.

EVIDENCE: Admissibility of confessional statement – Requirements thereof.

EVIDENCE: Confessional statement – Definition – S.28 of Evidence Act 2011 – Import.

EVIDENCE: Confessional statement – Significance – Whether alone can sustain the conviction – Relevant principles thereof.

EVIDENCE: Hearsay – Where investigating police officer testifies on his investigatory activities – Whether testimony does not amount to hearsay.

JUDGMENT AND ORDERS: Where there are other evidence sufficient to sustain conviction – Whether expunging the confessional statement will effect the conviction of the appellant.

Issues for Determination

1. **Whether the eminent justices of the court of Appeal ought to have upheld the learned trial judge decision to admit the appellant's purported extra judicial statement being "Exhibit D (Ground No. 1)**
2. **Whether beyond "Exhibit D", there was adequate, cogent and sufficient evidence to convict the Appellant of the charge of conspiracy to commit armed robbery and murder (Grounds 2, 3, 4 and 5).**

Facts of the Matter

This appeal is against the judgment of the Court of Appeal, Lagos Division delivered on the 16th day of May, 2014 which affirmed the judgment of the Lagos State High Court delivered on 13th December, 2007.

The appellant herein, who was the 2nd accused person at the trial court, was charged along with three other co-accused persons before the trial court on four counts charge of conspiracy to commit armed robbery, murder and receiving stolen goods, contrary to Sections 403A, 402(2) (A), 319(1) and 427 of the Criminal Procedure Code, Cap 32, Vol. 2 Laws of Lagos State of 1999 respectively. In proof of its case, the prosecution called three witnesses and tendered eight (8) exhibits i.e Exhibits A to H, while the 2nd accused/appellant did not call any witness but testified on his behalf. During the trial, the prosecution sought to tender a confessional statement which it alleged was voluntarily made by the accused/appellant and the appellant herein, objected to the admissibility of the said confessional statement on the ground that it was not made voluntarily by him. In compliance with the law, the trial court conducted a trial within trial in order to determine the voluntariness of the said confessional statement. At the end of the mini-trial, the court held that the statement was made voluntarily and admitted it in evidence and marked it as Exhibit D. The trial thereafter proceeded in earnest and in the end, the trial court found or held that the prosecution/respondent had proved its case beyond reasonable doubt that the appellant and the three other co-accused persons committed all the offences as charged and convicted them accordingly.

Piqued by the judgment of the trial court, the appellant appealed to the Court of Appeal, albeit without success. Miffed by the judgment of the Court of Appeal affirming the conviction and sentences passed on him by the trial court, the appellant further appealed to the Supreme Court.

The case of the prosecution is that on the 9th of December, 2000, the deceased late Chief Layi Balogun arrived at Muritala Muhammad International Airport from Abuja at around 3.30pm after which he, in company of his security detail, one Sgt Olajide Longe, left for his (deceased's) office situate at No. 1 Balogun Street, Oregun, Ikeja, Lagos. The security detail was in mufti. Then at about 9.00pm both of them left the office for the deceased's residence at No. 26, Oluwole Street, Akoka along with the deceased's driver.

On approaching his residence, the gate was opened when the deceased and his security detail were accosted by five unknown armed men who fired gun shots towards the chest of the security detail. Thereafter, the deceased, the security detail and other members of the deceased's family were taken hostage by the five gun-men. After about ten to fifteen minutes later, both the deceased i.e Chief Balogun and the security detail were shot after which the gun-men carted away with the deceased's cell phone, omega wrist watch and a sum of N20,000.00 and fled the scene of the crime. The Chief and the security detail were later rushed to hospital where the former passed on.

Held: *(Unanimously dismissing the appeal)*

1. *The three modes of establishing criminal cases*
There are three modes of proof of criminal cases. These methods or modes of proof are:

(a) By testimonies of eye witness or witnesses who watched, heard or witnessed the commission of the crime by the accused person(s)
(b) Through confessional statement voluntarily made by the accused.
(c) Through circumstantial evidence which clearly point to the sole fact that the accused and no other person committed the offence charged.

See Emeka vs. The State (2001) 6 SCNJ 267.

For the time being, I will concern myself with Exhibit "D", which is the confessional statement of the appellant even though he retracted it during his defence. In the course of the proceedings in this case at the trial court, the prosecution sought to tender in evidence the confessional statement of the appellant. The latter objected to the admissibility of that statement on the ground of torture and stated that it was not voluntarily made by him. The law is trite and well settled too, that where there is dispute as to whether or not an accused person's

statement sought to be tendered was made voluntarily by him, it is the duty of the trial court to try the voluntariness of such statement by conducting a "trial within trial" otherwise known as 'mini-trial'. See Olayinka vs. State (2007) 9 NWLR (pt. 1040) 561; Obasi vs. State (1965) NWLR 119. In this instant case, the learned trial judge had duly complied with this rule as he had conducted a 'trial within trial' before he finally admitted the confessional statement of the accused/appellant in evidence as Exhibit "H". Having ascertained the voluntariness of the extra-judicial statement of the accused/appellant, the trial court, in my view, is duty bound to rely and act on such confessional statement (Exhibit "D"). The call by the learned counsel for the appellant that the statement should be expunged from the record by this court is therefore of no moment uncalled for and is rather absurd.
(*P 279 --280 Paras B – A)*

2. *The definition of confessional statement*
A confessional statement can simply be defined as an admission by a person charged (or an accused person accused) of committing a crime at anytime stating or suggesting the inference that he committed such crime. See section 28 of the Evidence Act 2011 as amended. It is well settled law, that free an voluntary confession of guilt alone by an accused person, provided it is direct and positive and was duly made voluntarily, is sufficient to ground a conviction, since a confession always remains the best proof of what he had done. See Alabi vs. State (1993) 7 NWLR (pt. 307) 5; Fabiyi vs. State (2015) 6-7 SC (pt. 1) 83; Osetole & Anor vs. State (2012) 6 SCNJ 321; Nwachukwu vs. The State (2002) 7 SCNJ 230; Dogo vs. The State (2013) 2-3 SC (pt. 11) 75 at 92-94.

I am mindful of the fact and it is even settled law, that before a court convicts an accused person on his confessional statement alone, it must ascertain whether such confessional statement was voluntarily made and that it was also direct, positive, pungent and consistent with other facts as proved. See Jimoh vs. State (2014) 10 NWLR (pt. 1414) 105. Looking closely and dispassionately at the confessional statement Exhibit "D" vis a vis the record of proceeding, I am not doubtful of the fact that the trial court had duly examined and evaluated Exhibit "D" and also the lower court had also adequately considered same before

endorsing the trial court's finding reliance on it. (*P 280 Paras B – G)*

3. *Requirements which a confessional statement must meet*
It is apposite to say, that this court has over the years evolved some requirements which a confessional statement must meet in order to be relied on by trial courts. Some of these requirements include, the followings:

(i) It must contain the words of caution.
(ii) The cautionary words must have been administered in the language understood by the accused person.
(iii) The statement was duly signed or thumb printed by the accused person.
(iv) That the statement was recorded in the language understood by the accused person.
(v) That the statement was after being recorded read over and interpreted to the maker in the language it was recorded.

From the look at the statement of the appellant Exhibit "D", it is crystal clear that all the above requirements were met or complied with, hence I also hold the view, that the trial court was right to accept and act on the extra-judicial statement of the appellant (Exhibit "D").
(*P 281 Paras B – F)*

4. *An accused can be convicted solely on his confessional statement*
It is one of the complaints of the appellant that the trial court had convicted him on uncorroborated and inadmissible evidence. According to him, the trial court solely relied on the confessional statement (Exhibit "D") to convict him of the offences charged. In the first place, it needs be emphasized here, that a confession of an accused to the commission of an offence plays a vital role in the determination of his guilt. Therefore, a trial court is empowered to convict him even on the confessional statement alone, once that trial court is convinced that the confession was voluntary as in this instant case. I said so

because, by his confession, the accused, now appellant, had confirmed the commission of criminal responsibility in terms of mens rea and actus rea. See Okeke vs. State (2003) 15 NWLR (pt. 842) 25.
(*P 281 Paras F – I)*

5. *Retraction of a confessional statement and its admissibility*
It also needs to be emphasized and it is also trite law too, that mere retraction of a voluntary confessional statement by an accused person, as in this instant case, does not render such statement inadmissible or worthless or untrue in considering his guilt. See Idowu vs. State (2000) 7 SC (pt. 11) 50. (*Pp 281 – 282 Paras I – A)*

6. *Prosecution not obliged to call a host of witnesses to discharge onus of proof.*
Learned counsel for the appellant frowned at the prosecution's failure to call a witness to testify in the case at the trial within trial more especially on the admission of the commission of the offences when appellant was said to have boasted in a cell of committing the offences. With due respect to the learned appellant's counsel, it is not necessary for the prosecution, in order to discharge the onus of proof imposed upon it by law, to call a host of witnesses or to adduce or tender every available piece of evidence. It is sufficient if the evidence called is enough to discharge the burden placed on it by law. The position of the law is well settled, that the prosecution is not bound to call every person linked to the commission of the crime by physical presence or otherwise, to give evidence on what he perceived. Once persons who can testify to the actual commission of the crime and on the other ingredients have done so, that will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 (1) of the Evidence Act 2011 as amended, Cap 112 Laws of the Federation of Nigeria 2004. See Sadau vs. State (1968) 124; The State vs. Ogbudunjo & Anor (2001) 12 NWLR (pt. 698) 576; Obue vs. State (1976) 2 SC 141; Shurumo vs. The State (2010) 44 NSCQR 159. As a matter of fact, even a single witness who gives a cogent eye witness account of the incident can be sufficient. See Odili vs. State (1977) 4 SC 1. (*Pp 282 – 283 Paras H – D)*

7. *A credible identification evidence dispenses with the need for identification parade*

Another complaint by the appellant relates to the identification of the appellant. According to the learned appellant's counsel, the evidence of PW1 and PW2 was faulty and nebulous and that the situation required the conduct of identification parade. He referred to the case of Agboola vs. State (2013) 5 SCJN 683 at 701/702. He opined that the trial court was wrong to have solely relied on the confessional statement Exhibit "D" which was even inadmissible. I must reiterate here, that identification evidence is not sine qua non for conviction. It is sufficient if credible evidence is adduced to show that the person charged with an offence is the same as the person who was seen committing the offence. When a trial court is confronted with identification evidence, all it is required to do is to be satisfied that the evidence of identification had established the guilt of the accused person beyond reasonable doubt. See Ukpabi vs. State (2004) 6-7 SC 27. Identification parade is not necessary in all criminal cases. (*P 283 Paras. E – H)*

8. *The purpose and establishment of identification*

Identification is simply a means of establishing whether a person charged with an offence is actually the same person who committed the offence. Therefore, once credible evidence abounds confirming that the person charged was the actual one who committed the offence, as in this instant case, then there will be no need to conduct any identification parade at all. See Orimoloye vs. The State (1984) 10 SC (Reprint) 128; Ebri vs. The State (2004) 5 SC (pt. 11) 29. Here, the two eye witnesses namely PW1 and PW2 had contact or interaction with the appellant and other co-accused persons for quite a reasonable time during the process of commission of the offences Also, the appellant had identified himself when in his confessional statement Exhibit "D", he had fixed himself at the scene and time of the crime on the date of the incidence. The requirement of formal identification parade is therefore superfluous as rightly held by the two lower courts.
(*Pp 283 – 284 Paras H – B)*

9. *Evidence of IPO is not hearsay when in relates to his investigation activities*

I do not share the appellant's counsel's view that the evidence of an IPO amounts to hearsay evidence because as an IPO he narrates to the

court the outcome of his investigation or enquiries or what he recovered or discovered in the course of his duty. He must have discovered or recovered some pieces of evidence vital to the commission of the crime which trial courts normally consider in arriving at a just decision one way or the other. The lower court was therefore right in refusing to discountenance such evidence adduced or given by PW3. (*P 284 Paras C – E)*

10. *Accused is presumed innocent until the contrary is proved*
The age-long principle of law, is that in criminal cases an accused person is constitutionally presumed innocent until the contrary is proved by the prosecution. The onus of proof in criminal cases does not shift as the burden throughout lies on the prosecution in a criminal trial which must prove the guilt of the accused. See Bello vs. State (2007) 10 NWLR (pt. 1043) 564; Igabele vs. State (2006) 6 NWLR (pt. 975) 100.

Any doubt in the prosecution's case must be resolved in favour of the accused person. In this instant case, as found by the two lower courts, the prosecution had led credible, cogent and reliable evidence in proof of all the offences the appellant and his co-conspirators were accused of committing. The appellant at the close of the prosecution's case presented his defence when he testified as DW2. The learned trial judge had also duly and painstakingly considered and evaluated the entire evidence adduced in the case by both parties before concluding that the prosecution had proved its case beyond reasonable doubt and convicted him as charged. (*P 284 Paras E – H)*

11. *Effect of concurrent findings of two lower courts*
To my observation, there are in this instant appeal, concurrent findings of two lower courts both arriving at the conclusion that the prosecution had proved its case against the present appellant beyond reasonable doubt. As a matter of policy, this court is always hesitant in interfering with or disturbing the concurrent findings of two lower courts except on special circumstances, for instance, that the findings are perverse or there is misconception or misapplication of law. (*P 285 Paras D – E)*

12. *Where concurrent findings are supported by evidence*
Indeed there is no point beating about the bush or flogging a dead horse as the concurrent findings and conclusion were supported by the evidence adduced and borne out of the records. It follows that this court is well advised to hold its peace and affirm what those earlier courts did. (*P 293 Paras H – I*

13. *When confessional statement is relevant in criminal proceedings*
On this matter of Exhibit "D", the confessional statement a reference to Section 27(1) of the Evidence Act 2004 now Section 28 of the Evidence Act, 2011 is helpful. It provides as follows:

> **"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the interference that he committed that crime."**

It is settled law with loads of judicial authorities that a confession would be relevant against the person who makes it when the statement is voluntary thus admissible and so once a confessional statement is deemed to be positive, direct and unequivocal, such statement would be admitted as having been voluntarily made and the court can convict based solely on that confessional statement. In such a situation where the voluntary confession of guilt by an accused person whether judicial or extra-judicial, if it is direct and positive, duly made and satisfactorily proved is sufficient to ground a conviction and it needs no corroborative evidence. See Yusuf vs. State (1976) 6 SC 167 at 173; Olabode vs. State (2007) ALL FWLR (pt. 389) 1301; Kanu vs. King (1952) 14 WACA 30; Nwachukwu vs. State (2003) FWLR (pt. 123) 312. *(Pp 289 – 290 Paras I – D)*

14. *The significance of trial within trial*
It is because of the strategic position of a confessional statement that there is no getting away from it that once there is a challenge to the voluntariness of confessional statement that the trial court faced with this challenge is bound to conduct a trial within trial to determine the voluntariness or otherwise. Once that trial within trial has been carried out and the court rules that the confession was voluntarily

made, the appellant can no longer argue that he did not make the confession voluntarily without first impugning the trial within trial. See Bouwor vs. State (2016) LPELR – 26054 (SC).
(*P 290 Paras D – F)*

15. *The primary duty of a trial court is to evaluate evidence*
T**he primary responsibility of resolving findings of fact, evaluation and ascription of probative value to evidence is within the province of the trial court and as such appellate courts are enjoined to keep a safe distance from interfering except under exceptional circumstances. See Egbe vs. Adefarasin (1987) 1 (SC) p. 1; Ezeh Ibeh vs. State (1997) ISCNJ 256 – 271.** (*P 290 Paras F – G)*

16. *Trial within trial was well conducted*
Clearly there is nothing to fault in all that transpired in the trial within trial and that the trial court carried out its function creditably and dispelled all doubts regarding the voluntary nature of that statement, Exhibit "D" and so the trial court was on solid ground to have placed reliance on it in making its conclusion of guilt of the appellant. Also the Court of Appeal having the advantage of the documents before it showing all the trial court did was equally right to affirm the findings and conclusions so made by the court of first instance.
(*P 293 Paras A – B)*

17. *Where there are other evidence to sustain conviction*
However to fulfill all righteousness, if the confessional statement had been wrongly admitted and it is expunged the conclusion of the two courts below would not be touched as there is a surfeit of evidence that would have sustained the conviction. In this regard I refer to Section 251 (1) of the Evidence Act, 2011 (as amended); State vs. Ogunbunjo (2001) FWLR (pt. 37) 1097 (SC).

In this respect the PW1 and PW2 who were direct eye-witnesses of the armed robbery and murder recounted how the whole operation took place which evidence was uncontroverted. The PW3, the investigating police officer also carried out his duties in that regard thoroughly and professionally and made available to the trial court the processes through which he obtained his information and inquiries.

Also to be noted is that the two courts below saw nothing to impugn the identification of the operators as proffered by PW1 and PW2 which made unnecessary an identification parade since their identification of the culprits were direct and positive leaving no doubt as to whether or not the witnesses knew what they were saying. See: Nwabueze vs. The State (1988) 4 NWLR (pt. 86) 16 at 30-31; Patrick Ikemson & Ors vs. The State (1988) 6 SCNJ (pt. 1) 54 at 65; Alabi vs. The State (1993) 7 NWLR (pt. 307) 511 at 524; Aliyu Wakala & Ors vs. The State (1991) 8 NWLR (pt. 211) 552 at 565.

Per Ejimbi Eko (JSC):

There is no substance in this appeal. As correctly submitted for the respondent with or without the disputed confession in Exhibits "H" and "D", the evidence of the PW1. PW2, PW3 and DW4 link the Appellant to the offences he was charged and convicted for.

The PW1 and PW2 were eye witnesses of the armed robbery and the murder of Layi Balogun. They each, gave direct evidence of what they saw and experienced in the hands of the armed robbers on the fateful day. They were neither discredited nor contradicted as regards the substance of their testimonies.
(*Pp 293; 295 Paras C – H; E – G)*

18. *Where accused may be convicted based on his confessional statement*
The applicable principle here is that an accused who disputes his confessional statement may still be convicted of the offence(s) which he is charged if evidence abide outside the disputed confessional statement. In the case at hand, the appellant is convicted for armed robbery and the murder of one Layi Balogun. The evidence of PW1, PW2, PW3 and PW4 clearly link the appellant with the two offences and both courts below are perfectly right in their reliance on the evidence to convict the appellant. PW1 by his evidence leaves no one in doubt that the appellant is the person who kept watch over him during

the robbery. PW1 also witnessed the murder of Layi Balogun with whom he was forced upstairs by the invading armed robbers, the appellant being one of them. This testimony remains unshaken.

And there is the equally damnifying evidence of PW2. He recognised the appellant and one other accused person at the trial as being among the five armed robber who struck and, in the course of the robbery, extorted from their deceased victim Twenty Thousand Naira and Exhibit "C", a cell phone. The witness unmistakably identified Exhibit "C" in court which was recovered from, yet again, another accused person with whom the appellant herein was tried.

A conviction based solely on the uncontroverted evidence of these witnesses as affirmed by the court below remains solid. See R. vs. Kana 14 WACA 30, Onochies & 7 others vs. The Republic (1966) NMLR 307 and Tajudeen Fabiyi vs. The State (2015) LPELR-24834 (SC). With the presumption of the correctness of the concurrent findings of the two courts below persisting this far, this appeal accordingly fails. See Omotola & Ors. vs. The State (2009) LPELR-2663 (SC) and Nkebisi & Anor vs. State. (*P 294 Paras C – I)*

Nigerian Cases Cited

Alabi vs. State (1993) 7 NWLR (pt. 307) 5;
Alabi vs. The State (1993) 7 NWLR (pt. 307) 511
Aliyu Wakala & Ors vs. The State (1991) 8 NWLR (pt. 211) 552
Bello vs. State (2007) 10 NWLR (pt. 1043) 364;
Bouwor vs. State (2016) LPELR – 26054 (SC).
Dogo vs. The State (2013) 2-3 SC (pt. 11) 75
Ebri vs. The State (2004) 5 SC (pt. 11) 29.
Egbe vs. Adefarasin (1987) 1 (SC) p. 1;
Ezeh Ibeh vs. State (1997) ISCNJ 256 – 271.
Fabiyi vs. State (2015) 6-7 SC (pt. 1) 83;
Idowu vs. State (2000) 7 SC (pt. 11) 50;
Igabele vs. State (2006) 6 NWLR (pt. 975) 100.
Jimoh vs. State (2014) 10 NWLR (pt. 1414) 105.
Kanu vs. King (1952) 14 WACA 30;
Nkebisi & Anor vs. State.
Nwabueze vs. The State (1988) 4 NWLR (pt. 86) 16

Nwachukwu vs. State (2003) FWLR (pt. 123) 312.
Nwachukwu vs. The State (2002) 7 SCNJ 230;
Obosi vs. State (1965) NMLR 119.
Obue vs. State (1976) 2 SC 141;
Odili vs. State (1977) 4 SC 1.
Okeke vs. State (2003) 15 NWLR (pt. 842) 25.
Olabode vs. State (2007) ALL FWLR (pt. 389) 1301;
Olayinka vs. State (2007) 9 NWLR (pt. 1040) 561
Omotola & Ors. vs. The State (2009) LPELR-2663 (SC)
Onochie & 7 Others vs. The Republic (1966) NMLR 307
Orimoloye vs. The State (1984) 10 SC (Reprint) 128;
Osetole & Anor vs. State (2012) 6 SCNJ 321;
Patrick Ikemson & Ors vs. The State (1988) 6 SCNJ (pt. 1) 54
R. vs. Kana 14 WACA 30,
Sadau vs. State (1968) 124;
Shurumo vs. The State (2010) 44 NSCQR 159
State vs. Ogunbunjo (2001) FWLR (pt. 37) 1097 (SC).
Tajudeen Fabiyi vs. The State (2015) LPELR-24834 (SC).
The State vs. Ogbudunjo & Anor (2001) 12 NWLR (Pt. 698) 576
Ukpabi vs. State (2004) 6-7 SC 27.
Yusuf vs. State (1976) 6 SC 167

Foreign Cases Cited
R. v. Thompson (1893) 2 G.B. 12
Ibrahim v. R (1914) I. C. 599 at 660

Nigerian Statutes Cited
Evidence Act 2004 – Section 27(1)
Criminal Procedure Code, Cap 32, Vol. 2 Laws of Lagos State 1999 – Ss. 402 (A), 403 (A), 319 (1) and 427.

Representation
F. A. Dalley and O. A. Olude for the Appellant
Adedoyin Rhodes-Vivour (Mrs) with Thomas Ojo, Ireti Banjo and Princess Obi for the respondent.

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): This appeal is against the judgment of the Court of Appeal, Lagos Division ("The lower court" for short) delivered on the 16th day of May, 2014 which affirmed the judgment of the Lagos State High Court (trial court) delivered on 13th December, 2007.

The appellant herein, who was the 2nd accused person at the trial court, was charged along with three other co-accused persons before the trial court on four counts charge of conspiracy to commit armed robbery, murder and receiving stolen goods, contrary to Sections 403A, 402(2) (A), 319(1) and 427 of the Criminal Procedure Code, Cap 32, Vol. 2 Laws of Lagos State of 1999 respectively. In proof of its case, the prosecution (now respondent) called three witnesses and tendered eight (8) exhibits i.e Exhibits A to H, while the 2nd accused/appellant did not call any witness but testified on his behalf. During the trial, the prosecution sought to tender a confessional statement which it alleged was voluntarily made by the accused/appellant and the appellant herein, objected to the admissibility of the said confessional statement on the ground that it was not made voluntarily by him. In compliance with the law, the trial court conducted a trial within trial in order to determine the voluntariness of the said confessional statement. At the end of the mini-trial, the court held that the statement was made voluntarily and admitted it in evidence and marked it as Exhibit D. The trial thereafter proceeded in earnest and in the end, the trial court found or held that the prosecution/respondent had proved its case beyond reasonable doubt that the appellant and the three other co-accused persons committed all the offences as charged and convicted them accordingly.

Piqued by the judgment of the trial court, the appellant appealed to the Court of Appeal (the lower or court below), albeit without success. Miffed by the judgment of the court below affirming the conviction and sentences passed on him by the trial court, the appellant further appealed to this court.

The case of the prosecution is that on the 9th of December, 2000, the deceased late Chief Layi Balogun arrived at Muritala Muhammad International Airport from Abuja at around 3.30pm after which he, in company of his security detail, one Sgt Olajide Longe, left for his (deceased's) office situate at No. 1 Balogun Street, Oregun, Ikeja, Lagos. The security detail was in mufti. Then at about 9.00pm both of them left the office for the

deceased's residence at No. 26, Oluwole Street, Akoka along with the deceased's driver.

On approaching his residence, the gate was opened when the deceased and his security detail were accosted by five unknown armed men who fired gun shots towards the chest of the security detail. Thereafter, the deceased, the security detail and other members of the deceased's family were taken hostage by the five gun-men. After about ten to fifteen minutes later, both the deceased i.e Chief Balogun and the security detail were shot after which the gun-men carted away with the deceased's cell phone, omega wrist watch and a sum of N20,000.00 and fled the scene of the crime. The Chief and the security detail were later rushed to hospital where the former passed on.

On filing this appeal at the Supreme Court, the appellant, in keeping with the practice and rules of this court, prepared his brief of argument and served same on the respondent. The appellant's brief of argument, settled by F. Ajibola Dalley Esq., was filed on his behalf on 18th August, 2017. In the said brief of argument, two issues were identified for the determination of this appeal which are set out hereunder:

1. **Whether the eminent justices of the court of Appeal ought to have upheld the learned trial judge decision to admit the appellant's purported extra judicial statement being "Exhibit D (Ground No. 1)**

2. **Whether beyond "Exhibit D", there was adequate, cogent and sufficient evidence to convict the Appellant of the charge of conspiracy to commit armed robbery and murder (Grounds 2, 3, 4 and 5).**

Upon being served with the appellant's brief of argument, the learned counsel for the respondent also filed a brief on behalf of her client on 17th October, 2017. The said respondent's brief of argument was settled by Adedoyin Rhodes-Vivour and therein, two issues were identified as germane for the determination of this appeal. The dual issues are reproduced below:

A

A. Whether the eminent justices of the Court of Appeal ought to have upheld the learned trial judge's decision to admit to evidence (sic) the Appellant (sic) purported extra-judicial statement, being "Exhibit D".

B

B. Whether beyond "Exhibit D" there was adequate, cogent and sufficient evidence to convict the appellant of the charges of conspiracy to commit armed robbery, armed robbery and murder.

C

The above issues raised by the learned counsel for the respondent are word to word the same with those two raised by the appellant as reproduced above. The respondents can therefore be said to have adopted the issues for determination proposed by the appellant's learned counsel.

D

E

SUBMISSIONS BY APPELLANT'S COUNSEL ON THE ISSUES FOR DETERMINATION

Issue No. 1

While making submissions on this first issue for determination, the learned counsel for the appellant contended that the learned trial judge did not follow the guide lines set by this apex court in admitting the confessional statement of the appellant i.e. Exhibit D. He referred to Sections 27 and 28 of the Evidence Act which insist that the confessional statement must be ascertained by the trial court to have been made voluntarily. See the cases of **R. vs. Thompson (1893)2QB 12; Ibrahim vs. R. (1914) AC 599 at 660.** Learned counsel for the appellant argued rightly too, that when the voluntariness of a confessional statement is challenged the trial court is duty bound to conduct a trial within trial in order to ascertain that such statement was voluntarily made by the accused person. He cited the case of **Rasheed Lasisi vs. The State (2013) LPELR – 2018 3 (SC) Re Osakwe (1994) 2 NWLR (Pt. 326) 273 at 290; Ebot vs. State (1993) 4 NWLR (Pt. 240) 644 and Nwosu vs. State (1986) 4 NWLR (Pt. 186) 428.**

F

G

H

I

Learned appellant's counsel further argued that it is the duty of the prosecution to prove that confessional statement was voluntarily made by the

accused person. See **Gbadamosi & Anor vs. The State (1992) LPELR – 1313 (SC).** He opined that the prosecution had failed to establish the voluntariness of Exhibit D in this instant case because it was not established to have been made voluntarily in the process of the trial within trial because of the failure of the prosecution to call the verifying officer to testify at the trial within trial. He again submitted that the trial judge did not consider and evaluate the evidence adduced at the trial within trial in his ruling on same. He argued that the learned justices of the lower court ought to have interfered with the finding of the trial judge on the trial within trial and reverse same but they unfortunately failed so to do. He on that submission, urged this court to do so and reject the said exhibit as it was inadmissible and to expunge same from the record, adding that where legally inadmissible evidence was wrongfully admitted in evidence, the appellate court can rightly intervene by expunging it from the record. He cited the case of **Fatai Olayinka vs. State (2007) LPELR – 2580 (SC)** in urging this court to resolve this first issue in the appellant's favour.

Issue No. 2

This issue deals with whether there was any sufficient evidence to convict the appellant aside Exhibit "D".

The learned counsel for the appellant argued that the evidence presented by the prosecution is manifestly weak and unreliable as it fails to link the appellant to the commission of the alleged crime and that it is improbable for the appellant to have committed the alleged offences for the following reasons:

(i) The appellant was not arrested at the scene of the crime.

(ii) There was no independent cogent eye witnesses evidence to show that the appellant fled the scene of the crime.

(iii) The weapon used in the alleged crime was never recovered from the appellant.

(iv) The items stolen were never recovered from the appellant.

(v) The appellant was not properly identified.
(vi) The inconsistency in the oral testimony of PW3.

He pointed out that the evidence of PW1 and PW2 at the trial that they saw the appellant participated in the robbery and murder of the deceased is contrary to their extra judicial statements as they made no mention of the appellant nor gave any description of him in the said statement. He cited the case of **Chukwuka Ogudo vs. The State (2011) 11-12 (Pt. 1) SCM 209 at 222-223.** He therefore submitted that failure of the court below to take cognizance of the inherent inconsistencies in both PW1 & PW2 statements to the police and their oral testimonies occasioned a miscarriage of justice. He argued further that the court below ought not have relied on PW1 & PW2's purported identification of the appellant as same is vague and imprecise as no credible evidence in form of identification parade was conducted. He contended that identification of the appellant through the television is unknown to law and therefore untenable in proof of the identity of an accused person. He also argued that the court below erred in law by relying on the oral testimony of PW3 as his testimony can be described as legally inadmissible hearsay evidence. He referred to Section 76 and 77 of the Evidence Act 2004 and submitted that the court below can only ascribe probative weight to the oral evidence of a witness who said or heard a fact in issue. He submitted finally, that the court below, in failing to articulate its reasons for upholding the trial court's reliance on the evidence of PW1 and PW2, had occasioned miscarriage of justice. He then urged this court to resolve this issue in favour of the appellant and allow this appeal.

The respondent, as I stated above, has adopted the two issues formulated by the appellant;

Issues No. 1

Responding on the appellant's submission on this issue, the learned counsel for the respondent referred to the contention of the failure of prosecution to call the verifying police officer before whom the statement was taken to testify. He argued that except as provided for by statute, no particular number of witnesses shall in any case be required for the proof of a fact and that the prosecution has no duty to call every available piece of evidence. He referred

to the case of **Edamine vs. The State (1996) LPELR – 1002 (SC).** He also submitted that failure to take confessional statement before a superior police officer would not render the confessional statement inadmissible. **Edamine vs. State (Supra).** He submitted that Exhibit "D" speaks for itself as a document voluntarily obtained from the appellant and the statement of the verifying officer in Exhibit "D" automatically raises a presumption in favour of the prosecution. He pointed out that the PW3 gave an oral testimony on how he obtained the said confessional statement from the appellant and he ensured that the statement was confirmed by a superior police officer. He argued that even if Exhibit "D" was wrongly admitted, the court below considered other evidence outside the confessional statement before arriving at its conclusion in its judgment. He referred to the judgment of the court below at pages 476-481 of the record. He then urged the court to resolve this issue in favour of the respondent.

Issue No. 2

This issue queries whether there are other evidence sufficient to ground conviction of the appellant apart from Exhibit "D".

The learned counsel referred to the judgment of the court below at pages 478-479 of the record and submitted that both PW1 and PW2 are credible witnesses who saw the appellant in the act and that the identity of the appellant was at all times known by PW1 and PW2. On the contention of the appellant that the evidence of PW3 was hearsay and that failure to call the cell mate of the appellant who informed him that the appellant boasted while in the cell that he was among those that robbed the deceased. The learned counsel to the respondent also argued that Sections 76 and 77 (a) and (b) referred to by the appellant on this point are not applicable in the sense that the PW3 was merely giving evidence in respect of the investigation carried out by him to unravel the people behind the crime. In the light of the foregoing, he urged the court to resolve this issue in favour of the respondent and to allow the appeal.

RESOLUTION OF ISSUES FOR DETERMINATION

Looking at the two sets of issues for determination proposed by the learned counsel for the parties, I feel that approaching this appeal based on the issues raised in the appellant's brief of argument will comfortably determine this

appeal. I will therefore be guided by them and in doing so, I shall consider them together since as I said supra, both issues had been adopted by the learned counsel for the respondent in her brief of argument.

Issues Nos 1 & 2

The first issue revolves on Exhibit "D", the confessional statement made by the appellant. Perhaps it is apt to commence the consideration of this issue by stating that there are three modes of proof of criminal cases. These methods or modes of proof are:

(a) By testimonies of eye witness or witnesses who watched, heard or witnessed the commission of the crime by the accused person(s)

(b) Through confessional statement voluntarily made by the accused.

(c) Through circumstantial evidence which clearly point to the sole fact that the accused and no other person committed the offence charged.

See **Emeka vs. The State (2001) 6 SCNJ 267.**

For the time being, I will concern myself with Exhibit "D", which is the confessional statement of the appellant even though he retracted it during his defence. In the course of the proceedings in this case at the trial court, the prosecution sought to tender in evidence the confessional statement of the appellant. The latter objected to the admissibility of that statement on the ground of torture and stated that it was not voluntarily made by him. The law is trite and well settled too, that where there is dispute as to whether or not an accused person's statement sought to be tendered was made voluntarily by him, it is the duty of the trial court to try the voluntariness of such statement by conducting a "trial within trial" otherwise known as 'mini-trial'. See **Olayinka vs. State (2007) 9 NWLR (pt. 1040) 5; Obosi vs. State (1965) NWLR 119.** In this instant case, the learned trial judge had duly complied with this rule as he had conducted a 'trial within trial' before he finally admitted the confessional statement of the accused/appellant in evidence as Exhibit "H". Having ascertained the voluntariness of the extra-judicial statement of the

A accused/appellant, the trial court, in my view, is duty bound to rely and act on such confessional statement (Exhibit "D"). The call by the learned counsel for the appellant that the statement should be expunged from the record by this court is therefore of no moment uncalled for and is rather absurd.

B A confessional statement can simply be defined as an admission by a person charged (or an accused person accused) of committing a crime at anytime stating or suggesting the inference that he committed such crime. See section 28 of the Evidence Act 2011 as amended. It is well settled law, that free C an voluntary confession of guilt alone by an accused person, provided it is direct and positive and was duly made voluntarily, is sufficient to ground a conviction, since a confession always remains the best proof of what he had done. See **Alabi vs. State (1993) 7 NWLR (pt. 307) 5; Fabiyi vs. State** D **(2015) 6-7 SC (pt. 1) 83; Osetole & Anor vs. State (2012) 6 SCNJ 321; Nwachukwu vs. The State (2002) 7 SCNJ 230; Dogo vs. The State (2013) 2-3 SC (pt. 11) 75 at 92-94.**

I am mindful of the fact and it is even settled law, that before a court E convicts an accused person on his confessional statement alone, it must ascertain whether such confessional statement was voluntarily made and that it was also direct, positive, pungent and consistent with other facts as proved. See **Jimoh vs. State (2014) 10 NWLR (pt. 1414) 105.** Looking closely and F dispassionately at the confessional statement Exhibit "D" vis a vis the record of proceeding, I am not doubtful of the fact that the trial court had duly examined and evaluated Exhibit "D" and also the lower court had also adequately considered same before endorsing the trial court's finding reliance G on it when in its judgment, the lower court stated thus, inter alia:

> **"After reviewing the evidence placed before the court in the trial within trial, the learned trial judge held that appending** H **of the signatures by the appellants is proof that those statements were voluntarily made. This in my view is in line with the decision of the Supreme Court in Uche Obidiozo & Ors Vs. The State (supra). The learned trial judge had** I **followed logically the guide set by the apex court for admission of such statements. It was right on the part of the trial court to have admitted the confessional statement of the**

1st and 2nd appellants and marked them as Exhibits "H" and "D" respectively. I do not have any reason to disturb the decision of the trial court on this issue ....."

It is apposite to say, that this court has over the years evolved some requirements which a confessional statement must meet in order to be relied on by trial courts. Some of these requirements include, the followings:

(i) It must contain the words of caution.
(ii) The cautionary words must have been administered in the language understood by the accused person.
(iii) The statement was duly signed or thumb printed by the accused person.
(iv) That the statement was recorded in the language understood by the accused person.
(v) That the statement was after being recorded read over and interpreted to the maker in the language it was recorded.

From the look at the statement of the appellant Exhibit "D", it is crystal clear that all the above requirements were met or complied with, hence I also hold the view, that the trial court was right to accept and act on the extra-judicial statement of the appellant (Exhibit "D").

It is one of the complaints of the appellant that the trial court had convicted him on uncorroborated and inadmissible evidence. According to him, the trial court solely relied on the confessional statement (Exhibit "D") to convict him of the offences charged. In the first place, it needs be emphasized here, that a confession of an accused to the commission of an offence plays a vital role in the determination of his guilt. Therefore, a trial court is empowered to convict him even on the confessional statement alone, once that trial court is convinced that the confession was voluntary as in this instant case. I said so because, by his confession, the accused, now appellant, had confirmed the commission of criminal responsibility in terms of mens rea and actus rea. See **Okeke vs. State (2003) 15 NWLR (pt. 842) 25.** It also needs to be emphasized and it is also trite law too, that mere retraction of a voluntary confessional statement by an accused person, as in this instant case, does not

render such statement inadmissible or worthless or untrue in considering his guilt. See **Idowu vs. State (2000) 7 SC (pt. 11) 50**

Now, coming to the issue of alleged want of corroborative evidence insinuated by the learned counsel for the appellant, I do not think that is true. As it could be fathomed, PW1 and PW2 were eye witnesses who had actually witnessed first-hand, the entire criminal act, perpetrated by the appellant and his partners in crime. Both of them gave uncontradicted and uncontroverted testimonies which had duly corroborated Exhibit "D", the appellants confessional statement. I must however state here that a confessional statement which is made voluntarily and is direct, cogent, credible and positive, is enough to ground conviction even without corroboration of any sort. See **Sule Iyanda Salawu vs The State (1971) NWLR 249; Grace Akinte vs. The State (1988) 17 SCNJ (pt. 11) 226; Yahaya vs. The State (1989) 12 SC 282 at 290.** In any case, in this present case, the criminal event took place in the presence of PW1 and PW2 who, as eye witnesses, had watched, observed and witnessed the entire event as it happened first hand. Those two eye witnesses had witnessed the armed robbery operation and heard the sound of the gunshots fired at the deceased and the security detail and had also seen the body of the victim in his room upstairs, after the gun shots. Similarly, some exhibits in the nature of items/goods that were robbed of the deceased, were all tendered in evidence by the prosecution at the trial in proof, the offences the appellant and his co-conspirators were charged with, tried and convicted by the trial court. The witnesses called by the prosecution, as rightly held by the trial court, had given credible and reliable evidence which fixed the appellant to the scene and time of the commission of the crime and linked him with the offences when the appellant and his co-conspirators dastardly murdered the deceased after robbing him of the goods, some of which were duly exhibited at the trial. These pieces of evidence were neither contradicted nor challenged in any material respect at the trial. The appellant was therefore pinned down in the commission of the offences charged.

Learned counsel for the appellant frowned at the prosecution's failure to call a witness to testify in the case at the trial within trial more especially on the admission of the commission of the offences when appellant was said to have boasted in a cell of committing the offences. With due respect to the

learned appellant's counsel, it is not necessary for the prosecution, in order to discharge the onus of proof imposed upon it by law, to call a host of witnesses or to adduce or tender every available piece of evidence. It is sufficient if the evidence called is enough to discharge the burden placed on it by law. The position of the law is well settled, that the prosecution is not bound to call every person linked to the commission of the crime by physical presence or otherwise, to give evidence on what he perceived. Once persons who can testify to the actual commission of the crime and on the other ingredients have done so, that will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 (1) of the Evidence Act 2011 as amended, Cap 112 Laws of the Federation of Nigeria 2004. See **Sadau vs. State (1968) 124; The State vs. Ogbudunjo & Anor (2001) 12 NWLR (pt. 698) 576; Obue vs. State (1976) 2 SC 141; Shurumo vs. The State (2010) 44 NSCQR 159.** As a matter of fact, even a single witness who gives a cogent eye witness account of the incident can be sufficient. See **Odili vs. State (1977) 4 SC 1.**

Another complaint by the appellant relates to the identification of the appellant. According to the learned appellant's counsel, the evidence of PW1 and PW2 was faulty and nebulous and that the situation required the conduct of identification parade. He referred to the case of Agboola vs. State (2013) 5 SCJN 683 at 701/702. He opined that the trial court was wrong to have solely relied on the confessional statement Exhibit "D" which was even inadmissible. I must reiterate here, that identification evidence is not sine qua non for conviction. It is sufficient if credible evidence is adduced to show that the person charged with an offence is the same as the person who was seen committing the offence. When a trial court is confronted with identification evidence, all it is required to do is to be satisfied that the evidence of identification had established the guilt of the accused person beyond reasonable doubt. See **Ukpabi vs. State (2004) 6-7 SC 27.** Identification parade is not necessary in all criminal cases. Identification is simply a means of establishing whether a person charged with an offence is actually the same person who committed the offence. Therefore, once credible evidence abounds confirming that the person charged was the actual one who committed the offence, as in this instant case, then there will be no need to conduct any identification parade at all. See **Orimoloye vs. The State (1984)**

10 SC (Reprint) 128; Ebri vs. The State (2004) 5 SC (pt. 11) 29. Here, the two eye witnesses namely PW1 and PW2 had contact or interaction with the appellant and other co-accused persons for quite a reasonable time during the process of commission of the offences Also, the appellant had identified himself when in his confessional statement Exhibit "D", he had fixed himself at the scene and time of the crime on the date of the incidence. The requirement of formal identification parade is therefore superfluous as rightly held by the two lower courts. Again on the quality of the testimony of PW3 who is the investigation police officer which the appellant's learned counsel called for its discountenance because according to him it is hearsay evidence. Here, I do not share the appellant's counsel's view that the evidence of an IPO amounts to hearsay evidence because as an IPO he narrates to the court the outcome of his investigation or enquiries or what he recovered or discovered in the course of his duty. He must have discovered or recovered some pieces of evidence vital to the commission of the crime which trial courts normally consider in arriving at a just decision one way or the other. The lower court was therefore right in refusing to discountenance such evidence adduced or given by PW3.

The age-long principle of law, is that in criminal cases an accused person is constitutionally presumed innocent until the contrary is proved by the prosecution. The onus of proof in criminal cases does not shift as the burden throughout lies on the prosecution in criminal trials which must prove the guilt of the accused. See **Bello vs. State (2007) 10 NWLR (pt. 1043) 364; Igabele vs. State (2006) 6 NWLR (pt. 975) 100.**

Any doubt in the prosecution's case must be resolved in favour of the accused person. In this instant case, as found by the two lower courts, the prosecution had led credible, cogent and reliable evidence in proof of all the offences the appellant and his co-conspirators were accused of committing. The appellant at the close of the prosecution's case presented his defence when he testified as DW2. The learned trial judge had also duly and painstakingly considered and evaluated the entire evidence adduced in the case by both parties before concluding that the prosecution had proved its case beyond reasonable doubt and convicted him as charged. It is sequel to that, that I find myself in entire agreement with the Court of Appeal (the lower court) when it observed as follows:

"This court has painstakingly read both the extra judicial statement of PW1, PW2, PW3. This court without any difficulty arrived at the fact that the learned trial judge had performed the duty imposed upon him by law in evaluating the evidence before him and ascribing probative value to them. The learned trial judge meticulously discharged that responsibility. The evidence of eye witnesses to the event who saw it all when it happened. It was direct and positive and this court is unable to see how the learned trial judge misapplied those facts to upset them."

The two issues are hereby resolved in favour of the respondent against the appellant.

To my observation, there are in this instant appeal, concurrent findings of two lower courts both arriving at the conclusion that the prosecution had proved its case against the present appellant beyond reasonable doubt. As a matter of policy, this court is always hesitant in interfering with or disturbing the concurrent findings of two lower courts except on special circumstances, for instance, that the findings are perverse or there is misconception or misapplication of law. None of these vices are apparent in this instant case. I therefore see no reason to disturb or interfere with the concurrent findings of the two lower courts.

On the whole, it is my judgment that this appeal is unmeritorious. It fails and is accordingly dismissed. The judgment of the Court of Appeal, Lagos Division, which had earlier affirmed the decision of the trial court, is also hereby further affirmed by me. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Amiru Sanusi (JSC), and to register that support I shall make some comments.

This is an appeal against the judgment of the Lagos Division of the Court of Appeal delivered on the 16th day of May, 2014 Coram: Sidi Dauda Bage JCA (as he then was), Yargata Nimpar and Abimbola Obaseki –

A Adejumo JJCA which court below affirmed the judgment of the trial court below affirmed the judgment of the trial court on the 13th day of December, 2007 per O. O. Oluwayomi J.

By a Notice of Appeal dated 7th day of June 2016 the appellant seeks an Order
B of court setting aside the said judgment of the Court of Appeal.

STATEMENT OF FACTS

According to the prosecution's version of events, on 7th December ,2000,the
C deceased ,late Chief Lai Balogun arrived at the Muritala Mohammed Airport from Abuja at about 3.30p.m after which the deceased in the company of his driver and security detail, sergeant Olajide Longe was taken to his office situated at 1,Balogun street, Oregun Industrial Estate, Ikeja Lagos.

D Subsequently, the deceased at about 9.05 p.m on 7th December 2000 left his office for his residence at 26, Oluwole Street, Akoka, Lagos in the company of his driver and his security detail.

On approaching the deceased's residence, the security gatemen opened
E the gate after which both the deceased and his security detail were accosted by five (5) unknown armed men who fired gunshots towards the security details chest.

Upon gaining access into the residence of the deceased after threat to
F life had been issued by the gunmen, the deceased and the security detail were taken upstairs into two separate rooms with armed gunmen standing guard whilst members of the deceased's family were held captive downstairs with another armed man stationed to watch over them.

G After about 10 to 15 minutes, both the deceased and the security detail were both shot in the separate rooms in which they were held after which the armed gunmen carted away the deceased's cellular phone, Omega wristwatch and the sum of N20,000.00 (Twenty Thousand Naira) and fled the scene of the
H crime.

Subsequently the deceased and the security detail were both taken to the hospital where the deceased was later declared dead. The date of hearing was 26/10/17 at which learned counsel for the appellant, Ajibola Dalley
I adopted the brief of argument of the appellant filed on 18/8/17 and in it distilled two issues for determination, viz:

1. Whether the justices of the Court of Appeal ought to

have upheld the learned trial judge's purported extra judicial statement being "Exhibit D" (Ground 1)

2. Whether beyond "Exhibit D". there was adequate, cogent and sufficient evidence to convict the appellant of the charges of Conspiracy to Commit Armed Robbery, Robbery and Murder (Grounds 2, 3, 4 and 5).

Mrs. Adedoyin Rhodes-Vivour, learned counsel for the respondent, adopted the brief of argument of the respondent filed on the 17/10/17 in which she adopted the issues formulated by the appellant.

The issues are apt and I shall use them for the purpose of determining this appeal.

Issues 1 And 2

These question whether the Court of Appeal ought to have upheld the decision of the trial court admitting in evidence Exhibit "D", the extra-judicial statement of appellant and if beyond Exhibit "D" there was adequate, cogent and sufficient evidence to convict the appellant of the offences of conspiracy to commit armed robbery, robbery and murder.

Mr. Dalley, learned counsel for the appellant contended that the purported confessional statement ought not to have been admitted as it did not meet the conditions upon which the ruling in the trial within trial on the voluntariness of the statement would be against admitting the statement in evidence as Exhibit "D". That the statement ought to have been rejected and since the Court of Appeal upheld what the trial court did, this apex court should reverse the decision. He cited:

Audu vs. The State (2003) 7 NWLR (pt. 820) page 516; Ganivu Gbadamosi & Anor vs. State (1992) LPELR – 1313 (SC); In Re **Osakwe (1994) 2 NWLR (pt. 326) 273 at 290; Ebot**

vs. State (1993) 4 NWLR (PT. 240) 644; Nwosu vs. State (1986) 4 NWLR (pt. 186) 428 etc; Sections 27 (1) & 28 of the Evidence Act, 2004.

For the appellant, learned counsel further contended that the trial court ought not to have attached any significant probative weight on Exhibit "D" and so that court relying heavily on it should bring about a reversal of the conviction and sentence of the appellant. He stated on that the evidence presented by the prosecution is manifestly weak and unreliable as it failed to link the appellant to the commission of the alleged crime. That the extra-judicial statements of the PW1 and PW2 ran counter to his oral evidence in court and so this evidence should be discountenanced as ureliable. He cited **Ogudo vs. The State (2011) 11-12 (pt. 1) SCM 209 at 222 at 223.** Also that the identification of the appellant as put forward by PW1 and PW2 is vague, imprecise and unreliable and cannot be used to link the appellant to the alleged offences. He relied on **Bassey Akpan Archibong vs. The State (2006) LPELR – 537; Agboola vs. State (2013) 5 SC NJ 683 at 701 to 702.** Learned counsel for the appellant said the prosecution's case is premised on mere suspicion and conjecture which no matter how strong cannot take the place of legal proof. He cited. **Onah vs. State (1985) 3 NWLR (pt. 12) 236; Alake vs. State (1992) 9 NWLR (pt. 265) 200; Adie vs. State (1980) 12 NSCC; Kolawole vs. State (2015) LPELR – 24400 (SC)**

Appellant's learned counsel also submitted that the court below ignored the evidence proffered by the appellant and thereby infringed on his fair hearing right under Section 36 (4) of the 1999 Constitution of the Federal Republic of Nigeria.

That this is a proper case for the disturbance of concurrent findings and conclusions of two courts below. He cited **Nigeria Limited Owners of M/N Africa Hyacienth vs. The Owners of the MV Fortunato & Ano.** (2011) LPELR - 3054 (SC).

That the establishment of duress, oppression or coercion to make a confessional statement is a finding of fact and as such it is a determination to be made by a court of law and falls within the exclusive preserve of the trial court and not an area for the interference of an appellate court. She cited **Egbe vs. Adefarasin** (1987) 1 SC 1; **Eze Ibeh vs. State (1997) 1 SCNJ 256 271.**

Learned counsel for the respondent said the prosecution has no duty to call every available piece of evidence and no number is stipulated to be produced as witnesses before a conviction can be secured. She cited **Edamine vs. The State (1996) LPELR – 1002 (SC); Ehimiyein vs. State (2016) LPELR – 408841 (SC).**

She went on to contend that assuming without conceding that Exhibit "D" was wrongfully admitted in evidence and is expunged that would not affect the decision of the court at the end of the day since that evidence alone expunge would not alter the eventual outcome of the case. She referred to **State vs. Ogbubunjo (2001) FWLR (pt. 37) 1097.**

That the eye-witness's account PW1 and PW2 was direct and remained unchallenged. He cited Obot vs. State (1024) LPELR – 23130 (CA).

Mrs. Rhodes-Vivour also contended that the appellant could be convicted solely on the strength of the confessional statement without any corroborative evidence. She referred to **Joel Adamu vs. State (2017) LPELR – 41436 (SC); James Simon vs. The State (2017) LPELR – 41988 (SC); Lawal vs. The State (2016) LPELR – 40633 (SC).**

The contending positions are, for the appellant that the court should interfere and disturb the concurrent findings of facts and conclusions arrived at by the two courts below as the confessional statement was wrongly admitted and the trial court gave it weight it ought not to. Also that there were inconsistencies in the statements made extra judicially by PW1 and PW2 as against their oral evidence at the trial and the identification of the culprits was faulty. Again that the evidence of PW3, the IPO was hearsay which ought to be disregarded. On the side of the respondent is that the trial court rightly admitted and relied on the confessional statement being voluntarily made by the appellant and the prosecution was able to prove by credible evidence the offences of conspiracy, armed robbery and murder against the appellant beyond reasonable doubt and the trial court was right to have convicted the appellant based on cogent and credible evidence and the lower court right to have affirmed the conviction.

On this matter of Exhibit "D", the confessional statement a reference to Section 27(1) of the Evidence Act 2004 now Section 28 of the Evidence Act, 2011 is helpful. It provides as follows:

"A confession is an admission made at any time by a person

charged with a crime, stating or suggesting the interference that he committed that crime."

It is settled law with loads of judicial authorities that a confession would be relevant against the person who makes it when the statement is voluntary thus admissible and so once a confessional statement is deemed to be positive, direct and unequivocal, such statement would be admitted as having been voluntarily made and the court can convict based solely on that confessional statement. In such a situation where the voluntary confession of guilt by an accused person whether judicial or extra-judicial, if it is direct and positive, duly made and satisfactorily proved is sufficient to ground a conviction and it needs no corroborative evidence. See **Yusuf Vs. State (1976) 6 SC 167 at 173; Olabode vs. State (2007) ALL FWLR (pt. 389) 1301; Kanu vs. King (1952) 14 WACA 30; Nwachukwu vs. State (2003) FWLR (pt. 123) 312.**

It is because of the strategic position of a confessional statement that there is no getting away from it that once there is a challenge to the voluntariness of confessional statement that the trial court faced with this challenge is bound to conduct a trial within trial to determine the voluntariness or otherwise. Once that trial within trial has been carried out and the court rules that the confession was voluntarily made, the appellant can no longer argue that he did not make the confession voluntarily without first impugning the trial within trial. See **Bouwor vs. State (2016) LPELR – 26054 (SC).**

On the primary responsibility of resolving findings of fact, evaluation and ascription of probative value to evidence is within the province of the trial court and as such appellate courts are enjoined to keep a safe distance from interfering except under exceptional circumstances. See **Egbe vs. Adefarasin (1987) 1 (SC) p. 1; Ezeh Ibeh vs. State (1997) ISCNJ 256 – 271.**

I shall refer to excerpts of the trial court's findings as follows:

"There is credible evidence to that effect, there is eye account evidence of PW1 and PW2, their confessional statements having been tried during the proceedings in the trial within trial. It was positive. The confessional statements, Exhibits "H" and "D" are positive, they are direct; they lead to only one conclusion. They were not beaten before they gave it, in

fact, they made it voluntarily."

That court of first instance further stated as follows:

"The Supreme Court has held in Omega Bank Nig. Plc. Vs. O.B.C. Ltd. (2005) 1 SC part 1 page 49 at page 77. Edozie JSC page 71. He stated that it has to be borne in mind, that although a document may be admissible in evidence under the provision of the law. The weight to be attached to its contents is another matter. For it to be admitted, it is subject to test for credibility, weight or cogency by the court. And before it becomes an acceptable document it would have been tested. I must say that Exhibit "D" and "H" were thoroughly tested under cross examination as to his (sic) credibility and its cogency and I hold that they were confessional statements that were made voluntarily without duress, without any promise of a reward, it is not contrary to Section 28 of the Evidence Act Laws of the Federation, 1990, the Exhibits "H" and "D" had been admitted and they are properly admitted before this court. See also the case of Ayeni vs. Dada. It has been held that, if the court believes it, I believe Exhibits "D" and "H", the contents (sic) because they came from the 1st and 2nd accused person (sic) who gave rhetoric of how they spent heir lives, pick pocketing, robbery (sic) and murdering."

The court below stated on appeal thus:

"I quoted the above decision of the Supreme Court in extensio having found the decision and its circumstance, on all fours, with the present appeal. In the instant appeal, the two appellants 1st and 2nd, made their respective statements (extra judicial) to the police. Each signed his own statements. At trial they both challenged the voluntariness of the statements with their signatures on them. The learned trial judge conducted a trial within trial to ascertain their voluntariness. After

reviewing the evidence placed before the court in the trial within trial, the learned trial judge held that appending of the signatures by the appellants is proof that those statements were voluntarily made. This in my view is in line with, the decision of Supreme Court in Uche Obidiozo & Ors vs. The State. The learned trial judge had followed logically the guide set by the apex court for admission of such statements. It was right on the part of the trial court to have admitted the confessional statements of the 1st and 2nd appellants and marked them as Exhibits "H" and "D" respectively. I do not have any reason to disturb the decision of the trial court on this issue. I resolve Issue No. 1 against the appellant and in favour of the respondent".

On the extent the trial court went in discharging its responsibility in finding out on the matter of the voluntariness or otherwise of the confessional statement, that court held as follows:

"The confessional statements Exhibits "D" and "H" of the 1st and 2nd accused persons go to a very good issue. It was direct confessional statement. It has been tested during the trial within trial proceedings and it has been admitted as being a positive and direct confession, voluntarily made. They went before a superior police officer, which was not compulsory but desirable. They also signed i.e. 2nd accused person signed Exhibit "D" before a superior police officer and also the 1st accused person signed Exhibit "H" before a superior police officer and also the 1st accused person signed Exhibit "H" before a superior police officer. These were times when they would have told them whether they were beaten or not. Having been proved under trial within trial, I accept Exhibits "D" and "H" as being positive, voluntary, properly proved by the prosecution as confessional statements; they could be convicted on its alone".

Clearly there is nothing to fault in all that transpired in the trial within trial and

A that the trial court carried out its function creditably and dispelled all doubts regarding the voluntary nature of that statement, Exhibit "D" and so the trial court was on solid ground to have placed reliance on it in making its conclusion of guilt of the appellant. Also the Court of Appeal having the
B advantage of the documents before it showing all the trial court did was equally right to affirm the findings and conclusion so made by the court of first instance.

However to fulfill all righteousness, if the confessional statement had
C been wrongly admitted and it is expunged the conclusions of the two courts below would not be touched as there is a surfeit of evidence that would have sustained the conviction. In this regard I refer to Section 251 (1) of the Evidence Act, 2011 (as amended); **State vs. Ogunbunjo (2001) FWLR (pt.**
D **37) 1097 (SC).**

In this respect the PW1 and PW2 who were direct eye-witnesses of the armed robbery and murder recounted how the whole operation took place which evidence was uncontroverted. The PW3, the investigating police
E officer also carried out his duties in that regard thoroughly and professionally and made available to the trial court the processes through which he obtained his information and inquiries.

Also to be noted is that the two courts below saw nothing to impugn the
F identification of the operators as proffered by PW1 and PW2 which made unnecessary an identification parade since their identification of the culprits were direct and positive leaving no doubt as to whether or not the witnesses knew what they were saying. See:
G **Nwabueze vs. The State (1988) 4 NWLR (pt. 86) 16 at 30-31; Patrick Ikemson & Ors vs. The State (1988) 6 SCNJ (pt. 1) 54 at 65; Alabi vs. The State (1993) 7 NWLR (pt. 307) 511 at 524; Aliyu Wakala & Ors vs. The State (1991) 8 NWLR (pt. 211) 552 at 565.**

H Indeed there is no point beating about the bush or flogging a dead horse as the concurrent findings and conclusions were supported by the evidence adduced and borne out of the records. It follows that this court is well advised to hold its peace and affirm what those earlier courts did. From the foregoing
I and the well rendered lead judgment, I too find no merit in this appeal which I dismiss.

I abide by the consequential orders made.

A

Mary Ukaego Peter-odili
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): My learned brother **AMIRU SANUSI** (**JSC**) had obliged me in draft his lead judgment just delivered. I entirely agree with his lordship that the appeal is completely devoid of merit and that same be dismissed.

The applicable principle here is that an accused who disputes his confessional statement may still be convicted of the offence(s) which he is charged if evidence abide outside the disputed confessional statement. In the case at hand, the appellant is convicted for armed robbery and the murder of one Layi Balogun. The evidence of PW1, PW2, PW3 and PW4 clearly link the appellant with the two offences and both courts below are perfectly right in their reliance on the evidence to convict the appellant. PW1 by his evidence leaves no one in doubt that the appellant is the person who kept watch over him during the robbery. PW1 also witnessed the murder of Layi Balogun with whom he was forced upstairs by the invading armed robbers, the appellant being one of them. This testimony remains unshaken.

And there is the equally damnifying evidence of PW2. He recognised the appellant and one other accused person at the trial as being among the five armed robbers who struck and, in the course of the robbery, extorted from their deceased victim Twenty Thousand Naira and Exhibit "C", a cell phone. The witness unmistakably identified Exhibit "C" in court which was recovered from, yet again, another accused person with whom the appellant herein was tried.

A conviction based solely on the uncontroverted evidence of these witnesses as affirmed by the court below remains solid. See **R. vs. Kana 14 WACA 30, Onochie & 7 others vs. The Republic (1966) NMLR 307** and **Tajudeen Fabiyi vs. The State (2015) LPELR-24834 (SC).** With the presumption of the correctness of the concurrent findings of the two courts below persisting this far, this appeal accordingly fails. See **Omotola & Ors. vs. The State (2009) LPELR-2663 (SC) and Nkebisi & Anor vs. State.**

It is for the forgoing and more so the fuller reasons adumbrated in the lead judgment that I dismiss the appeal and affirm the judgment of the two courts below.

Musa Dattijo Muhammad
Justice, Supreme Court

BATA OGUNBIYI, (JSC): My learned brother **Sanusi, JSC** has obliged me the lead judgment in this appeal. I agreed that the appeal lacks any merit and should be dismissed.

My brother has resolved the two issues raised satisfactorily. I do not have anything else useful to add. I also dismiss this appeal in terms of the lead judgment of my brother.

Clara Bata Ogunbiyi
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by my learned brother, **Amiru Sanusi, (JSC).** It represents my views in the appeal. Accordingly, I adopt it.

There is no substance in this appeal. As correctly submitted for the respondent with or without the disputed confession in Exhibits "H" and "D", the evidence of the PW1. PW2, PW3 and DW4 link the appellant to the offences he was charged and convicted for.

The PW1 and PW2 were eye witnesses of the armed robbery and the murder of Layi Balogun. They each, gave direct evidence of what they saw and experienced in the hands of the armed robbers on the fateful day. They were neither discredited nor contradicted as regards the substance of their testimonies.

The previous statement of the PW1 was tendered as Exhibit "A" without any effort made to draw his attention to any portion thereof for purposes of contradiction. That is the condition precedent for using the previous statement of a witness to contradict him. The position of the law is that, before any contradiction can be established between the evidence of a witness and the previous statement made by the witness, the statement must be brought to the attention of the witness for his explanation in accordance with Section 199 and 209 (now Sections 232 and 235) of the Evidence Act. Contradiction between the testimony of the witness and his previous statement, in the instant case Exhibit "A", cannot therefore be established without compliance with the mandatory provisions of the Evidence Act,

aforestated: **Kwaghsir vs. The State (1995) 3 NWLR (pt. 386) 651; Balogun vs. A. G. Ogun State (2002) 2 SC (pt. 11) 89.**

The PW1, seized by the robbers and shot twice after being dragged upstairs with the deceased Layi Balogun, was categorical that he knew the 2nd accused who shot him. The 2nd accused (the appellant), according to the PW1, was the person assigned to stay with him. The cross-examination did little to shake the PW1's credibility. The trial court believed him. Appellant had been identified and physically and properly fixed to the crime alleged.

The PW2's recognition of the 1st accused and the appellant (the 2nd accused), as being among the 5 robbers, was also not discredited by cross examination. The PW2 averred that the robbers took Layi Balogun's cell phone, wrist watch and N20,000.00. He identified the wrist watch, Exhibit "C" and the cell phone.

The cell phone was recovered from the 4th accused, DW4, who admitted buying it from one Kola and the 3rd accused for N1,500.00. The PW3, the Investigating police Officer (IPO), testified that the 3rd accused, upon his arrest, identified the 1st accused as the person who sold Layi Balogun's cell phone, Exhibit "B", to the 4th accused (the DW4). The PW3's evidence, as correctly submitted by the respondent's counsel, was also not challenged or contradicted by the appellant.

It is on this footing that I agree with the lower court's findng at page 478 that:

> **The bottom line of the Supreme Court's decision of Eze Ibeh Vs. The State (supra) is that, there is the presumption that a trial judge's decision on facts is correct, a presumption which must be displaced by a person who seeks to upset the decision if he can. In the instant appeal, the learned counsel to the appellants strenuously worked to upset the decision of the learned trial judge on facts. I had earlier in this judgment stated how he considered that the learned trial judge had misdirected himself on the evidence of Pw1, PW2 and PW3. The evidence of Pw1 and PW2 are evidence of eye witnesses to the event who saw it all when it happened. It was direct and positive, and this court is unable to see how the learned**

trial judge misapplied those facts to upset them. PW3's evidence is attacked as being hearsay for his failure to produce the cell-mate of the 2nd appellant who reported as boasting of being a participant in the robbery in question. This also had no effect whatsoever as this fact only constituted an aspect of the evidence of the PW3 as the Investigating police Officer (IPO). The efforts made by the appellant to upset the findings of facts made by the learned trial judge had not yielded any result to upset it. Let me state, here and now, that, the determination earlier on by this Court of Issue No. 1, with relation to the confessional statements of appellants, Exhibit "H" and "D" had dealt with the meat of this appeal. The issue No. 2 dealing with other credible and cogent fact by the prosecution, amounts to mere surplusage with Exhibits "H": and "D" already admitted against the appellants, the law is that even without corroboration of a confession it is sufficient to support conviction, so long as the court is satisfied of its truth. See Mohammed J. Yahaya vs. The State (1986) 12 SC 282 at 290; Isaac Stephen vs. The State (1986) 12 SC. 450 at 470; R. vs. ITULE (1961) All NLR 462 at 465; Sule Iyanda Salawu vs. The State (1971) NMLR 249; Grace Akinfe vs. The State (1988) 7 SCNJ (pt. 11) 226, at pp 237-238.

Even if the PW1 and PW2 had failed to describe the appellant as one of the armed robbers who shot and killed Layi Balogun the fact that, at the material time he was with the 2nd accused who stole and later sold Layi Balogun's cellphone, seized from the said Layi Balogun in the course of the robbery not only links him to the robbery and the death of Layi Balogun, it also sufficiently corroborates the testimonies of PW1 and PW2. The evidence of PW1 and PW2 have also been corroborated by the defence testimony of the 4th accused (DW4). The admission of the 3rd accused to the IPO, PW3, is another evidence solidifying the evidence of PW1 and PW2.

From the totality of the evidence of PW1, PW2, PW3 and DW4, with or without Exhibits "H" and "D", the conviction and sentence of the appellant

A can be sustained. That is my answer to the question: Whether, apart from Exhibit "D" the prosecution led cogent and credible evidence in proof of the guilt of the appellant beyond reasonable doubt? Exhibit "D" was not the only anchor the conviction of the appellant was fastened; as I have, here
B demonstrated.

I have no cause to interfere with the concurrent findings of fact made by the trial and intermediate courts. This appeal lacking in substance is hereby dismissed. I hereby adopt all the consequential orders made in the lead
C judgment.

Ejembi Eko
Justice, Supreme Court

D

E

F

G

H

I

1. IBRAHIM SHEHU SHEMA
2. SANI HAMISU MAKANA
3. LAWAL AHMED SAFANA
4. IBRAHIM LAWAL DANKABA

AND

FEDERAL REPUBLIC OF NIGERIA

SC. 814/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 26TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Issues for determination – Issue not derived from a cognizable ground of appeal – Whether issue incompetent.

*CASE LAW: Principles in **Amadi vs. FRN (2008) LPELR – 441 (SC) –** Relevant considerations thereof.*

CASE LAW: Principles in Kalu vs. FRN – Relevant Considerations thereof.

*CASE LAW: Principles in **Nyame vs. FRN (2010) 7 NWLR (pt.1193) 344 –** Relevant considerations thereof.*

CONSTITUTIONAL LAW: Construction – S.36(6)(b) CFRN 1999 – The phrase "**To be given adequate facilities for the preparation of his defence** –

Meaning and significance.

CONSTITUTIONAL LAW: Power of Attorney-General of a State – Power to grant fiat – S. 211 of CFRN 1999 – Whether such power can be revoked.

CONSTITUTIONAL LAW: Power of Attorneys-General of the federation and of State – Delegation of powers of prosecution – SS 174(1)(b)(c) and 211(1)(b)(c) of the 1999 CFRN – Extent and Purport.

CONSTITUTIONAL LAW: Powers of Attorney-General of a state – S. 211 of CFRN 1999 – Whether such powers of A-G are not subject to review by court – Relevant considerations thereof.

COURT: Allegations of bias against court is a serious issue – Admonition on counsel – Need to refrain from unsubstantiated allegation of bias against courts.

COURT: Issues for determination – Approach of court thereto – Whether court not bound to adopt hook line and sinker

COURT: Supreme Court – Departure from its previous decisions – Relevant principles thereof – Onus on party applying thereto.

CRIMINAL LAW AND PROCEDURE: Prosecution of criminal cases – Whether the Attorney-General of Katsina State can invite the EFCC to prosecute an offence under the penal code in the name of FRN – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Application for leave to prefer charge in the High Court of Katsina State – Procedure thereof – S. 188(b) Criminal Procedure Code Law and other relevant Rules – Relevant Considerations thereof.

CRIMINAL LAW AND PROCEDURE: Institution of Criminal Proceedings – Powers of Attorney-General of the Federation or State – S.174(1)(b) and

(c) and S. 211 (1)(b) and (c) of CFRN 1999 – Whether these powers are exclusive to the Attorney-General.

CRIMINAL LAW AND PROCEDURE: Obligations under S.36(6)(b) of CFRN 1999 – Provision of facilities for the defence of the accused – Whether to be complied before the accused enters his defence – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Prosecution – Powers of EFCC to prosecute – S.13(2) of EFCC Act – Power to co-ordinate the enforcement of any other law on corruption including in the Penal Code.

CRIMINAL LAW AND PROCEDURE: Prosecution of cases – Whether EFCC can prosecute financial crimes involving Katsina State Officials in the name of FRN – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Prosecution of financial crimes – Powers of EFCC – S. 7(2)(f) of EFCC Act – Whether empowers the commission to enforce any law relating to financial crimes.

JUDGMENT AND ORDERS: Decision of Court – Whether proper decision of court arrived at by wrong procedure will not be set aside on appeal – Relevant principles.

STATUTES: Hierarchy of laws – General Principles – Where conflict exists between EFCC Act and Criminal Procedure Code Law of Katsina – Implication.

Issues for Determination

1 Whether the lower court was right when it upheld the decision of the Katsina State High Court that the EFCC as a common agency for both Federal and State Economic and Financial Crimes, is empowered to initiate criminal proceedings and file charge No. KTH/34C/2016 before the Katsina State High Court for offences in the Penal Code Law, Cap

96, Laws of Katsina State, with the Attorney General's authorization.

2 Whether having regard to the circumstances of the case leading to this appeal, the lower court was not right to have upheld the decision of the trial court that the charge (No. KTH/34C/16) and the proof of evidence thereof are competent and not in breach of section 36 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999?

Facts of the Matter

The Supreme Court to determine preliminary issues, by way of interlocutory appeal, from the judgment of Court of Appeal sitting in Kaduna, dated 12th day of September, 2017, which affirmed the decision of the Katsina State High Court delivered on 21st February, 2017, which dismissed the appellants' motion on notice dated 3rd day of January, 2017 and filed on 4th day of January, 2017 seeking to (i) declare the filing of the charge sheet by EFCC as incompetent on constitutional grounds and (ii) declare as inchoate the entire proceedings as the charge sheet was not accompanied by proof of evidence as known to law thereby dislodging the appellants' right to fair hearing as recognised by Section 36(6) (b) of the 1999 Constitution as amended.

The trial court dismissed the appellants motion while the court of Appeal affirmed the trial court's decision.

Being dissatisfied with the decision of the Court of Appeal, the appellants filed four separate but identical notices and grounds of appeal on the 21st of September, 2017 against the judgment in the registry of Court of Appeal containing ten (10) grounds. The appellants' joint brief of argument was subsequently filed on 18th October, 2017 while the respondent's brief is dated 24th October, 2017, and the appellants' joint reply brief dated 30th October, 2017.

On the 16th December 2016, by a 22-count charge, appellants were alleged to have committed sundry corruption and financial crime related offences, such as conspiracy, criminal breach of trust, forgery, aiding and abetting contrary to relevant provisions of the Penal Code Law of Katsina State. Consequently, charges were filed against the accused persons/appellants before the Katsina State High Court, pursuant to Section 185 (a) Criminal Procedure Code Law, Cap 37, Laws of Katsina State, 1991 and for offences in the penal code.

The charges were filed by the Economic and Financial Crimes Commission on the authorization of the Hon. Attorney General of Katsina State, upon the issuance of a fiat by the said Hon. Attorney General of Katsina State pursuant to Section 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

On being served with the charges and prior to arraignment, appellant filed an application dated 3rd day of January, 2017 and filed on 4th day of January, 2017. The application was seeking to terminate the proceedings on the grounds, among others that the EFCC cannot initiate the criminal proceedings against them in the name of the Federal Republic of Nigeria, and that the EFCC has no power to prosecute a state offence, (even with the fiat of the Attorney General of Katsina State). The appellants also contended that the prosecution did not furnish them with all the documents necessary for their defence of the case. For these and other reasons, the appellants challenged the jurisdiction of the trial court to hear and entertain the charges.

Parts of the reliefs sought in the application forming basis of this appeal, are:

> "**1. An order terminating the instant proceedings i.e charge no: KTH/34C/2016 FRN vs. IBRAHIM SHEHU SHEMA AND 3 OTHERS because the offences alleged against the applicants are offences cognizable and punishable under the Penal Code Cap 96 Laws of Katsina State and are therefore not FEDERAL OFFENCES which the Federal Republic of Nigeria or any of her Agencies particularly the Economic and Financial Crimes Commission can prosecute.**
>
> **2. AN ORDER of this honourable court quashing and/or striking out the instant Charge No. KTH/34C/2016 between FRN vs. IBRAHIM SHEHU SHEMA & 3 ORS, dated and filed on the 16th of December 2016 because being state offences cognizable and punishable under the Penal Code Cap 96 Laws of Katsina State, they can only be instituted by the Attorney-General of**

Katsina State in the name of Katsina State or the Commissioner of Police."

ALTERNATIVELY

1. **An Order directing the Prosecutor to furnish the defence with all documents inclusive of all the statements made by the defendants, statements made by all the witnesses, Police Investigation Reports, Statements of Bank Accounts in compliance with section 84 of the Evidence Act, and every other document relevant to the prosecution of this matter.**

2. **An Order staying further hearing of these proceedings until the order of this honourable court granting the defendants leave to access all documentary evidence to be relied on by the prosecution in the instant trial is obeyed and or complied with.**

3. **An ORDER dispensing with the physical appearance and arraignment of 1st – 4th appellants/applicants in the instant Charge No: KTH/34C/2016 between FRN vs. IBRAHIM SHEHU SHEMA & 3 ORS during and pending the determination of this motion on notice. AND FOR SUCH FURTHER ORDER/ORDERS as this honourable court may deem fit to make in the circumstances."**

Held: (*Unanimously dismissing the appeal)*

1. *Where an issue is not derived from a cognizable ground of appeal*
Having taken a careful look at issue 3 and the arguments for and against same by the respondent and the appellants, I am of the view that the appellants' issue 3 is incompetent having not derived from cognisable ground of appeal. The law is trite that an issue must be distilled or distillable from a ground of appeal. This is not the case

here. In this circumstance, I take a cue from the decision of this court in AKEREDOLU vs. MIMIKO & 2 ORS (2013) 12 SCM (Pt. 2) 135 at 154, and hold that issue 3 is incompetent and same is hereby struck-out. *(Pp 341 – 342 Paras I – B)*

2. *Court not bound to adopt any issue formulated by parties*

I also wish to state, by way of further elucidation, that the court is bound to consider an issue once formulated by the parties. The court is not however expected to be a "slave" to the litigants and their counsel by adopting whatever issues formulated hook, line and sinker irrespective or illogicality of such issues. The duty of court is to consider all the issues, and where appropriate collapse, integrate, harmonise, extend, increase or generally structure and restructure such number of issues as are crucial to effectively and effectually determine the issues in the appeal or matter as the case may be to ensure that justice is done.

In this circumstance, this court has given deep thoughts to ALL the issues and ARGUMENTS canvassed by the appellants and the respondent in all three different briefs filed in respect of this interlocutory appeal, namely the appellants' joint brief of argument, the respondent's brief of argument and the appellants' joint reply brief. Some of the issues overlap and/or are interwoven. It is not possible for a court to formulate issues on every shade of opinions or arguments canvassed by the parties in a case or appeal. It is in view of the foregoing that I have limited myself to two main issues in this interlocutory appeal. All other ancillary arguments and issues are duly considered within the confines of the two main issues formulated from the issues respectively formulated by the parties, for the purpose of determining this crucial interlocutory appeal of national significance. *(P 342 Paras B – G)*

Per Peter-Odili (JSC)

> **"The point has to be made that in formulating issues of its own for the determination of the appeal, the Court of Appeal was within its powers to do so as long as the issues**

were consistent or arose from the grounds of appeal filed by the appellants. Also the appellate court was free if it chooses to for ease of handling the task before it to adopt the issues as framed either by the appellant or the respondent or even use any of the issues from either side suitable for its purpose, again such issues must have come from the grounds of appeal and not outside.

It is in the observance of the principle which leads the court in the pursuit of the proper administration of justice that the court would do either of those things above pertaining to the issues or questions to be answered in the appeal. A look at grounds 1, 3 and 4 of the appellant's motion on notice, the trial court Ruling and the grounds of the notice of appeal would show the reasons for the appeal court's jettisoning of the issues as raised by the appellant and going further to substitute its own which that court considered apt and appropriate. What I am trying to say is that an appellate court is not shackled or bound to use the issue as raised only by the appellant or any party if in doing so, the court would risk losing its way, rather the court should use the issues that would guide it and if not to set the tone with questions crafted by itself as a roadmap to answer the posers that are to be solved. The condition in all this is that the issues stem from the grounds of the appeal and the interest of justice which is the focal point in it all and there is no format. See: Abiru vs. State (2011) 17 NWLR (Pt. 1275) 1 at 17-18, Labiyi vs. Anretiola (1992) 8 NWLR (Pt.258) 139; Aduku vs Adejoh (1994) 5 NWLR (Pt. 346) 582; Ogunbiyi vs. Ishola (1996) 6 NWLR (Pt. 452) 12; Okeke vs. State (2016) 7 NWLR (Pt. 1512) 417 at 434.

From what is seen in the record, particularly the decision of the Court of Appeal it is easy to see that the court below

fully understood and appreciated the complaint of the appellants as it could see from the issues the appellants crafted from Grounds 1, 2 and 3 while Issue 2 stemmed from Grounds 4 and 5 of the notice of appeal."
(Pp 367 – 368 Paras C – B)

3. *In formulating issues for determination the court of Appeal was not biased*
The slant of the arguments of the appellants is that the court below was biased when it by-passed the issues as formulated by the "appellants and framed new questions answering them in favour of the respondent as shown in part of the judgment above and thereby displayed some bias against the appellants. That angle portrayed by the appellants is difficult to accept in that the court below was free to do what it did since in utilizing the court's crafted issues, the court had its sight on the grounds of appeal and resolved the concerns of the appellants as to whether the Katsina State, Attorney General could validly issue his fiat to anyone or prosecuting agency outside Katsina State to prosecute a criminal matter pursuant to the penal code applicable in Katsina State.

The Court of Appeal answered in the affirmative and that in doing so the concept of Federalism provided for in the 1999 Constitution of Nigeria (as amended) was not infracted and I agree with that position. Again that the criminal proceedings were commenced in the name of the Federal Republic of Nigeria and not Katsina State is not an argument that could be sold, because Katsina State is part of the Federation of Nigeria and so whether in the name of Katsina State or the Republic of Nigeria or EFCC or the commissioner of police, the validity of the charge would not be impugned. The deciding factor is that the matter being crimes allegedly committed against Katsina State, it is that state through the instrumentality of the Chief Law Officer that is its Attorney General has set the ball rolling and in this instance, the Attorney General has done the extra by being at the side of the Economic and Financial Crimes Commission (EFCC) in initiating and prosecuting the matter. Therefore the argument that the EFCC is an interloper and entering into the domain of a federating unit without right is not one that can be sustained in the prevailing

circumstances where the State Attorney General has within powers directed the EFCC to prosecute. *(P 369 Paras B – I)*

4. *Allegation of bias against a court is a serious issue*
The allegation of bias touted by the appellant as the reason for the court below doing what it did in reformulating the issues is not borne out of the record. The caution of this court in the case of Adebesin vs. State (2014) 9 NWLR (Pt. 1413) 609 per Ngwuata (JSC) is applicable here and it is thus:

> **"My Lords, it has become fashionable for a certain category of learned counsel to rake up unfounded claims of bias against the trial courts and the court below, in some cases in more vocal terms than the appellant herein. These allegations are serious and reflect adversely on the adversary process of our jurisprudence. They should not be made unless counsel making them has facts in or out of the records to substantiate same. To say that a judge is biased in the resolution of dispute before him is no less than saying that the judge is in breach of the sacred, solemn and judicial oath administered on every judge to dispense justice without fear or favour, affection or ill-will to all manner of men. We all took, and are bound by, the solemn oath and a false and unsubstantiated allegation of breach of the said oath is no less a serious matter than proven case of breach of same."** *(P 370 Paras A – F)*

5. *Power of Attorney-General to delegate the prosecution of criminal cases*
It is common knowledge that, to ensure speedy disposal of criminal cases, the Attorneys-General of the States do delegate their powers to the various State Commissioners of Police who institute and prosecute criminal matters in the name of the State as Commissioners of Police. Such powers are also delegated to other agencies such as the Federal Board of Internal Revenue, Nigerian Customs Service, National Drug Law Enforcement Agency (NDLEA) and lately EFCC by the Attorney-

General of the Federation. This arrangement is made possible subject to the provisions of section 174 (1)(b)(c) and 211(1)(b)(c) of the Constitution of the Federal Republic of Nigeria 1999 in respect of the powers of the Attorney-General of the Federation or State respectively. *(P 346 Paras D – E)*

Per Baje (JSC):

> **"Nigerians have now internalised the reality of the challenges facing the country in the area of anti-corruption and related financial crimes. Our country people, agencies and institutions are now, or must now be, at home with the shift in the paradigm of impunity to recognise that both the case law and statute provisions recognise the fact that, indeed, the law empowers the EFCC to institute a case in the name of the Attorney-General of the Federation, Federal Republic of Nigeria and not necessarily in its name only, and that it could so institute in any court, State or Federal. This court has held in several instances that the EFCC is a statutory body created under the laws of Nigeria to investigate and prosecute a class of criminal offences.**

To further buttress my position on this issue, I wish to reiterate the well settled position of this court in the case see NYAME vs. FRN (2010) 7 NWLR (Pt. 1193) 344. In this case, this court indicated, and very clearly, that there is nothing here that prevents the EFCC from prosecuting offenders in the name of the "Federal Republic of Nigeria" being the agency responsible for co-coordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with Economic and Financial Crimes in the Federal Republic of Nigeria by virtue of section 1(2)(c) of the EFCC Act.

The effect of our clear and ambiguous stance in NYAME vs. F.R.N (supra) and which we have no reason to depart from, is that the

commission (the EFCC) is the co-coordinating agency for the enforcement of the provisions of any other law or regulation on economic and financial crimes, including the criminal code and the penal code. The Commission has the power under section 13(2) of the Act to prosecute offences so long as they are financial crimes. I have not seen what substantial miscarriage of justice the appellants have suffered by the EFCC prosecuting them for those offences under the name of Federal Republic of Nigeria for crimes they have allegedly committed under Penal Code Law, 96, Laws of Katsina State. To further amplify that legal authorities clearly support the stand of the trial judge and lower court, that the EFCC can institute a case in the name of the Attorney-General of the Federation, and not necessarily in its name only, I refer to the case of AMAECHI vs. INEC & 2 ORS (2008) 5 NWLR (Pt. 1080) 227 at 307, this court, per Oguntade (JSC) held

> **"The EFCC is a statutory body created under the laws of Nigeria. Its duties include the investigation and prosecution of a class of criminal offences. In essence; once its investigation has shown prima facie that a person has committed a criminal offence, the duty of EFCC is to have such offender prosecuted in a court of law…"**
> *(Pp 346 – 347 Paras G – H)*

6. *EFCC can prosecute State offences involving corruption in the name of FRN*

There is nothing here that prevents the EFCC from prosecuting such offender in the name of the Federal Republic of Nigeria. After all, by Section 1(2)(c) of the EFCC Act, the EFCC has the "responsibility of coordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with Economic and Financial Crimes in Ngeria." i.e of the Federal Republic of Nigeria. In NYAME vs. F.R.N. (2010) 7 NWLR (Pt. 1193) 344, this court held at page 403 that:

> **"The Commission is the coordinating agency for the enforcement of the provisions of any other law or regulation to Economic and Financial Crimes, including the Criminal Code and the Penal Code. The Economic and Financial Crimes Commission has power under Section 13(2) of the Act to prosecute offences so long as they are financial crimes."** *(Pp 347 – 348 Paras I – C)*

7. *The A-G of Katsina State was right to invite EFCC to prosecute in the name of FRN*

Coming back to the question, my answer is that the court below was right in deciding in affirming the decision of the Katsina State High Court that the Attorney-General of that State has the powers to invite EFCC, an agency of the federal government to prosecute the appellants firstly. Also the EFCC so empowered was at liberty to bring the charge and prosecute in the name of the Federal Republic of Nigeria and before a Katsina State High Court for offences allegedly committed under the penal code of Katsina State.

This issue should not be confused as the EFCC did not charge into Katsina State or invaded the state and by its own motion start the initiation and prosecution of erstwhile state functionaries of Katsina State without going through the State authority in a Federal system such as we operate by law under the 1999 constitution of the federation. *(P 377 Paras F – H)*

8. *Power of A-G to institute criminal proceedings is not exclusive*

I need to add, at this stage, by re-echoing the voice of this court Per NGWUTA, JSC (P. 32, parass. E-G) (DARIYE vs. FRN) that, institution of proceeding against any person before any court in Nigeria other than a Court Martial is not the exclusive prerogative of the Attorney-General of the Federation and/or his counterpart in the State. S.174 (1)(b) and (c) and S.211(1)(b) and (c). This becomes more compelling given the provisions of the Act. *(P 348 Paras D – E)*

9. *EFCC can enforce any law relating to financial crimes including under the penal code.*
Clearly, it is absolutely impossible to agree less, that the above quoted provisions of the Economic and Financial Crimes Commission (Establishment) Act Cap. El, LFN, Vol. 5, 2004 empowers the prosecutors in Legal and Prosecution unit of the EFCC to prosecute any person who commits any of the offences that the Commission is empowered to prosecute under the Act. The lower court was, therefore, right in my view to have applied the law correctly when it held that the powers and duties of the EFCC as stated under section 13(2) allows the legal and prosecution unit of the commission to prosecute offenders under the Act. Without prevarication, section 7 (2) (f) empowered the EFCC to enforce any law or regulations relating to Economic and Financial Crimes, including the penal code.
(Pp 350 – 351 Paras H – B)

10. *Settled and agreed issues*
It is not in contention that:

(1) the Attorney-General of Katinsa State has donated a fiat to the respondent's agency (the EFCC) to prosecute the appellants pursuant to section 211 of the Constitution;

(2) by section 7 (1) the Commission has power to cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under the Act or other law relating to economic and financial crimes;

(3) by section 7(2)(f), in addition to the powers conferred on the commission by the Act, the commission shall be the co-ordinating agency charged with the responsibility of enforcing the provisions of *any other law or regulations relating to economic and financial crimes including the criminal code and penal code;*

(4) by the provisions of S. 13(2) the legal and prosecution unit shall be charged with responsibility for prosecuting the offenders. *(P 351 Paras B – G)*

Per Baje (JSC)

"With those key points, the regime of anti-corruption law in Nigeria is meant to be symbiotically applied, implemented and given effect by both Federal and State agencies. There is much wisdom in so doing. There is a national revolt by all concerned against corruption and financial crimes, at all levels of the courts- including ours as the Supreme Court of the land. Indigenous philosophies of Nigerians support this symbiotic, multi-institutional, pronged-approach to the war against corruption and financial infelicities, more appropriately called financial crimes.

As between EFCC Act and Penal Code, or between Federal Government of Nigeria and Katsina State of Nigeria, what matters most, and justifiably so, is that corruption and financial crimes be tracked, investigated, prosecuted and punished. The age-old indigenous view in Southwest (and perhaps in other parts of Nigeria) is that the "snake of financial crime" be not allowed to escape on account of gender sentiments. It matters not if the 'monstrous snake' of corruption and financial crimes biting Nigeria is killed by a man or woman; all that matters is the death of the 'deadly snake of corrupt practices and financial hooliganism daily killing Nigeria and Nigerians.

At this stage, the guilt of the appellants is not yet established. This matter is yet to be tried but has only travelled the long, tortious journey of interlocutory

> **appeal to prove or test the law. That is why we must, as a court of law of last resort, set the law straight. It is the intention of the makers of the law, that the EFCC prosecutes financial crimes. To the extent that a State has not, for the time being, established equivalent agency like the EFCC for dealing with Economic and Financial Crimes at the state level, the powers of the EFCC remains extant. This is because the EFCC is vested with powers to co-ordinate and enforce related provisions in the penal code- which provisions do not violate any known law of Katsina State".** *(Pp 351 – 352 Paras H – F)*

11. *The hierarchy of laws in Nigeria*

The law on the hierarchy of laws in Nigeria, is as stated by Kalgo JSC (as he then was) in ATTORNEY GENERAL, ABIA STATE vs. ATTORNEY GENERAL, FEDERATION (2002) 6 NWLR (Pt. 763) 264 at PAGES 479-480:

> **"The Constitution is what is called the grundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. By the provisions of the Constitution, the laws made by the National Assembly come next to the Constitution, followed by those made by the House of Assembly of a State."**

Thus, the lower court was right when it held at page 310 of the record of appeal thus. "Further, the argument that the criminal procedure code law of Katsina State does not provide for or accommodate the power of the Economic and Financial Crimes Commission to institute criminal proceedings in the High Court of Katsina State by filing of information cannot change this position. This is because it will mean that the criminal procedure code law of Katsina State is in obvious conflict with the Economic and Financial Crimes Commission (Establishment) Act." *(Pp 352 – 353 Paras F – B)*

Per Baje (JSC)

> **"To the extent of the above provisions of the law, it is our considered view that the lower court applied the law correctly. The law evinces a clear intention that, with or without express delegation from the Attorne*y*-General of Katsina State, the EFCC could validly prefer the present charges and prosecute the appellants in the name of the Federal Republic of Nigeria as a common agency of both the Attorney-General of the Federation and Attorney-General of Katsina State. We agree with the respondent that a community reading of provisions of Sections 15((5) and 211 (1)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended); Sections 6(m), 7(f), 13(2)(a) and (d) and 46 of the EFCC (Establishment) Act, 2004 and Section 185(a) of the criminal procedure code (CPC), Cap 37, laws of Katsina State, 1991 gives the EFCC powers to do what it sought to do by attempting to prosecute the appellants.**
> *(P 353 Paras C – F)*

12. *The interpretation of S. 36(6)(b) of CFRN 1999*

To all intents and purposes, the phrase *"be given adequate facilities for the preparation of his defence"* in the above provision is general and open-ended. It is meant to ensure that the accused person or persons receive necessary hints, aid and assistance that would assist him in preparing his defence to the charge, including the statements of the prosecution witnesses and his own written statements. See OKOYE vs. COMMISSIONER OF POLICE (supra), AKABOGU vs. THE STATE (supra); IBRAHIM vs. STATE (supra).

In this appeal, it is obvious that what the appellants seek is to *"be given adequate time and facilities for the preparation of his defence",* which would appear to have been made available by way of proofs of evidence which had the names and addresses of the witnesses; the summary of the evidence the witnesses would give; and the list of exhibits to be tendered as contained, all which are contained in pages 8-22 of the records. Clearly, what the appellants desire, I think

inappropriately, to be availed with the primary documents the prosecution would tender in evidence in the charge and/or provide them a complete proof of evidence containing the said primary documents. Our attention is drawn to paragraphs 15 and 19(i), (ii) and (iii) of the affidavit in support of the appellants' motion (at pages 53 and 54 of the records of appeal), which forms the basis of this appeal. Their grouse in the said motion is that the respondent has not served actual documents, not just the copies thereof, which the prosecution intends to rely upon at the trial.

Per Baje (JSC):

"It is my candid view that the lower court did justice to this issue when it affirmed the decision of the trial court that non-availability or provision of all the documents i.e. statements of accused persons and all witnesses, investigation reports, bank statements and other documents by the prosecution to the accused persons did not breach the provisions of section 36(6) (b) of the 1999 Constitution. This is because the application was premature. As at the time of the appellants' application before the trial court leading to this appeal was brought, the appellants had not taken their plea to the charge which made the application to be premature and untenable.

Finally, on this point, I wish to restate the fact that the intention of Section 36 (6)(a) and (b) of the 1999 Constitution (as amended) is to give an accused person the opportunity to know the case against him and to prepare and be heard on his defence. Therefore, I hold that the 22 count charge, the proof of evidence, list of exhibits, list of witnesses with their addresses that accompany charge No. KTH/34C/2016 are competent and in sufficient compliance with the requirements of Section 36(6)(a) and (b) of the 1999 Constitution (as amended). In sum, issue two is resolved in favour of the appellants. *(Pp 356 – 357 Paras E – F)*

13. *Principles and practices which determine and control the Supreme Court to depart from its previous decisions.*

I need to make one final point before concluding this ruling by responding specifically to the request made on this court by the appellants to depart from its previous decisions. Put differently, the appellants have labored to persuade this court to depart from its previous decision in DARIYE vs. F.R.N. (supra) and NYAME vs. F.R.N. (supra). However, appellants failed to state or demonstrate any cogent reason, ground or situation justifying a departure from the aforementioned decisions of this court. This court may, and could in justifiable cases, depart or overrule its previous decisions under certain identifiable circumstances and in accordance with the laid down principles of law. The Supreme Court could depart from its previous decisions where it is shown or demonstrated that the earlier decisions are either erroneous in law; reached per *incuriam* or occasioning a miscarriage of justice. In the instant case, the appellants invited the Supreme Court to overrule its previous decisions on the interpretation that sections 7(1), (2) and Section 13(2) of the EFCC Act which provide the EFCC with the powers and rights to prosecute under the penal and criminal codes of States in the State High Court.
(Pp 357 – 358 Paras F – B)

Per Baje (JSC):

> **"It needs to be said clearly, and for the avoidance of misconceptions of the principle or basis of the rule on departing from previous decisions, that this court does not indulge in the practice of departing from its previous decisions to suit the whims and caprices of the litigants, but to sustain the ends of justice. The Supreme Court has never, and may that day never be dawn, when it will depart from its previous decisions merely because the decision(s) is and/or are against the case presented by the parties.**
>
> **In this interlocutory appeal, the appellants have not shown or demonstrated that the above decisions of the Supreme Court in DARIYE vs. F.R.N. (supra) and NYAME vs. F.R.N.**

(supra) complained of are erroneous in law or given per *incuriam* or contrary to public policy thereby occasioning miscarriage of justice. That is not the case here. Quite frankly, if there is anything in those two cases, they affirm and seek vehemently to implement and apply the public policy against corruption and financial crimes, what I described above as 'deadly snake of corrupt practices and financial hooliganism daily killing Nigeria and Nigerians."

Therefore, the 'unholy' invitation of the appellants to depart from those decisions of this court for the sole benefit of twisting this appeal in their favour is hereby refused as baseless, and unjustifiable. Ours is to look beyond the sometimes deceptive, woolly persuasions of all counsel, and this should be the position in all cases and appeals, to ensure that justice is not only done, but manifestly seen by all and sundry to have been done. *(P 358 Paras B – G)*

14. *Whether proper decision of Court arrived at by wrong procedure will be set aside*

To be said is that assuming that the court below went through the wrong route in arriving at its decision and that is not the case here so long as the conclusion is correct, that decision will not be set aside since the decision is correct. See: U.B.A vs. Achoru (1990) 9-10 SC 115; Ibulunye vs. Dikibo & Ors (2010) 18 NWLR (Pt. 1225) 627. *(P 370 Paras F – G)*

Per Odili (JSC):

"I agree with the conclusion of the two courts below, that section 36(6) of the 1999 Constitution was not infracted. I say so because the non-service of all the statements made by all the proposed witnesses, police investigating reports, statements of bank accounts and every other documents rendered the proof of service incomplete, inchoate was not in breach of the provisions of section 36(6) of the 1999 Constitution as the plea has not been taken. It is

unfounded and misleading that the court below made out a case for the respondent as what that court did, the parties or none of them was kept in the dark and unheard. I rely on the cases of A.C.B. Ltd vs. Integrated Dimensional System Ltd & Ors (2012) LPELR-9710 (SC). Adigun vs. Ayinde (1993) NWLR (Pt. 313) 516; Western Steel Works vs. Iron and Steel Workers Union (1987) 1 NWLR (Pt. 49) 28; Obawole vs. Williams (1996) 10. NWLR (Pt. 477) 146, which have shown the way and that the appellants cited them in vain since they do not avail them".
(P 371 Paras A – E)

15. *Powers of Attorney-General are not subject to review by courts.*
The grouse of the appellants herein is that the EFCC cannot prosecute a matter emanating from Katsina State in the name of the Federal Republic of Nigeria. The two courts below decided that the EFCC is competent and empowered to file charge No. KTH/34C/2016 against the appellants before the Katsina State High Court.

The facts leading to the present situation are that the Attorney General of Katsina State gave on fiat to the EFCC to prosecute offences under the laws of Katsina State. The Attorney General went the extra mile to be in court in all the proceedings at the trial court and court below and even before the Supreme Court at this instance. The point being pushed by the appellants is that the EFCC cannot prosecute a Katisina State offence since EFFC is a federal agency and under the concept of federalism would be seen as interloping into a federating unit without vires. That argument in my humble view is for the Katsina State Attorney General to push forward and not for any other person or even the court as the powers of the Attorney General pursuant to Section 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) are not subject to review by any court of law and there is a surfeit of judicial authorities in that regard such as State vs. Ilori (1983) 14 NSCC 69 at 75; George vs. FRN (2011) 10 NWLR (Pt. 1254) 1 at 68.

What has transpired in this instance with the Katsina State Attorney General's granting of the fiat to the EFCC and goes further to

attend court with the prosecution underscores the fact that the fiat was not mistakenly issued and that the State of Katsina was fully backing the prosecution of the appellants pursuant to its state criminal proceedings. Again, the powers of the Attorney-General within Section 211(1) (b) CFRN 1999 is not narrowed to only individual legal practitioners and not institutions such as the EFCC.
(Pp 372 – 373 Paras I – F)

Per Odili JSC:

> **"By the provisions of Section 211(1) of the 1999 Constitution as amended, the Attorney-General's power of public prosecution is not exclusive. The "any other authority or person" in subsection (1) can institute and undertake criminal proceedings. Also the office of the Attorney General does not have the monopoly of prosecution, in any court and decide whether to go on with it or not. Therefore anybody or authority is competent to initiate criminal proceedings against an offender, once he is granted the fiat to do so. See FRN vs. Osahon (2006) 5 NWLR (Pt. 973) 361 at 405 per Belgore JSC (as he then was); Fawehinmi vs. Akilu (1987) 4 NWLR (Pt. 67) 787; Compt. N.P.S vs. Adekanye (2002) 15 NWLR (Pt. 790) 318.**

I shall quote for effect the said section 211(1) CFRN [211(1) The Attorney-General of a State shall have power:

> **(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence created by or under any Law of the House of Assembly.**
> **(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and**

(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. *(P 376 Paras C – H)*

16. *Principles in Kalu vs. FRB*
For emphasis, I shall refer to a recent case of this court which has settled a lot of the worries of the appellants and that is the case of Kalu vs. FRB (2012) LPELR-9287 where this court held thus:

> **"I have not seen, nor have I been told, what substantial miscarriage of justice the appellants have suffered by the EFCC prosecuting them for money laundering offences under the name of the "Federal Republic of Nigeria". Let me repeat that Section 15(5) of the 1999 Constitution obligates the Federal Republic of Nigeria, as a State, "to abolish corrupt practices and abuse of power". The enactment of the EFCC Act and the Money laundering (prohibition) Act are all in a bid to discharge not only this constitutional obligation, but also the country's international obligation in the global war against corruption, terrorism, drugs and other cross-border crimes. The appellants, in view of the pronouncement of Lokulo-Sodipe JCA in E.O. Wike vs. FRN (No. CA/A/85/C/2009 of 17th July, 2009), cannot possibly maintain their argument that since the proper complainants were not before the lower court and that in the absence of proper complainants the lower court lacks jurisdiction to try them. I hereby adopt the following passage in the opinion of His Lordship in Wike vs. FRN (supra) to dismiss the submission".** *(Pp 376 – 377 Paras I – E)*

17. *A-G of Katsina State can delegate power of prosecution to EFCC*
Appellants' contention under their 2nd issue is that the Katsina State Attorney General cannot delegate the powers of instituting criminal proceedings against them to the respondent who is not an officer of his department. I agree with learned respondent's counsel that the correct position of the law is contrary to what the appellants assert. A

great number of the decisions of this court insist that by virtue of Section 211(1) of the 1999 Constitution as amended the Attorney General of a State is empowered to institute criminal proceedings in respect of an offence under any law of the House of Assembly; that the power may be exercised by him in person or through the officers of his department; that the Attorney General is further empowered to take over and continue any criminal proceedings instituted by any other authority or persons and, at any stage before judgment is delivered, discontinue such criminal proceedings instituted by him or any other person or authority; that the use of the word "may" in Section 211(2) of the Constitution shows clearly that in delegating his powers, to institute or undertake criminal proceedings, the Attorney General is not restricted to only officers of his department. The EFCC, learned respondent's counsel is again right, for this court has so held, is one such authority the 1999 Constitution in Section 211 empower to institute and undertake criminal proceedings in respect of acts which though provided for by the State House of Assembly constitute Economic and Financial Crimes as provided for under Section 5 of the Economic and Financial Crimes Commission (Establishment) Act. See Osahon vs. FRN (2006) 2 SC (Pt. 11) 1, Amadi vs. FRN (2008) 18 NWLR (Pt. 1119) 259 at 275, 276, Nyame vs. FRN (2010) 7 NWLR (Pt. 1193) 344 at 403; that, lastly, the Attorney General's powers under Section 221 of the 1999 Constitution the appellants challenge, through to this appeal, cannot be questioned by or through the court. See Rabiu vs. State (1981) 2 NCLR 293, State vs. Ilori (1983) 1 SCNLR 94, Ibrahim vs. State (1986) NWLR (Pt. 18) 650 and **Amadi vs. FRN (supra).** *(Pp 380 – 381 Paras I – G)*

18. *Appellants were properly served under S. 185 of CPC of Katsina State 1991*
It is to be noted that the respondent as prosecution served on the appellants' proofs of evidence which contained the summaries of statements of the prospective witnesses and had gone on further to set out all the names of the witnesses they proposed to call in proving the allegations against the appellants, in my humble view the stipulations under section 185 (a) of the Criminal Procedure Code (CPC) Laws of

Katsina State 1991 had been met. In the provisions of that law the statements of the accused person is not one of the materials to be filed along with the charge. Also the statements of witnesses are pieces of evidence which will come up at the trial and so asking to be given the statements of the accused persons before their pleas are taken before trial is not part of the provisions of the CPC. The appellants therefore labour in vain to overflog the issue as it would serve no useful purpose. See FRN vs. Wabara (2013) 5 NWLR (Pt. 1347) 331 at 350; Ogudo vs. State (2011) 18 NWLR (Pt. 1278) 1 at 52 53; U.N.T.H.M.B vs. Nnoli (1994) 8 NWLR (Pt.376) 376 at 400-401, NNPC vs. Famfa Oil Ltd (2012) 17 NWLR (Pt. 1328) 148 at 195. *(P 379 Paras B – E)*

Per M. D. Muhammad (JSC):

> **"Yes, as persistently held by this court, given the clear words of Section 36(6) (b) of the 1999 Constitution as amended, the appellants are manifestly entitled to such "facilities", in addition to adequate time, they may require for the preparation of their defence. This court has maintained that any "material" the respondent uses and or is relevant in the prosecution or defence of the appellants who are being arraigned at the trial court should be made available to the appellants to enable them adequately prepare their defence. See Layonu vs. State (1967) 1 ALL NLR 198 and Udo vs. State (1988) 1 NSCC (Pt. 19) 1163 at 1172.**

The essence of the principle is that both the respondent herein and the appellants they prosecute must enjoy equal opportunity in the conduct of their respective cases. Under no circumstances, this court insists, should the prosecution enjoy sole access to the evidence on which basis the trial of an accused person is pursued. Allowing the respondent undue access to the materials that provide the evidence the court is urged to convict the appellants, learned appellants' counsel would be right, will constitute unpardonable violation of Section 36(6) (b) of the Constitution. In Okoye & ors vs. Commissioner of police (2015) 4-5 Sc

(Pt. 1) 101 this court per Akaahs (JSC) restated the principle thus:

> **"The moment an accused is facing a charge, his personal liberty is at stake and before that liberty is taken away, he must be afforded every opportunity to defend himself …….**
>
> ***Once he becomes aware that he has a charge hanging over his neck for an infraction of the law and makes a request either orally or in writing for any facilities to prepare for his defence, the court must accede to his request and the prosecution has to comply……."(*** Italics mine for emphasis).

In the case at hand the appellants, having failed to specify what materials the respondent refused to supply them following their request and the trial court's order thereon, cannot invokes 36(6) (b) of the 1999 Constitution as amended to forsteall their trial. See Ogboh & anor vs. FRN (2002) LPELR-2285. *(Pp 379 – 380 Paras I – I)*

Per Eko (JSC):

> **"The Attorney-General of Katsina State, in exercise of his powers under Section 211 of the Constitution gave the EFCC the *fiat* to prosecute the appellants under the penal code law of Katsina State. Upon a careful perusal of the provisions of Section 211(1)(b) & (c) of the Constitution, it appears that the Constitution contemplates also the right of any other authority or person, not just the Attorney-General, to initiate criminal proceedings. Thus initiation of criminal proceedings for an offence is not an exclusive prerogative of the Attorney-General. However, the power to take over and continue or discontinue such prosecution remains exclusive to the Attorney-General.**

The peculiar facts of this case, including his issuance of fiat to the

EFCC, an investigating and prosecuting authority created by an Act of the National Assembly, suggests that the proceedings against the appellants were initiated at the instance of, and on the authority of, the Attorney-General of Katsina State. His physical presence in the prosecuting team clearly removes any doubt that he authorised the proceedings the subject of this appeal. The appellants cannot say that they do not know who their accuser(s) are.

The main grouse of the appellants under this issue is that if EFCC is proceeding against them on the authority of the fiat given to it by the Attorney-General of Katsina State then it should prosecute them in the name of the donor of the power or fiat. That is, in the name of either Attorney-General of Katsina State, or Katsina State. They tend to hold the view that proceeding against them in the name: FEDERAL REPUBLIC OF NIGERIA, vitiates the proceedings against them. The appellants, like the plaintiffs in A.G. LAGOS STATE vs. A.G. FEDERATION (2014) 9 NWLR (Pt. 1412) 217, hold "the mistaken idea that the Federal Government of Nigeria is synonymous with the Federation or Federal Republic of Nigeria". This point was laid to rest in A.G., LAGOS STATE vs. A.G. FEDERATION (supra) at page 280 where Ngwuta, JSC, clarifies the point thus:

> **"The Federal Republic of Nigeria (or the Federation) is the repository of the sovereignty of the people of Nigeria whereas the Federal or state Governments, in contradistinction, are donees of the powers and authority of the people.**

In other words, the Federation of Nigeria, or the Federal Republic of Nigeria, is distinct and separate from the Federal Government of Nigeria which often, is a product of periodic elections: A.G. KANO STATE vs. A.G. FEDERATION (2007) 6 NWLR (Pt. 1029) 164.
(Pp 386 – 387 Paras C – C)

19. *Procedure for application for leave to prefer a charge at the High Court of Katsina State.*

Usually an application for leave to prefer charge in the High Court, under the criminal procedure code in Katsina State, is brought under Section 185(b) of the criminal procedure code law and criminal code (application for leave to prefer charge in the High Court) rules made thereunder. The extant criminal procedure (application for leave to prefer a charge in the High Court) rules, 1970 mandatorily requires that the application for leave to prefer a charge shall state the charge in respect of which leave is sought. The appellants do not complain about this. The grouse of the appellants is that the mandatory proofs of evidence they are entitled to does not contain "adequate facilities" or materials they would need to prepare adequately for their defence. Rules 3 (2) of the criminal procedure (application for leave to prefer a charge in the High Court) Rules provides, in mandatory terms that "there shall accompany the application proofs of the evidence of the witnesses whom it is proposed to call in support of the charge", and that the proofs of evidence shall be accompanied by the prosecutor's statement of undertaking "that the evidence shown in the proof of evidence will be evidence which will be available at the trial" and that the case disclosed by the proofs is a true case.

Proofs of evidence, in criminal proceedings, are what pleadings and front loading of evidence are in civil trials. The essence of both is to enable the parties know not only the case they are to meet at the trial but also to be enabled to adequately prepare to counter the oral and documentary evidence by which the case is to be proved. They ensure, as K.M.O. Kekere-Ekun, JCA (as he then was) stated in ADEBISI ADEGBUYI & ANOR vs. HON. RAMONI OLALEKAN MUSTAPHA & ORS. (2010) LPELR-3600 (CA), that there is no trial by ambush.

Trial by ambush is what the framers of the constitution detested and provided against when they provide in Section 36(6) (b) that

Every person who is *charged* with a criminal offence shall be entitled to be given *adequate* time and facilities for the preparation of his defence. *(Pp 383 – 384 Paras C – B)*

Per Eko (JSC):

"This is a basic fundamental right every person who is charged with a criminal offence is entitled to. That is, every person charged with a criminal offence is entitled to be given adequate *facilities* for the preparation of his defence. *Charge* as a noun, means a formal accusation of an offence. As a verb "charge" means to formally accuse a person of an offence. See Black's Law Dictionary 9th ed.
The provisions of Section 36(6)(b) of the Constitution are unambiguous. They are therefore entitled to be given their ordinary plain and simple meaning without venturing to import thereto any extraneous matters that may lead to circumventing or giving the provisions an entirely different interpretation from what the lawmaker intended them to be: UNIPETROL vs. E.S.B.I.R. (2006) ALL FWLR (Pt. 317) 413 at 423. The initiation of the criminal proceedings against the appellants invariably leads to the invocation of the jurisdiction of the criminal court to determine their civil rights, particularly the right to their personal liberty, guaranteed by Sections 36(1) and 35 of the Constitution. The judex therefore shall be guided by the wisdom of this court expressed in RABIU vs. THE STATE (1980) 8-11 SC 130; ONYEMA vs. OPUTA (1987) 6 SC 362: Firstly, that the Constitution should be given broad and liberal construction to promote its purpose; secondly; and that narrow and conservative construction should be avoided, and also that the Constitution should be construed to promote good government and people's welfare. These are ever living words against trial by ambush.

The right guaranteed by Section 36(6)(b) of the Constitution applies to every person charged with a criminal offence: OGBOH & ANOR. vs. F.R.N. (2002) 4 S.C. (Pt. II) 106; (2002) 10 NWLR (Pt. 774) 21. Section 185(b) of the CPC and criminal procedure (application for leave to prefer a charge

in the High Court) Rules, 1970 have been enacted to further give effect to the right guaranteed, by Section 36(6)(b) of the Constitution to every person charged with a criminal offence. This constitutional right of the accused person imposes a duty on his accuser to furnish him with all the facilities, particularly the evidential materials his accuser intends to use against him at his trial, from the moment he is formally accused of a criminal offence. He has to have these facilities before he is called upon to take his plea to the charge. That enables him to decide, in the first place, how he should plead to the charge. The proofs of evidence with the front loaded evidence of the witnesses and documents the prosecutor intends to call at the trial *prima facie* constitute "adequate facilities" the person charged with a criminal offence would have for the preparation of his defence. The prosecutor, cannot deny the accused person these facilities, and if he does deny the accused person this right the trial no doubt will be vitiated. *(Pp 384 – 385 Paras B – C)*

20. Right of accused to know case against him.

The right guaranteed to the person charged with a criminal offence, the duty imposed on his accuser, by Section 36(6)(b) of the constitution not merely fanciful. In ORISAKWE vs. GOVERNOR, IMO STATE (1982) 3 NCLR 743 at 755 OPUTA, CJ (as he then was) stated that if the right of fair hearing under Section 33(I) of the 1979 Constitution, *in pari materia* with Section 36(I) of the 1999 Constitution, and the rule of natural justice is to be of any real right, it must carry with it a corresponding and equal right in the accused person to know the case his accuser has against him. This view was cited with approval in OKOYE & ORS. vs. COMMISSIONER OF POLICE (2015) 4-5 SC (Pt. I) 101. This court considered the provisions of Section 33(6)(b) of the 1979 Constitution, *in pari materia* with Section 36(6)(b) of the 1999 Constitution in UDO vs. THE STATE (1988) 6 SC 346 and declared that it is a provision of "equal opportunities for both the prosecution and the defence". Commenting on this equality of opportunities between the prosecution and the defence, under Section 36(6)(b) of the

1999 Constitution, K.B. Aka'ahs, JSC, stated in OKOYE vs. COMMISSIONER OF POLICE (supra) that the prosecutor, therefore, will not be allowed to have sole access to the evidence, and that "in a situation where the accused person does not know the case he will meet, while the prosecution knows everything concerning the case against accused person ahead of time amounts to nothing less than procedural inequality which is a gross violation of the principle of fair hearing or fair trial" tantamounting to violation of the provisions of Section 36(6)(b) of the 1999 Constitution. This is what the appellants herein are saying, and I agree with them.

I agree with the appellants that they are entitled, having been formally accused of criminal offences, to be given adequate facilities, in the proofs of evidence, for the preparation of their defence. Accordingly, the respondent as the prosecutor, is hereby ordered or directed to furnish to the appellants, each, proofs of evidence comprising statements of all witnesses and documents which are proposed to be called in support of the charge(s) preferred against the appellants, as the accused person. *(Pp 385 – 386 Paras D – B)*

21. *Principle in Nyame vs. FRN*
In NYAME vs. F.R.N. (2010) 7 NWLR (Pt. 1193) 344 (SC), at page 403, it was held that EFCC is the co-ordinating agency for the enforcement of the provisions of any other law or regulation on economic and financial crimes, including the criminal code and the penal code. The commission has powers under Section 13(2) of the (enabling) Act to prosecute offences so long as they are financial crimes.
(P 387 Paras D – F)

22. *Principles in Ama div s. FRN*
In the co-operative federalism practised in Nigeria the EFCC is a common agency empowered to investigate and prosecute offenders for both the Federal and State economic and financial crimes, and as such it qualifies as any other authority or person empowered by Section 211 (1)(b) of the Constitution to institute or initiate criminal proceedings: AMADI vs. FRN (2008) LPELR-441 (SC). In the AMADI case (supra) the EFCC initiated the trial of the appellant for offences under advance fee fraud and other related offences Act, 2004 (an Act of the National

Assembly), and offences under the criminal code law of Lagos State. The contention that EFCC, an agency created by an Act of the National Assembly, could not competently prosecute state offences relating to economic and financial crimes was dismissed. See also OSAHON vs. FRN (2006) 2 SC (Pt. II) I; (2006) 2 NWLR (Pt. 973) 361.
(P 387 Paras F – I)

23. *A-G has power to revoke fiat*
I wish to state finally, that the fiat issued by the Attorney-General of Katsina State is not irrevocable. He, being the donor of the power, reserves the right to resume or revoke the power he had delegated to the EFCC to prosecute the appellants on his behalf. Section 211 of the Constitution is very clear and unequivocal on that residual power of the Attorney-General of the Sate.

I read in draft the judgment delivered by S.D. BAGE, JSC, in this appeal. I agree that the Attorney-General of Katsina State has rightly delegated his prosecutorial powers to EFCC to prosecute the appellants herein by the *fiat* he issued to the EFCC. My position on the rights of the appellants under Section 36(6)(b) of the Constitution is that the appellants are entitled to be given proofs of evidence containing the statements of all witnesses, and the documents the prosecutor intends to call evidence on in their trial. *(Pp 387 – 388 Paras I – C)*

Per Galinge (JSC):

> **"Section 211(1)(a) of the Constitution of the Federal Republic of Nigeria provides that the Attorney-General of a state shall have power to institute and undertake criminal proceedings against any person before any court of law in Nigeria in respect of any offence created by or under any law of the House of Assembly. Sub-section (i)(b) of the same section provides that the Attorney-General of a State has the power to take over and continue such criminal proceedings that may have been instituted by any other authority or person. From this constitutional provision, it is very clear that the power to institute and undertake criminal proceedings before any**

court in Nigeria in respect of any offence created by or under any law of the House of Assembly is not exclusive preserve of the Attorney-General of the State. Other authorities or persons have power to so institute and undertake criminal proceedings before any court of law in Nigeria as well. By Section 7(2)(f) of the Economic and Financial Crimes (Establishment) Act 2004, the EFCC shall be the coordinating agency for the enforcement of the provisions of any law or regulation relating to economic and financial crimes including the criminal code and the penal code.

EFCC is clearly an authority or person by virtue of Section 1(2)(a)&(b) of the EFCC Act which provides that the commission is a body corporate with perpetual succession and may be sued in its corporate name. Since it is an authority it has the power to institute and undertake criminal proceedings against any person before any court of law in Nigeria, Katsina State inclusive. *(Pp 388 – 389 Paras E – B)*

24. *Obligations under S. 36(6)(b) to be complied before an accused enters his defence*

Section 36(6)(b) of the Constitution provides as follows:

> **"Every person who is charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence."**

This is clearly a constitutional obligation that must be fulfilled before an accused person enters his defence. At what point in time would a failure to give facilities to an accused will amount to a breach of his right to fair hearing. In the case of Okoye & Ors vs. C.O.P & Ors which was cited and relied upon by learned senior counsel for the appellant, this court per Aka-ahs, JSC said:

> **"After the accused has entered his plea, but before the actual trial commences, the accused or the counsel representing him should be availed all the facilities that**

will assist in the preparation of his defence. For avoidance of doubt, what the accused requires is the statement of witnesses and police investigation reports and any medical report, which bears resemblance to the offence allegedly committed by the accused."

In the instant case the plea of the accused persons had not been taken. Section 36(6)(b) says the documents are required for the accused defence. When the accused is set for his defence and the necessary facilities are not provided, he can decline to proceed with his defence and insist on his right to be availed with the facilities. If the required facilities are not provided and he is forced to enter his defence and if in absence of his defence the case if determined in either way, he will now be in a position to complain that his right to fair hearing has been violated.

In the instant case, the appellants neither appeared before the court no pleaded to the charge. I do not see how their rights were violated thereby. I am of the firm view that the lower court was right when it affirmed the decision of the trial court. *(Pp 389–390 Paras H–G)*

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The EFCC (Establishment) Act, 2004 - Sections 6(m), 7(f), 13(2)(a) and (d) and 46
The EFCC Act – S. 1(2)(c)

Representation
J.B. Daudu (SAN) with A.T. Kehinde (SAN), E.Y. Kura (SAN), Aliyu Ahmed and Uyi Igunma, for the Appellant.

L.O. Fagbemi (SAN) with J. S. Okutepa (SAN), Dr. J.O. Olatoke (SAN), A.U. El-Marzua A.G. Katsina State and M.S. Abubakar (Esq.), for the Respondent.

(DAUDA BAGE, (JSC) (Delivering the Lead Judgment): We are this morning constituted as a court to determine preliminary issues, by way of interlocutory appeal, from the judgment of Court of Appeal sitting in Kaduna, dated 12th day September, 2017, which affirmed the decision of the Katsina State High Court delivered on 21st February, 2017, which dismissed the appellants' motion on notice dated 3rd day of January, 2017 and filed on 4th day of January, 2017 seeking to (i) declare the filing of the charge sheet by EFCC as incompetent on constitutional grounds and (ii) declare as inchoate the entire proceedings as the charge sheet was not accompanied by proof of evidence as known to law thereby dislodging the appellants' right to fair hearing as recognised by Section 36(6) (b) of the 1999 Constitution as amended.

The trial court's decision refusing and dismissing the appellants' application for lack of merit can be found at pages 34 47 of the records; while the decision of the lower court affirming the decision of the trial court can be found at pages 291-340 of the records.

Being dissatisfied with the decision of the lower court, the appellants filed four separate but identical notices and grounds of appeal on the 21st of September, 2017 against the judgment in the registry of court below containing ten (10) grounds. The identical notices of appeal are contained on

pages 341-404 of the record. The appellants' joint brief of argument was subsequently filed on 18th October, 2017 while the respondent's brief is dated 24th October, 2017, and the appellants' joint reply brief dated 30th October, 2017.

SUMMARY OF FACTS

On the 16th December 2016, by a 22-count charge, appellants were alleged to have committed sundry corruption and financial crime related offences, such as conspiracy, criminal breach of trust, forgery, aiding and abetting contrary to relevant provisions of the Penal Code Law of Katsina State. Consequently, charges were filed against the accused persons/appellants before the Katsina State High Court, pursuant to Section 185 (a) Criminal Procedure Code Law, Cap 37, Laws of Katsina State, 1991 and for offences in the penal code.

The charges were filed by the Economic and Financial Crimes Commission (hereinafter called "EFCC") on the authorization of the Hon. Attorney General of Katsina State, upon the issuance of a fiat by the said Hon. Attorney General of Katsina State pursuant to Section 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

On being served with the charges and prior to arraignment, appellant filed an application dated 3rd day of January, 2017 and filed on 4th day of January, 2017 as contained at pages 48-90 of the records. The application was seeking to terminate the proceedings on the ground, among others that the EFCC cannot initiate the criminal proceedings against them in the name of the Federal Republic of Nigeria (hereinafter called "FRN"), and that the EFCC has no power to prosecute a state offences, (even with the fiat of the Attorney General of Katsina State). The appellants also contended that the prosecution did not furnish them with all the documents necessary for their defence of the case. For these and other reasons, the appellant challenged the jurisdiction of the trial court to hear and entertain the charges.

Parts of the reliefs sought in the application forming basis of this appeal, are:

"**(1) An order terminating the instant proceedings i.e charge no: KTH/34C/2016 FRN vs. IBRAHIM SHEHU SHEMA AND 3 OTHERS because the**

offences alleged against the applicants are offences cognizable and punishable under the Penal Code Cap 96 Laws of Katsina State and are therefore not FEDERAL OFFENCES which the Federal Republic of Nigeria or any of her Agencies particularly the Economic and Financial Crimes Commission can prosecute.

(2) AN ORDER of this honourable court quashing and/or striking out the instant Charge No. KTH/34C/2016 between FRN vs. IBRAHIM SHEHU SHEMA & 3 ORS, dated and filed on the 16th of December 2016 because being state offences cognizable and punishable under the Penal Code Cap 96 Laws of Katsina State, they can only be instituted by the Attorney-General of Katsina State in the name of Katsina State or the Commissioner of Police."

ALTERNATIVELY

"(1) An Order directing the Prosecutor to furnish the defence with all documents inclusive of all the statements made by the defendants, statements made by all the witnesses, Police Investigation Reports, Statements of Bank Accounts in compliance with section 84 of the Evidence Act, and every other document relevant to the prosecution of this matter.

(2) An Order staying further hearing of these proceedings until the order of this honourable court granting the defendants leave to access all documentary evidence to be relied on by the prosecution in the instant trial is obeyed and or complied with.

(3) An ORDER dispensing with the physical appearance and arraignment of 1st – 4th appellants/appliants in the instant Charge No: KTH/34C/2016 between FRN vs. IBRAHIM SHEHU SHEMA & 3 ORS during and pending the determination of this motion on notice. AND FOR SUCH FURTHER ORDER/ORDERS as this honourable court may deem fit to make in the circumstances."

In a ruling delivered on 21st January, 2017, the learned trial Judge, after considering the respective submissions of counsel to the parties, dismissed the appellants' objection and affirmed its jurisdiction to hear the charges.

Dissatisfied with the above ruling, the appellants filed 4 identical notices of appeal containing 5 similar grounds each to the Court of Appeal. The said notices and grounds of appeal are contained at Pages 168-199 of the record of appeal.

The lower court heard the appellants' appeal on the 15th day of June, 2017 and delivered its ruling on the 12th September, 2017. In its ruling, the lower court held inter alia, that the appeal is frivolous, vexatious and devoid of any merit.

The court below specially held that 'the Attorney General of Katsina State has the powers to invite EFCC (an agency of the Federal Government) to prosecute the case.

Still being unhappy with the ruling of the lower court, the appellants filed 4 identical notices of appeal and formulated 10 grounds. The appellants specifically canvassed that, because part of the decision of the Court of Appeal emphasized the existence of Supreme Court decisions on the issue of the power of the EFCC to prosecute under the Penal Code in the name of the Federal Republic of Nigeria, the appellants sought to invoke the power of the Supreme Court of Nigeria to depart from its previous decision(s) by overruling itself. The notices of appeal are contained at pages 341-404 of the records of appeal.

ISSUES FOR DETERMINATION

A At page 14 of their brief of arguments dated 17th October, 2017 and filed on 18th October, 2017, the appellants formulated three issues for the determination of this appeal, thus:

B **"(1) Whether contrary to the resolution of the court below, the issues formulated by the appellants in the court below, did not arise from the grounds of appeal and the facts in the printed record, and whether such**

C **a finding did not prejudice the mind of the said court below when it held that appellants were not entitled to the documents requested from the prosecution until after plea had been taken and by so holding**

D **made out a new case for the respondent? (ISSUE NO 1) (GROUNDS 1 AND 9).**

(2) Whether the Kaduna Division of the Court of Appeal

E **was right when it affirmed the decision of the Katsina State High Court that the Attorney-General of Katsina State has the powers to invite EFCC (an agency of the Federal Government) to prosecute the**

F **appellants in the name of the Federal Republic of Nigeria before the Katsina State High Court for offences allegedly committed under the Penal Code Cap 96 Laws of Katsina State? (Issue No. 2) (Grounds 2, 3, 4, 5 and 6 of the identical notices of**

G **appeal).**

(3) Whether the Kaduna Division of the Court of Appeal

H **was right when it affirmed the decision of the Katsina State High Court that the non-availability of all the documents i.e. statements of accused persons and all witnesses, investigation reports, bank statements**

I **and other documents by the prosecution to the accused persons did not breach the provisions of section 36-(6) (b) of the 1999 Constitution? (Issue No**

3) (Grounds 7, 8 and 10 of the identical notices of appeal)."

On its part, the respondent also formulated three issues for determination at page 6 of its respondents brief dated and filed 24th October, 2017, thus:

"(1) Having regard to the grounds of appeal and the facts in the printed record, whether the Court of Appeal was not right in its approach of formulating and/or reformulating relevant issues for determination submitted by parties, after bolding that the appellant issue

(2) was incompetent and whether same has occasioned any bias and/or miscarriage of justice in the entire circumstance of the appeal? (Grounds 1 and 9 in the identical notices of appeal).

(4) Whether having regard to the provisions of relevant laws and judicial authorities especially section 211 Constitution of the Federal Republic of Nigeria, the lower court was not right when it upheld the decision of the Katsina State High Court that the EFCC as a common agency fir both Federal and State economic and financial crimes, is empowered to initiate criminal proceedings and file charge No. KTH/34C/2016 before the Katsina State High Court for offences in the Penal Code Law, Cap 96, Laws of Katsina State, with or without the Attorney General's authorization (Grounds 2, 3, 4, 5 and 6).

(5) Whether having regard to the peculiar circumstances of the case leading to the appeal, the lower court was not right to have upheld the decision of the trial court that the charge (No. KTH/34C/16)

and the proof of evidence thereof are competent and not in breach of section 36 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (Grounds 7, 8 and 10).”

The issues formulated by the parties are similar in some respect. I have considered the issues formulated on behalf of the parties some of which overlap, resulting in seemingly repetitious arguments and submissions. The justice of this appeal demands that I narrow down the main issues as precisely as possible with clarity to ensure a judicious, effective and proper determination of the issues in contention between the parties in this interlocutory appeal. Given this background, I am persuaded that issues 2 of both the appellants and respondent and issue 3 of the respondents are the main issues in this appeal, and I have adopted same with modification thus:

“(1) Whether the lower court was right when it upheld the decision of the Katsina State High Court that the EFCC as a common agency for both Federal and State Economic and Financial Crimes, is empowered to initiate criminal proceedings and file charge No. KTH/34C/2016 before the Katsina State High Court for offences in the Penal Code Law, Cap 96, Laws of Katsina State, with the Attorney General's authorization.

(2) Whether having regard to the circumstances of the case leading to this appeal, the lower court was not right to have upheld the decision of the trial court that the charge (No. KTH/34C/16) and the proof of evidence thereof are competent and not in breach of section 36 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999?”

CONSIDERATION AND RESOLUTION OF RELEVANT ISSUES:

RESOLUTION OF PRELIMINARY POINTS

Two preliminary issues have been raised by the appellants and respondent. By way of motion on notice dated 24th October, 2017, the respondent has prayed this court to strike out issue 3 of the appellant's brief of argument for being incompetent. In support of this position, the learned senior counsel for the respondent contended that issue 3 was formulated from virus invested grounds, having derived from a non-existing "ground 10". Counsel submitted that an issue cannot arise from a non-existing ground and liable to be struck out, citing the case of **OKETADE vs. A ADEWUNMI** (2010) 8 NWLR Pt. 1195, at 63, **GLOBE FISHING IND. LTD vs. COKER** (1990) 7 NWLR Pt. 162, at 265.

In sum, the learned counsel urged this court to strike out issue 3 formulated by the appellants.

In their response to the motion as contained in pages 3-4 of the appellants' joint reply brief dated 30th October, 2017, the appellants contended that it is long settled that cases are not decided on technicalities, citing the case of **ADEKEYE vs. AKIN-OLUGBADE** (1987) 3 NWLR Pt. 60, at 214 and urged this Court to dismiss the said motion/preliminary objection.

The above issue is crucial to the resolution of the main issues in this interlocutory appeal. The necessary question is what is the nature or purport of the appellants' issue 3 that the respondent earnestly desired to have same struck-out. Issues 3 of the appellants qualified as a "mega issue" due to its nature. The appellants' issue 3 in contention reads:

> **"Whether having regard to the peculiar circumstances of the case leading to the appeal, the lower court was not right to have upheld the decision of the trial court that the charge (No. KTH/34C/16) and the proof of evidence thereof are competent and not in breach of Section 36 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (Grounds 7, 8 and 10)."**

Having taken a careful look at issue 3 and the arguments for and against same by the respondent and the appellants, I am of the view that the appellants' issue 3 is incompetent having not derived from cognisable ground of appeal. The

law is trite that an issue must be distilled or distillable from a ground of appeal. This is not the case here. In this circumstance, I take a cue from the decision of this court in **AKEREDOLU vs. MIMIKO** & 2 ORS (2013) 12 SCM (Pt. 2) 135 at 154, and hold that issue 3 is incompetent and same is hereby struck-out.

I also wish to state, by way of further elucidation, that the court is bound to consider an issue once formulated by the parties. The court is not however expected to be a "slave" to the litigants and their counsel by adopting whatever issues formulated hook, line and sinker irrespective or illogicality of such issues. The duty of court is to consider all the issues, and where appropriate collapse, integrate, harmonise, extend, increase or generally structure and restructure such number of issues as are crucial to effectively and effectually determine the issues in the appeal or matter as the case may be to ensure that justice is done.

In this circumstance, this court has given deep thoughts to ALL the issues and ARGUMENTS canvassed by the appellants and the respondent in all three different briefs filed in respect of this interlocutory appeal, namely the appellants' joint brief of argument, the respondent's brief of argument and the appellant joint reply brief. Some of the issues overlap and/or are interwoven. It is not possible for a court to formulate issues on every shade of opinions or arguments canvassed by the parties in a case or appeal. It is in view of the foregoing that I have limited myself to two main issues in this interlocutory appeal. All other ancillary arguments and issues are duly considered within the confines of the two main issues formulated from the issues respectively formulated by the parties, for the purpose of determining this crucial interlocutory appeal of national significance.

RESOLUTION OF ISSUE 1

"Whether the lower court was right when it upheld the decision of the Katsina State High Court that the EFCC as a common agency for both Federal and State economic and financial crimes, is empowered to initiate criminal proceedings and file charge No. KTH/34C/2016 before the Katsina State High Court for offences in the Penal Code Law, Cap 96, Laws of Katsina State, with the Attorney

General's authorization."

The thrust of the contention of the appellants in this interlocutory appeal, is best summarised as unwillingness to allow the agent of the respondent, the EFCC, prosecute the appellants for the allegations levied against them. This contention is anchored on the issue two of the appellants' brief of argument. As stated above, issue one formulated by the appellants has not been of much assistance to us in pursuit of our sole objective of justice, beyond technicalities and deployment of dilatory advocacy skills.

We note that, in their arguments on the issue as formulated for the purpose of this appeal, which is similar to issue two formulated by the appellants, it is contended that the court below saw nothing wrong with the initiation of the 22-count charge by the EFCC on the basis that the Attorney-General of the State is not the only person empowered under section 211 of the CFRN (as amended) to institute criminal charges in a court of law. This is because, the appellants contend, the law recognizes that where any other person or body of persons is empowered under other enactments to initiate and commence criminal proceedings, such a person or body of persons could competently commence such proceedings in the High Court.

The appellants contended further that, the position of the court below was erroneous on the ground that the court based the validity of the charges preferred against the appellants on the provision of section 211 of the 1999 Constitution of the Federal Republic of Nigeria. The learned senior counsel to the appellants contended that, the court below was wrong not to have recognised that the powers of Federal and State authorities were kept in strict water-tight compartments by the provisions of sections 174-(1) (3) and 211-(1-)-(3)) of the 1999 Constitution.

The learned senior counsel pointed out that the territorial jurisdiction in criminal matters is determined by the statute creating it. Counsel cited the case of **NITEL PLC vs. AWALA** (2002) 3 NWLR (Pt. 753) 1 at 12, para E and submitted that the proper prosecuting party in a criminal trial depends on whether the offence was created by the State Government or by the Federal Government. He contended further that the delegation to EFCC by the Attorney-General of Katsina State can only be construed as being tantamount to Katsina State surrendering its 'independence or sovereignty' to the Federal

A Government of Nigeria.

On the supposition that Nigeria is a Federation and that the constitution does not permit a Federal Agency to invade a State by way of the so-called powers to prosecute, the learned senior counsel to the appellants cited and quoted
B extensively from the decision of the lower court in the case of **SUNDAY OLOYEDE vs. THE STATE** (2013) LPELR-2015 (CA).

The learned senior counsel observed that, to arrive at its decision, the lower court had relied on the cases of **DARIYE vs. FRN** (2015) 10 NWLR Pt.
C 1467 PAGE 325 at 352-354 and **NYAME vs. FRN** (2010) 7 NWLR Pt. 1193 PAGE 394 and the case of **JINADU vs. FRN** (2015) LPELR-24381 **(CA)** and **KALU vs. FRN** (2016) LPELR- SC 215/2012. However, the learned appellants' counsel contended that those cases could be distinguished from the
D instant appeal to the extent that they are completely outside the scope and purview of the prosecutorial powers of the EFCC. Counsel reasoned that Section 13(2) of the EFCC only allows its legal and prosecution unit to prosecute offenders for offences committed under the Act. Counsel contended
E that the penal and criminal codes are not Federal enactments but State laws. Moreover, the appellants were specifically charged under the provisions of Cap 96 Laws of Katsina State.

The learned appellants' counsel submitted in the alternative that should
F this court be minded to apply the decision in **DARIYE** and **NYAME** (supra) for the purpose of interpreting section 13(2) of the EFCC Act, then, this court is being invited by counsel to do two things; modify its previous position and depart from the decisions (rations) in the two cases. To drive home its position
G on the need to overrule ourselves and depart from our previous decisions, the appellants relied on, and quoted extensively from the case of **BUCKNOR-MACLEANS vs. INLANKS LTD** (1980) 8-11 SC, per Idigbe JSC (as he then was); **TEWOGBADE vs. OBADINA** (1994) 4 SCNJ 161, per Iguh JSC,
H (as he then was).

In sum, the learned senior counsel to the appellants respectfully urged this court to depart from the cases of **DARIYE** and **NYAME** (supra) as they suggest that the EFCC can prosecute in State court offences allegedly
I committed under the penal and criminal code of a State, and to resolve this issue one (same as issue 2 in the appellants; brief of arguments) in favour of the appellants.

A On its part, the respondent argued in respect of this issue that, the appellants have taken the burden of Katsina State government on themselves, crying about "sovereignty" of Katsina State. The position of the respondent is informed by the fact that Katsina State that donated the power has not
B complained of a breach of its sovereignty. The learned counsel submitted further that the powers vested in the Attorney General pursuant to Section 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is not subject to review by any court of law. To support this view, the learned
C senior counsel relied on the case of **STATE vs. ILORI (1983)** Vol. 14 **NSCC Pt. 69** at 75; **GEORGE vs. FRN** (2011) 10 NWLR (Pt. 1254) 1 at 68, and further argued that any exercise of the powers of the Attorney General is presumed to have been rightly and regularly done until the contrary is proved,
D relying on Section 150(1) Evidence Act, 2011; **OGBUYIYA vs. OKUDO (1990) 7 SC** Pt. 1, 66; **TIMOTHY vs. FRN** (2008) All FWLR (Pt.402) 1136; **ADEBAYO vs. THE STATE** (2012) LPELR-9464-CA.

The parties are ad-idem that the basis of the appeal is the propriety or
E otherwise of the Attorney-General of Katsina State in donating its power to the EFCC, an agency responsible to file charges against the appellants pursuant to section 211 of the Constitution. I begin by setting the law straight, by quoting verbatim, the exact provision of the constitution, which states thus:

F

"211. (1) The Attorney General of a state shall have power:

(a) to institute and undertake criminal
G **proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House**
H **of Assembly;**

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or
I **person; and**

(c) to discontinue at any stage before judgment is delivered any such criminal

proceedings instituted or undertaken by him or any other authority or person.

(2) The powers conferred upon the Attorney-General of a state under subsection 1 of this section may be exercised by him in person or through officers of his department.

(3) In exercising his powers under this Section, the Attorney-General of a state shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process."

It is common knowledge that, to ensure speedy disposal of criminal cases, the Attorneys-General of the State do delegate their powers to the various State Commissioners of Police who institute and prosecute criminal matters in the name of the State as Commissioners of Police. Such powers are also delegated to other agencies such as the Federal Board of Internal Revenue, Nigeria Customs Service, National Drug Law Enforcement Agency (NDLEA) and lately EFCC by the Attorney-General of the Federation. This arrangement is made possible subject to the provisions of section 174 (1)(b)(c) and 211(1)(b)(c) of the Constitution of the Federal Republic of Nigeria 1999 in respect of the powers of the Attorney-General of the Federation or State respectively.

Nigerians have now internalised the reality of the challenges facing the country in the area of anti-corruption and related financial crimes. Our country people agencies and institutions are now, or must now be, at home with the shift in the paradigm of impunity to recognise that both the case law and statute provisions recognise the fact that, indeed, the law empowers the EFCC to institute a case in the name of the Attorney General of the Federation, Federal Republic of Nigeria and not necessarily in its name only, and that it could so institute in any court, State or Federal. This court has held in several instances that the EFCC is a statutory body created under the laws of Nigeria to investigate and prosecute a class of criminal offences.

To further buttress my position on this issue, I wish to reiterate the well settled position of this court in the case see **NYAME vs. FRN** (2010) 7 NWLR (Pt. 1193) 344. In this case, this court indicated, and very clearly, that there is nothing here that prevents the EFCC from prosecuting offenders in the name of the "Federal Republic of Nigeria" being the agency responsible for co-coordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with Economic and Financial Crimes in the Federal Republic of Nigeria by virtue of section 1(2)(c) of the EFCC Act.

The effect of our clear and ambiguous stance in **NYAME** v**s. F.R.N** (supra) and which we have no reason to depart from, is that the commission (the EFCC) is the co-coordinating agency for the enforcement of the provisions of any other law or regulation on economic and financial crimes, including the criminal code and the penal code. The Commission has the power under section 13(2) of the Act to prosecute offences so long as they are financial crimes. I have not seen what substantial miscarriage of justice the appellants have suffered by the EFCC prosecuting them for those offences under the name of Federal Republic of Nigeria for crimes they have allegedly committed under Penal Code Law, 96, Laws of Katsina State. To further amplify that legal authorities clearly support the stand of the trial judge and lower court, that the EFCC can institute a case in the name of the Attorney-General of the Federation, and not necessarily in its name only, I refer to the case of **AMAECHI vs. INEC & 2 ORS** (2008) 5 NWLR (Pt. 080) 227 at 307, this court, per Oguntade JSC held:

> **"The EFCC is a statutory body created under the laws of Nigeria. Its duties include the investigation and prosecution of a class of criminal offences. In essence; once its investigation has shown prima facie that a person has committed a criminal offence, the duty of EFCC is to have such offender prosecuted in a court of law…"**

There is nothing here that prevents the EFCC from prosecuting such offender in the name of the Federal Republic of Nigeria. After all, by Section 1(2)(c) of the EFCC Act, the EFCC has the "responsibility of coordinating the various

institutions involved in the fight against money laundering and enforcement of all laws dealing with Economic and Financial Crimes in Nigeria." i.e of the Federal Republic of Nigeria. In **NYAME vs. F.R.N**. (2010) 7 NWLR (Pt. 1193) 344, this court held at page 403 that:

> **"The Commission is the coordinating agency for the enforcement of the provisions of any other law or regulation or economic and financial crimes, including the criminal code and the penal code. The Commission has the power under Section 13(2) of the Act to prosecute offences so long as they are financial crimes."**

I need to add, at this stage, by re-echoing the voice of this court Per NGWUTA, JSC (P. 32, parass. E-G) **(DARIYE vs. FRN)** that, institution of proceeding against any person before any court in Nigeria other than a Court Martial is not the exclusive prerogative of the Attorney-General of the Federation and/or his counterpart in the State. S.174 (1)(b) and (c) and S.211(1)(b) and (c). This becomes more compelling given the provisions of the Act.

I' will take a few minutes to quote extensively from the specific provisions of the EFCC Act, to justify the position of this court that there are several agencies, bodies and institutions, beyond the Attorney-General of the Federation and/or his counterpart in the State, with powers to prosecute specific offences.

> "**7. (1) That the Commission has power to-**
>
> **(a) cause investigations to be conducted as to whether any person corporate body or organisation has committed an offence under this Act or other law relating to economic and financial crimes; and**
>
> **(b) cause investigation to be conducted into the properties of any person if it appears to the Commission that the person's life style and extent of the**

properties are not justified by his source of income.

(2) in addition to the powers conferred on the Commission by this Act, the Commission shall be the co-ordinating agency charged with the responsibility of enforcing the provisions of"

"(a) the Money Laundering Act 2004, 2003 No. 7. 1995; No. 13.

(b) the Advance Fee Fraud and Other Fraud Related Offences Act 1995;

(c) the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, as amended;

(d) the Banks and other Financial Institutions Act 1991; as amended; and

(e) Miscellaneous Offences Act; and

(f) any other law or regulations relating to economic and financial crimes including the criminal code and penal code.

"13. (1) The General and Assets Investigation Unit shall be charged with responsibilities for-

(a) the prevention 'and detection of offences in violation of the provisions of this Act;

(b) the arrest and apprehension of economic and financial crime perpetrators;

(c) the investigation of assets and properties of persons arrested for committing any offence under this Act;

(d) the identification and tracing of proceeds and properties involved in

any offence under this Act and the forfeiture of such proceeds and properties to the Federal Government; and

(e) dealing with matters connected with extradition and mutual assistance in criminal matters involving economic and financial offences.

(2) The Legal and Prosecution Unit shall be charge with responsibility for-

(a) prosecuting offenders under this Act;

(b) supporting the General and Assets Investigation Unit by providing the unit with legal advice and assistance, whenever it is required

(c) conducting such proceedings as may be necessary towards the recovery of any assets or property forfeited under this Act and

(d) performing such other legal duties as the Commission may refer to it from time to time

(3) There shall be appointed or each of the units a principal officer who shall be known by such designation as the Commission may determine.

Clearly, it is absolutely impossible to agree less, that the above quoted provisions of the Economic and Financial Crimes Commission (Establishment) Act Cap. El, LFN, Vol. 5, 2004 empowers the prosecutors in Legal and Prosecution Unit of the EFCC to prosecute any person who commits any of the offences that the Commission is empowered to prosecute under the Act. The lower court was, therefore, right in my view to have

A applied the law correctly when it held that the powers and duties of the EFCC as stated under section 13(2) allows the legal and prosecution unit of the commission to prosecute offenders under the Act. Without prevarication, section 7 (2) (f) empowered the EFCC to enforce any law or regulations
B relating to Economic and Financial Crimes, including the penal code.

It is not in contention that:

C **"(1) the Attorney-General of Katinsa State has donated a fiat to the respondent's agency (the EFCC) to prosecute the appellants pursuant to section 211 of the Constitution;**

D **(2) by section 7 (1) the Commission has power to cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under the Act or other law**
E **relating to economic and financial crimes;**

(3) by section 7(2)(f), in addition to the powers conferred on the commission by the Act, the commission shall be the co-ordinating agency
F **charged with the responsibility of enforcing the provisions of *any other law or regulations relating to economic and financial crimes including the criminal code and penal code;***

G

(4) by the provisions of 13(2) the legal and prosecution unit shall be charged with responsibility for prosecuting the offenders."

H

With those key points, the regime of anti-corruption law in Nigeria is meant to be symbiotically applied, implemented and given effect by both Federal and State agencies. There is much wisdom in so doing. There is a national revolt
I by all concerned against corruption and financial crimes, at all levels of the courts- including ours as the Supreme Court of the land. Indigenous philosophies of Nigerians support this symbiotic, multi-institutional,

pronged-approach to the war against corruption and financial infelicities, more appropriately called financial crimes.

As between EFCC Act and Penal Code, or between Federal Government of Nigeria and Katsina State of Nigeria, what matters most, and justifiably so, is that corruption and financial crimes be tracked, investigated, prosecuted and punished. The age-old indigenous view in Southwest (and perhaps in other parts of Nigeria) is that the "snake of financial crime" be not allowed to escape on account of gender sentiments. It matters not if the 'monstrous snake' of corruption and financial crimes biting Nigeria is killed by a man or women; all that matters is the death of the 'deadly snakes' of corrupt practices and financial hooliganism daily killing Nigeria and Nigerians.

At this stage, the guilt of the appellants is not yet established. This matter is yet to be tried but has only travelled the long, tortious journey of interlocutory appeal to prove or test the law. That is why we must, as a court of law of last resort, set the law straight. It is the intention of the makers of the law, that the EFCC prosecutes financial crimes. To the extent that a State has not, for the time being, established equivalent agency like the EFCC for dealing with Economic and Financial Crimes Commission at the state level, the powers of the EFCC remains extant. This is because the EFCC is vested with powers to co-ordinate and enforce related provisions in the penal code-which provisions do not violate any known law of Katsina State.

The law on the hierarchy of laws in Nigeria, is as stated by Kalgo JSC (as he then was) in **ATTORNEY GENERAL, ABIA STATE vs. ATTORNEY GENERAL, FEDERATION** (2002) 6 NWLR (Pt. 763) 264 at PAGES 479-480:

> **"The Constitution is what is called the grundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. By the provisions of the Constitution, the laws made by the National Assembly come next to the Constitution, followed by those made by the House of Assembly of a State."**

Thus, the lower court was right when it held at page 310 of the record of appeal thus. "Further, the argument that the criminal procedure code law of Katsina State does not provide for or accommodate the power of the Economic and Financial Crimes Commission to institute criminal proceedings in the High Court of Katsina State by filing of information cannot change this position. This is because it will mean that the criminal procedure code law of Katsina State is in obvious conflict with the Economic and Financial Crimes Commission (Establishment) Act."

To the extent of the above provisions of the law, it is our considered view that the lower court applied the law correctly. The law evinces a clear intention that, with or without express delegation from the Attorney General of Katsina State, the EFCC could validly prefer the present charges and prosecute the appellants in the name of the Federal Republic of Nigeria as a common agency of both the Attorney General of the Federation and Attorney General of Katsina State. We agree with the respondent that a community reading of provisions of Sections 15((5) and 211 (1)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended); Sections 6(m), 7(f), 13(2)(a) and (d) and 46 of the EFCC (Establishment) Act, 2004 and Section 185(a) of the criminal procedure code (CPC), Cap 37, laws of Katsina State, 1991 gives the EFCC powers to do what it sought to do by attempting to prosecute the appellants.

In view of the foregoing, issue one is resolved in favour of the respondent, and we hold that the Economic and Financial Crimes Commission possess the power to institute the present criminal proceedings against the appellants in the High Court of Katsina State by filing of information.

RESOLUTION OF ISSUE 2:

> **"Whether having regard to the circumstances of the case leading to this appeal, the lower court was not right to have upheld the decision of the trial court that the charge (No. KTH/34C/16) and the proof of evidence thereof are competent and not in breach of section 36 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999?"**

A

The main contention of the appellants on this issue is that they were not availed of the prosecution's documents to be used in proof of its case such as statements of accused persons, statements of witnesses and every other
B documentary evidence to be used by the prosecution and that such lapse or breach amounted to a breach of their rights as guaranteed by section 36(6)(b) of the 1999 Constitution.

The learned senior counsel to the appellants submitted emphatically,
C that the Court of Appeal was wrong when it held that the appellants were not entitled to the documents requested from the prosecution until after plea had been taken and by so holding made out a new case for the respondent. Counsel pointed out the perceived offensive part of the ruling of the lower court as
D contained at page 321-322 of the records, where his lordship Abiru JCA held as follows:

> **"Section 36 (6) (b) only comes to play after charges have been**
> E **preferred and the accused person has pleaded to the charge preferred, and even then, it is not automatic and has to be applied for. Therefore, the non-service, and even the non-provision, of the 'facilities' for defence along with the proofs**
> F **of evidence accompanying a charge cannot constitute an omission and it cannot make the proofs of evidence incomplete or inchoate and in breach of section 36 (6) (b) of the constitution. There is nothing in section 36 (6) (b) of the**
> G **constitution. There is nothing in section 36 (6) (b) of the 1989 Constitution that can invalidate a charge preferred against an accused person. The proofs of evidence served on the appellants, along with the charge, met the requirements of**
> H **the law. It is settled law that the purpose of serving proofs of evidence on an accused person is to give him the opportunity of knowing what the prosecution witnesses are coming to court to say against him EDE vs. THE STATE (1977) 1 FCA**
> I **95, ABACHA vs. THE STATE (2002) 11 NWLR (Pt. 779) 437…"**

On the basis of the foregoing, the learned senior counsel to the appellants urged this court to resolve this issue in favour of the appellants, and to hold that they were not availed of the prosecution's documents to be used in proof of its case contrary to section 36(6)(b) of the 1999 Constitution.

The appellants further contended that the ruling of the trial judge, which was upheld by the lower court, stemmed from the misconception that the proof of evidence annexed to the charge. He contended that the trial court was in error of law, and which error was wrongly upheld at the lower court. On this basis, the appellants urged us to resolve issue two in its favour.

The respondent debunked the appellants' arguments as totally misconceived. According to the learned senior counsel for the respondent, the decision of the lower court that the charge filed against the appellants, along with the proofs of evidence, is competent was based on sound reasoning and this court has no business tampering with it. The learned senior counsel to the respondent contended that the charge sheet served on the appellants had attached to it a proof of evidence which had the names and addresses of the witnesses; the summary of the evidence the witnesses would give; and of course the list of exhibits to be tendered as contained at pages 8 22 of the records. Counsel insisted that no other facilities are required for the appellants to know and anticipate the charges against them.

The learned senior counsel to the respondent contended further that the courts have interpreted the phrase "be given adequate facilities for the preparation of his defence" in section 26 6(b) to mean that a person charged with an offence is entitled on demand to be given anything that would assist him in preparing his defence to the charge, including the statements of the prosecution witnesses and his own written statements. To buttress its position, the respondent cited the cases of **OKOYE vs. COMMISSIONER OF POLICE** (2015) LPELR-24675 (SC), **AKABOGU vs. THE STATE** (2016) LPELR-40929 (CA), **NWEKE vs. THE STATE** (2017) LPELR-42103 (SC), **IBRAHIM vs. STATE** (2017) LPELR SC 652/2013.

The respondent submits further that the lower court was on sound legal footing when it affirmed the decision of the trial court that there were enough facilities available for the defence to defend themselves and that the proof of evidence was competent and not in breach of section 36(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

In conclusion, the learned senior counsel to the respondent submitted that the charge No. KTH/34C/2016 and the proofs of evidence thereof are competent and in total compliance with the requirements of the applicable law. The learned senior counsel asserted that the decision of the lower court cannot be faulted if carefully perused by this court, and urged the court to resolve this issue in favour of the respondent.

In resolving this issue, it is pertinent to reproduce the provisions of Section 36(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

> **"Every person who is charged with a criminal offence shall be entitled to:**
> **(a) Be informed promptly in the language he understands and in detail of the nature of the offence;**
> **(b) Be given adequate time and facilities for the preparation of his defence…"**

To all intent and purposes, the phrase ***"be given adequate facilities for the preparation of his defence"*** in the above provision is general and open-ended. It is meant to ensure that the accused person or persons receive necessary hints, aid and assistance necessary that would assist him in preparing his defence to the charge, including the statements of the prosecution witnesses and his own written statements. See **OKOYE vs. COMMISSIONER OF POLICE** (supra), **AKABOGU vs. THE STATE** (supra); **IBRAHIM vs. STATE** (supra).

In this appeal, it is obvious that what the appellants seek is to ***"be given adequate time and facilities for the preparation of his defence",*** which would appear to have been made available by way of proofs of evidence which had the names and addresses of the witnesses; the summary of the evidence the witnesses would give; and the list of exhibits to be tendered as contained, all which are contained in pages 8-22 of the records. Clearly, what the appellants desire, I think inappropriately, to be availed with the primary documents the prosecution would tender in evidence in the charge and/or provide them a complete proof of evidence containing the said primary

documents. Our attention is drawn to paragraphs 15 and 19(i), (ii) and (iii) of the affidavit in support of the appellants' motion (at pages 53 and 54 of the records of appeal), which forms the basis of this appeal. Their grouse in the said motion is that the respondent has not served actual documents, not just the copies thereof, which the prosecution intends to rely upon at the trial.

It is my candid view that the lower court did justice to this issue when it affirmed the decision of the trial court that non-availability or provision of all the documents i.e. statements of accused persons and all witnesses, investigation reports, bank statements and other documents by the prosecution to the accused persons did not breach the provisions of section 36(6) (b) of the 1999 Constitution. This is because the application was premature. As at the time of the appellants' application before the trial court leading to this appeal was brought, the appellants had not taken their plea to the charge which made the application to be premature and untenable.

Finally, on this point, I wish to restate the fact that the intention of Section 36 (6)(a) and (b) of the 1999 Constitution (as amended) is to give an accused person the opportunity to know the case against him and to prepare and be heard on his defence. Therefore, I hold that the 22 count charge, the proof of evidence, list of exhibits, list of witnesses with their addresses that accompany charge No. KTH/34C/2016 are competent and in sufficient compliance with the requirements of Section 36(6)(a) and (b) of the 1999 Constitution (as amended). In sum, issue two is resolved in favour of the appellants.

I need to make one final point before concluding this ruling by responding specifically to the request made on this court by the appellants to depart from its previous decisions. Put differently, the appellants have labored to persuade this court to depart from its previous decision in **DARIYE vs. F.R.N.** (supra) and **NYAME vs. F.R.N.** (supra). However, appellants failed to state or demonstrate any cogent reason, ground or situation justifying a departure from the aforementioned decisions of this court. This court may, and could in justifiable cases, depart or overrule its previous decisions under certain identifiable circumstances and in accordance with the laid down principles of law. The Supreme Court could depart from its previous decisions where it is shown or demonstrated that the earlier decisions are either erroneous in law; reached per ***incuriam*** or occasioning a miscarriage of

justice. In the instant case, the appellant invited the Supreme Court to overrule its previous decisions on the interpretation that section 7(1), (2) and Section 13(2) of the EFCC Act which provides the EFCC with the powers and right to prosecute under the penal and criminal codes of States in the State High Court.

It needs to be said clearly, and for the avoidance of misconceptions of the principle or basis of the rule on departing from previous decisions, that this court does not indulge in the practice of departing from its previous decisions to suit the whims and caprices of the litigants, but to sustain the ends of justice. The Supreme Court has never, and may that day never be dawn, when it will depart from its previous decisions merely because the decision(s) is and/or are against the case presented by the parties.

In this interlocutory appeal, the appellants have not shown or demonstrated that the above decisions of the Supreme Court in **DARIYE vs. F.R.N.** (supra) **and NYAME vs. F.R.N.** (supra) complained of are erroneous in law or given per ***incuriam*** or contrary to public policy thereby occasioning miscarriage of justice. That is not the case here. Quite frankly, if there is anything in those two cases, they affirm and seek vehemently to implement and apply the public policy against corruption and financial crimes, what I described above as 'deadly snakes' of corrupt practices and financial hooliganism daily killing Nigeria and Nigerians."

Therefore, the 'unholy' invitation of the appellants to depart from those decisions of this court for the sole benefit of twisting this appeal in their favour is hereby refused as baseless, and unjustifiable. Ours is to look beyond the sometimes deceptive, woolly persuasions of all counsel, and this should be the position in all cases and appeals, to ensure that justice is not only done, but manifestly seen by all and sundry to have been done.

Having resolved the two issues formulated in this appeal against the appellants and in favour of the respondent, it necessarily means this appeals is unmeritorious. Therefore, I rule and declare that this appeal lacks merit and is accordingly dismissed.

I affirm the judgment of the lower court.

That will be the judgment of this court.

Sidi Dauda Bage
Justice, Supreme Court

APPEARANCES

J.B. Daudu (SAN) with A.T. Kehinde (SAN), E.Y. Kura (SAN), Aliyu Ahmed and Uyi Igunma, for the Appellant.

L.O. Fagbemi (SAN) with J. S. Okutepa (SAN), Dr. J.O. Olatoke (SAN), A.U. El-Marzua A.G. Katsina State and M.S. Abubakar Esq., for the Respondent.

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Sidi Dauda Bage JSC and to register that support, I shall make some comments.

This is an appeal against the decision of the full panel of the Court of Appeal. Kaduna Division or court below or lower court delivered on the 12th day of September, 2017, Coram: Adzira Gana Mshelia, Uchechukwu Onyemenam, Stephen Jonah Adah, Habeeb Adewale Olumuyiwa Abiru and Mudashiru Nasiru Oninyangi JJCA which affirmed the decision of the Katsina State High Court delivered on 21st February, 2017 per Ibrahim M. Bako J. dismissing the appellants' motion on notice filed on 4th January, 2017 seeking the reliefs on the face of the motion paper which shall be recast hereunder; viz:

1. **An Order terminating the instant proceedings i.e. charge No:KTH/34C/2016 FRN vs. Ibrahim Shehu Shema & 3 ors because the offences alleged against the applicants are offences cognizable and punishable under the penal code Cap 96 Laws of Katsina State and are therefore not Federal Offences which the Federal Republic of Nigeria or any of her Agencies particularly the Economic and Financial Crime Commission can prosecute.**

2. An Order of this honourable court quashing and/or striking out the instant charge No. KTS/34C/2016 between FRN vs. Ibrahim Shehu Shema & 3 Ors, dated and filed on the 16th of December 2016 because being

state offences cognizable and punishable under the penal code Cap 96 Laws of Katsina State, they can only be instituted by the Attorney General of Katsina State in the name of Katsina State or the Commissioner of Police.

ALTERNATIVELY

3. An Order directing the prosecutor to furnish the defence with all documents inclusive of all the statements made by the defendants, statements made by all the witnesses, police investigation reports, statement of bank accounts in compliance with section 84 of the evidence act, and every other document relevant to the prosecution of this matter.

4. An Order staying further hearing of these proceedings until the Order of this honourable court granting the defendant leave to access all documentary evidence to be relied on by the prosecution in the instant trial is obeyed and or complied with.

5. An Order dispensing with the physical appearance and arraignment of 1st -4th appellants/applications in the instant charge No. KTH/34C/2016 between FRN vs. Ibrahim Shehu Shema & 3 Ors during and pending the determination of this motion on notice.

6. And for such further order/orders as this honourable court may deem fit to make in the circumstances.

The grounds upon which the above reliefs were sought are as follows:

(a) That the proceedings was initiated in total disregard for due process and absence of constitutional authority and locus standi on the part of the

prosecutor who initiated the proceedings.

(b) That the proofs of evidence are incomplete.

(c) That the 22 counts contained in the charge are vague, ambiguous, unspecific, nebulous and speculative.

(d) That the materials being sought to be relied upon by the prosecution i.e. witness statements, appellant's statement and other sundry documentary evidence have not been given to the defendants or through their learned counsel.

(e) That this honourable court does not have the vires/jurisdiction to entertain or adjudicate upon this case.

(f) This honourable court has inherent judicial powers to grant all the reliefs sought above.

The full details in the background facts are well set out in the lead judgment and so dispensing of the need to repeat them except for when the occasion calls for a reference in the course of this appeal.

On the 8th day of November, 2017 date of hearing, learned Senior Advocates J.B. Daudu, A.T. Kehinde and E.Y. Kurah adopted their appellant's brief of argument filed on the 18th day of October 2017 and a reply brief filed on 30/10/17. In the appellant's brief of argument were formulated three issues for determination which are as follows:

1. Whether contrary to the resolution of the court below, the issues formulated by the appellants in the court below, did not arise from the grounds of appeal and the facts in the printed record, and whether such a finding did not prejudice the mind of the said court below when it held that appellants were not entitled to the documents requested from the prosecution until after plea had been taken and by so holding made out a new case for the respondent. (Issue 1) (Grounds 1 and 9).

2. Whether the Kaduna Division of the Court of Appeal

was right when it affirmed the decision of the Katsina High Court that the Attorney-General of Katsina State has the powers to invite EFCC (An Agency of the Federal Government) to prosecute the appellants in the name of the Federal Republic of Nigeria before the Katsina State High Court for offences allegedly committed under the penal code Cap 96 Laws of Katsina State (Issue No 2) (Grounds 2, 3, 4, 5 and 6 of the identical notices of appeal).

3. **Whether the Kaduna Division of the Court of Appeal was right when it affirmed the decision of the Katsina State High Court that the non-availability of all the documents i.e. statements of accused persons and all witnesses, investigation reports, bank statements and other documents by the prosecution to the accused persons did not breach the provisions of Section 36 (6) (b) of the 1999 Constitution. (Issue No 3) (Grounds 7, 8 and 10 of the identical notices of appeal).**

L.O. Fagbemi SAN, J.S. Okutepa SAN and Dr. J.O. Olatako SAN for the respondent adopted its brief of argument filed on 24/10/17 and in it were raised three issues for determination, which are thus:

1. **Having regard to the grounds of appeal and the facts in the printed record, whether the Court of Appeal was not right in its approach of formulating and/or reformulating relevant issues for determination submitted by parties, after holding that the appellants issue 2 was incompetent and whether same has occasioned any bias and/or miscarriage of justice in the entire circumstance of the appeal (Ground1 and 9 of the identical notices of appeal).**

2. **Whether having regard to the provisions of relevant**

laws and judicial authorities especially section 211 Constitution of the Federal Republic of Nigeria, the lower court was not right when it upheld the decision of the Katsina State High Court that the EFCC as a common agency for both Federal and State High Court for offences in the penal code law, Cap 96, Laws of Katsina State, with or without the Attorney General's authorization (Grounds 2, 3, 4, 5 and 6).

3. Whether having regard to the peculiar circumstances of the case leading to the appeal, the lower court was not right to have upheld the decision of the trial court that the charge No. (KTH/34C/2016) and the proof of evidence thereof are competent and not in breach of section 36 (6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (Grounds 7, 8 and 10).

I shall make use of the issues as raised by the appellants for ease of reference.

ISSUE 1

Whether contrary to the resolution of the court below, the issues formulated by the appellants in the court below, did not arise from the grounds of appeal and the facts in the printed record, and whether such a finding did not prejudice the mind of the said court below when it held that appellants were not entitled to the documents requested from the prosecution until after plea had been taken and by so holding made out a new case for the respondent.

Learned counsel for the appellants submitted that grounds 1, 2 and 3 challenge the competence of the charge was filed and whilst grounds 4 and 5 highlight the constitutional imperativeness of the making available of copies of the documentary material to be relied upon in the trial by the prosecution. That

A the court below was expected to adjudicate on the two issues formulated in the appellants' amended brief and not doing so rendered the adjudication of the court below faulty. The cases of **Ayinde vs. Adigun** (1993) NWLR (Pt.313) 516; **Triana Ltd vs. U.T.B. Plc** (2009) 12 NWLR (Pt. 1155) 313 at 329 -330,
B relied upon.

That the court below showed a preference for the respondent's issues for determination as opposed to those of the appellants' and in doing so re-crafted the case before it leaving no option but to ascribe a judicial bias against
C the appellants' case. The case of **African International Bank Ltd vs. Integrated Dimensional System Ltd & Ors** (2012) LPELR-9710 (SC).

That what the lower court did was to go against the principle which is that, it is the plaintiff's case that determines the jurisdiction of the court and on
D appeal, the equivalent of plaintiff's claims is the notice of appeal and appellant's brief of argument. The case of **Babale vs. Abdulkadir** (1993) 2 SCNJ 110.

Learned counsel for the appellants contended that it is not in the interest
E of a fair or speedy trial as the court below denied the appellants of a constitutional right due to them and instead raised self-imposed hurdles of plea being taken before such a right could inure in accordance with Section 36 (6) (b) of the 1999 Constitution. The case of **Obawole vs. Williams** (1996) 10
F NWLR (Pt. 477) 146.

In response, learned counsel for the respondent stated that there is no disputing the fact that an appellate court has the right, indeed duty where appropriate to formulate issue(s) for the determination of an appeal
G particularly where it is of the opinion that the issues as formulated by counsel for the parties do not deal with the substantive issue in controversy in the appeal provided the issue(s) is/are consistent with the ground(s) of the appeal. That the step or approach taken by the lower court was appropriate,
H unassailable and cannot be faulted in law in the entire circumstance of this appeal. That it is now settled that an appellate court may, where it deems the issues formulated for the determination of an appeal incapable of serving the interest of justice, reframe or formulate new issues for determination of the
I appeal. That the court has powers to get into the meat of the matter before it and answer the questions raised not necessarily in the way and manner formulated by either of the parties, but in such a fashion that it is clear that the

dispute has been considered and the justice of the matter brought out and dealt with to finality. It was stated for the respondent that there is no format in so doing so long as justice is served and as far as the issues arise from the grounds of appeal. The case of **Okeke vs. State (2016) 7 NWLR (Pt. 1512) 417 at 343; Adeniyi vs. Fabiyi (1992) 5 NWLR (Pt. 242); Pius vs. State (2016) 9 NWLR (Pt. 1517) 341 at 354-355, Gundiri vs. Nyako (2014) 2 NWLR (Pt. 1391) 211** etc.

It was submitted for the respondent that this court will not set aside the judgment of the lower court since the decision is right even if the reasons given were wrong. The cases of **U.B.A vs. Achoru** (1990) 9-10 SC 115; **Ibulunye vs. Dikibo & Ors** (2010) 18 NWLR (Pt. 1225) 627.

Learned counsel for the respondent stated that it is not correct that the lower court ***raised*** the issue suo motu without hearing the parties thereon. He cited; **Ayinde vs. Adigun** (1993) NWLR (Pt. 313) 516; **Babale vs. Abdulkadir** (1993) 2 SCNJ 110 etc.

The appellants put forward the argument that the court below did not utilise the issues as formulated by them even though they arose from the grounds of appeal and rather that lower court formulated issues with which it determined the appeal before it. I shall recast the very words of the court below thus:

> **"Now, one of the most elementary principles of appellate court practice is that an issue for determination must relate to and arise from the grounds of appeal Ebute vs. Union of Nigeria Plc (2012) 3 NWLR (Pt. 1284) 254, Odusote vs. Independent National Electoral Commission (2014) 17 NWLR (Pt. 1436) 255. Similarly, it is elementary that an issue for determination must arise from the decision appealed against Shell Petroleum Development Company of Nigeria Ltd. vs. Oruambo (2012) 5 NWLR (Pt. 1294) 591. *Therefore, only issues for determination which are formulated within the parameters of the grounds of appeal and stemming from the decision appealed against are competent to be* ventilated Sha vs. Kwan (2000) 8 NWLR (Pt. 670) 685 and Agbakoba vs. Independent National Electoral Commission**

(2008) 18 NWLR (Pt. 1119) 489. ***Counsel to the appellants indicated in their brief of arguments that the second issue formulated for determination formulated by them arose from Grounds 1, 2, and 3 of the notice of appeal – read through the 3 grounds of the appeal as well as the Ruling appealed against shows clearly that the second issue for determination of the appellants as couched, was not formulated within the parameters of the grounds of appeal and neither did it entire (sic) stem from the decision of the lower court. The question of whether or not "the Attorney General of Katsina State has the powers to invite EFCC (an Agency of the Federal Republic of Nigeria before the Katsina State High Court for offences allegedly committed under the penal code" law of the Katsina State which formed the core of the second issue for determination, as formulated by the counsel to the appellants, was not raised either in the motion of the appellants before the lower court or in the written arguments of their counsel on the motion paper and neither was it touched on upon by the lower court in the Ruling appealed against and it was not mentioned anywhere in the grounds of appeal. The second issue for determination as formulated by the appellants in thus incompetent.***

The first issue for determination was distilled from Grounds 4 and 5 on the respective notices of appeal of the appellants. Again reading through the first issue for determination as formulated by the counsel to the appellants, it does not entirely emanate from the decision of the lower court appealed against. The case canvassed by the appellants in their written addresses before the lower court and in respect of which the lower court made findings in the Ruling was that the non-service of all the statements made by the appellant, statements made by all the proposed witnesses, police investigating reports, statement of bank accounts and every other document relevant to the prosecution of this matter as part of the proofs of evidence

A ***rendered the proof of service incomplete, inchoate and in breach of the provisions of section 36(6) of the 1999 Constitution. The question before the lower court was "non-service of the documents as part of the proof of evidence" and***
B ***not "non-availability" of the documents as stated in first issue for determination formulated by the counsel to the appellants and there is a world of difference between the two phrases" (italics for emphasis).***
C

The point has to be made that in formulating issues of its own for the determination of the appeal, the Court of Appeal was within its powers to do so as long as the issues were consistent or arose from the grounds of appeal filed
D by the appellant. Also the appellate court was free if it chooses to for ease of handling the task before it to adopt the issues as framed either by the appellant or the respondent or even use any of the issues from either side suitable for its purpose, again such issues must have come from the grounds of appeal and not
E outside.

It is in the observance of the principle which leads the court in the pursuit of the proper administration of justice that the court would do either of those things above pertaining to the issues or questions to be answered in the
F appeal. A look at grounds 1, 3 and 4 of the appellant's motion on notice, the trial courts Ruling and the grounds of the notice of appeal would show the reasons for the appeal court's jettisoning of the issues as raised by the appellant and going further to substitute its own which that court considered apt and
G appropriate. What I am trying to say is that an appellate court is not shackled or bound to use the issue as raised only by the appellant or any party if in doing so, the court would risk losing its way, rather the court should use the issues that would guide it and if not to set the tone with questions crafted by itself as a
H roadmap to answer the posers that are to be solved. The condition in all this is that the issues stem from the grounds of the appeal and the interest of justice which is the focal point in it all and there is no format. See: **Abiru vs. State** (2011) 17 NWLR (Pt. 1275) 1 at 17-18, **Labiyi vs. Anretiola** (1992) 8 NWLR
I (Pt.258) 139; **Aduku vs Adejoh** (1994) 5 NWLR (Pt. 346) 582; **Ogunbiyi vs. Ishola** (1996) 6 NWLR (Pt. 452) 12; **Okeke vs. State** (2016) 7 NWLR (Pt. 1512) 417 at 434.

A From what is seen in the record, particularly the decision of the Court of Appeal it is easy to see that the court below fully understood and appreciated the complaint of the appellants as it could see from the issues the appellants crafted from Grounds 1, 2 and 3 while Issue 2 stemmed from Grounds 4 and 5
B of the notice of appeal and that full knowledge of the lower court is evident from an excerpt of the judgment thus:

> C **"The contention of the appellants under this issue for determination are in three phrases- (i) that by the concept of Federalism provided for in the 1999 Constitution of Nigeria (as amended), the economic and financial crimes commission has no power to initiate and commence**
> D **criminal prosecution in the Katsina State High Court in respect of offences committed under the penal code law of Katsina State; (ii) that the fiat given to the Economic and Financial Crimes Commission by the Attorney General of**
> E **Katsina State to prosecute the appellants under the penal code law of Katsina State was unconstitutional and amounted to an abdication of sovereignty by the Katsina State Government, and (iii) that by the fiat, the Attorney**
> F **General of Katsina State constituted the Economic and Financial Crimes Commission into an agent of Katsina State and that the criminal proceedings ought to have been commenced in the name of Katsina State and not in the**
> G **name of the Federal Republic of Nigeria".**

And further held thus:

> H **"Now, as stated earlier in this judgment, the contention of the appellants before the lower court and in respect of which the lower court made findings in the Rulings was that the non-service of all the statements made by the appellants,**
> I **statements made by the all the proposed witnesses, police investigation reports, statements of bank accounts and every other documents relevant to the prosecution of this matter as**

part of the proof of service rendered the proof of service incomplete, inchoate and in breach of the provisions of section 36(6) of the 1999 Constitution. The issue was not whether the appellants were "entitled" to be given those processes as part of the "facilities" necessary for their defence".

The slant of the arguments of the appellants is that the court below was biased when it by-passed the issues as formulated by the "appellants and framed new questions answering them in favour of the respondent as shown in part of the judgment above and thereby displayed some bias against the appellants. That angle portrayed by the appellants is difficult to accept in that the court below was free to do what it did since in utilizing the court's crafted issues, the court had its sight on the grounds of appeal and resolved the concerns of the appellants as to whether the Katsina State, Attorney General could validly issue his fiat to anyone or prosecuting agency outside Katsina State to prosecute a criminal matter pursuant to the penal code applicable in Katsina State.

The Court of Appeal answered in the affirmative and that in doing so the concept of Federalism provided for in the 1999 Constitution of Nigeria (as amended) was not infracted and I agree with that position. Again that the criminal proceedings were commenced in the name of the Federal Republic of Nigeria and not Katsina State is not an argument that could be sold, because Katsina State is part of the Federation of Nigeria and so whether in the name of Katsina State or the Republic of Nigeria or EFCC or the commissioner of police, the validity of the charge would not be impugned. The deciding factor is that the matter being crimes allegedly committed against Katsina State, it is that state through the instrumentality of the Chief Law Officer that is its Attorney General has set the ball rolling and in this instance, the Attorney General has done the extra by being at the side of the Economic and Financial Crimes Commission (EFCC) in initiating and prosecuting the matter. Therefore the argument that the EFCC is an interloper and entering into the domain of a federating unit without right is not one that can be sustained in the prevailing circumstances where the State Attorney General has within powers directed the EFCC to prosecute.

A The allegation of bias touted by the appellant as the reason for the court below doing what it did in reformulating the issues is not borne out of the record. The caution of this court in the case of **Adebesin vs. State** (2014) 9 NWLR (Pt. 1413) 609 per Ngwuata JSC is applicable here and it is thus:

B

> **"My Lords, it has become fashionable for a certain category of learned counsel to rake up unfounded claims of bias against trial court and the court below, in some cases in**
> C **more vocal terms than the appellant herein. These allegations are serious and reflect adversely on the adversary process of our jurisprudence. They should not be made unless counsel making them has facts in or out of**
> D **the records to substantiate same. To say that a judge is biased in the resolution of dispute before him is no less than saying that the judge is in breach of the sacred, solemn and judicial oath administered on every judge to dispense**
> E **justice without fear or favour, affection or ill-will to all manner of men. We all took, and are bound by, the solemn oath and a false and unsubstantiated allegation of breach of the said oath is no less a serious matter than proven of**
> F **breach of same."**

To be said is that assuming that the court below went through the wrong route in arriving at its decision and that is not the case here so long as the conclusion
G is correct, that decision will not be set aside since the decision is correct. See: **U.B.A vs. Achoru** (1990) 9-10 SC 115; **Ibulunye vs. Dikibo & Ors** (2010) 18 NWLR (Pt. 1225) 627.

The appellants had sought from the trial court for it to direct the
H prosecutor to furnish the defence with all the documents inclusive of all the statements made by the defendants, statements made by all the witnesses, police investigating reports, statements of Bank Accounts in compliance with section 84 of the Evidence Act, and every other document relevant to the
I prosecution of this matter.

The respondent's reaction to that request is that the prayer was premature, the plea having not been taken.

A The trial court refused to grant the prayer and on appeal the court below went along the line towed by the court of first instance hence the ventilation of the grievance at this stage citing bias on the part of the court below for its decision. I agree with the conclusion of the two courts below, that section B 36(6) of the 1999 Constitution was not infracted. I say so because the non-service of all the statements made by all the proposed witnesses, police investigating reports, statements of bank accounts and every other documents rendered the proof of service incomplete, inchoate was not in breach of the C provisions of section 36(6) of the 1999 Constitution as the plea has not been taken. It is unfounded and misleading that the court below made out a case for the respondent as what that court did, the parties or none of them was kept in the dark and unheard. I rely on the cases of **A.C.B. Ltd vs. Integrated** D **Dimensional System Ltd & Ors** (2012) LPELR-9710 (SC). **Ayinde vs. Adigun** (1993) NWLR (Pt. 313) 516; Western Steel Works Vs. Iron and Steel Workers Union (1987) 1 NWLR (Pt. 49) 28; **Obawole vs. Williams** (1996) 10. NWLR (Pt. 477) 146, which have shown the way and that the appellants E cited them in vain since they do not avail them.

In conclusion the issue is resolved against the appellants.

ISSUE 2

F

Whether the Kaduna Division of the Court of Appeal was right when it affirmed the decision of the Katsina High Court that the Attorney-General of Katsina State has the powers to G **invite EFCC (An agency of the Federal Government) to prosecute the appellants in the name of the Federal Republic of Nigeria before the Katsina State High Court for offences allegedly committed under the penal code Cap 96 Laws of** H **Katsina State.**

Learned counsel for the appellants contended that the delegation to EFCC by the Attorney General of Katsina State can only be construed as being I tantamount to Katsina State surrendering its independence or sovereignty to the Federal Republic of Nigeria, a situation anathema to the Federal System of government. He referred to Section 4(4), (5), (6) and (7) CFRN 1999; **NITEL**

PLC vs. Awala (2002) 3 NWLR (Pt. 753) 1 at 13 (CA), Section 211 CFRN 1999.

That there is a need for the Supreme Court to depart from its decision in **Nyame vs. FRN** (2010) 7 NWLR (Pt. 1193) 394.

The case of **Bucknor-Macleans vs. Inlaks Ltd** (1980) 8-11 SC 1; **Tewogbade vs. Obadina** (1994) 4 SCNJ 161.

Learned counsel for the appellant submitted that the Attorney General of Katsina State expressly delegated his powers of prosecuting his state offences under the laws of Katsina State to Legal Department of EFCC and so EFCC brought the charges under the laws of Katsina State in the name of the Federal Republic of Nigeria which is out of tune with the authority given to it. He cited **Yabatech vs. M.C. & D. Ltd** (2014) 3 NWLR (Pt. 1395) 616 at 659; **Okafor vs. Nnaife** (1987) 4 NWLR (Pt. 64) 129.

That the names of proper parties before a court of law is jurisdictional and where the proper parties are not before the court as in the instant case, the court will lack the vires to adjudicate on the matter. He referred to: **CBN vs. S.A.P. (Nig) Ltd** (2005) 3 NWLR (Pt. 911) 152 at 177; **Amadi vs. FRN** (2008) 18 NWLR (Pt. 1119) 259 etc.

Learned senior counsel for the respondent submitted that by the provisions of Section 211 (1) CFRN 1999 the Attorney General's power of public prosecution is not exclusive and so anybody or authority is competent to initiate criminal proceedings against an offender, once he is granted the fact to do so which includes institutions such as EFCC. He relied on **Akingbolu vs. FRN** (2012) 9 NWLR (Pt. 1306) 511 at 530 – 533.

That the issue of proper parties not being before the court does not arise as Katsina State is part of the Federal Republic of Nigeria and so can use that name and with any prosecuting body or person to implement its criminal process. He cited **FRN vs. Nwosu** (2016) 17 NWLR (Pt. 1541) 226; **FRN vs. Iweka** (2013) 3 NWLR (Pt. 1341) 285; **A.G. Rivers State vs. A.G. Akwa Ibom State** (2011) 8 NWLR (pt. 1248) 31.

That there is no foundation for the Supreme Court to depart from its earlier decisions in **Dariye vs. FRN** (supra) and **Nyame vs. FRN** (supra).

The grouse of the appellants herein is that the EFCC cannot prosecute a matter emanating from Katsina State in the name of the Federal Republic of Nigeria. The two courts below decided that the EFCC is competent and

empowered to file charge No. KTH/34C/2016 against the appellants before the Katsina State High Court.

The facts leading to the present situation are that the Attorney General of Katsina State gave on fiat to the EFCC to prosecute offences under the laws of Katsina State. The Attorney General went the extra mile to be in court in all the proceedings at the trial court and court below and even before the Supreme Court at this instance. The point being pushed by the appellants is that the EFCC cannot prosecute a Katisina State offence since EFFC is a federal agency and under the concept of federalism would be seen as interloping into a federating unit without vires. That argument in my humble view is for the Katsina State Attorney General to push forward and not for any other person or even the court as the powers of the Attorney General pursuant to Section 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) are not subject to review by any court of law and there is a surfeit of judicial authorities in that regard such as **State vs. Ilori** (1983) 14 NSCC 69 at 75; George vs. FRN (2011) 10 NWLR (Pt. 1254) 1 at 68.

What has transpired in this instance with the Katsina State Attorney General's granting of the fiat to the EFCC and goes further to attend court with the prosecution underscores the fact that the fiat was not mistakenly issued and that the State of Katsina was fully backing the prosecution of the appellants pursuant to its state criminal proceedings. Again, the powers of the Attorney General within Section 211(1) (b) CFRN 1999 is not narrowed to only individual legal practitioners and not institutions such as the EFCC. In response to the concerns of the appellants the lower court stated as follows:

> **What the aggregation of the above mean is that the legal prosecution unit of the Economic and Financial Crimes Commissions, in the exercise of its power of prosecution, is empowered to file information against offenders for offences committed under the provisions of the criminal code or penal code. And since offences under the provisions of the penal code can only be prosecuted in the State High Court, it follows that the legal and prosecution unit of the Economic and Financial Crimes Commission can file information in the State High Court to prosecute offences under criminal**

code or penal code. This is the position as adumbrated by the Supreme Court and by this court in plethora of cases Amadi vs. Federal Republic of Nigeria (2008) 18 NWLR (1119) 259; Ahmed vs. Federal Republic of Nigeria (2009) 12 NWLR (Pt. 1159) 536; Nyame vs. FRN (2010) 7 NWLR (Pt. 1193) 344; Akingbolu vs. FRN (2012) 9 NWLR (Pt. 1306) 511 at 511; Oluese vs. FRN (2013) LPELR 22016 (CA); Dariye vs. FRN (2015) 10 NWLR (Pt. 1467) 325; Oleksy vs. FRN (2017) LPELR-CA/L/981EC/2015, Joel vs. FRN (2017) LPELR-42323 (CA); Bryan vs. FRN (2017) LPELR-42304 (CA); Ezekiel vs. Attorney General of the Federation (2017) LPELR-41908 (SC)"… Similarly provisions concerning the Independent Corrupt Practices Commission were interpreted by the Supreme Court in Attorney General, Ondo State vs. Attorney General, Federation (2002) 9 NWLR (Pt. 772) 222 and the court stated that the Independent Corrupt Practices Commission could institute criminal proceedings for prosecution of offences in any state of the Federation."

The court below went on thus:

"Further, the argument that the criminal procedure code law of Katsina State does not provide for or accommodate the power of the Economic and Financial Crimes Commission to institute criminal proceedings in the High Court of Katsina State by filing of information cannot change this position. This is because it will mean that the criminal procedure code law of Katsina State is in obvious conflict with the Economic and Financial Crimes Commission (Establishment) Act. On the hierarchy of laws on Nigeria, Kalgo JSC stated in Attorney General, Abia State vs. Attorney General, Federation (2002) 6 NWLR (Pt. m763) 264 at pages 479-480 that:

A **The constitution is what is called the grundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the constitution. By the provisions of the constitution,**
B **the laws made by the National Assembly come next to the constitution, followed by those made by the House of Assembly of a State.**

C **The Economic and Financial Crimes Commission (Establishment) Act was passed by the National Assembly and it must thus take procedure over of the criminal procedure law of Katsina State. Thus,**
D **whichever way it is looked at, the Economic and Financial Crimes Commission possesses the power to institute the present criminal proceedings against the appellants in the High Court of Katsina State by filing**
E **of information".**

Continuing further, the court below stated:

F **"It has been pointed out that the provisions of the Act impinge on the cardinal principle of federalism, namely, the requirement of equality and autonomy of the State Government and non-interference with the functions of State**
G **Government.** ***This is true, but as seen above, both the federal and state government share the power to legislate in order to abolish corruption and abuse of office. If this is a breach of the principle of federalism, then I am afraid, it is the constitution***
H ***that makes the provisions that have facilitated the breach of the principle. As far as the aberration is supported by the provision of the constitution, I think it cannot rightly be argued that an illegality has occurred by the failure of the constitution to***
I ***adhere to the cardinal principels which are at best ideals to follow or guidance for an statutes according to its peculiar circumstance. Sections 15(5) of the Constitution is intended to***

A ***instigate the federal and state governments to embark on, and wage, total war on corruption that has become endemic in this country. As Shakespeare would put it, desperate malady deserves desperate remedy. I am sure, this is what has***
B ***informed the enactment of this constitutional provision that is apparently an aberration on the ideals of federalism" (Italics for emphasis).***

C By the provisions of Section 211(1) of the 1999 Constitution as amended, the Attorney-General's power of public prosecution is not exclusive. The "any other authority or person" in subsection (1) can institute and undertake criminal proceedings. Also the office of the Attorney General does not have
D the monopoly of prosecution, in any court and decide whether to go on with it or not. Therefore anybody or authority is competent to initiate criminal proceedings against an offender, once he is granted the fiat to do so. See **FRN vs. Osahon** (2006) 5 NWLR (Pt. 973) 361 at 405 per Belgore JSC (as he then
E was); **Fawehinmi vs. Akilu** (1987) 4 NWLR (Pt. 67) 787; **Comptroller of Prisons vs. Adekanye** (2002) 15 NWLR (Pt. 790) 318.

I shall quote for effect the said section 211(1) CFRN 211(1) The Attorney-General of a State shall have power:

F

(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence
G **created by or under any Law of the House of Assembly.**

(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and

H **(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.**

I For emphasis, I shall refer to a recent case of this court which has settled a lot of the worries of the appellants and that is the case of Kalu vs. FRB (2012) LPELR-9287 where this court held thus:

"I have not seen, nor have I been told, what substantial miscarriage of justice the appellants have suffered by the EFCC prosecuting them for money laundering offences under the name of the "Federal Republic of Nigeria". Let me repeat that Section 15(5) of the 1999 Constitution obligates the Federal Republic of Nigeria, as a State, "to abolish corrupt practices and abuse of power". The enactment of the EFCC Act and the Money laundering (prohibition) Act are all in a bid to discharge not only this constitutional obligation, but also the country's international obligation in the global war against corruption, terrorism, drugs and other cross-border crimes. The appellants, in view of the pronouncement of Lokulo-Sodipe JCA in E.O. Wike vs. FRN (No. CA/A/85/C/2009 of 17th July, 2009), cannot possibly maintain their argument that since the proper complainants were not before the lower court and that in the absence of proper complainants the lower court lacks jurisdiction to try them. I hereby adopt the following passage in the opinion of His Lordship in Wike vs. FRN (supra) to dismiss the submission".

Coming back to the question, my answer is that the court below was right in deciding in affirming the decision of the Katsina State High Court that the Attorney General of that State has the powers to invite EFCC, an agency of the federal government to prosecute the appellants firstly. Also the EFCC so empowered was at liberty to bring the charge and prosecute in the name of the Federal Republic of Nigeria and before a Katsina State High Court for offences allegedly committed under the penal code of Katsina State.

This issue should not be confused as the EFCC did not charge into Katsina State or invaded the state and by its own motion start the initiation and prosecution of erstwhile state functionaries of Katsina State without going through the State Authority in a Federal system such as we operate by law under the 1999 constitution of the federation.

ISSUE 3

Whether the Kaduna Division of the Court of Appeal was right when it affirmed the decision of the Katsina State High Court that the non-availability of all the documents i.e. statements of accused persons and all witnesses, investigation reports, bank statements and other documents by the prosecution to the accused persons did not breach the provisions of Section 36 (6)(b) of the 1999 Constitution.

Learned senior advocate for the appellants stated that the balance the courts strive to maintain, particularly in criminal trial is one of equal opportunity. That this court cannot answer affirmatively that there is a parity of opportunity for both parties in this case where the prosecution has been allowed to play a hide and seek game at the disadvantage to the appellants. He relied on Mohammed vs. Kano a.a. (1968) 1 ALL NLR 412 at 413. That the appellants are entitled to the documentary materials. He cited **Okoye vs. Commissioner of police** (2015) LPELR-24675 (SC); **Akabogu vs. The State** (2016) LPELR-40929, **Goji vs. State** (1975) 5 SC 55; **Kalu vs. FRN** (2014) 1 NWLR (Pt. 1389) 479 at 528 – 547.

For the respondent, learned counsel contended that the court below was right when it affirmed the decision of the trial court that there were enough facilities available for the defence to defend themselves and that the proof of evidence was competent and not in breach of section 36(6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He relied on **FRN vs. Wabara** (2014) ALL FWLR (Pt. 7140) 76 at 93 – 97.

That the respondent supplied the proofs of evidence to the charge and the appellants understood the complaint against them and identified the offences against them as being offences against the law of Katsina State and called them by their names. Learned counsel further submitted that the appellants are reading into the law what has not been provided in it and so cannot be sustained. He cited **Ifezue vs. Mbadugha** (1984) 5 SC 79; **Obeta vs. Okpe** (1996) 9 NWLR (Pt. 473) 401; Criminal Procedure Code Cap 37 Laws of Katsina State 1991 etc.

That the rule of fair hearing is not operated in vacuo and so the

A appellants cannot lawfully resort to section 36 CFRN 1999 to demand for documents not within the ambit of the Katsina State CPC Law and prior to arraignment. He stated that a summary of evidence in form of proof of evidence is all that is required. He cited **Akwuobi vs. The State** (2017) 2 B NWLR (Pt. 1550) 421 at 442-443.

It is to be noted that the respondent as prosecution served on the appellants' proofs of evidence which contained the summaries of statements of the prospective witnesses and had gone on further to set out all the names of C the witnesses they proposed to call in proving the allegations against the appellants, in my humble view the stipulations under section 185 (a) of the Criminal Procedure Code (CPC) Laws of Katsina State 1991 had been met. In the provisions of that law the statement of the accused person is not one of the D materials to be filed along with the charge. Also the statements of witnesses are pieces of evidence which will come up at the trial and so asking to be given the statements of the accused persons before their pleas are taken before trial is not part of the provisions of the CPC. The appellants therefore labour in vain E to overflog the issue as it would serve no useful purpose. See **FRN vs. Wabara** (2013) 5 NWLR (Pt. 1347) 331 at 350; **Ogudo vs. State** (2011) 18 NWLR (Pt. 1278) 1 at 52 – 53; **U.N.T.H.B vs. Nnoli** (1994) 8 NWLR 376 at 400-401, **NNPC vs. Famfa Oil Ltd** (2012) 17 NWLR (Pt. 1328) 148 at 195.

F Clearly the issue cannot be favourably resolved for appellants as they are asking for what the law and practice have not provided.

All the three issues settled against the appellants and from the well reasoned lead judgment I too see no merit in this appeal which I dismiss.

G I abide by the consequential orders as made.

Mary Ukaego Peter-odili
Justice, Supreme COURT

H **DATTIJO MUHAMMAD, (JSC):** Having read in draft the lead judgment of my learned brother ***SIDI DAUDA BAGE JSC*** just delivered, I agree with his lordship that the appeal being bereft of merit be dismissed.

The two germane issues the appeal raises have long been resolved, to I the contrary of what learned appellants' counsel postulates, by this court. Yes, as persistently held by this court, given the clear words of Section 36(6) (b) of the 1999 Constitution as amended, the appellants are manifestly entitled to

A such "facilities", in addition to adequate time, they may require for the preparation of their defence. This court has maintained that any "material" the respondent uses and or is relevant in the prosecution or defence of the appellants who are being arraigned at the trial court should be made available
B to the appellants to enable them adequately prepare their defence. See **Layonu vs. State (1967) 1 ALL NLR 198** and **Udo vs. State (91988) 1 NSCC (Pt. 19) 1163 at 1172.**

The essence of the principle is that both the respondent herein and the
C appellants they prosecute must enjoy equal opportunity in the conduct of their respective cases. Under no circumstances, this court insists, should the prosecution enjoy sole access to the evidence on which basis the trial of an accused person is pursued. Allowing the respondent undue access to the
D materials that provide the evidence the court is urged to convict the appellants, learned appellants' counsel would be right, will constitute unpardonable violation of Section 36(6) (b) of the Constitution. In **Okoye & ors vs. Commissioner of police (2015) 4-5 Sc (Pt. 1) 101** this court per Akaahs JSC
E restated the principle thus:

> **"The moment an accused is facing a charge, his personal liberty is at stake and before that liberty is taken away, he**
F **must be afforded every opportunity to defend himself …….**
>
> ***Once he becomes aware that he has a charge hanging over his***
G ***neck for an infraction of the law and makes a request either orally or in writing for any facilities to prepare for his defence, the court must accede to his request and the prosecution has to comply……."*** (Italics mine for emphasis).

H

In the case at hand the appellants, having failed to specify what materials the respondent refused to supply them following their request and the trial court's order thereon, cannot invoke 36(6) (b) of the 1999 Constitution as amended to
I forsteall their trial. See **Ogboh & anor vs. FRN (2002) LPELR-2285.**

Appellants' contention under their 2nd issue is that the Katsina State Attorney General cannot delegate the powers of instituting criminal

A proceedings against them to the respondent who is not an officer of his department. I agree with learned respondent's counsel that the correct position of the law is contrary to what the appellants assert. A great number of the decisions of this court insist that by virtue of Section 211(1) of the 1999
B Constitution as amended the Attorney General of a State is empowered to institute criminal proceedings in respect of an offence under any law of the House of Assembly; that the power may be exercised by him in person or through the officers of his department; that the Attorney General is further
C empowered to take over and continue any criminal proceedings instituted by any other authority or persons and, at any stage before judgment is delivered, discontinue such criminal proceedings instituted by him or any other person or authority; that the use of the word "may" in Section 211(2) of the
D Constitution shows clearly that in delegating his powers, to institute or undertake criminal proceedings, the Attorney General is not restricted to only officers of his department. The EFCC, learned respondent's counsel is again right, for this court has so held, is one such authority the 1999 Constitution in
E Section 211 empower to institute and undertake criminal proceedings in respect of acts which though provided for by the State House of Assembly constitute Economic and Financial Crimes as provided for under Section 5 of the Economic and Financial Crimes Commission (Establishment) Act. See
F **Osahon vs. FRN (2006) 2 SC (Pt. 11) 1, Amadi vs. FRN (2008) 18 NWLR (Pt. 1119) 259 at 275, 276, Nyame vs. FRN (2010) 7 NWLR (Pt. 1193) 344 at 403;** that, lastly, the Attorney General's powers under Section 221 of the 1999 Constitution the appellants challenge, through to this appeal, cannot be
G questioned by or through the court. See **Rabiu vs. State (1981) 2 NCLR 293, State vs. Ilori (1983) 1 SCNLR 94, Ibrahim vs. State (1986) NWLR (Pt. 18) 650** and **Amadi vs. FRN (supra).**

It is for the foregoing and the fuller reasons of my learned brother ***SIDI***
H ***DAUDA BAGE JSC*** that in adjudging this appeal devoid of merit I dismiss same. I abide by the consequential orders effected in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

I

BATA OGUNBIYI, (JSC): I have had the privilege of reading in draft the lead judgment just delivered by my learned brother Bage, JSC. I agree that the

judgment of the lower court has stood the test of time and should be endorsed.

The facts of the case and the two issues raised from the grounds of appeal are clearly spelt out in the lead judgment.

The matter in this appeal is interlocutory and thus in the nature of a preliminary objection. The justice of this case would best be determined when the matter proceeds to trial with evidence having been taken and all materials facts placed before the court.

It is unfortunate to say that objections raised would only delay the quick disposal of this case which would not be in the interest of all parties. As rightly submitted by the learned counsel for the respondent, the two lower courts are not in breach of section 36 (6) (a) and (b) of the Constitution as wrongly contemplated by the appellants' counsel. It is premature to conceive that the appellants herein were neither given a fair hearing, nor were they refused proper information or adequate time and facilities for the preparation of their defence.

My learned brother has dealt adequately with the issues raised.

I adopt his judgment as mine and I also dismiss the appeal in like terms.

Clara Bata Ogunbiyi
Justice, Supreme Court

EJEMBI EKO, (JSC): The appellants are being prosecuted for offences under the penal code law of Katsina State at the High Court of Katsina State. The Attorney-General of Katsina State issued a fiat authorising or empowering the Economic and Financial Crimes Commission (EFCC) to institute the criminal proceedings, by way of information accompanied by proofs of evidence, against the appellants. The said High Court granted leave to the prosecutors to proceed on the information against the appellants. Upon granting leave, the High Court summoned the appellants to appear before it for their arraignment and pleas.

After the service of the summons on them, the appellants entered appearance under protest. They queried the information on diverse grounds, including:

i. That the proof of evidence did not comply with section 36(6) (b) of the Constitution they, the accused persons

having not been furnished with "adequate facilities for the preparation of their defence".

ii. That the EFCC is prosecuting them in the name of the Federal Republic of Nigeria, notwithstanding that the fiat was issued by the Attorney-General of Katsina State pursuant to his powers under Section 211 of the Constitution 1999, as amended, and that the grounds that EFCC is not an officer in the Attorney-General's office.

Usually an application for leave to prefer charge in the High Court, under the criminal procedure code in Katsina State, is brought under Section 185(b) of the criminal procedure code law and criminal code (application for leave to prefer charge in the High Court) rules made thereunder. The extant criminal procedure (application for leave to prefer a charge in the High Court) rules, 1970 mandatorily requires that the application for leave to prefer a charge shall state the charge in respect of which leave is sought. The appellants do not complain about this. The grouse of the appellants is that the mandatory proofs of evidence they are entitled to does not contain "adequate facilities" or materials they would need to prepare adequately for their defence. Rules 3 (2) of the criminal procedure (application for leave to prefer a charge in the High Court) Rules provides, in mandatory terms that "there shall accompany the application proofs of the evidence of the witnesses whom it is proposed to call in support of the charge", and that the proofs of evidence shall be accompanied by the prosecutor's statement of undertaking "that the evidence shown in the proof of evidence will be evidence which will be available at the trial" and that the case disclosed by the proofs is a true case.

Proofs of evidence, in criminal proceedings, are what pleadings and front loading of evidence are in civil trials. The essence of both is to enable the parties know not only the case they are to meet at the trial but also to be enabled to adequately prepare to counter the oral and documentary evidence by which the case is to be proved. They ensure, as K.M.O. Kekere-Ekun, JCA (as he then was) stated in **ADEBISI ADEGBUYI & ANOR vs. HON. RAMONI OLALEKAN MUSTAPHA & ORS. (2010) LPELR-3600 (CA)**, that there is no trial by ambush.

Trial by ambush is what the framers of the constitution detested and provided against when they provide in Section 36(6) (b) that:

> **Every person who is *charged* with a criminal offence shall be entitled to be given *adequate* time and facilities for the preparation of his defence.**

This is a basic fundamental right every person who is charged with a criminal offence is entitled to. That is, every person charged with a criminal offence is entitled to be given adequate **facilities** for the preparation of his defence. **Charge** as a noun, means a formal accusation of an offence. As a verb "charge" means to formally accuse a person of an offence. See Black's Law Dictionary 9th ed.

The provisions of Section 36(6)(b) of the Constitution are unambiguous. They are therefore entitled to be given their ordinary plain and simple meaning without venturing to import thereto any extraneous matters that may lead to circumventing or giving the provisions an entirely different interpretation from what the lawmaker intended them to be: **UNIPETROL vs. E.S.B.I.R. (2006) ALL FWLR (Pt. 317) 413 at 423**. The initiation of the criminal proceedings against the appellants invariably leads to the invocation of the jurisdiction of the criminal court to determine their civil rights, particularly the right to their personal liberty, guaranteed by Sections 36(1) and 35 of the Constitution. The judex therefore shall be guided by the wisdom of this court expressed in **RABIU vs. THE STATE (1980) 8-11 SC 130; ONYEMA vs. OPUTA (1987) 6 SC 362:** Firstly, that the Constitution should be given broad and liberal construction to promote its purpose; secondly; and that narrow and conservative construction should be avoided, and also that the Constitution should be construed to promote good government and people's welfare. These are ever living words against trial by ambush.

The right guaranteed by Section 36(6)(b) of the Constitution applies to every person charged with a criminal offence: **OGBOH & ANOR. vs. F.R.N. (2002) 4 S.C. (Pt. II) 106; (2002) 10 NWLR (Pt. 774) 21.** Section 185(b) of the CPC and criminal procedure (application for leave to prefer a charge in the High Court) Rules, 1970 have been enacted to further give effect to the right guaranteed, by Section 36(6)(b) of the Constitution to every person charged

with a criminal offence. This constitutional right of the accused person imposes a duty on his accuser to furnish him with all the facilities, particularly the evidential materials his accuser intends to use against him at his trial, from the moment he is formally accused of a criminal offence. He has to have these facilities before he is called upon to take his plea to the charge. That enables him to decide, in the first place, how he should plead to the charge. The proofs of evidence with the front loaded evidence of the witnesses and documents the prosecutor intends to call at the trial *prima facie* constitute "adequate facilities" the person charged with a criminal offence would have for the preparation of his defence. The prosecutor, cannot deny the accused person these facilities, and if he does deny the accused person this right the trial no doubt will be vitiated.

The right guaranteed to the person charged with a criminal offence, the duty imposed on his accuser, by Section 36(6)(b) of the constitution not merely fanciful. In **ORISAKWE vs. GOVERNOR, IMO STATE (1982) 3 NCLR 743 at 755** OPUTA, **CJ** (as he then was) stated that if the right of fair hearing under Section 33(I) of the 1979 Constitution, ***in pari materia*** with Section 36(I) of the 1999 Constitution, and the rule of natural justice is to be of any real right, it must carry with it a corresponding and equal right in the accused person to know the case his accuser has against him. This view was cited with approval in **OKOYE & ORS. vs. COMMISSIONER OF POLICE (2015) 4-5 SC (Pt. I) 101.** This court considered the provisions of Section 33(6)(b) of the 1979 Constitution, ***in pari materia*** with Section 36(6)(b) of the 1999 Constitution in **UDO vs. THE STATE (1988) 6 SC 346** and declared that it is a provision of "equal opportunities for both the prosecution and the defence". Commenting on this equality of opportunities between the prosecution and the defence, under Section 36(6)(b) of the 1999 Constitution, K.B. Aka'ahs, **JSC,** stated in **OKOYE vs. COMMISSIONER OF POLICE (supra)** that the prosecutor, therefore, will not be allowed to have sole access to the evidence, and that "in a situation where the accused person does not know the case he will meet, while the prosecution knows everything concerning the case against accused person ahead of time amounts to nothing less than procedural inequality which is a gross violation of the principle of fair hearing or fair trial" tantamounting to violation of the provisions of Section 36(6)(b) of the 1999 Constitution. This is what the

A appellants herein are saying, and I agree with them.

I agree with the appellants that they are entitled, having been formally accused of criminal offences, to be given adequate facilities, in the proofs of evidence, for the preparation of their defence. Accordingly, the respondent as
B the prosecutor, is hereby ordered or directed to furnish to the appellants, each, proofs of evidence comprising statements of all witnesses and documents which are proposed to be called in support of the charge(s) preferred against the appellants, as the accused person.

C The Attorney-General of Katsina State, in exercise of his powers under Section 211 of the Constitution gave the EFCC the fiat to prosecute the appellants under the penal code law of Katsina State. Upon a careful perusal of the provisions of Section 211(1)(b) & (c) of the Constitution, it appears that
D the Constitution contemplates also the right of any other authority or person, not just the Attorney-General, to initiate criminal proceedings. Thus initiation of criminal proceedings for an offence is not an exclusive prerogative of the Attorney-General. However, the power to take over and continue or
E discontinue such prosecution remains exclusive to the Attorney-General.

The peculiar facts of this case, including his issuance of fiat to the EFCC, an investigating and prosecuting authority created by an Act of the National Assembly, suggests that the proceedings against the appellants were
F initiated at the instance of, and on the authority of, the Attorney-General of Katsina State. His physical presence in the prosecuting team clearly removes any doubt that he authorised the proceedings the subject of this appeal. The appellants cannot say that they do not know who their accuser(s) are.

G The main grouse of the appellants under this issue is that if EFCC is proceeding against them on the authority of the fiat given to it by the Attorney-General of Katsina State then it should prosecute them in the name of the donor of the power or fiat. That is, in the name of either Attorney-General of
H Katsina State, or Katsina State. They tend to hold the view that proceeding against them in the name: FEDERAL REPUBLIC OF NIGERIA, vitiates the proceedings against them. The appellants, like the plaintiffs in **A.G. LAGOS STATE vs. A.G. FEDERATION (2014) 9 NWLR (Pt. 1412) 217,** hold "the
I mistaken idea that the Federal Government of Nigeria is synonymous with the Federation or Federal Republic of Nigeria". This point was laid to rest in **A.G., LAGOS STATE vs. A.G. FEDERATION (supra) at page 280** where

Ngwuta, **JSC**, clarifies the point thus:

> **"The Federal Republic of Nigeria (or the Federation) is the repository of the sovereignty of the people of Nigeria whereas the Federal or state Governments, in contradistinction, are donees of the powers and authority of the people.**

In other words, the Federation of Nigeria, or the Federal Republic of Nigeria, is distinct and separate from the Federal Government of Nigeria which often, is a product of periodic electins: **A.G. KANO STATE vs. A.G. FEDERATION (2007) 6 NWLR (Pt. 1029) 164.**

In **NYAME vs. F.R.N. (2010) 7 NWLR (Pt. 1193) 344 (SC), at page 403**, it was held that EFCC:

> **Is the co-ordinating agency for the enforcement of the provisions of any other law or regulation on economic and financial crimes, including the criminal code and the penal code. The commission has powers under Section 13(2) of the (enabling) Act to prosecute offences so long as they are financial crimes.**

In the co-operative federalism practised in Nigeria the EFCC is a common agency empowered to investigate and prosecute offenders for both the Federal and State economic and financial crimes, and as such it qualifies as **any other authority or person** empowered by Section 211 (1)(b) of the Constitution to institute or initiate criminal proceedings: **AMADI vs. FRN (2008) LPELR-441 (SC).** In the **AMADI case (supra)** the EFCC initiated the trial of the appellant for offences under advance fee fraud and other related offences Act, 2004 (an Act of the National Assembly), and offences under the criminal code law of Lagos State. The contention that EFCC, an agency created by an Act of the National Assembly, could not competently prosecute state offences relating to economic and financial crimes was dismissed. See also **OSAHON vs. FRN (2006) 2 SC (Pt. II) I; (2006) 2 NWLR (Pt. 973) 361.**

I wish to state finally, that the fiat issued by the Attorney-General of

Katsina State is not irrevocable. He, being the donor of the power, reserves the right to resume or revoke the power he had delegated to the EFCC to prosecute the appellants on his behalf. Section 211 of the Constitution is very clear and unequivocal on that residual power of the Attorney-General of the Sate.

I read in draft the judgment delivered by S.D. BAGE, **JSC**, in this appeal. I agree that the Attorney-General of Katsina State has rightly delegated his prosecutorial powers to EFCC to prosecute the appellants herein by the fiat he issued to the EFCC. My position on the rights of the appellants under Section 36(6)(b) of the Constitution is that the appellants are entitled to be given proofs of evidence containing the statements of all witnesses, and the documents the prosecutor intends to call evidence on in their trial.

Ejembi Eko,
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the privilege of reading in advance the judgment just delivered by my learned brother BAGE, JSC and I agree with the reasoning contained therein and conclusion arrived thereat. Section 211(1)(a) of the Constitution of the Federal Republic of Nigeria provides that the Attorney-General of a state shall have power to institute and undertake criminal proceedings against any person before any court of law in Nigeria in respect of any offence created by or under any law of the House of Assembly. Sub-section (i)(b) of the same section provides that the Attorney-General of a State has the power to take over and continue such criminal proceedings that may have been instituted by any other authority or person. From this constitutional provision, it is very clear that the power to institute and undertake criminal proceedings before any court in Nigeria in respect of any offence created by or under any law of the House of Assembly is not exclusive preserve of the Attorney-General of the State. Other authorities or persons have power to so institute and undertake criminal proceedings before any court of law in Nigeria as well. By Section 7(2)(f) of the Economic and Financial Crimes (Establishment) Act 2004, the EFCC shall be the coordinating agency for the enforcement of the provisions of any law or regulation relating to economic and financial crimes including the criminal code and the penal code.

EFCC is clearly an authority or person by virtue of Section 1(2)(a)&(b) of the EFCC Act which provides that the commission is a body corporate with perpetual succession and may be sued in its corporate name. Since it is an authority it has the power to institute and undertake criminal proceedings against any person before any court of law in Nigeria, Katsina State inclusive.

In Attorney-General of Ondo State vs. Attorney-General of the Federation (2002) 6 SC (Pt. 1) 1 the full court of the Supreme Court clearly stated that the prosecution of criminal matters in the State High Court is not an exclusive preserve of the State Attorney-General in the words:

> **"The Attorney-General of the Federation his powers under Section 174 of the Constitution as an agency of the Federal Government. The law is well established that the court cannot control the manner he exercises his powers so conferred… nor can he be prevented from exercising his functions on the grounds that his jurisdiction does not extend to any particular state in Nigeria. Section 174 of the Constitution does not impose any such limitation."**

See **The State vs. Ilorin (1983) 1 SCNLR 94** Section 211 of the Constitution does not impose any limitation to the powers of the EFCC to institute and undertake criminal proceedings against any person in Katsina State in respect of any offence created by or under any law of that state. The fiat given by the Attorney-General of Katsina State to the EFCC was so given out of caution that they would not abuse any of the provision of the Constitution. Even without the fiat, the EFCC as an agent of the Federal Government had the power to prosecute the appellants in the name of the Federal Republic of Nigeria before the Katsina State High Court for offences committed under the penal code of Katsina State.

Section 36(6)(b) of the Constitution provides as follows:

> **"Every person who is charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence."**

This is clearly a constitutional obligation that must be fulfilled before an accused person enters his defence. At what point in time would a failure to give facilities to an accused will amount to a breach of his right to fair hearing. In the case of **Okoye & Ors vs. C.O.P & Ors** which was cited and relied upon by learned senior counsel for the appellant, this court per Aka-ahs, JSC said:

> **"After the accused has entered his plea, but before the actual trial commences, the accused or the counsel representing him should be availed all the facilities that will assist in the preparation of his defence. For avoidance of doubt, what the accused requires is the statement of witnesses and police investigation reports and any medical report, which bears resemblance to the offence allegedly committed by the accused."**

In the instant case the plea of the accused persons had not been taken. Section 36(6)(b) says the documents are required for the accused defence. When the accused is set for his defence and the necessary facilities are not provided, he can decline to proceed with his defence and insist on his right to be availed with the facilities. If the required facilities are not provided and he is forced to enter his defence and if in absence of his defence the case if determined in either way, he will now be in a position to complain that his right to fair hearing has been violated.

In the instant case, the appellants neither appeared before the court no pleaded to the charge. I do not see how their rights were violated thereby. I am of the firm view that the lower court was right when it affirmed the decision of the trial; court.

For these few words and the more detailed reasoning in the lead judgment, I find no merit in this appeal. Accordingly same shall be and it is accordingly dismissed by me.

Paul Adamu Galinje
Justice, Supreme Court

KEHINDE AJUMOBI
AND
THE STATE

SC. 515/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

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

APPEAL: Grounds of appeal – Where no issue was formulated from a ground – Implication.

APPEAL: Issue for determination – Where failure of a lower court to consider an issue for determination has not resulted in a miscarriage of justice – Attitude of the Supreme Court thereto.

CRIMINAL LAW AND PROCEDURE: Identification of accused – Where based on the credible evidence of witness – Whether an appellant court will not interfere.

CRIMINAL LAW AND PROCEDURE: Where party alleges that piece of evidence casts doubt on the case of prosecution – Onus of proof on the party How discharged.

CRIMINAL LAW AND PROCEDURE: Where trial court relies on evidence capable of being believed and convicts an accused – Attitude of an

appellate court thereto.

Issues for Determination

1. **Whether the learned Justices of the Court of Appeal came to a justifiable conclusion in law and equity when their Lordships held that the appellant was sufficiently identified as one of the armed robbers that committed the offence in issue and that the discrepancies between the appellant's extra judicial statement and his oral testimony in court relate in substance and not form such that the appellant's defence of mistaken identity may be thrown away with the wave of hand.**

2. **Whether the learned Justices of the Court of Appeal were correct in law and equity when their Lordships failed/refused to consider issue (3) distilled by the appellant herein who was also the appellant at the court below and whether same failure did not lead to a miscarriage of justice?**

Facts of the Matter

The appellant and Raheem Ayinde were arraigned before the Kwara State High Court, Ilorin Division in charge No. KWS/36C/2010 for Criminal Conspiracy and Robbery contrary to Sections 97 of the Penal Code and Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Laws of the Federation of Nigeria 2004. The charge contained six counts; count 1 was for conspiracy while the remaining five counts were for armed robbery. The learned trial Judge found that the prosecution proved the ingredients of the offence of armed robbery against the accused and convicted them accordingly. He thereafter sentenced each of them to 14 years imprisonment without an option of fine and did not specify the count on which the sentence was based.

The appellants appealed separately against the judgment of the trial court to the Court of Appeal, Ilorin Division complaining against the non specification of the count/s on which the trial court based its sentence. The court below dismissed the appeal as being predicated on technicalities in its judgment delivered on 10th July, 2014. The appellant was further dissatisfied with the judgment of the Court of

Appeal and appealed against it to the Supreme Court.

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

1. *A ground of appeal is abandoned where no issue is formulated therefrom*
Ground 2 of the amended notice of appeal which complained about the failure of the lower court to enter separate verdicts in respect of each count in the charge was abandoned as no issue was formulated from it. See: Nwokearu vs. State (2013) 16 NWLR (Pt. 1380) 207 at 233. It is accordingly struck out. *(P 400 Paras A – B)*

2. *Where court acts on evidence that is cogent and convicts an accused*
The law however still remains that where the evidence adduced by the prosecution is capable of being believed and the trial judge believed it and convicts the accused, an appellate court will be slow to overturn the verdict simply on the basis that the trial court could have viewed such evidence otherwise. *(P 403 Paras A – B)*

3. *Where party alleges that a piece of evidence casts doubts on the case of prosecution.*
Where it is suggested that a piece of evidence casts some doubt on the prosecution's case, it is necessary to show, unless such is manifest or evident from the records, what aspect becomes doubtful by reason of the evidence. See: Archibong vs. State (2006) 14 NWLR (Pt. 1000) 349. *(P 403 Paras B – C)*

4. *Attitude of Supreme Court to concurrent findings*
The attitude of the Supreme Court on concurrent findings of fact is that of non interference unless it is shown to have resulted in miscarriage of justice or a violation of some principles of law or the same is demonstrated to be perverse. See: Wankey vs. State (1993) 5 NWLR (Pt. 295) 542 *(P 403 Paras C – D)*

5. *Onus on prosecution to prove the participation of appellant in the robbery*
Per K.B Akaahs (JSC):

"The task for the prosecution in the instant appeal is to

show that the appellant participated in the robbery while armed. As learned counsel has shown in his brief there is no dispute that a robbery took place within the vicinity where the appellant was arrested.

The story put up by the appellant was that on the fateful evening of his arrest, he had invited the 2nd accused whom he requested to work for him at his car wash centre and he was seeing off the 2nd accused when they encountered people who accosted them and accused them of being the persons who disrupted the neighbourhood. And according to the appellant he denied the accusation and tried to give an explanation but the people did not believe him; instead they attacked and brutally injured him which resulted in his hospitalization.

The evidence which the trial court relied upon was given by PW2, PW3 and PW4. PW2, Ismail Kolawole stated that after he had eaten the food served by his wife, he asked her to throw away the water they used in washing their hands. As she got to the passage, he heard people shouting and he enquired what caused the noise. He then ran out to see what was happening in the passage and on getting to the passage he noticed the 1st accused holding his wife and as he opened the door, the 2nd accused hit him with a bottle on the head and then asked him (PW2) to lead him (2nd accused) into the bedroom. While in the bedroom he demanded for money but PW2 said he had no money. The 2nd accused then used the broken bottle to stab him on the stomach. PW3, Saadu Garba who lives in the same compound with PW2 and PW4 narrated how he heard some people shouting in the corridor passage and decided to find out what was responsible for the noise. As he opened the door to go out, the 1st accused met him at the door holding a cutlass and ordered him back into the

room where he commanded him to lie down and was beating him. The 1st accused asked for money. He showed him N5,000.00 which was on the table. He collected the money and PW3's handset. 1st accused left and returned to ask for more money. It was at that instance that he heard the door being banged and an alarm of thief, thief was raised. The 1st accused then ran out of the room and when he ventured out he noticed that the 2nd accused had been arrested and was being beaten while some people were chasing the 1st accused who ran away but was caught when he attempted to scale the fence. When PW3 was cross-examined he said that after the 1st accused had robbed him, he went out of the room and returned a second time demanding for more money and it was then that he heard people shouting thief, thief and the 1st accused then ran out and tried to escape. A room separated his own from that of PW2. PW4, Rashidat Ismaila who is the wife of PW2 also gave evidence on what happened on the night of 12/8/2009. She confirmed that it was the 2nd accused who took away her phone and hit her husband with a bottle on the head. She said that the 2nd accused was arrested inside the house while the 1st accused ran outside and attempted to jump the fence.
(Pp 403 – 404 Paras D – F)

6. *The findings of the lower court were not perverse*
The learned trial Judge settled the issue of the appellant's identification and the non production of the allegedly stolen items and the lower court rightly saw no compelling reason to disturb the findings and credibility of witnesses as they were not perverse. This court sees no reason whatsoever to interfere with the decisions arrived at by the two lower courts. *(P 407 Paras H – I)*

7. *The evidence of the identification of the accused is credible*
Learned counsel for the appellant hammered on the possibility of

mistaken identity which led to the arrest of the appellant but this argument cannot fly because of the positive identification of the appellant by PW2, PW3, and PW4. The evidence given by these witnesses is rock solid. The learned trial Judge found them to be credible evidence and believed them. He could not have done otherwise; hence the conclusion was to reject the appellant's version. The prosecution therefore proved its case beyond reasonable doubt. The lower court endorsed the judgment of the trial Judge. There is no doubt in my mind that the two lower courts did the right thing and I will therefore affirm the judgment of the lower court.
(Pp 407 – 408 Paras I – B)

8. *Where failure of the lower court to consider an issue for determination has not led to miscarriage of justice*
The learned trial Judge gave full consideration to the evidence adduced by the prosecution and the defence and found that the prosecution proved its case beyond reasonable doubt. The conviction was not based on the purported admission which the accused were said to have made to PW8 that they had gone to rob and luck ran out on them. Even if the said evidence of PW8 is expunged it will not adversely affect the outcome of the case. Consequently, even if the lower court did not consider issues 3 and 4 submitted to it by the appellant in depth, no miscarriage of justice has been occasioned which will lead to the appeal. *(P 411 Paras B – D)*

Nigerian Cases Cited
Archibong vs. State (2006) 14 NWLR (Pt. 1000) 349.
Nwokearu vs. State (2013) 16 NWLR (Pt. 1380) 207
Wankey vs. State (1993) 5 NWLR (Pt. 295) 542

Nigerian statutes cited
Robbery and Firearms (Special Provisions) Act Cap RII Laws of the Federation of Nigeria 2004 – Section 1(2)(a)
Penal Code – Sections 97

Representations

D. A. Awosika (Esq.) with Romeo Ese Michael (Esq.) and N.F. John (Esq.) for the Appellant.

Kolade Obafemi (Esq.) with Emmanuel Bwala (Esq.) for the Respondent.

BAYANG AKAAHS, (JSC.) (Delivering the lead Judgment): The appellant and Raheem Ayinde were arraigned before the Kwara State High Court, Ilorin Division in charge No. KWS/36C/2010 for Criminal Conspiracy and Robbery contrary to sections 97 of the Penal Code and section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Laws of the Federation of Nigeria 2004. The charge contained six counts; count 1 was for conspiracy while the remaining five counts were for armed robbery. The learned trial Judge found that the prosecution proved the ingredients of the offence of armed robbery against the accused and convicted them accordingly. He thereafter sentenced each of them to 14 years imprisonment without an option of fine and did not specify the count on which the sentence was based.

The appellants appealed separately against the judgment of the trial court to the Court of Appeal, Ilorin Division complaining against the non specification of the count/s on which the trial court based its sentence. The court below dismissed the appeal as being predicated on technicalities in its judgment delivered on 10th July, 2014. The appellant was further dissatisfied with the judgment of the Court of Appeal and appealed against it in the notice of appeal dated and filed on 4th August, 2014.

The appellant's brief was filed along with an amended notice of appeal on 2nd March, 2017. Both the amended notice and the appellant's brief were deemed filed on 17th May, 2017. Two issues were formulated from the amended notice of appeal to wit:

> **3. Whether the learned Justices of the Court of Appeal came to a justifiable conclusion in law and equity when their Lordships held that the appellant was sufficiently identified as one of the armed robbers that committed the offence in issue and that the discrepancies between the appellant's extra judicial statement and his oral testimony in court relate in substance and not form**

such that the appellant's defence of mistaken identity may be thrown away with the wave of hand.

4. **Whether the learned Justices of the Court of Appeal were correct in law and equity when their Lordships failed/refused to consider issue (3) distilled by the appellant herein who was also the appellant at the court below and whether same failure did not lead to a miscarriage of justice?**

The respondent adopted the issues raised by the appellant.

Learned counsel for the appellant, Awosika Esq. submitted on issue 1 that even though there is a concurrent finding of facts by the two lower courts as to the identity of the appellant as one of those who participated in the robbery offence, nevertheless the defence of mistaken identity encapsulated in Exhibits P4 and P7 is probable in the entire circumstances of the case. While conceding that it is not the law that the prosecution must tender every item stolen before it can secure conviction, he submitted that where the tendering of items stolen goes to the credibility or otherwise of the robbery story, the law requires such items to be tendered so that their whereabouts can be accounted for. He argued that since the appellant denied participating in any robbery and that he was seeing off his friend at the time of the arrest the production of the stolen items traceable to him would have made the prosecution's case foolproof. He maintained that for the credibility of the evidence that the appellant was arrested around the scene of crime to be believed, the items which he stole and which he had taken into his possession must be found with him or the people who saw him being arrested should give an explanation on how he managed to dispose of the items at the point of arrest. Learned counsel drew a distinction between being caught at the scene of crime and being identified as a criminal. When an accused is being caught at the scene of crime, there should be credible evidence such as being found in possession of the stolen item but where the accused is identified as the criminal, the credible evidence to be adduced is most often by identification parade. He cited the case of **Bozin vs. State (1985) 2 NWLR (Pt. 8) 465** and **Adisa vs. State (1991) 1 NWLR (Pt. 168) 490.** He said no identification parade was carried out in this case. Since the appellant was not apprehended with the stolen items

particularly the wallet which was alleged to contain N34,000.00, his story that he was arrested while escorting the 2nd accused should be believed.

On Issue No. 2 learned counsel argued that the Justices of the Court of Appeal failed to properly evaluate and consider whether the trial court was right or not in considering the alleged oral confession which the appellant made to PW8 and that the Honourable court did not give the issue the consideration it deserves. It was the contention of learned counsel that all courts ought to consider and resolve all arguments on all the material issues canvassed by parties before them. He relied on **Olowolagba vs. Bakare (1998) 3 NWLR (Pt. 543) 528** where Iguh JSC posited thus at page 534:

> **"It is indisputable, pursuant to the right of parties to any litigation to fair hearing, that a trial court ought to hear and consider all legal and admissible evidence adduced before it in respect of all relevant issues joined by the parties. In the same vein an appellate court ought to hear and consider the arguments on all material issues canvassed by parties before it'.**

Learned counsel complained that the court below merely copied and pasted the arguments of both counsel on issues 3 and 4 submitted before their Lordships and made no pronouncement on their resolution especially on issue 3 and went ahead to conclude on another point without making known their consideration and resolution of the issue. He submitted that the failure by the lower court to consider the said issue 3 occasioned grave injustice to the appellant herein.

Learned counsel has tried to identify the argument on this issue under the omnibus ground because according to him when the trial Judge made reference to the evidence of the prosecution, his Lordship used the totality of evidence led by the prosecution which included the purported oral confession allegedly made by the appellant to PW8. He went on to state that since the learned justices of the court below affirmed the judgment of the trial court in all its ramifications, he was of the view that it should be taken for granted that their Lordships found nothing wrong with the usage of the said oral confession against the appellant.

Learned counsel for the respondent, Obafemi Esq. relying on his brief filed on 27/7/2017 submitted that it is desirable that issues formulated in the brief of argument be tied or married to the grounds of appeal. I agree entirely with this submission. Ground 2 of the amended notice of appeal which complained about the failure of the lower court to enter separate verdicts in respect of each count in the charge was abandoned as no issue was formulated from it. See: **Nwokearu vs. State (2013) 16 NWLR (Pt. 1380) 207 at 233.** It is accordingly struck out. In respect of issue 1 dealing with the case of mistaken identity, learned counsel for the respondent argued that the appellant completely ignored the direct and unchallenged evidence given by PW3, PW4, PW5 and PW6 before the trial court which the lower court found to be credible. He contended that a clear examination of the evidence from the victims of the robbery which was not challenged or destroyed under cross examination point to the irresistible conclusion that the appellant was one of the armed robbers that robbed and wounded the victims who testified before the court. He said a concession was made in paragraph 4.1 in the appellant's brief about appellant being one of the robbers and that PW2 and Pw3 were victims of the robbery but the contention of learned counsel is based principally on the possibility of reasonable doubt of the appellant being one of the robbers. He enumerated the necessary ingredients which the prosecution must establish beyond reasonable doubt in order to sustain a charge of armed robbery which include:

(a) There was a robbery or series of robberies;

(b) The robbery or each robbery was an armed robbery, and

(c) The accused was one of those who took part in the armed robbery. He cited several cases for this submission such as:

Bozin vs. State (supra); Okosi vs. Attorney-General Bendel State (1989) 2 Sc (Pt. 1) 126; (1989) 1 NWLR (Pt. 100) 642; Martins vs. State (1997) 1 NWLR (Pt. 481) 355; Osuagwu vs. State (2013) 1-2 Sc (Pt. 1) 37; (2013) 5 NWLR (Pt. 1347) 360; Emeka vs. State (2014)

6-7 Sc (Pt. 1) 64, (2014) 13 NWLR (Pt. 1425) 614; Simon vs. State (2017) 8 NWLR (Pt. 1566) 119 at 136.

He said that the arguments advanced by learned counsel for the appellant under issue 1 centre on the mistaken identity of the appellant and submitted that the lower court was right to have followed the court of 1st instance in dismissing the appeal by holding that the appellant was properly convicted for the offence of armed robbery by the High Court because of the evidence of PW2 who identified the appellant as the one who stabbed PW2 on the stomach with a broken bottle. He maintained that it is the circumstances of a case that determine the form of identification necessary and relied on the dictum of Belgore (JSC) (as he then was) in **Adamu vs. State (1991) 4 NWLR (Pt. 187) 530 at 537** for this submission. He further submitted that in the identification of the appellant by the victims of the robbery, the court of first instance gave good consideration to the defence of mistaken identity which was faintly put forward by the appellant. The lower court looked into the trial court's consideration of the evidence offered in defence vis-à-vis the extra judicial statement before concluding that the evidence was not only contradictory to the extra judicial statement and found that the appellant's evidence was not credible.

As regards the prosecution's inability to investigate the contents of Exhibit P7, learned counsel for the respondent submitted that the appellant did not set up any defence which required to be investigated. It was a bare statement that he was not an armed robber.

In his consideration of issue 2 learned counsel for the respondent submitted that the conviction of the appellant which was affirmed by the lower court was not hinged on the appellant's oral confession to PW8. He said that the lower court dealt with issues 3 and 4 together and resolved them based on the decision in **Uwagboe vs. State (2008) 12 NWLR (Pt. 1102) 621.** He submitted further that the appellant has not pointed to any portion of the holdings or findings of the court where the alleged confessional statement was made the fulcrum of the decision and a clear reading of the judgment of the lower court showed that the conviction of the appellant was premised on the positive identification of the appellant by the victims of the armed robbery. He argued that there is nowhere in the appellant's brief where it was argued

A that if the alleged oral confession of the appellant is expunged there will be no other material evidence to support the conviction or that the non specific pronouncement on the substance of the oral confession of the appellant to PW8 has occasioned any miscarriage of justice.

B The main thrust of this appeal revolves on the non tendering of the items which were allegedly stolen by the appellant and the 2nd accused during the robbery. In the evidence of PW2 he enumerated the stolen items to include:

C

1. A wallet containing N34,000.00
2. PW2's wife Nokia handset
3. PW2 double sim Lumia handset
4. PW2 wrist watch

D

Learned counsel for the appellant in arguing the appeal submitted that for the story of PW2 to command and commend belief, he PW2 ought to be able to tell the court what happened to those items that were purportedly stolen from the
E scene of crime. In other words the stolen items should be tendered as evidence and if not tendered there should be explanation from the prosecution why they cannot be produced in evidence. Learned counsel however agreed that it is not the law that the prosecution must tender every item stolen before it can
F secure conviction. See **Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561** where it was held that to secure a conviction for armed robbery the prosecution must prove the following:

G

(a) that there was an armed robbery;
(b) that the accused was armed; and
(c) that the accused, while with the arm or arms, participated in the robbery. Once the prosecution proves the above ingredients beyond reasonable
H **doubt, failure to tender the offensive weapon cannot result in the acquittal of the accused person because of the possibility of the accused person doing away with the offensive weapon after the commission of the**
I **offence in order to exculpate himself from criminal responsibility.**

The production of the stolen items no doubt will make water tight the case of the prosecution. The law however still remains that where the evidence adduced by the prosecution is capable of being believed and the trial judge believed it and convicts the accused, an appellate court will be slow to overturn the verdict simply on the basis that the trial court could have viewed such evidence otherwise. Where it is suggested that a piece of evidence casts some doubt on the prosecution's case, it is necessary to show, unless such is manifest or evident from the records, what aspect becomes doubtful by reason of the evidence. See: **Archibong vs. State (2006) 14 NWLR (Pt. 1000) 349.** The attitude of the Supreme Court on concurrent findings of fact is that of non interference unless it is shown to have resulted in miscarriage of justice or a violation of some principles of law or the same is demonstrated to be perverse. See: **Wankey vs. State (1993) 5 NWLR (Pt. 295) 542.** The task for the prosecution in the instant appeal is to show that the appellant participated in the robbery while armed. As learned counsel has shown in his brief there is no dispute that a robbery took place within the vicinity where the appellant was arrested.

The story put up by the appellant was that on the fateful evening of his arrest, he had invited the 2nd accused whom he requested to work for him at his car wash centre and he was seeing off the 2nd accused when they encountered people who accosted them and accused them of being the persons who disrupted the neighbourhood. And according to the appellant he denied the accusation and tried to give an explanation but the people did not believe him; instead they attacked and brutally injured him which resulted in his hospitalization.

The evidence which the trial court relied upon was given by PW2, PW3 and PW4 PW2, Ismail Kolawole stated that after he had eaten the food served by his wife, he asked her to throw away the water they used in washing their hands. As she got to the passage, he heard people shouting and he enquired what caused the noise. He then ran out to see what was happening in the passage and on getting to the passage he noticed the 1st accused holding his wife and as he opened the door, the 2nd accused hit him with a bottle on the head and then asked him (PW2) to lead him (2nd accused) into the bedroom. While in the bedroom he demanded for money but PW2 said he had no money. The 2nd accused then used the broken bottle to stab him on the stomach. PW3,

A Saadu Garba who lives in the same compound with PW2 and PW4 narrated how he heard some people shouting in the corridor passage and decided to find out what was responsible for the noise. As he opened the door to go out, the 1st accused met him at the door holding a cutlass and ordered him back into the B room where he commanded him to lie down and was beating him. The 1st accused asked for money. He showed him N5,000.00 which was on the table. He collected the money and PW3's handset. 1st accused left and returned to ask for more money. It was at that instance that he heard the door being banged C and an alarm of thief, thief was raised. The 1st accused then ran out of the room and when he ventured out he noticed that the 2nd accused had been arrested and was being beaten while some people were chasing the 1st accused who ran away but was caught when he attempted to scale the fence. When PW3 was D cross-examined he said that after the 1st accused had robbed him, he went out of the room and returned a second time demanding for more money and it was then that he heard people shouting thief, thief and the 1st accused then ran out and tried to escape. A room separated his own from that of PW2. PW4, E Rashidat Ismaila who is the wife of PW2 also gave evidence on what happened on the night of 12/8/2009. She confirmed that it was the 2nd accused who took away her phone and hit her husband with a bottle on the head. She said that the 2nd accused was arrested inside the house while the 1st accused ran F outside and attempted to jump the fence.

There were other witnesses who testified. PW6 recorded the statements of the two accused persons which were admitted in evidence without objection and were marked Exhibits P4 and P5 respectively. In exhibit P4 G which is the statement of the 1st accused, he said he was accompanying the 2nd accused away from his house because his mother was cooking for him and had asked him not to take any visitors into the house. PW6 stated that 1st accused was not arrested in his house but quite far away.

H The accused testified in their own defence. The 1st accused said he was planning to open a car wash station and to this end he bought blocks and arranged for a well digger to dig a well for him.

The 2nd accused who was his apprentice accompanied him to buy a I pumping machine from the shop. After leaving the shop, they were about boarding a vehicle which will take the 2nd accused home but he said he did not have any transport money and he invited the 2nd accused to accompany him

home to eat some food since the 2nd accused said he was hungry. They left for his mother's house. On reaching the house the food was not yet ready so he gave N1000.00 to the 2nd accused to use as transport money and also buy some food with N70.00. His mother sent him with N5,400.00 to give the caretaker who gave him the land. He then decided to escort the 2nd accused to where he could board a vehicle and return home while he went to deliver his mother's message to the caretaker. While on the way they met two men who were traveling in the opposite direction. As they made to pass one of the men called them back and asked them where they were coming from and he told the people they were from his house. They further asked where the house was located and he said it was the house of Alhaja working in the General hospital. One of the men then said he and 2nd accused resembled those who were disturbing the neighbourhood and he protested. One of the men then told them to kneel down but he refused. One of the men told them that if they refused to kneel down, they will see what will happen to them. They entered into an altercation and the man slapped him and he held his hand and they started to fight. He sustained injury. Other people joined in the fight. He later fainted and was taken to hospital where he regained his consciousness the next day and realized that he was in handcuffs. He denied having robbed any body in his life as he was gainfully employed. He said the police took 2 men and a woman to the hospital but they could not identify him. He denied any knowledge of the cutlass, stick and broken bottle which were admitted as exhibits P1, P2 and PW3.

In his evaluation of the evidence of PW2, 3 and 4, the learned trial Judge stated at page 109 of the records as follows:

> **"In analyzing the evidence of PW2, 3 and 4, it is clear that they all identified the two accused as having attacked them with cutlass and broken bottle on the 12th day of August, 2012 at about 9-9:30pm. The evidence of PW2 and 3 in my view corroborates one another as to how Rashidat Ismail was about throwing away water used in washing (sic) hand after their dinner and she encountered the two accused persons in their corridor or passage, how she shouted and her shout attracted her husband and he was attacked by 2nd accused**

who hit him with a bottle on the head. The evidence of PW4 corroborates the evidence of PW2 who she said is her husband that the 2nd accused hit him with a bottle on the head. The three prosecution witnesses Pw2, 3 and 4 identified the two accused persons as having attacked them with bottle and cutlass on the 12/8/2012. Under cross-examination the PW2 and Pw3 identified exhibit P3 pieces of broken bottle as being green like the beer bottle the 2nd accused used in hitting PW2 on the head and stabbing him in the stomach, while PW3 identified exhibit P1 the cutlass as being like the one the 1st accused attached him with".

The learned trial Judge proceeded to hold at page III that:

"I am of the considered view that the said prosecution witnesses had adduced evidence beyond reasonable doubt to show and prove that the two accused persons attacked and robbed them with a cutlass broken bottle and a gun. I do agree with the submission of learned prosecution counsel that the evidence of the prosecution witnesses were direct, cogent and compelling and were unshaken under cross-examination to the effect that they maintained their evidence in-chief that they were robbed by the two accused persons with dangerous weapons such as cutlass which they identified as exhibit P1, broken bottle as exhibit P3 and gun not tendered.

Notwithstanding the fact that none of the items allegedly stolen from the prosecution witnesses were tendered in evidence by the prosecution i.e. PW2's N34,000.00 (thirty four thousand naira) only, his wallet containing the said sum, his Fuma duel Sim GSM, his wife's Nokia handset and his wrist watch, PW3's N5,000.00 (five thousand naira) and handset with GLO Sim, PW7's N14,000.00 (fourteen thousand naira), her VCD and DVD players and two GSM

handsets. I am of the view that the prosecution witnesses were consistent in their evidence of being attacked by the two accused persons on the 11th and 12th of August, 2009 with a gun, cutlass and broken bottle as earlier on stated in the course of this judgment".

The lower court in reviewing the judgment of the learned trial Judge and the submissions of counsel on issue 1 held at pages 281-282 of the record thus:

"After perusal of submissions of both counsel on issue 1, I hereby resolved (sic) that there was commission of armed robbery by the appellant and 2nd accused person. In Nwaturuocha vs. The State in Suit No. SC 197/2010 delivered on 11/3/2011 which is reported in (2011)6 NWLR (Pt. 1242) 170 the Supreme Court held that where the appellant was identified by the prosecution witnesses without equivocation, a straight issue of credibility will arise, that is to say where an alibi has been raised and there is visual positive identification of the accused, which is believed by the trial court, the appellate court should not disturb such a finding i.e. where there is more credible evidence fixing the accused person with the commission of the crime, the defence of alibi will not avail him per J.A. Fabiyi JSC His Lordship went further to say that proof beyond reasonable doubt is not proof beyond all iota of doubt and not be stretched beyond reasonable limit, otherwise it will cleave".

The learned trial Judge settled the issue of the appellant's identification and the non production of the allegedly stolen items and the lower court rightly saw no compelling reason to disturb the findings and credibility of witnesses as they were not perverse. This court sees no reason whatsoever to interfere with the decisions arrived at by the two lower courts.

Learned counsel for the appellant hammered on the possibility of mistaken identity which led to the arrest of the appellant but this argument cannot fly because of the positive identification of the appellant by PW2,

PW3, and PW4. The evidence given by these witnesses is rock solid. The learned trial Judge found them to be credible evidence and believed them. He could not have done otherwise; hence the conclusion was to reject the appellant's version. The prosecution therefore proved its case beyond reasonable doubt. The lower court endorsed the judgment of the trial Judge. There is no doubt in my mind that the two lower courts did the right thing and I will therefore affirm the judgment of the lower court.

The appellant's issues 3 and 4 in the lower court which learned counsel is complaining were not considered in the judgment of the lower court and therefore led to a miscarriage of justice read as follows:

> **"3.03 Taking into consideration the quality and nature of the purported oral confession allegedly made by the appellant to PW8, was it proper for the learned trial Judge to have relied on such a confession that the appellant was guilty as charged (Ground 6).**
>
> **3.04 Taking into consideration the fact that prosecution led evidence which showed that the appellant was already in the custody of the police prior to the hours of 9pm 9,30 of 12/8/2009 that the said offence (sic) were allegedly committed, is it not obvious that this piece of evidence created a serious doubt in the case of prosecution such that it could not have been proper and just for the learned trial Judge to hold as His Lordship did that the appellant was guilty as charged".**

Onaghise Timothy PC. No 433382 who testified as PW8 stated as follows:

> **"On 12/8/2009, at about 23 hours one Ganiyu Rahman PW5 (m) of Budo Nuhu area Ilorin, member of Nigeria Vigilante group came to Adewole Police Station and reported a case of armed robbery at Budo Nuhu area. Immediately I and three other police officers went to the scene and met the victim by**

A **name Ismail Kolawole (m) of Budo Nuhu area in a pool of blood and the two accused persons already arrested by the community members and some exhibits such as 1 cutlass, broken bottles, short plank were also recovered. In that**
B **moment I put up a question to the 2 accused persons i.e their motive of coming to the area where they were arrested and they said they came to rob but luck ran against them and in order to save the victim's life I rushed him to the hospital**
C **because he was bleeding profusely."**

When reviewing the evidence adduced at the trial in the course of the judgment the learned trial Judge said at pages 120-121 of the record:

D

"The court do agree with the submission of the prosecution counsel that the evidence of PW8 the IPO was neither denied nor controverted by any of the accused persons to the effect
E **that he asked the two accused persons at the scene, meeting them being made to sit down by the community members who arrested them what they came to do, they said they came to rob and luck ran against them. The said IPO was not**
F **cross-examined on this piece of evidence and neither did any of the accused persons adduce evidence to contradict same".**

Was this the basis on which the learned trial Judge found the accused guilty of
G the robbery which led to the sentence of 14 years imprisonment imposed on them?

In his consideration of the evidence of the appellant and 2nd accused, the learned trial Judge said:

H

"In perusing the statements of the two accused persons admitted and marked as exhibits P4 and P5 tendered through PW6 Inspector Augustine Onwuka recorded at the Special
I **Anti Robbery squad on the 16/8/2009 and the statement of the 2nd accused tendered and admitted through PW8 Police Corporal Onaghise Timothy and exhibit P7, the statement of**

the 1st accused person tendered and admitted through PW9 Corporal Omotosho who testified to have only taken the statement of the 1st accused person on the 12/8/2009, I am of the considered view that the evidence of the two accused persons in court contradicts their statements".

He analysed exhibits 4 and 5 vis-à-vis the accused persons' oral evidence in court where he found several contradictions and the submission of counsel to the parties and then proceeded to make the following findings and conclusion:

"The court would rather believe the submission of the prosecution counsel where he states in his adopted written address at page 8 thereof that the two accused persons did not address the robbery incident of 12/8/2009 for which they were arrested but were rather addressing what happened to them on 11/8/2009, that they tactically avoided the incident for which they were arrested and arraigned in court.

In exhibit P4 the 1st accused did not refer to any date while in exhibit P5 the 2nd accused referred to three dates before the 11/8/2009 and also referred to 11/8/2009 when he states (sic) that the 1st accused called him and therein stated all other statement to the point of being arrested in front of the complainant's house which contradicts his evidence in-chief of being beaten by two men to the extent of shedding blood and he becoming unconscious.

In view of the foregoing, I am of the view that the evidence of the two accused persons as adduced before the court contradicts their statements, exhibits P4, P5 and P7 thus cannot be believed or manifestly relied upon. The evidence of the prosecution in my view is direct, cogent, corroborative and has proved or fulfilled the ingredients of the offence of Armed Robbery charged, and I hereby hold that the prosecution has proved its case beyond reasonable doubt,

and the two accused persons are hereby convicted accordingly".

The learned trial Judge gave full consideration to the evidence adduced by the prosecution and the defence and found that the prosecution proved its case beyond reasonable doubt. The conviction was not based on the purported admission which the accused were said to have made to PW8 that they had gone to rob and luck ran out on them. Even if the said evidence of PW8 is expunged it will not adversely affect the outcome of the case. Consequently, even if the lower court did not consider issues 3 and 4 submitted to it by the appellant in depth, no miscarriage of justice has been occasioned which will lead to allowing the appeal.

In sum this appeal is totally bereft of merit and it is accordingly dismissed.

I affirm the judgment of the Court of Appeal, Ilorin Division delivered on 10th July, 2014 in CA/IL/C.7/2013 which had affirmed the conviction of the appellant by Ajayi J. of the Kwara State High Court, Ilorin on 11/7/2012 in Charge No. KWS/36C/2010. Appeal is dismissed.

K. B. AKAAHS
Justice, Supreme Court

I.T. MUHAMMAD, (JSC): My learned brother, Akaahs (JSC) afforded me an opportunity to read in a draft form, the judgment just delivered. I agree with my lord that the appeal lacks merit. I join my lord in dismissing the unmeritorious appeal. I abide by the consequential orders made in the leading judgment.

Ibrahim Tanko Muhammad
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother **Aka'ahs, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is lacking in merit and should be dismissed. I too will dismiss the appeal and affirm the decision of the court below.

Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

ADAMU AUGIE, (JSC): I read in draft the lead Judgment delivered by my learned brother, Akaahs, JSC, and I agree with him that the Appeal totally lacks merit.

It is clear that the Appellant has not proffered any valid reasons to question the findings of the trial Court that touches on credibility. It is also settled that where there is sufficient evidence to support concurrent findings of fact by two lower Courts, such findings will not be disturbed unless there is significant error apparent on the Record; that is, the findings are shown to be perverse, or some miscarriage of justice or some violation of principles of law or procedure is shown – see **Ogoala vs. The State** *(1991) 2 NWLR (Pt. 175) 506 SC.*

In this case, there is more than enough evidence establishing by the Prosecution to support the concurrent findings of the trial Court and Court below, and this Court is not in the position to intervene.

It is for this and the other reasons in the lead Judgment that I also dismiss this Appeal and affirm the decision of the Court below.

Amina Adamu Augie,
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother AKA'AHS (JSC) and I agree entirely with the reasoning contained therein and the conclusion arrived thereat.

My learned brother has as usual treated exhaustively all the issues submitted for resolution of this appeal in such a way that I have no useful thing to add. For the same reasoning articulated in the lead judgment, which I adopt as mine, this appeal shall be and it is hereby dismissed.

Paul Adamu Galinje
Justice, Supreme Court

LEKAN OLAOYE
AND
THE STATE

SC. 488/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 19TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Where trial court wrongly admitted evidence – Approach of an appellate court thereto – S.251 Evidence Act 2011 – Relevant considerations thereof.

CONSTITUTIONAL LAW: Presumption of innocence of the accused – Implication on – Burden of proof placed on prosecution in criminal cases.

COURT: Confessional Statement – Where direct, cogent, positive and credible – Whether court can convict without other corroborative evidence – Relevant considerations thereof.

COURT: Conviction solely on a confessional statement – Obligation of Court thereto – Relevant considerations.

COURT: Objection to admissibility of confessional statement on ground of involuntariness – Duty on trial court thereto.

COURT: Supreme Court – When will not interfere with concurrent findings of two lower courts.

COURT: Where confronted with identification evidence – Approach thereto – Relevant principles thereof.

CRIMINAL LAW AND PROCEDURE: Contradiction of a witness – Previous statement –Procedure thereof – SS. 232 and 235 of Evidence Act 2011 – Failure to comply – Effect.

CRIMINAL LAW AND PROCEDURE: Proof of criminal cases – Three modes of proving criminal cases – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Admissibility of a confessional statement – Where an accused retracts his confessional statement – Whether such retraction does not affect its admissibility in evidence.

CRIMINAL LAW AND PROCEDURE: Confession made by accused – Role and significance in the determination of the guilt of accused.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Formal requirements for its admissibility – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – The establishment of the voluntariness of a confessional statement is a question of facts which falls with the exclusive dormain of trial courts – Attitude of appellate courts to the determination of facts by trial courts.

CRIMINAL LAW AND PROCEDURE: Conviction of accused – Whether confessional statement alone is sufficient to ground conviction – Relevant factors thereto.

CRIMINAL LAW AND PROCEDURE: Evidence of identification credible and established that accused was seen committing the offence – Whether an identification parade not necessary – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Onus of proof on prosecution to prove the guilt of the accused beyond reasonable doubt – S. 135 of Evidence Act – Whether prosecution is obliged to call all available evidence or a host of witnesses to discharge onus of proof – Relevant considerations thereof.

EVIDENCE: Admissibility of a confessional statement – Essential requirements thereof.

EVIDENCE: Hearsay evidence – Where IPO narrates to the court the outcome of his investigations and inquiries – Whether such evidence amounts to hearsay.

WORDS AND PHRASES: Confessional statement – Meaning.

Issues for Determination

1. **Whether the eminent justices of the Court of Appeal were right in holding admissible Exhibit H, the purported confessional statement of the appellant predominantly relied on in convicting the appellant of the charges of conspiracy to commit armed robbery, robbery and murder same having been established to have been obtained under duress.**

2. **Whether apart from the Exhibit "H", the prosecution led cogent and credible evidence in proof of the guilt of the appellant beyond reasonable doubt.**

Facts of the Matter

This appeal is against the judgment of the Court of Appeal, Lagos division delivered on the 16th day of May, 2014 which affirmed the judgment of the Lagos State High Court delivered on 13th December, 2007.

The appellant herein who was the 1st accused person at the trial court, was charged along with three other co-accused persons before the trial court on offences of conspiracy to commit armed robbery, robbery, murder and receiving stolen goods, contrary to Section 403A, 402(2) (A), 319(1) and 420 of the

Criminal Procedure Code, Cap 32 Vol. 2 Laws of Lagos State of 1994. In proof of the case, the prosecution called three witnesses and tendered eight (8) exhibits, while the 1st accused/appellant did not call any witness but testified on his behalf. During the trial, the prosecution sought to tender a confessional statement which it alleged was voluntarily made by the accused/appellant but the defence objected to the admissibility of the said confessional statement on the ground that it was not made voluntarily by the accused/appellant. As is the law, the trial court conducted trial within trial in order to determine the voluntariness of the said confessional statement. At the end of the mini-trial, the court held that the statement was made voluntarily and admitted it in evidence and marked it as Exhibit H. The trial thereafter proceeded in earnest and in the end the trial court found or held that the prosecution/respondent had proved its case beyond reasonable doubt that the appellant and the three other co-accused persons committed all the offences as charged and convicted them accordingly.

Miffed by the judgment of the trial court, the appellant appealed to the Court of Appeal albeit, without success. Aggrieved by the judgment of the court below affirming the conviction and sentence passed on him by the trial court, the appellant further appealed to the Supreme Court.

The case of the prosecution was that on the 9th of December, 2000, the deceased late Chief Layi Balogun arrived at Muritala Muhammad International Airport from Abuja at around 3.30pm after which he, in company of his security detail, one Sgt Olajide Longe, left for his (deceased's) office situate at No. 1, Balogun Street, Oregun, Ikeja Lagos. The security detail was in mufti. Then at about 9.00pm both of them left the office for the deceased's residence at No. 26, Oluwole Street, Akoka along with the deceased's driver.

On approaching his residence, the gate was opened when the deceased and his security detail were accosted by five unknown armed men who fired gun shots towards the chest of the security detail. Thereafter, the deceased, the security detail and other members of his family were taken hostage by the five gun-men. After about ten to fifteen minutes later, both the deceased i.e Chief Balogun and the security detail were shot after which the gun-men carted away with the deceased's cell phone, omega wrist watch and a sum of N20,000.00 and fled the scene of the crime. The Chief and the security detail were later rushed to hospital where the former passed on. The trial court convicted the appellant and his co-accused persons as charged: The appellant's appeal to the Court of Appeal was

dismissed, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The three modes of proving criminal cases*
Perhaps it is apt to kick-start the resolution of this issue by reiterating that there are three modes of proof of criminal cases. These methods or modes of such proof are:

(a) By testimonies of eye witness or witnesses who watched, heard or witnessed the commission of the crime by the accused person(s)
(b) Through confessional statement voluntarily made by the accused
(c) Through circumstantial evidence which clearly point to the sole fact that the accused and no other person committed the offence charge.

(P 437 Paras C – F)

2. *Duty on court where a confessional statement is challenged on ground of involuntariness*
In the course of the proceedings in this case at the trial court, the prosecution sought to tender in evidence the confessional statement allegedly made by the appellant. The latter objected to the admissibility of that statement on the ground that it was obtained through torture admitted on him. The law is trite and well settled too, that where there is dispute on whether or not an accused person made the statement sought to be tendered made same voluntarily, it is the duty of the trial court to try the voluntariness of such statement by conducting, a "trial within trial" otherwise known as 'mini trial. See Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561; Obosi vs. State (1965) NMLR 119. In this instant case, the learned trial judge had duly complied with this rule and had conducted 'trial within trial' before he finally admitted the confessional statement of the accused/appellant in evidence as Exhibit H. Having ascertained the voluntariness of the

extra-judicial statement of the accused/appellant, the trial court in my view is duty bound to rely and act on the confessional statement (Exhibit H). The call by the learned counsel for the appellant that the statement should be expunged from the record by this court is therefore of no moment and rather absurb. *(Pp437 – 438 Paras G – B)*

3. *Meaning of a confessional statement*
A confessional statement can be simply be defined as an admission by a person charged or an accused person accused of committing a crime at anywhere or at anytime stating or suggesting the inference that he committed such crime. See section 28 of the Evidence Act 2011 as amended. It is well settled law, that free and voluntary confession of guilt, alone by an accused person provided it is direct and positive and was duly made voluntarily, is sufficient to ground a conviction, since a confession always remains the best proof of what he had done. See Alabi vs. State (1993) 7 NWLR (Pt. 307) 511; Fabiyi vs. State (2015) 6-7 SC (Pt. 1) 83. Osetole & Anor vs. State (2012) 6 SCNJ 321; Nwachukwu vs. The State (2002) 7 SCNJ 230; Dogo vs. The State (2013) 2-3 SC (Pt. II) 75 at 92-94. *(P 438 Paras B – E)*

4. *Duty on court before convicting solely on a confessional statement.*
I am not unaware of the fact and it is even settled law that before a court convicts an accused person on his confessional statement alone, it must ascertain whether such confessional statement was voluntarily made and that it was also direct, positive, pungent and consistent with other facts as proved. See Jimoh vs. State (2014) 10 NWLR (Pt. 1414) 105. Looking closely and dispassionately at the confessional statement Exhibit H vis a vis the record of proceeding, I am not doubtful of the fact that the trial court had duly examined and evaluated Exhibit H and also the lower court had duly considered same before endorsing the trial court's reliance on it. *(P 438 Paras E – G)*

5. *Requirements pertinent to the admissibility of a confessional statement*
It is pertinent to say that this court has over the years evolved some requirements which a confessional statement must meet in order to be

relied on by trial courts. Some of these requirements include the followings:

(i) It must contain the words of caution
(ii) The cautionary words must have been administered in the language understood by the accused.
(iii) The statement was duly signed or thumb printed by the accused.
(iv) That the statement was recorded in the language understood by the accused person.
(v) That the statement was after being recorded read over and interpreted to the maker in the language it was recorded.

From the look of the statement of the appellant Exhibit H, it is as clear as crystal, that all the above requirements were met or complied with, hence I also hold the view that the trial court was right to accept and act on the extra-judicial statement of the appellant (Exhibit H).
(P 439 Paras B – F)

6. *The role and implication of confession made by accused*
It needs be stressed here, that a confession of an accused person to the commission of an offence plays a vital role in the determination of his guilt. Therefore, a trial court is free to convict him even on the confessional statement alone once that trial court is convinced that the confession is voluntary as in this instant case. I said so because by his confession, the accused (now appellant) had confirmed the commission of criminal responsibility in terms of mens rea and actus rea. See Okeke vs. State (2003) 15 NWLR (pt. 842) 25. *(P 439 Paras G – I)*

7. *Effect on admissibility where a confessional statement is retracted.*
It also needs to be emphasised and its also settled law too, that mere retraction of a voluntary confessional statement by an accused person, as in this instant case, does not render such statement inadmissible or worthless or untrue in considering his guilt. See Idowu vs. State (2000) 7 SC (Pt. II) 50. *(Pp 439 – 440 Paras I – A)*

8. *Where a confessional statement is direct positive cogent and credible no other corroborative evidence required.*

Now, coming to the issue of alleged want of corroborative evidence insinuated by the learned counsel for the appellant I do not think that is true. As it could fathomed, PW1 and PW2 were eye witnesses who had actually witnessed the entire criminal act perpetrated by the appellant and his partners in crime. Both of them gave uncontradicted and uncontroverted testimonies which had duly corroborated Exhibit 'H', the appellant's confessional statement. I must however state here, that a confessional statement which is made voluntarily and is direct, cogent, credible and positive, is enough to ground conviction even without corroboration of any sort. See Sule Iyanda Salawu vs. The State (1971) NWLR 249; Grace Akinfe vs. The State (1988) 7 SCNJ (Pt. II) 226; Yahaya vs. The State (1986) 12 SC 282 at 290. In any case, in this instant case, the criminal event took place in the presence of PW1 and PW2 who as eye witnesses, had watched, observed and witnessed the entire event as it happened first hand. Those two eye witnesses had witnessed the armed robbery operation and heard the sound of the gunshots fired at the deceased and had also seen the body of the victim in his room upstairs after the gun shots. Similarly, some exhibits in the nature of items/goods that were robbed from the deceased, were all tendered by the prosecution at the trial in proof of the offences the appellant and his co-accused were charged with, tried and convicted by the trial court. The witnesses called by the prosecution as rightly held by the trial court, had given credible and reliable evidence which fixed the appellant at the scene and time of the crime and linked him with the crime when the appellant and his co-conspirators dastardly murdered the deceased after robbing him of the goods some of which were duly exhibited at the trial. Those pieces of evidence were neither contradicted nor challenged in any material respect at the trial. The appellant was therefore pinned down in the commission of the offences charged. *(P 440 Paras B – H)*

9. *Prosecution not bound to call every available evidence or host of witness to discharge burden of proof.*

Learned counsel for the appellant frowned at the prosecution's failure to call a witness to testify in the case at the trial within trial more especially on the admission of the commission of the offences who PW3 testified on alleged boasting in a cell by the appellant. With due deference to the learned appellant's counsel, it is not necessary for the prosecution to in order to discharge the onus of proof imposed upon it by law, to call a host of witnesses or to adduce or tender every available pieces of evidence. It is sufficient if the evidence called is enough to discharge the onus placed on it by law. The true position of the law is that the prosecution is not bound to call every person linked to the commission of the crime by physical presence or otherwise to give evidence on what he perceived. Once persons who can testify to the actual commission of the crime and on the other ingredients have done so, that will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 (1) of the Evidence Act 2011 as amended, Cap 112 Laws of the Federation of Nigeria 2004. See The State vs. Ogbubuoyo & Anor (2001) 12 NWLR (Pt. 678) 576; Obue vs. State (1976) 2 SC 141; Shurumo vs. The State (2010) 44 NSCQR 159. As a matter of fact, even a single witness who gives cogent eye witness account of the incident can be sufficient. See Odili vs. State (1977) 4 SC 1. *(Pp 440 – 441 Paras I – D)*

10. *Where there is a credible evidence of identification to establish that the accused was seen committing the offence, identification parade not necessary.*

I must emphasis here, that identification evidence is not sine qua non for conviction. It is sufficient if credible evidence is adduced to show that the person charged with an offence is the same as the person who was seen committing the offence(s). When a trial court is confronted with identification evidence, all it is required to do is to be satisfied that the evidence of identification had established the guilt of the accused person beyond reasonable doubt. See Ukpabi vs. State (2004) 6-7 SC 27. Identification parade is not necessary in all criminal cases. Identification is simply a means of establishing whether a person

charged with an offence is actually the same person who committed the offence. Therefore once credible evidence abounds confirming that the person charged was the actual one who committed the offence, as in this instant case, then there will be no need to conduct, identification parade at all. See Orimoloye vs. the State (1984) 10 SC (Reprint) 128; Ebri vs. The State (2004) 5 Sc (Pt. II) 29. Here, the two eye witnesses namely PW1 and PW2 had contact or interaction with the appellant and other co-accused persons for quite a reasonable time during the commission of the offences. Also, the appellant had identified himself when in his confessional statement Exhibit 'H', he had fixed himself at the scene of the crime on the day of the incident. The requirement of formal identification parade is therefore superfluous as rightly held by the two lower courts. Also on the quality of the testimony of PW3 who is the investigation police officer which the appellant's learned counsel called for its discountenance because according to him it is hearsay evidence. *(Pp 441 – 442 Paras F – C)*

11. *Where evidence of IPO does not amount to hearsay*
I do not share the appellant's counsel's view that the evidence of an IPO amounts to hearsay because an IPO narrates to the court the outcome of his investigation or enquiries or what he recovered and in the course of his duty he must have discovered or recovered some pieces of evidence vital to the commission of the crime which trial courts normally consider in arriving at just decision one way or the other. The lower court was therefore right in refusing to discountenance the evidence adduced or given by PW3. *(P 442 Paras C – E)*

12. *The presumption of innocence of the accused implication on burden in criminal cases.*
The age long principle of law, is that in criminal cases an accused person is constitutionally presumed innocent until the contrary is proved by the prosecution. The onus of proof in criminal cases does not shift as the burden throughout lies on the prosecution in criminal trial which must prove the guilt of the accused. See Bello vs. State (2007) 10 NWLR (Pt. 1043) 564; Igabele vs. State (2006) 6 NWLR (Pt. 975) 100.

However, any doubt in the prosecution's case must be resolved in favour of the accused person. In this instant case, as found by the two lower courts, the prosecution had led credible, cogent and reliable evidence in proof of all the offences the appellant and his co-conspirators were accused of committing. The appellant at the close of the prosecution's case presented his defence when he testified as DW1. The learned trial judge had duly and painstakingly considered and evaluated the entire evidence adduced in the case by both parties before concluding that the prosecution had proved its case beyond reasonable doubt and convicted him as charged. *(P 442 Paras E – H)*

13. *Where Supreme Court will not interfere with concurrent findings.*
It is worthy of note that there is in this instant appeal, concurrent findings of two lower courts both reaching the same conclusion that the prosecution had proved its case against the present appellant beyond reasonable doubt. As a matter of practice, this court is always hesitant in interfering with or disturbing the concurrent findings of two lower courts except on special circumstances, for instance, where the findings are perverse or there is misconception or misapplication of law. None of these vices are apparent in this instant case. I therefore see no reason to disturb or interfere with the findings of the two courts below. *(P 443 Paras C – E)*

14. *The definition of confession*
The definition of a confession is as stated in Section 28 of the Evidence Act 2011 thus:

> **"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime".**

It is now settled law that a confession would be relevant against the person who makes it when the statement is voluntary and thereby admissible. It follows that once a confessional statement is deemed to be positive, direct and unequivocal such a statement would be admitted since it has been voluntarily made and when that is the case such a confessional statement alone as evidence can sustain a conviction. In such a case also there is no need for corroboration. In

this I place reliance on the cases of Yusuf vs. State (1976) 6 SC 167 at 173; Olabode vs. State (2007) All FWLR (Pt. 389) 1301; Nwachukwu vs. State (2003) FWLR (Pt. 123) 312; 312; Kanu vs. King (1952) 14 WACA 30; R vs. Omokoro (1941) 7 WACA 146.
(Pp 447 – 448 Paras H – C)

15. *The establishment of duress in the making of confessional statement is a question of fact*
To reiterate the stand of this court on the matter regarding confessional statements and its acceptability in evidence, it is now trite law that the establishment of duress, oppression or coercion to make a confessional statement is a finding of facts and so it is for the determination of a court of law which however falls within the exclusive domain of the court of trial which has the primary duty of resolving findings of facts, evaluation and ascription of probative value to evidence to which an appellate court is in a way forbidden from interfering or disturbing those facts so elicited except under exceptional circumstances. I rely on Ebge vs. Adefarasin (1987) 1 SCI; Eze Ibeh vs. State (1997) 1 SCNJ 256-271.

The Supreme Court has gone further to list the formal requirements of an extra-judicial statement as follows:

(a) It must carry the usual form of caution
(b) each of the words of caution must be in the language understood by the maker
(c) it must be followed by the makers thumb-print or signature
(d) it must be recorded in the language understood by the maker
(e) it must be read over and interpreted to the maker in the language in which it is made.
See Kim vs State (1992) 4 NWLR (Pt. 233) 17.

Indeed the trial court carried out its duties as required by law before it admitted the said statement as Exhibit 'H' in its confessional status.

Assuming however that the said statement was wrongly brought in as the court below brought out that there were other areas in the evidence adduced by the prosecution respondent sufficient for the utilisation of the trial court to ground the conviction.
(P 451 Paras A – H)

16. *Wrongly admitted evidence. The principles in S.251 of Evidence Act 2011*
Again to be said is that under Section 251 of the Evidence Act, the wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted. This is really the answer to the vehemently put across submission of learned counsel for the appellant that Exhibit 'H' be jettisioned as if, that is the only anchor on which the conviction is supported. In this case not only is there no foundation on which the said confessional statement would be expunged from evidence even if theoretically that was the case, there is enough upon which the court can support a conviction of the appellant. See State vs. Ogbubunjo (2001) FWLR (Pt. 37) 1097; Uche Obidiozo & Ors vs. State (1987) 12 SC 74 at 93. *(P 452 Paras B – E)*

17. *There was corroborative evidence*
Per Peter-Odili (JSC):

> **"At the risk of over flogging a vexed issue, the lower court examined and considered other evidence apart from the confessional statement and in concluding affirmed the decision of the trial court. As the PW1 and PW2 were direct eye witnesses of the armed robbery and murder and recounted how the entire operation took place and those pieces of evidence remained unchallenged or contradicted by the appellant at the court of first instance. The investigating police officer, PW3 stated what he found in the course of his investigation and tendered the items he recovered there. Of note is that the appellant was arrested based on the recovered**

handset of the deceased Chief Layi Balogun. This evidence of PW3 was not dainted by the appellant and so the court was duty bound to use it in building up the case against the appellant.

Again, the appellant had a grouse on the absence of an identification parade which the circumstances prevailing in the instant case made unnecessary when the PW1 and PW2 effectively identified the appellant and others when they were paraded on television. This they could do as PW1 and PW2 said they had over 20 minutes interaction with the appellant and co-travellers. There is no hard and fast rule as to how an identification could be acceptably made especially in this case where the certainty of who accosted and dealt with them was clear and not in doubt to the eye-witnesses, that made an identification parade unnecessary. See Tajudeen Alabi vs. State(1993) 7 NWLR (307) 511 at 527; Adamu vs. The State (1986) 3 NWLR (Pt. 32) 865; Mbenu vs. The State (1988) 3 NWLR (Pt. 84) 615.

It has to be said that it is erroneous for the appellant to posit that the evidence of PW3 should be discountenanced being hearsay evidence. That submission is a misconception since PW3 is the investigating police officer who has to narrate to the court what transpired in the course of his investigation. In this process of stating what he found out in carrying out his inquires, would be pieces of evidence which with another witness would be considered hearsay but from him since the court has to know the synopsis of his investigating journey it is direct evidence. See Obot vs. State (2014) LPELR-23130 (CA).

In conclusion, this is one of those instances where the concurrent findings of facts of the court below are to be left un-tampered with stemming as they were from the evidence on record leading to the irresistible conclusion that for a fact

the prosecution respondent proved its case against the appellant beyond reasonable doubt, the essential ingredients of the offences have been made out as required by law. See Abeke Onofowokan vs. The State (1987) 7 SCNJ 233 at 249; Basil Akalezi vs. The State (1993) 2 NWLR (Pt. 273) 1 at 13; Ogidi vs. State (2005) 1 NCC 163 at 177.
(Pp 452 – 453 Paras F – F)

18. *There were other evidence implicating the appellant*
Per Eko (JSC):

"There is no substance in this appeal. As correctly submitted for the respondent with or without the disputed confession in Exhibits H and D, the evidence of the PW1, PW2, PW3 and DW4 link the appellant to the offences he was charged and convicted for.

The PW1 and PW2 were eye witnesses of the armed robbery and the murder of Layi Balogun. They, each, gave direct evidence of what they saw and experienced in the hands of the armed robbers on the fateful day. They were neither discredited nor contradicted as regards the substance of their testimonies.

The previous statement of the PW1 was tendered as Exhibit A without any effort made to draw his attention to any portion thereof for purposes of contradiction. That is the condition precedent for using the previous statement of a witness to contradict him. The position of the law is that, before any contradiction can be established between the evidence of a witness and the previous statement made by the witness, the statement must be brought to the attention of the witness for his explanation in accordance with Sections 199 and 209 (now Sections 232 and 235) of the Evidence Act. Contradiction between the testimony of the witness and his

previous statement, in the instant case Exhibit A, cannot therefore be established without compliance with the mandatory provisions of the Evidence Act, aforestated: KWAGHSHIR vs. THE STATE (1995) 3 NWLR (Pt. 386) 651; BALOGUN vs. A.G, OGUN STATE (2002) 2 SC (Pt. II) 89.

The PW1, seized by the robbers and shot twice after being dragged upstairs with the deceased Layi Balogun, was categorical that he knew the 2nd accused who shot him. The 2nd accused, according to the PW1, was the person assigned to stay with him. The cross-examination did little to shake the PW1's credibility. The trial court believed him.

The PW2's recognition of the 2nd accused and the appellant (the 1st accused), as being among the 5 robbers, was also not discredited by cross examination. The PW2 averred that the robbers took Layi Balogun's cell phone, wrist watch and N20,000.00. He identified the wrist watch, Exhibit C, and the cell phone.

The cell phone was recovered from the 4th accused, DW4, who admitted buying it from one Kola and the 3rd accused for N1,500.00. The PW3, the investigating police officer (IPO), testified that the 3rd accused, upon his arrest, identified the appellant (1st accused) as the person who sold Layi Balogun's cell phone, Exhibit B, to the 4th accused (the DW4). The PW3's evidence, as correctly submitted by the respondent's counsel, was also not challenged or contradicted by the appellant". *(P 454 – 455 Paras E – F)*

Nigerian Cases Cited

Abeke Onofowokan vs. The State (1987) 7 SCNJ 233;
Adamu vs. The State (1986) 3 NWLR (Pt. 32) 865;
Alabi vs. State (1993) 7 NWLR (Pt. 307) 5;
Balogun vs. A.G, Ogun State (2002) 2 SC (Pt. II) 89.

Basil Akalezi vs. The State (1993) 2 NWLR (Pt. 273) 1;
Bello vs. State (2007) 10 NWLR (Pt. 1043) 364;
Dogo vs. The State (2013) 2-3 SC (Pt. II) 75 .
Ebge vs. Adefarasin (1987) 1 SCI;
Ebri vs. The State (2004) 5 Sc (Pt. II) 29.
Eze Ibeh vs. State (1997) 1 SCNJ 256-271.
Fabiyi vs. State (2015) 6-7 SC (Pt. 1) 83.
Grace Akinfe vs The State (1988) 7 SCNJ (Pt. II) 226;
Idowu vs. State (2000) 7 SC (Pt. II) 50;
Igbole vs. State (2006) 6 NWLR (Pt. 975) 100.
Jimoh vs. State (2014) 10 NWLR (Pt. 1414) 105.
Kanu vs. King (1952) 14 WACA 30;
Kim vs State (1992) 4 NWLR (Pt. 233) 17.
Kwaghshir vs. The State (1995) 3 NWLR (Pt. 386) 651;
Mbenu vs. The State (1988) 3 NWLR (Pt. 84) 615.
Nwachukwu vs. State (2003) FWLR (Pt. 123) 312;
Nwachukwu vs. The State (2002) 7 SCNJ 230;
Obosi vs. State (1965) NMLR 119.
Obot vs State (2014) LPELR-23130 (CA).
Obue vs. State (1976) 2 SC 141;
Odili vs. State (1977) 4 SC 1.
Ogidi vs. State (2005) 1 NCC 163.
Okeke vs. State (2003) 15 NWLR (pt. 842) 25.
Olabode vs. State (2007) All FWLR (Pt. 389) 1301;
Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 5;
Orimoloye vs. the State (1984) 10 SC (Reprint) 128;
Osetole & Anor vs. State (2012) 6 SCNJ 321;
R vs. Omokoro (1941) 7 WACA 146.
Sadau vs. State (1968) 124;
Shurumo vs. The State (2010) 44 NSCQR 159;
State vs. Ogbubunjo (2001) FWLR (Pt. 37) 1097;
Sule Iyanda Salawu vs The State (1971) NWLR 249;
Tajudeen Alabi vs. State(1993) 7 NWLR (307) 511;
The State vs. Ogbubuoyo & Anor (2001) 12 NWLR (Pt. 678) 576;
Uche Obidiozo & Ors vs State (1987) 12 SC 74

A *Ukpabi vs. State (2004) 6-7 SC 27.*
Yahaya vs The State (1986) 12 SC 282.
Yusuf vs. State (1976) 6 SC 167;

B **Nigerian Statutes Cited**
The Evidence Act 2011 Section 138 (1); Section 28 S. 251
Section 403A, 402(2) (A), 319(1) and 420 of the Criminal Procedure Code, Cap 32 Vol. 2 Laws of Lagos State of 1994.

C

Representation
F.A. Dalley and O.A. Olude for the Appellant.
Adedoyin Rhodes-Vivour (Mrs) with Thomas Ojo, Ireti Banjo and Princess
D *Obi for the Respondent.*

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): This appeal is against the judgment of the Court of Appeal, Lagos division ("The lower
E court" for short) delivered on the 16th day of May, 2014 which affirmed the judgment of the Lagos State High Court (trial court) delivered on 13th December, 2007.

The appellant herein who was the 1st accused person at the trial court,
F was charged along with three other co-accused persons before the trial court on offences of conspiracy to commit armed robbery, robbery, murder and receiving stolen goods, contrary to Section 403A, 402(2) (A), 319(1) and 420 of the Criminal Procedure Code, Cap 32 Vol. 2 Laws of Lagos State of 1994.
G In proof of the case, the prosecution (now respondent) called three witnesses and tendered eight (8) exhibits, while the 1st accused/appellant did not call any witness but testified on his behalf. During the trial, the prosecution sought to tender a confessional statement which it alleged was voluntarily made by the
H accused/appellant but the defence objected to the admissibility of the said confessional statement on the ground that it was not made voluntarily by the accused/appellant. As is the law, the trial court conducted trial within trial in order to determine the voluntariness of the said confessional statement. At the
I end of the mini-trial, the court held that the statement was made voluntarily and admitted it in evidence and marked it as Exhibit H. The trial thereafter proceeded in earnest and in the end the trail court found or held that the

prosecution/respondent had proved its case beyond reasonable doubt that the appellant and the three other co-accused persons committed all the offences as charged and convicted them accordingly.

Miffed by the judgment of the trial court, the appellant appealed to the Court of Appeal (the lower or court below), albeit, without success. Aggrieved by the judgment of the court below affirming the conviction and sentence passed on him by the trial court, the appellant further appealed to this court.

The case of the prosecution was that on the 9th of December, 2000, the deceased late Chief Layi Balogun arrived at Muritala Muhammad International Airport from Abuja at around 3.30pm after which he, in company of his security detail, one Sgt Olajide Longe, left for his (deceased's) office situate at No. 1, Balogun Street, Oregun, Ikeja Lagos. The security detail was in mufti. Then at about 9.00pm both of them left the office for the deceased's residence at No. 26, Oluwole Street, Akoka along with the deceased's driver.

On approaching his residence, the gate was opened when the deceased and his security detail were accosted by five unknown armed men who fired gun shots towards the chest of the security detail. Thereafter, the deceased, the security detail and other members of his family were taken hostage by the five gun-men. After about ten to fifteen minutes later, both the deceased i.e Chief Balogun and the security detail were shot after which the gun-men carted away with the deceased's cell phone, omega wrist watch and a sum of N20,000.00 and fled the scene of the crime. The Chief and the security detail were later rushed to hospital where the former passed on.

After filing this appeal before the Supreme Court, the counsel for the appellant, in keeping with the practice and rules of this court, prepared his brief of argument and served same on the respondent. The appellant's brief of argument settled by F. Ajibola Dalley Esq, was filed on behalf of the appellant on 13th July 2017. In the said brief of argument; three issues were identified for the determination of this appeal which are set out hereunder:

1. Whether the eminent justices of the Court of Appeal were right in holding admissible Exhibit H, the purported confessional statement of the appellant predominantly relied on in convicting the appellant of

the charges of conspiracy to commit armed robbery and murder same having been established to have been obtained under duress (Grounds 1 and 2).

2. **Whether the eminent justices of the Court of Appeal were right in relying exclusively on the challenged evidence presented by the prosecution without taking cognisance of the case presented by the defence (Grounds 3 and 4).**

3. **Whether the eminent justices of the Court of Appeal were right in holding that the trial court rightly admitted the challenged evidence of the Prosecution witnesses without furnishing or stating any reasons whatsoever for arriving at such findings and conclusion (Ground 5).**

Upon being served with the appellant's brief of argument, the learned counsel for the respondent also filed a brief on behalf of its client on 23rd August, 2007. The said respondent's brief of argument was settled by Adedoyin Rhodes-Vivour and therein, two issues were identified as germane for the determination of this appeal. The dual issues are reproduced below:

A. **Whether the eminent justices of the Court of Appeal were right in holding admissible Exhibit H, the purported confessional statement of the appellant predominantly relied on in convicting the appellant of the charges of conspiracy to commit armed robbery, robbery and murder same having been established to have been obtained under duress.**

B. **Whether apart from the Exhibit "H", the prosecution led cogent and credible evidence in proof of the guilt of the appellant beyond reasonable doubt.**

It is not out of place to note that the respondent by her Issue No. 1, has adopted the corresponding appellant's issue No. 1

SUBMISSIONS BY APPELLANT'S COUNSEL ON HIS ISSUES FOR DETERMINATION

ISSUE NO. 1

This issue deals with whether the court below was right in holding admissible, Exhibit H the confessional statement of the appellant.

The learned counsel to the appellant contended that the confessional statement obtained from the appellant was not voluntarily made by him. He submitted that where element of oppression either by way of torture, inhuman or degrading treatment is established, the voluntariness of the said confessional statement is vitiated. He submitted that the onus of establishing whether a confessional statement is admissible or not is on the prosecution. He cited the case of COP vs. EPHRAIM ALOZIE (2017) LPELR 1313 (SC). He argued further, that the prosecution failed to present any form of documentary evidence particularly in form of a medical report, corroborating the testimony of PW3 that the gun shut injuries sustained by the appellant occurred before he was arrested and detained at the Special Anti Robbery Squad Ikeja, Lagos. He argued further that the court below ought not to have accepted Exhibit "H" in the light of uncontroverted credible evidence presented during the trial within trial. He cited the case of THE STATE vs. JAMES GWANGWAN (2015) LPELR 24837 (SC) where it was held per Ogunbiyi JSC as follows:

> **"The law is trite and well established it is open for an appellate court to interfere with findings of a trial court when such findings have been made on legally inadmissible evidence or they are perverse or are indeed not based on any evidence before the court".**

He therefore submitted that the trial court relied on a legally inadmissible confessional statement of the appellant (Exhibit "H") in convicting and sentencing the appellant. He urged this court to expunge from the record the

A legally inadmissible purported confessional statement attributed to the appellant.

ISSUE NO. 2

B This issue queries whether the court below was right in relying exclusively on the challenged evidence of the prosecution without taking cognisance of the case presented by the defence. He argued that the statements of both PW1 and PW2 made at the police station were inconsistent with their oral testimonies in C court. They testified at the trial that they saw the appellant participating in the robbery and murder of the deceased, whereas in their statements to the police, they made no mention of the appellant or gave any description of him. He cited the case of OGUDU vs. THE STATE (2011) 11-12 (Pt. 1) SCM 209 at D 222-223. He therefore submitted that failure of the court below to take cognisance of apparent inconsistencies in both PW1's and PW2's statements made to the police and their oral testimonies had occasioned a miscarriage of justice. He contended further, that the court below ought not have relied on E PW1's and PW2's purported identification of the appellant as same was vague and imprecise as no credible evidence in form of identification was conducted. He contended that identification of the appellant on the television by PW1 and PW2 as one of those who robbed and killed the deceased cannot take the place F of lawfully conducted identification parade. He submitted further, that the court below erred in law by relying on the oral testimony of PW3 as his testimony can at best be described as legally inadmissible hearsay evidence. He referred to Section 37 and 38 of the Evidence Act 2011 as amended and G submitted that the court ought to ascribe probative weight only to direct, oral evidence of a witness who either saw or heard a fact in issue. He submitted again, that the court below erred in law and that miscarriage of justice had been occasioned when it relied on the impeached evidence presented without H taking any form of cognisance of the case presented by the appellant in his defence. He urged this court to also resolve this issue in favour of the appellant.

I **ISSUE NO. 3**

This issue questions whether the court below was right in holding that the trial court rightly admitted the challenged evidence of the prosecution witnesses

without giving reasons on such conclusion.

The learned counsel for the appellant argued that the court erred in law when it upheld that the trial court need not give reason for believing the evidence of PW1 and PW2 who claimed to have seen the appellant in the group of people that allegedly robbed and killed the deceased. He then urged the court to also resolve this third issue in favour of the appellant and allow the appeal.

SUBMISSIONS OF RESPONDENT'S COUNSEL ON HER ISSUES FOR DETERMINATION

As I stated above, the respondent adopted the first issue formulated by the appellant and raised an additional issue for determination. On issue No. 1 i.e the issue relating to admissibility of Exhibit "H" the learned counsel referred to the contention of the appellant to the effect that the court below affirmed the decision of the trial court on the basis that the appellant had his signature on the statement, rather than the voluntariness of that statement.

The learned counsel to the respondent submitted that this contention is misconceived as the lower court apart from the issue of signature, held that the trial court followed logically the guide set by the apex court. He referred to the judgment of the lower court at page 472 of the record. He argued that establishment of oppression or coercion is a finding of fact and as such it is a determination to be made by a court of law and it falls within the exclusive preserve of the trial judge only. He submitted that the court below rightly considered the ratio decidendi adopted by the trial court in reaching the decision that the confessional statement was voluntarily obtained. He submitted that a careful perusal of Exhibit "H" will show that it was recorded in total compliance with the requirement of the law. He submitted that the case of KIM vs. STATE (1992) 4 NWLR (pt 233) Pg. 17 this court stated the requirements of admissibility of extra judicial statement and listed them to include the followings:

(a) It must carry the usual words of caution

(b) Each of the words of caution must be in the language understood.

(c) It must be followed by the maker's thumb print or

A

signature by the accused.

(d) It must also be recorded in the language understood by the maker.

(e) It must be read over and interpreted to the maker in the language in which it was made.

B

The learned respondent's counsel argued further that even if Exhibit "H" was wrongly admitted, same would not automatically cause a reversal of the C judgment. She cited Section 251 of the Evidence Act and submitted that wrongful admission of an evidence shall not itself be a ground for reversal of a decision where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the D same, even if such evidence had not been admitted. She then urged the court to resolve this issue in favour of the respondent.

ISSUE NO. 2

E This issue relates to whether apart from Exhibit "H", the prosecution led cogent and credible evidence to prove appellant's guilt beyond reasonable doubt.

The learned counsel submitted that the lower court apart from F affirming the decision of the trial court on the ruling on the "trial within trial," also considered all evidence led in the trial before affirming the judgment of the trial court. He referred to the judgment of the court below at page 478 of the record.

G On the contention of the appellant that PW1's & PW2's identification of the appellant is vague, she referred to the judgment of the court below at pages 479-481 of the record. Also on the contention of the appellant that the evidence of PW3 was hearsay for failure to call the cell mate of the appellant H who informed him (PW3) that the appellant boasted while in the cell and that he was among those who robbed and killed the deceased, she responded by submitting that Section 37, 38, 125 and 126 of the Evidence Act 2011 referred to by the appellant are not applicable in the instant case as the IPO was merely I giving evidence in respect of the investigation carried out by him to unravel the people behind the crime. He urged the court to resolve the issue in favour of the respondent and to dismiss the appeal.

RESOLUTION OF ISSUE FOR DETERMINATION

Looking at the two sets of issue for determination proposed by the learned counsel for the parties, I feel that approaching this appeal based on the issues raised in the respondent's brief of argument will comfortably determine this appeal. I will therefore be guided by them, and in doing so, I shall consider them together since as I said supra, the first issue had also been adopted in the appellant's first proposed issue for determination.

ISSUES NOS 1 & 2

The first issue revolves on Exhibit H, the confessional statement allegedly made by the appellant. Perhaps it is apt to kick-start the resolution of this issue by reiterating that there are three modes of proof of criminal cases. These methods or modes of such proof are:

> **(a) By testimonies of eye witness or witnesses who watched, heard or witnessed the commission of the crime by the accused person(s)**
> **(b) Through confessional statement voluntarily made by the accused**
> **(c) Through circumstantial evidence which clearly point to the sole fact that the accused and no other person committed the offence charged.**

For the time being, I will concern myself with Exhibit H, which is the confessional statement allegedly made by the appellant even though he retracted it during his defence. In the course of the proceedings in this case at the trial court, the prosecution sought to tender in evidence the confessional statement allegedly made by the appellant. The latter objected to the admissibility of that statement by the ground that it was obtained through torture arbitered on him. The law is trite and well settled too, that where there is dispute on whether or not an accused person made the statement sought to be tendered made same voluntarily, it is the duty of the trial court to try the voluntariness of such statement by conducting, a “trial within trial” otherwise known as 'mini trial. See Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 5; Obasi vs. State (1965) NWLR 119. In this instant case, the learned trial judge had duly complied with this rule and had conducted 'trial within trial' before he

finally admitted the confessional statement of the accused/appellant in evidence as Exhibit H. Having ascertained the voluntariness of the extra-judicial statement of the accused/appellant, the trial court in my view is duty bound to rely and act on the confessional statement (Exhibit H). The call by the learned counsel for the appellant that the statement should be expunged from the record by this court is therefore of no moment and rather absurb.

A confessional statement can be simply be defined as an admission by a person charged or an accused person accused of committing a crime at anywhere or at anytime stating or suggesting the inference that he committed such crime. See section 28 of the Evidence Act 2011 as amended. It is well settled law, that free and voluntary confession of guilt, alone by an accused person provided it is direct and positive and was duly made voluntarily, is sufficient to ground a conviction, since a confession always remains the best proof of what he had done. See Alabi vs. State (1993) 7 NWLR (Pt. 307) 5; Fabiyi vs. State (2015) 6-7 SC (Pt. 1) 83. Osetole & Anor vs. State (2012) 6 SCNJ 321; Nwachukwu vs. The State (2002) 7 SCNJ 230; Dogo vs. The State (2013) 2-3 SC (Pt. II) 75 at 92-94.

I am not unaware of the fact and it is even settled law that before a court convicts an accused person on his confessional statement alone, it must ascertain whether such confessional statement was voluntarily made and that it was also direct, positive, pungent and consistent with other facts as proved. See Jimoh vs. State (2014) 10 NWLR (Pt. 1414) 105. Looking closely and dispassionately at the confessional statement Exhibit H vis a vis the record of proceeding, I am not doubtful of the fact that the trial court had duly examined and evaluated Exhibit H and also the lower court had duly considered same before endorsing the trial court's reliance on it when in its judgment the lower court stated as follows, inter alia.

> **"After reviewing the evidence placed before the court in the trial within trial, the learned trial judge held that appending of the signatures by the appellants is proof that those statements were voluntarily made. This in my view is in line with the decision of the Supreme Court in Uche Obidiozo & Ors Vs the State (supra). The learned trial judge had followed logically the guide set by the apex court for**

admission of such statements. It was right on the part of the trial court to have admitted the confessional statement of the 1st and 2nd appellants and marked them as Exhibit 'H' and 'D' respectively. I do not have any reason to disturb the decision of the trial court on this issue……."

It is pertinent to say that this court has over the years evolved some requirements which a confessional statement must meet in order to be relied on by trial courts. Some of these requirements include the followings:

(i) It must contain the words of caution
(ii) The cautionary words must have been administered in the language understood by the accused.
(iii) The statement was duly signed or thumb printed by the accused.
(iv) That the statement was recorded in the language understood by the accused person.
(v) That the statement was after being recorded read over and interpreted to the maker in the language it was recorded.

From the look of the statement of the appellant Exhibit H, it is as clear as crystal, that all the above requirements were met or complied with, hence I also hold the view that the trial court was right to accept and act on the extra-judicial statement of the appellant (Exhibit H).

It is also part of the complaints of the appellant that the trial court had convicted him on an uncorroborated and inadmissible evidence. According to him, the trial court solely relied on the confessional statement (Exhibit H) to convict him of the offences charged. It needs be stressed here, that a confession of an accused person to the commission of an offence plays a vital role in the determination of his guilt. Therefore, a trial court is free to convict him even on the confessional statement alone once that trial court is convinced that the confession is voluntary as in this instant case. I said so because by his confession, the accused (now appellant) had confirmed the commission of criminal responsibility in terms of mens rea and actus rea. See **Okeke vs. State (2003) 15 NWLR (pt. 842) 25.** It also needs to be emphasised and its

also settled law too, that mere retraction of a voluntary confessional statement by an accused person, as in this instant case, does not render such statement inadmissible or worthless or untrue in considering his guilt. See **Idowu vs. State (2000) 7 SC (Pt. II) 50.**

Now, coming to the issue of alleged want of corroborative evidence insinuated by the learned counsel for the appellant I do not think that is true. As it could fathomed, PW1 and PW2 were eye witnesses who had actually witnessed the entire criminal act perpetrated by the appellant and his partners in crime. Both of them gave uncontradicted and uncontroverted testimonies which had duly corroborated Exhibit 'H', the appellant's confessional statement. I must however state here, that a confessional statement which is made voluntarily and is direct, cogent, credible and positive, is enough to ground conviction even without corroboration of any sort. See **Sule Iyanda Salawu vs. The State (1971) NWLR 249; Grace Akinfe vs. The State (1988) 7 SCNJ (Pt. II) 226; Yahaya vs. The State (1986) 12 SC 282 at 290.** In any case, in this instant case, the criminal event took place in the presence of PW1 and PW2 who as eye witnesses, had watched, observed and witnessed the entire event as it happened first hand. Those two eye witnesses had witnessed the armed robbery operation and heard the sound of the gunshots fired at the deceased and had also seen the body of the victim in his room upstairs after the gun shots. Similarly, some exhibits in the nature of items/goods that were robbed from the deceased, were all tendered by the prosecution at the trial in proof of the offences the appellant and his co-accused were charged with, tried and convicted by the trial court. The witnesses called by the prosecution as rightly held by the trial court, had given credible and reliable evidence which fixed the appellant at the scene and time of the crime and linked him with the crime when the appellant and his co-conspirators dastardly murdered the deceased after robbing him of the goods some of which were duly exhibited at the trial. Those pieces of evidence were neither contradicted nor challenged in any material respect at the trial. The appellant was therefore pinned down in the commission of the offences charged.

Learned counsel for the appellant frowned at the prosecution's failure to call a witness to testify in the case at the trial within trial more especially on the admission of the commission of the offences who PW3 testified on alleged

boasting in a cell by the appellant. With due deference to the learned appellant's counsel, it is not necessary for the prosecution to in order to discharge the onus of proof imposed upon it by law, to call a host of witnesses or to adduce or tender every available pieces of evidence. It is sufficient if the evidence called is enough to discharge the onus placed on it by law. The true position of the law is that the prosecution is not bound to call every person linked to the commission of the crime by physical presence or otherwise to give evidence on what he perceived. Once persons who can testify to the actual commission of the crime and on the other ingredients have done so, that will suffice for the satisfaction of the principle of proof beyond reasonable doubt as stipulated by Section 138 (1) of the Evidence Act 2011 as amended, Cap 112 Laws of the Federation of Nigeria 2004. See **Sadau vs. State (1968) 124; The State vs. Ogbubuoyo & Anor (2001) 12 NWLR (Pt. 678) 576; Obue vs. State (1976) 2 SC 141; Shurumo vs. The State (2010) 44 NSCQR 159.** As a matter of fact, even a single witness who gives cogent eye witness account of the incident can be sufficient. See **Odili vs. State (1977) 4 SC 1.**

Another complaint by the appellant relates to the identification of the appellant. According to the learned appellant's counsel, the evidence of PW1 and PW2 were faulty and nebulous and that the situation required the conduct of identification parade. He referred to the case of **Agboola vs State (2013) 5 SCNJ 683 at 701/702.** He opined that the trial court was wrong to have solely relied on the confessional statement (Exhibit H), which was even inadmissible. I must emphasis here, that identification evidence is not sine qua non for conviction. It is sufficient if credible evidence is adduced to show that the person charged with an offence is the same as the person who was seen committing the offence(s). When a trial court is confronted with identification evidence, all it is required to do is to be satisfied that the evidence of identification had established the guilt of the accused person beyond reasonable doubt. See Ukpabi vs. State (2004) 6-7 SC 27. Identification parade is not necessary in all criminal cases. Identification is simply a means of establishing whether a person charged with an offence is actually the same person who committed the offence. Therefore once credible evidence abounds confirming that the person charged was the actual one who committed the offence, as in this instant case, then there will be no need to conduct, identification parade at all. See **Orimoloye vs. the State (1984) 10**

SC (Reprint) 128; Ebri vs. The State (2004) 5 Sc (Pt. II) 29. Here, the two eye witnesses namely PW1 and PW2 had contact or interaction with the appellant and other co-accused persons for quite a reasonable time during the commission of the offences. Also, the appellant had identified himself when in his confessional statement Exhibit 'H', he had fixed himself at the scene of the crime on the day of the incident. The requirement of formal identification parade is therefore superfluous as rightly held by the two lower courts. Also on the quality of the testimony of PW3 who is the investigation police officer which the appellant's learned counsel called for its discountenance because according to him it is hearsay evidence. Here, I do not share the appellant's counsel's view that the evidence of an IPO amounts to hearsay because an IPO narrates to the court the outcome of his investigation or enquiries or what he recovered and in the course of his duty he must have discovered or recovered some pieces of evidence vital to the commission of the crime which trial courts normally consider in arriving at just decision one way or the other. The lower court was therefore right in refusing to discountenance the evidence adduced or given by PW3.

The age long principle of law, is that in criminal cases an accused person is constitutionally presumed innocent until the contrary is proved by the prosecution. The onus of proof in criminal cases does not shift as the burden throughout lies on the prosecution in criminal trial which must prove the guilt of the accused. See **Bello vs. State (2007) 10 NWLR (Pt. 1043) 364; Igbole vs. State (2006) 6 NWLR (Pt. 975) 100.**

However, any doubt in the prosecution's case must be resolved in favour of the accused person. In this instant case, as found by the two lower courts, the prosecution had led credible, cogent and reliable evidence in proof of all the offences the appellant and his co-conspirators were accused of committing. The appellant at the close of the prosecution's case presented his defence when he testified as DW1. The learned trial judge had duly and painstakingly considered and evaluated the entire evidence adduced in the case by both parties before concluding that the prosecution had proved its case beyond reasonable doubt and convicted him as charged. It is sequel to that that I find myself in entire agreement with the Court of Appeal (the lower court) when it observed as below:

"This court has painstakingly read both the extra judicial statement of PW1, PW2, PW3. This court without any difficulty arrived at the fact that the learned trial judge had performed the duty imposed upon him by law in evaluating the evidence before him and ascribing probative value to them. The learned trial judge meticulously discharged that responsibility. The evidence of eye witnesses to the event who saw it all when it happened. It was direct and positive and this court is unable to see how the learned trial judge misapplied those facts to upset them".

It is worthy of note that there is in this instant appeal, concurrent findings of two lower courts both reaching the same conclusion that the prosecution had proved its case against the present appellant beyond reasonable doubt. As a matter of practice, this court is always hesitant in interfering with or disturbing the concurrent findings of two lower courts except on special circumstances, for instance, where the findings are perverse or there is misconception or misapplication of law. None of these vices are apparent in this instant case. I therefore see no reason to disturb or interfere with the findings of the two courts below.

The resultant effect of all that I posited above is that the two issues for determination ought to be and are accordingly resolved against the appellant and in favour of the respondent herein.

In the final result, I do not find any merit in this appeal as would justify me to interfere with the decision of the lower court. The appeal therefore fails for being meritless. It is accordingly dismissed by me. The judgment of the Court of Appeal, Lagos division which had earlier affirmed the judgment of the trail High Court of Lagos State is hereby further affirmed.

Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Amiru Sanusi JSC and to register that support, I shall make some remarks.

This is an appeal against the judgment of the Lagos Division of the Court of Appeal or court below or lower court Coram: Justice Sidi Dauda Bage JCA (as he then was), Yargata Nimpar and Abimbola Osarugue Obaseki Adejumo JJCA. The court below affirmed the judgment of the trial court delivered on the 13th day of December 2007 per D.O. Oluwayemi J.

FACTS BRIEFLY STATED:

According to the prosecution's version of events on 7th December, 2000, the deceased, late Chief Lai Balogun arrived at the Muritala Mohammed Airport from Abuja at about 3.30p.m. after which the deceased in the company of his driver and security detail, Sergeant Olajide Longe was taken to his office situated at No. 1, Balogun Street, Oregun Industrial Estate, Ikeja, Lagos.

Subsequently, the deceased at about 9.05p.m. on 7th December 2000 left his office for his residence at 26, Oluwole Street, Akoka, Lagos in the company of his driver and his security detail.

On approaching the deceased's residence, the security gatemen opened the gate after which both the deceased and his security detail were accosted by 5 unknown armed men who fired gunshots towards the security detail's chest.

Upon gaining access into the residence of the deceased after threat to life had been issued by the gunmen, the deceased and the security detail were taken upstairs into two separate rooms with armed gunmen standing guard whilst members of the deceased's family were held captive downstairs with another armed man stationed to watch over them.

After about 10 to 15 minutes, both the deceased and the security detail were shot in the separate rooms in which they were held after which the armed gunmen carted away the deceased's cellular phone, omega wristwatch and the sum of N20,000.00 (Twenty Thousand Naira) and fled the scene of the crime.

The deceased and the security detail were both taken to the hospital where the deceased was later declared dead.

On the 26th October 2017 date of hearing, learned counsel for the appellant, F.Ajibola Dalley adopted his brief of argument filed on 18/7/2017 and in it were raised three issues for determination, viz.:

1. **Whether the eminent justices of the Court of Appeal were right in holding admissible, Exhibit H, the**

purported confessional statement of the appellant predominately relied on in convicting the appellant of the charges of conspiracy to commit armed robbery, robbery and murder same having been established to have been obtained under duress. (Grounds 1 and 2).

2. Whether the eminent justices of the Court of Appeal were right in relying exclusively on the challenged evidence presented by the prosecution without taking cognisance of the case presented by the defence. (Grounds 3 and 4).

3. Whether the eminent justices of the Court of Appeal were right in holding that the trial court rightly admitted the challenged evidence of the prosecution's witnesses without finishing or stating any reasons whatsoever for arriving at such findings and conclusion. (Ground 5).

Mrs. Adedoyin Rhodes-Vivour, learned counsel for respondent adopted its brief of argument filed on 23/8/17. She adopted issue one of the appellant and made an additional one as follows:

ISSUE ONE
Whether the eminent justices of the Court of Appeal were right in holding admissible, Exhibit H, the purported confessional statement of the appellant predominately relied on in convicting the appellant of the charges of conspiracy to commit armed robbery, robbery and murder same having been established to have been obtained under duress.

ISSUE TWO
Whether apart from the Exhibit "H" the prosecution led cogent and credible evidence in proof of the guilt of the appellant beyond doubt.

I shall utilise the issues as stated by the respondent in the determination of this appeal.

ISSUES 1 & 2

These two issues in the main question the admissibility of the confessional statement, Exhibit H and if apart from that exhibit there was any other evidence, cogent and reliable upon which the guilt of the accused/appellant could be based.

Canvassing the position of the appellant, Mr. Dalley of counsel submitted that the purported confessional statement attributed to the appellant was neither voluntarily obtained nor was it volunteered by him of his free volition but was rather obtained by means of torture and so the statement ought to have been rejected. He cited section 29(2) and (5) of the Evidence Act 2011, impari material with section 28 of the Evidence Act 2004; **Ganiyu Gbadamosi & Anor vs. State (1992) LPELR-1313 (SC)** etc.

Learned counsel for the appellant further contended that it was wrong for the trial court to have relied heavily on this legally inadmissible confessional statement of the appellant, Exhibit H and worse still for the court below to have affirmed that wrongly obtained decision and it is incumbent on this court to interfere and set the record straight. He cited **The State vs. James Gwangwan** (2015) LPELR-24837 (SC).

It was also submitted for the appellant that the testimonies of PW1 and PW2 in court were inconsistent with their statements to the police. It was cited the case of **Chukwuka Ogudo vs. The State** (2011) 11-12 SCM 209 at 222 to 223.

That the evidence on the identification of the appellant as proffered by PW1 and PW2 was faulty and vague and an identification parade was necessary. The case of **Agboola vs. State** (2013) 5 SCNJ 683 at 701-702, referred to.

That the evidence of PW3 was hearsay and the court ought not to have placed probative weight on it as it was even inadmissible. Learned counsel referred to section 37, 38, 125 and 126 of Evidence Act, **Thomas Opolo vs. The State** (1977) 11-12 SC (Reprint) 1 at 7 per Bello (JSC) (as he then was);

ChimaIjiofor vs. The State (2001) NWLR (Pt. 718) 371.

Learned counsel for appellant described the failure of the prosecution to produce to testify a key witness which appellant contends is fatal to the case of the prosecution. He cited **Kolawole vs. State** (2015) LPELR-24400(SC); **Onah vs. State** (1985) 3 NWLR (Pt. 12) page 236; **Alake vs. State** (1992) 9 NWLR (Pt. 265) 200.

It was also submitted for the appellant that the Court of Appeal had failed to consider the defence put forward by the appellant and so the appellant was denied his constitutional right of fair hearing as enshrined under Section 36 (4) of the 1999 constitution.

Countering the submissions of the appellant, Mrs. Rhodes-Vivour of counsel for the respondent contended that the trial court acted correctly in conducting the trial within trial once there was that challenge on the voluntariness of the confessional statement and came to the decision accepting the statement within its discretion judiciously and judicially done. That the court below affirmed what the trial court did rightly and so the objection at this point should be disregarded by the Supreme Court. He cited **Bouwor vs. State** (2026) LPELR-26054 (SC); **Uche Obidiozo & Ors vs. State** (1987) 12 SC 74 at 93, 100-102.

For the respondent, learned counsel submitted that even if Exhibit H was wrongly admitted, same would not amount to a reversal of the judgment of the two courts below as there was more than enough to sustain the conviction. She relied on **Section 251 of the Evidence Act; State vs. Ogbubunjo** (2001) FWLR (Pt. 37) 1097 (SC).

That PW1 and PW2 were direct eye witnesses of the armed robbery and recounted how the operation took place and the evidence of PW3, the investigating police officer was supportive.

The appellant strongly urges this court to expunge the admitted Exhibit H and to hold that the lower courts reliance on it jeopardised the conviction secured thereby.

The definition of a confession is as stated in Section 28 of the Evidence Act 2011 thus:

> **"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that**

he committed that crime".

It is now settled law that a confession would be relevant against the person who makes it when the statement is voluntary and thereby admissible. It follows that once a confessional statement is deemed to be positive, direct and unequivocal such a statement would be admitted since it has been voluntarily made and when that is the case such a confessional statement alone as evidence can sustain a conviction. In such a case also there is no need for corroboration. In this I place reliance on the cases of **Yusuf vs. State** (1976) 6 SC 167 at 173; **Olabode vs. State** (2007) All FWLR (Pt. 389) 1301; **Nwachukwu vs. State** (2003) FWLR (Pt. 123) 312; 312; **Kanu vs. King** (1952) 14 WACA 30; **R vs. Omokoro** (1941) 7 WACA 146.

There needs be pointed out that the Evidence Act 2011 at Section 29 (2) (a) and (b) has provided for the circumstances in which a confessional statement would be rejected in evidence.

"Section 29

(2) If in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that his confession was or may have been obtained.

(b) by oppression of the person who made it or

(c) in consequence of anything said or done which was likely in the circumstances existing at the time to render unreliable any confession which might be made by him in such consequences, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession *(not withstanding that it may be true)* was not obtained in a manner contrary to the provisions of this section."

In this case at hand, at the trial court, the appellant as 1st accused objected to the tendering of his confessional statement stating that it was not voluntarily made being obtained by torture and duress. The trial court empanelled a trial within trial to determine the voluntariness or otherwise of the said statement and in ruling it voluntarily made admitted it as Exhibit 'H'. The exact words of the trial court are hereunder captured thus:

"The duty of a trial court in a case of trial within trial is to assist the trial court in the determination of the voluntariness or otherwise of a confessional state Exhibit ID1 sought to be tendered. It is also trite that the burden of proof lies on the prosecution and never shifts as state (sic) by Oguntade JSC in the case AGALE vs. THE STATE 2006 6 NWLR (Pt. 975) at 111. Without tautology, it is evident from Exhibit ID1 that the 1st accused person was cautioned by the recorder PW1 that he was not obliged to say anything and whatever he said would be given in evidence. Also 1st accused person was taken before a superior police Officer ASP Sunday Maichibe on 21/01/2001 there he had opportunity to either accept or deny the statement ID1 or inform the SPO that he was tortured or threatened before he signed the statement. Moreover, PW1 stated that the 1st accused and himself were facing each other while he gave facts he wrote them down. Even though PW1 denied knowing what is called a theatre room. I believe there is a theatre room at SARS but based on the condition of the 1st accused person during the arrest. It was not possible for anybody to have shot him again because the police even took him to the General Hospital where he was treated. From the totality of evidence of PW1, DW1 and the submission of the learned counsel Mrs. B. Akinlade and Mr. J.A. Sanni and having regard to the contents of Exhibits ID1, I believe the statement was obtained in a conducive atmosphere since the 1st accused said he did not know PW1 before his arrest, then most of the facts in Exhibit ID1 were given by the accused

person before his arrest, then most of the facts in Exhibit ID1 were given by accused person to PW1. He may have been tortured but not by PW1. The accused was given handful opportunity to deny (sic) the statement being made voluntarily when he was taken before a Superior police officer. The content of Exhibit ID1 is germane to the case of prosecution, I hereby say that the statement Exhibit ID1 was voluntarily made under a good conducive atmosphere".

At the court below, when the entire matter came on appeal, that appellate court in agreement with the outcome of the trial within trial of the court of first instance stated thus:

"I quoted the above decision of the Supreme Court in extensio, having found the decision and its appeal. In the instant appeal, the two appellants 1st and 2nd, made their respective statements (extra judicial) to the police. Each signed his own statements. At trial they both challenged the voluntariness of the statements with their signatures on them. The learned trial judge conducted a trial within trial to ascertain their voluntaries (sic). After reviewing the evidence placed before the court in the trial within trial, the learned trial judge held that appending of the signatures by the appellants is proof that those statements were voluntarily made. This in my view is in line with, the decision of the Supreme Court in *Uche Obidiozo & Ors vs. The State (supra). The learned trial judge had followed logically the guide set by the apex court for admission of such statements. It was right on the part of the trial court to have admitted the confessional statements of the 1st and 2nd appellants and marked them as Exhibits 'H' and 'D' respectively. I* do not have any reason to disturb the decision of the trial court on this issue. I resolve issue No. 1 against the appellants and in favour of the respondent".

To reiterate the stand of this court on the matter regarding confessional statements and its acceptability in evidence, it is now trite law that the establishment of duress, oppression or coercion to make a confessional statement is a finding of facts and so it is for the determination of a court of law which however falls within the exclusive domain of the court of trial which has the primary duty of resolving findings of facts, evaluation and ascription of probative value to evidence to which an appellate court is in a way forbidden from interfering or disturbing those facts so elicited except under exceptional circumstances. I rely on **Ebge vs. Adefarasin** (1987) 1 SCI; **Eze Ibeh vs. State** (1997) 1 SCNJ 256-271.

The Supreme Court has gone further to list the formal requirements of an extra-judicial statement as follows:

(a) It must carry the usual form of caution
(b) each of the words of caution must be in the language understood by the maker
(c) it must be followed by the makers thumb-print or signature
(d) it must be recorded in the language understood by the maker
(e) it must be read over and interpreted to the maker in the language in which it is made.
See Kim vs State (1992) 4 NWLR (Pt. 233) 17.

Indeed the trial court carried out its duties as required by law before it admitted the said statement as Exhibit 'H' in its confessional status.

Assuming however that the said statement was wrongly brought in as the court below brought out that there were other areas in the evidence adduced by the prosecution respondent sufficient for the utilisation of the trial court to ground the conviction. That Court of Appeal held thus:

"This court has painstakingly read both the extra-judicial statement of PW1, PW2, PW3. This court without any difficulty arrived at the fact that the learned trial judge had performed the duty imposed upon him by law, in evaluating the evidence before him and ascribing probative values to

them. The learned trial judge diligently and meticulously discharged that irresponsibility. The evidence of PW1, PW2, are evidences of eye witnesses to the event who saw it all when it happened. It was direct and positive, and this court is unable to see how the learned trial judge misapplied those facts to upset them".

Again to be said is that under Section 251 of the Evidence Act, the wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted. This is really the answer to the vehemently put across submission of learned counsel for the appellant that Exhibit 'H' be jettisioned as if, that is the only anchor on which the conviction is supported. In this case not only is there no foundation on which the said confessional statement would be expunged from evidence even if theoretically that was the case, there is enough upon which the court can support a conviction of the appellant. See **State vs. Ogbubunjo** (2001) FWLR (Pt. 37) 1097; **Uche Obidiozo & Ors vs. State** (1987) 12 SC 74 at 93.

At the risk of over flogging a vexed issue, the lower court examined and considered other evidence apart from the confessional statement and in concluding affirmed the decision of the trial court. As the PW1 and PW2 were direct eye witnesses of the armed robbery and murder and recounted how the entire operation took place and those pieces of evidence remained unchallenged or contradicted by the appellant at the court of first instance. The investigating police officer, PW3 stated what he found in the course of his investigation and tendered the items he recovered there. Of note is that the appellant was arrested based on the recovered handset of the deceased Chief Layi Balogun. This evidence of PW3 was not dainted by the appellant and so the court was duty bound to use it in building up the case against the appellant.

Again, the appellant had a grouse on the absence of an identification parade which the circumstances prevailing in the instant case made unnecessary when the PW1 and PW2 effectively identified the appellant and others when they were paraded on television. This they could do as PW1 and

PW2 said they had over 20 minutes interaction with the appellant and co-travellers. There is no hard and fast rule as to how an identification could be acceptably made especially in this case where the certainty of who accosted and dealt with them was clear and not in doubt to the eye-witnesses, that made an identification parade unnecessary. See **Tajudeen Alabi vs. State**(1993) 7 NWLR (307) 511 at 527; **Adamu vs. The State** (1986) 3 NWLR (Pt. 32) 865; **Mbenu vs. The State** (1988) 3 NWLR (Pt. 84) 615.

It has to be said that it is erroneous for the appellant to posit that the evidence of PW3 should be discountenanced being hearsay evidence. That submission is a misconception since PW3 is the investigating police officer who has to narrate to the court what transpired in the course of his investigation. In this process of stating what he found out in carrying out his inquires, would be pieces of evidence which with another witness would be considered hearsay but from him since the court has to know the synopsis of his investigating journey it is direct evidence. See Obot vs State (2014) LPELR-23130 (CA).

In conclusion, this is one of those instances where the concurrent findings of facts of the court below are to be left un-tampered with stemming as they were from the evidence on record leading to the irresistible conclusion that for a fact the prosecution respondent proved its case against the appellant beyond reasonable doubt, the essential ingredients of the offences have been made out as required by law. See **Abeke Onofowokan vs. The State** (1987) 7 SCNJ 233 at 249; **Basil Akalezi vs. The State** (1993) 2 NWLR (Pt. 273) 1 at 13; **Ogidi vs. State** (2005) 1 NCC 163 at 177.

From the foregoing and the better articulated lead judgment, I too see no merit in this appeal which I dismiss.

I abide by the consequential orders as made by my learned brother.

Mary Ukaego Peter-odili
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): The lead judgment of my learned brother ***AMIRU SANUSI JSC*** has thoroughly addressed all the issues raised by the appeal. The appellant has indeed failed to establish before us why the concurrent finding of the two lower courts should be interfered with. The appeal must accordingly fail. I adopt all the reasoning in the lead judgment to

dismiss the unmeritorious appeal. I accordingly affirm the lower court's judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I have had the privilege of reading in draft the lead judgment of my learned brother **Sanusi, (JSC).** It is well researched and reasoned. I agree that the concurrent judgments of the two lower courts should also be affirmed. The appellant did not show any reason why this court should interfere therewith.

I therefore also affirm the judgments in terms of the line of reasoning advanced by my learned brother herein.

Appeal is also dismissed by me.

Clara Bata Ogunbiyi
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by my learned brother, AMIRU SANUSI, (JSC). It represents my views in the appeal. Accordingly, I adopt it.

There is no substance in this appeal. As correctly submitted for the respondent with or without the disputed confession in Exhibits H and D, the evidence of the PW1, PW2, PW3 and DW4 link the appellant to the offences he was charged and convicted for.

The PW1 and PW2 were eye witnesses of the armed robbery and the murder of Layi Balogun. They, each, gave direct evidence of what they saw and experienced in the hands of the armed robbers on the fateful day. They were neither discredited nor contradicted as regards the substance of their testimonies.

The previous statement of the PW1 was tendered as Exhibit A without any effort made to draw his attention to any portion thereof for purposes of contradiction. That is the condition precedent for using the previous statement of a witness to contradict him. The position of the law is that, before any contradiction can be established between the evidence of a witness and the previous statement made by the witness, the statement must be brought to the attention of the witness for his explanation in accordance with Sections 199

A and 209 (now Sections 232 and 235) of the Evidence Act. Contradiction between the testimony of the witness and his previous statement, in the instant case Exhibit A, cannot therefore be established without compliance with the mandatory provisions of the Evidence Act, aforestated: **KWAGHSHIR vs.**
B **THE STATE (1995) 3 NWLR (Pt. 386) 651; BALOGUN vs. A.G, OGUN STATE (2002) 2 SC (Pt. II) 89.**

The PW1, seized by the robbers and shot twice after being dragged upstairs with the deceased Layi Balogun, was categorical that he knew the 2nd
C Accused who shot him. The 2nd accused, according to the PW1, was the person assigned to stay with him. The cross-examination did little to shake the PW1's credibility. The trial court believed him.

The PW2's recognition of the 2nd accused and the appellant (the 1st
D accused), as being among the 5 robbers, was also not discredited by cross examination. The PW2 averred that the robbers took Layi Balogun's cell phone, wrist watch and N20,000.00. He identified the wrist watch, Exhibit C, and the cell phone.

E The cell phone was recovered from the 4th accused, DW4, who admitted buying it from one Kola and the 3rd accused for N1,500.00. The PW3, the investigating police officer (IPO), testified that the 3rd accused, upon his arrest, identified the appellant (1st accused) as the person who sold Layi Balogun's
F cell phone, Exhibit B, to the 4th accused (the DW4). The PW3's evidence, as correctly submitted by the respondent's counsel, was also not challenged or contradicted by the appellant.

It is on this footing that I agree with the lower court's finding at page
G 478 that:

> **The bottom line of the Supreme Court's decision of EZE IBEH Vs. The State (supra) is that, there is the presumption**
> H **that a trial judge's decision on facts is correct; a presumption which must be displaced by a person who seeks to upset the decision if he can. In the instant appeal, the learned counsel to the appellants strenuously worked to**
> I **upset the decision of the learned trial judge on facts. I had earlier in this judgment stated how he considered that the learned trial judge had misdirected himself on the evidence**

of PW1, PW2 and PW3. The evidence of PW1 and PW2 are evidences of eye witnesses to the event who saw it all when it happened. It was direct and positive, and this court is unable to see how the learned trial judge misapplied those facts to upset them. PW3's evidence is attacked as being hearsay for his failure to produce the cell-mate of the 2nd appellant who reported as boasting of being a participant in the robbery in question. This also had no effect whatsoever as this fact only constituted an aspect of the evidence of the PW3 as the investigating police officer (IPO). The efforts made by the appellants to upset the findings of facts made by the learned trial judge had not yielded any result to upset it. Let me state, here, and now, that, the determination earlier on by this court of Issue No. 1, with relation to the confessional statements of appellants, Exhibit "H" and "D" had dealt with the meat of this appeal. The issue No. 2 dealing other credible and cogent fact by the prosecution, amounts to mere surplusage with Exhibit "H" and "D" already admitted against the appellants, the law is that even without corroboration of a confession it is sufficient to support conviction, so long as the court is satisfied of its truth. See MOHAMMED J. YAHAYA vs. THE STATE (1986) 12 SC 282 at 290; ISAAC STEPHEN vs. THE STATE (1986) 12 SC. 450 at 470; R. vs. ITULE (1961) ALL NLR 462 at 465; SULE IYANDA SALAWU vs. THE STATE (1971) NMLR. 249; GRACE AKINFE vs. THE STATE (1988) 7 SCNJ (Pt. 11) 226, at Pp. 237-238.

Even if the PW1 and PW2 had failed to describe the appellant as one of the armed robbers who shot and killed Layi Balogun the fact that he sold Layi Balogun's cell phone, seized from the deceased Layi Balogun in the course of the robbery not only links him to the robbery and the death of Layi Balogun, it also sufficiently corroborates the testimonies of PW1 and PW2. The evidence of PW1 and PW2 have also been corroborated by the defence testimony of the 4th accused (DW4). The admission of the 3rd accused to the IPO, PW3, is

A another evidence solidifying the evidence of PW1 and PW2.

From the totality of the evidence of PW1, PW2, PW3 and DW4, with or without Exhibits H and D, the conviction and sentence of the appellant can be sustained. That is my answer to the question: whether, apart from Exhibit H

B the prosecution led cogent and credible evidence in proof of the guilt of the appellant beyond reasonable doubt? Exhibit H was not the only anchor the conviction of the appellant was fastened; as I have, here demonstrated.

I have no cause to interfere with the concurrent findings of fact made by

C the trial and intermediate courts. This appeal lacking in substance is hereby dismissed. I hereby adopt all the consequential orders made in the lead judgment.

Ejembi Eko

D ***Justice, Supreme Court***

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H

I

1. MR. NEWMAN IGHEDO
2. MR. RICHARD DUVWIAMA
3. CHIEF ADAM OVEREN
4. MR. DICKSON KPOLOGIRI
5. MR. OGHENEMENE AKPONOKAN
(for themselves and on behalf of
Ekrusierho Community Ekamkpamre)

AND

POWER HOLDING CO. NIG PLC

SC. 151/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 12TH JANUARY, 2018

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Claim for compensation – Whether special or general damages – Where it is for a specific sum computed in a document prepared before the commencement of action.

ACTION: Representative action – Or. IV Rule 3 Federal High Court (Civil Procedure) – Rules – Conditions/ingredients of a representative action.

ACTION: Representative action – Where persons representing and those represented do not have common interest and common grievance – Effect on the representative order made.

ACTION: Representative proceedings – Origin and rationale.

ACTION: Representative Suit – Rule of convenience – Flexible nature of Essence.

APPEAL: Formulation of grounds of appeal – Relevant rules thereof – Nature – Purpose and application.

CASE Law: ***Principles in Adediran and Anor vs. Interland Transport Ltd (1991) 9 NWLR (Pt. 214) 155.***

CASE Law: ***Principles in Shell Development Co. vs. Otoko and Ors (1990) 6 NWLR (Pt. 159) 693.***

COURT: Award of special damages – Where evidence adduced by a party in proof of special damages is unsatisfactory – Proper approach of court thereto – Whether court cannot use its own parameters and substitute general damages for special damages.

COURT: Reliance on unpleaded facts – Where lower court relied on unpleaded document as basis for its calculation and award of damages – Effect.

COURT: Rules relating to formulation of grounds of appeal – Proper approach thereto – Whether issue of technicality or substance – Guiding principles.

DAMAGES: Nature of damages – Where damages quantified and ascertainable before commencement of action – Whether general or special damages – Relevant Considerations

JUDGMENT AND ORDERS: Award of damages – Party failed to prove special damages – Whether special damages can be substituted for general damages.

JUDGMENT AND ORDERS: Damages awarded based on evidence or document in existence before the accrual of cause of action – Propriety.

JUDGMENT AND ORDERS: Award of compensation – Where court awarded compensation based on evidence before the accrual of cause of action – Where document relied upon was not pleaded – Whether court cannot award compensation based on inadmissible evidence.

PARTIES: Proper parties Where the representatives and persons represented do not have common interest and grievance – Whether proper parties are before the court.

RULES OF COURT: Purpose and role – Relevant considerations thereof.

Issue for Determination

Whether the learned Justices of the Court of Appeal were right in holding that the plaintiffs cannot prosecute this action in a representative capacity.

Facts of the Matter

This is an appeal by the plaintiffs at the Federal High Court being dissatisfied with the judgment of the Court of Appeal, Lagos Division delivered on the 15th day of December, 2004 which set aside the judgment of Egbo-Egbo, J. earlier given on the 21st day of November 2000, and ordered the striking out of their claim in suit No.FHC/B/157/96 on the ground that it was incompetent.

The appellants as plaintiffs had instituted an action for themselves and on behalf of Ekrusierho community in Ekakpoimre. By their writ of summons issued on 15/11/1996, they had claimed the sum of one hundred and fifty million Naira (N150,000,000.00) being compensation and for loss suffered as a result of pollution of their (Plaintiffs) stream. They had claimed in the alternative, the sum of one hundred and fifty million Naira (N150,000,000.00) being damages for nuisance, negligence and or breach of statutory duty.

The appellants case is that sometime in 1991 in the course of the respondent's operation at Delta Power Station at Ughelli, they found that the respondent's waste oil chemicals from the power station were channelled through

the respondent's drainage system and discharged unto appellants' land and Ekruiserho stream thereby polluting the said stream and land. Consequently, the Ekrusierho stream, a major source of water supply and major source of income for the community became unfit for human consumption and fishing activities. The inhabitants of the community thereby lost their source of domestic water supply and the fishing community was dislodged. The vegetation in the immediate environment of the stream was also affected. The appellants lodged series of complaints in respect of the pollution first to the Assistant General Manager in charge of the said Delta Power Station, who ordered for a scientific test of the water samples from the Ekrusierho stream. Subsequently, the appellants commissioned Messrs JAS GERE AND KNIGHT FRANK in July 1993 and January, 1995 respectively to carry out valuation of the losses and damages occasioned by the said pollution which they forwarded to the respondent. In reaction to the appellants' complaints, the respondent, in 1994 dispatched a team of officers on a joint inspection with the appellants' representatives. A scientific test of the Ekrusierho stream in the respondent's laboratory, located at Sapele was conducted. Thereafter, the appellants pressed for compensation but the respondent declined to pay any compensation. This refusal led the appellants to institute the action claiming the sum of one hundred and fifty million Naira (N150,000,000.00) as compensation and loss suffered as a result of the continuous pollution of the said Ekrusierho stream which led to the consequential hardship, loss of source of income and destruction of the surrounding vegetation or in the alternative the same amount was claimed as damages for nuisance, negligence and or breach of statutory duty.

Pleadings were filed and exchanged by parties. The case proceeded to hearing. Both parties called witnesses and a number of exhibits were tendered and admitted in evidence. Judgment was later entered in favour of the appellants by the trial Federal High Court in the sum of fifty million Naira (N50,000,000.00) which was to be distributed on the basis of what the community would think fit in the circumstances. The respondent was dissatisfied with the judgment of the trial court, hence appealed to the Court of Appeal on 18/12/2000. In its reserved judgment delivered on 15/12/2004, the Court of Appeal held that the action was incompetent in that the action could not be commenced in a representative capacity and struck out the suit.

Being dissatisfied with the judgment of the Court of Appeal led the

appellants to appeal on 4th June, 2004 on a sole ground of appeal to the Supreme Court.

Held: *Unanimously dismissing the appeal)*

1. *The origin and rationale of representative action*
Generally, the rule as to representative actions is said to have been derived, a long time ago, from the court of Chancery, which required the presence of all parties to an action, so as to put an end to the matters in controversy. However, the practice was relaxed in due course since 1876 in Commissioner of Sewers of the City of London vs. Gellantly (1876) 3 Ch.D 610 at 615, where the court held as follows:

> **"Where one multitude of persons were interested in a right, and another of persons interested in contesting that right, and that right was a general right and it was utterly impossible to try the question of the existence of the right between that two multitudes on account of their number some individuals out of the one multitude might be selected to represent one set of claimants and another set of persons to represent the parties resisting the claim and the right might be finally decided as between all parties in a suit so constituted".** *(P 484 Paras A – D)*

2. *Representative action is a rule of convenience and flexible in nature*
However,, this rule has been described as "a rule of convenience only". See; Harrison vs. Abergavenny (Marguis of) (1887) 3 TLR 324 at 325. Hence, as a rule that came into being only for convenience, and for the sake of convenience, it has been relaxed. See; Bedfor (Duke of) vs Ellis (1901) AC 1 at 8. Therefore, it is a rule which should not be treated as rigid but as a flexible tool of convenience in the administration of justice. See; John vs Rees (1969) 2 WLR 1294 at 1306, Chief P.O. Anatogu & Ors vs. The Hon. Attorney General of the East-Central State of Nigeria & Ors (1976) 11 SC (Reprint) 59, (1976) LPELR – 483 (SC). *(P 484 Paras E – G)*

3. *Conditions or ingredients of a representative action*

In this case, reliance was placed on the provisions of the Rules of Court in the commencement of the action in a representative capacity by the appellants against the respondent.

Order IV rule 3 of the Federal High Court, Civil Procedure Rules provides as follows:

> **"Where more persons than one have the same interest in one suit, one or more of such persons may with the approval of the court, be authorized by the other persons interested to sue or to defend in such suit for the benefit of or on behalf of all parties so interested".**

It is settled already that for an action to lie in a representative capacity, the following conditions or ingredients must exist:

(a) There must be common interest;
(b) There must be a common grievance and;
(c) The relief claimed must be beneficial to all.

See; Adediran & Anor vs. Interland Transport Ltd (1991) 9 NWLR (214) 155; (1991) LPELR 88; Elijah Idise & Ors Vs. Williams International Ltd (1995) 1 NWLR (Pt.370) 142 (1995) SCNJ 120; (1995) LPELR 1424.

Generally, from the evidence adduced before the trial court, upon review of the totality of the available evidence on record, the trial court found on the facts that the appellants proved their case beyond reasonable doubt.

> **However, on the issue of the capacity in which the appellants instituted the action, the trial court referred to the decision of this court in Adediran & Anor vs. Interland Transport Ltd (supra).** *(Pp 484 – 485 Paras G – E)*

Per Ariwola (JSC) :

"It is clear from the records that both courts below, (the trial Federal High Court and the Court of Appeal) respectively which granted the appellants claims and the latter that allowed the appeal against the judgment, relied on the decision of this court in Adediran & Anor vs. Interland Transport Ltd (supra). What then are the facts of the said case that led to the decision the court took.

The facts of that case are that, plaintiffs are residents of Ire-Akari Housing Estate, Isolo. The residents have formed an Association, known as the Ire-Akari Housing Estate Association. with leave of the court, plaintiffs brought an action on behalf of themselves and all other members of the Ire-Akari Housing Estate Association, at Isolo in Lagos State. The defendant, which is a Limited Liability Company with its registered office at No.9 Brickfield Road, Ebute-Metta, and the 2nd defendant also a Limited Liability Company are owners of Plots 351, 352, 353 along Okeho Street, in Block VA of the Ire-Akari Housing Estate. Defendants are in the transport business. They own several long trailers. They use their premises in the Estate as their workshop and for parking their trailers. Consequently, there is considerable traffic of these long heavy trailers in the Estate, throughout the day and for most part of the night. The many drivers employed to drive these vehicles also park the trailers in the roads of the Estate making the road virtually impassable. In many cases they block the access roads to the houses of the residents. The complaint of the residents of the Estate is that the heavy trailers have rendered the reads unsafe for children, destroyed the roads and knocked down electric poles. The disturbing noise made by the drivers in the process of returning to park the vehicles and taking off early in the morning, constitute in addition to the other inconvenience activities, the nuisance complained of. After general protests

to the 1st defendant, the residents, who are the plaintiffs, brought the action.

After due trial of the claim on pleadings exchanged by the parties in the High court, the claim against the 2nd defendant was dismissed by the trial Judge while the learned Judge, inter alia, held the 1st defendant liable for the tort of nuisance and awarded N20,000.00 as general damages. N30,000.00 was also awarded in respect of special damages. Perpetual injunction was granted, restraining the defendants by themselves or their directors, officers, servants or agents from using the said plots of land in Ire Akari Housing Estate, Isolo for transport business or any other industrial purpose. In his considered judgment, the learned trial Judge found that plaintiffs were members of the Association known as Ire Akari Housing Estate Association. The action was instituted on behalf of all the members of the Association resident at Ire Akari Estate. Furthermore, after recounting the facts, the learned trial Judge, inter alia, found that these acts of nuisance which were continuous, constitute substantial discomfort to the plaintiffs and other members of the Association.

The defendant appealed to the court of Appeal, on five grounds of errors of law and of facts. Eight issues for determination were distilled from the five grounds of appeal and argued. Out of the whole eight issues, the Court of Appeal considered only four issues 1,3,5 and 7.

On issue (3), the court below, citing and relying on Order 15 Rule 4 (2) RSC 1985 of England, applicable, submitted that not all those residents which were affected, were before the court. Plaintiffs were bound to bring before the court other residents of the Estate who are entitled to sue having suffered from the same acts of nuisance. Plaintiffs represented only members of the Association. Under the rules, the other residents should with their consent be made co-plaintiffs, or otherwise sued as defendants.

The main reason for the judgment of the court below, inter alia, was that the claim was in respect of Public nuisance for which plaintiffs had no competence to sue. Plaintiffs claim was accordingly struck out. The plaintiffs then appealed to this court on ten grounds of appeal. Six issues respectively were formulated by both parties but the issues were not dissimilar hence were considered together. However, the only issue that is most connected to the instant matter is the issue pertaining to the capacity of the appellants to sue as representatives and on behalf of all the members of Ire Akari Housign Estate Association. The Association is made up of the residents of the Housing Estate. The court referred to Order 13 rule 14 of the High Court of Lagos State Rules, Cap 52 of the Laws of Lagos State, 1972 which is, impair material, with Order IV rule 3 of the Federal High Court, Civil Procedure Rules earlier referred to on the right to institute an action in a representative capacity. The plaintiffs were said to have complied with the requirement of the rules and were rightly accordingly granted leave to bring the action. But the bane of contention was whether the plaintiffs had common interest in the action which they brought in the High Court.

This court then opined that the fact that the plaintiffs suffered private nuisance had been settled and the learned trial Judge had found five different types of nuisance caused. However, the court found that it had not been shown by the plaintiffs that all the residents of the Ire-Akari Housing Estate were members of their Association. The court then opined further that from the description of the nuisance caused by the defendant, the residents of the Housing Estate could not have suffered the same type of nuisance or inconvenience. Each and every resident must have suffered different kind of nuisance from the act of the defendant's vehicles and employees. This court held that by the provisions of Order 13 rule 14 of the High Court (supra) the persons being represented and the persons representing them must have the same interest in the cause or matter. Not only that, the grievance which they all have must be common grievance".
(Pp 486 – 489 Paras G – A)

4. *It is wrong to make a representative order where there is no common interest and common grievance*
The same view was held in Adefulu vs Oyesile (1989) 5 NWLR (Pt.122) 377 at 396. In that case, this court held, *inter alia,* as follows:

> **"..... to bring a representative action..... it is essential that the representative in the action must have the same interest as the persons that he claims to represent. If the interests as well as the grievance are common, a representative action would be in order, provided that the relief sought in the action is in its nature beneficial to those whom the plaintiff represents".**

This court in Adediran's case (supra) finally held that by the nature of the nuisance created by the defendants, the grievances of the plaintiffs and the persons in the Association they represented cannot be the same or common in all respects. The court concluded that the trial court was in error when it granted the plaintiff, in the first place, the leave to bring the representative action. The appeal was allowed in part and the action was struck out, since it was wrongly brought in a representative action.

In the instant case, learned counsel for the respondent had contended that, right from the inception of the suit, from the statement of defence, the respondent not wanting to ambush or take the appellants by surprise sounded an early warning signal that the representative action procedure adopted by the appellants was inappropriate, invalid and incompetent in the circumstance of the suit. But the appellants paid a deaf ear to the warning. *(P 489 Paras A – G)*

Per Ariwola (JSC)

> **"From the report prepared by PW3, Exhibit G3, the appellants interests which were said to have been valued as excerpts from the pleadings, oral and documentary evidence before the court are:**
> **(a) Loss of fishing rights in the stream;**

(b) Loss of fish ponds;
(c) Loss of drinking water and water for domestic purposes;
(d) Injurious infactions and other related matters.

In Oragbaide vs. Onitiju (1962) 1 ALL NLR 32, (1962) 1 SCN LR 70; the plaintiff had instituted an action for himself and on behalf of Ifetedo community, claiming an area of land as communal property. The evidence adduced by the plaintiff however showed that he and the others represented by him claimed to have each an individual farm of his own within the area in dispute. That meant that the whole community could not have owned the whole area as community land. The issue that came up before this court was the appropriateness or otherwise of the representative action brought in the circumstances by the plaintiffs. The court held that there was no common interest between the plaintiff (Olabode) and the people of Ifetedo, in that, on the evidence adduced for the plaintiff, it was plain that he and others claimed to have each an individual farm of his own within the area in dispute. The plaintiff could therefore not maintain an action on behalf of the people purportedly represented.

Also in Busari Ayinde vs. Adedokum Akanji (Bale Sagbo) & Ors (1988) 1 NWLR (Pt. 68) 70, an action instituted in a representative capacity by some plaintiffs for trespass and injunction alleged to have been committed on their separate potions of land was held to be improper and damages suffered by each plaintiff as well as each of those others, represented is different. This court per Uwais, JSC (as he then was) later the CJN, opined as follows:

> **"It is very clear from the foregoing, the claims of the plaintiffs and the facts of this case, that it was improper for the plaintiffs to bring representative action for themselves and on behalf of the other 114 landowners. The various torts of trespass, if at all committed on the individual plots of the plaintiffs and the 114 land owners, did not arise from one transaction but series of**

transaction. In other words, there was no joint tort. The causes of action though similar are in fact distinct. In the same way no single award of damages or the grant of injunction can be made to the plaintiffs and the 114 land owners as they have different, though similar causes of action. Their interests are not therefore common. See: Amachree vs. Newington 14 WACA 97".
(Pp 491 – 492 Paras E – G)

5. *No common interest in the stant case*
Considering and relying on the Ayinde vs. Akanji's case (supra) the court below opined that the question of the plaintiffs' common interest with others being represented in the action was fundamental in the determination of the appeal and should be the same deciding factor in the instant appeal. For, if the appellants here had no capacity or common interest with other plaintiffs (namely the 7,959 inhabitants according to 1991 census figure out of which 300-369 are said to be fishermen as well as the farmers who had rubber trees to bring representative action, the said action before the trial court would be vitiated. See; Markt & Co. Ltd vs. Knight SS Co. Ltd (1910) 2 KB 1021 in which a number of miners had gotten drowned through the flooding of a mine. The personal representatives of the deceased miners joined together and brought one action against the proprietors of the mine, claiming that the mine had gotten flooded through their negligence. The court held that the plaintiffs could not bring one action in the circumstance. *(Pp 492 – 493 Paras G – B)*

6. *Plaintiff must have common interest in a suit brought in a representative capacity*
In Shell Development Co. Ltd vs. Otoko & Ors (1990) 6 NWLR (Pt.159) 693 where the respondents had represented a certain communities in bringing an action against the appellant for oil spillage which they claimed desecrated their juju shrines and polluted their source of drinking water owned by them, killed their fishes and other living creatures and their economic life was adversely affected by the said pollution. The trial court granted their claim but on appeal, the judgment was set aside allowing the appeal on the ground that the

respondent did not have common interest in the suit they had brought in a representative capacity. *(P 493 Paras B – D)*

7. *Where plaintiffs and those they represent have varied interests*
As clearly shown in the evidence adduced, oral and documentary, there is no doubt in the instant case that certain acts of the respondents caused the pollution of Ekrusierho stream and this continuous pollution of the stream affected the fishermen, farmers and families in the community, the exact numbers of which could not be readily ascertained. In other words, the plaintiffs and those others that they claimed to have represented had varied interests. They in short did not have common interests in the effect of the pollution of the stream. In the same vein, their grievances also cannot be said to be common and the reliefs claimed by them for themselves and on behalf of others cannot be said to be beneficial to all. As a result, the court below rightly followed and applied this court's decision in Adeniran vs. Interland Transport Limited (Supra) in holding that the appellants lacked the capacity by which they brought the action before the trial court. In other words, it follows therefore, that the trial court was in error in granting the appellants leave, in the first place, to sue the respondent in a representative capacity as they did. The court below was therefore right in allowing the respondent's appeal and striking out the appellants' suit before the trial Federal High Court.

In the circumstance, this appeal is unmeritorious, it fails and liable to dismissal. *(Pp 493 – 494 Paras F – B)*

8. *Purpose of rules of Court and approach to rules guiding the formulation of grounds of appeal.*
Generally, rules of court are meant to regulate matters in court and assist parties in the prosecution of their cases to achieve fair hearing and quick dispensation of justice. See; Solanke vs Somefun (1974) 1 SC 141; IBODO vs ENAROFIA (1980) 5-7 SC 42; Aina vs Obabiolorunkosi (1986) 2 NWLR (Pt.22) 316; John vs Blakk (No. 1) (1988) 1 NWLR (Pt.72) 648. And rules of court are meant to be obeyed and complied with by parties and the court. See; Afolabi vs. Adekunle (1983) 14 NSCC 3981 405; University of Lagos vs. Aigoro (1985) 1 NWLR (Pt.1) 143.

However, the rules of our appellate procedure relating to formulation of grounds of appeal, have been held to be primarily designed to ensure fairness to the other party. And therefore the application of such rules should not be reduced to a matter of mere technicality, whereby the court will consider the form rather than the substance.

In Alhaji Salami O. Aderounmu & Anor vs. Emmanuel Olajide Olowu (2000) 4 NWLR (Pt.652) 253; (2000) LPELR 141 (SC) this court had opined as follows:

> **"The prime purpose of the rules of appellant procedure, both in the Supreme Court and in the Court of Appeal, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal, and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the other side, of the precise nature of the complaint of the appellant and, consequently, of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form..... What is important in a ground of appeal, and the test the court should apply, is whether or not an impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection, or as the case may be, error of fact".**

I have carefully examined the five grounds of cross appeal filed by the cross appellant and the objection of the cross respondents. There is no doubt, that the grounds of appeal may not have been elegantly crafted but the substance of the complaint of the cross appellant is surely obtainable from the grounds of appeal. And the Cross respondents did not complain that they are left in the dark or confused as to what the complaints are all about. *(Pp 496 – 497 Paras A – B)*

9. *Award of damages based on evidence or document in existence before the accrual of the cause of action*
From the above, it is clear beyond any doubt that the court below based its award of N28 million payable to the cross respondents as reasonable compensation on the valuation reports in Exhibits E, G3 and H which reports covered period between 1966-1993 far beyond the period covered by the cross respondents claims. *(P 504 Paras A – B)*

10. *Award of damages based on a document not pleaded by the parties*
As clearly shown earlier, the court below was right in its findings that the cross respondents in their amended statement of claim did not claim compensation from 1966-1993 and that they did not plead or claim special damages. However, with the greatest respect, the court somersaulted in conclusion by relying on the same valuation reports which covered beyond the cross respondents' claim, in awarding compensation which they considered reasonable in the circumstances. It was, to say the least, wrong for the court below to have relied on the said valuation reports which recommended compensation covering 1966-1993 whereas cause of action accrued in 1991. The period covering 1966-1993 was not pleaded by the cross respondents and the said valuation report had been prepared before the action was instituted at all. *(P 504 Paras B – E)*

11. *Where a party's claim for compensation is based on evidence before the commencement of action.*
Having arrived in the valuation report at certain figures of compensation due to the cross respondents before the matter went to court, that has rendered their claim as special damages. It is trite law the "where the precise amount of a particular item has become clear before the trial, either because it has already occurred or so becomes crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damages".
See; Mcgregor on Damages, 13 Edition at pages 923 and 927.
(P 504 Paras E – F)

12. *Unsatisfactory evidence cannot sustain proof of special damages*
It is not worthy that the valuation reports in Exhibits E, G3 and H which were relied on by both courts below are at variance with the

pleaded facts and the evidence adduced by the cross respondents before the trial court. These Exhibits, in my view, ought to have been disregarded and not relied on by the court in assessing or computing any reasonable compensation due to the cross respondents having been shown to contain more than pleaded or claimed.

In Ganiyu Badmus & Anor vs. Abegunde (1999) 7 SC (Pt.1) 78 at 81; (1999) LPELR 715, this court opined as follows on this particular issue:

> **"But where a plaintiff sets out to adduce evidence in proof of the special damages claimed by him and the evidence being deficient or unsatisfactory is rejected by the court that should put an end to the claim. The trial Judge is not entitled to embark upon his own assessment of the special damages using his conceived parameters in place of evidence..... so in no circumstance can a General damages be properly substituted for special damages which a plaintiff has failed to prove or even if he has led evidence on it, did not infact make any claim for it".**

See also African shipping Agency vs. Kalla (1978) 11 NSCC 114 at 120. *(Pp 504 – 505 Paras F – C)*

13. *Trial Court relied on unpleaded documents to compute damages*
As earlier stated, it is evident on record that the trial court relied on the valuation reports in Exhibits E, G3 and H in arriving at the sum of N50 million it awarded in favour of the cross respondents as reasonable compensation for their alleged losses etc. This was rightly adjudged by the court below to be wrong and was so declared, not having been contained in their amended Statement of Claim. However, the court below unfortunately fell in the same error by relying on the same unpleaded facts to assess and compute the compensation it thought was to be awarded, assuming that the action had been properly instituted by proper parties and the claim is properly made. *(P 505 Paras C – E)*

14. *Factors which made the cross appeal sustainable*
In the final analysis, this court comes to the following conclusion:

(a) That the cross respondents having conceded that they did not plead that the pollution which is their cause of action started in 1966 but the award of N28,000,000.00 as compensation predicted as it were on Exhibits E, G3 and H is wrong and therefore perverse.

(b) The court below having held that since the cross respondents did not amend their statement of claim to ask for compensation from 1966-1993, the award of N50 million cannot be justified, fell into the same error and relied on the said Exhibits E, G3 and H to make its award of N28, million in favour of the cross respondents instead of discountenancing the said Exhibits totally.

(c) No award can justifiably be made in law to cover a period when the cause of action had not arisen. In the instant case the cause of action is said to have arisen in 1991 but the scientific Laboratory test which established pollution was only done in 1994.

(Pp 505 – 506 Paras E – B)

Nigerian Cases Cited

Adediran & Anor vs. Interland Transport Ltd (1991) 9 NWLR (214) 155; (1991) LPELR 88;
Adefulu vs Oyesile (1989) 5 NWLR (Pt.122) 377.
Afolabi vs. Adekunle (1953) 14 NSCC 3981 405;
African shipping Agency vs. Kalla (1978) 11 NSCC 114.
Aina vs Obabiolorunkosi (1986) 2 NWLR (Pt.22) 316;
Alhaji Salami O. Aderounmu & Anor vs. Emmanuel Olajide Olowu (2000) 4 NWLR (Pt.652) 253; (2000) LPELR 141 (SC)
Amachree vs. Newington 14 WACA 97".
Bedfor (Duke of) vs Ellis (1901) AC 1.
Busari Ayinde vs Adedokum Akanji (Bale Sagbo) & Ors (1988) 1 NWLR (Pt. 68) 70,

A *Chief P.O. Anatogu & Ors vs. The Hon. Attorney General of the East-Central State of Nigeria & Ors (1976) 11 SC (Reprint) 56, (1976) LPELT – 483 (SC).*
Elijah Idise & Ors Vs. Williams International Ltd (1995) 1 NWLR (Pt.370) 142 (1995) SCNJ 120; (1995) LPELR – 1424.
B *Ganiyu Badmus & Anor vs Abegunde (1999) 7 SC (Pt.1) 78; (1999) LPELR 715*
Harrison vs. Abergavenny (Marguis of) (1887) 3 TLR 324.
Ibado vs Enerofia (1980) 5-7 SC 42;
C *In Shell Development Co. Ltd vs Otoko & Ors (1990) 6 NWLR (Pt.159) 693*
John Vs Black (1988) 1 NWLR (Pt.72) 648.
Oragbaide vs. Onitiju (1962) 1 ALL NLR 32, (1962) 1 SCN LR 70;
Solanke vs Somefun (1974) 1 SC 141;
D *University of Lagos vs. Aigoro (1985) 1 NWLR (Pt.1) 143.*

Foreign Cases Cited

Commissioner of Sewers of the City of London vs. Gellantly (1876) 3 Ch.D
E *610 at 615*
John vs Rees (1969) 2 WLR 1294,
Markt & Co. Ltd vs. Knight SS Co. Ltd (1910) 2 KB 1021

F **Nigerian Statutes Cited**

Representation

C.A. Ajuyah, (SAN) with Nnenko Ntiaidem (Esq.) for the respondents/
G appellants.

Frank O. Ezekwueuche (Esq.) for the respondent/appellants.

H **OLU ARIWOOLA, (JSC) (Delivering the Lead Judgment)**: This is an appeal by the plaintiffs at the Federal High Court being dissatisfied with the judgment of the Court of Appeal, Lagos division delivered on the 15th day of December, 2004 which set aside the judgment of Egbo-Egbo, J. earlier given
I on the 21st day of November 2000, and ordered the striking out of their claim in suit No.FHC/B/157/96 on the ground that it was incompetent.

The appellants as plaintiffs had instituted an action for themselves and on behalf of Ekrusierho community in Ekakpoimre. By their writ of summons issued on 15/11/1996, they had claimed the sum of one hundred and fifty million Naira (N150,000,000.00) being compensation and for loss suffered as a result of pollution of their (Plaintiffs) stream. They had claimed in the alternative, the sum of one hundred and fifty million Naira (N150,000,000.00) being damages for nuisance, negligence and or breach of statutory duty.

The appellants case is that sometime in 1991 in the course of the response's operation at Delta Power Station at Ughelli, they found that the respondent's waste oil chemical from the power station were channelled through the respondent's drainage system and discharged unto appellants' land and Ekruiserho stream thereby polluting the said stream and land. Consequently, the Ekrusierho stream, a major source of water supply and major source of income for the community became unfit for human consumption and fishing activities. The inhabitants of the community thereby lost their source of domestic water supply and the fishing community was dislodged. The vegetation in the immediate environment of the stream was also affected. The appellants lodged series of complaints in respect of the pollution first to the Assistant General Manager in charge of the said Delta Power Station, who ordered for a scientific test of the water samples from the Ekrusierho stream. Subsequently, the appellants commissioned Messrs JAS GERE AND KNIGHT FRANK in July 1993 and January, 1995 respectively to carry out valuation of the losses and damages occasioned by the said pollution which they forwarded to the respondent. In reaction to the appellants' complaints, the respondent, in 1994 dispatched a team of officers on a joint inspection with the appellants' representatives. A scientific test of the Ekrusierho stream in the respondent's laboratory, located at Sapele was conducted. Thereafter, the appellants pressed for compensation but the respondent declined to pay any compensation. This refusal led the appellants to institute the action claiming the sum of one hundred and fifty million Naira (N150,000,000.00) as compensation and loss suffered as a result of the continuous pollution of the said Ekrusierho stream which led to the consequential hardship, loss of source of income and destruction of the surrounding vegetation or in the alternative the same amount was claimed as

damages for nuisance, negligence and or breach of statutory duty.

Pleadings were filed and exchanged by parties. The case proceeded to hearing. Both parties called witnesses and a number of exhibits were tendered and admitted in evidence. Judgment was later entered in favour of the appellants by the trial Federal High Court in the sum of fifty million Naira (N50,000,000.00) which was to be distributed on the basis of what the community would think fit in the circumstances. The respondent was dissatisfied with the judgment of the trial court, hence appealed to the court below on 18/12/2000. Pursuant to the leave granted by the court below, the respondent filed an amended notice of appeal on 18/10/2002. Briefs of argument were filed and exchanged by parties. In its reserved judgment delivered on 15/12/2004, the Court of Appeal held that the action was incompetent in that the action could not be commenced in a representative capacity and struck out the suit.

Being dissatisfied with the judgment of the Court of Appeal led the appellants to appeal on 4th June, 2004 on a sole ground of appeal. Parties filed and exchanged briefs of argument. In the appellants' amended brief of argument filed on 20/2/2017 the appellants distilled the following sole issue for the determination of the appeal.

Whether the learned Justices of the Court of Appeal were right in holding that the plaintiffs cannot prosecute this action in a representative capacity.

This appeal was argued on 17/10/2017. Mr. Ajuyah, SAN of counsel for the appellants indentified the processes they were relying on for the appeal. These include the amended appellants' brief of argument and appellants' reply brief of argument. He adopted and relied on both briefs of argument to urge the court to allow the appeal and set the judgment of the court below and grant the damages claimed by the appellants at the trial court as ordered.

Learned senior counsel referred to his Notice of preliminary objection to the notice of cross appeal by the respondent. He adopted and relied on the argument contained in the cross respondent's brief of argument. He urged the court to allow the objection and sustain same in striking out the cross appeal. He submitted that there was no response to the preliminary objection by the

respondent. However, in the event that the objection fails he relied on the arguments in the cross respondents' brief of argument to urge the court to dismiss the cross appeal.

Mr. Ezekwueche of counsel for the respondent identified his respondent/cross appellant's brief of argument filed on 22/6/2012, earlier deemed filed on 5/11/2012 but finally deemed properly filed and served on 17/10/2017. Also, cross appellant's reply brief of argument which was filed on 25/11/2014 was deemed properly filed and served on 17/10/2017. For the respondent's response to the appellant's preliminary objection learned counsel referred to the Reply of Cross appellant. He adopted and relied on both processes to urge the court to dismiss the main appeal, overrule the preliminary objection of the appellant and allow the cross appeal.

In arguing the sole issue distilled for determination of the appeal appellants referred to their claim and contended that before the action was commenced, the five nominees of the members of Ekrusierho community, authorized to initiate the action for themselves and on behalf of the members of the said community sought and obtained the approval of the trial court to prosecute the action in a representative capacity. He referred to the ruling of the trial court on the exparte application of the appellants to institute the action as they did.

Reference was made in the brief of argument to the pleading of the appellants on pages 24-27 of the record. Learned senior counsel contended that the respondent in its pleading in answer to the averments of the appellants in their Statement of Claim did not deny the following facts.

(a) The existence of the Ekrusierho stream;
(b) That the people of Ekrusierho community use the stream for fishing and as source of water supply;
(c) That the named plaintiffs are members of Ekrusierho community.

Learned senior counsel contended further that, in any case, the testimony of the 2nd and 4th plaintiffs, given at the trial, support the averments in their pleadings, that members of the community use the stream and that their grievance is that the pollution of the stream by the respondent dislodged their

fishing activities and damages their source of water supply, among other damages. He referred to Exhibits C-C9 and the evidence of PW4 at pages 70-72 of the record, to contend that the respondent's scientific investigation confirmed the pollution of the stream. He referred to the findings of the trial court on pages 222 and 262 of the record and the trial judge's conclusion in awarding the sum he awarded in favour of the appellants.

Learned senior counsel contended that the learned Justices of the court below who did not interfere with the findings of the learned trial Judge that the appellants' community stream was polluted by the respondent and the pollution adversely affected appellants' major source of domestic water supply, fishing activities and immediate environment were in grave error in their holding on pages 489 and 492 of the record and in coming to the conclusion that the appeal has merit and was allowed.

Learned senior counsel referred to Order IV rules 1,2 and 3 of the Federal High Court Rules, 1979, and contended that the said rules were not put into consideration before reaching the conclusion to allow the appeal of the respondent. He submitted that the provisions of the said rules are plain and unambiguous and do not require any interpretation aid. Learned senior counsel contended that, the appellants' community which from the evidence consist of more persons than one with the same interest in the stream are entitled to bring the action for the benefit of all members of the community as provided by the rules of the court. He submitted that the appellants having shown by their pleadings and evidence, their common grievance against the respondent, were competent to prosecute the action in a representative capacity as approved by the learned trial Judge.

Learned senior counsel contended that the reasoning of the learned Justices that within Ekrusierho community there are farmers, fishermen and families who have varied interest is untenable and without legal basis. He contended further that the five named appellants came to court as representatives of all persons of the community affected by the respondent's wrongful act. There was no evidence showing or suggesting that any fisherman, farmer or family in the community owned or had exclusive right to the stream which defeats the claim of the community. No one made the case that the stream was owned separately by those mentioned by the learned Justices of the court below to justify the conclusion reached by the

A Honourable court. The learned senior counsel submitted that to commence separate actions as suggested by the learned Justices of the court below will lead to multiplicity of actions and that clearly defeats the object of rules 1 and 3 which permits proceedings in representative capacity where all such actions
B can be settled in one action. He relied on **Montgomery vs. Foy Morgau & Co** (1895) 2 Q.B 321 at 324; **Newspaper Corporation vs. Oni & Ors** (1995) 1 SCNJ 218 at 233-236.

Learned senior counsel referred to the case of **Adediran vs. Interland**
C **Transport Limited** (1991) 9 NWLR (Pt.214) 144 and submitted that, it was patently wrongly relied upon and applied to this case by the court below.

He contended that in the instant appeal there is evidence from PW6 and PW7 and Exhibit B, that members of the community who were fishing in the
D stream suffered a common grievance which is the pollution of the community stream and dislodging of their fishing activities. He submitted that the relief claimed is beneficial to all and arose out of the same transactions and involved common questions of law and facts.

E Learned senior counsel referred to the findings of the trial court on the application of Adeniran's case (supra). He referred to the case of **ELF Nigeria Limited vs. Sillo & Ors** (1994) 6 NWLR (Pt.350) 150 which was prosecuted in a representative capacity and submitted that the facts upon which the case
F rest are similar to the instant. He observed that the case of ELF Nigeria Limited was cited to the court below but no reason was given by the court for not considering and applying it to the instant. He relied on **Idoniboye Olu vs. NNPC** (2003) 1 SC (Pt.1) 40 at 70; **Adegoke Motors Ltd vs. Adesanya**
G (1989) 3 NWLR (Pt.109) 250 at 265-266. Learned senior counsel submitted that, the appellants having shown communal right to the stream which was polluted by the respondent with the resultant loss and damage, the appellants were right in bringing the action in representative capacity and the court below
H was wrong in holding that the appellants cannot prosecute their action in representative capacity and in striking out the claim as incompetent.

In conclusion, learned senior counsel urged the court to hold that the appeal has merit and should be allowed.

I In the brief of argument filed by the respondent, it adopted the sole issue distilled by the appellants with a slight modification as follows:

"Whether having regard to the pleading of the appellants and the evidence adduced before the court, the learned justices of the Court of appeal were right in holding that the appellants cannot prosecute this action in a representative capacity".

In arguing the sole issue, learned counsel for the respondent anchored his submissions on paragraphs 1,3,4,6,7,8,14 and 15 of the amended statement of claim and the three (3) Valuation reports Exhibits E, H and G3 tendered by the appellants. He quoted the said paragraphs of the appellants pleadings. He referred to paragraphs 1 and 16 of the Statement of defence where the respondent joined issues with the appellants on the competence and propriety of the action instituted in representative capacity as pleaded in paragraph 1 of the amended statement of claim. He referred to the testimony of PW3, PW6 and PW7 and contended that the evidence is very pertinent to the issue under consideration. PW3 is the author of Exhibit G3, as an Estate Surveyor.

Learned counsel referred to the findings of the trial Judge on the issue of representative action and its appropriateness or otherwise in the circumstances of the appellants' action and the evidence adduced before the court, which eventually led to the award of N50,000 as compensation to the appellants by the respondent. He referred to the findings of the court below on the same issue of the appellants' representative capacity in instituting the action as they did. He contended that with its findings, the court below then came to the resolution that the appellants could not sue in a representative capacity as they had varied interests. hence, the court below held that the appeal had merit and it was allowed.

Learned counsel submitted that the court below was right and correct in its application of the decision of this court in **Adediran vs. Interland Transport Ltd** (Supra) and in setting aside the judgment of the trial court and striking out the action for want of capacity of the plaintiffs to bring the action in a representative capacity.

On the application of Order IV Rule 3 of the Federal High Court, he referred to the decided cases which the court below referred to and considered on the issue of representative action before coming to the conclusion that the appellants lacked competence to institute the action in representative capacity as they did. He referred to Order IV rule 3 (supra) and the decision of this

court in Adediran's case and submitted that the three requirements listed in the decision must coexist simultaneously or contemporaneously before a representative action can competently lie. He submitted further that the appellants in this case neither have a common interest nor common grievance in the suit, in that each of the 398 fishermen has a separate and distinct cause of action; each of the 797 families or households adversely affected by the pollution of their source of drinking water has a separate and distinct cause of action. He contended that it is not the whole Ekrusierho community that suffered all the same type of hardship arising from the said pollution of the stream. He submitted that loss of income is personal to each of the 398 fishermen for which each ought to have instituted his own separate action.

Learned counsel contended that the evidence of PW3, PW6 and PW7 when viewed alongside Exhibits E, G3 and H show that each fisherman retains his own catch or sells sae to meet his individual family commitments; each individual household sources its own drinking water and fish ponds are individually owned. The appellants neither pleaded nor gave evidence that Ekrusierho community practices communalism. He referred to same decisions of appellate courts on the institution of an action in representative capacity including **Amachree & Ors vs. Onitiju** (1962) 1 ANLR 32; **Busari Ayinde & 2 Ors vs. Adedokun Akanji I** (Bale Sagbo) & 9 Ors (1998) ANLR 59.

Learned counsel submitted that it is settled law that no representative action will lie to establish the right of numerous persons to recover damages collectively where each ought to sue and prove his or her individual losses or damages. He submitted further that Order IV Rule 3 of the Federal High Court Rules, 1990 which permits joinder of plaintiffs does not intend such a joinder where such plaintiffs should sue in their separate rights or where the injuries to them are separate or distinct.

Learned counsel referred to the case of **ELF Nigeria Limited vs. Sillo & Ors** (Supra) which the appellants say is in all fours with the instant case, and submitted that the decision in the case is inapplicable to the facts of this appeal, in that, the issue that fell for determination of the court was not the capacity of the respondents to sue in a representative capacity. The case was not fought by the parties on the issue of representative capacity and so is distinguishable and inapplicable to the instant appeal. He finally submitted that the learned

Justices of the court below were correct and justified in setting aside the judgment of the trial Federal High Court and striking out the action for want of capacity of the appellants to bring the action in a representative capacity. He urged the court to dismiss the appeal and affirm the judgment of the court below.

The appellants filed a reply brief of argument to the respondent brief of argument. He attempted to compare and distinguish each of the several decided cases cited by the respondent in its brief of argument with the instant case on appeal. Learned senior counsel submitted that this case is quite distinguishable with the long list of the cases cited by the respondent and they are not applicable. On the other hand, he concluded that the case of **ELF Nigeria Ltd vs. Sillo & Ors** (supra) relied on by the appellants is applicable to and in all fours with the instant case hence he urged the court to apply it and hold that the appeal has merit and ought to be allowed.

As earlier indicated, the action that culminated into this appeal was instituted by the appellants in a representative capacity, but the respondent as defendant joined issue with the appellants as plaintiffs at the trial court. The appellants in paragraph 1 of their amended statement of claim filed on 01/9/97 claimed as follows:

> **"1. The plaintiffs, are members of Ekrusierho Community in Akakpamre and they bring this action for themselves and on behalf of other members of Ekrusierho Community, Ekakpamre in Ughelli South Local Government Area, Delta State".**

The above averment was denied by the respondent in its paragraphs 1 and 1(b) of the amended statement of defence filed on as follows:

> **"1 The defendant denies paragraphs 1,3,4,5,6,7,8,9, 10,11,12,13,14 and 15 of the Statement of Claim and puts the plaintiffs to the strictest proof of the averments contained in those paragraphs.**
>
> **1(b) The defendant will contend at the trial that the plaintiffs have different interests in the subject matter of the suit".**

Generally, the rule as to representative actions is said to have been derived, a long time ago, from the court of Chancery, which required the presence of all parties to an action, so as to put an end to the matters in controversy. However, the practice was relaxed in due course since 1876 in **Commissioner of Sewers of the City of London vs. Gellantly** (1876) 3 Ch.D 610 at 615, where the court held as follows:

> **"Where one multitude of persons were interested in a right, and another of persons interested in contesting that right, and that right was a general right and it was utterly impossible to try the question of the existence of the right between that two multitudes on account of their number some individuals out of the one multitude might be selected to represent one set of claimants and another set of persons to represent the parties resisting the claim and the right might be finally decided as between all parties in a suit so constituted".**

However,, this rule has been described as "a rule of convenience only". See; **Harrison vs. Abergavenny (Marguis of)** (1887) 3 TLR 324 at 325. Hence, as a rule that came into being only for convenience, and for the sake of convenience, it has been relaxed. See; **Bedfor (Duke of) vs. Ellis** (1901) AC 1 at 8. Therefore, it is a rule which should not be treated as rigid but as a flexible tool of convenience in the administration of justice. See; **John vs Rees** (1969) 2 WLR 1294 at 1306, **Chief P.O. Anatogu & Ors vs. The Hon. Attorney General of the East-Central State of Nigeria & Ors** (1976) 11 SC (Reprint) 56, (1976) LPELT 483 (SC).

In this case, reliance was placed on the provisions of the Rules of Court in the commencement of the action in a representative capacity by the appellants against the respondent.

Order IV rule 3 of the Federal High Court, Civil Procedure Rules provides as follows:

> **"Where more persons than one have the same interest in one suit, one or more of such persons may with the approval of the court, be authorized by the other persons interested to**

sue or to defend in such suit for the benefit of or on behalf of all parties so interested".

It is settled already that for an action to lie in a representative capacity, the following conditions or ingredients must exist:

(a) There must be common interest;
(b) There must be a common grievance and;
(c) The relief claimed must be beneficial to all.

See; **Adediran & Anor vs. Interland Transport Ltd (1991) 9 NWLR (214) 155; (1991) LPELR 88; Elijah Idise & Ors vs. Williams International Ltd (1995) 1 NWLR (Pt.370) 142l (1995) SCNJ 120; (1995) LPELR – 1424.**

Generally, from the evidence adduced before the trial court, upon review of the totality of the available evidence on record, the trial court found on the facts that the appellants proved their case beyond reasonable doubt.

However, on the issue of the capacity in which the appellants instituted the action, the trial court referred to the decision of this court in **Adediran & Anor vs. Interland Transport Ltd** (supra). The learned trial Judge relied on the said decision and came to the following conclusion, that:

"The plaintiffs from the inception of this case, i.e. from their writ of summons made no pretence about it. They emphatically claimed that the suit was about Ekrusierho stream which belonged to that community which has been polluted by the defendant thereby depriving them of the use of that stream for fishing, drinking and other domestic uses. Thus there is a common interest, common grievance and the relief claimed is beneficial to all.....

Their common interest is the river and their common grievance is the pollution of that river which has made them to lose income which they hitherto used in the education of their children.

The outcome of the case, if it is in their favour will be used to mitigate the loss suffered by them as a community.....

I am convinced the plaintiffs did their homework properly and have proved this on a balance of probability".

Judgment was accordingly entered in favour of the plaintiffs by the trial court.

On appeal to the court below, the court, relying also on the same **Adediran & Anor vs. Interland Transport Limited** (supra) and other decision of this court such as **Oragbaide vs. Onitiju** (1962) 1 ALL NLR 32; **Busari Ayinde vs. Adedokun (Bale Sagbo) & 9 Ors** (1988) 1 NWLR (Pt.68) 70 on the issue of instituting an action in a representative capacity, had answered the question in the affirmative, namely, that the respondents could not sue in a representative capacity as the plaintiffs had varied interest, in that, some were fishermen while others were farmers and the community consisted of several family groups but not a single family. The court below after considering the other issue raised by the respondent in the appeal in its unanimous decision concluded that the appeal was meritorious and was allowed. The action was then struck out for want of capacity in the appellants as plaintiffs to institute the action in a representative capacity.

There is no doubt, that in the main appeal to this court from the decision of the court below, the issue in dispute was narrowed down to the capacity of the appellants to institute the action as they did before the trial Federal High Court, hence the sole issue for determination.

As clearly shown on the record, this action was commenced at the Federal High Court in representative capacity by the appellants.

It is clear from the records that both courts below, (the trial Federal High Court and the Court of Appeal) respectively which granted the appellants claim and the latter that allowed the appeal against the judgment, relied on the decision of this court in **Adediran & Anor vs. Interland Transport Ltd** (supra). What then are the facts of the said case that led to the decision the court took.

The facts of that case are that, plaintiffs are residents of Ire-Akari Housing Estate, Isolo. The residents have formed an Association, known as the Ire-Akari Housing Estate Association. With leave of the court, plaintiffs

brought an action on behalf of themselves and all other member of the Ire-Akari Housing Estate Association, at Isolo in Lagos State. The defendant, which is a Limited Liability Company with its registered office at No.9 Brickfield Road, Ebute-Metta, and the 2nd defendant also a Limited Liability Company are owners of Plots 351, 352, 353 along Okeho Street, in Block VA of the Ire-Akari Housing Estate. Defendants are in the transport business. They own several long trailers. They use their premises in the Estate as their workshop and for parking their trailers. Consequently, there is considerable traffic of these long heavy trailers in the Estate, throughout the day and for most aprt of the night. The many drivers employed to drive these vehicles also park the trailers in the roads of the Estate making the road virtually impassable. In many cases they block the access roads to the houses of the residents. The complaint of the residents of the Estate is that the heavy trailers have rendered the reads unsafe for children, destroyed the roads and knocked down electric poles. The disturbing noise made by the drivers in the process of returning to park the vehicles and taking off early in the morning, constitute in addition to the other inconvenience activities, the nuisance complained of. After general protests to the 1st defendant, the residents, who are the plaintiffs, brought the action.

After due trial of the claim on pleadings exchanged by the parties in the High court, the claim against the 2nd defendant was dismissed by the trial Judge while the learned Judge, inter alia, held the 1st defendant liable for the tort of nuisance and awarded N20,000.00 as general damages. N30,000.00 was also awarded in respect of special damages. Perpetual injunction was granted, restraining the defendants by themselves or their directors, officers, servants or agents from using the said plots of land in Ire Akari Housing Estate, Isolo for transport business or any other industrial purpose. In his considered judgment, the learned trial Judge found that plaintiffs were members of the Association known as Ire Akari Housing Estate Association. The action was instituted on behalf of all the members of the Association residents at Ire Akari Estate. Furthermore, after recounting the facts, the learned trial Judge, inter alia, found that these acts of nuisance which were continuous, constitute substantial discomfort to the plaintiffs and other members of the Association.

The defendant appealed to the court of Appeal, on five grounds of errors of law and of facts. Eight issues for determination were distilled from

the five grounds of appeal and argued. Out of the whole eight issues, the Court of Appeal considered only four issues 1,3,5 and 7.

On issue (3), the court below, citing and relying on Order 15 Rule 4 (2) RSC 1985 of England, applicable, submitted that not all those residents which were affected, were before the court. Plaintiffs were bound to bring before the court other residents of the Estate who are entitled to sue having suffered from the same acts of nuisance. Plaintiffs represented only members of the Association. Under the rules, the other residents should with their consent be made co-plaintiffs, or otherwise sued as defendants.

The main reason for the judgment of the court below, inter alia, was that the claim was in respect of Public nuisance for which plaintiffs had no competence to sue. Plaintiffs claim was accordingly struck out. The plaintiffs then appealed to this court on ten grounds of appeal. Six issues respectively were formulated by both parties but the issues were not dissimilar hence were considered together. However, the only issue that is most connected to the instant matter is the issue pertaining to the capacity of the appellants to sue as representatives and on behalf of all the members of Ire Akari Housign Estate Association. The Association is made up of the residents of the Housing Estate. The court referred to Order 13 rule 14 of the High Court of Lagos State Rules, Cap 52 of the Laws of Lagos State, 1972 which is, impair material, with Order IV rule 3 of the Federal High Court, Civil Procedure Rules earlier referred to on the right to institute an action in a representative capacity. The plaintiffs were said to have complied with the requirement of the rules and were rightly accordingly granted leave to bring the action. But the bone of contention was whether the plaintiffs had common interest in the action which they brought in the High Court.

This court then opined that the fact that the plaintiffs suffered private nuisance had been settled and the learned trial Judge had found five different types of nuisance caused. However, the court found that it had not been shown by the plaintiffs that all the residents of the Ire-Akari Housing Estate were members of their Association. The court then opined further that from the description of the nuisance caused by the defendant, the residents of the Housing Estate could not have suffered the same type of nuisance or inconvenience. Each and every resident must have suffered different kind of nuisance from the act of the defendant's vehicles and employees. This court

held that by the provisions of Order 13 rule 14 of the High Court (supra) the persons being represented and the persons representing them must have the same interest in the cause or matter. Not only that, the grievance which they all have must be common grievance. The same view was held in **Adefulu vs Oyesile (1989) 5 NWLR (Pt.122) 377 at 396.** In that case, this court held, *inter alia,* as follows:

> **"..... to bring a representative action..... it is essential that the representative in the action must have the same interest as the persons that he claims to represent. If the interests as well as the grievance are common, a representative action would be in order, provided that the relief sought in that action is in its nature beneficial to those whom the plaintiff represents".**

This court in Adediran's case (supra) finally held that by the nature of the nuisance created by the defendants, the grievances of the plaintiffs and the persons in the Association they represented cannot be the same or common in all respects. The court concluded that the trial court was in error when it granted the plaintiff, in the first place, the leave to bring the representative action. The appeal was allowed in part and the action was struck out, since it was wrongly brought in a representative action.

In the instant case, learned counsel for the respondent had contended that, right from the inception of the suit, from the statement of defence, the respondent not wanting to ambush or take the appellants by surprise sounded an early warning signal that the representative action procedure adopted by the appellants was inappropriate, invalid and incompetent in the circumstance of the suit. But the appellants paid a deaf ear to the warning.

On the issue of the capacity of the appellants, the respondent relied on the testimonies of PW6 and PW7 given under both examination in-chief and cross examination as follows:

> **PW5 on pages 81 and 82 of the record under examination in-chief:**

A **"I fish at a stream in Ekrusierho and is owned by Ekrusierho community..... Apart from fishing we use it for drinking, for bathing and washing our clothes... The fishes we got from the stream are for**
B **consumption, for sale and to cater for our children in education"**

Under cross examination PW6 testified further as
C **follows:**

> **"There are so many fishermen in our community that I cannot tell you the number, I**
D **know some of the fishermen in my community. The compensation will be paid to people affected according to the recommendation given by the community".**

E

PW7 in his examination in-chief testified, inter alia, as follows:

F **"I performed my fishing and farming in Ekrusierho stream... As a result of this discharge, we have not been fishing on the river. The discharge is still going on. It also affected vegetation along the stream i.e.**
G **Our rubber trees and cassava are not producing well again".**

Under cross-examination, PW7 stated, inter alia, as follows:
H

"..... The fishermen involved are very many, about 389. We sent our list through our consultants to seek legal advice of NEPA. I do not have a copy of the list.
I **We submitted the list as stated above. The pollution affected me as I cannot fish and no water for domestic use".**

PW3 as the author of Exhibit G3 testified at page 67 of the record, *inter alia*, as follows:

> **"I saw some fishermen about 10. They were not fishing but they introduced themselves as such. I said my assistants gave me a figure of over 300 fishermen..... Compensation is to be paid to those who suffered losses. To not (sic) sure that the real people are paid, I put a proviso at page 5 of my report that before they are paid they must be indentified physically..... The amount used in the report for each fisherman is for 1993. It can be the same figure for 1966. It was used as the figure available at the material time..... The report Exhibit G3 was on 300 fishermen and 600 people on water as at page 4 paragraph 11(a) and (b). That is 10% of the people using water from the river..... I used the 600 people as a conservative figure as the population was more".**

From the report prepared by PW3, Exhibit G3, the appellants interests which were said to have been valued as excerpts from the pleadings, oral and documentary evidence before the court are:

(e) Loss of fishing rights in the stream;
(f) Loss of fish ponds;
(g) Loss of drinking water and water for domestic purposes;
(h) Injurious infactions and other related matters.

In **Oragbaide vs. Onitiju** (1962) 1 ALL NLR 32, (1962) 1 SCN LR 70; the plaintiff had instituted an action for himself and on behalf of Ifetedo community, claiming an area of land as communal property. The evidence adduced by the plaintiff however showed that he and the others represented by him claimed to have each an individual farm of his own within the area in dispute. That meant that the whole community could not have owned the whole are as community land. The issue that came up before this court was the

appropriateness or otherwise of the representative action brought in the circumstances by the plaintiffs. The court held that there was no common interest between the plaintiff (Olabode) and the people of Ifetedo, in that, on the evidence adduced for the plaintiff, it was plain that he and others claimed to have each an individual farm of his own within the area in dispute. The plaintiff could therefore not maintain an action on behalf of the people purportedly represented.

Also in **Busari Ayinde vs. Adedokum Akanji (Bale Sagbo) & Ors** (1988) 1 NWLR (Pt. 68) 70, an action instituted in a representative capacity by some plaintiffs for trespass and injunction alleged to have been committed on their separate potions of land was held to be improper and damages suffered by each plaintiff as well as each of those others, represented is different. This court per **Uwais, JSC** (as he then was) later the CJN, opined as follows:

> **"It is very clear from the foregoing, the claims of the plaintiffs and the facts of this case, that it was improper for the plaintiffs to bring representative action for themselves and on behalf of the other 114 landowners. The various torts of trespass, if at all committed on the individual plots of the plaintiffs and the 114 land owners, did not arise from one transaction but series of transaction. In other words, there was no joint tort. The causes of action though similar are in fact distinct. In the same way no single award of damages or the grant of injunction can be made to the plaintiffs and the 114 land owners as they have different, though similar causes of action. Their interests are not therefore common. See: Amachree vs. Newington 14 WACA 97".**

Considering and relying on the **Ayinde vs. Akanji's** case (supra) the court below opined that the question of the plaintiffs' common interest with others being represented in the action was fundamental in the determination of the appeal and should be the same deciding factor in the instant appeal. For, if the appellants here had no capacity or common interest with other plaintiffs (namely the 7,959 inhabitants according to 1991 census figure out of which 300-369 are said to be fishermen as well as the farmers who had rubber trees to bring representative action, the said action before the trial court would be

A vitiated. See; **Markt & Co. Ltd vs. Knight SS Co. Ltd** (1910) 2 KB 1021 in which a number of miners had gotten drowned through the flooding of a mine. The personal representative of the deceased miners joined together and brought one action against the proprietors of the mine, claiming that the mine
B had gotten flooded through their negligence. The court held that the plaintiffs could to bring one action in the circumstance.

In **Shell Development Co. Ltd vs. Otoko & Ors** (1990) 6 NWLR (Pt.159) 693 where the respondents had represented a certain communities in
C bringing an action against the appellant for oil spillage which they claimed desecrated their juju shrines and polluted their source of drinking water owned by them, killed their fishes and other living creatures and their economic life was adversely affected by the said pollution. The trial court granted their
D claim but on appeal, the judgment was set aside allowing the appeal on the ground that the respondent did not have common interest in the suit they had brought in a representative capacity.

The court below had distinguished the case of **ELF (Nig) Limited vs.**
E **Sillo** (1994) 6 NELR (Pt.350) 258, from the instant case, the former not having been decided on the capacity of the plaintiffs to sue in a representative capacity but whether they had the right to institute the action in view of the provision of Section 3(1) of Minerals Act, 1916, which vested property in and
F control of all minerals and minerals oils, in under or upon any lands in Nigeria and of all rivers, streams and water courses throughout Nigeria in the Crown.

As clearly shown in the evidence adduced, oral and documentary, there is no doubt in the instant case that certain acts of the respondents caused the
G pollution of Ekrusierho stream and this continuous pollution of the stream affected the fishermen, farmers and families in the community, the exact numbers of which could to be readily ascertained. In other words, the plaintiffs and those others that they claimed to have represented had varied
H interests. They in short did not have common interests in the effect of the pollution of the stream. In the same vein, their grievance also cannot be said to be common and the relief claimed by them for themselves and on behalf of others cannot be said to be beneficial to all. As a result, the court below rightly
I followed and applied this court's decision in **Adeniran vs. Interland Transport Limited** (Supra) in holding that the appellants lacked the capacity by which they brought the action before the trial court. In other words, it

follows therefore, that the trial court was in error in granting the appellants leave, in the first place, to sue the respondent in a representative capacity as they did. The court below was therefore right in allowing the respondent's appeal and striking out the appellants' suit before the trial Federal High Court.

In the circumstance, this appeal is unmeritorious, it fails and liable to dismissal. Accordingly, the appeal is dismissed and the judgment of the court below delivered on 15/12/2004 is affirmed in setting aside the judgment of the Federal High Court as well as the award of N50,000,000.00 as compensation.

Now to the cross appeal.

There was a notice of cross appeal filed by the respondent/Cross appellant on the 9th day of June, 2008. It has five grounds of appeal with particulars. On the 17th October, 2017 when the cross appeal was argued, the cross respondents referred to their notice of preliminary objection to the cross appeal, filed on 20/02/2017. Learned senior counsel for the cross respondents adopted his cross respondents' brief of argument and relied on paragraph 2.0 on page 1 to paragraph 202 on page 5 of the said brief of argument, to urge the court to uphold the preliminary objection and strike out the cross appeal. However, learned senior counsel contended that in the event that the preliminary objection fails, he urged the court to consider the cross respondents brief of argument filed on 20/2/2017 and dismiss the cross appeal for lacking in substance.

Learned counsel for the Cross appellant, Mr. Ezekwueche referred to his cross appellant's brief of argument filed on 22/6/2012 but earlier deemed properly filed and served on 5/11/2012 and the cross appellant's reply brief of argument filed on 25/11/2014. Both the cross appellant's brief of argument and cross appellant's reply brief of argument were deemed filed on 17/10/2017. He adopted both processes to urge the court to dismiss the main appeal, overrule the Preliminary Objection and allow the cross appeal.

On the cross appeal, learned senior counsel contended that same is incompetent and void and that the court has no jurisdiction to entertain same on any of the alleged grounds, of cross appeal. The said objection is argued in the cross respondents' brief of argument.

He referred to the cross appeal and submitted that all the five grounds of appeal contravene Order 8 rule 2 sub-rules (2), (3) and (4) of the Rules of this court. He referred to the said rules of court and picked the grounds of cross

appeal one after the other to come to the conclusion that there is no valid grounds to sustain the said cross appeal, hence he submitted that the court has no jurisdiction to entertain the incompetent cross appeal.

He urged the court to strike out the cross appeal.

In responding to the cross respondent's preliminary objection, the cross appellant referred to its reply brief of argument deemed filed on 17/10/2017. Learned counsel for the cross appellant submitted that the preliminary objection is misconceived and therefore incompetent.

Learned counsel conceded that it is settled law that a ground of appeal which complains of error in law but does not set out or has no particulars and nature of the error in law complained of, should be struck out. He relied on **Osawaru vs. Ezeiruaku** (1978) 1 LRN 307; **Tilbury Construction vs. Ogunniyi** (1988) 2 NWLR (Pt.83) 64.

He submitted that ground 1,2,3 and 4 of the Grounds of Cross Appeal that alleged error in law all have their respective particulars of errors which adumbrated the nature and the precise error or errors being complained about, such that the cross respondents are not left in any confusion or misconception of what they are facing.

Order 8 Rule 2 sub-rules 2,3,4 of the Rules of the Supreme Court provides as follows:

> **"(2) If the grounds of appeal alleged misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated.**
>
> **(3) The notice of appeal shall set forth concisely and under distinct heads the ground upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.**
>
> **(4) No ground which is vague or general in terms which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence and any ground of appeal or any part thereof which is not permitted under this rule may be struck out be the court of its**

own motion or on application by the respondent."

Generally, rules of court are meant to regulate matters in court and assist parties in the prosecution of their cases to achieve fair hearing and quick dispensation of justice. See; **Solanke vs Somefun** (1974) 1 SC 141; **Ibodo vs Enarofia** (1980) 5-7 SC 42; **Aina vs Obabiolorunkosi** (1986) 2 NWLR (Pt.22) 316; **John Vs Blakk** (1988) 1 NWLR (Pt.72) 648. And rules of court are meant to be obeyed and complied with by parties and the court. See; **Afolabi vs. Adekunle** (1983) 14 NSCC 3981 405; **University of Lagos vs. Aigoro** (1985) 1 NWLR (Pt.1) 143.

However, the rule of our appellate procedure relating to formulation of grounds of appeal, has been held to be primarily designed to ensure fairness to the other party. And therefore the application of such rules should not be reduced to a matter of mere technically, whereby the court will consider the form rather than the substance.

In **Alhaji Salami O. Aderounmu & Anor vs. Emmanuel Olajide Olowu** (2000) 4 NWLR (Pt.652) 253; (2000) LPELR 141 (SC) this court had opined as follows:

> **"The prime purpose of the rules of appellant procedure, both in this court and in the Court of Appeal, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal, and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the other side, of the precise nature of the complaint of the appellant and, consequently, of the issues that are likely to arise on the appeal. Any ground that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form..... What is important in a ground of appeal, and the test the court should apply, is whether or not the impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection, or as the case may be, error of fact".**

I have carefully examined the five grounds of cross appeal filed by the cross appellant and the objection of the cross respondents. There is no doubt, that the grounds of appeal may not have been elegantly crafted but the substance of the complaint of the cross appellant is surely obtainable from the grounds of appeal. And the Cross respondents did not complain that they are left in the dark or confused as to what the complaints are all about. I consider the objection as lacking in substance and liable to being overruled. Accordingly, the preliminary objection is overruled. I shall therefore proceed to consider the cross appeal.

From the grounds of appeal filed by the cross appellant, the following two issues are formulated for determination.

Issue 1:

Having regard to the pleadings and the totality of evidence adduced before the court, were the learned Justices of the Court of Appeal correct to have awarded N28, million as compensation to the cross respondents instead of dismissing the cross respondents claim intoto. (Grounds 1,4, & 5).

Issue 2:

Whether the Cross respondents pleaded in their Amended Statement of Claim that they were claiming compensation from 1966-1993 and if not whether the Valuation Reports (Exhibits E, G3 and H) admitted in evidence by the court are not at variance with the case set up by the Cross respondents (Ground 12).

The Cross appellant choose to argue the two issues together.

Learned counsel submitted that the court below is in error in awarding the sum of N28,000.000 to the cross respondents having regard to the pleadings, law and the evidence adduced before the trial court. He referred to the valuation reports of the alleged losses, admitted as Exhibits E, G3 and H. He referred to the findings of the court below at page 491 of the record on two

concessions that were made by learned senior counsel for the respondents and contended that the learned Justices of the court below after making a finding of fact that the Cross-respondents did not amend their statement of claim to ask for compensation from 1966-1993, and therefore the award of N50,000,000.00 as damages could not be justified yet succumbed to the allure of Exhibits, E, G3 and H in awarding N28, million as reasonable compensation. Learned counsel submitted that from the various findings by the court below there was no basis for the court below to again seek recourse to the same valuation reports, Exhibits E, G3 and H wherein compensation was worked from 1966-1993 to base the award of N28 million on as they did. He submitted further that the only course available in such a situation was to dismiss the Cross Respondents' action for want of proof of their compensation.

Learned counsel referred to the claim of N150 MILLION for compensation and loss, consequent hardship, loss of source of income and destruction of vegetation pleaded in paragraph 15 of the Amended Statement of Claim is in the genre of special damages which ought to have been specially pleaded and for which strict proof is required. He contended that since special damages, unlike general damages must be strictly proved, the learned Justices of the Court below erred in awarding special damages based on the same Exhibits E, G3 and H that were already discredited since the Cross Respondents did not ask for compensation from 1966-1993 in their amended Statement of Claim.

Learned counsel contended that the resort to ascertaining the mean between the three awards recommended in Exhibits E, G3 and H is arbitrary, unempirical and amounts to an award predicted on rule of the thumb in a situation where the valuation reports are inapplicable because they covered the period of 1966-1993 which period was not pleaded in the amended Statement of Claim.

Learned counsel gave poser that on what basis were the said Exhibits used to arrive at the compensation of N28, million awarded by the court below? He submitted that, where, as in this case, the Cross respondents fielded two Expert witnesses to do a statistical quantification or valuation of their losses from 1966-1993 and arrived at various sum of money in the valuation reports, the damages have become crystallized and precise in terms

of mathematical figures, undoubtedly, that is special damages. He contended that the said Exhibits were all prepared before the suit was instituted. He relied on **Mcgregor on Damages, 13th Edition page 923, item** 1382 (b) page 927, **Badmus vs. Abegunde** (1999) 7 SC (Pt.1) 78 at 81 and 82. He submitted that the course of ascertainment of damages by the learned Justices of the court below employed in this case is patently wrong in law. He relied on **Dumex Nigeria Ltd vs. Ogboli** (1972) All NLR (Reprint) 241.

Learned counsel submitted that based on the findings of fact made by the court below at page 491 lines 12-21 of the record, there is nowhere in the Amended Statement of Claim and Reply to Amended Statement of Defence that the cross respondents pleaded that they were claiming compensation from 1966-1993.

Learned counsel referred to paragraph 3 of the amended Statement of Claim, where the Cross Respondents averred that it was sometime in 1991 that they found that Cross appellant's waste oil chemical from the power station were channelled unto their land and Ekrusierho stream thereby polluting the said land and stream. He contended that since the cross respondents never asked for or claimed compensation from 1966-1993, it was wrong for the court to have awarded compensation to them on the basis of the valuation Reports Exhibits E, G3 and H wherein compensation was worked from 1966.

Learned counsel submitted that it is settled law that parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings go to no issue and should be expunged from the records or disregarded. He relied on **Chief Victor Woluchem & Ors vs. Chief Gudi & Ors** (1981) 5 SC 291 at 320; **George vs. Dominion Flour Mills** (1963) ALL NLKR 77; **Adejumo vs Ayantegbe** (1989) 3 NWLR (Pt.110) 417.

He submitted that the learned Justices of the court below were wrong not to have expunged or discountenanced Exhibits E, G3 and H in their judgment, rather they predicated their award of N28,000,000.00 on the said Exhibits which predated the cause of action.

He urged the court to set aside the judgment sum of N28,000,000.00 awarded by the court below as reasonable compensation to the cross respondents and its stead dismiss the cross respondents case intoto. He finally urged the court to allow the cross appeal.

In responding to the cross appeal, the cross respondents distilled a sole

issue from the grounds of appeal filed by the cross appellant.
The said sole issue as couched encompassed the two issues formulated and argued together by the cross appellant.

Learned senior counsel for the cross respondents referred to the claims of the Cross respondents in paragraph 15 of the amended Statement of Claim. He contended that it is clear from the pleadings that Cross respondents' claim sounds in compensation as general damages. And that the alternative relief put the matter beyond doubt, as no special damages was intended to be claimed.

He contended that the principle observed by the courts in the award and assessment of general damages is settled. Courts have been empowered under their inherent jurisdiction to grant a claim for general damages if, the liability of a defendant is established. He relied on **SPDC vs. Pere Cole** (1978) 3 SC 183 at 194. He submitted that such general damages (unlike special damages) do not require proof. General damages flow naturally and consequently from a finding of liability on the part of a cross appellant for tortuous acts committed by it. He relied on **Union Bank of Nig. Plc vs. Ajabule & Anor** (2011) 12 SC (Pt.100) 25.

Learned counsel contended that there is no dispute as to liability of the cross appellant for the pollution of the cross respondents' communally owned stream. He referred to the findings of the learned trial Judge on page 220 lines 19 & 28 of the record on the liability of the cross appellant on the pollution caused by it an contended that there was no appeal against the finding of the trial court. He contended further that having found the cross appellant liable for polluting the cross respondents communally owned stream, the learned trial Judge was entitled to consider what a reasonable person would regard as reasonable compensation flowing from the cross appellant's conduct.
This does not necessarily depend on calculations made and figures arrived at from specific items.

Learned senior counsel submitted that as the cross appellant's liability has been established, the cross respondent was not obligated to prove general damages. He submitted further that documents put before a court to enable it form its opinion as to what measure of general damages are to be awarded merely serve as guide. Courts are not bound to limit themselves to such documents and may in fact disregard the said documents where appropriate

and form their own opinion as to what reasonable compensation/general damages taking into account the conduct of the defendant whose liability has been established.

Learned senior counsel submitted further that it is for the court, using the materials (Exhibits E, G3 and H) at its disposal, to work out what it considers in the circumstances to be reasonable compensation. And that, cross appellant did not appeal against the finding of the learned Justices of the court below that Exhibits E, G3 and H were properly admitted in evidence in the case.

Learned senior counsel referred to the arguments of the Cross appellant in its brief of argument on Exhibits E, G3 and H but contended that the argument was misconceived, in that the cross respondents' claim fell within the pleaded facts used as a basis for the calculation of compensation in exhibits E, G3 and H, that is, from 1991 onwards. He submitted that the court below was right to resort to Exhibits E, G3 and H as guide in the determination of what it considers to be reasonable compensation in a claim for general damages.

He urged the court to disregard the arguments put forward by the cross appellant as same is unmeritorious and to dismiss the cross appeal for lacking in merit.

As earlier noted, this is a cross appeal by the appellant who is the successful party in the Court of Appeal, who is averse to some part of that court's decision. The cross appellant had challenged the decision of the trial court which was given in favour of the cross respondents on several grounds including that the action which was instituted by the cross respondents in representative capacity was incompetent, in that those they claimed to repreent have no common interest with them. When upholding the argument of the cross appellant, the court below, allowed the appeal and struck out the suit for lacking in competence. The court below however went further to consider the award of damages made as compensation to the cross respondents. This is, what is being challenged in this cross appeal as the cross appellant felt aggrieved.

There is no doubt and it is clear from the record that the cross respondents in paragraph 15 of their amended Statement of claim generally claimed as follows:

"Plaintiffs claim the sum of N150, million being compensation and loss suffered by plaintiffs as a result of the continuous pollution of the said Ekrusierho stream and the consequent hardship, loss of source of income and destruction of surrounding vegetation or, in the alternative, Plaintiffs claim the sum of N150 million being damages for nuisance, negligence and or breach of statutory duty."

From the record, the findings of both the trial court and court below is that the cause of action, which was the pollution of Ekrusierho stream was noticed by the community in 1991.

Indeed, on page 214 of the record, the trial Judge in the court's judgment found as follows:

"The facts of the case as pleaded and given in evidence were that sometimes in 1991 the plaintiffs observed that the defendant's Delta Power Station in Ughelli situated on the Plaintiffs'' land had during its operations been sending our (sic) waste oil/chemicals and these channelled through the defendant's drainage system and discharged into plaintiffs' land and Ekrusierho stream thereby polluting the said land and stream".

The learned trial judge in his judgment went further as follows:

"PW6 and PW7 categorically averred that each used to fish on the Ekrusierho Stream before 1991 and that Delta Power Station was situated on their land".

It is also on record that the Cross respondents commissioned registered Surveyors to assess the extent of damage done to the land and stream in question and this is contained in the valuation reports produced by the Cross respondents and admitted as Exhibits E, G3 and H. There is no doubt that all the valuation reports on the pollution of the said stream covered the period between 1966-1993. It is clear from the record that the trial court as guided

and of course based its assessment of reasonable compensation on the valuation reports in Exhibits E, G3 and H. On record, in Exhibit E dated 3/7/1003 and Exhibit H dated January, 1995, compensation payable to the cross respondents was put at N30, million respectively. In Exhibit G3, compensation for the cross respondents" losses was put at N24, million. However, in resolving the issue, the court below made the following findings on page 491 of the record and page 16 of the judgment.

> **"Two important concessions were made by the learned counsel for the respondents and they are:**
>
> **(1) The respondents did not ask for compensation from 1966-1993 in their amended Statement of Claim, and**
>
> **(2) The respondents did not plead or claim special damages.**
>
> **The question to be asked is: Is the award of N50 million as general damages reasonable in the circumstances? Since the respondent did not amend the Statement of Claim to ask for compensation from 1966-1993, the award of N50 million as damages cannot be justified".**

The court below went further in its finding on page 492 of the record, inter alia, as follows:

> **"While Exhibits E and H put the compensation payable to the respondents at N30 million, Exhibit G3 on the other hand, gave an estimate of N24,705,000. The assessment made by the learned trial Judge for the payment of N50,000,000 was predicted on the value of the Naira which has continued to deteriorate.....**
>
> **The reasonable compensation which could accrue to the respondents if the action is properly instituted is to consider the mean between the three awards being recommended in Exhibits, E, G3 and H".**

From the above, it is clear beyond any doubt that the court below based its award of N28 million payable to the cross respondents as reasonable compensation on the valuation Reports in Exhibits E, G3 and H which reports covered period between 1966-1993 far beyond the period covered by the cross respondents claims.

As clearly shown earlier, the court below was right in its findings that the cross respondents in their amended statement of claim did not claim compensation from 1966-1993 and that they did not plead or claim special damages. However, with the greatest respect, the court somersaulted in conclusion by relying on the same valuation reports which covered beyond the cross respondents' claim, in awarding compensation which they considered reasonable in the circumstances. It was, to say the least, wrong for the court below to have relied on the said valuation reports which recommended compensation covering 1966-1993 whereas cause of action accrued in 1991. The period covering 1966-1993 was not pleaded by the cross respondents and the said valuation report had been prepared before the action was instituted at all. Having arrived in the valuation report at certain figures of compensation due to the cross respondents before the matter went to court, that has rendered their claim as special damages. It is trite law the "where the precise amount of a particular item has become clear before the trial, either because it has already occurred or so becomes crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damages".

See; **Mcgregor on Damages, 13 Edition at pages 923 and 927.**

It is note worthy that the valuation reports in Exhibits E, G3 and H which were relied on by both courts below are at variance with the pleaded facts and the evidence adduced by the cross respondents before the trial court. These Exhibits, in my view, ought to have been disregarded and not relied on by the court in assessing or computing any reasonable compensation due to the cross respondents having been shown to contain more than pleaded or claimed.

In **Ganiyu Badmus & Anor vs. Abegunde** (1999) 7 SC (Pt.1) 78 at 81; (1999) LPELR – 715, this court opined as follows on this particular issue:

"But where a plaintiff set out to adduce evidence in proof of the special damages claimed by him and the evidence being

deficient or unsatisfactory is rejected by the court that should put an end to the claim. The trial Judge is not entitled to embark upon his own assessment of the special damages using his conceived parameters in place of evidence..... so in no circumstance can a General damages be properly substituted for special damages which a plaintiff has failed to prove or even if he has led evidence on it, did not infact make any claim for it".

See also **African shipping Agency vs. Kalla** (1978) 11 NSCC 114 at 120.

As earlier stated, it is evident on record that the trial court relied on the valuation reports in Exhibits E, G3 and H in arriving at the sum of N50 million it awarded in favour of the cross respondents as reasonable compensation for their alleged losses etc. This was rightly adjudged by the court below to be wrong and was so declared, not having been contained in their amended Statement of Claim. However, the court below unfortunately fell in the same error by relying on the same unpleaded facts to assess and compute the compensation it thought was to be awarded, assuming that the action had been properly instituted by proper parties and the claim is properly made.

In the final analysis, this court comes to the following conclusion:

(A) That the cross respondents having conceded that they did not plead that the pollution which is their cause of action started in 1966 but the award of N28,000,000.00 as compensation predicted as it were on Exhibits E, G3 and H is wrong and therefore perverse.

(b) The court below having held that since the cross respondents did not amend their statement of claim to ask for compensation from 1966-1993, the award of N50 million cannot be justified, fell into the same error and relied on the said Exhibits E, G3 and H to make its award of N28, million in favour of the cross respondents instead of discountenancing the said Exhibits totally.

A

> **(c) No award can justifiably be made in law to cover a period when the cause of action had not arisen. In the instant case the cause of action is said to have arisen in 1991 but the scientific Laboratory test which established pollution was only done in 1994.**

B

The sum total of what I have been saying is that this cross appeal has merit and deserves to be allowed. The appeal is accordingly allowed. The award of the sum of N28 million by the court below in favour of the cross respondents is set aside.

C

There shall be no order on costs.

Olu Ariwola,
Justice, Supreme Court

D

CENTUS NWEZE, (JSC): My Lord, Ariwoola, JSC, obliged me with the draft of the leading judgment just delivered now. I entirely, agree with His Lordship that this appeal, being unmeritorious, should be dismissed.

E

The rule as to representative actions has been dealt within several judgments of this court. For instance in **Ejiofor Apeh and Ors v PDP and Ors [2016] LPELR – 40726 (SC) 9-13; and 17 – 19, this court [per Nweze, JSC]** explained that:

F

> **As with all rules which eventuated from equity's attenuation of the rigidity of the common law, the species of actions known as representative suits were evolved for the relaxation of the 'Complete Joinder' rule under the common law, F. Nwadialo, *Civil Procedure in Nigeria* (Second Edition) (Lagos: University of Lagos Press, 2000) 110 *et seq.***

G

H

Under the old common law practice, all parties who were interested in a suit, were required to be present in court so that "a final end might be made of the controversy", per Lord McNaugbton in **Duke of Bedford v Allis A. C, 1, 8, (H.L) (P.C.).** Unarguably, the rules were too rigid for practical purposes when they had to be applied to societies or groups, **The Taff Vale Railway Company v. Amalgamated Society of Railway Servants (1901) A.C. 426 (H.L.).**

I

Characteristically, equity, in response, evolved its own rules which were adapted to meet the difficulties presented by a multiplicity of persons interested in the subject matter of litigation. Accordingly, the rules of equity allowed some of such persons to sue on behalf of themselves and all others having the same interest. Understandably, this was done to prevent a failure of justice, **The Taff Vale Railway Company v. Amalgamated Society of Railway Servants (1901) A.C. 426 (H.L.)**

In his notable reconstruction of principles akin to the above, which Lord Penzance had articulated in **Wytcherley vs. Andrews (1871) L. R. 2 P and D at 328, Lord Denning, in Abuakwa v. Adanse (1957) 3 All ER 559, 563** quipped that it was a rule

> **...'founded on justice and common-sense' for all persons with the same interest... to regard the party named on the Writ as their champion ... if he wins they reap the fruit of victory. If he fails they fall with him and must take the consequences. These are the basic principles on which representative actions are founded.**
>
> **The rule was that, if the plaintiff sued, or any of the defendants was sued, in a representative character, this must be stated on the Writ, and must also appear in the title or heading of the Statement of Claim, *Re Tottenham* [1896] 1 Ch. 628. However, in such representative suits, both the named plaintiff and the un-named parties, that is, those they represent, are parties to the action; the only difference is that the named plaintiff, as it were, is in control of the suit [*dominus litis]* until the matter is disposed with at first instance, Oketie v Olugbor [1995] 5 SCNJ 217; Ekennia vs. Nkpakar [1997] 5 SCNJ 70, 88.**
>
> **Put differently, the named plaintiff is the sole plaintiff until judgment is given; as such he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings, Otapo vs. Sunmonu [1987] 2 NWLR (Pt. 58) 587.**

Where, however, he falls out with the unnamed or represented parties for any reason, the court has power to add or substituted any person represented, though unnamed in the representative action, and to bring him in as at the date of the original writ, Otapo v Sunmonu, (supra) approvingly adopting Moon vs. Atherton (1972) QB 435; (1972) 3 WLR 57; (1972) 3 All ER 145.

The powers that inhere on the named plaintiff are hedged around with limitations. For instance, he can only represent those who have given him authority to do so, and in respect of a claim in which his interest in the subject matter is common with that of those he represents. He cannot, without their authority and order of court authorising him to do so, defend counter claims made against him in the principal action, *Smith and Ors vs. Cardiff Corporation (1953, 2* All ER. 1373).

After judgment, he cannot deprive other persons of the same class of the benefit of the judgment if they think fit to prosecute it, *Handford vs. Storie* (1825) 2 Sim. and St. 196, *Re, Alpha Co* (1903) 1 Ch 203; *Re Calgary etc.* (1908) Ch 652, Watson vs. Cave, (No.1) 17 Ch.D. 19 Cotton L., approvingly, adopted in Otapo vs. Sumonu (supra)....

At pages 17 – 19; E-A, His Lordship, further, pointed out that:

What crystallises from the earlier exposition on the point is that the jurisprudential postulate underlying suits in representative capacity is that the person or persons suing or defending in a representative capacity must have the same interest in the proceeding, Ogamioba and Ors vs. Chief Ogene and Ors [1961] All NLR 56 at 62; (1991) 1 SCNLR 115. This means that the parties on record [and those they represent] must have common interest.

Put differently, the subject matter must evince a common interest as opposed to diverse interests, Ukpon and Anor v Commission for Finance and Economic Development (2006) LPELR – 3349 (SC); common grievance and the reliefs sought must, in their nature, be beneficial to all the representatives and those represented. The cases on this point are many, *Market and Co Ltd. vs. Smith and Ors vs. Cardiff Corporation* (1954) 1QB 210; *Nsima vs. Nnaji and Ors* (1961) NLR 441; *Amajideogu vs. Ononaku* (1988) 2 NWLR (Pt. 78) 614; *Idise vs. Williams Int. Ltd.* [1995] 1 SCNJ 120; (1995) 1 NWLR (Pt. 370) 142; *Ukata vs. Ndinaeze* (1997) 4 SCNJ 137, 139; [1997] 4 NWLR (Pt. 499) 251.

Others include: **Oragbaide vs. Onitiju (1962) 1 All NLR 32, 37 citing Mark and Co. Ltd vs. Knight S.S. Co. Ltd. (1910) K.B. 1021, per Fletcher – Moulton L J; Charter vs. Rigby and Co (1896) QB 1131; Amachree vs. Newington 14 WACA 97; Ayinde and Ors vs. Akanji and Ors [1988] 1 NWLR (Pt.68) 70; Akporue v Okei [1973] 12 SC 137; Akpan and Anor vs. Commissioner for Finance and Economic Development and Anor (2006) LPELR 3349 (SC).**

From the above survey of binding authorities, it is obvious that similarity of interests would not suffice in the albescence of a commonality of interest, **Akpan and Anor vs. Commissioner for Finance and Economic Development and Anor (supra); Obiode vs. Orewere [1982] 1-2 SC 170, 175-177; Wiri vs. Wuche [1980] 1-2 SC 1, 42-43; Afolabi vs. Adekunle [1983] 2 SCNLR 141, 154; Atane vs. Amu [1974] 10 SC 237, 243-244.**

Even then, the burden is on the plaintiff [and with respect to this application, the applicants herein] to establish a commonality of interests, **Atane vs. Amu (supra); Ogamioba vs. Oghene (1961) 1 All NLR 56, 60.** In all, the applicants have a duty to satisfy this court of the commonality of their interests. This must be evidenced in the following twin prerequisites, common grievance and a relief or reliefs beneficial to all of them, **Ayinde and Ors vs. Akanji and Ors [1988] 1NSCC 43,** approvingly, adopting **Ogamiola and Ors vs. Oghene and Ors (1961) 1 All N.L.R. 56, 60.**

I adopt my above views as my contribution in this judgment. It is for these, and the more detailed, reasons in the leading judgment that I too shall

A enter an order dismissing this appeal. Appeal dismissed.

Chima Centus Nweze,
Justice, Supreme Court.

B **ADAMU AUGIE, (JSC):** I had a preview of the lead judgment delivered by my learned brother, Ariwoola, JSC, and I agree entirely with his reasoning and conclusions. He addressed all the Issues canvassed in the Appeal and Cross-Appeal, meticulously and decisively, and I have nothing useful to add thereto.

C I adopt his reasoning and conclusion, and also dismiss the Appeal and allow the Cross-Appeal. I abide by the consequential Order made.

Amina Adamu Augie,
Justice, Supreme Court.

D

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 and contained therein and the conclusion arrived thereat.

E Clearly the Appellants and others on whose behalf they claimed in representative capacity had varied and diverse interests. Some were farmers and others were fishermen. The lower court was therefore right to follow this court's decision in **Adeniran vs. Interland Transport Ltd (1991) 9 NWLR**

F **(Pt. 214) 155.** Appeal is dismissed.

The lower court was right in striking out the suit at the trial court as it was wrongly constituted.

There was no basis for the award of N28 million by the lower court in

G favour of the cross respondents.

Accordingly the cross appeal is allowed by me.

I abide by all the consequential orders made in the lead judgment, including order as to costs.

H

Paul Adamu Galinje
Justice, Supreme Court

I