MOHAMMED BELLO

VS

THE STATE

SC. 221/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 25TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE SUPREME COURT**
PAUL ADAMU MALINJE	**JUSTICE, SUPREME COURT**

CASE LAW: The principle in ***Kwatie Kwashie vs. The King (1950) 13 WACA 86.***

CASE LAW: The Principle ***in Ogunsola vs. The State (1979) LRN 300****.*

CASE LAW: The principle in ***R. vs Palmer Iyakwe (1944) 10 WACA 180.***

COURT: Proof – Where at the end of prosecution's case the court is left in doubt – Whether prosecution has failed to prove its case beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Conviction – Where an accused is convicted under the criminal code rather than the Armed Robbery and Firearms (Special Provision) Act under which he was charged – Impropriety thereof – Whether an accused cannot be properly convicted under a different law from which he was charged – The principle in ***Okobi vs. The State (1984) 15 SC 520 (1984) LPELR – 2453.***

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – What constitutes a lesser offence.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Principles thereof – Whether the ingredients of the lesser offence must be subsumed in the original offence charged.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Restrictions on court thereto – Whether it must be shown that the particulars of the offence charged are the same or similar to the lesser offence.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – The principle in ***Adava vs. The State (2006) 30 WRN 171.***

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – The principle in ***Ezeja vs. The State (1985) 3 NWLR (Pt. 12) 429****.*

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Whether offence convicted of must be carved out of the particulars of the offence charged – The principle in ***Nwogugua vs. The Queen (1963) 1 All NLR 203.***

EVIDENCE: Possession of stolen goods – S. 167(a) of Evidence Act – The application of the phrase "soon after" – Whether will depend on the nature of the goods and the facility and ease with which those types of goods can pass from hand to hand – The principle in ***Eze vs. The State (1985) 3 NWLR (pt. 12) 429.***

EVIDENCE: Possession of stolen property – Presumption in S. 167(a) of Evidence Act – Rebutable presumption –Where accused gives explanation of how he came in possession of the stolen property – The principle in ***The State vs. Nnolim (1994) 5 NWLR (Pt.345) 394 at 410.***

EVIDENCE: Presumption – S. 167(a) of Evidence Act – Being in possession of recently stolen property – Whether not a presumption of law but of fact – Implication.

EVIDENCE: S. 167(a) of Evidence Act, 2011 – Conviction for possession of stolen goods – What amounts to "recent" – Whether time cannot be rigidly fixed.

PRACTICE AND PROCEDURE: "Appeal" – Where facts decided by the lower court were not appealed by a party – Whether deemed to have been accepted.

STATUTE: Criminal Procedure Code – S.218 thereof – Principles for its invocation – Whether the lesser offence must be a kindred of the offence charged and the ingredients of the lesser offence must be embedded in the offence charged.

WORDS AND PHRASES: "Soon" Meaning under s. 167(a) of Evidence Act 2011.

Issue for determination

Facts of the matter

The appellant and others were charged on a four (4) count charge for armed robbery and stealing at the High Court of Kwara State, sitting at Illorin. At the close of evidence, the trial court entered the verdict of not guilty in favour of the appellant and others.

The case against the appellant was that he was found in possession of a gold wrist watch which was stolen from the owner at gun point.

However, the trial court discharged the appellant on the count of robbery under the Robbery and Firearms (Special Provisions) Act but was convicted for receiving stolen property under Criminal Code Law of Kwara State.

This decision was confirmed by the Court of Appeal hence, this appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. Misapplication of S.167(a) of the Evidence Act

What one can deduce from the foregoing holding of the lower court is that the statutory presumption of fact under Section 167(a) of the Evidence Act, 2011 [formerly S. 149 (a)] cannot apply to this case because of "the time lapse of about two weeks" between the time of the theft or robbery and the time the appellant was found with, and arrested for his possession of the Nokia handsets. And that because of the time lapse the appellant could not be convicted for receiving the said Nokia handset, Exhibit N1 "knowing same to have been stolen". The appellant was nonetheless convicted, a conviction the lower court affirmed, for being in possession of a stolen Nokia Handset which he, allegedly, knew, or had reason to know, that it was stolen. The fact of the appellant's possession of the Nokia Handsets, Exhibit N1, is borne by the fact that DW2 gave the appellant (DW1) the handset to sell for him. If the lower court made a distinction between DW1's possession of the handset in consequence of the DW2 giving it to him to sell, and the fact that he received the handset, Exhibit N1, from the DW2 the distinction appears to be one without a difference. There is no difference between six and half a dozen. The implication of this is if two weeks, between the date of the theft and the time the appellant was arrested, blunted the

presumption under Section 167(a) [formerly Section 149(a)] of the Evidence Act for receiving the handset, then it should logically as well apply to the possession of the said handset for which he was convicted, as a lesser offence to the offence of armed robbery contrary to Section 1(2) of the Robber and Firearms (Special Provisions) Act he was tried for and discharged. *(Pp 241-242 paras H-C)*

2. *The time within which the stolen items were found in the possession of accused person cannot be rigidly fixed in order to constitute "recent"*

It appears to me, this is the contention of the appellant in his issue 2. That is, that the lapse of "a period of 15 days in the entire circumstances of this cannot be said to be recent", and that the 15 days period was enough for the handset "to have travelled several hands". I am not prepared, as suggested by the appellant's counsel, to lay down any rigid rule "that the time within which the item(s) (stolen) were found with the accused person must be absolutely fixed". Every case must be treated on its own peculiar facts and circumstances. For this particular case, the template laid by the lower court is that the period of two weeks had adversely or seriously reduced the presumption under Section 167(a) of the Evidence Act. The provision emphasized the phrase "soon after the theft". This according to Sankey, JCA in Omopupa vs. The State (2008) All FWLR (pt. 445) 1648 at 1677, and I agree with her, makes;

> **The proximity of the time of possession to the time of the theft is an essential requirement of the presumption; either the accused is the thief or (a receiver of the stolen items) with the knowledge that they are stolen goods**. *(P 242 paras D-G)*

3. *The meaning of the word "soon" under S. 167(a) of Evidence Act*

The word "soon" is defined in Chambers 21st Century Dictionary Revised Edition as;

> **In a short time from now or from a stated time; quickly: with little delay.**

The courts under Section 167(a) [formerly 149(a)] of the Evidence Act, may presume that:

> **a man who is in possession of stolen goods <u>soon</u> <u>after</u> the theft is either the thief or has <u>received</u> the goods knowing them to be stolen unless he can account for his possession.**
>
> *(Pp 242-243 paras G-A)*

4. *The meaning of the phrase "soon after"*

As I earlier stated I am not prepared to prescribed any rigid period of time in relation to the phrase "soon after". It all depends on the facts of each case. The respondent drew our attention to the case of Eze vs. The State (1985) 3 NWLR (pt. 13) 429 where a period of 5 months was held to be sufficient for the purpose of the provision. At 436 of the report, Oputa, JSC had stated:

> **The expression "soon after the theft" – (in otherwords, how soon will the possession be to lead to the inference that the possessor was the thief and not merely the receiver with guilty knowledge?) – will naturally depend on the nature of the goods and the facility and ease with which those types of goods can pass from hand to hand: R. vs. Palmer Iyakwe (1944) 10 WACA 180; Kwartie Kwashie vs. The King (1950) 13 WACA 86.** *(P 243 paras B-C)*

5. *The facts of R. vs. Palmer Iyakwe (1944) 10 WACA 180*

> **In Palmer Iyakwe's case, the appellant was found in possession of the stolen shoes :five months after the theft" and the West African Court of Appeal held:-**
>
> **"the doctrine of recent possession cannot operate in such a way as to make it proper for the appellant to be convicted of the burglary and stealing". A verdict of guilty of receiving stolen property knowing it to be stolen was accordingly substituted by WACA.** *(P 243 paras D-E)*

6. *The facts of Kwartie Kwashie vs. The King (1950) 13 WACA 86.*

In Kwartie Kwashie's case, the appellant was found in possession of stolen articles barely 90 minutes after the theft and the West African Court of Appeal held that, from those circumstances, it was open to the trial court to convict the appellant of house breaking and stealing*.(P 243 paras E-F)*

7. *The presumption under S. 167(a) is a presumption of fact.*

The point must be made, as Oputa, JSC emphasised in Eze vs. The State (supra), that the presumption of "recent possession", as contained in Section 167(a) [formerly 149(a)] of the Evidence Act, is not a presumption of law, but a presumption of fact, and that if it were a presumption of law it will be an absolute inference established by law and therefore irrebuttable. But as a presumption of fact, it is rebuttable, and inconclusive. *(P 243 paras G-H)*

8. *Where facts decided by the lower court were not appealed by prosecution, it is taken to be accepted by them.*

From the peculiar facts of this case. I find the statement of the lower court, at page 119 of the record – "that the lapse of two weeks had reduced the presumption of being in possession of stolen to the one of receiving stolen property knowing same to have been stolen", rather ambivalent. The basis of this presumption of fact is the fact of being "in possession of stolen goods soon after the theft". The finding of fact that the lapse of two weeks adversely reduced the presumption was not appealed by the prosecution, and therefore it is taken to be acceptable to them. *(Pp 243-244 paras H-A)*

9. *Effect where accused gives explanation on how he came in possession of the stolen property*

The presumption, in Section 167(a) [formerly S. 149 (a)] of the Evidence Act is one of facts, and it is rebuttable. The Lower Court never once addressed its mind to the explanations given in Exhibit B1 and B2, the extra-judicial statements of the accused persons, and in the testimonies of the DW1 and DW2. The presumption is displaced where the accused person gave an explanation of how the stolen property came into his possession which might be reasonably true, unless contradicted by the prosecution. On this, I find support in the statement of Adio, JSC in The State vs. Nnolim (1994) 5 NWLR (pt. 345) 394 at 410, that in order to displace the presumption the accused person needs to "explain the circumstances in which (the stolen property) came into his possession, that is –

> **An explanation by (the accused of the way in which (the) stolen property came into his possession which might reasonably be true and which is consistent with his innocence, although the court may not be convinced of its truth, would displace the presumption under Section 149 (a) of the Evidence Act. See Salami vs. The State (1988) 3 NWLR (pt. 85) 670. In this connection, the court may infer guilty knowledge where the accused gives no explanation at all about how he came to be in possession of the property recently stolen or where the explanation given is untrue.** *(P 244 paras A-D)*

Per Eko (JSC)

"In the instant case, the explanations offered in Exhibits B1 and B2 are exculpatory. Exhibit B1 and B2 put in the body of evidence by the prosecution forms part of the prosecution's case. It is no business of the prosecution to

establish the defence of the accused while at the same insisting on the guilt of the same accused person. In criminal proceedings the onus of proof remains throughout on the prosecution to establish the guilt of the accused beyond reasonable doubt Bozin vs. The State (1985) 2 NWLR (Pt.8) 465. That burden is not discharged when the prosecution puts before the court, simultaneously, both exculpatory facts and inculpatory facts. Paul Ameh vs. The State (1978) 11 SC at page 368. There is no proof beyond reasonable doubt when the prosecution put into the body of evidence before the count two conflicting versions of the same incident.

The totality of Exhibits B1 and B2, and the evidence of Dw1 and DW2 is that the appellant gave uncontradicted explanation that it was DW1 that gave him Exhibit N1 to sell. Dw2 confirmed the evidence without contradiction. No evidence exists that suggests that the DW2 who gave the appellant Exhibit N1 to sell was complicit in the armed robbery. He like, the appellant, were discharged in the courts of conspiracy to rob and the armed robbery. There is also no evidence establishing that the explanations were untrue. *(P 244 paras E-H).*

10. Failure of court to give sufficient consideration to the defence of accused

For the offence under Section 319A of the Penal Code Law it is a defence if the accused gives reasonable explanation as to how the stolen property came into his possession. The trial court must give sufficient consideration to that defence. In Ogunsola vs. The State (1979) LRN 300 the High Court of Bauchi State (on appeal) held, and I am greatly persuaded thereby, that the failure of the Upper Area Court, Gombe, to give sufficient consideration to the appellant's defence, that he bought the stolen turkey from an itinerant trader and that he had since left the turkey to roam about freely in his house for four months before he was accused of being in possession of stolen turkey, was fatal to the conviction for the offence under Section 319A of the Penal Code. The High Court held also that the failure of the appellant to call the itinerant trader from whom the appellant claimed to have bought the turkey was not necessarily fatal to his defence, nor did it absolve the trial court of its duty to give the defence sufficient consideration. In the instant case, the defence of DW1, corroborated by DW2 and even the prosecution's own evidence Exhibits B1 and B2, was not at all considered.*(Pp 244-245 paras I-B)*

11. Effect where at the end of prosecution's case the court is left in doubt

The position of this court is that a verdict of guilty is perverse if given inspite of obvious contradictions in the case of the prosecution: Alfred Onyemena vs. The State (1974) All NLR 471 at 530; Boy Muka vs. The State (1976) 10 SC 305. The law is also settled that if on the whole of the evidence by the prosecution the court is left in state of doubt; the prosecution would have failed to discharge their burden of proving the guilt of the accused person beyond reasonable doubt:

James Ikhane vs. Commissioner of Police (1977) 11 SC 379. Exhibits B1 and B2, and the uncontradicted evidence of DW1 and DW2, all as to how the appellant came to have possession of Exhibits N and N1 have that potency of leaving the court in a state of doubt. *(P 245 paras C-D)*

Per Eko (JSC)
"The trial court and the lower court made an issue of the appellant (as DW1) being evasive when cross-examined by the learned DPP "that he asked the 2nd accused (the DW2) for receipt and without collecting it he still proceeded to offer it for sale without receipt". The DW2, who should have issued receipt to the appellant (DW1) testified and admitted that he gave the handset to the appellant. The appellant was consistent and persistent in this explanation. It is also contained in Exhibits B1 and B2 forming part of the prosecution's case. I do not think that the issue of receipt will still be material if, in his *viva vace* evidence, the DW2, from whom the appellant obtained the handset had himself categorically admitted giving the appellant the handset. A receipt is after all a document that formally acknowledges that the DW2 gave the handset to the appellant and/or that the appellant received the handset from the DW2. There is nothing magical about a formal receipt if informal receipt is not in doubt.

The trial court appeared to have been swayed, in not believing the DW1 by the fact the Hausa man who allegedly sold the handset to the DW2 did not issue receipt to the DW2. He also did not testify. This fact alone does not justify the trial court's abdication of its duty to consider the defence of the appellant (DW1) in its totality. The fact that the DW1 was evasive under cross-examination by the DPP does not translate to DW2 also being evasive and unbelievable. *(P 245 paras E-H)*

12. *An offence created by a State law cannot be an element of a Federal offence*
It is obvious that in the judgment of the trial court that the lower court affirmed the conviction of the appellant for the offence under Section 319A of the Penal Code Law in consequence of the trial court's invocation of Section 218 of the Criminal Procedure Code. The Lower Court, like the trial court, had made no effort at suggesting that the offence created by Section 319A of the Penal Code Law of Kwara State was a lesser offence of the armed robbery contrary to Section 1 (2) of the Robbery and Firearms (Special Provisions) Act, a Federal offence. Certainly, as the two penal statutes by two different legislative bodies are different, the offence created by the State penal statute cannot be, in any way,

stretched to be an element of the Federal offence. In their concurrent conviction of the appellant for the offence of being in possession of stolen property contrary to Section 319A of the Penal Code Law, the two courts below were quite oblivious of the fact that an offence of receiving, which is an offence lesser than the armed robbery charged, was created by the Robbery and Firearms (Special Provisions) Act. The Act specifically created, in Section 5 thereof, an offence of "receiving property which has been obtained by means of any act constituting an offence under this Act" and provided therefore life imprisonment as the penalty. I do not think, if I may use sports analogy, that it is right for the central referee to use the rules of rugby touch to blow fouls in soccer. It is not right, and it is not possible. *(P p243-244 paras I-C)*

13. *The purport of conviction for a lesser offence*

Audi alteram parterm the requirement that the accused person shall be given "in detail-the nature of the offence" he is charged with is a requirement of Section 36(6) of the Constitution. This requirement is a core imperative of criminal justice administration in this country. This court, no doubt, had this in mind in Agumadu vs. The Queen (1963) 1 All NLR 201 and Okwuwa vs. The State (1964) 1 All NLR 361 at 364 when it held that:-

> **The lesser offence is a combination of some of the several particulars making up the offence charged. In other wards, the particulars constituting the lesser offence are carved out of the particulars of the offence charged.**

English courts insist that the trial court can only convict for the less offence "provided that the indictment for the aggravated offence contains words apt to include the particulars of both the aggravated and the lesser offence R. vs. O. Brien 6 Cr. App. R. 108. *(P 246 paras D-F)*

Per Eko (JSC)

"I cannot see from the courts alleging criminal conspiracy to commit armed robbery and armed robbery contrary to Robbery and Firearms (Special Provisions) Act that the appellant (1st accused) herein was sufficiently put on notice of the elements constituting the offence under Section 319A of the Penal Code Law of Kwara State. I do not think, in substitution for the Federal offence that the prosecution failed to prove is proper. The appellant could not, in the circumstance, be deemed to have notice of the particulars of the state offence under Section 319A of the Penal Code, or that the particulars of this State offence were carved out of the Federal offence not proved. In the circumstance, I allow the appeal.

The conviction and sentence of the appellant for the offence contrary to Section 319A of the Penal Code Law of Kwara State by the Kwara State High Court in the charge No. NWS/11C/2010, which conviction and sentence the Court of Appeal, Ilorin Division in the appeal No. CA/IL/C.122/2013 affirmed are hereby set aside. In their stead I enter an order discharging and acquitting the appellant for the said offence." *(P p 246-247 paras G-A)*

14. *Conviction for a lesser offence where the principal offence charged was not proved*

Now, in Adava vs. The State (2006) 30 WRN 171, the appellants were charged with the offence of culpable homicide punishable with death under Section 221(a), read with Section 79, of the Penal Code, Cap 89 the Laws of Northern Nigeria 1963, Vol. III (applicable in Kogi State). They each pleaded not guilty to the charge.

The prosecution called a total of five (5) witnesses and closed its case. Each of the appellants testified in his own defence and jointly called four (4) witnesses. At the end of the trial, and in a considered judgment, the learned trial Judge found each of the appellants guilty as charged, convicted them and sentence them to death.

On appeal, it was held that the conviction of the appellants, under Section 221 (a), read with Section 79, of the Penal Code, for the offence of culpable homicide punishable with death, could not be upheld as the ingredients of the offence as required by law, had not been, completely, proved by evidence at the trial.

The court noted that one of the most important ingredients of the offence, namely, the cause of death of the deceased was not proved. The court pointed out that the evidence of the Medical Officer (Pw1), who performed the post mortem examination on the deceased, and the medical report, (Exhibit 1), which he wrote thereafter, were not useful at all in determining the cause of death of the deceased.

It was, further, held that, although the deceased was alleged to have been shot on the stomach and he died within 48 hours, there was no evidence to show the extent of the injury on him, even though there was clear evidence that he was shot by the first appellant on the instruction of the second appellant.

In the court's view, this, however, must have caused bodily pain to the deceased which constituted the ingredients of the offence of voluntarily causing hurt without provocation as defined by Section 240 and punishable under Section 246 of the Penal Code. To the question whether the appellants, who were not charged with this offence, could be convicted of it, the court returned an affirmative answer. It explained its reason thus:

By Section 218 of the Criminal Procedure Code Cap. 30 of Laws

of Northern Nigeria 1963 applicable to Kogi State, an accused person can be convicted of a lesser offence if proved even though he is not charged with it. See Okwuwa vs. State (1964) 1 All NLR 361. The offence of voluntarily causing hurt without provocation is proved in this case against the appellants contrary to Section 246 of the Penal Code.*((Pp 247-248 paras H-D)*

15. *Conviction for a lesser offence under applicable principles*

In Ezeja vs. The State (supra), the appellant was originally, charged with causing grievous hurt to Cyprian Okpala by shooting and wounding him with his service pistol but the evidence at the trial disclosed a lesser offence of causing hurt without provocation hence the conviction of the appellant by the trial court under Section 246 of the Penal Code. *(P 248 paras G-H).*

16. *Restrictions on court in convicting on a lesser offence*

These decisions have to be contrasted with The Nig. Air Force vs. Kamaldeen (2007) LPELR – 2010 (SC) 24; C-D, where this court held that:

> **It must be shown that the particulars and the fact and the circumstances of the original offence charged are the same or similar to the lesser offence. See, Okwuwa vs. The State (1964) 1 All NLR 361 where this court stated in a passage thus:**
>
> **The lesser offence is a combination of some of the several particulars making up one offence charged in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged."**
>
> **Under our criminal jurisprudence the power of a court exercising criminal jurisdiction to convict on alternative offences or lesser offences is limited and cannot be exercised outside the limits laid down by law.** *[Italics supplied for emphasis]*
>
> *(Pp 248 -249 paras H-B).*

17. *Principles of conviction for a lesser offence*

In Agugua vs. The State (2017) LPELR – 4202 (SC) 54-55, E-A, this court explained that:

> **…. The offence of attempted robbery is a lesser offence than the robbery charged. The ingredients are less onerous to prove. The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See: The Nigeria Air Force vs. Kamaldeen (2007) 2 SC**

113. *[Italics supplied for emphasis] (P 249 paras C-D).*

18. *An accused cannot be convicted under a law different from that which he is charged*

In Okobi vs. The State (1984) 7 SC 47; (1984) LPELR – 2453 (SC) one of the questions that arose for determination was whether a failure to secure a conviction under the Robbery and Firearms (Special Provision) Act entitled a High Court Judge to proceed to convict of a lesser offence under the Criminal Code by virtue of Section 179 of the Criminal procedure Law (in *pari materia* with Section 218 of the Criminal Procedure Code).

Speaking for this court. Obeseki, JSC, at page 23; A-C, made the following enduring pronouncements:

> ***I am of the settled view that this court has no jurisdiction to entertain any application to convict the appellant of a lesser offence under the Criminal Code at the hearing of an appeal against a conviction for an offence under the provisions of the Robbery and Firearms (Special Provisions) Act. There being no provision under the Robbery and Firearms (Special Provisions) Act permitting such a course of action, it will amount to a denial of justice to the appellant to convict him of an offence under a law different from that under which he was tried for the sole purpose of securing his conviction.*** *[Italics supplied for emphasis] (P 249 paras E-H).*

Per Nweze (JSC)

"His Lordship had explained the ways of enabling the court to utilize its powers under the Criminal Procedures Law (and here I add the Criminal Procedure Code) thus:

> **… to enable the court to utilize its powers under the Criminal Procedure Law to advantage, the offence should and must be charged under the two laws in the alternative.**
>
> **The court is not a prosecutor but an adjudicator and it borders on persecution for the court to invoke its powers under a law under which the prosecution decided not to proceed or prosecute. The jurisdiction being exercised by the High Court of the State in the trial of persons for offences under the Armed robbery and Firearms (Special Provisions) Act is the jurisdiction conferred upon the High Court by the Robbery and Firearms (Special Provision) Act. Offences under the Act are Federal offences. As the Act gave no jurisdiction to convict of offence other than those set out in the Act the High Court cannot by the**

application of Section 179 (1) of the Criminal Procedure Law exercise the jurisdiction conferred by the Act to convict of an offence not under the Act. *[Italics supplied for emphasis]*

Not done yet, His Lordship announced, most authoritatively, that:

The High Court of Lagos State cannot, in my view, proceed to convict the appellant who was charged and tried for an offence under the Robbery and Firearms (Special Provisions) Act under the Criminal Code of Lagos State because the court found that it had committed no offence under the Robbery and Firearms (Special Provisions) Act.

As no offence under the Robbery and Firearms (Special Provisions) was proved, the High Court of Lagos State is not in my view, entitled to apply the provisions of Section 179 (1) of the Criminal Code Law to enter a conviction for an offence under the Criminal Code. *[Italics supplied for emphasis] (P 250 paras A-G).*

Per Nweze (JSC)

"Explaining the context of the nuanced usage of lesser offence, the distinguished jurist opined that:

Lesser offence mentioned in Section 179 (1) can only, in my view refer to lesser offence under the law or Act under which the main or composite offence was charged. It cannot properly be interpreted to refer to a lesser offence under another law. Section 179 (2) Criminal Procedure Law has, in my view an independent application which differs from that of Section 179 (1), of the Criminal Procedure Law. While Section 179 (1) of the Criminal Procedure Law enable conviction to be entered for complete lesser offence established by the proof of some of the several particulars of the main or principal offence, e.g. in the trial for robbery under Section 401, Criminal Code stealing under Section 390 Criminal Code is proved, Section 179 (2) Criminal Procedure Law enables a conviction to be entered for a lesser offence to which the main offence has been reduced by the proof of facts having the effect of reducing the main offence to a lesser offence e.g. in the trial for murder under Section 316 of the Criminal Code if provocation is proved, the offence is reduced from murder to manslaughter.

(Pp 250-251 paras G-H).

19. What constitutes a lesser offence

In Nwachukwu vs. The State (1986) 2 NWLR (pt. 25) 765; (1986) 1 SC 477; (1986) LPELR – 2085 (SC), Karibi-Whyte, JSC threw further light on the application of Section 179 of the CPL [in *pari material* with Section 218 of the CPC]. His Lordship, first, cited the decision in:

> **Torhamba vs. Police (1956) N.R.N.L.R. at p. 94 (where) the court had attempted to give a guide as to the determination of what constitutes a lesser offence (thus):**
>
> > **A lesser offence is a combination of some of the several particulars making up the offence charged, in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged… when one is considering action under Section 179, one should write out the particulars of which the offence charged consists and see whether it is possible to delete some words out of these particulars and have a residue of particulars making up the lesser offence of which it is proposed to convict. An authoritative example is furnished by the case of Cooray vs. The Queen (1955) 2 WLR (1953) AC 407.**

His Lordship, then, proceeded thus:

> **It must be kept constantly in mind that Section 179 in issue in this appeal is concerned (with) where the lesser (offence) charged in respect of which accused is convicted arises from the facts and evidence led in support of the more serious offence in respect of which the accused is charged. The operative words are lesser and/not 'another' offence. Thus, where the accused has notice of an aggravated offence, he also has notice of the lesser offence for which he could be convicted. The assumption, which is legitimate, is that accused would have challenged the more serious offence and must be fully aware of the case against him in respect of the lesser offence. It is therefore important to observe from the judicial decisions and the provisions that for Section 179 of the Criminal Procedure Act to apply, the following conditions must be observed.**
>
> > **Firstly, the indictment, in respect of which the accused is subsequently convicted for a lesser offence must contain words to notice both offences.**
> >
> > **Secondly, the evidence led and facts bound, though insufficient for conviction of the aggravated offence charged, must support the conviction for the lesser**

> **offence. Thirdly, it is in all cases not necessary to charge the accused with the lesser offence with which he is being convicted. This last mentioned is ordinary common sense. The greater includes by necessary implication the lesser.** *(Pp 251-252 paras D-C).*

20. *The invocation of S. 218 of CPC*

My Lords, I have quoted extensively from these judgments to demonstrate that the lower court was caught in a mix-up in the application of Section 218 (2) of the Criminal Procedure Code (supra). For the invocation of the said section the lesser offence must not only be kindred offence, with the actual offence charge, its ingredients must be embedded in the actual charge. Ezeja vs. The State (2008) All FWLR (pt. 428) 256, 268-269.

This much is, clearly, evident in the decisions considered above, The Nig Air Force vs. Kamaldeen (supra); Agugua vs. The State (supra); Okobi vs. The State (supra); Nwachukwu vs. The State (supra). Indeed only recently, this court in Agugua vs. The State (2017) LPELR – 4202 (SC) 54-55; E-A, relying on The Nig. Air Force vs. Kamaldeen (supra), restated the position that:

> **The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See: The Nigerian Air Force vs. Kamaldeen (2007) 2 SC 113; 154-55; E-A.** *(P 252 paras D-F).*

Per Galinje (JSC)

"This section is exceptional in that the prosecution is only required to show that it is reasonably suspected that something in the possession of the accused is stolen property for the burden of proof to shift to the defence to show that he came by the thing honestly.

A person accused of committing an offence under this section can only be found culpable if he does not give an account to the satisfaction of a court of justice as to how he came by the said property. In the instant case the appellant had fully accounted to the court how he came into possession of the Nokia handset and his account was corroborated by DW2 who admitted that he indeed was the one who gave the handset to the appellant to sell. To that extent, he had fully discharged the burden of proof as required by the provision of Section 319A of the Penal Code." *(P 253 paras C-D).*

Representations:
D. A. Awosika, (Esq.), with N. F. John, (Esq.) for the Appellant.
Kolade Obafemi, (Esq.), for the Respondent.

1. MRS GANIAT YETUNDE ELIAS
2. MR OLUSOJI ELIAS
(Suing for and as executors of the Estate of Dr. Taslim Olawale Elias)

VS

ECO BANK NIGERIA PLC

SC.99/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

TUESDAY, 25TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Denial of fair hearing – Where such exists on appeal – Whether the entire proceedings will be declared a nullity.

COURT: Judicial discretion – How exercised – Whether varies from one case to another.

COURT: Judicial discretion – Nature thereof – Relevant considerations

LEGAL PRACTITIONERS: Errors of counsel – Errors of counsel should not be visited on their clients – Whether this principle applies only to procedural law.

LEGAL PRACTITIONERS: Ignorance of the law – Where a counsel asserts ignorance of the law – Whether such plea cannot avail him.

PARTIES: Excuse from liability – Ignorance of the law – Where a party alleges ignorance of

the law – Whether sometimes may excuse the party from liability – The principle in ***Alloysius Akpaji vs. Francis Udemba (2009) NWLR (Pt. 1138) 5451****.*

PRACTICE AND PROCEDURE: Extension of time – Considerations thereof – Special circumstance – Whether mistake of counsel qualifies as special circumstance – The principle in ***Shittu Akinpelu vs Ebunola Adegbore & ors (2008) 10 NWLR (pt. 1096) 531, (2008) 45 Sc. (pt. 11) 75; (2008) 7 SCM 1***

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Discretionary nature thereof – Requirements.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Conditions necessary thereto – Whether applicant is to satisfy these conditions.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Requirements – Whether it is necessary to annex a notice of appeal which contains grounds of appeal, which prima facia show good cause why the appeal should be heard.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Conditions thereof must co-exist – Where one is absent – Whether application will be refused.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Where affidavit in support of application is deficient – Whether application will be refused.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Onus on applicant thereto – How discharged.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Twin conditions thereof – Whether conjunctive.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Delay in bringing application – Whether will not be prejudicial where satisfactorily explained.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Application thereof – Whether not granted as a matter of course.

RULES OF COURT: Obedience thereto – Counsel appearing for parties are expected to be conversant with rules of court – Where ignorant thereof – Whether not excusable.

Facts of the matter
The appellant brought an application for extension of time within which to appeal. The appellant also stated grounds for the application.

This application for extension of time was brought before the Supreme Court.

Held *(Unanimously dismissing the application)*

1. *Requirements for application for extension of time within which to appeal*
Before I proceed further to consider the submissions in this application, I need to state the obvious position of the court in considering this type of application. There is no doubt that the indulgence being sought by the applicants is discretionary. Therefore, in order to secure or obtain such discretionary indulgence from the court, an applicant is required to meet certain conditions. Although the court has an absolute discretion in the matter, the discretion must be exercised judicially upon settled principles.

Generally, the right to appeal is constitutionally guaranteed and an aggrieved party cannot be robbed or denied of such right.

However, the same Constitution prescribes the time within which an aggrieved party may appeal. And failure to file such an appeal timeously has given an opposing party a certain right, which, before the court will accede to extension of time to appeal, it must be satisfied that, indeed, the justice of the situation demands the court's indulgence in favour of an applicant.
(P 268 paras E-G).

2. *Conditions which must be fulfilled before an application for extension of time is granted*
To grant an indulgence in extending the time within which to appeal a decision of the Court of Appeal, (i) the application must set forth good and substantial reasons for the failure to appeal within the prescribed time and (ii) the proposed Notice of Appeal must contain grounds of appeal which, *prima facie,* show good cause why the appeal should be heard. See; RT. HON (DR.) OLISA IMEGWU VS. MR. EUENE UCHE OKOLOCHA & 2 ORS (2013) 9 NWLR (Pt.1359) 347; (2013) 2 SCM 81; (2013) 2 SCNJ 514; (2013) All FWLR (Pt.672) 1632; (2013) 54 NSCQR (Pt.3) 34; Order 2 rule 31 (2) (a), (b) and (c), Supreme Court Rules (as amended).

In other words, an application for extension of the time prescribed within which to file an appeal must be supported by an affidavit and necessary documents disclosing and setting forth good and substantial reasons for the failure to appeal or to seek leave to appeal, in addition to the proposed notice of appeal which must contain grounds of appeal which, prima facie, show good

cause why the appeal should be heard not why it should be allowed.
(Pp 268 - 269 paras H-B).

3. *Respondent countered and responded to applicant's affidavit*
Before I proceed to further consider the submissions of counsel, I must say that it is a misconception, to say the least, to conclude that the respondent did not counter or respond to certain paragraphs of the affidavit in support of the application. Indeed, in paragraph 3 of the counter affidavit of Oluwatobi Ogunba Esq., a legal practitioner in the law firm of the Solicitors to the respondent, he referred to the facts deposed to by John Ochada Esq. and stated that they are incorrect and are misleading facts. There is no doubt that the facts deposed to in those paragraphs in the affidavit in support are facts that are verifiable on the records while others are within the personal knowledge of the deponent. For instance, the fact that the earlier application filed before the court below instead of this court was done due to the ignorance of counsel. And that the appeal has very good chances of success. As the saying goes, not even the devil knows the thinking of a man. Therefore, it is not correct to say that those paragraphs were admitted not having been specifically responded to, and I so hold.*(P 276 paras C-D).*

4. *Ignorance does not excuse a party from liability*
Generally, ignorance of the law excuses not and ignorance of law excuses no one, respectively is a legal principle, holding that a person who is unaware of the existence of a law may not escape liability for violating that law simply or merely because he is unaware of its content. *(P 276 paras B-C).*

5. *Sometimes ignorance of the law can excuse non-lawyers*
As clearly deposed to by counsel to the applicants in his affidavit and in oral submission in address, he claimed ignorance or inadvertence of the rules of this court, in particular, that require filing of an appeal or an application for enlargement of time to appeal upon expiration of time prescribed for so doing to this court rather than court below. This sounds unbelievable and embarrassing, to say the least. It may have been understood and pardonable if the claim of ignorance had been attributed to the applicants themselves. Sometimes, ignorance of law can be excused to not legally trained persons. *(P 276 paras C-D).*

6. *Ignorance of law does not avail counsel*
However, in the instant case, the person who claimed ignorance of the law is a legal practitioner. This is ridiculous and unacceptable, to say the least, and cannot excuse the inadvertence of counsel. To be in advertent is not paying

proper attention, Counsel, as Ceaser's wife should be above board in this respect. *(P 276 paras G-H).*

7. *Situations where errors of counsel shall not be visited on their clients*
Ordinarily, it is trite law that the litigant should not be punished for the inadvertence of counsel engaged to do certain things. That is in relation to error of judgment or mistake of counsel, in particular, in procedural matters. See; Ibodo Vs. Enarofia (1980) 12 SC 195, Nneji Vs. Chukwu (1988) 3 NWLR (Pt.81) 184; Obidiaru Vs. Unique & Anor (1986) 3 SC 39; Afolabi Vs. Adekunle (1983) 14 SC 383; (1983) 14 SCNLR 398; Saleh Vs. Shetima Monguno & Ors (2006) 15 NWLR (Pt.1001)316; (2006) 7 SC (Pt.11) 97. *(Pp 276-277 paras H-A).*

8. *Mistake of counsel qualifies as special circumstance*
In Shittu Akinpelu Vs. Ebunola Adegbore & Ors (2008) 10 NWLR (Pt.1096) 531; (2008) 4-5 SC (Pt. 11) 75; (2008) 7 SCM 1 mistake of counsel is said to qualify as a special circumstance. In other words, the court should really exercise its discretion in favour of an application for extension of time to appeal, if it is shown to the satisfaction of the court that the failure to appeal or carry out an act within the prescribed period was caused by the negligence or mere inadvertence of his counsel. See; Doherty Vs. Doherty (1964) 1 All NLR 292; Ahmadu Vs. Salawu (1974) 9 SC 538; Bowaje Vs. Adediwura (1976) 6 SC 143.
(P 277 paras A-B).

Per Ariwoola JSC

> **"The decision to file an application rather than an appeal within the prescribed time cannot be said to be a mistake, or inadvertence of counsel but a deliberate act where the litigants themselves should have had a say by instructing their counsel to appeal. Notwithstanding the unfortunate wrong choice of filing an application, counsel again deliberately filed an application for leave to appeal before the lower court against the court's decision when he knew that the prescribed time had lapsed. All these are not good and substantial reasons to exercise the discretion of this court in favour of the applicants by extending time to seek leave to appeal to this court. The injuries caused were afflicted by the counsel for the applicants. The first condition is therefore not satisfied or met.**
> *(P 277 paras C-D).*

9. *Requirements for notice to contain arguable grounds of appeal*
The second condition that must be satisfied by the applicants to earn the

indulgence of the court is that the proposed notice of appeal attached to the application must contain grounds of appeal which, *prima facie,* show good cause why the appeal should be heard. The grounds of appeal proposed must be drawn by the applicant to be arguable but not frivolous. The applicant is however, not expected to show that the appeal will succeed, but is expected to exhibit good grounds showing reasonable prospect of success in the appeal. See; Holman Bros (Nig) Ltd Vs. Kigo (Nig) (1980) 12-11 SC 251.
(P 277 paras E-F).

10. *Effect where denial of fair hearing is sustained on appeal*
The law is trite, that a denial of fair hearing is a fundamental issue and where such exists, ordinarily the entire proceedings will be declared a nullity.

See; Akinfe Vs. The State (1988) 3 NWLR (Pt.85) 729 at 753; Bamgboye Vs. University of lIorin {1999} 10 NWLR (Pt.622) 290 at 333; Mohammed O. Ojengbede Vs. M. O. Esan & Anor (2001) 18 NWLR (Pt.746) 771.
(P 278 paras D-E).

Per Ariwoola (JSC)

"In the grounds upon which this application was brought as earlier stated in this ruling, ground 2 (a) above is on "the erroneous holding that the appellants' counsel was not in court on the 29th September, 2015 to adopt his brief when it was clear from the Certified True Copy (CTC) of the records of proceedings of 29th September, 2015 that Mr. E. Nwonu of counsel held the brief of Dr. Charles Mekwunye and accordingly announced his appearance before adopting the appellants' brief." In the ruling, of the court below delivered on 8th April, 2016, on the appellants' application whereby the Order of the court was sought "reviewing and/or varying and/or annulling part of the judgment," inter alia, the court granted relief A(i) only, by deleting the following words on page 4 of the judgment.
"Briefs of argument were deemed argued in line with Order 18 Rule 9(4) of the Court of Appeal Rules 2011 in the absence of Appellants' counsel, along with "None for appellants" in the column for appearances of counsel at page 28 of the judgment, and in its place, the said column' is substituted with "Mr. E. Nwonu holding brief of Dr. Charles Mekwunye, for appellants."

I therefore cannot see how the fundamental right to fair hearing of the appellants can again be said to be in breach, to warrant the grant of this instant application on that ground.

However, there are other proposed grounds 2,3 and 4 of appeal in

the said Notice of Appeal. As I stated earlier, the rule does not require that the applicant must show that the proposed grounds are likely to succeed but that they show good cause why the appeal should be heard. In my view, a careful consideration of the other three proposed grounds of appeal, may seem to show some cause why the appeal should be given opportunity of hearing.

In other words, even though the reason of ignorance of the law by the applicants counsel and delay by the court below in determining similar application before it, are not good and substantial reasons enough to grant this application, I am of the view that grounds 2,3 and 4 of the proposed grounds of appeal may seem to show some good cause why the appeal should be heard. See; Doherty Vs Doherty (1964) 1 All NLR 292; Alagbe Vs. Abimbola (1978) 11 SC 84; In Re-Adewunmi (1988) 3 NWLR (Pt.83) 483; Cooperative & Commerce Bank (Nig.) Ltd. Vs. Ogwuru (1993) 3 NWLR (Pt.284) 630."
(Pp 278 -279 paras E-C).

11. *Conditions for application must co-exist*
However, the two conditions listed in the Rules of this court are expected to co-exist and if one is non existent the application must fail.
The two conditions are conjunctive but not disjunctive. See; Uyaemenam Nwora & Ors Vs. Nweke Nwabueze & Ors (2011) 15 NWLR (Pt.1271) 467; (2011) LPELR - 8128; (2001) 11-12 (Pt.1) SC 187. *(P 279 paras D-E).*

12. *Rules of court are meant to be obeyed*
Ordinarily, it is trite law that rules of court are meant to be obeyed by all. See; N. A. Williams & Ors Vs. Hope Rising Vol. Society (1982) 1 All NLR (Pt.1) 1 at 5; Onwuka Kalu Vs. Victor Odili & Ors (1992) 5 NWLR (Pt.240) 130 (1992) 6 SCNJ 76; Ifeanyichukwu Trading Investment Ventures Ltd & Anor Vs. Onyesom Community Bank Ltd (2015) 8 SCM 85 (2015) LPELR - 24819. Counsel who is properly briefed to handle a matter for litigants in court should be diligent in doing so. The law and rules of court are expected to be in the breasts of counsel and the courts. Ignorance of either the Rule or Law by counsel cannot be excused. One on facts may be pardonable in the interest of justice.

As I earlier stated, the affidavit in support of this application failed to provide, as required by the rules, good and substantial reasons why the appeal was not filed within the prescribed time. And the issue of the alleged breach of fundamental right of fair hearing of the applicants

is not shown to exist and therefore not a ground of appeal good enough to convince this court in granting leave as sought. In other words the issue of jurisdiction alluded to by the applicants' counsel is not apparent on the records,

to warrant the grant of indulgence of this court in extending the prescribed time to appeal. *((P 279 paras F-H).*

13. *Nature of Judicial discretion*

The law is that judicial discretion must at all times be exercised not only judicially but also judiciously based on materials before the court. A judicial discretion is based upon facts and circumstances presented to the court from which it must draw conclusion governed by law, justice and common sense. See the decision of this court in the cases of WAZIRI VS. GUMEL (2012) ALL FWLR (Pt. 632) p. 1660 at page 1678 and AKINYEMI VS. ODU'A INV. CO. LTD (2012) 17 NWLR (Pt.1329) page 209 at 242. *(P 280 paras G-H).*

14. *Onus on applicant who applies for extension of time within which to appeal*

The Rules of this Court allow for a party who has been unable to file his appeal within time, to seek leave for extension of time within which he may file the appeal. However, for such application to be granted, the applicant must state the cause of the delay and then proceed to give cogent and credible reasons why the appeal was not filed within the statutory period allowed by the rules. He must also show that he has good and arguable grounds of appeal, and that such grounds are not frivolous but substantial. These two conditions must be satisfied by the applicant before the Court can exercise its discretion in favour of the application. Put differently, the application for extension of time to file an appeal would fail where the applicant cannot state to the satisfaction of the court, the reason for the delay in filing the notice of appeal and also show, prima facie, that the grounds of appeal he has exhibited are not frivolous.

In the instant application, the affidavit of John Ochada, of counsel on behalf of the appellant stated in paragraph 7 thereof, that the appellant's counsel inadvertently filed the application seeking leave of court to appeal and leave for extension of time within which to appeal at the Court of Appeal and leave for extension of time within which to appeal at the Court of Appeal. In paragraph 4.9 of the written address of counsel in support of the application, counsel claimed ignorance in bringing the application for leave to appeal before the Court of Appeal instead of this court. I agree with my learned brother, Ariwoola, JSC, that although ignorance of law can be excused to not legally trained persons, the same standard cannot be applied to a legal practitioner. Indeed, it is unacceptable to excuse the inadvertence of a Legal Practitioner. Inadvertence of counsel in filing an appeal within time, to my mind, cannot be a credible and cogent reason for the delay which this court should entertain.
(P p280-281 paras I-E).

15. *Twin conditions for extension of time are conjunctive*

In the words of DONGBAN-MENSEM, JCA *IN MIDLAND GALVANISING PRODUCT LTD VS. O.S.I.R.S. (2015) 8 NWLR (Pt.1460)* 29 *at P.44* which I hereby endorse, *"a judicial discretion* is *exercised judiciously upon the existence of good and compelling circumstances. A judicial discretion is therefore not available to be dished out like some free flowing water from a natural fountain. The judicial fountain flows only upon the disclosure of substantial reasons which could adversely affect the right of a citizen."*

I am of the considered view that, the applicants in this appeal have failed to proffer good and substantial reasons for the delay in filing the appeal within the time prescribed by the rules of this court. As afore stated, the twin conditions required of an applicant in an application for leave for extension of time to appeal, are conjunctive. They must both be satisfied before the court can exercise its discretion in favour of the application "judiciously" and "judicially."

My Lord had already reviewed the issue regarding the appellants' claim of denial of fair hearing as none existent, I see no reason therefore, why this court should grant the application.

On the whole, it is my well-considered opinion that this application has no merit and is accordingly refused. I hereby dismiss this application.
(Pp 281-282 paras F-A).

Per Nweze (JSC)

"This court's powers to extend time within which to appeal or to apply for leave to appeal are statutory, UNILAG Vs. *Aigoro* (1985) 16 (pt. 1) SC 88, 212; (1985) 1 NWLR (pt 1) 143. While Sections 22 and 27 (2) (a) of the Supreme Court Act prescribe the period within which to appeal against decisions of the Court of Appeal (hereinafter, simply, referred to as "the lower court"), Order 2 Rule 4 and 28 (1), (2), (3), (4) and (5) of the Supreme Court (as amended) in 1999 provide for the court's exercise of its discretion to extend time within which to appeal, IKENTA BEST (NIG) LTD VS. AG, RIVERS STATE (2008) All FWLR (pt 417) 1, 16.

The object of these provisions is to give the court the discretion to extend time with a view to avoiding injustice to the parties, *UNILAG Vs. Aigoro* (supra) 195. By employing the precatory word "may" these provisions vest in the court the exercise of discretion. It must be emphasised here that though the discretion must be exercised in a judicial manner, that is, according to laid down principles, it is not a typically judicial function. As this court

explained in *UNILAG Vs. Aigoro* (supra) 216, it is a function which lies, awkwardly, between, clearly, judicial acts and, clearly, administrative acts and are referred to as judicial discretions.

One immutable principle that runs through case law, both in England and Nigeria, is that the exercise of judicial discretion depends on the facts and circumstances of each case. In effect, in such matters, no one case can be authority for another, see per Kay LJ IN *Jenkins Vs. Bushby* (1891) 1 Ch 484, 494 approvingly adopted in *Odusote Vs. Odusote* (1971) 1 All NLR 221, 222; *UNILAG Vs. Aigoro* (supra).

The principles that have been laid down in the determination of applications of this nature are, truly, many and varied. In the first place, every such application must, conjunctively, surmount the twin conditions ordained in the above provisions of the rules of this court (supra), *Alagbe* vs. *Abimbola* (1978) 2 SC 89; *Ibodo Vs. Enarofia* (1980) 12 SC 195; *Williams Vs. Hope Rise Voluntary Funds Society* (1982) 1 All NLR (pt I) 1; Doherty Vs. Doherty (1964) 1 All NLR 292; *Yonwuren Vs. Modern Signs Ltd* (1985)1 NWLR (pt .2) 244; *Mobil Oil (Nig) Ltd Vs. Agadaigho* (1988) 2 NWLR (pt. 77) 383; *Okere Vs. Nkem* (1992) 4 NWLR (pt. 234) 132; *Kotoye Vs. Saraki* (1995) 5 NWLR (pt. 395) 256; *Balogun Vs. Afolalu* (1994) 7 NWLR (pt 355) 206; *F.H.A. Vs. Abosede* (1998) 2 NWLR (pt 537) 177; *Shanu Vs. Afribank Nig Plc* (2000) 13 NWLR (pt 684) 392; *Oloko* Vs. *Ube* (2001) 13 NWLR (pt 729) 161. The two conditions are conjunctive and not disjunctive, *Yonwuren Vs. Modern Signs (Nig) Ltd* (supra). They must be present in the affidavit, *Ikenta Best (Nig) Ltd* Vs. *AG, Rivers State* (supra)" *(P 282-283 paras C-A).*

16. *Delay will not be relevant if satisfactorily explained*

Although the length of time that elapsed between the date of the judgement and the filing of the application must be factored into the court's decision, that notwithstanding, extension of time could still be granted if the delay is satisfactorily explained, *ALAGBE* VS. *ABIMBOLA* (1978) 11 SC 84; *OJORA* V *BAKARE* (1976) 10 SC 15; *RE: ADEWUNMI AND* CO (1988) 2 NWLR (pt 83) 483. *(P 283 paras B-C).*

Per Nweze JSC

"Another factor which has regained currency is the fact of the true and genuine mistake or error of judgement of counsel. Thus, where it is satisfactorily established that the failure to appeal within the

prescribed time is attributable to the above failings on the part of counsel, the application will be granted. However, the court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case, IROEGBU VS. OKWORDU (1990) 6 NWLR (pt 159) 643; (1990) 21 NSCC (pt 111) 377.

In such a situation, where it appears to the court that the delay was occasioned by the genuine mistake of counsel, it will be up to the respondent to show in what respect he would be prejudiced if the indulgence sought is granted, *Ikenta Best (Nig) Ltd Vs. AG, Rivers State* (supra). In all, where there is the possibility of a miscarriage of justice due to a catalogue of mistakes on the part of counsel for the applicant, an application for extension of time will be granted, *Iroegbu Vs. Okwordu* (1990) 21 NSCC (pt 111) 377; *NIWA Vs. SPDC(supra).*

Such an applicant must, above all, satisfy the second conjunctive condition, namely, that he has arguable grounds of appeal and not a frivolous appeal. In short, he should show good cause why the appeal should be heard. The good cause or reason is for the hearing of the appeal and not that the appeal will succeed, *Ikenta Best (Nig) Ltd Vs. AG, Rivers State* (supra); *Holman Bros (Nig) Ltd Vs. Kigo (Nig) Ltd* (1980) 8-11 SC 43." *(P 283 paras C-F).*

17. *Judicial discretion varies from one case to another*

As noted earlier, the exercise of judicial discretion depends on the facts and circumstances of each case. In effect, in such matters, no one case can be authority for another, see per Kay LJ IN *Jenkins Vs. Bushby* (1891) 1 Ch 484,494 approvingly adopted in *Odusote Vs. Odusote (1971)* 1 All NLR 221, 222; *UNILAG Vs. Aigoro* (supra). Put differently, in determining an application for extension of time, such as this, each case must be decided on its own peculiar facts and circumstances. The corollary is that the facts to be taken into consideration are inexhaustive, *UNILAG Vs. Olaniyan (No.* 1) (1985) 1 NWLR (pt 1) 156; (2001) FWLR (pt 56) 808; *CCB (Nig) Ltd Vs. Ogwuru (1993)* 3 NWLR (pt 284) 630. *((P 283 paras G-I).*

18. *An application seeking leave within which to appeal is not granted as a matter of course*

In all, however, it has to be noted that an application seeking leave to appeal is not granted as a matter of course, *Ogundimu Vs. Kasunmu* (2006) 41 WRN 1; *ACB Plc* Vs. *Evolocha* (2001) FWLR (pt 60) 1611, 1621; *Williams Vs. Hope Rise Voluntary Funds Society* (2001) 34 WRN 171; (1982) 13 NSCC36.

As indicated in the leading judgement, the affidavit in support of this application failed to provide good and substantial reasons why this appeal was not filed within the prescribed time. It is, therefore, un-grantable.
(P 284 paras A-B).

Representations
Dr. C.D Mekwunye with S.M. Emojeghwave Esq for the appellants/applicants
D.I. Nwachukwu Esq for the respondent.

MOHAMMED BELLO

VS

THE STATE

SC. 221/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 25TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE SUPREME COURT**
PAUL ADAMU MALINJE	**JUSTICE, SUPREME COURT**

CASE LAW: The principle in ***Kwatie Kwashie vs. The King (1950) 13 WACA 86.***

CASE LAW: The Principle ***in Ogunsola vs. The State (1979) LRN 300****.*

CASE LAW: The principle in ***R. vs Palmer Iyakwe (1944) 10 WACA 180.***

COURT: Proof – Where at the end of prosecution's case the court is left in doubt – Whether prosecution has failed to prove its case beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Conviction – Where an accused is convicted under the criminal code rather than the Armed Robbery and Firearms (Special Provision) Act under which he was charged – Impropriety thereof – Whether an accused cannot be properly convicted under a different law from which he was charged – The principle in ***Okobi vs. The State (1984) 15 SC 520 (1984) LPELR – 2453.***

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – What constitutes a lesser offence.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Principles thereof – Whether the ingredients of the lesser offence must be subsumed in the original offence charged.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Restrictions on court thereto – Whether it must be shown that the particulars of the offence charged are the same or similar to the lesser offence.

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – The principle in ***Adava vs. The State (2006) 30 WRN 171.***

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – The principle in ***Ezeja vs. The State (1985) 3 NWLR (Pt. 12) 429****.*

CRIMINAL LAW AND PROCEDURE: Conviction for a lesser offence – Whether offence convicted of must be carved out of the particulars of the offence charged – The principle in ***Nwogugua vs. The Queen (1963) 1 All NLR 203.***

EVIDENCE: Possession of stolen goods – S. 167(a) of Evidence Act – The application of the phrase "soon after" – Whether will depend on the nature of the goods and the facility and ease with which those types of goods can pass from hand to hand – The principle in ***Eze vs. The State (1985) 3 NWLR (pt. 12) 429.***

EVIDENCE: Possession of stolen property – Presumption in S. 167(a) of Evidence Act – Rebutable presumption –Where accused gives explanation of how he came in possession of the stolen property – The principle in ***The State vs. Nnolim (1994) 5 NWLR (Pt.345) 394 at 410.***

EVIDENCE: Presumption – S. 167(a) of Evidence Act – Being in possession of recently stolen property – Whether not a presumption of law but of fact – Implication.

EVIDENCE: S. 167(a) of Evidence Act, 2011 – Conviction for possession of stolen goods – What amounts to "recent" – Whether time cannot be rigidly fixed.

PRACTICE AND PROCEDURE: "Appeal" – Where facts decided by the lower court were not appealed by a party – Whether deemed to have been accepted.

STATUTE: Criminal Procedure Code – S.218 thereof – Principles for its invocation – Whether the lesser offence must be a kindred of the offence charged and the ingredients of the lesser offence must be embedded in the offence charged.

WORDS AND PHRASES: "Soon" Meaning under s. 167(a) of Evidence Act 2011.

Issue for determination

Facts of the matter

The appellant and others were charged on a four (4) count charge for armed robbery and stealing at the High Court of Kwara State, sitting at Illorin. At the close of evidence, the trial court entered the verdict of not guilty in favour of the appellant and others.

The case against the appellant was that he was found in possession of a gold wrist watch which was stolen from the owner at gun point.

However, the trial court discharged the appellant on the count of robbery under the Robbery and Firearms (Special Provisions) Act but was convicted for receiving stolen property under Criminal Code Law of Kwara State.

This decision was confirmed by the Court of Appeal hence, this appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. Misapplication of S.167(a) of the Evidence Act

What one can deduce from the foregoing holding of the lower court is that the statutory presumption of fact under Section 167(a) of the Evidence Act, 2011 [formerly S. 149 (a)] cannot apply to this case because of "the time lapse of about two weeks" between the time of the theft or robbery and the time the appellant was found with, and arrested for his possession of the Nokia handsets. And that because of the time lapse the appellant could not be convicted for receiving the said Nokia handset, Exhibit N1 "knowing same to have been stolen". The appellant was nonetheless convicted, a conviction the lower court affirmed, for being in possession of a stolen Nokia Handset which he, allegedly, knew, or had reason to know, that it was stolen. The fact of the appellant's possession of the Nokia Handsets, Exhibit N1, is borne by the fact that DW2 gave the appellant (DW1) the handset to sell for him. If the lower court made a distinction between DW1's possession of the handset in consequence of the DW2 giving it to him to sell, and the fact that he received the handset, Exhibit N1, from the DW2 the distinction appears to be one without a difference. There is no difference between six and half a dozen. The implication of this is if two weeks, between the date of the theft and the time the appellant was arrested, blunted the

presumption under Section 167(a) [formerly Section 149(a)] of the Evidence Act for receiving the handset, then it should logically as well apply to the possession of the said handset for which he was convicted, as a lesser offence to the offence of armed robbery contrary to Section 1(2) of the Robber and Firearms (Special Provisions) Act he was tried for and discharged. *(Pp 241-242 paras H-C)*

2. *The time within which the stolen items were found in the possession of accused person cannot be rigidly fixed in order to constitute "recent"*

It appears to me, this is the contention of the appellant in his issue 2. That is, that the lapse of "a period of 15 days in the entire circumstances of this cannot be said to be recent", and that the 15 days period was enough for the handset "to have travelled several hands". I am not prepared, as suggested by the appellant's counsel, to lay down any rigid rule "that the time within which the item(s) (stolen) were found with the accused person must be absolutely fixed". Every case must be treated on its own peculiar facts and circumstances. For this particular case, the template laid by the lower court is that the period of two weeks had adversely or seriously reduced the presumption under Section 167(a) of the Evidence Act. The provision emphasized the phrase "soon after the theft". This according to Sankey, JCA in Omopupa vs. The State (2008) All FWLR (pt. 445) 1648 at 1677, and I agree with her, makes;

> **The proximity of the time of possession to the time of the theft is an essential requirement of the presumption; either the accused is the thief or (a receiver of the stolen items) with the knowledge that they are stolen goods**. *(P 242 paras D-G)*

3. *The meaning of the word "soon" under S. 167(a) of Evidence Act*

The word "soon" is defined in Chambers 21st Century Dictionary Revised Edition as;

> **In a short time from now or from a stated time; quickly: with little delay.**

The courts under Section 167(a) [formerly 149(a)] of the Evidence Act, may presume that:

> **a man who is in possession of stolen goods <u>soon</u> <u>after</u> the theft is either the thief or has <u>received</u> the goods knowing them to be stolen unless he can account for his possession.**
>
> *(Pp 242-243 paras G-A)*

4. *The meaning of the phrase "soon after"*

As I earlier stated I am not prepared to prescribed any rigid period of time in relation to the phrase "soon after". It all depends on the facts of each case. The respondent drew our attention to the case of Eze vs. The State (1985) 3 NWLR (pt. 13) 429 where a period of 5 months was held to be sufficient for the purpose of the provision. At 436 of the report, Oputa, JSC had stated:

> **The expression "soon after the theft" – (in otherwords, how soon will the possession be to lead to the inference that the possessor was the thief and not merely the receiver with guilty knowledge?) – will naturally depend on the nature of the goods and the facility and ease with which those types of goods can pass from hand to hand: R. vs. Palmer Iyakwe (1944) 10 WACA 180; Kwartie Kwashie vs. The King (1950) 13 WACA 86.** *(P 243 paras B-C)*

5. *The facts of R. vs. Palmer Iyakwe (1944) 10 WACA 180*

> **In Palmer Iyakwe's case, the appellant was found in possession of the stolen shoes :five months after the theft" and the West African Court of Appeal held:-**
>
> **"the doctrine of recent possession cannot operate in such a way as to make it proper for the appellant to be convicted of the burglary and stealing". A verdict of guilty of receiving stolen property knowing it to be stolen was accordingly substituted by WACA.** *(P 243 paras D-E)*

6. *The facts of Kwartie Kwashie vs. The King (1950) 13 WACA 86.*

In Kwartie Kwashie's case, the appellant was found in possession of stolen articles barely 90 minutes after the theft and the West African Court of Appeal held that, from those circumstances, it was open to the trial court to convict the appellant of house breaking and stealing*.(P 243 paras E-F)*

7. *The presumption under S. 167(a) is a presumption of fact.*

The point must be made, as Oputa, JSC emphasised in Eze vs. The State (supra), that the presumption of "recent possession", as contained in Section 167(a) [formerly 149(a)] of the Evidence Act, is not a presumption of law, but a presumption of fact, and that if it were a presumption of law it will be an absolute inference established by law and therefore irrebuttable. But as a presumption of fact, it is rebuttable, and inconclusive. *(P 243 paras G-H)*

8. *Where facts decided by the lower court were not appealed by prosecution, it is taken to be accepted by them.*

From the peculiar facts of this case. I find the statement of the lower court, at page 119 of the record – "that the lapse of two weeks had reduced the presumption of being in possession of stolen to the one of receiving stolen property knowing same to have been stolen", rather ambivalent. The basis of this presumption of fact is the fact of being "in possession of stolen goods soon after the theft". The finding of fact that the lapse of two weeks adversely reduced the presumption was not appealed by the prosecution, and therefore it is taken to be acceptable to them. *(Pp 243-244 paras H-A)*

9. *Effect where accused gives explanation on how he came in possession of the stolen property*

The presumption, in Section 167(a) [formerly S. 149 (a)] of the Evidence Act is one of facts, and it is rebuttable. The Lower Court never once addressed its mind to the explanations given in Exhibit B1 and B2, the extra-judicial statements of the accused persons, and in the testimonies of the DW1 and DW2. The presumption is displaced where the accused person gave an explanation of how the stolen property came into his possession which might be reasonably true, unless contradicted by the prosecution. On this, I find support in the statement of Adio, JSC in The State vs. Nnolim (1994) 5 NWLR (pt. 345) 394 at 410, that in order to displace the presumption the accused person needs to "explain the circumstances in which (the stolen property) came into his possession, that is –

> **An explanation by (the accused of the way in which (the) stolen property came into his possession which might reasonably be true and which is consistent with his innocence, although the court may not be convinced of its truth, would displace the presumption under Section 149 (a) of the Evidence Act. See Salami vs. The State (1988) 3 NWLR (pt. 85) 670. In this connection, the court may infer guilty knowledge where the accused gives no explanation at all about how he came to be in possession of the property recently stolen or where the explanation given is untrue.** *(P 244 paras A-D)*

Per Eko (JSC)

"In the instant case, the explanations offered in Exhibits B1 and B2 are exculpatory. Exhibit B1 and B2 put in the body of evidence by the prosecution forms part of the prosecution's case. It is no business of the prosecution to

establish the defence of the accused while at the same insisting on the guilt of the same accused person. In criminal proceedings the onus of proof remains throughout on the prosecution to establish the guilt of the accused beyond reasonable doubt Bozin vs. The State (1985) 2 NWLR (Pt.8) 465. That burden is not discharged when the prosecution puts before the court, simultaneously, both exculpatory facts and inculpatory facts. Paul Ameh vs. The State (1978) 11 SC at page 368. There is no proof beyond reasonable doubt when the prosecution put into the body of evidence before the count two conflicting versions of the same incident.

The totality of Exhibits B1 and B2, and the evidence of Dw1 and DW2 is that the appellant gave uncontradicted explanation that it was DW1 that gave him Exhibit N1 to sell. Dw2 confirmed the evidence without contradiction. No evidence exists that suggests that the DW2 who gave the appellant Exhibit N1 to sell was complicit in the armed robbery. He like, the appellant, were discharged in the courts of conspiracy to rob and the armed robbery. There is also no evidence establishing that the explanations were untrue. *(P 244 paras E-H).*

10. Failure of court to give sufficient consideration to the defence of accused

For the offence under Section 319A of the Penal Code Law it is a defence if the accused gives reasonable explanation as to how the stolen property came into his possession. The trial court must give sufficient consideration to that defence. In Ogunsola vs. The State (1979) LRN 300 the High Court of Bauchi State (on appeal) held, and I am greatly persuaded thereby, that the failure of the Upper Area Court, Gombe, to give sufficient consideration to the appellant's defence, that he bought the stolen turkey from an itinerant trader and that he had since left the turkey to roam about freely in his house for four months before he was accused of being in possession of stolen turkey, was fatal to the conviction for the offence under Section 319A of the Penal Code. The High Court held also that the failure of the appellant to call the itinerant trader from whom the appellant claimed to have bought the turkey was not necessarily fatal to his defence, nor did it absolve the trial court of its duty to give the defence sufficient consideration. In the instant case, the defence of DW1, corroborated by DW2 and even the prosecution's own evidence Exhibits B1 and B2, was not at all considered.*(Pp 244-245 paras I-B)***

11. Effect where at the end of prosecution's case the court is left in doubt

The position of this court is that a verdict of guilty is perverse if given inspite of obvious contradictions in the case of the prosecution: Alfred Onyemena vs. The State (1974) All NLR 471 at 530; Boy Muka vs. The State (1976) 10 SC 305. The law is also settled that if on the whole of the evidence by the prosecution the court is left in state of doubt; the prosecution would have failed to discharge their burden of proving the guilt of the accused person beyond reasonable doubt:

James Ikhane vs. Commissioner of Police (1977) 11 SC 379. Exhibits B1 and B2, and the uncontradicted evidence of DW1 and DW2, all as to how the appellant came to have possession of Exhibits N and N1 have that potency of leaving the court in a state of doubt. *(P 245 paras C-D)*

Per Eko (JSC)
"The trial court and the lower court made an issue of the appellant (as DW1) being evasive when cross-examined by the learned DPP "that he asked the 2nd accused (the DW2) for receipt and without collecting it he still proceeded to offer it for sale without receipt". The DW2, who should have issued receipt to the appellant (DW1) testified and admitted that he gave the handset to the appellant. The appellant was consistent and persistent in this explanation. It is also contained in Exhibits B1 and B2 forming part of the prosecution's case. I do not think that the issue of receipt will still be material if, in his *viva vace* evidence, the DW2, from whom the appellant obtained the handset had himself categorically admitted giving the appellant the handset. A receipt is after all a document that formally acknowledges that the DW2 gave the handset to the appellant and/or that the appellant received the handset from the DW2. There is nothing magical about a formal receipt if informal receipt is not in doubt.

The trial court appeared to have been swayed, in not believing the DW1 by the fact the Hausa man who allegedly sold the handset to the DW2 did not issue receipt to the DW2. He also did not testify. This fact alone does not justify the trial court's abdication of its duty to consider the defence of the appellant (DW1) in its totality. The fact that the DW1 was evasive under cross-examination by the DPP does not translate to DW2 also being evasive and unbelievable. *(P 245 paras E-H)*

12. *An offence created by a State law cannot be an element of a Federal offence*
It is obvious that in the judgment of the trial court that the lower court affirmed the conviction of the appellant for the offence under Section 319A of the Penal Code Law in consequence of the trial court's invocation of Section 218 of the Criminal Procedure Code. The Lower Court, like the trial court, had made no effort at suggesting that the offence created by Section 319A of the Penal Code Law of Kwara State was a lesser offence of the armed robbery contrary to Section 1 (2) of the Robbery and Firearms (Special Provisions) Act, a Federal offence. Certainly, as the two penal statutes by two different legislative bodies are different, the offence created by the State penal statute cannot be, in any way,

stretched to be an element of the Federal offence. In their concurrent conviction of the appellant for the offence of being in possession of stolen property contrary to Section 319A of the Penal Code Law, the two courts below were quite oblivious of the fact that an offence of receiving, which is an offence lesser than the armed robbery charged, was created by the Robbery and Firearms (Special Provisions) Act. The Act specifically created, in Section 5 thereof, an offence of "receiving property which has been obtained by means of any act constituting an offence under this Act" and provided therefore life imprisonment as the penalty. I do not think, if I may use sports analogy, that it is right for the central referee to use the rules of rugby touch to blow fouls in soccer. It is not right, and it is not possible. *(P p243-244 paras I-C)*

13. *The purport of conviction for a lesser offence*

Audi alteram parterm the requirement that the accused person shall be given "in detail-the nature of the offence" he is charged with is a requirement of Section 36(6) of the Constitution. This requirement is a core imperative of criminal justice administration in this country. This court, no doubt, had this in mind in Agumadu vs. The Queen (1963) 1 All NLR 201 and Okwuwa vs. The State (1964) 1 All NLR 361 at 364 when it held that:-

> **The lesser offence is a combination of some of the several particulars making up the offence charged. In other wards, the particulars constituting the lesser offence are carved out of the particulars of the offence charged.**

English courts insist that the trial court can only convict for the less offence "provided that the indictment for the aggravated offence contains words apt to include the particulars of both the aggravated and the lesser offence R. vs. O. Brien 6 Cr. App. R. 108. *(P 246 paras D-F)*

Per Eko (JSC)

"I cannot see from the courts alleging criminal conspiracy to commit armed robbery and armed robbery contrary to Robbery and Firearms (Special Provisions) Act that the appellant (1st accused) herein was sufficiently put on notice of the elements constituting the offence under Section 319A of the Penal Code Law of Kwara State. I do not think, in substitution for the Federal offence that the prosecution failed to prove is proper. The appellant could not, in the circumstance, be deemed to have notice of the particulars of the state offence under Section 319A of the Penal Code, or that the particulars of this State offence were carved out of the Federal offence not proved. In the circumstance, I allow the appeal.

The conviction and sentence of the appellant for the offence contrary to Section 319A of the Penal Code Law of Kwara State by the Kwara State High Court in the charge No. NWS/11C/2010, which conviction and sentence the Court of Appeal, Ilorin Division in the appeal No. CA/IL/C.122/2013 affirmed are hereby set aside. In their stead I enter an order discharging and acquitting the appellant for the said offence." *(P p 246-247 paras G-A)*

14. *Conviction for a lesser offence where the principal offence charged was not proved*
Now, in Adava vs. The State (2006) 30 WRN 171, the appellants were charged with the offence of culpable homicide punishable with death under Section 221(a), read with Section 79, of the Penal Code, Cap 89 the Laws of Northern Nigeria 1963, Vol. III (applicable in Kogi State). They each pleaded not guilty to the charge.

The prosecution called a total of five (5) witnesses and closed its case. Each of the appellants testified in his own defence and jointly called four (4) witnesses. At the end of the trial, and in a considered judgment, the learned trial Judge found each of the appellants guilty as charged, convicted them and sentence them to death.

On appeal, it was held that the conviction of the appellants, under Section 221 (a), read with Section 79, of the Penal Code, for the offence of culpable homicide punishable with death, could not be upheld as the ingredients of the offence as required by law, had not been, completely, proved by evidence at the trial.

The court noted that one of the most important ingredients of the offence, namely, the cause of death of the deceased was not proved. The court pointed out that the evidence of the Medical Officer (Pw1), who performed the post mortem examination on the deceased, and the medical report, (Exhibit 1), which he wrote thereafter, were not useful at all in determining the cause of death of the deceased.

It was, further, held that, although the deceased was alleged to have been shot on the stomach and he died within 48 hours, there was no evidence to show the extent of the injury on him, even though there was clear evidence that he was shot by the first appellant on the instruction of the second appellant.

In the court's view, this, however, must have caused bodily pain to the deceased which constituted the ingredients of the offence of voluntarily causing hurt without provocation as defined by Section 240 and punishable under Section 246 of the Penal Code. To the question whether the appellants, who were not charged with this offence, could be convicted of it, the court returned an affirmative answer. It explained its reason thus:

By Section 218 of the Criminal Procedure Code Cap. 30 of Laws

of Northern Nigeria 1963 applicable to Kogi State, an accused person can be convicted of a lesser offence if proved even though he is not charged with it. See Okwuwa vs. State (1964) 1 All NLR 361. The offence of voluntarily causing hurt without provocation is proved in this case against the appellants contrary to Section 246 of the Penal Code.*((Pp 247-248 paras H-D)*

15. *Conviction for a lesser offence under applicable principles*

In Ezeja vs. The State (supra), the appellant was originally, charged with causing grievous hurt to Cyprian Okpala by shooting and wounding him with his service pistol but the evidence at the trial disclosed a lesser offence of causing hurt without provocation hence the conviction of the appellant by the trial court under Section 246 of the Penal Code. *(P 248 paras G-H).*

16. *Restrictions on court in convicting on a lesser offence*

These decisions have to be contrasted with The Nig. Air Force vs. Kamaldeen (2007) LPELR – 2010 (SC) 24; C-D, where this court held that:

> **It must be shown that the particulars and the fact and the circumstances of the original offence charged are the same or similar to the lesser offence. See, Okwuwa vs. The State (1964) 1 All NLR 361 where this court stated in a passage thus:**
>
> **The lesser offence is a combination of some of the several particulars making up one offence charged in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged."**
>
> **Under our criminal jurisprudence the power of a court exercising criminal jurisdiction to convict on alternative offences or lesser offences is limited and cannot be exercised outside the limits laid down by law.** *[Italics supplied for emphasis]*
>
> *(Pp 248 -249 paras H-B).*

17. *Principles of conviction for a lesser offence*

In Agugua vs. The State (2017) LPELR – 4202 (SC) 54-55, E-A, this court explained that:

> **…. The offence of attempted robbery is a lesser offence than the robbery charged. The ingredients are less onerous to prove. The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See: The Nigeria Air Force vs. Kamaldeen (2007) 2 SC**

113. *[Italics supplied for emphasis] (P 249 paras C-D).*

18. *An accused cannot be convicted under a law different from that which he is charged*

In Okobi vs. The State (1984) 7 SC 47; (1984) LPELR – 2453 (SC) one of the questions that arose for determination was whether a failure to secure a conviction under the Robbery and Firearms (Special Provision) Act entitled a High Court Judge to proceed to convict of a lesser offence under the Criminal Code by virtue of Section 179 of the Criminal procedure Law (in *pari materia* with Section 218 of the Criminal Procedure Code).

Speaking for this court. Obeseki, JSC, at page 23; A-C, made the following enduring pronouncements:

> ***I am of the settled view that this court has no jurisdiction to entertain any application to convict the appellant of a lesser offence under the Criminal Code at the hearing of an appeal against a conviction for an offence under the provisions of the Robbery and Firearms (Special Provisions) Act. There being no provision under the Robbery and Firearms (Special Provisions) Act permitting such a course of action, it will amount to a denial of justice to the appellant to convict him of an offence under a law different from that under which he was tried for the sole purpose of securing his conviction.*** *[Italics supplied for emphasis] (P 249 paras E-H).*

Per Nweze (JSC)

"His Lordship had explained the ways of enabling the court to utilize its powers under the Criminal Procedures Law (and here I add the Criminal Procedure Code) thus:

> **… to enable the court to utilize its powers under the Criminal Procedure Law to advantage, the offence should and must be charged under the two laws in the alternative.**
>
> **The court is not a prosecutor but an adjudicator and it borders on persecution for the court to invoke its powers under a law under which the prosecution decided not to proceed or prosecute. The jurisdiction being exercised by the High Court of the State in the trial of persons for offences under the Armed robbery and Firearms (Special Provisions) Act is the jurisdiction conferred upon the High Court by the Robbery and Firearms (Special Provision) Act. Offences under the Act are Federal offences. As the Act gave no jurisdiction to convict of offence other than those set out in the Act the High Court cannot by the**

application of Section 179 (1) of the Criminal Procedure Law exercise the jurisdiction conferred by the Act to convict of an offence not under the Act. *[Italics supplied for emphasis]*

Not done yet, His Lordship announced, most authoritatively, that:

The High Court of Lagos State cannot, in my view, proceed to convict the appellant who was charged and tried for an offence under the Robbery and Firearms (Special Provisions) Act under the Criminal Code of Lagos State because the court found that it had committed no offence under the Robbery and Firearms (Special Provisions) Act.

As no offence under the Robbery and Firearms (Special Provisions) was proved, the High Court of Lagos State is not in my view, entitled to apply the provisions of Section 179 (1) of the Criminal Code Law to enter a conviction for an offence under the Criminal Code. *[Italics supplied for emphasis] (P 250 paras A-G).*

Per Nweze (JSC)

"Explaining the context of the nuanced usage of lesser offence, the distinguished jurist opined that:

Lesser offence mentioned in Section 179 (1) can only, in my view refer to lesser offence under the law or Act under which the main or composite offence was charged. It cannot properly be interpreted to refer to a lesser offence under another law. Section 179 (2) Criminal Procedure Law has, in my view an independent application which differs from that of Section 179 (1), of the Criminal Procedure Law. While Section 179 (1) of the Criminal Procedure Law enable conviction to be entered for complete lesser offence established by the proof of some of the several particulars of the main or principal offence, e.g. in the trial for robbery under Section 401, Criminal Code stealing under Section 390 Criminal Code is proved, Section 179 (2) Criminal Procedure Law enables a conviction to be entered for a lesser offence to which the main offence has been reduced by the proof of facts having the effect of reducing the main offence to a lesser offence e.g. in the trial for murder under Section 316 of the Criminal Code if provocation is proved, the offence is reduced from murder to manslaughter.

(Pp 250-251 paras G-H).

19. What constitutes a lesser offence

In Nwachukwu vs. The State (1986) 2 NWLR (pt. 25) 765; (1986) 1 SC 477; (1986) LPELR – 2085 (SC), Karibi-Whyte, JSC threw further light on the application of Section 179 of the CPL [in *pari material* with Section 218 of the CPC]. His Lordship, first, cited the decision in:

> **Torhamba vs. Police (1956) N.R.N.L.R. at p. 94 (where) the court had attempted to give a guide as to the determination of what constitutes a lesser offence (thus):**
>
> > **A lesser offence is a combination of some of the several particulars making up the offence charged, in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged… when one is considering action under Section 179, one should write out the particulars of which the offence charged consists and see whether it is possible to delete some words out of these particulars and have a residue of particulars making up the lesser offence of which it is proposed to convict. An authoritative example is furnished by the case of Cooray vs. The Queen (1955) 2 WLR (1953) AC 407.**

His Lordship, then, proceeded thus:

> **It must be kept constantly in mind that Section 179 in issue in this appeal is concerned (with) where the lesser (offence) charged in respect of which accused is convicted arises from the facts and evidence led in support of the more serious offence in respect of which the accused is charged. The operative words are lesser and/not 'another' offence. Thus, where the accused has notice of an aggravated offence, he also has notice of the lesser offence for which he could be convicted. The assumption, which is legitimate, is that accused would have challenged the more serious offence and must be fully aware of the case against him in respect of the lesser offence. It is therefore important to observe from the judicial decisions and the provisions that for Section 179 of the Criminal Procedure Act to apply, the following conditions must be observed.**
>
> > **Firstly, the indictment, in respect of which the accused is subsequently convicted for a lesser offence must contain words to notice both offences.**
> >
> > **Secondly, the evidence led and facts bound, though insufficient for conviction of the aggravated offence charged, must support the conviction for the lesser**

> **offence. Thirdly, it is in all cases not necessary to charge the accused with the lesser offence with which he is being convicted. This last mentioned is ordinary common sense. The greater includes by necessary implication the lesser.** *(Pp 251-252 paras D-C).*

20. *The invocation of S. 218 of CPC*

My Lords, I have quoted extensively from these judgments to demonstrate that the lower court was caught in a mix-up in the application of Section 218 (2) of the Criminal Procedure Code (supra). For the invocation of the said section the lesser offence must not only be kindred offence, with the actual offence charge, its ingredients must be embedded in the actual charge. Ezeja vs. The State (2008) All FWLR (pt. 428) 256, 268-269.

This much is, clearly, evident in the decisions considered above, The Nig Air Force vs. Kamaldeen (supra); Agugua vs. The State (supra); Okobi vs. The State (supra); Nwachukwu vs. The State (supra). Indeed only recently, this court in Agugua vs. The State (2017) LPELR – 4202 (SC) 54-55; E-A, relying on The Nig. Air Force vs. Kamaldeen (supra), restated the position that:

> **The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See: The Nigerian Air Force vs. Kamaldeen (2007) 2 SC 113; 154-55; E-A.** *(P 252 paras D-F).*

Per Galinje (JSC)

"This section is exceptional in that the prosecution is only required to show that it is reasonably suspected that something in the possession of the accused is stolen property for the burden of proof to shift to the defence to show that he came by the thing honestly.

A person accused of committing an offence under this section can only be found culpable if he does not give an account to the satisfaction of a court of justice as to how he came by the said property. In the instant case the appellant had fully accounted to the court how he came into possession of the Nokia handset and his account was corroborated by DW2 who admitted that he indeed was the one who gave the handset to the appellant to sell. To that extent, he had fully discharged the burden of proof as required by the provision of Section 319A of the Penal Code." *(P 253 paras C-D).*

Representations:
D. A. Awosika, (Esq.), with N. F. John, (Esq.) for the Appellant.
Kolade Obafemi, (Esq.), for the Respondent.

1. MRS GANIAT YETUNDE ELIAS
2. MR OLUSOJI ELIAS
(Suing for and as executors of the Estate of Dr. Taslim Olawale Elias)

VS

ECO BANK NIGERIA PLC

SC.99/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

TUESDAY, 25TH JANUARY, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Denial of fair hearing – Where such exists on appeal – Whether the entire proceedings will be declared a nullity.

COURT: Judicial discretion – How exercised – Whether varies from one case to another.

COURT: Judicial discretion – Nature thereof – Relevant considerations

LEGAL PRACTITIONERS: Errors of counsel – Errors of counsel should not be visited on their clients – Whether this principle applies only to procedural law.

LEGAL PRACTITIONERS: Ignorance of the law – Where a counsel asserts ignorance of the law – Whether such plea cannot avail him.

PARTIES: Excuse from liability – Ignorance of the law – Where a party alleges ignorance of

the law – Whether sometimes may excuse the party from liability – The principle in ***Alloysius Akpaji vs. Francis Udemba (2009) NWLR (Pt. 1138) 5451****.*

PRACTICE AND PROCEDURE: Extension of time – Considerations thereof – Special circumstance – Whether mistake of counsel qualifies as special circumstance – The principle in ***Shittu Akinpelu vs Ebunola Adegbore & ors (2008) 10 NWLR (pt. 1096) 531, (2008) 45 Sc. (pt. 11) 75; (2008) 7 SCM 1***

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Discretionary nature thereof – Requirements.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Conditions necessary thereto – Whether applicant is to satisfy these conditions.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Requirements – Whether it is necessary to annex a notice of appeal which contains grounds of appeal, which prima facia show good cause why the appeal should be heard.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Conditions thereof must co-exist – Where one is absent – Whether application will be refused.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Where affidavit in support of application is deficient – Whether application will be refused.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Onus on applicant thereto – How discharged.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Twin conditions thereof – Whether conjunctive.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Delay in bringing application – Whether will not be prejudicial where satisfactorily explained.

PRACTICE AND PROCEDURE: Extension of time within which to appeal – Application thereof – Whether not granted as a matter of course.

RULES OF COURT: Obedience thereto – Counsel appearing for parties are expected to be conversant with rules of court – Where ignorant thereof – Whether not excusable.

Facts of the matter
The appellant brought an application for extension of time within which to appeal. The appellant also stated grounds for the application.

This application for extension of time was brought before the Supreme Court.

Held *(Unanimously dismissing the application)*

1. *Requirements for application for extension of time within which to appeal*
Before I proceed further to consider the submissions in this application, I need to state the obvious position of the court in considering this type of application. There is no doubt that the indulgence being sought by the applicants is discretionary. Therefore, in order to secure or obtain such discretionary indulgence from the court, an applicant is required to meet certain conditions. Although the court has an absolute discretion in the matter, the discretion must be exercised judicially upon settled principles.

Generally, the right to appeal is constitutionally guaranteed and an aggrieved party cannot be robbed or denied of such right.

However, the same Constitution prescribes the time within which an aggrieved party may appeal. And failure to file such an appeal timeously has given an opposing party a certain right, which, before the court will accede to extension of time to appeal, it must be satisfied that, indeed, the justice of the situation demands the court's indulgence in favour of an applicant.
(P 268 paras E-G).

2. *Conditions which must be fulfilled before an application for extension of time is granted*
To grant an indulgence in extending the time within which to appeal a decision of the Court of Appeal, (i) the application must set forth good and substantial reasons for the failure to appeal within the prescribed time and (ii) the proposed Notice of Appeal must contain grounds of appeal which, *prima facie,* show good cause why the appeal should be heard. See; RT. HON (DR.) OLISA IMEGWU VS. MR. EUENE UCHE OKOLOCHA & 2 ORS (2013) 9 NWLR (Pt.1359) 347; (2013) 2 SCM 81; (2013) 2 SCNJ 514; (2013) All FWLR (Pt.672) 1632; (2013) 54 NSCQR (Pt.3) 34; Order 2 rule 31 (2) (a), (b) and (c), Supreme Court Rules (as amended).

In other words, an application for extension of the time prescribed within which to file an appeal must be supported by an affidavit and necessary documents disclosing and setting forth good and substantial reasons for the failure to appeal or to seek leave to appeal, in addition to the proposed notice of appeal which must contain grounds of appeal which, prima facie, show good

cause why the appeal should be heard not why it should be allowed.
(Pp 268 - 269 paras H-B).

3. *Respondent countered and responded to applicant's affidavit*
Before I proceed to further consider the submissions of counsel, I must say that it is a misconception, to say the least, to conclude that the respondent did not counter or respond to certain paragraphs of the affidavit in support of the application. Indeed, in paragraph 3 of the counter affidavit of Oluwatobi Ogunba Esq., a legal practitioner in the law firm of the Solicitors to the respondent, he referred to the facts deposed to by John Ochada Esq. and stated that they are incorrect and are misleading facts. There is no doubt that the facts deposed to in those paragraphs in the affidavit in support are facts that are verifiable on the records while others are within the personal knowledge of the deponent. For instance, the fact that the earlier application filed before the court below instead of this court was done due to the ignorance of counsel. And that the appeal has very good chances of success. As the saying goes, not even the devil knows the thinking of a man. Therefore, it is not correct to say that those paragraphs were admitted not having been specifically responded to, and I so hold.*(P 276 paras C-D).*

4. *Ignorance does not excuse a party from liability*
Generally, ignorance of the law excuses not and ignorance of law excuses no one, respectively is a legal principle, holding that a person who is unaware of the existence of a law may not escape liability for violating that law simply or merely because he is unaware of its content. *(P 276 paras B-C).*

5. *Sometimes ignorance of the law can excuse non-lawyers*
As clearly deposed to by counsel to the applicants in his affidavit and in oral submission in address, he claimed ignorance or inadvertence of the rules of this court, in particular, that require filing of an appeal or an application for enlargement of time to appeal upon expiration of time prescribed for so doing to this court rather than court below. This sounds unbelievable and embarrassing, to say the least. It may have been understood and pardonable if the claim of ignorance had been attributed to the applicants themselves. Sometimes, ignorance of law can be excused to not legally trained persons. *(P 276 paras C-D).*

6. *Ignorance of law does not avail counsel*
However, in the instant case, the person who claimed ignorance of the law is a legal practitioner. This is ridiculous and unacceptable, to say the least, and cannot excuse the inadvertence of counsel. To be in advertent is not paying

proper attention, Counsel, as Ceaser's wife should be above board in this respect. *(P 276 paras G-H).*

7. *Situations where errors of counsel shall not be visited on their clients*
Ordinarily, it is trite law that the litigant should not be punished for the inadvertence of counsel engaged to do certain things. That is in relation to error of judgment or mistake of counsel, in particular, in procedural matters. See; Ibodo Vs. Enarofia (1980) 12 SC 195, Nneji Vs. Chukwu (1988) 3 NWLR (Pt.81) 184; Obidiaru Vs. Unique & Anor (1986) 3 SC 39; Afolabi Vs. Adekunle (1983) 14 SC 383; (1983) 14 SCNLR 398; Saleh Vs. Shetima Monguno & Ors (2006) 15 NWLR (Pt.1001)316; (2006) 7 SC (Pt.11) 97. *(Pp 276-277 paras H-A).*

8. *Mistake of counsel qualifies as special circumstance*
In Shittu Akinpelu Vs. Ebunola Adegbore & Ors (2008) 10 NWLR (Pt.1096) 531; (2008) 4-5 SC (Pt. 11) 75; (2008) 7 SCM 1 mistake of counsel is said to qualify as a special circumstance. In other words, the court should really exercise its discretion in favour of an application for extension of time to appeal, if it is shown to the satisfaction of the court that the failure to appeal or carry out an act within the prescribed period was caused by the negligence or mere inadvertence of his counsel. See; Doherty Vs. Doherty (1964) 1 All NLR 292; Ahmadu Vs. Salawu (1974) 9 SC 538; Bowaje Vs. Adediwura (1976) 6 SC 143.
(P 277 paras A-B).

Per Ariwoola JSC

> **"The decision to file an application rather than an appeal within the prescribed time cannot be said to be a mistake, or inadvertence of counsel but a deliberate act where the litigants themselves should have had a say by instructing their counsel to appeal. Notwithstanding the unfortunate wrong choice of filing an application, counsel again deliberately filed an application for leave to appeal before the lower court against the court's decision when he knew that the prescribed time had lapsed. All these are not good and substantial reasons to exercise the discretion of this court in favour of the applicants by extending time to seek leave to appeal to this court. The injuries caused were afflicted by the counsel for the applicants. The first condition is therefore not satisfied or met.**
> *(P 277 paras C-D).*

9. *Requirements for notice to contain arguable grounds of appeal*
The second condition that must be satisfied by the applicants to earn the

indulgence of the court is that the proposed notice of appeal attached to the application must contain grounds of appeal which, *prima facie,* show good cause why the appeal should be heard. The grounds of appeal proposed must be drawn by the applicant to be arguable but not frivolous. The applicant is however, not expected to show that the appeal will succeed, but is expected to exhibit good grounds showing reasonable prospect of success in the appeal. See; Holman Bros (Nig) Ltd Vs. Kigo (Nig) (1980) 12-11 SC 251.
(P 277 paras E-F).

10. *Effect where denial of fair hearing is sustained on appeal*
The law is trite, that a denial of fair hearing is a fundamental issue and where such exists, ordinarily the entire proceedings will be declared a nullity.

See; Akinfe Vs. The State (1988) 3 NWLR (Pt.85) 729 at 753; Bamgboye Vs. University of lIorin {1999} 10 NWLR (Pt.622) 290 at 333; Mohammed O. Ojengbede Vs. M. O. Esan & Anor (2001) 18 NWLR (Pt.746) 771.
(P 278 paras D-E).

Per Ariwoola (JSC)

"In the grounds upon which this application was brought as earlier stated in this ruling, ground 2 (a) above is on "the erroneous holding that the appellants' counsel was not in court on the 29th September, 2015 to adopt his brief when it was clear from the Certified True Copy (CTC) of the records of proceedings of 29th September, 2015 that Mr. E. Nwonu of counsel held the brief of Dr. Charles Mekwunye and accordingly announced his appearance before adopting the appellants' brief." In the ruling, of the court below delivered on 8th April, 2016, on the appellants' application whereby the Order of the court was sought "reviewing and/or varying and/or annulling part of the judgment," inter alia, the court granted relief A(i) only, by deleting the following words on page 4 of the judgment.
"Briefs of argument were deemed argued in line with Order 18 Rule 9(4) of the Court of Appeal Rules 2011 in the absence of Appellants' counsel, along with "None for appellants" in the column for appearances of counsel at page 28 of the judgment, and in its place, the said column' is substituted with "Mr. E. Nwonu holding brief of Dr. Charles Mekwunye, for appellants."

I therefore cannot see how the fundamental right to fair hearing of the appellants can again be said to be in breach, to warrant the grant of this instant application on that ground.

However, there are other proposed grounds 2,3 and 4 of appeal in

the said Notice of Appeal. As I stated earlier, the rule does not require that the applicant must show that the proposed grounds are likely to succeed but that they show good cause why the appeal should be heard. In my view, a careful consideration of the other three proposed grounds of appeal, may seem to show some cause why the appeal should be given opportunity of hearing.

In other words, even though the reason of ignorance of the law by the applicants counsel and delay by the court below in determining similar application before it, are not good and substantial reasons enough to grant this application, I am of the view that grounds 2,3 and 4 of the proposed grounds of appeal may seem to show some good cause why the appeal should be heard. See; Doherty Vs Doherty (1964) 1 All NLR 292; Alagbe Vs. Abimbola (1978) 11 SC 84; In Re-Adewunmi (1988) 3 NWLR (Pt.83) 483; Cooperative & Commerce Bank (Nig.) Ltd. Vs. Ogwuru (1993) 3 NWLR (Pt.284) 630."
(Pp 278 -279 paras E-C).

11. *Conditions for application must co-exist*
However, the two conditions listed in the Rules of this court are expected to co-exist and if one is non existent the application must fail.
The two conditions are conjunctive but not disjunctive. See; Uyaemenam Nwora & Ors Vs. Nweke Nwabueze & Ors (2011) 15 NWLR (Pt.1271) 467; (2011) LPELR - 8128; (2001) 11-12 (Pt.1) SC 187. *(P 279 paras D-E).*

12. *Rules of court are meant to be obeyed*
Ordinarily, it is trite law that rules of court are meant to be obeyed by all. See; N. A. Williams & Ors Vs. Hope Rising Vol. Society (1982) 1 All NLR (Pt.1) 1 at 5; Onwuka Kalu Vs. Victor Odili & Ors (1992) 5 NWLR (Pt.240) 130 (1992) 6 SCNJ 76; Ifeanyichukwu Trading Investment Ventures Ltd & Anor Vs. Onyesom Community Bank Ltd (2015) 8 SCM 85 (2015) LPELR - 24819. Counsel who is properly briefed to handle a matter for litigants in court should be diligent in doing so. The law and rules of court are expected to be in the breasts of counsel and the courts. Ignorance of either the Rule or Law by counsel cannot be excused. One on facts may be pardonable in the interest of justice.

As I earlier stated, the affidavit in support of this application failed to provide, as required by the rules, good and substantial reasons why the appeal was not filed within the prescribed time. And the issue of the alleged breach of fundamental right of fair hearing of the applicants

is not shown to exist and therefore not a ground of appeal good enough to convince this court in granting leave as sought. In other words the issue of jurisdiction alluded to by the applicants' counsel is not apparent on the records,

to warrant the grant of indulgence of this court in extending the prescribed time to appeal. *((P 279 paras F-H).*

13. *Nature of Judicial discretion*
The law is that judicial discretion must at all times be exercised not only judicially but also judiciously based on materials before the court. A judicial discretion is based upon facts and circumstances presented to the court from which it must draw conclusion governed by law, justice and common sense. See the decision of this court in the cases of WAZIRI VS. GUMEL (2012) ALL FWLR (Pt. 632) p. 1660 at page 1678 and AKINYEMI VS. ODU'A INV. CO. LTD (2012) 17 NWLR (Pt.1329) page 209 at 242. *(P 280 paras G-H).*

14. *Onus on applicant who applies for extension of time within which to appeal*
The Rules of this Court allow for a party who has been unable to file his appeal within time, to seek leave for extension of time within which he may file the appeal. However, for such application to be granted, the applicant must state the cause of the delay and then proceed to give cogent and credible reasons why the appeal was not filed within the statutory period allowed by the rules. He must also show that he has good and arguable grounds of appeal, and that such grounds are not frivolous but substantial. These two conditions must be satisfied by the applicant before the Court can exercise its discretion in favour of the application. Put differently, the application for extension of time to file an appeal would fail where the applicant cannot state to the satisfaction of the court, the reason for the delay in filing the notice of appeal and also show, prima facie, that the grounds of appeal he has exhibited are not frivolous.

In the instant application, the affidavit of John Ochada, of counsel on behalf of the appellant stated in paragraph 7 thereof, that the appellant's counsel inadvertently filed the application seeking leave of court to appeal and leave for extension of time within which to appeal at the Court of Appeal and leave for extension of time within which to appeal at the Court of Appeal. In paragraph 4.9 of the written address of counsel in support of the application, counsel claimed ignorance in bringing the application for leave to appeal before the Court of Appeal instead of this court. I agree with my learned brother, Ariwoola, JSC, that although ignorance of law can be excused to not legally trained persons, the same standard cannot be applied to a legal practitioner. Indeed, it is unacceptable to excuse the inadvertence of a Legal Practitioner. Inadvertence of counsel in filing an appeal within time, to my mind, cannot be a credible and cogent reason for the delay which this court should entertain.
(P p280-281 paras I-E).

15. *Twin conditions for extension of time are conjunctive*

In the words of DONGBAN-MENSEM, JCA *IN MIDLAND GALVANISING PRODUCT LTD VS. O.S.I.R.S. (2015) 8 NWLR (Pt.1460)* 29 *at P.44* which I hereby endorse, *"a judicial discretion* is *exercised judiciously upon the existence of good and compelling circumstances. A judicial discretion is therefore not available to be dished out like some free flowing water from a natural fountain. The judicial fountain flows only upon the disclosure of substantial reasons which could adversely affect the right of a citizen."*

I am of the considered view that, the applicants in this appeal have failed to proffer good and substantial reasons for the delay in filing the appeal within the time prescribed by the rules of this court. As afore stated, the twin conditions required of an applicant in an application for leave for extension of time to appeal, are conjunctive. They must both be satisfied before the court can exercise its discretion in favour of the application "judiciously" and "judicially."

My Lord had already reviewed the issue regarding the appellants' claim of denial of fair hearing as none existent, I see no reason therefore, why this court should grant the application.

On the whole, it is my well-considered opinion that this application has no merit and is accordingly refused. I hereby dismiss this application.
(Pp 281-282 paras F-A).

Per Nweze (JSC)

"This court's powers to extend time within which to appeal or to apply for leave to appeal are statutory, UNILAG Vs. *Aigoro* (1985) 16 (pt. 1) SC 88, 212; (1985) 1 NWLR (pt 1) 143. While Sections 22 and 27 (2) (a) of the Supreme Court Act prescribe the period within which to appeal against decisions of the Court of Appeal (hereinafter, simply, referred to as "the lower court"), Order 2 Rule 4 and 28 (1), (2), (3), (4) and (5) of the Supreme Court (as amended) in 1999 provide for the court's exercise of its discretion to extend time within which to appeal, IKENTA BEST (NIG) LTD VS. AG, RIVERS STATE (2008) All FWLR (pt 417) 1, 16.

The object of these provisions is to give the court the discretion to extend time with a view to avoiding injustice to the parties, *UNILAG Vs. Aigoro* (supra) 195. By employing the precatory word "may" these provisions vest in the court the exercise of discretion. It must be emphasised here that though the discretion must be exercised in a judicial manner, that is, according to laid down principles, it is not a typically judicial function. As this court

explained in *UNILAG Vs. Aigoro* (supra) 216, it is a function which lies, awkwardly, between, clearly, judicial acts and, clearly, administrative acts and are referred to as judicial discretions.

One immutable principle that runs through case law, both in England and Nigeria, is that the exercise of judicial discretion depends on the facts and circumstances of each case. In effect, in such matters, no one case can be authority for another, see per Kay LJ IN *Jenkins Vs. Bushby* (1891) 1 Ch 484, 494 approvingly adopted in *Odusote Vs. Odusote* (1971) 1 All NLR 221, 222; *UNILAG Vs. Aigoro* (supra).

The principles that have been laid down in the determination of applications of this nature are, truly, many and varied. In the first place, every such application must, conjunctively, surmount the twin conditions ordained in the above provisions of the rules of this court (supra), *Alagbe* vs. *Abimbola* (1978) 2 SC 89; *Ibodo Vs. Enarofia* (1980) 12 SC 195; *Williams Vs. Hope Rise Voluntary Funds Society* (1982) 1 All NLR (pt I) 1; Doherty Vs. Doherty (1964) 1 All NLR 292; *Yonwuren Vs. Modern Signs Ltd* (1985)1 NWLR (pt .2) 244; *Mobil Oil (Nig) Ltd Vs. Agadaigho* (1988) 2 NWLR (pt. 77) 383; *Okere Vs. Nkem* (1992) 4 NWLR (pt. 234) 132; *Kotoye Vs. Saraki* (1995) 5 NWLR (pt. 395) 256; *Balogun Vs. Afolalu* (1994) 7 NWLR (pt 355) 206; *F.H.A. Vs. Abosede* (1998) 2 NWLR (pt 537) 177; *Shanu Vs. Afribank Nig Plc* (2000) 13 NWLR (pt 684) 392; *Oloko* Vs. *Ube* (2001) 13 NWLR (pt 729) 161. The two conditions are conjunctive and not disjunctive, *Yonwuren Vs. Modern Signs (Nig) Ltd* (supra). They must be present in the affidavit, *Ikenta Best (Nig) Ltd* Vs. *AG, Rivers State* (supra)" *(P 282-283 paras C-A).*

16. *Delay will not be relevant if satisfactorily explained*

Although the length of time that elapsed between the date of the judgement and the filing of the application must be factored into the court's decision, that notwithstanding, extension of time could still be granted if the delay is satisfactorily explained, *ALAGBE* VS. *ABIMBOLA* (1978) 11 SC 84; *OJORA* V *BAKARE* (1976) 10 SC 15; *RE: ADEWUNMI AND* CO (1988) 2 NWLR (pt 83) 483. *(P 283 paras B-C).*

Per Nweze JSC

"Another factor which has regained currency is the fact of the true and genuine mistake or error of judgement of counsel. Thus, where it is satisfactorily established that the failure to appeal within the

prescribed time is attributable to the above failings on the part of counsel, the application will be granted. However, the court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case, IROEGBU VS. OKWORDU (1990) 6 NWLR (pt 159) 643; (1990) 21 NSCC (pt 111) 377.

In such a situation, where it appears to the court that the delay was occasioned by the genuine mistake of counsel, it will be up to the respondent to show in what respect he would be prejudiced if the indulgence sought is granted, *Ikenta Best (Nig) Ltd Vs. AG, Rivers State* (supra). In all, where there is the possibility of a miscarriage of justice due to a catalogue of mistakes on the part of counsel for the applicant, an application for extension of time will be granted, *Iroegbu Vs. Okwordu* (1990) 21 NSCC (pt 111) 377; *NIWA Vs. SPDC(supra).*

Such an applicant must, above all, satisfy the second conjunctive condition, namely, that he has arguable grounds of appeal and not a frivolous appeal. In short, he should show good cause why the appeal should be heard. The good cause or reason is for the hearing of the appeal and not that the appeal will succeed, *Ikenta Best (Nig) Ltd Vs. AG, Rivers State* (supra); *Holman Bros (Nig) Ltd Vs. Kigo (Nig) Ltd* (1980) 8-11 SC 43." *(P 283 paras C-F).*

17. *Judicial discretion varies from one case to another*

As noted earlier, the exercise of judicial discretion depends on the facts and circumstances of each case. In effect, in such matters, no one case can be authority for another, see per Kay LJ IN *Jenkins Vs. Bushby* (1891) 1 Ch 484,494 approvingly adopted in *Odusote Vs. Odusote (1971)* 1 All NLR 221, 222; *UNILAG Vs. Aigoro* (supra). Put differently, in determining an application for extension of time, such as this, each case must be decided on its own peculiar facts and circumstances. The corollary is that the facts to be taken into consideration are inexhaustive, *UNILAG Vs. Olaniyan (No.* 1) (1985) 1 NWLR (pt 1) 156; (2001) FWLR (pt 56) 808; *CCB (Nig) Ltd Vs. Ogwuru (1993)* 3 NWLR (pt 284) 630. *((P 283 paras G-I).*

18. *An application seeking leave within which to appeal is not granted as a matter of course*

In all, however, it has to be noted that an application seeking leave to appeal is not granted as a matter of course, *Ogundimu Vs. Kasunmu* (2006) 41 WRN 1; *ACB Plc* Vs. *Evolocha* (2001) FWLR (pt 60) 1611, 1621; *Williams Vs. Hope Rise Voluntary Funds Society* (2001) 34 WRN 171; (1982) 13 NSCC36.

As indicated in the leading judgement, the affidavit in support of this application failed to provide good and substantial reasons why this appeal was not filed within the prescribed time. It is, therefore, un-grantable.
(P 284 paras A-B).

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