KABIR ABDULLAHI

VS

THE STATE

SC. 955/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings –Attitude of Supreme Court thereto –When Supreme Court may interfere with concurrent findings.

COURT: Approach to justice – Whether the attitude of court has changed from deciding case on mere technicalities – The principle in ***Makeri Smelting Co. Ltd vs. Access Bank (Nig) Plc (2002) 7 NWLR (pt. 766) 447****.*

COURT: Interpretation of statutes - Duty on court thereto – Whether the function of the court is to interpret a statute in accordance with the intention of the legislature – The Principle in ***Ugwu vs. Ararume (2007) 12 NWLR (pt. 1048) 369.***

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where direct and positive – Whether can be relied solely for the conviction of the accused – The principle in ***Peter Iliya Azabada vs. The State (2014) All FWLR (Pt. 751) 1620****.*

CRIMINAL LAW AND PROCEDURE: Criminal cases –Proof thereof – Whether to prove case beyond reasonable doubt – Implication.

CRIMINAL LAW AND PROCEDURE: Murder – Elements thereof – Whether prosecution is expected to establish them beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof – Cause of death – Whether medical report is not only the way of proving cause of death.

CRIMINAL LAW AND PROCEDURE: Proof – Medical evidence – Relevancy – Where medical evidence is not available –Whether cause of death can be inferred from a compelling evidence that the deceased died as a result of an act or omission of the person charged with causing the death.

STATUTE: Criminal Procedure Code – S. 222 thereof – Purport.

STATUTE: Criminal Procedure Code –S. 382 thereof –Nature and purport.

STATUTE: Criminal procedure Code – S.S 288 and 382 thereof –Nature and purport.

WORDS AND PHRASES: Confession –S. 28 of Evidence Act 2011 considered.

Issues for determination

1. **Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1).**

2. **Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect (Grounds 2 and 3)".**

Facts of the matter

This appeal emanated from the judgment of Court of Appeal, Kaduna Judicial Division, Kaduna State, CORAM: UWANI MUSA ABBA AJI, ABDUL ABOKI and HABEEB A.D. ABIRU, JJCA (hereinafter referred to as the "lower court)" delivered on 22nd May, 2015, wherein, the lower court affirmed the decision of the Katsina State High Court of Justice, Katsina Judicial Division (hereinafter referred to as "trial court') delivered on 24th April, 2012.

The lower court affirmed the judgment of the trial court which convicted the appellant herein for the offence of culpable homicide punishable with death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death with one other accused person.

The appellant herein was disgruntled with the judgment of the lower court and appealed to this honourable court based on the notice of appeal adumbrated at pages 157 -161 of the transcribed record of appeal. The said notice of appeal contains only three (3) grounds of appeal.

Statement of Fact Relevant to This Appeal

By a charge dated 19th June, 2008, the appellant with one other accused person were charged by the respondent at the trial court with the act of forming common intention to commit offence of culpable homicide punishable with death under Section 221 of the Penal Code in furtherance of which they allegedly caused the death of one Abubakar Dayyabu by doing an act to wit: by beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of the act and thereby committed an offence punishable under Section 221 of the Penal Code.

The appellant and the other co-accused person (i.e. AUWALU ABUBAKAR) were tried, convicted and sentenced to death by the trial court. The appellants (at the lower court) were dissatisfied with the decision of the

trial court and appealed to the lower court upon four grounds of appeal and five grounds of appeal filed by the 1st and 2nd appellants respectively.

The lower court in its considered judgment dismissed the appeal and affirmed the judgment of the trial court. It is against the said judgment that this appeal before this honourable court was filed.

Held: *(Unanimously dismissing the Appeal)*

1. *A statute is the will of the legislature*

The totality of the evidence presented in this case leaves this court with little or no room to arrive at a different conclusion with the trial and lower court. This stems from the fact that the duty of court is to interpret the statute in accordance with the intention of the law makers. In UGWU vs. ARARUME (2007) 12 NWLR (Pt. 1048) 369 at 498 this court stated thus:-

> **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature"** *(P 208 Paras C - F).*

2. *Attitude of Court has changed from deciding cases on mere technicalities*

Courts generally have deliberately shifted away from narrow technical approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. See MAKERI SMELTING CO. LTD vs. ACCESS BANK (NIG.) PLC (2002) 7 NWLR (Pt. 766) 447 at 476 – 477.

> **"The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that case should always be decided, whenever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a**

> **blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits."**

See also AJAKAIYI vs. IDEHAI (1994) 8 NWLR (Pt. 364) 504; ARTRA IND LTD vs. NBCI (1997) 1 NWLR (Pt. 483) 574; DAKAT vs. DASHE (1997) 12 NWLR (Pt. 531) 46; BENSON vs. NIGERIA AGIP CO. LTD (1982) 5 SC. 1. *(Pp 208 - 209.Paras F - A).*

3. *When Supreme Court may interfere with concurrent findings of facts.*
Further more, the law is that this court will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such findings are perverse, or are not supported by the evidence, or are reached as a result of a wrong application of any principle of substantive law or procedure. See ARABAMBI vs. ADVANCE BEVERAGES IND. LTD. (2005) 19 NWLR (Pt. 959) 1 per Onnoghen, JSC as he then was, (now CJN) (Pt. 46), paragraphs C-E. Also OCHIBA vs. THE STATE (2011) 12 SC (Pt. IV) page 79 per Rhodes-Vivour, JSC (Pages 51-52) paragraphs F-B; CAMEROON AIRLINES vs. OTUTUIZU (2011) 12 SC (Pt. III) 200; OLOWU vs. NIG. ARMY (2011) 12 SC (Pt. 11) 1; AROWOLO vs. OLOWOOKERE & 2 Ors (2011) 11-12 SC (Pt. II) 98. *(P 209 Paras B - D).*

4. *The Nature and purport of S. 222 of the Criminal Procedure Code*
Again, the above finding also becomes inevitable given the provisions of Section 222 of the CPC to the effect that:-

> **"No error in stating either the offence or the particulars required to be stated in the charge and no omission to state in the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was infact misled by such error or omission and it has occasioned a failure of justice".** *(P 209 Paras D - F).*

5. *The Nature and purport of Ss. 288 and 382 of CPC*
Also compelling are the provisions of Sections 288 and 382 of the Criminal Procedure Code, which state respectively (repeated for emphasis).

Section 288 of the CPC

"A court exercising appellate jurisdiction shall not in exercise of such jurisdiction interfere with the finding or sentence or other order of the lower court on the ground that only that evidence has been wrongly admitted or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity. *(P 209 Paras F - I).*

6. *The Nature and purport of S. 382 of Criminal Procedure Code*
Section 382 of the CPC

"Subject to the provisions of herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the appeal or reviewed on account of any error, omission or irregularity in the complaint, summons warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Criminal Procedure Code unless the Appeal Court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity." *(P 210 Para A - D).*

7. *The meaning of confession*
Moreover, by virtue of the provisions of S. 28 of the Evidence Act, confessional statement is tenable and admissible. The section

describes confessional statement thus:-

> **"A confession is an admission made at any time by a person charged with a crime tending to show or suggest the inference that he committed the crime."**

Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. In the instant appeal, it is a combination of a confessional statement and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. This has been settled position in our jurisprudence of criminal justice. See for example PATRICK IKEMSONS & 2 ORS vs. THE STATE (1989) 3 NWLR (Pt. 110) 455 at 476 paragraph D; JOSEPH IDOWU vs. THE STATE (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt. 680) at 48; NKWUDA EDAMINE vs. THE STATE (1996) 3 NWLR (Pt. 438) 530 at 537 paragraphs D – E; SAMUEL THEOPHILUS vs. THE STATE (1996) 1 NWLR (Pt. 423) 139 at 155 paragraphs A – B; and AWOPEJU vs. THE STATE (2002) 3 MJSC 141 at 151. *(P 210 Paras D - H).*

8. *Confessional statement is the best evidence and can be relied solely for the conviction of the accused.*

This court per the learned Onnoghen, JSC, as he then was (now CJN) in PETER ILIYA AZABADA vs. THE STATE (2014) All FWLR (Pt. 751) 1620 paragraph B has made it abundantly clear in the following words:-

> **"The confessional statement of an accused, where it is direct, positive and unequivocal as to the commission of the crime charged is the best evidence and can be relied upon solely for conviction of the accused person. An accused person can be convicted on his confessional statement alone, where the confession is consistent with**

other ascertained facts which have been proved".
"Confession in criminal procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than evidence of an eye witness because the evidence comes from the horse's mouth who is the accused person. There is no better evidence and there is no further proof. Therefore, where an accused person confesses to a crime in the absence of an eye witness to the killing, he can be convicted on his confession alone once the confession is positive direct and properly proved. In other words a free and voluntary confession of guilt, direct and positive and if duly made and satisfactorily proved, is sufficient without corroborative evidence so long as the court is satisfied as to the truth of the confession." *(P 211 Paras A - F).*

Per Bage (JSC)
In the instant appeal, the court is not left in any confusion, as the appellant and his co-accused informed the trial court that, the appellant used the belt to separate the fight between the deceased and co-accused. This is corroborative evidence to the eye witness account of PW.1 and PW.2. These witnesses gave a vivid account of what they saw and heard at scene. They confirmed that the appellant and Auwalu Abubakar (the co-accused) had caused the death of the deceased. Abubakar Dayyabu, by jointly beating him with a belt and other instruments with knowledge that death was the probable consequences of their act. Their evidence was found to be credible, cogent and unequivocal same having not been discredited, or controverted under cross-examination. The appellant had attempted to use motive as a shield, that he used the belt to separate the fight between the deceased and the co-accused person. This court, has consistently maintained that proof of motive on the part of an accused on a charge of murder is not a *sine qua non* to his conviction for the offence yet if evidence of motive is available it is not only a relevant fact but also admissible under Section 9 of the Evidence Act. See: JIMOH ISHOLA vs. THE STATE (1978) 9 AND

10 S.C 81 at 104; YEKINI WAHABI OKUNNU vs. THE STATE (1977) 3 S.C 151 at 161. The appellant did not produce evidence of motive, beyond the mere mention of the use of the belt to separate the fight between the deceased person and the co-accused.

This mention of motive, is not sufficient evidence to dislodge the eye witness account of PW.1 and PW.2, who had witnessed, helplessly, the rain of beating, with the use of the said belt by the appellant which had contributed to the death of the deceased person. *(Pp 211 - 212 Paras F - D).*

9. *Onus on prosecution in criminal cases*

Before concluding, let me state that, it is a cardinal requirement of our criminal justice system that the prosecution must prove its case beyond all reasonable doubt. See MUKA vs. THE STATE (1979) 9-10 SC. 305; ANEKWE vs. THE STATE (1976) 8-10 SC. 225. This means every ingredient of an offence must be established to that standard to proof so as to leave no reasonable doubt of the guilt of an accused. This certainly applied to the cause of death in homicide cases where the prosecution must prove with certainty the cause of death and that it is due to the act of the accused.

It is not a matter of probability but of certainty. *(P 212 .Paras D - G).*

10. *Elements of murder*

It is well settled that a charge of murder is established when the prosecution proves the following beyond reasonable doubt, that (a) the deceased has died, (b) that death of the deceased has resulted from the act of the accused (c) that the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence. See: AKINFE vs. THE STATE (1988) 3 NWLR (Pt. 85) 729; ONAH vs. THE STATE (1985) 3 NWLR (Pt. 12) 236. The prosecution in this case had successfully discharged the burden of proof placed upon it by law and by so doing proved its case against the appellant at the trial court. There were no material

contradiction in the prosecution evidence to warrant any attention by court at trial and at the Court of Appeal. The Court of Appeal was right when it affirmed the decision of the trial court sentencing the appellant to death because there was cogent, credible and unequivocal evidence that linked the appellant with the offence. I do not find any reason to disturb the concurrent findings of the two lower courts, not shown to be perverse, or had occasioned a miscarriage of justice.

Having resolved the two issues in the appeal against the appellant, the appeal is devoid of merit, and it is hereby dismissed. The decision of the lower court affirming the sentence and conviction of the appellant is hereby affirmed by me. *(Pp 212 - 213 Paras G - C).*

11. *Medical evidence is relevant to establish cause of death*
If there is no medical evidence available to establish the cause of death, there must be compelling evidence that the deceased died as a result of an act or omission of the person charged with causing the death of the deceased. Where such evidence is not available the case cannot be said to have been proved beyond reasonable doubt. In examining compelling evidence it must be done fairly to see if inferences consistent with the innocence of the accused person can be made. See Amayo vs. State (2001) 12 SC (Pt. 1) p.1. *(Pp 213 - 214 Paras H - A).*

12. *Evidence of eye witness was not destroyed under cross-examination*
The record showed that PW1 and PW2 were eye witnesses to the killing of the deceased by the appellant and the co-accused and the manner of that killing the accounts rendered by these witnesses especially PW1 and PW2 who saw and heard at the scene was credible, cogent and unequivocal and nothing was done to discredit the said eye witnesses under cross-examination. Therefore the evidence remained unchallenged and the two courts below anchored their findings thereon which concurrent findings are difficult to disturb there being no perversity or miscarriage of justice or that

the findings came from outside the record before. *(P 222 Paras E - G).*

13. *Court can make inference from facts before it*
Also the cry by the appellant of the absence of a medical report on the cause of death has not dainted the weight of evidence as there was more than enough from which the court can infer the cause of death and at whose hand.

The concern of the appellant of the court below stating its view on the cause of death is misplaced as the court was within its powers to make the deduction or inference from the facts available to it. See Ada vs. State (2008) 13 NWLR (Pt. 1103) 149 at 166; Ebeinwe vs. State (2011) 17 NWLR (Pt. 1246) 402 at 416; Alao vs. State (2015) 17 NWLR (Pt. 1488) 245 at 269; Idiok vs. State (2008) 13 NWLR (Pt. 1104) 225 at 240; Ben vs. State (2006) 16 NWLR (Pt. 1006) 582; Owhoruke vs. COP (2015) 15 NWLR (Pt. 1483) 557 at 581; Abogede vs. State (1996) 4 SCNJ 223 at 233; Babatunde vs. State (2014) 2 NWLR (Pt. 1391) 298 at 321. *(Pp 222 - 223 Paras G - B).*

14. *Medical evidence is not only the way of proving cause of death*
Admittedly, in the offence of culpable homicide or murder, the prosecution is duty bound to prove the cause of death of the deceased which also must be linked to the act of the accused person. Cause of death could be established through medical evidence or post mortem report. That however could not be the only method of proving death of a deceased victim, because medical evidence ceases to be of practical necessity especially in situation where the deceased died almost immediately from the act of the accused, as in this instant case. See Ben vs. State (2006) 16 NWLR (Pt. 1006) 582; Uguru vs. State (2002) 9 NWLR (Pt. 771) 90; Alarape vs. The State (2001) LRCN 634; Babuga vs. The State (1996) 7 NWLR (Pt. 460) 279.

In this instant case, there is compelling and reliable evidence from the testimonies of PW1 and PW2 who were eye witnesses to the commission of the offence, who testified that the 1st accused stabbed

the deceased on his back and the deceased fell down, while the second accused (the appellant) continued to beat him with a belt on his forehead. In this instant case therefore, the tendering of medical or post mortem report was not of necessity and therefore not fatal to the case of the respondent/prosecution. *(Pp 223 - 224 Paras G - C).*

15. *Attitude of Supreme Court to concurrent findings*
Finally, it is noted by me, that in this instant appeal there are concurrent findings of both the trial court and the court below confirming the guilt of the appellant or that the respondent did prove its case against him beyond reasonable doubt. This court as a matter of practice and policy does not interfere with or disturb the findings of two lower courts, except in a situation where it finds the findings as perverse or that there is misconception of facts or misapplication of law either procedural or substantive. See Ochiba vs. The State (2011) 12 SC (Pt. IV) 79; Arowolo vs. Olowookere & 2 Ors (2011)11-12 SC (Pt. 11) 98. I am unable to say that any of these viruses exist in the findings of the two courts below as would warrant me to interfere with or disturb such findings. *(P 224 Paras C - F.).*

Nigerian cases cited
Abogede vs. State (1996) 4 SCNJ 223
Ada vs. State (2008) 13 NWLR (Pt. 1103) 149
Ajakaiyi vs. Idehai (1994) 8 NWLR (Pt. 364) 504
Akinfe vs. The State (1988) 3 NWLR (Pt. 85) 729
Alao vs. State (2015) 17 NWLR (Pt. 1488) 245
Alarape vs. The State (2001) LRCN 634
Amayo vs. State (2001) 12 SC (Pt. 1) p.1.
Anekwe vs. The State (1976) 8-10 SC. 225
Arabambi vs. Advance Beverages Ind. Ltd. (2005) 19 NWLR (Pt. 959)
Arowolo vs. Olowookere & 2 Ors (2011) 11-12 SC (Pt. II) 98
Artra Ind. Ltd vs. NBCI (1997) 1 NWLR (Pt. 483) 574
Awopeju vs. The State (2002) 3 MJSC 141
Babatunde vs. State (2014) 2 NWLR (Pt. 1391) 298

Babuga vs. The State (1996) 7 NWLR (Pt. 460) 279.
Ben vs. State (2006) 16 NWLR (Pt. 1006) 582
Benson vs. Nigeria Agip Co. Ltd (1982) 5 SC. 1
Cameroon Airlines vs. Otutuizu (2011) 12 SC (Pt. III) 200
Dakat vs. Dashe (1997) 12 NWLR (Pt. 531) 46
Ebeinwe vs. State (2011) 17 NWLR (Pt. 1246) 402
Idiok vs. State (2008) 13 NWLR (Pt. 1104) 225
Ishola vs. The State (1978) 9 AND 10 S.C 81
Joseph Idowu vs. The State (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt. 680)
Makeri Smelting Co. Ltd vs. Access Bank (Nig.) Plc (2002) 7 NWLR (Pt. 766) 447
Muka vs. The State (1979) 9-10 SC. 305;
Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt. 438) 530
Ochiba vs. The State (2011) 12 SC (Pt. IV) 79;
Olowu vs. Nig. Army (2011) 12 SC (Pt. 11) 1;
Onah vs. The State (1985) 3 NWLR (Pt. 12) 236
Owhoruke vs. COP (2015) 15 NWLR (Pt. 1483) 557
Patrick Ikemsons & 2 Ors vs. The State (1989) 3 NWLR (Pt. 110) 455
Peter Iliya Azabada vs. The State (2014) All FWLR (Pt. 751) 1620
Samuel Theophilus vs. The State (1996) 1 NWLR (Pt. 423) 139
Uguru vs. State (2002) 9 NWLR (Pt. 771) 90;
Ugwu vs. Ararume (2007) 12 NWLR (Pt. 1048) 369
Yekini Wahabi Okunnu vs. The State (1977) 3 S.C 151 .

Nigerian statues cited
The Criminal Procedure Code; Sections 222; 288 and 382
The Evidence Act; Section 28
The Penal Code; Section 221

Representation
O. M. Atoyebi with **D. S. Danboyi, O.D. Anjorin, L.B Tairu and A.T. Ngada**, for the Appellant.

S.B. Umar, D.P.P. Katsina State Ministry of Justice with **Abdurrahman**

Umar, ADPP and **M.U. Abdullahi**, State Counsel, Kastina State Ministry of Justice, for the Respondent.

SIDI DAUDA BAGE, (JSC) (Delivering The Lead Judgment):

This appeal emanated from the judgment of Court of Appeal, Kaduna Judicial Division, Kaduna State, CORAM: UWANI MUSA ABBA AJI, ABDUL ABOKI and HABEEB A.D. ABIRU, JJCA (hereinafter referred to as the "lower court)" delivered on 22nd May, 2015, wherein, the lower court affirmed the decision of the Katsina State High Court of Justice, Katsina Judicial Division (hereinafter referred to as "trial court') delivered on 24th April, 2012.

The lower court affirmed the judgment of the trial court which convicted the appellant herein for the offence of culpable homicide punishable with death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death with one other accused person. The judgment of the trial court is contained at pages 40-54 of the record of appeal while the judgment of the lower court can be found at pages 127-147 of the record of appeal.

The appellant herein was disgruntled with the judgment of the lower court and appealed to this honourable court based on the notice of appeal adumbrated at pages 157 -161 of the transcribed record of appeal. The said notice of appeal contains only three (3) grounds of appeal.

Statement of Fact Relevant to This Appeal

By a charge dated 19th June, 2008, the appellant with one other accused person were charged by the respondent at the trial court with the act of forming common intention to commit offence of culpable homicide punishable with death under Section 221 of the Penal Code in furtherance of which they allegedly caused the death of one Abubakar Dayyabu by doing an act to wit: by beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of the act and thereby committed an offence punishable under Section 221 of the Penal Code.

The appellant and the other co-accused person (i.e. AUWALU ABUBAKAR) were tried, convicted and sentenced to death by the trial court. The appellants (at the lower court) were dissatisfied with the decision of the

trial court and appealed to the lower court upon four grounds of appeal and five grounds of appeal filed by the 1st and 2nd appellants respectively. See pages 55 – 65 of the record of appeal.

The lower court in its considered judgment dismissed the appeal and affirmed the judgment of the trial court. It is against the said judgment that this appeal before this honourable court was filed.

Appellants' Issues for Determination

"(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1).

(b) Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect (Grounds 2 and 3)".

Respondent's Issues for Determination

"(1) The appellant has formulated two issues for the determination of this honourable court which appeared on P. 6 of his brief.

(2) The respondent herein adopts the two issues as formulated by the appellant".

Consideration and Resolution of the Issues

On issue number 1, the contention of the learned counsel for the appellant is that, the prosecution has failed woefully to discharge the burden of proof placed upon it by the law in this matter considering the material contradictions that emanated from the various pieces of evidence adduced by its witnesses. It is trite law that the onus of proof beyond reasonable doubt against the accused person remains on the prosecution throughout, and it does not shift. That is the purport of Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 and Section 135(1) Evidence Act Cap. E14; 2011. See, **UDOSEN Vs. THE STATE** (2007) 4 NWLR (Pt. 1023) 125 at 162 D-G;

THE STATE Vs. AJIE (2000) 7 SCNJ 1 at 14; **OFORLETE Vs. THE STATE** (2000) 12 NWLR (Pt. 681) 415 at 437 paragraphs B-C and **AIGBADION Vs. THE STATE** (2000) 7 NWLR (Pt. 666) 703 paragraph E and 740 paragraph B. In the instant case the prosecution has not successfully linked the appellant herein with the death of the deceased person and his conviction is liable to be quashed.

The learned counsel for the appellant contended further that, the prosecution witnesses (i.e. PW.1 –PW.5) who testified before the trial court did not establish that there was an agreement (if any) between the appellant herein and the other co-accused person (who is now a convict) to commit any offence or to kill the deceased or any person at all in this matter or any other matter.

PW.1 and PW.2 made reference to the appellant herein that he beat the deceased with belt, they did not testify that there was an agreement between the 1st and 2nd accused persons to kill the deceased above all, the evidence adduced by the P.W1 and PW.2 concerning the appellant (2nd accused person at the trial court) contradicts each other, therefore their evidence in that respect is not reliable. PW.1 (Rose Friday) gave evidence at pages 10-12 of the record of appeal, while the PW.2 (Hellen Friday) has her own testimony at pages 12-16 of the record of appeal. From the evidence of PW.1, the 1st accused person had been at the scene of the crime dragging issues with PW. 1, PW.2, the deceased person, and one Bishir for a long period before the arrival of the 2nd accused person (the appellant herein). It is also on record that PW.1 testified that she went on top of the body of the deceased (Abu) absorbing the beating by the appellant however, this aspect of her evidence contradicts that of the PW.2 who was also an eye witness because PW.2 never testified that PW.1 was on top of the body of the deceased to absorb the beating by the appellant herein. This contradiction in the evidence of PW.1 and PW.2 is very fatal and cannot be brushed aside because it has created doubt in the mind of the court which should be resolved in favour of the appellant.

It is trite that the trial courts should never form impression or base their decisions on contradictory evidence See **ONUCHUKWU vs. THE STATE** (1998) 4 NWLR (Pt. 547) 576 at 588 – 589 paragraphs D-H. In his defence the appellant herein denied the allegation of conspiracy and culpable homicide emphatically and unequivocally. He also denied the allegation of conspiracy

A and the lower court found that there was no conspiracy between them. His evidence remains unchallenged and uncontradicted, the trial court and the lower court ought to have believed and acted on the evidence and their failure to so do has occasioned a great miscarriage of justice against the appellant. See
B **OKOEBOR vs. POLICE COUNCIL** (2003) 12 NWLR (Pt. 834) 444 at 474 paragraphs F-H; **ARABAMBI vs. ADVANCE BEVERAGES IND. LTD** (2005) 19 NWLR (Pt. 959) 1 at 33 paragraphs F-G; **MUKA Vs. THE STATE** (1976) 9-10 sc 193. (The court cannot pick and close which witness to believe
C among witnesses). Ingredients of conspiracy not established.

Learned counsel further contended that, it is trite law that, when there is contradiction in the evidence of the prosecutions witnesses, reasonable doubt is created which must be resolved in favour of the accused person that is the appellant herein. See **ONUCHUKWU vs. THE STATE** (Supra) **TIJJANI**
D **SHEHU vs. THE STATE** (2010) 41 NSCQR 1280 at 1308; **OFORLETE vs. THE STATE** (Supra) (2000) 12 NWLR (Pt. 648) 169 at 177; **INUSA SAIDU vs. THE STATE**(1982) 13 SC 70; **ONIGBOGWU vs. THE STATE** (1974) 9 SC p.1; **MUKA vs. THE STATE** (1976) 9-10 sc 193. It is settled principle of
E law that where in a criminal charge or in a criminal trial there are inconsistencies contradictions or conflicts in the prosecutions case, it is not the function of the court to offer explanation, it is for the prosecution to explain the circumstances of the contradiction and prove its case beyond reasonable doubt,
F court should resolve this issue in favour of the appellant.

On issue two (2), the learned counsel for the appellant contended that Sections 80 and 81 of the Penal Code relied upon by the lower court are not applicable to the case at hand because the intention of the appellant herein when
G he intervened in the fight that ensued between the deceased and the 1st accused person (1st appellant at the lower court) was to put an end to the fight by using belt to separate them as indicated and in the evidence of the 1st accused person (1st appellant at the lower court) at page 40 of the record of appeal, the appellant as DW.1 testified that:-

H
> **"…Someone tried to stop the fight but he could not. I used a belt to separate them."**

DW. 2 (1st appellant at the lower court) corroborated the evidence of the appellant herein when he testified before the trial court as follows:-

I

A **"Another person passing by tried to separate us but we did not stop. There is the 2nd accused (the appellant herein) came with a belt and separated us by beating us with the belt."**

The above pieces of evidence were not challenged nor contradicted, they are
B therefore deemed admitted.

Learned counsel contended further that it is trite law that prosecution cannot go below "proof beyond reasonable doubt" to ground conviction of the appellant herein otherwise appellants presumption of innocence
C constitutionally will be tempered with and breached, which is null and void. See:- **OFORLETE vs. THE STATE** (Supra) and **THE STATE vs. AJIE** (Supra). We pray the court to resolve this issue in favour of the Appellant.

In its collective response to the arguments of the appellant, on the two (2)
D issues, the State through its counsel contended on issue one that, the respondent had at the trial court proved its case against the appellant beyond reasonable doubt as required by the law. The burden was discharged through credible and qualitative evidence, the evidence of PW.1 and PW.2 at pages 10-14 of the record. The PW.1 and PW.2 were eye witnesses to the incident leading to the
E death of the deceased in this case. They gave qualitative evidence of what they witnessed linking the appellant with the charge. Their evidence was never contradicted under cross-examination.

The learned counsel for the respondent further contended that, the
F appellant's submission on page 11 that the evidence of PW.1 and PW. 2 were contradictory reason being that while P.W.1 informed the court that she went on top of the deceased to absorb the beatings from the appellant, PW.2 on the other hand did not state such in her evidence.

G Our position is that what is contained in the evidence of PW.1 and PW.2 was a mere discrepancy which did not go to the root of the charge or substance of the case against the appellant.

Such minor discrepancy or contradictions that are not substantial are not
H fatal to the prosecutions case. See **OKANLAWON vs. THE STATE** (2015) 17 NWLR (Pt. 1489) 445 at 291-292 paragraphs G – A. The learned counsel for the respondent contended further that, by the combined effect of the Provisions of Sections 80 and 81 of the Penal Code, the appellant was guilty of the offence charged.

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A The trial court was therefore right in convicting and sentencing him to death, the lower court was also right when it affirmed the trial court's decision. For ease of reference the sections provide thus:

Section 80:

B **"Whenever an act which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons who join in the act with such knowledge orientation. Is liable for the act in the same manner as if the act were done**
C **by him alone with that knowledge or intention"**

Section 81:

"When an offence is committed by means of several acts whoever intentionally co-operate in the commission of that
D **offence by doing any of those acts either singly or jointly with any other person, commit that offence."**

From the evidence of PW.1 and PW.2 it is crystal clear that it was the
E joint acts of the appellant and his co-accused that caused the death of the deceased. The lower court was therefore right when it affirmed the judgment of the trial court.

On issue No. 2, the learned counsel for the respondent contended that, the lower court was right when it affirmed the decision of the trial court. The
F respondent had at the trial court led credible, cogent and unequivocal evidence against the appellant.

It is on record that PW.1 and PW.2 where eye witnesses to the killing of the deceased by the appellant and his co-accused. These witnesses gave a vivid
G account of what they saw and heard at the scene, their evidence was credible, cogent and unequivocal same having not been discredited, or controverted under cross-examination. They remained unshaken throughout the trial. On the unchallenged evidence of the prosecution, See: **ADA Vs. THE STAATE**
H (2008) 13 NWLR (Pt. 1103) 149 at 166 paragraphs F – G, this court held thus:

"A trial court will fail in its duty if it fails, refuses or neglects to convict on the evidence of the prosecution which is unchallenged and uncontroverted".

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A See also **EBEINWE vs. THE STATE** (2011) 17 NWLR (Pt. 1246) 402 at 416 paragraphs D-E; **ALAO vs. THE STATE** (2015) 17 NWLR (Pt. 1488) 245 at 269 paragraphs E – F; **IDIOK vs. THE STATE** (2008) 13 NWLR (Pt. 1104) 255 at 240 paragraphs F-G.

B The learned counsel for the respondent submitted finally that it is not the attitude of this court to disturb or overturn the concurrent findings of the two lower courts unless they are perverse or occasioned a miscarriage of justice. See: **EMEKA vs. THE STATE** (2014) 13 NWLR (Pt. 1425) 614 at 637-638 C paragraphs H-B. The Concurrent findings of the two lower courts in the instant case were not perverse. The appeal should be dismissed for lacking in merit and to affirm the decision of the lower court.

The totality of the evidence presented in this case leaves this court with little or no room to arrive at a different conclusion with the trial and lower court. D This stems from the fact that the duty of court is to interpret the statute in accordance with the intention of the law makers. In **UGWU Vs. ARARUME** (2007) 12 NWLR (Pt. 1048) 369 at 498 this court stated thus:-

E **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of** F **the legislature"**

Courts generally have deliberately shifted away from narrow technical approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. See **MAKERI SMELTING CO. LTD vs.** G **ACCESS BANK (NIG.) PLC** (2002) 7 NWLR (Pt. 766) 447 at 476 – 477.

"The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that case should always be decided, whenever possible on H **merit. Blunders must take place from time to time, and it is unjust to hold that because a blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the** I **merits."**

See also **AJAKAIYI vs. IDEHAI** (1994) 8 NWLR (Pt. 364) 504; **ARTRA IND LTD vs. NBCI** (1997) 1 NWLR (Pt. 483) 574; **DAKAT vs. DASHE** (1997) 12 NWLR (Pt. 531) 46; **BENSON vs. NIGERIA AGIP CO. LTD** (1982) 5 SC. 1.

Further more, the law is that this court will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such findings are perverse, or are not supported by the evidence, or are reached as a result of a wrong application of any principle of substantive law or procedure. See **ARABAMBI vs. ADVANCE BEVERAGES IND. LTD.** (2005) 19 NWLR (Pt. 959) 1 per Onnoghen, JSC as he then was, (now CJN) (Pt. 46), paragraphs C-E. Also **OCHIBA vs. THE STATE** (2011) 12 SC (Pt. IV) page 79 per Rhodes-Vivour, JSC (Pages 51-52) paragraphs F-B; **CAMEROON AIRLINES vs. OTUTUIZU** (2011) 12 SC (Pt. III) 200; **OLOWU vs. NIG. ARMY** (2011) 12 SC (Pt. 11) 1; **AROWOLO vs. OLOWOOKERE & 2 Ors** (2011) 11-12 SC (Pt. II) 98.

Again, the above finding also becomes inevitable given the provisions of Section 222 of the CPC to the effect that:-

> **"No error in stating either the offence or the particulars required to be stated in the charge and no omission to state in the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was infact misled by such error or omission and it has occasioned a failure of justice".**

Also compelling are the provisions of Sections 288 and 382 of the Criminal Procedure Code, which state respectively (repeated for emphasis).

Section 288 of the CPC

> **"A court exercising appellate jurisdiction shall not in exercise of such jurisdiction interfere with the finding or sentence or other order of the lower court on the ground that only that evidence has been wrongly admitted or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity.**

Section 382 of the CPC

"Subject to the provisions of herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the appeal or reviewed on account of any error, omission or irregularity in the complaint, summons warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Criminal Procedure Code unless the Appeal Court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity."

Moreover, by virtue of the provisions of S. 28 of the Evidence Act, confessional statement is tenable and admissible. The section describes confessional statement thus:-

"A confession is an admission made at any time by a person charged with a crime tending to show or suggest the inference that he committed the crime."

Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. In the instant appeal, it is a combination of a confessional statement and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. This has been settled position in our jurisprudence of criminal justice. See for example **PATRICK IKEMSONS & 2 ORS vs. THE STATE** (1989) 3 NWLR (Pt. 110) 455 at 476 paragraph D; **JOSEPH IDOWU vs. THE STATE** (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt. 680) at 48; **NKWUDA EDAMINE vs. THE STATE** (1996) 3 NWLR (Pt. 438) 530 at 537 paragraphs D – E; **SAMUEL THEOPHILUS vs. THE STATE** (1996) 1 NWLR (Pt. 423) 139 at 155 paragraphs A – B; and **AWOPEJU vs. THE STATE** (2002) 3 MJSC 141 at 151.

A This court per the learned Onnoghen, JSC, as he then was (now CJN) in **PETER ILIYA AZABADA vs. THE STATE** (2014) All FWLR (Pt. 751) 1620 paragraph B has made it abundantly clear in the following words:-

> **"The confessional statement of an accused, where it is direct,**
> B **positive and unequivocal as to the commission of the crime charged is the best evidence and can be relied upon solely for conviction of the accused person. The accused person can be convicted on his confessional statement alone, where the**
> C **confession is consistent with other ascertained facts which have been proved".**
>
> **"Confession in criminal procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than evidence of an eye witness because the evidence comes from**
> D **the horse's mouth who is the accused person. There is no better evidence and there is no further proof. Therefore, where an accused person confesses to a crime in the absence of an eye witness to the killing, he can be convicted on his**
> E **confession alone once the confession is positive direct and properly proved. In other words a free and voluntary confession of guilt, direct and positive and if duly made and satisfactorily proved, is sufficient without corroborative**
> F **evidence so long as the court is satisfied as to the truth of the confession."**

In the instant appeal, the court is not left in any confusion, as the appellant and his co-accused informed the trial court that, the appellant used the
G belt to separate the fight between the deceased and co-accused. This is corroborative evidence to the eye witness account of PW.1 and PW.2. These witnesses gave a vivid account of what they saw and heard at scene. They confirmed that the appellant and Auwalu Abubakar (the co-accused) had
H caused the death of the deceased, Abubakar Dayyabu, by jointly beating him with a belt and other instruments with knowledge that death was the probable consequences of their act. Their evidence was found to be credible, cogent and unequivocal same having not been discredited, or controverted under cross-
I examination. The appellant had attempted to use motive as a shield, that he

A used the belt to separate the fight between the deceased and the co-accused person. This court, has consistently maintained that proof of motive on the part of an accused on a charge of murder is not a ***sine qua non*** to his conviction for the offence yet if evidence of motive is available it is not
B only a relevant fact but also admissible under Section 9 of the Evidence Act. See: **JIMOH ISHOLA vs. THE STATE** (1978) 9 AND 10 S.C 81 at 104; **YEKINI WAHABI OKUNNU vs. THE STATE** (1977) 3 S.C 151 at 161. The appellant did not produce evidence of motive, beyond the
C mere mention of the use of the belt to separate the fight between the deceased person and the co-accused.

This mention of motive, is not sufficient evidence to dislodge the eye witness account of PW.1 and PW.2, who had witnessed, helplessly,
D the rain of beating, with the use of the said belt by the appellant which had contributed to the death of the deceased person.

Before concluding, let me state that, it is a cardinal requirement of our criminal justice system that the prosecution must prove its case
E beyond all reasonable doubt. See **MUKA vs. THE STATE** (1979) 9-10 SC. 305; **ANEKWE vs. THE STATE** (1976) 8-10 SC. 225. This means every ingredient of an offence must be established to that standard to proof so as to leave no reasonable doubt of the guilt of an accused. This
F certainly applied to the cause of death in homicide cases where the prosecution must prove with certainty the cause of death and that it is due to the act of the accused.

It is not a matter of probability but of certainty. It is well settled that
G a charge of murder is established when the prosecution proves the following beyond reasonable doubt, that (a) the deceased has died, (b) that death of the deceased has resulted from the act of the accused (c) that the act of the accused was intentional with knowledge that death or grievous
H bodily harm was its probable consequence. See: **AKINFE vs. THE STATE** (1988) 3 NWLR (Pt. 85) 729; **ONAH vs. THE STATE** (1985) 3 NWLR (Pt. 12) 236. The prosecution in this case had successfully discharged the burden of proof placed upon it by law and by so doing
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A proved its case against the appellant at the trial court. There were no material contradiction in the prosecution evidence to warrant any attention by court at trial and at the Court of Appeal. The Court of Appeal was right when it affirmed the decision of the trial court sentencing the B appellant to death because there was cogent, credible and unequivocal evidence that linked the appellant with the offence. I do not find any reason to disturb the concurrent findings of the two lower courts, not shown to be perverse, or had occasioned a miscarriage of justice.

C Having resolved the two issues in the appeal against the appellant, the appeal is devoid of merit, and it is hereby dismissed. The decision of the lower court affirming the sentence and conviction of the appellant is hereby affirmed by me.

D

Sidi Dauda Bage
Justice, Supreme Court

E **RHODES-VIVOUR, (JSC):** I have had the advantage of reading in draft the leading judgment of my learned brother, **Bage JSC.** I agree with his lordships reasoning and conclusions. The appellant and his co-accused were found guilty and sentenced to death for the offence of culpable F homicide contrary to section 221 of the Penal Code. There was no medical evidence or Postmortem Report of the cause of death, so I ask the question:

G **What evidence is necessary for a conviction for Murder where there is no medical evidence as to the cause of death?**

If there is no medical evidence available to establish the cause of H death, there must be compelling evidence that the deceased died as a result of an act or omission of the person charged with causing the death of the deceased. Where such evidence is not available the case cannot be said to have been proved beyond reasonable doubt. In examining compelling

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A evidence it must be done fairly to see if inferences consistent with the innocence of the accused person can be made. See **Amayo vs. State** (2001) 12 SC (Pt. 1) p.1.

B PW. 1 testified on oath thus:

> **"He was trying to stab me on my back but Abu intervened and the 1st accused stabbed him on his back and Abu fell down, the 2nd accused then started beating Abu with a belt on his forehead… Helen and I lifted Abu up and he was bleeding from his mouth and nose and he collapsed… He later on died…"**

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D

"He" is the co-accused. The 2nd accused is the appellant and Abu is the deceased. PW1 was cross-examined but surprisingly he was not asked a single question of the role the appellant played which led to the death of

E the deceased, or how the deceased died. The testimony of PW.1 is unchallenged and it's corroborated by PW.2

DW.1, i.e. the appellant's testimony was that he used the belt to separate them.

F There can be no doubt that the deceased (Abu) died as a result of the act of the appellant and the co-accused person. He received severe beating from the appellant to the most vulnerable part of his body, his head, and stab wounds from the co-accused person. This is compelling

G evidence that the deceased died from the severe beating received from appellant and the co-accused person. Their act caused his death. PW.1 and PW.2 are eyewitnesses to the severe beating received by the deceased. Their evidence is compelling and there is no need for medical evidence to

H establish cause of death. In the light of eyewitnesses evidence which was unshaken under cross-examination there is absolutely nothing to urge in favour of the appellant.

For this brief reason as well as those more fully given by my learned

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A brother, **Bage, JSC,** I would dismiss the appeal.
Appeal dismissed.

Olabode Rhodes-Vivour
Justice, Supreme Court

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PETER-ODILI, (JSC): I am at one with my learned brother, Sidi Dauda Bage JSC, in his reasoning culminating in the dismissal of the appeal of the appellant. To fully register my support for the decision I shall make
C some comments.

This appeal came from the judgment of the Court of Appeal Kaduna Division, Coram: Uwani Musa Abba Aji, Abdul Aboki and Habeeb A.D. Abiru JJCA or the court below or lower court delivered on 22nd May, 2015
D wherein the lower court affirmed the decision of the Katsina State High Court, delivered on the 24th April, 2012 convicting the appellant for the offence of culpable homicide punishable by death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death.

E

The detailed facts leading to this appeal are well captured in the lead judgment and no useful purpose would be derived in repeating same except for when the occasion calls for a reference to any part thereof.

F On the 15th day of February 2018, learned counsel for the appellant, O.M. Atoyebi Esq. adopted the brief of argument filed on 30/12/15 wherein were identified two issues for determination, thus:-

G **(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1)**

H **(b) Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect. (Grounds 2 and 3)**

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A Mrs. S.B. Umar, learned DPP of Katsina State for the respondent adopted the brief of argument filed on 18/2/2016 and also adopted the two issues as formulated by the appellant which I consider apt for my use.

ISSUE NO 1

B **(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses.**

C Learned counsel for the appellant contended that the prosecution failed woefully to discharge the burden of proof placed upon it by the law in this matter considering the material contradictions that emanated from the various pieces of evidence adduced by its witnesses. That the D prosecution has the onus to prove its criminal case beyond reasonable doubt. He cited **Udosen vs. State** (2007) 4 NWLR (Pt. 1023) 125 at 162.

That in respect of the offence of conspiracy, the essential ingredients of the offence were not made out, such as the agreement by E appellant or any other or others to execute an unlawful act and that the agreed act is unlawful.

For the appellant it was stated that the evidence the prosecution laid out were full of contradictions and created doubt which has to be resolved F in favour of the appellant.

He cited **Onuchukwu vs. State** (1998) 4 NWLR (Pt. 547) 576 at 588-589.

That the testimonies of the Defence witnesses which were G unchallenged ought to have been believed and in the light of those, the prosecution cannot be said to have proved its case against the appellant as required by law. He referred to **Okoebor v Police Council** (2003) 12 NWLR (Pt. 834) 444 at 474; **Arabambi vs. Advance Beverages Ind. Ltd** H (2005) 19 NWLR (Pt. 959) 1 at 33; **Muka vs. State** (1976) 9-10 SC 193 etc.

Responding, learned counsel for the respondent contended that PW.1 and PW.2 were eye witnesses to the incident leading to the death of I the deceased in this case and they gave quality evidence of what they

witnessed linking the appellant with the charge and their evidence were not contradicted under cross-examination. That the offence of conspiracy was not part of the judgment at the trial court and so the appellant erroneously in raising the issue at this point.

He relied on **Obasanjo Bello vs. FRN** (2011) 10 NWLR (Pt. 1256) 605 at 626.

That the fact that the offence of conspiracy was not proved or established against the appellant does not mean the offence of culpable homicide was not also proved since the two offences are distinct from each other and so one can be charged, proceeded and proved or established without the other. He relied on **Alufohai vs. State** (2015) 3 NWLR (Pt. 1445) 172 at 189.

He contended further that the contradictions or discrepancies in the evidence of the PW1 and PW2 were minor and being not substantial are not fatal to the prosecution's case. He cited **Okanlawon vs. State** (2015) 17 NWLR (Pt. 1489) 445 at 291-292.

That the trial court and as accepted by the court below was right to have done a proper assessment and evaluation of the prosecution witnesses whose credibility were not dainted as against the feeble denial of the appellant. He cited **Attah Vs. State** (2010) 10 NWLR(Pt. 1201) 190 at 113; **Idiok vs. State** (2008) 13 NWLR (Pt. 1104) 225 at 240; **Jimmy vs. State** (2013) 18 NWLR (Pt. 1386) 229 at 253.

The stance of the appellant is that by the way the charge was crafted, the offence of conspiracy was therein embedded and that the prosecution had not established the essential elements of conspiracy upon which the court could rightly found a conviction. It is necessary to recast the charge for the necessary clarification of what it contained and as to what part of the divide the submissions on either side the charge can be situated. This is because while the appellant contends that conspiracy was imputed, the respondent disagreeing takes the position that the charge was homicide carried out by the appellant and his co-accused and that the fact of the common intention mentioned in the charge did not convert the charge to

A that of conspiracy. The said charge reads thus:-

> **"That you (1) Auwalu Abubakar and (2) Kabiru Abdullahi all of Sabywar Unguwa Quarters, Katsina on or about 28th October 2005 at the same address, within**
>
> B **Katsina Judicial Division, had formed a common intention to commit culpable homicide punishable with death, in furtherance of which you caused the death of one ABUBAKAR DAYYABU of the same address by**
>
> C **doing an act of wit: beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of your act and thereby committed an offence punishable under section 221 of the**
>
> D **Penal Code." (Underlining is supplied for emphasis).**

Clearly the charge in my humble view did not contain a count for the offence of conspiracy as it is a distinct offence separate from the main offence. The situation is not changed on account of the use of the words,

E "common intention to commit culpable homicide" as those words were an adumbration on how the culpable homicide was effected by the two accused persons. If the prosecution intended to charge for conspiracy, it is such as must be manifestly stated in a separate and distinct count of its

F own and not an appendage. See **Obasanjo Bello vs. F.R.N**(2011) 10 NWLR (Pt. 1256) 605 at 626.

The learned trial judge at the conclusion of his judgment had held thus:-

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> **"…I therefore find the accused persons guilty of the offence of culpable homicide punishable by death pursuant to Section 221 of the Penal Code".**

H While sentencing the Appellant and one other the trial Court on page 54 held thus:-

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A **"…Having heard the plea of the learned counsel to the convicts and also having considered the fact that the convicts have no previous record of conviction and the tender age of the convicts the court however being tied by**
B **the provisions of the law leaves me no room to manoeuvre but to invoke its provisions do hereby sentence the convicts to death…"**

Indeed the appellant and the other accused were charged for
C culpable homicide punishable with death, convicted and sentenced as such and the issue of the offence of conspiracy did not arise at all either in the charge or the judgment of the trial court. On appeal to the court below it held thus:-

D **"The 1st and 2nd appellants jointly attacked the deceased, the 1st appellant stabbed the deceased with a knife and the 2nd appellant beat him with a belt on his forehead which I believe must have aggravated the cause of death of the**
E **deceased as the forehead is another sensitive part of the body."**

It is evident that the offence of conspiracy was not in the view of the Court of Appeal either and its, importation at this Apex Court on appeal
F through the submission of learned counsel for the appellant would serve no purpose whatsoever as the said offence of conspiracy was not what was presented at the trial court as charge for which the appellant at the trial court stood trial and so any references in that regard are neither here nor
G there. The reason is obvious as the brief of counsel cannot be given a place not intended for it by law and so cannot assume the position of a charge properly before court. Therefore the submissions of counsel for the appellant as to whether or not the prosecution established the offence of
H conspiracy go to no issue. See **Alufohai vs. State** (2015) 3 NWLR (Pt. 1445) 172 at 189.

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A Also to be said is the assertion by learned counsel for the appellant that there were discrepancies and contradictions in the evidence of PW1 as against that of PW2. For effect I shall state some parts of the evidence of PW1:-

B **"On 28th November, 2005, I was walking with Hellen Bishir and Abu. We went to collect cassettes and as we were coming back and the 1st accused came in our middles and removed my cap from my head. I begged him to give me my cap back and Helen also intervened asking the 1st accused why he was**

C **behaving that way and asked him to give me my cap he abused Hellen. Abu intervened and told the 1st accused to remember that it was fasting period and they were fasting and not supposed to fight. The 1st accused then confronted Abu and fight ensured. The 2nd accused came while I myself and Hellen**

D **were trying to separate the fighters. The 1st accused then turned to Hellen, and he brought a knife wanting to stab Hellen but she ran away. The 1st accused stabbed me on the side of my face but the hone of my face prevented penetration**

E **of the knife. I was injured. He was trying to stab me on my back but Abu intervened and the 1st accused stabbed him on his back and Abu fell down <u>the 2nd accused then started beating Abu with a belt on his forehead, I went on top of the</u>**

F **<u>body of Abu and I was absorbing the beating, the beating stopped…"</u>**

PW2 stated thus:

G **"…2nd accused started beating Abu with the belt on the head…"**

On the issue of discrepancy or contradictions in evidence of witnesses and what the effect would be, it needs be reiterated that it is not every discrepancy or inconsistency or contradiction in evidence of a witness or that

H witness's evidence as against another witness's version that would totally affect the prosecution's case, rather for such a damning effect, the discrepancy or contradiction must be such as has gone to the root of the matter but where such discrepancy or contradiction is not substantial, then it is not fatal to the

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prosecutions' case. See **Okanlawon vs. State** (2015) 17 NWLR (Pt. 1489) 445 at 291-292; **Jimmy vs. State** (2013) 18 NWLR (Pt. 1386) 229 at 253.

It is therefore seen why the two lower courts' findings and conclusions were in line with Section 80 and 81 of the Penal Code which I shall quote hereunder, viz:-

Section 80:

> **"Whenever an act which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons who join in the act with such knowledge orientation is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention".**

Section 81:

> "**When an offence is committed by means of several acts, whoever intentionally co-operate in the commission of that offence by doing any of those acts, either singly or jointly with any other person, commit that offence".**

From the above the issue is resolved against the appellant.

ISSUE 2:

> **Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible an unequivocal evidence to that effect.**

For the appellant it was submitted that the court below was wrong when it affirmed the decision of the trial court sentencing the appellant to death despite the fact that there was no cogent, credible and unequivocal evidence before the courts below to that effect. That there was no medical report and the Court of Appeal cannot assume the duty of a medical practitioner to offer medical opinion as done in this case. He cited **Idowu vs. State** (1998) 11 NWLR (Pt. 574) 334 at 365; **Abayomi Adelenwa vs. The State** (1972) 10 SC

A 12 at 18; **Ogundele vs. Agiri** (2009) 18 NWLR (Pt. 1173) 219 at 252.

That the failure of the prosecution to tender the post mortem report brought into operation the presumption that if it was produced would have been unfavourable to the prosecution. He cited **Section 167 (d) of the Evidence**
B **Act, 2011.**

Learned counsel for the appellant stated that in line with the case of **Abey vs. Alex** (1999) 14 WLR (Pt. 637) 148, the prosecution failed to establish a
C logical link between the act of the appellant and the death of the deceased and so appellant is entitled to a discharge and acquittal. He cited **R vs. Nwokocha (1949) 2 WACA 453.**

Learned counsel for the respondent submitted that it is not in all cases where there is no medical report that the cause of death is not established in
D homicide cases as in this case, the evidence of PW1 and PW2 provided the needed material upon which the trial court could find that essential ingredient established. That Section 167(d) of the Evidence Act 2011 did not avail the appellant. He relied on **Ali vs. State** (2015) 10 NWLR (Pt. 1466) 1 at 38; **Aliyu**
E **vs. State** (2013) 12 NWLR (Pt. 1368) 403 at 426; **Jua vs. State** (2010) 4 NWLR (Pt. 1184) 217 at 243.

The record showed that PW1 and PW2 were eye witnesses to the killing of the deceased by the appellant and the co-accused and the manner of that
F killing the accounts rendered by these witnesses especially PW1 and PW2 who saw and heard at the scene was credible, cogent and unequivocal and nothing was done to discredit the said eye witnesses under cross-examination. Therefore the evidence remained unchallenged and the two courts below
G anchored their findings thereon which concurrent findings are difficult to disturb there being no perversity or miscarriage of justice or that the findings came from outside the record before.

Also the cry by the appellant of the absence of a medical report on the cause of death has not dainted the weight of evidence as there was more than
H enough from which the court can infer the cause of death and at whose hand.

The concern of the appellant of the court below stating its view on the cause of death is misplaced as the court was within its powers to make the deduction or inference from the facts available to it. See **Ada vs. State** (2008)
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A 13 NWLR (Pt. 1103) 149 at 166; **Ebeinwe vs. State** (2011) 17 NWLR (Pt. 1246) 402 at 416; **Alao vs. State** (2015) 17 NWLR (Pt. 1488) 245 at 269; **Idiok vs. State** (2008) 13 NWLR (Pt. 1104) 225 at 240; **Ben vs. State** (2006) 16 NWLR (Pt. 1006) 582; **Owhoruke vs. COP** (2015) 15 NWLR (Pt. 1483) 557 B at 581; **Abogede vs. State** (1996) 4 SCNJ 223 at 233; **Babatunde vs. State** (2014) 2 NWLR (Pt. 1391) 298 at 321.

From the foregoing and the better reasoned lead judgment I too find no merit in this appeal which I dismiss as I abide by the consequential orders made.

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Mary Ukaego Peter-Odili
Justice, Supreme Court

D **INYANG OKORO, (JSC):** I had the advantage of reading in draft the lead judgment of my learned brother, Sidi Dauda Bage, JSC just delivered. I am in complete agreement with the reasons adduced to reach the conclusion that this appeal lacks merit and deserves an order of dismissal. Accordingly, I adopt these reasons and conclusion as mine . The decision of the lower court which E affirmed the conviction and sentence of the appellant is hereby affirmed by me.

Appeal Dismissed.

John Inyang Okoro
F *Justice, Supreme Court*

AMIRU SANUSI, (JSC): I was supplied before now, with the draft judgment of my learned brother Bage, JSC. His reasoning and conclusion that the appeal G is unmeritorious are agreeable to me.

At any rate, I will advance few comments below in support of the lead judgment especially on the issue of medical evidence establishing the cause of the death of the deceased victim. Admittedly, in the offence of culpable homicide or murder, the prosecution is duty bound to prove the cause of death H of the deceased which also must be linked to the act of the accused person. Cause of death could be established through medical evidence or post mortem report. That however could not be the only method of proving death of a deceased victim, because medical evidence ceases to be of practical necessity

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especially in situation where the deceased died almost immediately from the act of the accused, as in this instant case. See **Ben vs. State** (2006) 16 NWLR (Pt. 1006) 582; **Uguru vs. State** (2002) 9 NWLR (Pt. 771) 90; **Alarape vs. The State** (2001) LRCN 634; **Babuga vs. The State** (1996) 7 NWLR (Pt. 460) 279.

In this instant case, there is compelling and reliable evidence from the testimonies of PW1 and PW2 who were eye witnesses to the commission of the offence, who testified that the 1st accused stabbed the deceased on his back and the deceased fell down, while the second accused (the appellant) continued to beat him with a belt on his forehead. In this instant case therefore, the tendering of medical or post mortem report was not of necessity and therefore not fatal to the case of the respondent/prosecution.

Finally, it is noted by me, that in this instant appeal there are concurrent findings of both the trial court and the court below confirming the guilt of the appellant or that the respondent did prove its case against him beyond reasonable doubt. This court as a matter of practice and policy does not interfere with or disturb the findings of two lower courts, except in a situation where it finds the findings as perverse or that there is misconception of facts or misapplication of law either procedural or substantive. See **Ochiba vs. The State** (2011) 12 SC (Pt. IV) 79; **Arowolo vs. Olowookere & 2 Ors** (2011)11-12 SC (Pt. 11) 98. I am unable to say that any of these viruses exist in the findings of the two courts below as would warrant me to interfere with or disturb such findings.

On the whole, for these few remarks and the fuller and more detailed reasons contained in the lead judgment, I shall also adjudge this appeal unmeritorious and dismiss it straightaway. The appeal fails and is accordingly dismissed.

Amiru Sanusi
Justice, Supreme Court

MATTHEW IKPEKPE
VS
1. WARRI REFINERY & PETROCHEMICAL COMPANY LIMITED
2. DR. DENA

SC. 203/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES - VIVOUR	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Leave to appeal – Issue of jurisdiction – Whether does not require leave to be raised at the appellate court.

COURT: Federal High Court – Jurisdiction thereof – S. 251(1) of the CFRN 1999 – Interpretation thereof – Whether does not have jurisdiction involving matters relating to simple contracts.

COURT: Jurisdiction – Fundamental importance thereof.

COURT: Jurisdiction – How determined – Whether it is by considering the claim of the plaintiff.

COURT: State High Court – Jurisdiction thereof – Simple contract – Whether it is a State High Court rather than the Federal High Court that has jurisdiction to entertain matters relating to simple contracts.

PRACTICE AND PROCEDURE: Court of Appeal – Jurisdiction thereof – Where the Court of Appeal decides that it has no jurisdiction – Whether is proper to proceed and determine case on its merit – Rationale.

PRACTICE AND PROCEDURE: Courts – Determination of Issues – Where issues are placed before intermediate courts – Whether such courts are obliged to determine all issues so placed.

PRACTICE AND PROCEDURE: Preliminary Objection – No argument in support thereof – Whether presumed to be abandoned.

Issues for determination

1. **Whether section 230(1) (P) of the 1979 Constitution as amended by Decree No 107 of 1993 now section 251(1) (P) of the 1999 Constitution applies to action founded on breach of contract and specific performance for which the State High Court enjoys jurisdiction in line with the decision in Felix Onuorah vs. Kaduna Refinery and Petrochemical co. Ltd (2005) All FWLR (pt. 256) 1356.**
2. **Whether the Court of Appeal was right to dismiss the appeal when it did not find it necessary to consider and determine the issues identified by the appellant.**

Facts of the matter

This is an appeal against the judgment of the Court of Appeal Benin Division delivered on 4th March, 2005, wherein the court below set aside the judgment of the trial State High Court for lack of jurisdiction and struck out the claim of the appellant who was the plaintiff at the trial court.

The appellant as plaintiff sued the respondents as defendants before the High Court of Delta State, holden at Warri, claiming the following:-

1. **A declaration that the plaintiff is entitled to be employed by the first defendant as driver with effect from 12th day of June, 1987.**
2. **Order of specific performance of the contract of employment of plaintiff by the first defendant upon the successful medical test the first defendant ordered the plaintiff to undergo as a condition for the said employment as a driver II on the first defendant salary grade level 16/1.**
3. **N500,000.00 against the second defendant being damages in that on the 29th of June, 1987 the second defendant wrongfully and unlawfully and acting ultra vires and arbitrarily withheld the letter of appointment issued by the 1st defendant to the plaintiff employing the plaintiff as a driver II on the first defendant salary grade level 16/1**

The appellant in this appeal was a casual driver with the 1st respondent, Warri Refinery and Petrochemical Company Ltd; then as Petrochemical section of the NNPC at Ekpan. He applied for employment as driver II on the 1st respondent's salary grade level 16/1. In August, 1986, the appellant was interviewed along with others for regular employment with the Corporation. However, on or about 30th December, 1986, he was dismissed from service. In June, 1987, he was invited by the 1st appellant's letter to attend a medical test, a condition upon handing over to him his letter of employment by the 1st respondent which letter was alleged at the material time to be in the custody of the 2nd respondent, an employee of the 1st respondent assigned to the Petrochemical section of NNPC, Ekpan as its Project Manager. Appellant states that he passed the medical test conducted and medical report was issued to him which automatically entitled him to be employed as a driver II. That the 2nd respondent withheld the letter of employment issued by the 1st respondent to the appellant without any just cause, consequent upon which he instituted the action.

The respondents in their joint amended statement of defence denied the claim and stated that they never issued any employment letter to the appellant and that the medical test conducted by the 1st respondent was one of ***sin quo-non*** for an applicant seeking gainful employment with the corporation and that it is

not a guarantee or certainty or an assurance that the applicant is successful when such examination is conducted.
In his judgment, the learned trial Judge

Dissatisfied with the above judgment of the learned trial Judge, the Respondents herein appealed to the Court of Appeal as appellants. The lower court set aside the judgment of the High Court of Delta State on the ground that the said State High Court lacked jurisdiction to entertain the matter and to make the orders it made in the judgment.

Also dissatisfied with the judgment of the court below, the appellant has appealed to this court.

Held: *(Unanimously allowing the appeal)*

1. *Where no argument is adduced in support of preliminary objection, it is presumed to be abandoned*

The above is all that relates to the preliminary objection. There is no argument in support of the said issues raised in the notice of preliminary objection. The only reasonable conclusion would be that it has been abandoned. It is not the duty of the court to proffer argument for the respondents in support of the notice of preliminary objection or the issues raised therein. But even if there was argument in support, the law is trite that issue of jurisdiction is constitutional or statutory and therefore a matter of law. The appellant needed no leave to raise same. Moreover, issue of jurisdiction was the main and probably the only decision of the lower court. It is my view that the said issue 1 was properly raised by the appellant. See Agbule vs. Warri Refinery & Petrochemical Company Ltd (2012) LPELR – 20625 (SC), (2013) 6 NWLR (Pt. 1350) 318; NNPC & Anor vs. Orhiowasele & Ors (2013) 13 NWLR (Pt. 1371) 211; Wema Securities & Finance Plc vs. Nigeria Agricultural Insurance Co. (2015) LPELR – 24833 (SC); Western Steel Works Ltd & Anor vs. Iron Steel Workers Ltd (No. 1) 1987) 1 NWLR (Pt. 49) 284; Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592.

As the learned counsel for the respondents did not proffer any argument on the preliminary objection, I do not know why he

insisted that leave ought to have been obtained. *(Pp 240 - 241 Paras F - B).*

2. *Fundamental importance of jurisdiction*
The importance of the jurisdiction of a court cannot be over emphasized. The law is trite that jurisdiction is a threshold issue and livewire that determines the authority of a court of law or tribunal to entertain a case before it and it is only when a court is imbued or conferred with the necessary jurisdiction by the Constitution or law that it will have the judicial power and authority to entertain, hear and adjudicate upon any cause or matter brought before it by the parties. Where a court proceeds to hear and determine a matter without the requisite jurisdiction, it amounts to an exercise in futility and the proceedings and judgment generated therefrom are null, void and of no effect no matter how well conducted. See Nigeria Deposit Insurance Corporation vs. Central Bank of Nigeria & anor (2002) 7 NWLR (Pt. 766) 272; Shelim & anor vs. Gobang (2009) 12 NWLR (Pt. 1156)435; Utih vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 166, Petrojessica Enterprises Ltd & anor vs. Leventis Technical Co. Ltd (1992) 5 NWLR (Pt. 244) 675. *(P 243 Paras D - G).*

3. *How to determine jurisdiction of Courts*
The next thing I wish to determine is the nature of the claim of the appellant before the trial court. This is so because it is the claim of the Plaintiff that determines the jurisdiction of the court to entertain the suit. See Adetayo & Ors vs. Ademola & Ors (2010) 15 NWLR (Pt. 1215) 169; Abia State Transport Cooperation & Ors vs. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) P. I., Dr. Salik vs Idris & Ors (2014) 15 NWLR (Pt. 1429) 36. *(Pp 243 - 244 Paras G - A).*

4. *Federal High Court does not have jurisdiction to entertain matters relating to simple contracts.*
There is no doubt that by the above provision i.e. section 230(1) (s) of Decree 107 of 1993 which is in *pari material* with section 251(1) (s) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as

amended) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies shall be brought before the Federal High Court. I have given a thorough examination of a plethora of cases of this court on this issue and there is a consistent pronouncement that the Federal High Court does not have jurisdiction to entertain matters relating to simple contracts. It must not be forgotten that I have already held that the claim of the appellant relates to a simple contract of employment which the appellant sought specific performance. This type of claim, definitely, is not contemplated under section 230(1) (P) (s) of the 1979 Constitution as amended by Decree 107 of 1993. See Onuorah vs KRPC Ltd (2005) All FWLR (Pt. 256) 1356, Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nig. Ltd & anor (2012) 18 NWLR (Pt. 1333) 555; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33.

In Integrated Timber & Plywood Products Ltd vs. Union Bank Nigeria (2006) 12 NWLR (Pt. 995) 483, this court held emphatically that in a simple contract (as in this case), it is the High Court and not the Federal High Court that has jurisdiction to entertain and determine it. See also Eze vs. Federal Republic of Nigeria (1987) LPELR – 1193 (SC) PP 29-30 paragraphs G-F). *(P 245 Paras B - H).*

5. *It is the State High Court that has jurisdiction to entertain matters relating to simple contracts.*

In a simple contract of employment as in the instant case, there is nothing in section 230(1) of the 1979 Constitution (as amended) which shows that the Federal High Court is conferred with exclusive jurisdiction to entertain matters arising therefrom. Rather it is the State High court which continues to have jurisdiction to entertain issues connected therewith as brought by the parties for adjudication. The court below made a grave error as to the claim of the appellant before the trial court. Had the court of Appeal properly

located the claim of the appellant, I belief, their decision would have been different.

I am fully convinced that the learned trial Judge had jurisdiction to entertain the claim of the appellant herein. *(Pp 245 - 246 Paras H - B).*

6. *Intermediate courts should pronounce on all issues place before it.*
Eight issues were distilled and placed before the court below for determination. Unfortunately, only one issue (of jurisdiction) was determined by the court blow leaving untouched seven issues. This court has stated in quite a number of cases that intermediate courts should pronounce on all issues placed before it. It should not restrict it to one or more issues which its opinion may dispose of the matter. This is to give the apex court the benefit of their views in the matter should there be the need to consider other issues not determined by the intermediate court. See Chief Adebisi Adegbuyi vs. All Progressives Congress & Ors (2014) LPELR – 24214 (SC); Xtoudos Services Nig Ltd. vs. Taisei W. A Ltd (2005) WRN 46 at 37; Edem vs. Canon Balls Ltd (2005) 12 NWLR (PT. 938) 27. *(P 246 Paras C - E).*

7. *Matters of simple contract is within the jurisdiction of the State High Court*
Be that as it may, this appeal succeeds on the only issue of jurisdiction determined by the court below. This court is of the firm view that the appellant's claim i.e. enforcement of contract of employment was squarely within the jurisdiction of the Delta State High Court. The learned trial Judge was right to assume jurisdiction in the matter. The court below was therefore wrong to strike out the claim on the ground that the said court did not have jurisdiction to entertain the matter. The judgment and orders of the learned trial Judge are hereby reinstated and the lower court is ordered to determine all the other seven issues presented before it as this matter is remitted back to the Court of Appeal Benin Division f or hearing *de novo*. *(P 246 Paras E - G).*

8. *Proper procedure where the Court of Appeal says that it has no jurisdiction*

I agree with his lordship that it is the State High Courts that have jurisdiction to decide simple contract. I must also observe that this court has said on several occasions that when the penultimate court finds out that it or the trial High Court did not have jurisdiction to hear the case it should say so and proceed to give a decision on the merits. This is the procedure that must always be followed, so that if it turns out that the Court of Appeal was wrong the Supreme Court would have the benefit of a judgment on the merits from that court. Where this is not done as in this case and the Supreme Court finds that the Court of appeal was wrong on jurisdiction, the only order the top court can make is to send the case back to the Court of Appeal. This comes with huge costs and delay. See Isah vs. INEC & 3 Ors (2014) 1-2 SC (Pt. iv) p. 101; Brawal shipping (Nig) Ltd. vs. Onwadike Co. Ltd (2000) 6 SC (Pt. ii) p. 133

In view of the above, my learned brother has found the Court of Appeal to be wrong on jurisdiction and has ordered that court to hear the appeal on its merits. I am in full agreement with his lordship. *(P 247 .Paras A - E).*

9. *Issues of jurisdiction when raised do not require leave*

The issue of jurisdiction is no doubt not just an issue of law, it is a substantial issue of law. Appeal on it is therefore one of law which the appellant, in an appeal from the court below to the appellate court does not need leave first sought and obtained to appeal on. Ground two, against which the respondent half-heartedly directed his objection also raises a question of law alone. It, therefore, does not need leave of court to be brought. The respondents apparently raised the preliminary objection as a scare-crow. They did not argue it. They have abandoned it. *(P 248 Paras B - C).*

Per Eko (JSC)

"On the merits, the substance of the appellant's suit at the trial court, in my view, was the tort of detinue. The appellant's complaint at trial court was that the 2nd defendant/respondent, a servant of the 1st defendant/respondent had wrongfully detained from him the letter of employment issued to him by the 1st defendant/respondent. It is on this fact that the appellant, as the plaintiff, claimed damages against the respondents, as the defendants at the trial court. The 1st respondent, the employer/master of the 2nd respondent was apparently joined in the suit for purposes of vicarious liability it has for the liability of the 2nd respondent in the alleged tort of detinue. The Federal High Court has no jurisdiction in tort of detinue. The appropriate court , in the circumstance, was the High Court of Delta State Section 230(1) (p) & (s) of the 1979 Constitution, as introduced thereto by Decree 107 of 1993 is *in pari material* with their successors, Section 251(1) (p) & (s) of the 1999 Constitution. By these provisions, the Constitution does not intend to divest the State High Courts of their jurisdiction over disputes relating to torts or simple contracts. This Court makes the point loud and clear in ONUORAH vs. KRPC LTD (2005) ALL FWLR (Pt. 256) 1356 and all the decisions following which cited it with approval. NEPA vs. EDEGBERO (2002) 12 SC (Pt. ii) 119, an earlier decision of this Court, which held that the action for declaration and injunction, the principal purpose of which is the nullification of the decision of the defendant (NEPA, a Federal agency) terminating the appointments of the plaintiffs falls squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended, is only an authority for it decided on the peculiar facts of the case. The facts of this case distinguish it from NEPA vs. EDEGBERO (Supra). In this case the appellant, as the plaintiff, had sued *inter alia* for damages on the premise of the 2nd respondent/defendant wrongful

withholding or detaining from him his letter of appointment duly issued by the 1st respondent/defendant, which wrongful act caused him the loss of the appointment. The facts of the instant suit do not fall squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended by Decree 107. That is what distinguishes it from the EDEGBERO case (supra). This distinction is what makes ONUORAH's case applicable.

The issue at the Lower Court was whether the appellant was entitled to the N300,000.00 awarded to him, as damages for the wrongful act of the respondents, as defendants? The Lower Court, having struck out the suit, did not decide or resolve the question. They should have resolved it, in case they may be wrong as an intermediate court, on the issue of jurisdiction. The appeal before the Lower Court was not an interlocutory appeal but an appeal against final decision. It, therefore, behoved the lower court, an intermediate court, to resolve all the issues before it or express an opinion on the merits of the case. This alternative course was what this court enjoined the Lower Court to take, as can be seen from NIPOL LTD vs. BIOKU INVESTMENT & PROP. CO. LTD (1992) 23 NSCC (Pt. 1) 606 at 618; KATTO vs. CBN (1991) 9 NWLR (Pt. 214) 126 at 149.

It is unfortunate that this case has to be remitted back to the Lower Court to decide the issues they omitted to decide which thereafter could have clothed this court with jurisdiction to review. That is only course open to us, though not economical.

All orders made in the lead judgment, including the order remitting the case back to the lower court to be heard *de novo* on all the other issues, except the issue of jurisdiction just resolved herein by this Court, are hereby adopted. *(Pp 248 - 249 Paras C - H).*

Nigerian cases cited

Abia State Transport Cooperation & Ors vs. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) P. I.
Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33
Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592
Adetayo & Ors vs. Ademola & Ors (2010) 15 NWLR (Pt. 1215) 169
Agbule vs. Warri Refinery & Petrochemical Company Ltd (2012) LPELR – 20625 (SC), (2013) 6 NWLR (Pt. 1350) 318
Brawal shipping (Nig) Ltd. vs. Onwadike Co. Ltd (2000) 65C (Pt. ii) p. 133
Shelim & anor vs. Gobang (2009) 12 NWLR (Pt. 1156)435
Chief Adebisi Adegbuyi vs. All Progressives Congress & Ors (2014) LPELR – 24214 (SC);
Dr. Salik vs. Idris & Ors (2014) 15 NWLR (Pt. 1429) 36
Edem vs. Canon Balls Ltd (2005) 12 NWLR (PT. 938) 27
Eze vs. Federal Republic of Nigeria (1987) LPELR – 1193 (SC) PP 29-30
Integrated Timber & Plywood Products Ltd vs. Union Bank Nigeria (2006) 12 NWLR (Pt. 995) 483
Isah vs. INEC & 3 Ors (2014) 1-2 SC (Pt. iv) p. 101
Katto vs. CBN (1991) 9 NWLR (Pt. 214) 126
NEPA vs. EDEGBERO (2002) 12 SC (Pt. ii) 119
Nigeria Deposit Insurance Corporation vs. Central Bank of Nigeria & anor (2002) 7 NWLR (Pt. 766) 273
NIPOL LTD vs. BIOKU INVESTMENT & PROP. CO. LTD (1992) 23 NSCC (Pt. 1) 606 at 618
NNPC & Anor vs. Orhiowasele & Ors (2013) 13 NWLR (Pt. 1371) 211
Onuorah vs KRPC Ltd (2005) All FWLR (Pt. 256) 1356
Onuorah vs. Krpc LTD (2005) ALL FWLR (Pt. 256) 1356
Petrojessica Enterprises Ltd & anor vs. Leventis Technical Co. Ltd (1992) 5 NWLR (Pt. 244) 675
Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nig. Ltd & anor (2012) 18 NWLR (Pt. 1333) 555.
Utih vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 166
Wema Securities & Finance Plc vs. Nigeria Agricultural Insurance Co. (2015) LPELR – 24833 (SC).

A *Western Steel Works Ltd & Anor vs. Iron Steel Workers Ltd (1987) 2 NWLR (Pt. 179) 188*
Xtoudos Services Nig Ltd. vs. Taisei W. A Ltd (2005) WRN 46

B **Foreign cases cited**

Nigerian statutes cited
The 1979 Constitution as amended by Decree 107 of 1993 Section 230(1) (P)
C (s)
The 1999 Constitution Section 251(1) (p) & (s)

Representation
D. E. Agbaga, (Esq.) for the Appellant.
D C. D. Bello, (Esq.) for the Respondents.

INYANG OKORO, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal Benin Division delivered on
E 4th March, 2005, wherein the court below set aside the judgment of the trial State High Court for lack of jurisdiction and struck out the claim of the appellant who was the plaintiff at the trial court. A perusal of the record of appeal shows the following as the facts leading to this appeal.
F The appellant as plaintiff sued the Respondents as defendants before the High Court of Delta State, holden at Warri, claiming the following:-

4. **A declaration that the plaintiff is entitled to be employed by the first defendant as driver with effect from 12th day of June, 1987.**
G 5. **Order of specific performance of the contract of employment of plaintiff by the first defendant upon the successful medical test the first defendant ordered the plaintiff to undergo as a condition or the said employment as a driver II on the first defendant salary grade level 16/1.**
H 6. **N500,000.00 against the second Defendant being damages in that on the 29th of June, 1987 the second defendant wrongfully and unlawfully and acting ultra vires and arbitrarily withheld the letter of appointment issued by the 1st defendant to the plaintiff employing**
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the plaintiff as a driver II on the first defendant salary grade level 16/1

The appellant in this appeal was a casual driver with the 1st Respondent, Warri Refinery and Petrochemical Company Ltd; then as Petrochemical section of the NNPC at Ekpan. He applied for employment as driver II on the 1st Respondent's salary grade level 16/1. In August, 1986, the Appellant was interviewed along with others for regular employment with the Corporation. However, on or about 30th December, 1986, he was dismissed from service. In June, 1987, he was invited by the 1st Appellant's letter to attend a medical test, a condition upon handing over to him his letter of employment by the 1st Respondent which letter was alleged at the material time to be in the custody of the 2nd Respondent, an employee of the 1st Respondent assigned to the Petrochemical section of NNPC, Ekpan as its Project Manager. Appellant states that he passed the medical test conducted and medical report was issued to him which automatically entitled him to be employed as a driver II. That the 2nd Respondent withheld the letter of employment issued by the 1st respondent to the appellant without any just cause, consequent upon which he instituted the action.

The Respondents in their joint amended statement of defence denied the claim and stated that they never issued any employment letter to the appellant and that the medical test conducted by the 1st Respondent was one of ***sin quo-non*** for an applicant seeking gainful employment with the corporation and that it is not a guarantee or certainty or an assurance that the applicant is successful when such examination is conducted.

In his judgment, the learned trial Judge on page 99 of the record of appeal made the following findings and conclusions:-

"The evidence before me shows that 2nd defendant, Dr. Dena is an employee of 1st Defendant Company. I so find.

As contended in plaintiff's pleadings and in his evidence, 2nd defendant had no mandate or authority by or from 1st Defendant Company to withhold plaintiff's letter of appointment. I so find.

I have earlier found the 2nd defendant did wrongfully withheld (sic) the said letter. I so find again.

As servant of the 1st Defendant Company, 2nd defendant acted in the course of his duty, albeit wrongfully.

2nd defendant's action is wrongful and improper if he had eh authority or mandate of 1st Defendant Company to withhold plaintiff's letter of appointment Dr. Dena to have come to court to place his evidence before the court to that effect. He appears to have defiantly or arrogantly ignored this proceedings whilst the battle concerning his wrongful act was raging.

The absence of plaintiff's letter of appointment (which 2nd defendant is withholding) has to a large extent, prevented this court from granting the declaration sought by plaintiff. It has made it impossible for the court to ascertain plaintiff's entitlements, i.e. salary on appointment and fringe benefits and allowances. More importantly, plaintiff has suffered hardship and loss of earnings as a result of 2nd defendant's act which is ultra vires and wrongful. Accordingly, plaintiff is entitled to general damages. In plaintiff's alternative claim at paragraph 14(c) of his statement of claim, he claims the sum of N500,000= (five hundred thousand naira) as general damages.

Having regard to all I have said in respect of 2nd defendant's wrongful act, I award the sum of N300,000= (three hundred thousand naira) as general damages against 2nd defendant, Dr. Dena for his wrongful act of arbitrarily withholding plaintiff's letter of appointment in his capacity as servant of 1st defendant company who is vicariously liable."

Dissatisfied with the above judgment of the learned trial Judge, the Respondents herein appealed to the Court of Appeal as Appellants. The lower court set aside the judgment of the High Court of Delta Stat on the ground that the said State High Court lacked jurisdiction to entertain the mater and to make the orders it made in the judgment.

A Also dissatisfied with the judgment of the court below, the Appellant has appealed to this court. Notice of appeal was filed on 20th May, 2005 against the judgment of the court below which was delivered on 4th March 2005. There are two grounds of appeal, out of which two issues have been B distilled for the determination of this appeal.

On 12th February, 2018 when this appeal was argued, the learned counsel for the appellant, D.E. Agbaga, Esq. adopted the appellant's brief of argument filed on 16th November, 2006. The two issues alluded to above are C as follows:-

3. **Whether section 230(1) (P) of the 1979 Constitution as amended by Decree No 107 of 1993 now section 251(1) (P) of the 1999 Constitution applies to action founded on breach of contract and** D **specific performance for which the State High Court enjoys jurisdiction in line with the decision in Felix Onuorah vs. Kaduna Refinery and Petrochemical co. Ltd (2005) All FWLR (pt. 256) 1356.**
4. **Whether the Court of appeal was right to dismiss the appeal when** E **it did not find it necessary to consider and determine the issues identified by the appellant.**

Also, C.C. Bello, Esq. of counsel for the Respondents, on the same date identified and adopted the Respondent's brief of argument he filed on 15th F March, 2007 wherein he formulated two similar issues but couched differently thus:-

1. **Whether the Court of Appeal was wrong in holding that section 230(1) of the Constitution of the Federal Republic of Nigeria 1979** G **as amended by the Constitution (Suspension and Modification) Decree (Decree 107) of 1993 vested jurisdiction in the Federal High Court rather than the State High Court in the appellant's action seeking declaratory reliefs and specific performance** H **against the respondents when the 1st Respondent is an agency of the Federal Government.**
2. **Whether the Court of Appeal did not consider the appellant's case complaining that the respondents did not appeal against the order** I **of vicarious liability made by the trial court and, in any event,**

whether the decision of the Court of Appeal on the issue of jurisdiction did not dispose of the entire appeal before it.

I shall, in the circumstance of this case, determine this appeal on the two issues distilled by both parties. But before then, let me make a few comments in respect of notice of preliminary objection contained on page 4, paragraphs 3.00 – 3.04 of the Respondents' brief. It states:-

"3.00 NOTICE OF PRELIMINARY OBJECTION

6.01 At the hearing of this appeal, the respondents shall raise preliminary objection to the competence of this appeal thus:-

6.02 (1) Grounds 1 and 2 of the grounds of appeal being grounds of mixed law and facts were filed without leave of the Court of Appeal or this Honourable Court contrary to section 233 (3) of the Constitution of the Federal Republic of Nigeria 1999.

6.03 (2) The appellant cannot raise the issue of jurisdiction in his brief as he has done in issue 1 thereof without seeking or obtaining leave of this Honourable Court in that he did not argue of (sic) canvass the said issue in his brief at the Court of Appeal.

6.04 We therefore urge this Honourable Court to strike out he said issue 1 of the appellants' brief of argument and grounds 1 and 2 of the grounds of appeal for being incompetent".

The above is all that relates to the preliminary objection. There is no argument in support of the said issues raised in the notice of preliminary objection. The only reasonable conclusion would be that it has been abandoned. It is not the duty of the court to proffer argument for the respondents in support of the notice of preliminary objection or the issues raised therein. But even if there was argument in support, the law is trite that issue of jurisdiction is constitutional or statutory and therefore a matter of law. The appellant needed no leave to raise same. Moreover, issue of jurisdiction was the main and probably the only decision of the lower court. It is my view that the said issue 1 was properly raised by the appellant. See **Agbule vs. Warri Refinery & Petrochemical Company Ltd (2012) LPELR – 20625 (SC), (2013) 6 NWLR (Pt. 1350) 318;**

NNPC & Anor vs. Orhiowasele & Ors (2013) 13 NWLR (Pt. 1371) 211; Wema Securities & Finance Plc vs. Nigeria Agricultural Insurance Co. (2015) LPELR – 24833 (SC); Western Steel Works Ltd & Anor vs. Iron Steel Workers Ltd (1987) 2 NWLR (Pt. 179) 188; Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592.

As the learned counsel for the respondents did not proffer any argument on the preliminary objection, I do not know why he insisted that leave ought to have been obtained. In circumstance therefore, the preliminary objection is devoid of merit and is accordingly overruled. I shall now resolve the two issues submitted for determination which I intend to take them together.

On issue one, learned counsel for the Appellant submitted that the case of the Appellant as stated at the trial court is founded on breach of contract of employment and specific performance for which a State High Court enjoys residual jurisdiction. He stressed that it is the claim of the party which determines whether a court has jurisdiction or not.

Learned counsel submitted further that the Federal High Court is not conferred with jurisdiction to hear matters of simple contractual relationship between parties as such matters are outside the provisions of section 230(1) and (s) of the 1979 Constitution as amended by Decree 107 of 1993 new section 251 (1) of the 1999 Constitution, referring to the case of **Onuorah vs. Kaduna Refinery & Petrochemical Company Ltd (2005) All FWLR (Pt. 256) 1356; 7-UP Bottling Co. vs. Abiola & Sons (2001) FWLR (Pt. 70) 1611; Trade Bank PLC vs. Banilux Ltd (2003) FWLR (Pt. 162) 1871.**

Concluding on the 1st issue, learned counsel submitted that having regard to the decision of this court in **Onuorah vs KRPC Ltd** ***(Supra),*** the decision of the court below that the trial court lacked jurisdiction to have tried this case was made in error and ought to be set aside.

On issue 2, the learned counsel for the appellant submitted that the court below erred when it declined and/or failed to consider the issues raised by the Appellant (then Respondent) in his brief. That had the court below considered those issues, it would have come to a different

A conclusion, relying on **I.B.W.A. Ltd vs. Imano Nig. Ltd (2001)FWLR (Pt. 44) 421 at 443 paragraphs D-E and Owoseni vs. Faloye (2005) All FWLR (Pt. 284) 220 at 249 paragraphs F-G.** He urged the court to resolve the two issues in favour of the appellant.

B In his response on the first issue, the learned counsel for the Respondents, C.D. Bello, Esq. submitted that the decision of the Court of Appeal in holding that the judgment of the trial court was a nullity for lack of jurisdiction is correct having regard to the provisions of section 230 (1) C of the Constitution of the Federal Republic of Nigeria 1979 as amended by the Constitution (Suspension and Modification) Decree (Decree No. 107) of 1993. On the essential elements which determine the jurisdiction of a court, learned counsel referred to the cases **of Madukolu vs.** D **Nkemdilim (1962) 2 SCNLR 341 at 348; Odofin vs. Agu (1992) 3 NWLR (Pt. 229) 350 at 365 and Olutola vs. University of Ilorin (2005) 3 MJSC 151 at 164.**

Learned counsel submitted further that having regard to the principles E enunciated in **Madukolu vs. Nkemdilim** ***(supra),*** there are features in the case in hand which affected the competence or jurisdiction of the trial court to try the case in that Decree No. 107 of 1993 had from its commencement date removed from the State High Court's jurisdiction to F try causes and matters, amongst others, seeking declaratory reliefs against the Federal Government and its agencies. Learned counsel referred to the case of **NEPA vs. Edegbero (2013) 1 MJSC 69**. According to him, breach of contract or alleged breach of contract cannot G be excluded from the purview of section 230(1) of the 1979 Constitution as amended by Decree No. 7 of 1993.

On issue 2, learned counsel submitted that after reaching the decision that the trial court lacked the jurisdiction to entertain this matter, it was not H necessary for the lower court to go further to consider the arguments in support of other issues in the appeal before it, relying on **UBN vs. Sugunro (2006) 9 MJSC 164 at 175.** He submitted further that the lower court was right in not going further to consider the other issues raised in the appeal having regard to its decision on the issue of jurisdiction which I

A disposed of the entire appeal, citing **7-Up Bottling Company Ltd vs. Abiola & Sons Bottling Company Ltd (2001) 5 MJSC 93 at 105.** He urged the court to resolve the two issues against the appellant.

The simple and straight forward issue in this appeal is to determine B which court has jurisdiction to entertain the claim of the appellant herein. Is it the High Court of Delta State, sitting in Warri or is it the Federal High court? The learned trial Judge of the Delta State High Court assumed jurisdiction in this matter and entered judgment for the appellant in part. C However, the court below held that the said High Court lacked jurisdiction to entertain the matter and struck out the claim of the appellant. It further held that the suit ought to have been filed at the Federal High Court.

D The importance of the jurisdiction of a court cannot be over emphasized. The law is trite that jurisdiction is a threshold issue and livewire that determines the authority of a court of law or tribunal to entertain a case before it and it is only when a court is imbued or conferred E with the necessary jurisdiction by the Constitution or law that it will have the judicial power and authority to entertain, hear and adjudicate upon any cause or matter brought before it by the parties. Where a court proceeds to hear and determine a matter without the requisite jurisdiction, F it amounts to an exercise in futility and the proceedings and judgment generated therefrom are null, void and of no effect no matter how well conducted. See **Nigeria Deposit Insurance Corporation vs. Central Bank of Nigeria & anor (2002) 7 NWLR (Pt. 766) 273; Chelim & anor** G **vs. Gobang (2009) 12 NWLR (Pt. 1156)435; Utih vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 206, Petrojessica Enterprises Ltd & anor vs. Leventis Technical Co. Ltd (1992) 5 NWLR (Pt. 244) 675.**

The next thing I wish to determine is the nature of the claim of the appellant before the trial court. This is so because it is the claim of the H Plaintiff that determines the jurisdiction of the court to entertain the suit. See **Adetayo & Ors vs. Ademola & Ors (2010) 15 NWLR (Pt. 1215) 169; Abia State Transport Cooperation & Ors vs. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) P. I., Dr. Salik vs Idris &** I

Ors (2004) 15 NWLR (Pt. 1429) 36.

From the statement of claim of the appellant (as Plaintiff) before the trial court, it is clear that the 1st Respondent herein had offered to employ the appellant as a driver. The appellant took steps to accept the offer by presenting himself for interview and attending a medical examination as ordered by the 1st Respondent. It must be noted that the appellant had been a casual driver in the 1st Respondent company before seeking a permanent employment. This contract of employment could not be concluded and no satisfactory reason was given for such failure. It is the failure of the Respondents to issue the appellant with appointment letter that has brought the appellant to court to order specific performance. Thus, the Appellant's claim at the trial court zero on breach of contract of employment and specific performance. The court below agrees that the claim of the appellant arose from breach of contract of employment. On page 178 – 179 of the record of appeal, the lower court held as follows:-

> **"In this case, the Plaintiff/Respondent action seeking for a declaration(s) challenging the validity of the executive order or administrative action of the 1st Defendant/Respondent including damages, an agency of the Federal Government of Nigeria** for breach of contract of employment **clearly falls within the purview of Decree 107 of 1993"**
> (underling mine for emphasis)

Having established that the claim of the appellant at the trial court arose from contract of employment and specific performance, is it the Federal High Court or the State High Court which has jurisdiction to entertain the matter?

At this stage, it is pertinent to reproduce the provisions of section 230(1) (P) and (s) of the 1979 Constitution as amended by Decree 107 of 1993 (now section 251(1) (P) and (s) of the 1999 Constitution (as amended). It states:-

> **"230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the**

National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:-
(P) the administration or the management and control of the Federal Government or any of its agencies,
(S) any action or proceeding for a declaration affecting the validity of the Federal Government or any of its agencies".

There is no doubt that by the above provision i.e. section 230(1) (s) of Decree 107 of 1993 which is in ***pari material*** with section 251(1) (s) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies shall be brought before the Federal High Court. I have given a thorough examination of a plethora of cases of this court on this issue and there is a consistent pronouncement that the Federal High Court does not have jurisdiction to entertain matters relating to simple contracts. It must not be forgotten that I have already held that the claim of the appellant relates to a simple contract of employment which the appellant sought specific performance. This type of claim, definitely, is not contemplated under section 230(1) (P) (s) of the 1979 Constitution as amended by Decree 107 of 1993. See **Onuorah vs. KRPC Ltd (2005) All FWLR (Pt. 256) 1356, Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nig. Ltd & anor (2012) 18 NWLR (Pt. 1333) 555; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33.**

In **Integrated Timber & Plywood Products Ltd vs. Union Bank Nigeria (2006) 12 NWLR (Pt. 995) 483**, this court held emphatically that in a simple contract (as in this case), it is the High Court and not the Federal High Court that has jurisdiction to entertain and determine it. See also **Eze vs. Federal Republic of Nigeria (1987) LPELR – 1193 (SC) PP 29-30 paragraphs G-F).**

In a simple contract of employment as in the instant case, there is nothing in section 230(1) of the 1979 Constitution (as amended) which shows that the Federal High Court is conferred with exclusive jurisdiction to

A entertain matters arising therefrom. Rather it is the State High court which continues to have jurisdiction to entertain issues connected therewith as brought by the parties for adjudication. The court below made a grave error as to the claim of the appellant before the trial court. Had the court of Appeal
B properly located the claim of the appellant, I belief, their decision would have been different.

I am fully convinced that the learned trial Judge had jurisdiction to entertain the claim of the appellant herein.

C Eight issues were distilled and placed before the court below for determination. Unfortunately, only one issue (of jurisdiction) was determined by the court blow leaving untouched seven issues. This court has stated in quite a number of cases that intermediate courts should pronounce
D on all issues placed before it. It should not restrict it to one or more issues which its opinion may dispose of the matter. This is to give the apex court the benefit of their views in the matter should there be the need to consider other issues not determined by the intermediate court. See **Chief Adebisi**
E **Adegbuyi vs. All Progressives Congress & Ors (2014) LPELR – 24214 (SC); Xtoudos Services Nig Ltd. vs. Taisei W. A Ltd (2005) WRN 46 at 37; Edem vs. Canon Balls Ltd (2005) 12 NWLR (PT. 938) 27.**

Be that as it may, this appeal succeeds on the only issue of jurisdiction
F determined by the court below. This court is of the firm view that the appellant's claim i.e. enforcement of contract of employment was squarely within the jurisdiction of the Delta State High Court. The learned trial Judge was right to assume jurisdiction in the matter. The court below was therefore wrong to strike out the claim on the ground that the said court did not have
G jurisdiction to entertain the matter. The judgment and orders of the learned trial Judge are hereby reinstated and the lower court is ordered to determine all the other seven issues presented before it as this matter is remitted back to the Court of Appeal Benin Division f or hearing ***de novo***. I make no order as
H to costs. This matter shall be given accelerated hearing.

Appeal Allowed.

John Inyang Okoro
Justice, Supreme Court

I

Rhodes-Vivour, (JSC): I had the benefit of reading a draft copy of the leading judgment delivered by my learned brother, **Okoro JSC.** I agree with his lordship that it is the State High Courts that have jurisdiction to decide simple contract. I must also observe that this court has said on several occasions that when the penultimate court finds out that it or the trial High Court did not have jurisdiction to hear the case it should say so and proceed to give a decision on the merits. This is the procedure that must always be followed, so that if it turns out that the Court of Appeal was wrong the Supreme Court would have the benefit of a judgment on the merits from that court. Where this is not done as in this case and the Supreme Court finds that the Court of appeal was wrong on jurisdiction, the only order the top court can make is to send the case back to the Court of Appeal. This comes with huge costs and delay. See **Isah vs INEC & 3 Ors (2014) 1-2 SC (Pt. iv) p. 101; Brawal shipping (Nig) Ltd. vs. Onwadike Co. Ltd (2000) 65C (Pt. ii) p. 133**

In view of the above, my learned brother has found the Court of Appeal to be wrong on jurisdiction and has ordered that court to hear the appeal on its merits. I am in full agreement with his lordship. It is for this and the fuller reasoning in the leading judgment that this appeal succeeds on the sole issue of jurisdiction. I abide by the orders and directives given by this court.

Olabode Rhodes-vivour
Justice, Supreme Court

AMIRU SANUSI, (JSC): His lordship Hon. Justice J. I. Okoro JSC who prepared this Judgment which was just read, had earlier supplied me with its draft. Having read same, I find myself at one with his reasoning and the conclusion reached that this appeal is meritorious. I also shall allow the appeal.

I abide by the consequential orders made therein, including one on costs. Appeal allowed.

Amiru Sanusi
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered in this appeal by my learned brother, JOHN INYANG OKORO, JSC. As it represents my view in the appeal, I hereby adopt it.

The issue of jurisdiction is no doubt not just an issue of law, it is a substantial issue of law. Appeal on it is therefore one of law which the appellant, in an appeal from the court below to the appellate court does not need leave first sought and obtained to appeal on. Ground two, against which the respondent half-heartedly directed his objection also raises a question of law alone. It, therefore, does not need leave of court to be brought. The respondents apparently raised the preliminary objection as a scare-crow. They did not argue it. They have abandoned it.

On the merits, the substance of the appellant's suit at the trial court, in my view, was the tort of detinue. The appellant's complaint at trial court was that the 2nd defendant/respondent, a servant of the 1st defendant/respondent had wrongfully detained from him the letter of employment issued to him by the 1st defendant/respondent. It is on this fact that the appellant, as the plaintiff, claimed damages against the respondents, as the defendants at the trial court. The 1st respondent, the employer/master of the 2nd respondent was apparently joined in the suit for purposes of vicarious liability it has for the liability of the 2nd respondent in the alleged tort of detinue. The Federal High Court has no jurisdiction in tort of detinue. The appropriate court , in the circumstance, was the High Court of Delta State Section 230(1) (p) & (s) of the 1979 Constitution, as introduced thereto by Decree 107 of 1993 is ***in pari material*** with their successors, Section 251(1) (p) & (s) of the 1999 Constitution. By these provisions, the Constitution does not intend to divest the State High Courts of their jurisdiction over disputes relating to torts or simple contracts. This Court makes the point loud and clear in **ONUORAH vs. KRPC LTD (2005) ALL FWLR (Pt. 256) 1356** and all the decisions following which cited it with approval. **NEPA vs. EDEGBERO (2002) 12 SC (Pt. ii) 119,** an earlier decision of this Court, which held that the action for declaration and injunction, the principal purpose of which is the nullification of the decision of the defendant (NEPA, a Federal agency) terminating the appointments of the plaintiffs falls squarely within the provisions of Section

A 230(1) (s) of the 1979 Constitution, as amended, is only an authority for it decided on the peculiar facts of the case. The facts of this case distinguish it from NEPA vs. EDEGBERO (Supra). In this case the appellant, as the plaintiff, had sued ***inter alia*** for damages on the premise of the 2nd B respondent/defendant wrongful withholding or detaining from him his letter of appointment duly issued by the 1st respondent/defendant, which wrongful act caused him the loss of the appointment. The facts of the instant suit do not fall squarely within the provisions of Section 230(1) (s) of the 1979 C Constitution, as amended by Decree 107. That is what distinguishes it from the EDEGBERO case **(supra).** This distinction is what makes ONUORAH's case applicable.

The issue at the Lower Court was whether the appellant was entitled to D the N300,000.00 awarded to him, as damages for the wrongful act of the respondents, as defendants? The Lower Court, having struck out the suit, did not decide or resolve the question. They should have resolved it, in case they may be wrong as an intermediate court, on the issue of jurisdiction. The E appeal before the Lower Court was not an interlocutory appeal but an appeal against final decision. It, therefore, behoved the lower court, an intermediate court, to resolve all the issues before it or express an opinion on the merits of the case. This alternative course was what this court enjoined the Lower F Court to take, as can be seen from **NIPOL LTD vs. BIOKU INVESTMENT & PROCO LTD (1992) 23 NSCC (Pt. 1) 606 at 618; KATTO vs. CBN (1991) 9 NWLR (Pt. 214) 126 at 149.**

It is unfortunate that this case has to be remitted back to the Lower G Court to decide the issues they omitted to decide which thereafter could have clothed this court its jurisdiction to review. That is only course open to us, though not economical.

All orders made in the lead judgment, including the order remitting the H case back to the lower court to be heard ***de novo*** on all the other issues, except the issue of jurisdiction just resolved herein by this Court, are hereby adopted. Appeal allowed.

Ejembi Eko
Justice, Supreme Court

I

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother **John Inyang Okoro, JSC,** just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal has merit, and it is accordingly allowed by me. I abide by all the orders contained in the lead Judgment.

Sidi Dauda Bage
Justice, Supreme Court

MICHAEL TAIYE
VS

THE STATE

SC. 479/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

CRIMINAL LAW AND PROCEDURE: Armed Robbery – Elements thereof – What prosecution must establish.

CRIMINAL LAW AND PROCEDURE: Burden of proof – Whether prosecution has the burden of proof beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Charge – Unlawful possession of firearms – Onus on accused – How discharged.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Whether sufficient to sustain conviction – Whether need to look for corroboration outside the confessional statement no matter how slight.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Validity thereof – Requisite Test to confirm.

CRIMINAL LAW AND PROCEDURE: Conspiracy – How proved.

CRIMINAL LAW AND PROCEDURE: Proof – How prosecution can prove its case beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof – Methods thereof – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Prosecution witnesses – Whether prosecution has discretion on the number of witnesses required to prove its case.

CRIMINAL LAW: Conspiracy – Meaning – When committed.

EVIDENCE: Presumption – The doctrine of recent possession – Application thereof.

EVIDENCE: Confessional Statement – Meaning – S 28. of Evidence Act 2011 – Relevant Consideration thereof.

Issue for determination

Whether the prosecution had proved its case beyond reasonable doubt as found by the trial court and subsequently affirmed by the lower court.

Facts of the matter

The appellant was arraigned before the High Court of Delta State (the trial court) and tried on four count charges as follows:-

COUNT NO. 1
STATEMENT OF OFFENCE: COUNT 1
Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and firearms (special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II
Armed robbery, punishable under Section 1(2) (a) of the Robbery and firearms (Special provisions) Act. 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash sums of N100,000.00 (One hundred thousand naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III
Armed robbery, punishable under Section 1(2)(a) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV

Illegal possession of firearms punishable under Section 3(1) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990

PARTICULARS OF THE OFFENCE

Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

When the charges were read and explained to the accused person (now appellant) he pleaded not guilty to each of the four counts. His trial thereupon commenced in earnest, wherein the prosecution called three witnesses to prove its case. The appellant as accused person, after the close of the prosecution's case testified for his defence without calling any witness to testify on his behalf. The prosecution at the trial tendered six exhibits including the voluntary confession statement which was marked as Exhibit E. While testifying for his defence, the appellant attempted to retract the confessional statement he made immediately after he was arrested by the police.

The brief facts giving rise to this appeal go this way. On the 11th day of January, 2006 at about 8.00pm the PW1 one police Inspector Sunday Ideho and PW2 Sgt Samuel Imana and other men of Nigeria Police Force while on road patrol along Aka Avenue, stopped an on-coming vehicle, a white Volvo car carrying four passengers therein. The driver of the said vehicle refused to stop. Thereupon, the police men on road patrol became suspicious and thereupon pursued the said Volvo car. In the process exchange of fire ensued between the police men and the people in the said vehicle after which the occupants of the white Volvo vehicle decided to stop and abandoned it and took to their heels each following different directions. Luck ran against the present appellant when he fell into a well near an uncompleted building and the police brought him out of the well and arrested him. When arrested he was found in possession of a locally made gun, and live cartridge. Also when the abandoned Volvo car was searched, two double barrel guns, three live cartridges and three expanded cartridges were recovered. The appellant when arrested that night was found to have bullet wound and on being taken to the police station, the appellant volunteered a statement which was recorded by PW2 which was confessional in

nature in that he admitted committing the offences charged. The said statement was tendered in evidence at the trial court and was admitted as Exhibit E.

At the end of the trial, the learned trial judge Hon. Justice G.E Gbemre found that all the four counts were proved against the accused/appellant by the prosecution/respondent and convicted the appellant and sentenced him to death on the offence of armed robbery and also to various terms of imprisonment in respect of the other three counts charged. Miffed by the convictions and sentences passed on him by the trial judge, the appellant appealed to the Court of Appeal, Benin division. The lower court heard his appeal and on the 7th May 2015 delivered its considered judgment in which it unanimously dismissed the appellant's appeal. The appellant still became disenchanted with the dismissal of his appeal by the court below, hence he further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Onus of proof on prosecution.*
   It is well settled principle of law that an accused person is presumed innocent until he or she is proved guilty. The prosecution as the accuser, is always saddled with the heavy burden of proving the guilt of the accused person and the standard of such proof in criminal cases or trial is proof beyond reasonable doubt. See JOSIAH ORUNGUA & ORS VS. THE STATE (1970) ALL NLR 269 OR (1970) LPELR – 2780 (SC). SEE SECTION 135 OF THE EVIDENCE Act 2011 (as amended) and also Section 138 of the Evidence Act 2011 (as amended) and also Section 138 of the same Evidence Act which make provision for the standard of proof. See also OLAYINKA AFOLALU VS. THE STATE (2010) 16 NWLR (Pt. 1220) 584; MILLER VS. MINISTER OF PENSIONS (1947) 2 All ER 372. It should be noted however, that in order to displace the presumption, the evidence adduced by the prosecution must be targeted at the standard of proof beyond reasonable doubt only and NOT proof beyond shadow of any doubt that the accused is guilty of the offence he is charged with. This is so because absolute certainty is impossible in any human adventure inclusive of the administration of criminal justice. *(P 274 Paras B - F).*

2. *Methods of proof in criminal cases*

The law has established or approved three methods of proof of a criminal offence by the prosecution in any criminal trial. These methods include the followings:-

(1) By a voluntary confessional statement of the accused person(s); or

(a) By circumstantial evidence which must be cogent, complete, unequivocal and compelling leading to the unresistible conclusion that the accused and no other person committed the offence but him; or

(b) By evidence of eye-witness or witnesses otherwise known as direct evidence. *(P 274 Paras F - H).*

3. *The confessional statement was voluntarily made by the appellant*

The prosecution in this instance case seems largely to have relied on the voluntary confessional statement volunteered by the accused now appellant, which the trial court admitted in evidence and marked same as Exhibit E. I note that the appellant merely resiled from making it voluntarily at the trial when he stated that he did not make such statement voluntarily to the police when he was arrested. That was what informed the trial court to conduct a trial within trial because the defence at page 34 of the record objected to the admissibility of the said confessional statement because his counsel stated thus "the statement was extracted under force as the IPO tortured the accused". After the mini trial, the trial court admitted the statement in evidence as Exhibit E and the court below agreed with the finding in that regard.

On my part, I have read the said statement and the court proceedings on the trial within trial and I have no reason to depart from the conclusion of the two lower courts on the voluntariness of exhibit E. I am equally satisfied that the prosecution had discharged the burden placed on it by law to prove that the statement was voluntarily made by the appellant. *(Pp 274 - 275 Paras I - D.).*

4. *When confessional Statement is sufficient to grant conviction accused*.
The appellant, during the trial within trial had adequate opportunity to cross examine the prosecution witness who recorded the said statement with regards to his allegation that it was extracted from him, or on the issue of the alleged torture or beating he allegedly received but he did not cross examine that prosecution witness/recorder of the statement (PW2) on that aspect during the trial within trial.

I am mindful of the fact that there are a long line of judicial authorities which had established that a free and voluntary confession by an accused person, if direct, positive and unequivocal and if satisfactorily proved is sufficient to ground a conviction. The law however, made it desirable for the trial court to look for some independent evidence outside the appellant's confession to the police, no matter how slight, to determine if the circumstances made it probable that the confession was in fact, true. See HARUNA VS. A.G FEDERATION (2012) 3 SC (Pt. IV) 40; ASHIWE VS. THE STATE (1983) 5 SC (Reprint) 1; ALARAPE VS. STATE (2001) 2 SC 114; GALADIMA VS. THE STATE (2012) 12 SC (Pt. II) 213; OSUAGWU VS. THE STATE (2003) 1-2 SC (Pt. 1) 37. *(P 275 Paras D - I)*.

5. *Requisite Test to confirm the validity of confessional Statement*
However, in numerous judicial authorities of this court it was decided that before relying solely on confessional statement to convict an accused or in the process of evaluation of same, trial courts are desired to subject the confessional statement to the following six tests, which are:

(i) Is there anything outside the confession to show that it is true?
(ii) Is it corroborated?
(iii) Are the relevant statements made in it of facts true as they can be tested?
(iv) Was the prisoner one who had the opportunity of committing the offence(s)?

(v) Is the confession possible? and

(vi) Is it consistent with the other facts which have been ascertained and have been proved?

Once a confessional statement is subjected to these six tests, the Supreme Court/the apex court decrees that same can be relied upon to ground a conviction. See MUSA VS. STATE (2013) 2-3 SC (Pt. II) 75 at 94; NWACHUKWU VS. THE STATE (2007) SCM (Pt. 2) 447 at 455; IKPO VS. STATE (1995) 9 NWLR (Pt. 421) 540 at 554. To my mind, the trial court had subjected Exhibit E to the above tests as endorsed by the court below. *(P 276 Paras A - E).*

6. *What elements prosecution must prove in order to establish the offence of arm robbery*

Now on whether or not the offence of armed robbery was established against the appellant, I must say that evidence abound as produced by the prosecution, to prove the offence of armed robbery against the accused person, (now appellant) as rightly found by the trial court. The elements required to be proved by the prosecution n order to obtain a conviction of the offence of armed robbery under Section 1(2) of the Robbery and Firearms Special Provisions/Act are listed hereunder:-

(a) That there was a robbery;

(b) That at the time of the robbery the accused or any of the accused person was armed with arms or offensive weapon

(c) That the accused facing the trial was the robber or one of the armed robbers.

See **Diva vs. The State (1980)8-11 SC 236; Bozin vs. The State (1985) 2 NWLR (Pt. 8) 465; Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561.** *(Pp 276 - 277 Paras F - A).*

7. *Meaning of confession.*

As I stated above the prosecution/respondent relied heavily on the confessional statement of the appellant which he made voluntarily. By Section 28 of the Evidence Act, a confession is an admission made at anytime, by a person charged with criminal offence(s) suggesting

the inference that he committed the crime he is charged with. I am not unaware that I stated so earlier that before an accused person can be convicted solely on his confessional statement it is desirable for the trial court to see if there is some evidence no matter, how slight, corroborating the contents of the statement which makes it probable that the confession as correct and true. In this instant case, there exist cogent, compelling and credible pieces of compelling circumstantial evidence supporting Exhibit E. For instance, evidence abound that there was theft of the vehicle which when the accused/appellant was arrested he was in possession of the said vehicle and other items therein. *(P 277 Paras A - E).*

8. *The application of doctrine of recent possession*

The doctrine of recent possession of stolen goods knowing same to have been stolen, therefore operates against him. The law is also trite that where a person is found in possession of recently stolen goods, he is presumed to either be the thief or the one who stole it or that he received it knowing it to have been stolen recently. Also some handsets and money were recovered from the car and the appellant respectively and the appellant in Exhibit E owned up when he admitted that the items were among the proceeds of their robbery operation. There was also evidence which revealed that there was exchange of fire between the police and the robbery gang which included the accused/appellant and when the appellant was arrested he was having gunshot injury. The appellant in Exhibit E clearly spelt out the co-accused persons he was in company of who had escaped besides admitting the robbery and other offences charged. He therefore had identified himself to be among the robbers pursued by the police on the fateful day. I therefore am in total agreement with the two lower courts that all the ingredients of armed robber were established or proved against the appellant beyond reasonable doubt. *(P 277 Paras E - I).*

9. *Meaning of conspiracy*

Conspiracy simply means an agreement by two or more persons to do or **cause to be done an illegal act, or an act which is legal but by illegal means. The mere agreement alone constitutes the offence of conspiracy and it is immaterial to prove that the act was in fact committed. See OBIAKOR VS. THE STATE (2002) 6 SC (Pt. II) 33 at 39/40.**

The offence of conspiracy may be committed even if the substantive or main offence was not committed or has been abandoned or aborted. See BALOGUN VS. AG OGUN STATE (2002) 2 SC (Pt. II) 89. *(P 278 Paras A - C).*

10. *How to prove conspiracy*

It needs to be stressed here, that the essential ingredients of the offence of conspiracy to commit armed robbery lies in the agreement and association to do an unlawful thing or act which is contrary to or forbidden by law, whether that thing/act is criminal or not and whether the accused person has knowledge of its unlawfulness. The offence of conspiracy is often not proved through direct evidence but the courts normally infer such agreement or plot from the facts of doing things towards a common purpose. See Clark vs. The State (1986) 4 NWLR (Pt. 35) 381; Odeneye vs. State (2011) SC 1; Nwankwoala vs. The State (2006) All FWLR (Pt. 339) 801. In the instant case and as rightly observed by the trial court and endorsed by the court below, the appellant revealed how the four of them were pursued by the police when they refused to stop when signaled to do so by the police. Also in the appellant's statement (Exhibit E) he revealed how he and his co-conspirators communicated on phones where to meet before the operation at Boloker Market even before they set for the robbery operation. All those pieces of evidence inferentially showed that there was a concert among them on when, how and where to operate the robbery operations. I have no reason therefore to hold differently from the findings of the two

lower courts that those pieces of evidence highlighted above, went a long way in proving or establishing the offence of criminal conspiracy beyond reasonable doubt as held by the trial court and upheld by the court below. *(P 278 Paras C - H).*

11. *Onus on Appellant to disprove unlawful possession of firearms*
There is no gain saying that the appellant possessed that gun illegally as he did not adduced any evidence that he had licence to possess such gun or that he was authorized by law to hold such firearms. The burden is therefore on him to establish that his possession of such gun/arm was authorized by law which he failed to so establish or to account for his possession of it. Having failed to so prove, the learned trial judge rightly held that that offence of illegal possession of firearms was proved against him and to convict him accordingly. The lower court was on the other hand, also right in upholding such conviction too. Again I have no reason to depart from the conclusion reached by the two courts below on that too. *(P 279 Paras A - C).*

12. *Prosecution has discretion on witnesses to be called*
With due deference to the learned counsel for the appellant, there is no law which imposes an obligation on the prosecution to call list or host of witnesses. The prosecution is merely needed to call enough material witnesses to prove its case and in doing so it has a discretion in the matter on who to call or who not to call. See ODUNEYE VS. THE STATE (2001) 13 WRN 88; AGBI VS. OGBEH (2006) 11 NWLR (Pt. 990) 65; BABUGA VS. STATE (1996) 7 NWLR (Pt 460) 279. In fact, even a murder case can be established by evidence of only one witness provided his evidence is credible and believed by the trial court. See EFFIONG VS. STATE (1998) 8 NWLR (Pt. 562) 362. *(P 279 Paras D - F).*

13. *Supreme Court does not disturb or interfere with concurrent findings*
Finally, in this instant appeal, observe that there are concurrent findings of two lower court. It is an established practice of this

court not to interfere with or disturb the findings of two lower courts except in an exceptional or special circumstances such as where the findings are perverse, or there is misconception of fact or misapplication of law be it substantive or procedural. None of these special circumstances have been shown to have existed in this instant appeal. I therefore do not see any cogent or compelling reason(s) for me to depart or to disturb or interfere with the concurrent findings. See BAMGBOYE VS. UNIVERSITY OF ILLORIN & ANOR (1999) 6 SC (Pt. II) 72; EHOLOR VS. OSAYANDE (1992) 7 SCNJ 217; MBENU & ANOR VS. THE STATE (1988) NWLR (Pt. 84) 615 or (1988) 7 SC (Pt. III) 71.

Thus, in the result, I find this instant appeal to be devoid of any substance or merit. It fails and is accordingly dismissed by me. I affirm the judgment of the lower court, which had also earlier affirmed the convictions and sentences passed on the appellant by the trial court. *(Pp 279 - 280 Paras G - B).*

14. *When Supreme Court will not interfere with concurrent findings*
What is on ground clearly are concurrent findings of fact of the two lower Courts and it is settled that the Apex Court will not interfere with such findings of fact so long as the said findings are supported by legally admissible evidence that are not perverse or have led to a miscarriage of justice. See AGALA VS. OKUSIN (2010) 10 NWLR (Pt. 1202) 412; OSIGWE VS. PSPLS MGT. CONSORTIWN LTD (2009) 3 NWLR (Pt. 1128) 378; ONWUDIWE VS. FRN (2006) 10 NWLR (Pt. 988) 382. *(P 286 Paras D - E).*

15. *How prosecution can prove its case beyond reasonable doubt*
Also to be stated is that it is settled law that the prosecution can prove its case beyond reasonable doubt by any of the combination of the following means:
a) By confession of the accused;
b) By direct evidence of eye witnesses; and
c) By circumstantial evidence.

This court has shown how the proof can be made and sustained. See in Julius ABIRIFON VS. THE STATE (2013) LPELR-20807 (SC), thus Per Muhammad JSC had this to say:
"……. **In Afio vs. The State (1986) 5 SC 194 at 219 – 220.** *(P 286 .Paras E - H).*

16. *Confession occupies a high authenticity of proof beyond reasonable doubt.*
It was stated as follows:

> **"How is a case proved beyond reasonable doubt? A case can be proved by direct oral evidence if the testimony of the witness who saw and heard them are believed, there will be proof beyond reasonable doubt… the local case of Joseph Ogunbadejo vs. The Queen (1954) 14 WACA 458 (otherwise known as APALARA'S case) is an excellent example of proof beyond reasonable doubt based purely on inference from circumstantial Evidence but far above these two methods of proof is voluntary confession of guilt by an accused person if it is direct and positive and satisfactorily proceed should occupy the highest place of authenticity when it comes to proof beyond reasonable doubt. This is why such a confession by itself is sufficient without further consideration to warrant a conviction unless the trial court is satisfied that the case has not been proved beyond reasonable doubt."**

In a nutshell the PW1 and PW2 stated how they caught the appellant with Exhibits A, A1, B, C and D which testimonies were not challenged. PW1 had rendered the account on how appellant was caught with a cut size locally made gun and a live cartridge and during the search of the Volvo car that the appellant and

cohorts abandoned, PW1 and others recovered two barrel gun cut to size, three live cartridges and three expended ones. Also that he, PW1 saw the accused in the well and recovered IDI and IDIA from his waist. *(Pp 286 - 287 Paras H - E).*

17. *Confessional Statement Corroborated.*

From the appellant's extra judicial statement, Exhibit E he stated thus: "I was armed with one of the guns while Efe and Andrew were also armed".

Clearly the confessional statement had corroboration in the evidence of PW1and PW2. In fact that is sufficient to ground the conviction and there is no necessity to call other witnesses since all they would come to say has been fully established and overloading the evidence would serve no useful purpose since what is on ground is sufficient. See Okoroji vs. State (2002) 5 NWLR (Pt. 759) 21 at 28; Omogodo vs. State (1981) 5 SC 5; Akpa vs. The State (2008) 14 NWLR (Pt. 1106) 72.

Indeed what I see is a situation where even without the corroborative evidence above stated, the trial court could safely convict on the free and voluntarily made confessional statement, Exhibit E which is cogent, direct and unequivocal and from the surrounding circumstances has been shown to be true leaving no room for further belabouring the fact. See Nwaebonyi vs. State (1994) 5 NWLR (Pt. 343) 138; Habibu Musa vs. The State (2013) LPELR – 19932; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Hassan vs. State (2001) 15 NWLR (Pt 735) 184.

This is a classic case where the Supreme Court is to keep within the principle already laid down and that is that the concurrent findings of two courts below made from what is on record within the applicable laws in line with evidence and there being no miscarriage of justice, this court has no business interfering.

In conclusion and in line with the well articulated lead judgment, I see no merit in this appeal and I dismiss it. *(Pp 287 - 288 Paras F - C).*

Nigerian cases cited

Afio vs. The State (1986) 5 SC 194.
Agala vs. Okusin (2010) 10 NWLR (Pt. 1202) 412;
Agbi vs. Ogbeh (2006) 11 NWLR (Pt. 990) 65;
Akpa vs. The State (2008) 14 NWLR (Pt. 1106) 72.
Alarape vs. State (2001) 2 SC 114;
Alarape vs. State (2001) 5 NWLR (Pt. 705) 79;
Ashiwe vs. The State (1983) 5 SC (Reprint) 1;
Babuga vs. State (1996) 7 NWLR (Pt 460) 279
Balogun vs. AG Ogun State (2002) 2 SC (Pt. II) 89.
Bamgbose vs. University of Illorin & Anor (1999) 6 SC (Pt. II) 72;
Bozin vs. The State (1985) 2 NWLR (Pt. 8) 465;
Clark vs. The State (1986) 4 NWLR (Pt. 35) 381;
Diva vs. The State (1980)8-11 SC 236;
Effiong vs. State (1998) 8 NWLR (Pt. 562) 362.
Ehobor vs. Osayande (1992) 7 SCNJ 217;
Galadima vs. The State (2012) 12 SC (Pt. II) 213;
Habibu Musa vs. The State (2013) LPELR – 19932;
Haruna vs. A.G Federation (2012) 3 SC (Pt. IV) 40;
Hassan vs. State (2001) 15 NWLR (Pt 735) 184.
Ikpo vs. State (1995) 9 NWLR (Pt. 421) 540
Joseph Ogunbadejo vs. The Queen (1954) 14 WACA 458
Josiah Orungua & Ors vs. The State (1970) All NLR 269 or (1970) LPELR – 2780 (SC).
Julius Abirifon vs. The State (2013) LPELR-20807 (SC)
Mbenu & Anor vs. The State (1988) NWLR (Pt. 84) 615 or (1988) 7 SC (Pt. III) 71
Miller vs. Minister of Pensions (1947) 2 All ER 372
Musa vs. State (2013) 2-3 SC (Pt. II) 75

A *Nwachukwu vs. The State (2007) SCM (Pt. 2) 447 at 455*
Nwaebonyi vs. State (1994) 5 NWLR (Pt. 343) 138
Nwankwoala vs. The State (2006) All FWLR (Pt. 339) 801.
Obiakor vs. The State (2002) 6 SC (Pt. II) 33
B *Oduneye vs. The State (2001) 13 WRN 88;*
Okoroji vs. State (2002) 5 NWLR (Pt. 759) 21;
Olayinka Afolalu vs. The State (2010) 16 NWLR (Pt. 1220) 584
Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561.
C *Omogodo vs. State (1981) 5 SC 5;*
Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382.
Osigwe vs. PSPLS Mgt. Consortiwn Ltd (2009) 3 NWLR (Pt. 1128) 378;
Osuagwu vs. The State (2003) 1-2 SC (Pt. 1) 37.

D
Foreign cases cited

Nigerian Statutes cites
E The Robbery and firearms (Special provisions) Act. 1990 Section 1(2) (a)
The Evidence Act 2011 (as amended) Sections 135; 138.
The Robbery and firearms (Special provisions) Act Section 3(1)
Representation
F **Ayo Asala** with him **E. Odje** for the Appellant
Hon. Peter Mrakpor (Attorney General Delta State, **O.F. Enenmo**, Director DTMOJ, **U.I. Amioku-Eshalommi (Mrs)** Chief State Counsel for the Respondent.

G **AMIRU SANUSI, (JSC) (delivering The Lead Judgment):**

The appellant was arraigned before the High Court of Delta State (the trial court) and tried on four count charges as follows:-

H **COUNT NO. 1**
STATEMENT OF OFFENCE: COUNT 1
Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and firearms (special
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provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE

Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II

Armed robbery, punishable under Section 1(2) (a) of the Robbery and firearms (Special provisions) Act. 1990.

PARTICULARS OF THE OFFENCE

Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash sums of N100,000.00 (One hundred thousand naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III

Armed robbery, punishable under Section 1(2)(a) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE

Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV

Illegal possession of firearms punishable under Section 3(1) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990

PARTICULARS OF THE OFFENCE

Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

When the charges were read and explained to the accused person (now appellant) he pleaded not guilty to each of the four counts. His trial thereupon commenced in earnest, wherein the prosecution called three witnesses to prove its case. The appellant as accused person, after the close of the prosecution's case testified for his defence without calling any witness to testify on his behalf. The prosecution at the trial tendered six exhibits including the voluntary confession statement which was marked as Exhibit E. While testifying for his defence, the appellant attempted to retract the confessional statement he made immediately after he was arrested by the police.

The brief facts giving rise to this appeal go this way. On the 11th day of January, 2006 at about 8.00pm the PW1 one police Inspector Sunday Ideho and PW2 Sgt Samuel Imana and other men of Nigeria Police Force while on road patrol along Aka Avenue, stopped an on-coming vehicle, a white Volvo car carrying four passengers therein. The driver of the said vehicle refused to stop. Thereupon, the police men on road patrol became suspicious and thereupon pursued the said Volvo car. In the process exchange of fire ensued between the police men and the people in the said vehicle after which the occupants of the white Volvo vehicle decided to stop and abandoned it and took to their heels each following different directions. Luck ran against the present appellant when he fell into a well near an uncompleted building and the police brought him out of the well and arrested him. When arrested he was found in possession of a locally made gun, and live cartridge. Also when the abandoned Volvo car was searched, two double barrel guns, three live cartridges and three expanded cartridges were recovered. The appellant when arrested that night was found to have bullet wound and on being taken to the police station, the appellant volunteered a statement which was recorded by PW2 which was confessional in nature in that he admitted

committing the offences charged. The said statement was tendered in evidence at the trial court and was admitted as Exhibit E even though, as I stated earlier, he attempted to retract it when giving evidence for his defence.

At the end of the trial, the learned trial judge Hon. Justice G.E Gbemre found that all the four counts were proved against the accused/appellant by the prosecution/respondent and convicted the appellant and sentenced him to death on the offence of armed robbery and also to various terms of imprisonment in respect of the other three counts charged. Miffed by the convictions and sentences passed on him by the trial judge, the appellant appealed to the Court of Appeal, Benin division (the lower or court below). The lower court heard his appeal and on the 7th May 2015 delivered its considered judgment in which it unanimously dismissed the appellant's appeal. The appellant still became disenchanted with the dismissal of his appeal by the court below, hence he further appealed to this court.

Parties filed and exchanged briefs of argument in keeping with the rules and practice applicable in this court. The appellant's brief of argument which was settled by Ayo Asala Esq was filed on 14th September 2015. In the said brief of argument, a sole issue for determination was proposed by the appellant's learned counsel which is set out hereunder:

> **"Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution had proved beyond reasonable doubt the offences of conspiracy, armed robbery and illegal possession of fire arms against the appellant".**

On its part, the respondents filed its brief of argument on 17th December, 2015 which said brief of argument was settled by Peter Mrakpor, the learned Attorney General of Delta State. In the brief of argument also sole issue for determination was raised which reads as below:-

A **"Whether on the evidence of the Respondent's witnesses and the confessional statement of the Appellant, the court below was right in affirming the judgment of the trial court which found the Appellant guilty for the offences of conspiracy to**
B **commit armed robbery, armed robbery and possession of illegal firearms (sic) (Grounds 1,2 and 3).**

Looking at the two sets of issues for determination proposed by the
C parties, there is no doubt saying that both of them are moreorless the same except the different wordings used in couching them. I shall therefore in considering or determining this appeal, adopt the lone issue raised in the appellant's brief of argument as reproduced supra even though 1, in order to
D avoid the verbosity used in framing each of them I shall reframe it as follows:

Whether the prosecution had proved its case beyond reasonable doubt as found by the trial court and
E **subsequently affirmed by the lower court."**

The learned counsel to the appellant rightly submitted that the prosecution is not relieved of the burden to prove the alleged offences beyond
F reasonable even where the accused person arrested at the scene of the crime made a confessional statement when or where there is a confessional statement. He argued that the prosecution failed to establish the offences of armed robbery and conspiracy against the appellant and that the two
G witnesses did not give eye witness account of the armed robbery. He contended that the individuals listed as witnesses were not called to testify in proof of its case. He conceded that even though the prosecution is not bound to call a host of witnesses, but where there is a vital issue for resolution and the presence of a particular witness will clarify it one way or the other, such
H witness must be called. He cited the case of **OGUDU vs. STATE (2012) All FWLR (Pt. 629) III at 1116-1117 and THE STATE vs. AJIE (2000) FWLR (Pt. 16) 2837 at 2844 parag G.**

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A He argued that counts 1 and II which deal with substantive offences of armed robbery of specific items cannot be said to have been proved against the appellant beyond reasonable doubt. He submitted that failure of the prosecution to call Felix Izomare and Desmond Denvan who were the B victims of the alleged armed robbery as contained in counts II and III, is fatal to the case of the prosecution. He stated that the trial court was wrong when it admitted and relied on Exhibit "E" in holding that the prosecution proved the four counts charge against the appellant beyond reasonable doubt. He C contended further, that inspite of the objection to the admissibility of Exhibit "E", the trial court admitted it after the appellant denied making same voluntarily. He argued that the evidence of PW2 revealed that the appellant was weak and feeble, lying down as a result of gunshot as at the time the D statement was obtained from him and there is no way, the said statement would have been obtained voluntarily. He urged the court to expunge Exhibit "E" from the record. He contended that there was no other grounds upon which the trial court convicted the appellant and PW1and PW2 who were E called by the prosecution even did not give any evidence relating to counts II & III. He argued that the appellant was not charged for robbing the occupants o the said vehicle and there was nothing in the record to show that the said vehicle was stolen by the appellant. He referred to the judgment of the court below at pages 68-69 of the record and submitted that the above finding is not F borne out of the evidence in the record. He contended that there is no evidence on record, that the said vehicle was stolen by appellant for the lower court to rely on Doctrine of recent possession of the Volvo car which is not one of the items listed to have been stolen as contained in the charge.

G He argued further the prosecution has failed to prove that the appellant participated in the alleged robbery and submitted that the totality of the evidence against the appellant was founded on suspicion which cannot ground conviction.

H The Learned appellant's counsel submitted further, that the court below was wrong in affirming the conviction of the appellant under count IV for illegal possession of firearms as there is even no credible evidence that those exhibits were found in the possession of the appellant. On the offence

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of conspiracy, he submitted that there is no inference of conspiracy to commit armed robbery when it is clear that the prosecution did not lead distinct evidence in respect of Count I. He therefore argued that once the charge of substantive offence fails, the charge of conspiracy must also fail. He contended that the evidence i.e. Exhibit "E" upon which the lower court upheld the conviction of the appellant for substantive offence is the same with that upon which the appellant was convicted for the offence of conspiracy. He then urged this court to set aside the decision of the two lower courts and discharge and acquit the appellant.

Replying, learned counsel or the respondent submitted that there was cogent, legally reliable and admissible evidence which met the requirements of the law having regard to the charge and ingredients of the offences with which the appellant was charged and upon which the court below upheld the convictions. He referred to the case of **JULIUS ABIRIFON vs. THE STATE (2012) LPELR – 20807 (SC).**

On the offence of armed robbery which relates to count 1, he referred to the evidence of PW1 & PW2 who gave account of how Exhibit "A" and "A1" were found with the appellant and how exhibits B,C &D were found in the Volvo car that was stolen by the appellant and 3 other boys who are now at large and Exhibit "E" which is the appellant's confessional statement made to the police and tendered in evidence through PW2. He referred to the judgment of the trial court at pages 68-69 especially lines 19-21 of pages 69 and that of the court below at pages 129-131 of the record and submitted that the above findings of facts were legally admissible and as such cannot be perverse. He submitted that every finding of facts by the two lower court was tied to a particular piece of evidence and as such the trial judge has duly performed the function of ascription of probative value to it and the court below agreed with the trial court. On the illegal possession of firearms which is the third count, he referred to the testimony of PW1 at 32 line 1-7 of the record at lines 24-25 and the judgment of the trial court at page 70, lines 5-9 and submitted that exhibit "E", as well as evidence of PW1 & PW2 had sufficiently established the offence of illegal possession of firearm.

A On the count of conspiracy to commit armed robbery which covers count 1, he cited the case of BUSARI vs. State (2015) LPELR – 24 279.

He also referred to the judgment of the court below at pages 132-134 of the record and urged the court not to disturb the findings of facts by two lower B courts moreso, when the courts reached a conclusion that there was conspiracy from vivid and unimpeachable testimonies of PW1 &PW2 as well as the content of Exhibit "E". On the failure to call Felix Izomare and Desmond Denvan, the victims of the robbery to testify for the prosecution, C and with regard to the question whether it is prejudicial to the case of the prosecution, he submitted that the unassailable testimonies of PW1 & PW2 as well as the voluntary confessional statement of the appellant had wholly rendered otiose the need to call them. He cited the case of **LT. F.O** D **ODUNLAMI vs. THE NIG. NAVY (2013) LPELR 20701** where per Fabiyi had thus to say

> **"Perhaps it should be stated that where the prosecution failed to call a particular witness, the accused is at liberty to** E **call him".**

On whether the trial court was right in admitting and relying on Exhibit "E", he submitted that the respondent was able to prove during trial, that the confessional statement was voluntarily obtained and the allegation by the F appellant that he was tortured was later abandoned and the appellant's claim that he was unsettled were mere after-though and at best, evasion of reality.

On the issue of retraction, he submitted that it is not the law, that denial of confessional statement provides grounds or reasons for either rejecting it G or rendering it unreliable or incapable of sustaining conviction. He submitted that, that does not preclude a court from convicting an accused even on his confessional statement alone where it was found to be direct, positive and unequivocal.

He argued that the court below, like the trial court in addition to the H confessional statement, relied on such other evidence from the testimonies of the respondent's witnesses to further establish the truth in the appellant's confessional statement and that both courts are aware of the desirability of having such corroborative evidence before convicting the appellant. He I

submitted that whether or not a statement of an accused or weight to be attached to it, is a question fact which evaluation and drawing inferences have always been the primary duty of the trial court which had the advantage and opportunity of seeing and watching the witnesses as they testified before it. He then urged this court to resolve this lone issue in favour of the respondent and dismiss the appeal.

It is well settled principle of law that an accused person is presumed innocent until he or she is proved guilty. The prosecution as the accuser, is always saddled with the heavy burden of proving the guilt of the accused person and the standard of such proof in criminal cases or trial is proof beyond reasonable doubt. See **Joseph Orungu & Ors vs. The State (1970) All NLR 269 or (1970) LPELR – 2780 (SC)**. See Section 135 of the Evidence Act 2011 (as amended) and also Section 138 of the Evidence Act 2011 (as amended) and also Section 138 of the same Evidence Act which make provision for the standard of proof. See also **Olayinka Afolalu vs. The State (2010) 16 NWLR (Pt. 1220) 584; Miller vs. Minister of Pensions (1947) 2 All ER 372.** It should be noted however, that in order to displace the presumption, the evidence adduced by the prosecution must be targeted at the standard of proof beyond reasonable doubt only and NOT proof beyond shadow of any doubt that the accused is guilty of the offence he is charged with. This is so because absolute certainty is impossible in any human adventure inclusive of the administration of criminal justice.

The law has established or approved three methods of proof of a criminal offence by the prosecution in any criminal trial. These methods include the followings:-

(2) By a voluntary confessional statement of the accused person(s); or

(c) By circumstantial evidence which must be cogent, complete, unequivocal and compelling leading to the unresistible conclusion that the accused and no other person committed the offence but him; or

(d) By evidence of eye-witness or witnesses otherwise known as direct evidence.

The prosecution in this instance case seems largely to have relied on

A the voluntary confessional statement volunteered by the accused now appellant, which the trial court admitted in evidence and marked same as Exhibit E. I note that the appellant merely resiled from making it voluntarily at the trial when he stated that he did not make such statement voluntarily to
B the police when he was arrested. That was what informed the trial court to conduct a trial within trial because the defence at page 34 of the record objected to the admissibility of the said confessional statement because his counsel stated thus **"the statement was extracted under force as the IPO**
C **tortured the accused".** After the mini trial, the trial court admitted the statement in evidence as Exhibit E and the court below agreed with the finding in that regard.

On my part, I have read the said statement and the court proceedings on
D the trial within trial and I have no reason to depart from the conclusion of the two lower courts on the voluntariness of exhibit E. I am equally satisfied that the prosecution had discharged the burden placed on it by law to prove that the statement was voluntarily made by the appellant. The appellant, during
E the trial within trial had adequate opportunity to cross examine the prosecution witness who recorded the said statement with regards to his allegation that it was extracted from him, or on the issue of the alleged torture or beating he allegedly received but he did not cross examine that prosecution
F witness/recorder of the statement (PW2) on that aspect during the trial within trial.

I am mindful of the fact that there are a long line of judicial authorities which had established that a free and voluntary confession by an accused
G person, if direct, positive and unequivocal and if satisfactorily proved is sufficient to ground a conviction. The law however, made it desirable for the trial court to look for some independent evidence outside the appellant's confession to the police, no matter how slight, to determine if the circumstances made it probable that the confession was in fact, true. See
H **Haruna vs. A.G Federation (2012) 3 SC (Pt. IV) 40; Ashiwe vs. The State (1983) 5 SC (Reprint) 1; Alarape vs. State (2001) 2 SC 114; Galadima vs. The State (2012) 12 SC (Pt. II) 213; Osuagwu vs. The State (2003) 1-2 SC (Pt. 1) 37.**
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A However, in numerous judicial authorities of this court it was decided that before relying solely on confessional statement to convict an accused or in the process of evaluation of same, trial courts are desired to subject the confessional statement to the following six tests, which are:

B **(vii) Is there anything outside the confession to show that it is true?**

(viii) Is it corroborated?

(ix) Are the relevant statements made in it of facts true as they can be tested?

C **(x) Was the prisoner one who had the opportunity of committing the offence(s)?**

(xi) Is the confession possible? and

D **(xii) Is it consistent with the other facts which have been ascertained and have been proved?**

Once a confessional statement is subjected to these six tests, the Supreme Court/the apex court decrees that same can be relied upon to ground E a conviction. See **Musa vs. State (2013) 2-3 SC (Pt. II) 75 at 94; Nwachukwu vs. The State (2007) SCM (Pt. 2) 447 at 455; Ikpo vs. State (1995) 9 NWLR (Pt. 421) 540 at 554.** To my mind, the trial court had subjected Exhibit E to the above tests as endorsed by the court below.

F Now on whether or not the offence of armed robbery was established against the appellant, I must say that evidence abound as produced by the prosecution, to prove the offence of armed robbery against the accused person, (now appellant) as rightly found by the trial court. The elements G required to be proved by the prosecution in order to obtain a conviction of the offence of armed robbery under Section 1(2) of the Robbery and Firearms Special Provisions/Act are listed hereunder:-

(d) That there was a robbery;

H **(e) That at the time of the robbery the accused or any of the accused person was armed with arms or offensive weapon**

(f) That the accused facing the trial was the robber or one of the armed robbers.

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See **Diva vs. The State** (1980)8-11 SC 236; **Bozin vs. The State** (1985) 2 NWLR (Pt. 8) 465; **Olayinka vs. The State** (2007) 9 NWLR (Pt. 1040) 561.

As I stated above the prosecution/respondent relied heavily on the
B confessional statement of the appellant which he made voluntarily. By Section 28 of the Evidence Act, a confession is an admission made at anytime, by a person charged with criminal offence(s) suggesting the inference that he committed the crime he is charged with. I am not unaware
C that I stated so earlier that before an accused person can be convicted solely on his confessional statement it is desirable for the trial court to see if there is some evidence no matter, how slight, corroborating the contents of the statement which makes it probable that the confession is correct and true. In
D this instant case, there exist cogent, compelling and credible pieces of compelling circumstantial evidence supporting Exhibit E. For instance, evidence abound that there was theft of the vehicle which when the accused/appellant was arrested he was in possession of the said vehicle and
E other items therein. The doctrine of recent possession of stolen goods knowing same to have been stolen, therefore operates against him. The law is also trite that where a person is found in possession of recently stolen goods, he is presumed to either be the thief or the one that stole it or that he received it
F knowing it to have been stolen recently. Also some handsets and money were recovered from the car and the appellant respectively and the appellant in Exhibit E owned up when he admitted that the items were among the proceeds of their robbery operation. There was also evidence which revealed
G that there was exchange of fire between the police and the robbery gang which included the accused/appellant and when the appellant was arrested he was having gunshot injury. The appellant in Exhibit E clearly spelt out the co-accused persons he was in company of who had escaped besides admitting the robbery and other offences charged. He therefore had
H identified himself to be among the robbers pursued by the police on the fateful day. I therefore am in total agreement with the two lower courts that all the ingredients of armed robber were established or proved against the appellant beyond reasonable doubt.

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This brings me to the offence of conspiracy to commit armed robbery. Conspiracy simply means an agreement by two or more persons to do or cause to be done an illegal act, or an act which is legal but by illegal means.
B The mere agreement alone constitutes the offence of conspiracy and it is immaterial to prove that the act was in fact committed. See **Obiakor vs. The State (**2002) SC (Pt. II) 33 at 39/40.

The offence of conspiracy may be committed even if the substantive or
C main offence was not committed or has been abandoned or aborted. See **Balogun vs. AG Ogun State (2002) 2 SC (Pt. II) 89.**

It needs to be stressed here, that the essential ingredients of the offence of conspiracy to commit armed robbery lies in the agreement and association
D to do an unlawful thing or act which is contrary to or forbidden by law, whether that thing/act is criminal or not and whether the accused person has knowledge of its unlawfulness. The offence of conspiracy is often not proved through direct evidence but the courts normally infers such agreement or plot
E from the facts of doing things towards a common purpose. See **Clark vs. The State (1986) 4 NWLR (Pt. 35) 381; Odeneye vs. State (2011) SC 1; Nwankwoala vs. The State (2006) All FWLR (Pt. 339) 801**. In the instant case and as rightly observed by the trial court and endorsed by the court
F below, the appellant revealed how the four of them were pursued by the police when they refused to stop when signaled to do so by the police. Also in the appellant's statement (Exhibit E) he revealed how he and his co-conspirators communicated on phones where to meet before the operation at
G Boloker Market even before they set for the robbery operation. All those pieces of evidence inferentially showed that there was a concert among them on when, how and where to operate the robbery operations. I have no reason therefore to hold differently from the findings of the two lower courts that those pieces of evidence highlighted above, went a long way in proving or
H establishing the offence of criminal conspiracy beyond reasonable doubt as held by the trial court and upheld by the court below.

Finally on the offence of illegal possession of firearms, the two prosecution witnesses testified that when the appellant was arrested when he

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A fell inside a well upon being pursued by the police, a gun and some live cartridges were recovered from him along with other items. There is no gain saying that the appellant possessed that gun illegally as he did not adduced any evidence that he had licence to possess such gun or that he was authorized
B by law to hold such firearms. The burden is therefore on him to establish that his possession of such gun/arm was authorized by law which he failed to so establish or to account for his possession of it. Having failed to so prove, the learned trial judge rightly held that that offence of illegal possession of
C firearms was proved against him and to convict him accordingly. The lower court was on the other hand, also right in upholding such conviction too. Again I have no reason to depart from the conclusion reached by the two courts below on that too.

D It is noted by me that the appellant's learned counsel raised dust on the prosecution's failure to call certain witnesses he named. He suggested that the prosecution's failure to call those named witnesses was fatal to its case. With due deference to the learned counsel for the appellant, there is no law
E which imposes an obligation on the prosecution to call list or host of witnesses. The prosecution is merely needed to call enough material witnesses to prove its case and in doing so it has a discretion in the matter on who to call or who not to call. See **Oduneye vs. The State (2001) 13 WRN**
F **88; Agbi vs. Ogbeh (2006) 11 NWLR (Pt. 990) 65; Babuga vs. State (1996) 7 NWLR (Pt 460) 279**. In fact, even a murder case can be established by evidence of only one witness provided his evidence is credible and believed by the trial court. See **Effiong vs. State** (1998) 8 NWLR (Pt. 562) 362.

G Finally, in this instant appeal, observe that there are concurrent findings of two lower court. It is an established practice of this court not to interfere with or disturb the findings of two lower courts except in an exceptional or special circumstances such as where the findings are perverse, or there is misconception of fact or misapplication of law be it substantive or
H procedural. None of these special circumstances have been shown to have existed in this instant appeal. I therefore do not see any cogent or compelling reason(s) for me to depart or to disturb or interfere with the concurrent findings. See **Bamgbose vs. University of Illorin & Anor (1999) 6 SC (Pt.**
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II) 72; Ehobor vs. Osayande (1992) 7 SCNJ 217; Mbenu & Anor vs. The State (1988) NWLR (Pt. 84) 615 or (1988) 7 SC (Pt. III) 71.

Thus, in the result, I find this instant appeal to be devoid of any substance or merit. It fails and is accordingly dismissed by me. I affirm the judgment of the lower court, which had also earlier affirmed the convictions and sentences passed on the appellant by the trial court. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I read in advance the leading judgment delivered by my learned brother, **Sanusi JSC**. I agree with his lordship's reasoning and conclusions that there is absolutely no merit in this appeal. The appellant's confessional statement, exhibit E and compelling evidence from prosecution witnesses resulted quite rightly in the trial judge finding that the case against the appellant was proved beyond reasonable doubt. This decision was affirmed by the Court of Appeal, and learned counsel for the appellant has been unable to show that concurrent findings of the two courts below were wrong. It is for this brief observation and the detailed reasoning in the leading judgment that I find no merit in the appeal and dismiss it.

Appeal dismissed.

Rhode-vivour
Justice Supreme Court

PETER-ODILI, (JSC): My learned brother, Amiru Sanusi JSC had graciously made available to me the draft of his leading judgment in which he dismissed the appeal of the appellant. I agree with his decision and the reasonings that led to the decision and for measure I shall make a few remarks to underscore my support.

This appeal is against the judgment of the Court of Appeal, Benin Division or Court below or Lower court delivered on the 7th day of May 2015 affirming the judgment of the High Court of Delta State, Effurun Division delivered on the 14th day of May 2013, convicting and sentencing the

A Appellant to death by hanging, having been found guilty of the offences of conspiracy to commit armed robbery, armed robbery and possession of illegal firearms.

The full text on the facts are well set out in the lead judgment and there B is no need repeating them here, unless when there comes a need for the utilization of any point thereof.

On the 15th day of February 2018 when the appeal was heard, Ayo Asala, learned counsel for the appellant adopted his brief of argument filed on C 14/9/2015 in which he raised a sole issue for determination, viz:-

Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution proved beyond reasonable doubt the offences of conspiracy, armed D **robbery and illegal possession of firearms against the appellant.**

The learned Attorney General of Delta State, Peter Mrakpor Esq. for the respondent adopted its brief of argument filed on 17/12/2015. In it was E formulated a single issue thus:-

Whether on the evidence of the respondent's witnesses and the confessional statement of the appellant, the court below was right in affirming the judgment of the trial court which F **found the appellant guilty for the offences of conspiracy to commit armed robbery, armed robbery and possession of illegal firearms – Grounds1, 2 and 3.**

In substance the issue as crafted on either side asks the same question G and for ease of reference I shall make use of that as drafted by the appellant which is more simply presented.

SINGLE ISSUE

Whether having regard to the totality of the evidence from H **the record, the lower court was right in upholding the decision of the trial court that the prosecution proved beyond reasonable doubt the offences of conspiracy, armed robbery and illegal possession of firearms against the**

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appellant.

Learned counsel for the appellant, Ayo Asala Esq. contended that the prosecution did not prove the charge of armed robbery against the appellant beyond reasonable doubt. That there was no eye witness account and despite the prosecution's assertion that certain individuals were robbed, they were not called to testify. That even though the prosecution is at liberty to call to testify who it wished but it is obligated to call to clarify a vital point that witness whose testimony would flit the balance either way or resolve the issue. He cited **Ogundu vs. State (2012) All FWLR (Pt. 629) 1111 at 1116-1117; The State vs. Ajie (2000) FWLR (Pt. 16) 2831 at 2844**.

That the learned trial judge should not have relied on the confessional statement of the appellant, Exhibit E being involuntarily obtained. He referred to **Kaseem vs. State (2009) All FWLR (Pt. 465) 1749 at 1773.**

Learned counsel for the appellant submitted that even though this appeal is from concurrent findings of two courts below, this is a proper case for the interference of the Supreme Court. He cited **Oguonzee vs. State** (1998) 5 NWLR (Pt. 551) 521; **Aruna vs. State (1990) 6 NWLR (Pt. 155) 125.**

Learned counsel for the respondent, the Attorney General of Delta State, Peter Mrakpor Esq. submitted that there is nothing upon which this court would base disturbing the concurrent findings of the two lower courts as there is nothing perverse in the findings nor a miscarriage of justice shown. He cited **Peter Iliya Azabada vs. The State (2014) LPELR – 23017 (SC); Habibu Musa vs. The State (2013) LPELR – 19932 (SC)** etc.

That the evidence of PW1 and PW2 are very explicit on how they arrested the appellant who abandoned a stolen white Volvo car upon being hounded by the two policemen. The two witnesses also testified on how Exhibits A and A1 were found on the appellant and Exhibits B,C and D found in the Volvo car that was stolen by the appellant and three other boys at large. That Exhibit E was properly admitted after a trial within trial and not wrongly taken in by the court.

That the findings of the two courts were based on deductions from available evidence and so do not admit of any interference from this court.

He cited **Oladipo vs. Moba L.G.A (2010) 5 NWLR (Pt. 1186) 117 at 150.**

Learned counsel for the respondent stated that though Felix Izomare and Desmond Denvan were listed as witnesses and not called did not damage the case of the prosecution since there was enough material placed before the court on which it could arrive at the proper decision. See **Lt. F.O. Odunlami vs. Nigerian Navy (2013) LPELR – 20701 (SC); Victor vs. State (2013) 12 NWLR (Pt. 1369) 465 at 485.**

The charges against the appellant are stated for clarity hereunder, viz:-

STATEMENT OF OFFENCE: COUNT 1

Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap, 398 Volume XXII Laws of the Federation of Nigeria, 1990

PARTICULARS OF OFFENCE:

Taiye Michael Efe (on or about the 11th day of January, 2006 at Effurun within Effurun judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II

Armed robbery punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 1990.

PARTICULARS OF OFFENCE:

Taiye Michael Efe (m) on the 11th day of January, 2006 at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash of N100,000.00 (One Hundred Thousand Naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III

Armed robbery, punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Volume XXII, Laws of the Federation of Nigeria 1990.

PARTICULARS OF OFFENCE:
Taiye Michael Efe (m) on the 11th day of January 2006 at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 Pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV
Illegal possession of firearms punishable under Section 3(1) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE:
Taiye Michael Efe (m) on the 11th day of January 2006 at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

In respect of the offence of conspiracy to commit armed robbery as stated in count 1, the learned trial judge held thus:-

> **"Usually in conspiracy to commit an offence, there is no written agreement and the agreement can only be inferred from the collateral circumstances and in this case the starting point is the evidence of the prosecution witnesses and both of them reeled out their eye witness testimonies on the day of the incident. Four young men in a vehicle, who were flagged down refused to stop; later open gun fire on the policemen, and upon facing superior fire power, abandoned their vehicle and fled in different directions. Accused was eventually caught inside a well, with a gunshot wounds and on him were Exhibits 'A' and 'A1', i.e. a gun and a bullet. The facts as relayed above can only point to the fact that all the occupants of that vehicle were on a mission to commit armed robbery or had committed armed robbery. The accused made a confessional statement which is Exhibit 'E' and an excerpt from the said Exhibit 'E' states: "…We usually call ourselves on phone and discuss our meeting point before any operation. We have met twice at Bolokor**

market before going out on robbery operations. The one of yesterday evening (i.e. the present case) made it twice… last night we also met at Bolokor market Warri before we proceeded on the robbery operation that let to my arrest. Andrew is our Armourer; he is the one that use (sic) to keep the guns and also produce it for robbery operations."

The above shows a clear meeting of the minds and has established all the ingredients of the offence of conspiracy to commit armed robbery. I have been urged by the defence counsel not to look at Exhibit 'E', the confessional statement. A statement by an accused which has been retraced has to pass some test for the court to attach or not to attach weight to the statement. Thus in **Usofor vs. The State** (2005) All FWLR (Pt. 242) Pg. 397 at 411, the court gave the following as the test that the court must apply:-

(1) Is there anything outside the confessional statement to show that it is true?

(2) It is corroborated?

(3) Are the relevant statement made in it of facts true as far as they can be tested?

(4) Was the 'Accused' one who had the opportunity of committing the offence?

(5) Is his confession possible

(6) Is it consistent with other facts which have been ascertained and have been proved?

If the confessional statement does not pass the test, no conviction can be found on it.

"I have taken cognizance of the test as enunciated above and I have come to the irresistible conclusion which is the proof beyond reasonable doubt that the accused was a conspirator and the offence of conspiracy has been therefore proved and established. Issue 1 is resolved in favour of the Prosecution."

The lower court affirmed the above decision of the learned trial judge. At pages 133 to 134 of the record, the lower court, per Ogunwumiju, JCA held:

Although the offence of conspiracy is distinct from the offence of armed robbery, it is intricately woven together. Once the

respondent has firmly established that two or more persons formed the necessary common intent to commit an unlawful act by unlawful means, the charge of conspiracy can be grounded on circumstantial evidence and the trial court may infer conspiracy from facts through which the common purpose was achieve…

I myself could not have put it better than the trial (sic) when his lordship held at page 67 of the record thus:….

It is clear that the possession of a single barrel cut to size gun with a live cartridge found with the appellant and two cut to size gun and three cartridges in the white Volvo car is sufficient evidence to prove the charges of conspiracy and possession of arms against the appellant".

What is on ground clearly are concurrent findings of fact of the two lower Courts and it is settled that the Apex Court will not interfere with such findings of fact so long as the said findings are supported by legally admissible evidence that are not perverse or have led to a miscarriage of justice. See **Agala vs. Olusin (2010) 10 NWLR (Pt. 1202) 412; Osigwe vs. PSPLS Mgt. Consortiwn Ltd (2009) 3 NWLR (Pt. 1128) 378; Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382.**

Also to be stated is that it is settled law that the prosecution can prove its case beyond reasonable doubt by any of the combination of the following means:

d) By confession of the accused;
e) By direct evidence of eye witnesses; and
f) By circumstantial evidence.

This court has shown how the proof can be made and sustained. See in **Julius Abirifon vs. The State** (2013) LPELR-20807 (SC), thus Per Muhammad JSC had this to say:

"…… In Afio vs. The State (1986) 5 SC 194 at 219 – 220.

It was stated as follows:

"How is a case proved beyond reasonable doubt? A case can be

proved by direct oral evidence if the testimony of the witness who saw and heard them are believed, there will be proof beyond reasonable doubt... the local case of Joseph Ogunbadejo vs. The Queen (1954) 14 WACA 458 (otherwise known as APALARA'S case) is an excellent example of proof beyond reasonable doubt based purely on inference from circumstantial Evidence but far above these two methods of proof is voluntary confession of guilt by an accused person if it is direct and positive and satisfactorily proceed should occupy the highest place of authenticity when it comes to proof beyond reasonable doubt. This is why such a confession by itself is sufficient without further consideration to warrant a conviction unless the trial court is satisfied that the case has not been proved beyond reasonable doubt."

In a nutshell the PW1 and PW2 stated how they caught the appellant with Exhibits A, A1, B, C and D which testimonies were not challenged. PW1 had rendered the account on how appellant was caught with a cut size locally made gun and a live cartridge and during the search of the Volvo car that the appellant and cohorts abandoned, PW1 and others recovered two barrel gun cut to size, three live cartridges and three expended ones. Also that he, PW1 saw the accused in the well and recovered IDI and IDIA from his waist.

From the appellant's extra judicial statement, Exhibit E he stated thus: **"I was armed with one of the guns while Efe and Andrew were also armed".**

Clearly the confessional statement had corroboration in the evidence of PW1and PW2. In fact that is sufficient to ground the conviction and there is no necessity to call other witnesses since all they would come to say has been fully established and overloading the evidence would serve no useful purpose since what is on ground is sufficient. See **Okoroji vs. State (2002) 5 NWLR (Pt. 759) 21 at 28; Omogodo vs. State (1981) 5 SC 5; Akpa vs. The State (2008) 14 NWLR (Pt. 1106) 72.**

Indeed what I see is a situation where even without the corroborative evidence above stated, the trial court could safely convict on the free and voluntarily made confessional statement, Exhibit E which is cogent, direct and unequivocal and from the surrounding circumstances has been shown to be true

leaving no room for further belabouring the fact. See **Nwaebonyi vs. State (1994) 5 NWLR (Pt. 343) 138; Habibu Musa vs. The State (2013) LPELR – 19932; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Hassan vs. State (2001) 15 NWLR (Pt 735) 184.**

This is a classic case where the Supreme Court is to keep within the principle already laid down and that is that the concurrent findings of two courts below made from what is on record within the applicable laws in line with evidence and there being no miscarriage of justice, this court has no business interfering.

In conclusion and in line with the well articulated lead judgment, I see no merit in this appeal and I dismiss it.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

INYANG OKORO, (JSC):I read in draft the lead judgment of my learned brother, Amiru Sanusi, JSC just delivered. I agree with the reasoning leading to the conclusion that this appeal is devoid of merit and deserves to be dismissed. I adopt both the reasoning and conclusion as mine. Accordingly, I dismiss this appeal and affirm the judgment of the lower court.

Appeal Dismissed.

John Inyang Okoro
Justice Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add.

The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage
Justice Supreme Court

NIGERIA PORTS AUTHORITY
VS
1. AMINU IBRAHIM AND COMPANY
2. OBOYE AYODE AND COMPANY

SC. 218/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES - VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACTION: Undefended list – Duty on Court – Whether must consider only notice of intention to defend in order to determine whether to transfer the case to the general cause list.

ACTION: Undefended list procedure – Purpose thereof.

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

CONTRACT: Variation thereof – When valid – Whether subject to offer and acceptance of parties.

COURT: Federal High Court – Jurisdiction thereof – Management and administration of Federal Agency – S. 251(1) of CFRN 1999 – Whether within the jurisdiction of the Federal High Court.

COURT: Federal High Court – Jurisdiction thereof – Management and Administration of Federal Agency – The principles in Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405.

COURT: Jurisdiction thereof – Federal High Court – S. 251(1) of CFRN 1999 – Purport.

COURT: Jurisdiction thereof – Fundamental nature – Whether can be raised at any stage of the proceedings.

COURT: Jurisdiction thereof – How determined.

COURT: Post-Judgment interest – Award thereof – The principle in B.E.G.H Ltd vs. U.H.S & L. Ltd (2011) 7 NWLR (Pt. 1246) 246.

EQUITY: Concept of waiver – Purport – The principle in Fasade vs. Babalola (2003) 11 NWLR (Pt. 830) 26.

EQUITY: Waiver – Principles thereof.

JUDGMENT & ORDERS: Pre-Judgment interest – When not pleaded or proved – Whether cannot be granted by court – Relevant principles thereof.

JUDGMENT & ORDERS: Pre-Judgment interest – When can be awarded – Relevant principles thereof.

PRACTICE AND PROCEDURE: Pre-judgment interest – Power of Federal High Court thereto – Order 42 Rule 7 FHCR – Relevant consideration.

PRACTICE AND PROCEDURE: Undefended list – Notice of intention to defend – Where a party files a notice of intention to defend – Whether party must not file documents to disprove the averments in the affidavit in support of undefended list.

PRACTICE AND PROCEDURE: Undefended list – Where defendant files affidavit in his notice of intention to defend – Whether plaintiff does not need to file affidavit controverting same.

PRACTICE AND PROCEDURE: Undefended list – Where plaintiff does not controvert averments in defendant's affidavit – Whether failure does not amount to admission – The principle in Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd (2002) FWLR (Pt. 121) 1913.

Issues for determination

1. **Whether the Respondents cause of action, namely in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).**
2. **Whether in the light of the concession by the Respondents on the Respondents' brief in the Court of Appeal that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal (without a Respondent's Notice to affirm the Judgment on different grounds) wrongly or rightly declined to set aside the Judgment of the Trial court (Ground 1)**
3. **Whether the court below rightly or wrongly held that paragraphs 3-14 of Appellant's Affidavit in support of Notice of Intention to Defend the action, were hearsay evidence and therefore inadmissible (Grounds V and VI).**
4. **Whether the court below rightly or wrongly confirmed the Judgment entered in favour of the Respondents by the trial court in the sum of USD9,186,201=00 and #144,303,981.00 (Grounds IV & IX)**
5. **Whether absence of specific agreement or evidence of custom and trade usage on payment of pre-Judgment**

interest and on liquidated nature of the claim, the court below rightly confirmed the pre and post Judgment interests awarded against the appellant by the trial court (Ground VIII).

6. **Whether the courts below rightly or wrongly find that there was waiver of the time of completion of contract by the appellant (Ground VII).**

Facts of the matter

This is an appeal against the Judgment of the Lagos division of the Court of Appeal delivered on 8th May 2009 which dismissed the appeal by the appellant before it.

The plaintiffs now respondents, approached the Federal High Court Lagos by filing a suit under the undefended list procedure claiming the under listed reliefs.

(a) An order directing the defendant (now appellant) to pay the sum of USD9, 186,701 to the plaintiff being the agreed fee for the consultancy services rendered by the plaintiffs/respondents to it (the appellant)

(b) Interest on the said sum of USD9,186,701= at the rate of 10% from 27th April 2004 until final liquidation of the debt.

(c) An order directing the defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services entered into by the plaintiffs to the Defendant;

(d) Interest on the sum of #144,303,981 = at the rate of 10% per annum from 27th April 2004 until final liquidation of the debt.

The respondents herein, based their cause of action on the alleged appellant's failure to pay them the agreed fees in respect of professional services they rendered to the appellant in conformity with letter dated 23/1/2003 in which the appellant employed the services of the respondents to reconcile the account

position regarding concessions which the appellant gave to Inter Services Limited. Nigeria Liquefied Gas ((LNG) and Mobil Oil Producing Unlimited. The respondents claimed that they satisfactorily executed the job and have thereupon exhibited interim and final bills to the appellant but the latter failed or neglected to pay them despite repeated demands. That failure to settle the claims triggered the plaintiffs/respondents to institute the suit under the Undefended List Procedure against the appellant at the Federal High Court (the trial court) claiming the payment of the aforementioned sums.

Upon being served with the originating process, the appellant filed a Notice of Intention to defend the suit supporting same with an affidavit. The defences raised in the affidavit accompanying the Notice of intention to defend the suit, including the followings:-

(i) That the Respondents did not perform the contract satisfactorily;

(ii) That the Respondents did not execute the contract within the 35 days as earlier agreed upon;

(iii) That there was no extension of time;

(iv) Parties did not agree on the sum of USD9,186,701= and #144,303,981=00 as claimed by respondents

(v) That the respondents unilaterally varied the remuneration payable from 18% to 5% and that the variation was never agreed upon by the appellant.

(vi) That payment of fees was contingent upon recoveries of the identified short falls from the affected companies and no such recoveries were made, hence no money was due for payment to the respondents by the appellant.

In its Judgment, the trial court held that all the above defences did not call for the transfer of the suit filed under the Undefended List procedure to the General Cause List, especially in view of the appellant's failure to exhibit documents in support of the affidavit supporting the notice of Intention to defend the suit. In the result, the trial Judge found in favour of the respondents herein, as plaintiffs thereat.

Aggrieved by the Judgment of the trial court, the appellant appealed to the Court of Appeal, Lagos division which dismissed the appellant's appeal and upheld the decision of the trial court.

Piqued by the Judgment of the Court of Appeal, the appellant further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal).*

1. *The fundamental nature of jurisdiction can be raised at any stage of the proceedings.*

   The first issue for determination raised in the appellant's brief of argument and the corresponding issue in the respondents' brief touch on issue of jurisdiction. As rightly pointed out, the parties in this appeal did not raise the issue of jurisdiction in the two courts below. At any rate and notwithstanding the fact that issue of jurisdiction was never raised in the two courts below, in view of its fundamental nature and also since the law is trite that issue of jurisdiction can be raised by any of the parties at any stage of the proceedings even at the Supreme Court, such issue must first of all be addressed by me. See FRANCIS DURWODE VS. STATE (2000) 15 NWLR (Pt. 691) 467. I must however stress here, that it is always ideal and better that issue of jurisdiction is raised at earliest stage of the proceeding in order to avoid wasting the precious time of the court as seemingly done by the appellant in this appeal at the lower court. *(P 324 Paras C - F).*

2. *How to determine jurisdiction*

   The approved practice is that when issue of jurisdiction is raised, the court must carefully peruse the claim of the plaintiff in order to determine the crucial issue of jurisdiction. See Shell BP Ltd vs. Onasanya (1979) 10 NSSC 334; Opiti vs. Ogbeiwi (1992) 4 NWLR (Pt 234) 184 at 195; Adeyemi vs Opeyori (1976) 10 SC 455. This is very important, because it is well settled law, that where the court lacks jurisdiction to adjudicate on a cause or matter, everything done in such want of jurisdiction, is a nullity. See Mustapha vs.

Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539.

It has long been a settled law, that when a court is faced with question as to whether it has jurisdiction in a matter or not, it is incumbent upon it, to refer to the subject matter of the claim as pleaded by the plaintiff. In the present case, the claim on which the plaintiffs (now respondents) before the trial court upon which they prayed for the determination of same are reproduced hereunder:-

(a) An order directing the Defendant to pay the sum of USD 9,186,701 to the plaintiffs being agreed fees for the consultancy services rendered by the plaintiffs to the Defendant.

(b) Interest on the said um of USD 9,186,701 at the rate of 10% from 27th April 2004 pending the final liquidation of the debt.

(c) An order directing the Defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services rendered by the plaintiffs to the Defendant

(d) Interest on the sum of #144,303.981 at the rate of 10% from 27th April 2004 pending the final liquidation of the debt (emphasis supplied)

My understanding of the above claims, is that the defendant (now appellant) employed the plaintiffs/respondents to render some consultancy services on its behalf on the agreed sum claimed which said services were rendered by the respondents/plaintiffs, but the defendant/appellant failed or neglected or refused to pay. By not paying the sum claimed, the defendant (now appellant) therefore became indebted to the plaintiffs/respondents. The subject-matter or cause of action, to my mind, is and remains more or less a claim for recovery of such debt owed by defendant/appellant. Therefore in my view even if the lower court referred to the said agreement to be a contract or simple contract such in true sense, is a misnomer or merely a matter of semantic because such transaction does not amount to a simple contract as the appellant is insinuating in order

to oust the jurisdiction of the Federal High Court. It is also my considered view, that a close look at the cause of action, leaves no one in doubt, that the cause of action related to or was transmitted out of or from administration or management and control of the appellant/company. *(Pp 325 - 326 Paras F - G).*

3. *The purport of S. 251(1) of CFRN 1999*
The jurisdiction of the Federal High Court especially as it relates to the present suit/action is derived from the provisions of Section 251 (1) of the 1999 Constitution (as amended), which provides thus:-
(a) "Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly the Federal High Court shall have and exercise Jurisdiction to the exclusion of any court in civil causes and matters.
(b) The administration or management and control of the Federal Government or any of its agencies" *(Pp 325 - 326 Paras H - B.).*

Per Sanusi (JSC):
"From the facts of the instant case, as can be gleaned from the record of appeal, the appellant herein, simply used its administrative powers and instructed vides its letter dated 22/1/2003, to assign the respondents to reconcile the concessions it earlier gave to Intel Services Limited Nigeria Liquefied Natural Gas Ltd and Mobil Production Nigeria Unlimited, because the appellant was desirous of reconciling the position of the concessions it earlier gave those named companies. There is no doubt that the respondents have rendered the service of reconciliation as consultants. I have read the cases of Onuorah vs. K R PC Ltd (2005) 6 NWLR (Pt. 921) 393 at 405; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33 at 52; IT PP Ltd vs. UBN PLC (2006) 12 NWLR (Pt 995) 483 FCE Oyo vs. Akinyemi (2008) 15 NWLR (Pt 1109) 21 and Minister of Works vs.

Tomes Nigeria Ltd (2002) 2 NWLR (Pt 752) 74, in which this court held that the Federal High Court lacks jurisdiction on matters relating to simple contract. However, as I posited above, the transaction executed by the parties in the present case did not pertain or relate to simple contract. Those cases are therefore distinguishable from the facts of the present case, hence those cases are not relevant or applicable to the facts in the present case. I accordingly so hold.

Again, there is no doubt that the appellant is an agency of the Federal Government, hence the trial court has jurisdiction to adjudicate in the mater by virtue of the provisions of Section 251(1) of the 1999 Constitution (as amended), contrary to the stance held by the learned senior counsel for the appellant. Having said so, I resolve the first issue against the appellant and in favour of the respondents". *(P 326 .Paras B - H).*

4. *A party needs not attach documents to disprove averments in an affidavit under undefended list*

On the second issue, the appellant contends in its Amended Brief of argument, that the trial court basically denied the defendant/appellant leave to defend the suit simply because it failed to attach documents to its affidavit in support of its Notice of Intention to defend the suit. On the other hand, the learned counsel for the respondents contended otherwise. It was argued on behalf of the respondents that the leave was not given to the appellant to defend the suit by the trial court simply because the appellant failed to place any material before the trial court which disclosed any defence to the suit. In the first place, I must state that it is not the correct position of the law, that a party who has filed a notice of intention to defend must, as a condition precedent attach a document in proof of or to disprove the deposition contained in the affidavit. All that the law requires is to provide sufficient or adequate facts in the said affidavit which call for thorough scrutiny or inquiry. In other words, attachment of documents by the appellant was/is not and was in fact, never given as the reason why

the appellant was denied leave to defend the suit. *(Pp 326 - 327 .Paras H - D).*

5. *What court must consider in an undefended list proceedings*
It needs to be emphasised here, that in an action brought under the Undefended List procedure, as in this instant case, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of his Notice of Intention to defend the suit. Once the court comes to the inevitable conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an Undefended suit and enter judgment accordingly without calling the defendant, even if present in court, to answer or be heard. See HAIDO vs. USIMAN (2004)3 NWLR (Pt. 859) 65; NKWO MARKET COMMUNITY BANK NIGERIA LTD vs. PAUL EJIKEME UWABACHI OBI (2010) 14 NWLR (Pt. 1213) 169. Also this court in the case of ACB Ltd vs. GWAGWADA (1994) 5 NWLR (Pt. 342) 25 held that the affidavit in support of the Notice of Intention to Defend must show that the grounds for asking to be heard in defence, are not frivolous, vague or disquiet to delay the trial of the action and it must show that there is dispute between the parties as had been shown in this case. *(P 327 Paras D - G).*

Per Sanusi (JSC):

"From the record of appeal, it is clear from the judgment of the trial court, that non-attachment of the exhibits to the affidavit in support of the suit by the appellant was not given as the reason why the trial court refused to grant leave to the appellant/defendant to defend the suit. The actual reason for the refusal to grant such leave, was clearly stated by the trial court at page 69 of the record where it held thus:-

> **"In fact the defendant did not place any material before the court to show that it is serious with this case or that there is any substantive matter to be heard at trial. This,**

> **I believe, is just filed to frustrate the plaintiffs, out of their legitimate earnings. I therefore enter judgment in favour of plaintiffs as claimed, as the Defendant has no reasonable or any defence to this action".**

Thus, from the above findings of the trial court, failure to attach documents to the affidavit was far from being the reason or withholding leave to the appellant to defend the suit.

On its part, the court below after considering the above findings of the trial court, had this to say at page 6 of the record as below:-

> **"The defence set upon by the appellant was a sham defence and was rightly, rejected by the trial court".**

In fact looking at the judgment of the trial court, there does not seem to be anywhere where the trial court attributed to the non-attachment of some documents to the defendant/appellant's affidavit, as the reason why it withheld or declined to grant leave to the appellant to defend the suit or why it refused to transfer the Undefended List suit to the general cause list. *(Pp 327 - 328 Paras H - E).*

6. *Court never made the assertion that affidavit was hearsay.*

I think if one closely looks at the entire proceedings, especially the judgment of the trial court, one can say that the latter or trial court never made the assertion that the affidavit supporting the notice of intention to defend the suit was hearsay. The trial court attributed its reason for withholding leave to defend, on non-presentation of sufficient materials before it as would warrant or justify it to use its discretion to grant the leave to defend. There was nowhere it was stated by the trial court that it rejected the request to grant leave to defend, because the evidence in the affidavit was hearsay. The refusal to grant the leave to defend as I posited above was purely based on the backdrop that the lower court held that the defence set upon by the appellant was a sham hence it held that the trial court was right in rejecting such purported defence presented by the appellant. *(Pp 328 - 329 .Paras H - B).*

Per Sanusi (JSC)

"I have also closely considered the arguments advanced by both parties learned counsel on the issue of some of the averments raised in the supporting affidavit being or amounting to hearsay evidence. As I stated earlier, the trial court gave its reason for refusing to grant the leave to defend in its Judgment and such reasons did not accord with the allegation that some of the paragraphs amounted to hearsay evidence and therefore inadmissible. To me, that issue of the said paragraphs of the affidavit being or amounting to hearsay evidence is of no moment since that was not the substratum of the decision of the trial court. It is however noted by me, that there was no further affidavit filed to challenge the averments in the paragraphs under reference in the supporting affidavit filed by the appellant/defendant. It is also noted by me, that despite the absence of any notice of intention to urge the court below to affirm the decision of the trial court on other grounds besides the ones relied on by the trial court, the court below dealt at lengths with the averments in the paragraphs under reference where it stated thus, inter alia:-

> **"A look at the affidavit in support of Notice of Intention to defend reproduced above show that the deponent deposed to all material facts not from his personal knowledge but from information availed him by Appellant's counsel and paragraphs 3 to 14 of the said affidavit all contain acts not within the knowledge of the deponent but information passed to him not from his employer, the Appellant, but from counsel".**

In any case dispite the above observation or findings by the court below, the same court found that the defence posed by the defendant/appellant was a sham as earlier found by the learned trial Judge. It is on that backdrop, that I also regard the issue of hearsay delved into by the lower court as of no moment, since both courts

after duly considering the affidavits evidence, resolved or arrived at the correct conclusion that the defendant/appellant's defence was a sham and that no sufficient material was placed before the trial court, hence the trial court rightly denied leave to the appellant to defend the suit, which in my view, was correct. It is also for these reasons that I resolve both the second and third issues for determination against the appellant herein. *(Pp 329 - 330 .Paras C - B).*

7. *When variation of contract must be valid*

There is nothing to be gained by saying, that the submission of the learned senior counsel for the appellant that the agreed percentage payable to the respondents for the recoveries as duly agreed upon by the parties, was 18% and not 5% as presented by the respondents might be its reason for conceding to the payment of the lesser sum of 5%, amounts to variation. For the variation of the agreed sum claimed by the respondents to be valid therefore, the appellant must be informed in writing and it (the latter) must also accept the new or lesser amount of their claim in writing for same to be valid and enforceable, since it is a fresh agreement. It is trite law that agreement for variation of an existing contract must possess the basic characteristics of a valid contract which are known to be offer, acceptance and consideration. See IDUFUEKO VS. PFIZER PRODUCTS LTD AND ANOR (2014) LPELR 22999 (SC; UNITY BANK PLC VS. OLATUNJI (2015) 5 NWLR (Pt. 1452) 203 at 242.

Now in this instant case, it is a clear as crystal, that vide the correspondences between the parties the agreed sum to be paid for recoveries was 18% and not 5%. That was what the parties accepted. It was based on such agreement that the respondents did their own part of the obligation. The respondents made a move and did claim 5% instead of the agreed 18% payment which was never agreed upon by the appellant, even though it was a reduction of the burden on the obligation on it, the appellant.

However, there appears to be no breach on the part of the respondents in the transaction since they had duly executed the job

assigned to them by the appellant creditably well. I do not think it will meet the Justice of the matter to say that the claim for lesser percentage as their entitlements would completely vitiate the entire agreement. The justice of the case is that the court should enforce or revert to the original percentage of 18% payment on the recoveries and recoverable as earlier agreed upon, instead of the 5% reduced amount which as I stated earlier, was never agreed upon in writing and accepted by the appellant since the latter appears to reject it. It will amount to sheer injustice to hold otherwise, since the respondents had apparently fulfilled or satisfied their obligation to the satisfaction of the appellant while the latter reneged its obligation by failing or refusing to pay them their hard-earned entitlements. It is my view therefore, that the lower court had rightly affirmed the judgment entered in favour of the respondents. The fourth issue is therefore hereby resolved against the appellant. *(Pp 331 - 332 Paras A - A).*

8. *When a pre-judgment interest can be awarded*

I have closely examined the Writ taken by the plaintiffs (now respondents) which was filed at the trial court and noticed that such claim of interest was really made by the plaintiffs/respondents against the appellant as defendants thereat.

The law is well settled that before a pre-Judgment interest can justifiable be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally pleaded and proved. See AG Ferrero & Company Ltd vs. Henkel Chemicals Nigeria Ltd (2011) LPELR – 12(sc); Adeyemi vs. Lan Baker Nig Ltd (2000) 7 NWLR (Pt. 663) 33 at 48. *(P 332 Paras D - F).*

9. *Court may grant pre-judgment interest even when not pleaded or prove.*
It is however a valid law, that a court can still grant pre-Judgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest like in this instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his Judgment. See Petgas Res Ltd vs. Mbanefo (2007) 6 NWLR (Pt. 1031) 545. *(P 332 Paras G - H).*

10. *The purport of Ord. 42 Rule 7 of the Federal High Court Rules*
In the present case, the respondents had for quite a long time, submitted their final report to the appellant but the later deliberately refused or neglected to pay them their hard-earned entitlement as agreed upon. Again, by Order 42 Rule 7 of Federal High Court (Civil Procedure) Rules 2000, the trial court has the power to award judgment interest. The provisions read thus:

> **"The court at the time of making any Judgment or order or at any time after wards, may direct the term with which the payment is to be made or other act is done, reckoned from the date of the Judgment or orders, or from some other time as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any Judgment, commencing from the date thereof or afterwards, as the case may be"**

In view of the above provisions, the trial court was therefore right in making the award of interest. The court below was also correct when it affirmed the trial court's order for the award of the said interest in the instant case. As a corollary, this issue must be and is also hereby accordingly resolved against the appellant. *(P 333 .Paras A - D).*

11. *The purport of waiver*

To my mind, waiver or acquiescence presupposes that the person is to be bound where he is fully cognizant or aware of his rights, yet he neglects to enforce such rights, or chooses to benefit instead of another, either by both of which he might claim. See Auto Import Export vs. Adebayo (2005) 19 NWLR (Pt. 959) 44. It is my considered view that waiver is an issue of law, and it is an elementary principle of law, that parties do not plead law but only facts.

The facts exposed by the respondents clearly show that the appellant had never timeously complained about the late submission of the reports until when the suit was instituted at the trial court. It is my considered view that failure to complain timeously amounted to waiver of the such delay or late submission of the report to it by the respondents as rightly held by the trial court and later endorsed by the learned Justices of the court below. This issue is also hereby resolved against the appellant.

I must state here, that I have duly perused the Appellant's Reply Brief. The said Reply Brief filed by the senior counsel on behalf of the appellant merely contained re-arguments, repetition and or fine-tuning of the arguments earlier proffered in the appellant's main brief. That is not the purport of a Reply brief at all. *(Pp 333 - 334 Paras I - E).*

12. *Attitude of Supreme Court to concurrent findings*

Finally, it is noted by me, that there are concurrent findings of two lower courts in this instant case. As a matter of practice and policy, this court does not normally interfere with or disturb the concurrent findings of two lower courts <u>except</u> on special or exceptional at circumstances, such as where the findings are either perverse or there is misconception of facts, or misapplication of law None of these viruses is prevalent in this case, hence I must refrain from tempering with the findings of the two courts below. *(P 334 Paras E - F).*

13. *The purpose of undefended list procedures*

The procedure under the undefended list is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. So, where the plaintiff satisfied the court with affidavit evidence which the defendant cannot answer, the court would enter judgment for the plaintiff, thereby avoiding a full blown trial with the usual expenses, frustrations and delay. ON the other hand if the defendant files an affidavit which discloses a defence on the merit, he would be granted leave to defend by the court. It prevents worthless and sham defences. See M.C. Investment Ltd & Anor vs. C.I. & C.M. Ltd (2012) 6 SC (Pt. i) p. 188

Both courts below found that the respondents were entitled to their fees for consultancy services. This court agreed with the concurrent findings of both courts below. The attitude of the appellant has been to dribble and frustrate the respondents. Denying them the judgment sum. I am satisfied that the appellant has no defence to the respondents claim, and it is for sham defences such as this that the undefended list was designed for. *(P 335 .Paras B - E.).*

14. *Action was within the jurisdiction of Federal High Court.*

A glance at the claim and the accompanying materials show that by letters dated 22nd January 2003 the appellant separately instructed the respondents to reconcile the position of the concessions it gave to Intel Services Limited, Nigeria, Liquefied Natural Gas Ltd and Mobil Producing Nigeria Unlimited. It was that decision of the appellant to reconcile the position of the concession that gave rise to the case and in getting to that policy decision appellant utilized the expertise of the respondents in the investigative activity. In giving Notice of Intention to Defend the appellant had stated that its reason is that the Federal Executive Council had referred all contracts awarded by it to the EFCC and the Federal Executive Council has also placed an embargo on payment of contracts awarded during the period which was an administrative decision even though that of the Federal Executive council. Clearly what was at play was an

administrative act of a Federal Government Agency within the purview of section 251 of the CFRN and so in the exclusive jurisdiction of the Federal High Court I refer to Oguebego vs. PDP (2016) 4 NWLR (Pt. 1503) 446; Goerge vs. FRN (2014) 5 NWLR (Pt. 1399) page 1.

A clearer view on this issue is seen in the case of Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405 at 427 wherein my learned brother, I. T Muhammad JSC stated thus:-

> **"The Constitution of the Federal Republic of Nigeria 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. Section 251 (1) (p) (q) ® and (s) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)"**

The situation herein is well placed in the administrative and management activity of the appellant and there is no running away from the fact that it is a matter the Federal High Court not only has jurisdiction to deal with but an exclusive jurisdiction and so the appellant cannot be wishful thinking covert to the matter to a simple contract so as to take it out of the powers of adjudication of the Federal High Court. The consequence is that the Federal High Court was well placed to assume jurisdiction which it correctly did and that is the end of the debate in that regard. The issue is resolved against the appellant. *(Pp 339 - 340 Paras C - B.).*

15. *Plaintiff is not to file affidavit to controvert affidavit of defendant in his notice of intention to defend.*

Again to be said is that in an Undefended List Procedure it is not permitted for a Plaintiff to file an affidavit to controvert facts contained in the affidavit of the defendant in support of the Notice of Intention to Defend. It is a matter left for the court to determine on what is already in, if it should transfer the suit to the general cause list or determine it on the claim of the plaintiff in the light of a worthless attempt at defence in the supporting affidavit of Notice to

Defend where it is available. See Odu vs. Agbor – Hemeson (2004) FWLR (Pt. 188) 935 where the court stated as follows:-

> **"Admittedly, the rules under the undefended list procedure do not expressly bar the use of further affidavit as submitted by learned counsel to the appellant but with profound respect to counsel. <u>It is not contemplated by the said procedure that triable issues raised by the defendants' affidavit should be rebutted or controverted by a further affidavit by the plaintiff as was done in the instant case</u>. All that the trial court is enjoined to do if the defendants' affidavit in support of the notice to defend discloses a defence is to transfer the suit to the general cause list for hearing and determination. There is no room for a further affidavit by the plaintiff to controvert the defendant's affidavit as such will lead to trial and thus defeat the objective of the speedy trial which the undefended list procedure is intended to achieve. The court below was therefore eminently justified in striking out the appellants' further affidavit."** *(Pp 342 - 343 .Paras E - C).*

16. *Failure of plaintiff to controvert defendant averment does not amount to admission.*

Again on the point is the case of Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd (2002) FWLR (Pt. 121) 1913 where the court at p. 1922 held as follows:

> **"In the present case, it is very important to further stress that the defences raises by the respondents with regard to their claims for set-off of U.S $9,000.00 and 2% commission against the appellant, while clearly disclosing a defence to the appellant's action on the merit, being plainly triable issues, cannot possibly be determined under the undefended list procedure, as the appellant is disputing the claim. The failure of the**

> **appellant to file a further affidavit to controvert the defences raised by the respondents in this respect therefore cannot be regarded as admission of the claims, as the appellant is not at all required to file such further affidavit under Order 23 of the High Court (Civil Procedure) Rules. The learned trial judge was therefore in grave error to have regarded the failure of the appellant to react to the claim of the respondents that the set-off being claimed by the respondents is part of the transaction between the parties that gave rise to the appellant's case, the respondents' claim must be proved by evidence before it can be regarded as established which would necessitate the hearing of the entire case or pleadings in order to allow each party the full opportunity of proving the relevant claims".** *(P 343 Paras C - I).*

17. *The purport of concept of waiver*

There is no use belaboring a point that is manifestly established by the documents or evidence before the court to the effect that there was an existing contractual relationship between the appellant and respondents arising from the letters as in the Record. It was based on these contractual agreements that respondents accepted the offer and carried out the assignment outlined in the said letters without the appellant raising an eyebrow only to change course after the completion of the work and submission of the bill of charges.

It follows that this later complaint by the appellant that respondents did not execute the contract within the agreed 35 days has lead to the conclusion from the conduct of the appellant that it has waived that completion of contract within 35 days. See the case of Fasade vs. Babalola (2003) 11 NWLR (Pt. 830) 26, Supreme Court held as follows:

> **"The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the**

> **choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both. The exercise has to be a voluntary act. <u>There is little doubt that, a man who is not under any legal disability should be the best judge of his own interest, if therefore, having full knowledge of the rights, interests, profits or benefit conferred upon or accruing to him by and under the law, but he intentionally decides to give up at these, or some of them, he cannot be heard to complain afterwards</u> that he has not been permitted to the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waited those rights".** See also the case of **Adecentro (Nig) Ltd. vs. C. OAU** (2005) 15 NWLR (Pt. 948) 290.

The only logical conclusion is that appellant is stopped from complaining about the none completion within 35 days and so has lost out therein.

On the matter of pre-judgment interest, the law is clear that such interest is awarded where there is an agreement for payment of interest, in which case a claim as such must be pleaded and proved as it would not do to just state a claim for pre-proof of same. However a court can grant pre-judgment interest on a monetary or liquidated sum awarded to a successful party even where such a party did not plead or adduce evidence to prove it as such interests naturally accrue from the failure to pay the sum involved over a period of time thereby depriving a party from the use and enjoyment of the sum involved. That in my humble view is substantial justice. I make reference to the case of Adeyemi vs. Lan and Banker (Nig) Ltd (2000) 7 NWLR (Pt. 663) 33 pg 48. Paras D-E, it was held thus:-

> **"…The law on pre-judgment interest is that the award must be based either on statute, contract or mercantile custom or equity and the plaintiff must plead the basis and lead satisfactory evidence. That is so. But the law also recognizes the right to interest of a plaintiff in a claim for the return of money arising from commercial transaction particularly where the defendants has held the money of the plaintiff for some time. In a situation arising from commercial matters I should think that a party holding on to the funds of another for so long without justification ought to pay him compensation for so doing."** *(Pp 345 - 347 Paras H - D).*

18. *A trial court can award pre-judgment interest where approved by rules of court.*

See also Petgas Res. Ltd vs. Mbanefo (2007) 6 NWLR (Pt. 1031) 545. A trial court can award judgment interest. The authority to award judgment interest is enshrined in the Rules of Court. Please see the case of B.E.G.H. Ltd vs. U.H.S & L. Ltd (2011) 7 NWLR (Pt. 1246) 246. The relevant position contained in the Federal High Court (Civil Procedure) Rules 2000 is found in Order 42 Rule 7 this states as follows:-

> **"The court at the time of making any judgment or Order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be done, reckoned from the date of the judgment or Order, or from some other point of time, as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any judgment, commencing from the date thereof or after wards, as the case may be."**

On the final point is that it is too late in the day for the appellant to complain about the report and that delay in complaint has constituted a waiver which needs not be pleaded to apply. See

Ekundayo vs. F.C.D.A (2015) LPELR – 24512 Auto Import Export vs. Adebayo (2005) 19 NWLR (Pt. 959)44. *(P 347 Paras D - I).*

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A *Petgas Res Ltd vs. Mbanefo (2007) 6 NWLR (Pt. 1031) 545*
See Shell BP Ltd vs. Onasanya (1979) 10 NSSC 334
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B **Nigerian Statutes cited**
The 1999 Constitution (as amended) - Section 251 (1)

Representation
C Bayo Osipitan (SAN), with A.M Kayode C.I.A Ofoegbunam and Wole Aroge for the Appellants
Peter Olomola for the Respondents

D **AMIRU SANUSI, (JSC) (Delivering the Lead Judgment):** This is an appeal against the Judgment of the Lagos division of the Court of Appeal (lover or court below) delivered on 8th May 2009 which dismissed the appeal by the appellant before it. The brief facts giving rise to the appeal as could be gathered from the record of appeal are summarized below:
E The plaintiffs now respondents, approached the Federal High Court Lagos by filing a suit under the undefended list procedure claiming the under listed reliefs.

F **(a) An order directing the defendant (now appellant) to pay the sum of USD9, 186,701 to the plaintiff being the agreed fee for the consultancy services rendered by the plaintiffs/respondents to it (the appellant)**

G **(b) Interest on the said sum of USD9,186,701= at the rate of 10% from 27th April 2004 until final liquidation of the debt.**

(c) An order directing the defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services entered into by the plaintiffs to the Defendant;

H **(d) Interest on the sum of #144,303,981 = at the rate of 10% per annum from 27th April 2004 until final liquidation of the debt.**

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It would seem to me that the respondents herein, based their cause of action on the alleged appellant's failure to pay them the agreed fees in respect of professional services they rendered to the appellant in conformity with letter dated 23/1/2003 in which the appellant employed the services of the respondents to reconcile the account position regarding concessions which the appellant gave to Inter Services Limited. Nigeria Liquefied Gas ((LNG) and Mobil Oil Producing Unlimited. The respondents claimed that they satisfactorily executed the job and have thereupon exhibited interim and final bills to the appellant but the latter failed or neglected to pay them despite repeated demands. That failure to settle the claims triggered the plaintiffs/respondents to institute the suit under the Undefended List Procedure against the appellant at the Federal High Court (the trial court) claiming the payment of the aforementioned sums.

Upon being served with the originating process, the appellant filed a Notice of Intention to defend the suit supporting same with an affidavit. The defences raised in the affidavit accompanying the Notice of intention to defend the suit, include the followings:-

(i) That the Respondents did not perform the contract satisfactorily;

(ii) That the Respondents did not execute the contract within the 35 days as earlier agreed upon;

(iii) That there was no extension of time;

(iv) Parties did not agree on the sum of USD9,186,701= and #144,303,981=00 as claimed by respondents

(v) That the respondents unilaterally varied the remuneration payable from 18% to 5% and that the variation was never agreed upon by the appellant.

(vi) That payment of fees was contingent upon recoveries of the identified short falls from the affected companies and no such recoveries were made, hence no money was due for payment to the respondents by the appellant.

In its Judgment, the trial court held that all the above defences did not call for the transfer of the suit filed under the Undefended List procedure to the General Cause List, especially in view of the appellant's failure to exhibit documents in support of the affidavit supporting the notice of Intention to defend the suit. In the result, the trial Judge found in favour of the respondents herein, as plaintiffs thereat.

Aggrieved by the Judgment of the trial court, the appellant appealed to the Court of Appeal, Lagos division (the lower court or court below) which dismissed the appellant's appeal and upheld the decision of the trial court.

Piqued by the Judgment of the lower court, the appellant further appealed to this court initially, the learned appellant's counsel filed a notice of appeal containing two grounds of appeal. However, with leave of this court, the appellant's learned counsel sought and was granted leave to amend its original notice of appeal. Sequel to that, it was allowed to amend and bring in an Amended Notice of Appeal which it filed on 26/6/2011. The Amended Notice of Appeal expanded the grounds of appeal from two to nine grounds. The appellant's learned counsel thereupon, filed an Amended Appellant's Brief of Argument on 13/2/2012 which was deemed filed on 26/11/2017. The said Brief of argument was settled by Prof Taiwo Osipitan, SAN. The learned senior counsel for the appellant distilled six issues for determination out of the nine grounds of appeal. The six issues for determination are reproduced hereunder:-

(1) Whether the Respondents cause of action, namely in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).

(2) Whether in the light of the concession by the Respondents on the Respondents' brief in the Court of Appeal that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal

(without a Respondent's Notice to affirm the Judgment on different grounds) wrongly or rightly declined to set aside the Judgment of the Trial court (Ground 1)

(3) Whether the court below rightly or wrongly held that paragraphs 3-14 of Appellant's Affidavit in support of Notice of Intention to Defend the action, were hearsay evidence and therefore inadmissible (Grounds V and VI).

(4) Whether the court below rightly or wrongly confirmed the Judgment entered in favour of the Respondents by the trial court in the sum of USD9,186,201=00 and #144,303,981.00 (Grounds IV & IX)

(5) Whether absence of specific agreement or evidence of custom and trade usage on payment of pre-Judgment interest and on liquidated nature of the claim, the court below rightly confirmed the pre and post Judgment interests awarded against the appellant by the trial court (Ground VIII).

(6) Whether the courts below rightly or wrongly find that there was waiver of the time of completion of contract by the appellant (Ground VII).

As regards the respondents, an Amended Respondents' Brief of Argument filed on their behalf on 6/11/2017 which was settled by one Peter Olomola and Ifeanyi Clinton Uwa. Six issues for determination were also decoded therein, which I shall reproduce hereunder. The issues are:-

(A) Whether or not the Federal High Court had Jurisdiction to entertain the suit (Ground III)

(B) Whether having regard to the concession by the Respondents in their brief of argument, that filing of Exhibits/Documents was not a condition precedent to the transfer of the suit to general cause list which formed the basis of the Judgment of the trial court, the learned Justices of the Court of Appeal should, without a Respondents' notice to Affirm the Judgment on

different ground, not have set aside the Judgment of the court below (Ground 1)

(C) Whether the learned Justices of the Court of Appeal rightly or wrongly failed to act on the Appellant's unchallenged affidavit showing cause why the appellant should be allowed to defend the suit. (Grounds v and vi)

(D) Whether the court below rightly or wrongly affirmed the judgment entered in favour of the Respondents by the trial court in the sums of USD 9,186,201.00 (sic) and #144,303,981.00 (Grounds IV & IX)

(E) Whether or not the lower court was right to have affirmed the decision of the trial court to award pre and post Judgment interest (Ground VIII)

(F) Whether or not the court below was right to have found that there was waiver of the time clause by the appellant. (Ground VII)

Submissions of Learned Counsel of the Appellant on Issues For Determination

ISSUE NO. 1

The first issue raised by the appellant relates to issue of jurisdiction even though it was never raised at the two courts below. As rightly submitted by the learned appellant's counsel, issue of jurisdiction can be raised at any time and before any court including this apex court and same issue can also be raised by the court ***suo motu.*** The learned appellant's counsel submitted that before raising this issue in this court, he sought and obtained leave of this court to raise the issue of jurisdiction for the first time before it. The learned counsel conceded that the Respondents as plaintiffs at the trial court, sued at the Federal High Court, and their cause of action was for recovery of sums of money allegedly due to them from the appellant, according to him, under contract of service rendered to the appellant. He referred to the endorsement on their statement of claim at page 5 of the record of appeal. He submitted that both the trial court and the court of appeal (i.e the lower court) made finings in that regard, in that

A both courts below in their Judgments/findings referred to the entire transaction between the plaintiffs and defendant now respondents and appellant respectively as "a contract".

It was further submitted on behalf of the appellant, that it was
B evidentially shown by the Originating Summons, statement of claim and the Judgments of the two lower courts, that the cause of action in the suit right from the outset was grounded on contract of service relating to recovery of payment allegedly due to the respondents in respect of services contract rendered by the
C respondents herein, for the benefit of the appellant's letters of request.

The learned counsel for the appellant further argued that since the respondent's cause of action pertains to or was based on simple contract, it thereupon, becomes outside the jurisdiction of the Federal High Court (trial Court) as provided by Section 251 of the Constitution of the Federal Republic
D of Nigeria 1999 (as amended) which clearly prohibits the Federal High Court from assuming jurisdiction on cause of action based on or relating to simple contract. Learned senior counsel on the above submission referred to the underlisted Judicial authorities which decided that case of simple contract
E devoid of statutory flavor, notwithstanding the inclusion of the Federal Government or any of its agencies as parties, only the State High Court or High Court of the Federal Capital Territory has jurisdiction and NOT the Federal High Court. See the cases of **OMUORAH vs KRPC Ltd (2005) 6 NWLR**
F **(Pt. 621) 393 at 405 (pares A-D; ADELECAN O. ECULINE NV (2006) 12 NWLR (Pt. 993) 33 at 52 ITPP Ltd vs. UBN Plc (2006) 12 NWLR (Pt. 995) 504; FCE OYO vs. AKINYEMI (2008) 15 NWLR (Pt. 1109) 21 at 49; MINISTER OF WORKS vs. TOMAS NIG LTD (2002) 2 NWLR (Pt. 752)**
G **744 at 777**. On the authorities of the above listed cases, the learned appellant's senior counsel, urged this court to hold that the trial court lacks Jurisdiction to entertain and determine the matter.

ISSUE NO. 2

H Issue No. 2 deals with whether in the light of the concession by the respondents that filing of exhibits/documents is not a condition precedent to the transfer of the suit to general cause list.

On this second issue, the learned counsel to the appellant argued that it

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was needless for the appellant to exhibit documents to the affidavit attached to its notice of intention to defend the suit before being allowed to defend same. It referred to the reaction of the respondents' Counsel at page 109 of the record, paragraph 5 – 17 where he conceded to his notice for intention to defend the Judgment of the trial court, which was to the effect that the affidavit showing cause must contain documents/exhibits. He therefore submitted that once the respondents' confesses his inability to support the judgment of the trial court the court below should have set aside the judgment. He cited the case of LH LTD vs. SONEB ENT. LTD (2010) 4 NWLR (Pt. 1185)561 SC. He then urged this court to resolve this issue in favour of the appellant.

ISSUE NO. 3

Issue No 3 relates to whether the court below was right to hold that paragraphs 3-14 of the appellant's affidavit in support of the notice of intention to defend the action, was mere hearsay.

Learned senior counsel for the appellant referred to the judgment of the court below at pages 145-146 of the record and submitted that inadmissibility of paragraphs 3-14 of the affidavit in support of notice of intention to defend the suit, was not the basis of the judgment of the trial court. He therefore submitted that a respondent who desired to support the Judgment of a court on ground different from the ground relied upon by the trial court, must file a Respondent's Notice to affirm such decision on such different ground (s). See Order 2 Rule 2 of the Court of Appeal) Rules. He cited the case of D. A (NIG) AIED Ltd vs. Oluwadare (2007) 7 NWLR (Pt. 1033) 336 at 385

He submitted that contrary to the decision of the court below, the contents of the affidavit in support of notice of intention to defend were not exclusively based on some of the paragraphs of the affidavit in support of the notice of intention to defend which restated the contents of the documents which were before the trial court. He then urged this court to also resolve this issue in favour of the appellant.

ISSUE NO. 4

Issue No 4 pertains to whether the court below was right or wrong in confirming the judgment entered in favour of the respondents by the trial court in the sum of USD 9, 186,201.00 and 144,303,981.00.

Here, the learned counsel to the appellant argued that there was no consensus ad idem on the amount of money payable by the appellant to the respondents for the services allegedly rendered by them to the appellant. He argued that the appellant never agreed with the respondents to pay fee calculated at the rate of 5% of the recoveries or the amount recoverable and that 18% was what was agreed upon vide the letter of offer/engagement. He argued that the respondents unilaterally varied the terms of payment from the agreed 18% to 5%. He submitted that unless accepted, a counter offer is incapable of being enforced as a contract. He cited and relied on the case of NNSC v Africo Incorporation (1994) 3 NWLR (Pt. 332) page 392 at 344. He argued that the appellant deposed to the fact that the contract was not satisfactorily executed and the court below ignored the fact that the appellant expected at this stage, to the appellant grant leave to defend the suit to establish the merit of the defence it raised in the affidavit for showing cause. He then urged the court to resolve this issue in favour of the appellant.

ISSUE NO. 5

Issue No 5 deals with the award of pre-Judgment interests. Learned silk for the appellant argued that the respondents did not tender any evidence of agreement by the appellant to pay them interest on the outstanding professional fee and that there was no evidence of custom or trade usage which entitles the respondents to charge interest on the outstanding professional fee.

He submitted that the 10% pre Judgment interest award in favour of the respondents is not liquidated sum and the court is limited to the Judgment in respect of liquidated and the ascertained sum of money. He urged the court to resolve this issue in favour of the appellant.

ISSUE NO. 6

Issue No 6 queries whether there was waiver of time of completion of the contract.

The learned counsel to the appellant argued that the court below wrongly applied the doctrine of waiver and acquiescence against the appellant, when the respondents did not plead waiver and acquiescence as the basis of their claims at the trial court. He cited the case of **Bank of the North Ltd vs. Yau (2001) 10 NWLR (Pt 721) page 408 at 441** paragraph f. He submitted that where waiver

A has not been specifically pleaded, the respondent who did not plead waiver is not entitled to rely on same as a defence or claim. He cited the case of **Okonkwo vs. CCB paragraph C (2003) 8 NWLR (Pt. 822) page 47 at 407-408H-B**. He urged the court to resolve this issue in favour of the appellant and
B to finally allow this appeal.

In his response to the argument of the learned appellant's counsel, the learned counsel to the respondents, as I stated supra, also formulated 6 issues for determination of the appeal. Their counsel's submissions go as below:-

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Submissions of Learned Counsel For Respondents

ISSUE NO. 1

The respondents' Issue No 1 deals with whether or not the Federal High Court
D had jurisdiction to entertain the suit. The learned counsel for the respondents argued that the cause of action as can be seen from the originating processes, relates to the administration or management and control of the appellant and not contract per se. He referred to Section 251 of the 1999 Constitution (as
E amended) and submitted that the claim of the respondents at the trial court bordered on the administration or management control of the appellant. He submitted that even if action was founded on a contract, the Federal High Court would still have jurisdiction to entertain same, as the court has jurisdiction to
F entertain all matters that involve the Federal Government or any of its agencies. He urged this court to resolve this issue in favour of the respondents or in the alternative to transfer the matter to High Court of Lagos State, if this court holds that the Federal High Court has no jurisdiction in accordance with Section
G 22(2) of the Federal High Court Act. 2004.

ISSUE NO. 2

Issue No 2 relates to whether filing of exhibit/documents was a condition precedent to the transfer of a suit to general cause list. On this issue, the learned
H counsel to the respondents argued that the suit was not transferred to the general cause list not because the appellant did not attach documents to its affidavit, but simply because the appellant did not place any material before the court which discloses any defence to the suit.

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Regarding the contention of the appellant that the respondents' argument that the appellant's affidavit in support of notice of intention to defend, contains hearsay evidence, that point was not raised at the High Court. He referred to
B page 52 of the record where the respondents were reported to have argued that (See pages 543 at 550 of the Record. He also referred to page 62 of the record and submitted that it is misleading for the appellant to say that the issue of affidavit for being hearsay was not raised by the respondents at the High Court
C and that it was also not correct that the respondents urged the court to give judgment based on fresh ground that the affidavit evidence is hearsay. He urged the court to resolve this issue in favour of the respondents.

ISSUE NO. 3

D Issue No 3 pertains to whether the court below was right or wrong to have acted on unchallenged affidavit showing cause why the appellant should be allowed to defend the suit.

The learned counsel to the respondents submitted that in the Undefended
E List Procedure, a plaintiff is not permitted to file any affidavit to controvert facts contained in the affidavit filed in support of the notice of intention to defend and that it is left for the court to determine the suit based on the facts supplied by the parties whether Judgment should be given in favour of the plaintiff or to transfer
F the suit to the general cause list. He therefore submitted that failure of the respondents to file further affidavit to challenge the averments in the appellant's affidavit in support of the notice of intention to defend, does not amount to an admission of facts stated therein. He cited referred to the Judgment of the case
G of **S.A.V vs. Tropical Industry Co. Ltd (2002) FWLR (Pt. 121) 1913.**

Learned counsel contended further, that the respondents are firms of chartered accountants and not recovery agents and that the only means of recovery known to law is through litigation or arbitration and that it will be illegal to instruct the respondents to do recovery. He urged the court to resolve
H this issue in favour of the respondents.

ISSUE NO. 4

Issue No 4 deals with whether the court below rightly or wrongly affirmed the

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A Judgment entered in favour of the respondents in the sum claimed.

He conceded that the appellant agreed to pay the respondents 18% of recoveries but due to the high amount discovered and in order not to smile a hold in the pocket of the appellant, the respondents wrote to inform the B appellant that they were willing to accept a reduced amount of 5% as opposed to the initially agreed 18%. He referred to the contention of the appellant that the respondents varied the contract by reducing the fee and therefore no contract because of the variation. In response to this contention, he submitted that since C the appellant is contending that they do not accept the reduction, their recourse has to be made to the old and existing contract. He urged this court to give effect to the earlier contract and hold that the respondents are entitled to same. On non-satisfactory execution of the contract, he submitted that the appellant failed to substantiate the claim that the contract was not performed D satisfactorily. He argued that there was never at any point in time, the appellant had communicated its alleged dissatisfaction to the respondents services rendered to it. He therefore submitted that the issue of non-satisfactory performance of the contract raised by the appellant can, at best, be described as E an afterthought or a calculated bid to abdicate in their obligation to pay for the services rendered to it.

On the issue of no recoveries to pay; he argued that the instruction never commissioned the respondents to recover the sums in the Report. He submitted F that the respondents are firms of chartered accountants and not a recovery agent and all they were instructed to do was to reconcile the appellant's account as state in the letter dated 22/1/2003.

On the issue of non-execution the contract within the agreed 35 days, he G submitted that a reasonable conclusion from the conduct of the appellant is that it waived that condition. He cited the case of **FASADE vs. BABALOLA (2003) 11 NWLR (Pt. 830) 26.** He argued that the respondents submitted Interim Report on 16/5/3003, while the Final Report was submitted on 27/4/2004 and the appellant without saying that it came in too late a time, hence H that was unacceptable. He therefore submitted that the appellant is stopped from raising these issues of contract not being executed within 35 days. He urged the court to resolve this issue in favour of the respondents.

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ISSUE NO. 5

Issue No 5 deals with the award of pre and post judgment interest.

The learned counsel for the respondents submitted that a trial court can
B award pre-Judgment-interest, as the authority to award judgment is contained in the Rules of Court. He referred to Order 42 Rule 7 of the Federal High Court (Civil Procedure) Rules 2004 and the case of **BEGH vs. UHS AL LTD (2011) 7 NWLR (Pt. 12246) 246**.

C He therefore submitted that the trial court acted within the ambit of its Rules in awarding interest on the claims of the respondents.

ISSUE NO. 6

Issue No 6 queries whether or not the court below was right to have found that
D there was waiver.

The learned counsel to the respondents submitted that the court below was right, having considered the entire facts before reaching to the conclusion that it was too late in the day to raise the issue of late submission of reports and
E that this complaint of the lateness was raised only after the suit was instituted hence, that attitude constituted a waiver. He cited the case of **AUTO IMPORT EXPORT vs. ADEBAYO (2005) 19 NWLR (Pt. 959) 44.**

On the contention of the appellant that waiver is a defence which ought to
F be pleaded, he contended that a party need not plead waiver in their pleadings in order to enjoy the defence. He referred to the case of **Auto Import Export v Adebayo (2005) supra**. He again submitted that issue of waiver is an issue of law and there is therefore no legal obligation on the respondents to have
G pleaded same. He then urged this court to resolve this issue in favour of the respondents and to finally dismiss the appeal.

Reply of the Appellant

Reply of the appellant on issue 1, relates to facts on issues no 2 and which had
H already been argued in the appellant's main Brief argument.

On issue Nos. 1 and 2, the respondents' counsel argued that the cases relied upon by the appellant cannot apply to the instant case, as none of those cases deal with pre-Judgment interest awarded as ordered under Undefended

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A list procedure.

On issue No. 6, he argued that in Auto Import Export's case, the suit was commenced by parties on Award and that pleadings merely filed and evidence led at the trial which made it easy for the trial court to resolve the issue of
B waiver. He therefore submitted that the issue of whether or not the appellant waived the late completion date is not the one that should have been summarily dismissed by the learned trial Judge. He then urged this court to dismiss the appeal.

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Resolution of Issues For Determination

The first issue for determination raised in the appellant's brief of argument and the corresponding issue in the respondents' brief touch on issue of jurisdiction. As rightly pointed out, the parties in this appeal did not raise the issue of
D jurisdiction in the two courts below. At any rate and notwithstanding the fact that issue of jurisdiction was never raised in the two courts below, in view of its fundamental nature and also since the law is trite that issue of jurisdiction can be raised by any of the parties at any stage of the proceedings even at the
E Supreme Court, such issue must first of all be addressed by me. See **Francis Durwode vs. State (2000) 15 NWLR (Pt. 691) 467**. I must however stress here, that it is always ideal and better that issue of jurisdiction is raised at earliest stage of the proceeding in order to avoid wasting the precious time of
F the court as seemingly done by the appellant in this appeal at the lower court.

The approved practice is that when issue of jurisdiction is raised, the court must carefully peruse the claim of the plaintiff in order to determine the crucial issue of jurisdiction. See **Shell BP Ltd vs. Onasanya (1979) NSSC**
G **334; Opiti vs. Ogbewi (1992) 4 NWLR (Pt 234) 184 at 195; Adeyemi vs. Opeyori (1976) 9-10 SC 3 at 49.** This is very important, because it is well settled law, that where the court lacks jurisdiction to adjudicate on a cause or matter, everything done in such want of jurisdiction, is a nullity. See **Mustapha vs. Governor of Lagos State (1987) NWLR (Pt. 58).**

H It has long been a settled law, that when a court is faced with question as to whether it has jurisdiction in a matter or not, it is incumbent upon it, to refer to the subject matter of the claim as pleaded by the plaintiff. In the present case, the claim on which the plaintiffs (now respondents) before the trial court upon

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A which they prayed for the determination of same are reproduced hereunder:-

(a) An order directing the Defendant to pay the sum of USD 9,186,701 to the plaintiffs being agreed fees for the consultancy services rendered by the plaintiffs to the Defendant.

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(b) Interest on the said um of USD 9,186,701 at the rate of 10% from 27th April 2004 writing the final liquidation of the debt.

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(c) An order directing the Defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services rendered by the plaintiffs to the Defendant

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(d) Interest on the sum of #144,303.981 at the rate of 10% from 27th April 2004 writing the final liquidation of the debt (emphasis supplied)

My understanding of the above claims, is that the defendant (now appellant) employed the plaintiffs/respondents to render some consultancy services on its E behalf on the agreed sum claimed which said services were rendered by the respondents/plaintiffs, but the defendant/appellant failed or neglected or refused to pay. By not paying the sum claimed, the defendant (now appellant) therefore became indebted to the plaintiffs/respondents. The subject-matter or F cause of action, to my mind, is and remains more or less a claim for recovery of such debt owed by defendant/appellant. Therefore in my view even if the lower court referred to the said agreement to be a contract or simple contract such in true sense, is a misnomer or merely a matter of semantic because such G transaction does not amount to a simple contract as the appellant is insinuating in order to oust the jurisdiction of the Federal High Court. It is also my considered view, that a close look at the cause of action, leave no one in doubt, that the cause of action related to or was transmitted out of or from administration or management and control of the appellant/company.

H The jurisdiction of the Federal High Court especially as it relates to the present suit/action is derived from the provisions of Section 251 (1) of the 1999 Constitution (as amended), which provides thus:-

(a) "Notwithstanding anything to the contrary contained

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in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly the Federal High Court shall have and exercise Jurisdiction to the exclusion of any court in civil causes and matters.

(b) The administration or management and control of the Federal Government or any of its agencies"

From the facts of the instant case, as can be gleaned from the record of appeal, the appellant herein, simply used its administrative powers and instructed vides its letter dated 22/1/2003, to assign the respondents to reconcile the concessions it earlier gave to Intel Services Limited Nigeria Liquefied Natural Gas Ltd and Mobil Production Nigeria Unlimited, because the appellant was desirous of reconciling the position of the concessions it earlier gave those named companies. There is no doubt that the respondents have rendered the service of reconciliation as consultants. I have read the cases of **Onuorah vs. K R PC Lt (2005) 6 NWLR (Pt. 921) 393 at 405; Adeleke O. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33 at 52; IT PP Ltd vs. UBA PLC (2006) 12 NWLR (Pt 1109) 21 FCE Oyo vs. Akinyemi (2008) 15 NWLR (Pt 1109) 21 and Minister of Works vs. Tomes Nigeria Ltd (2002) 2 NWLR (Pt 752) 74**, in which this court held that the Federal High Court lacks jurisdiction on matters relating to simple contract. However, as I posited above, the transaction executed by the parties in the present case did not pertain or relate to simple contract. Those cases are therefore distinguishable from the facts of the present case, hence those cases are not relevant or applicable to the facts in the present case. I accordingly so hold.

Again, there is no doubt that the appellant is an agency of the Federal Government, hence the trial court has jurisdiction to adjudicate in the mater by virtue of the provisions of Section 251(1) of the 1999 Constitution (as amended), contrary to the stance held by the learned senior counsel for the appellant. Having said so, I resolve the first issue against the appellant and in favour of the respondents.

ISSUE NO. 2

On the second issue, the appellant contends in its Amended Brief of Argument,

A that the trial court basically denied the defendant/appellant leave to defend the suit simply because it failed to attach documents to its affidavit in support of its Notice of Intention to defend the suit. On the other hand, the learned counsel or the respondents contended otherwise. It was argued on behalf of the
B respondents that the leave was not given to the appellant to defend the suit by the trial court simply because the appellant failed to place any material before the trial court which disclosed any defence to the suit. In the first place, I must state that it is not the correct position of the law, that a party who has filed a
C notice of intention to defend must, as a condition precedent attach a document in proof of or to disproof the deposition contained in the affidavit. All that the law requires is to provide sufficient or adequate facts in the said affidavit which call for thorough scrutiny or inquiry. In other words, attachment of documents by the appellant was/is not and was in fact, never given as the reason why the
D appellant was denied leave to defend the suit.

It needs to be emphasised here, that in an action brought under the Undefended List procedure, as in this instant case, the court is required to consider only the evidence contained in the affidavit filed by the defendant in
E support of his Notice of Intention to defend the suit. Once the court comes to the inevitable conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an Undefended suit and enter judgment accordingly without calling the
F defendant, even if present in court, to answer or be heard. See **HAIDO vs. USIMAN (2004)3 NWLR (Pt. 859) 62; NKWO MARKET COMMUNITY BANK NIGERIA LTD vs. PAUL EJIKEME UWABACHI OBI (2010) 14 NWLR (Pt. 1213) 169.** Also this court in the case of **ACB Ltd vs.**
G **GWAGWADA (1994) 4 SCNJ (Pt 2568)** held that the affidavit in support of the Notice of Intention to Defend must show that the grounds for asking to be heard in defence, are not frivolous, vague or disquiet to delay the trial of the action and it must show that there is dispute between the parties as had been shown in this case.

H From the record of appeal, it is clear from the judgment of the trial court, that non-attachment of the exhibits to the affidavit in support of the suit by the Appellant was not given as the reason why the trial court refused to grant leave to the appellant/defendant to defend the suit. The actual reason for the refusal

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A to grant such leave, was clearly stated by the trial court at page 69 of the record where it held thus:-

> **"In fact the defendant did not place any material before the court to show that he is serious with this case or that there is any substantive matter to be heard at trial. This, I believe, is just filed to frustrate the plaintiffs, out of their legitimate earnings. I therefore enter judgment in favour of plaintiffs as claimed, as the Defendant has no reasonable or any defence to this action".**

Thus, from the above findings of the trial court, failure to attach documents to the affidavit was far from being the reason or withholding leave to the appellant to defend the suit.

On its part, the court below after considering the above findings of the trial court, had this to say at page 6 of the record as below:-

> **"The defence set upon by the appellant was a sham defence and was rightly, rejected by the trial court".**

In fact looking at the judgment of the trial court, there does not seem to be anywhere where the trial court attributed to the non-attachment of some documents to the defendant/appellant's affidavit, as the reason why it withheld or declined to grant leave to the appellant to defend the suit or why it refused to transfer the Undefended List suit to the general cause list. This issue is also resolved against the appellant.

ISSUE NO. 3

On issue No 3, the learned appellant's senior counsel raised the question whether paragraphs 3 to 14 of the appellant's affidavits in support of notice of intention to defend the suit, were hearsay evidence and therefore not admissible. Here, the appellant hinged his submissions on what it perceived as the respondents' contention at the lower court that the appellant's counsel or litigation clerk not being party to the transaction entered by the parties, then their evidence was hearsay and therefore inadmissible. I think if one closely looks at the entire proceedings, especially the judgment of the trial court, one can say that the latter or trial court never made the assertion that the affidavit supporting the notice intention to defend the suit was hearsay. The trial court

attributed its reason for withholding leave to defend, on non-presentation of sufficient materials before it as would warrant or justify it to use its discretion to grant the leave to defend. There was nowhere it was stated by the trial court that it rejected the request to grant leave to defend, because the evidence in the affidavit was hearsay. The refusal to grant the leave to defend as I posited above was purely based on the backdrop that the lower court held that the defence set upon by the appellant was a sham hence it held that the trial court was right in rejecting such purported defence presented by the appellant.

I have also closely considered the arguments advanced by both parties learned counsel on the issue of some of the averments raised in the supporting affidavit being or amounting to hearsay evidence. As I stated earlier, the trial court gave its reason for refusing to grant the leave to defend in its Judgment and such reasons did not accord with the allegation that some of the paragraphs amounted to hearsay evidence and therefore inadmissible. To me, that issue of the said paragraphs of the affidavit being or amounting to hearsay evidence is of no moment since that was not the substratum of the decision of the trial court. It is however noted by me, that there was no further affidavit filed to challenge the averments in the paragraphs under reference in the supporting affidavit filed by the appellant/defendant. It is also noted by me, that despite the absence of any notice of intention to urge the court below to affirm the decision of the trial court on other grounds besides the ones relied on by the trial court, the court below dealt at lengths with the averments in the paragraphs under reference where it stated thus, inter alia:-

> **"A look at the affidavit in support of Notice of Intention to defend reproduced above show that the deponent deposed to all material facts not from his personal knowledge but from information availed him by Appellant's counsel and paragraphs 3 to 14 of the said affidavit all contain acts not within the knowledge of the deponent but information passed to him not from his employer, the Appellant, but from counsel".**

In any case dispite the above observation or findings by the court below, the same court found that the defence posed by the defendant/appellant was a sham as earlier found by the learned trial Judge. It is on that backdrop, that I also

A regard the issue of hearsay delved into by the lower court as of no moment, since both courts after duly considering the affidavits evidence, resolved or arrived at the correct conclusion that the defendant/appellant's defence was a sham and that no sufficient material was placed before the trial court, hence the B trial court rightly denied leave to the appellant to defend the suit, which in my view, was correct. It is also for these reasons that I resolve both the second and third issues for determination against the appellant herein.

C ***ISSUE NO. 4***

This issue relates to the propriety of the affirmation by the lower court of the judgment of the trial court in awarding in favour of the respondents, the sum of $9,186,201:00 and #144,303.981= . The appellant contends that there was no consensus ad idem on the exact amount payable to the respondents by the D appellant for the services rendered to it (the appellant) by them (i.e. the respondents). He argued that it never agreed with the respondents to pay them 5% of recoveries or the amount recoverable as claimed by the respondents. The appellant vehemently contended that what it agreed upon with the respondents E as per its letter was simply 18% and NOT 5%. Therefore, the claim of 5% by the respondents tantamount to unilaterally varying the terms of payment from 18% to 5% and that also, amounted to counter offer by the respondents which, of course, require the acceptance of the appellant for same to be enforceable. F He cited the authorities of **NNSC vs. Agric Incorporation (1994) 3 NWLR (Pt. 332) 392 at 344;** Council of **Yaba Tech vs. Nigeria tag Contractor (1989)1 NWLR (Pt. 95) 99** Learned counsel for the Appellant contended that in the absence of any acceptance of the counter offer made by the respondents G by the appellant on the 5% of recoveries, then the respondents can be said to have based their claims on a non-existent contract, since the basic principles of valid contract which are offer and acceptance were absent. See **Innih vs. Ferado A & S Ltd (1990) 5 NWLR (Pt. 152) 604 at 622.**

Conversely, the respondents' learned counsel urged that the senior H counsel's argument be discountenanced, even though he conceded that the appellant agreed to pay 18% of recoveries. However, in view of the high amount of discoveries and in order to reduce the burden of payment of the 18% agreed upon earlier, the respondents intimated their willingness to reduce it to

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A 5% only.

There is nothing to be gained by saying, that the submission of the learned senior counsel for the appellant that the agreed percentage payable to the respondents for the recoveries as duly agreed upon by the parties, was 18%
B and not 5% as presented by the respondents might be its reason for conceding to the payment of the lesser sum of 5%, amounts to variation. For the variation of the agreed sum claimed by the respondents to be valid therefore, the appellant must be informed in writing and it (the latter) must also accept the new or lesser
C amount of their claim in writing for same to be valid and enforceable, since it is a fresh agreement. It is trite law that agreement for variation of an existing contract must possess the basic characteristics of a valid contract which are known to be offer, acceptance and consideration. See **Idufueke Fizer Products Ltd and Anor (2014) LPELR 22999 (SC; Unity Bank PLc vs.**
D **Olubiyi (2015) NWLR (Pt. 1452) 203 at 242.**

Now in this instant case, it is a clear as crystal, that vide the correspondences between the parties the agreed sum to be paid for recoveries was 18% and not 5%. That was what the parties accepted. It was based on such
E agreement that the respondents did their own part of the obligation. The respondents made a move and did claim 5% instead of the agreed 18% payment which was never agreed upon by the appellant, even though it was a reduction of the burden on the obligation on it, the appellant.

F However, there appears to be no breach on the part of the respondents in the transaction since they had duly executed the job assigned to them by the appellant creditably well. I do not think it will meet the Justice of the matter to say that the claim for lesser percentage as their entitlements would completely
G vitiate the entire agreement. The justice of the case is that the court should enforce or revert to the original percentage of 18% payment on the recoveries and recoverable as earlier agreed upon, instead of the 5% reduced amount which as I stated earlier, was never agreed upon in writing and accepted by the appellant since the latter appears to reject it. It will amount to sheer injustice to
H hold otherwise, since the respondents had apparently fulfilled or satisfied their obligation to the satisfaction of the appellant while the latter reneged its obligation by failing or refusing to pay them their hard-earned entitlements. It is my view therefore, that the lower court had rightly affirmed the judgment

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entered in favour of the respondents. The fourth issue is therefore hereby resolved against the appellant.

ISSUE NO. 5

On this issue, the appellant queries the affirmation by the court below of the pre and post Judgment interest awarded by the trial court which the lower court endorsed. On this issue, the learned senior counsel for the appellant argued that the payment of such interest was never agreed upon by the parties. He also submitted that no evidence was adduced in support of the claim of such interests on the outstanding professional fees. He further argued that the respondents did not also lead evidence of any precedent on such payment based on any custom or trade as would justify their claim of such interests awarded by the trial court and endorsed or affirmed by the lower court.

I have closely examined the Writ taken by the plaintiffs (now respondents) which was filed at the trial court and noticed that such claim of interest was really made by the plaintiffs/respondents against the appellant as defendants thereat.

The law is well settled that before a pre-Judgment interest can justifiably be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally pleaded and proved. See **AG Terrene & Company Ltd vs. Henkel Chemicals Nigeria Ltd (2011) LPELR – 12(sc); Adeyemi vs. Lancuid Baker Nig Ltd (2000) 7 NWLR (Pt. 663) 3 at 48.**

It is however a valid law, that a court can still grant pre-Judgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest like in this instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his Judgment. See **Petgas Res Ltd vs. Mbaneto (2007) 6 NWLR (Pt. 1081) 545**.

In the present case, the respondents had for quite a long time, submitted their final report to the appellant but the later deliberately refused or neglected to pay them their hard-earned entitlement as agreed upon. Again, by Order 42 Rule 7 of Federal High Court (Civil Procedure) Rules 2000, the trial court has the power to award judgment interest. The provisions read thus:

> **"The court at the time of making any Judgment or order or at any time after wards, may direct the term with which the payment is to be made or other act is done, reckoned from the date of the Judgment or orders, or from some other time as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any Judgment, commencing from the date thereof or afterwards, as the case may be"**

In view of the above provisions, the trial court was therefore right in making the award of interest. The court below was also correct when it affirmed the trial court's order for the award of the said interest in the instant case. As a corollary, this issue must be and is also hereby accordingly resolved against the appellant.

ISSUE NO. 6

On this issue, the appellant queries whether the court below was correct when it found that there was a waiver of time clause by the appellant. It is clear that vide the agreement entered into by the parties in the suit, the respondents were to fully execute the job assigned to them by the appellant within 35 days. However, they submitted their first report on 16/5/2003 and the second on 27/4/2002. The period of the submission of the final report was no doubt outside the agreed period of 35 days. It is note worthy however, that the appellant never complained to the respondents on the submissions of each of the first and final reports outside the 35 days earlier agreed upon.

Also when the bill of charges was presented to it, the appellant did not reject it or raise the issue of late submission of such reports at the time of the presentation of the bill of charges. The appellant merely picked or raised the issue of late submission of the reports after the suit was instituted at the trial court which was 2½ years after the submission of the final report to it by the respondents. The question is, "Could the attitude of the appellant in that regard amount to waiver?" To my mind, waiver or acquiescence presupposes that the

A person is to be bound where he is fully cognizant or aware of his rights, yet he neglects to enforce such rights, or chooses to benefit instead of another, either by both of which he might claim. See **Auto Export vs. Adebayo (2005) 19 NWLR (Pt. 159) 544.** It is my considered view that waiver is an issue of law, B and it is an elementary principle of law, that parties do not plead law but only facts.

The facts exposed by the respondents clearly show that the appellant had never timeously complained about the late submission of the reports until when C the suit was instituted at the trial court. It is my considered view that failure to complain timeously amounted to waiver of the such delay or late submission of the report to it by the respondents as rightly held by the trial court and later endorsed by the learned Justices of the court below. This issue is also hereby resolved against the appellant.

D I must state here, that I have duly perused the Appellant's Reply Brief. The said Reply Brief filed by the senior counsel on behalf of the appellant merely contained re-arguments, repetition and or fine-tuning of the arguments earlier proffered in the appellant's main brief. That is not the purport of a Reply E brief at all.

Finally, it is noted by me, that there are concurrent findings of two lower courts in this instant case. As a matter of practice and policy, this court does not normally interfere with or disturb the concurrent findings of two lower courts F except on special or exceptional at circumstances, such as where the findings are either perverse or there is misconception of facts, or misapplication of law None of these viruses is prevalent in this case, hence I must refrain from tempering with the findings of the two courts below.

G On the whole, having resolved all the six issues for determination raised by the appellant against it, it is therefore my Judgment that the appeal is devoid of any merit. It fails and is accordingly dismissed by me. I affirm the Judgment of the lower court which had also rightly affirmed the judgment of the trial court. I award cost of #500,000 against the appellant herein, to be paid to the H respondents.

Amiru Sanusi
Justice, Supreme Court

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RHODES-VIVOUR, (JSC):

I read a draft of the leading judgment delivered by my learned brother Sanusi, JSC. I agree with his lordship's reasoning and conclusions that the respondents' are entitled to their fees for consultancy services rendered to the appellant. I must comment on the procedure under the undefended list.

The procedure under the undefended list is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. So, where the plaintiff satisfied the court with affidavit evidence which the defendant cannot answer, the court would enter judgment for the plaintiff, thereby avoiding a full blown trial with the usual expenses, frustrations and delay. ON the other hand if the defendant files an affidavit which discloses a defence on the merit, he would be granted leave to defend by the court. It prevents worthless and sham defences. See **M.C. Investment Ltd & Anor vs. C.I. & C.M. Ltd (2012) 6 SC (Pt. i) p. 188**

Both courts below found that the respondents were entitled to their fees for consultancy services. This court agreed with the concurrent findings of both courts below. The attitude of the appellant has been to dribble and frustrate the respondents. Denying them the judgment sum. I am satisfied that the appellant has no defence to the respondents claim, and it is for sham defences such as this that the undefended list was designed for.

For these brief reasons as well as those more fully given by my learned brother **Sanusi, JSC.** I, too dismiss this appeal with costs of N500,000 (Five hundred thousand Naira) against the appellant.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amiru Sanusi JSC and to register the support I have for the reasonings. I shall make some remarks.

This appeal is against the judgment of the Court of Appeal Lagos Division or court below or lower court against the appellant in favour of the respondents under the undefended list procedure.

A The facts leading to this appeal are well set out in the lead judgment and I shall not repeat them unless there comes a need to refer to any part thereof.

On the 13th day of February 2018 date of hearing, learned counsel for the appellant, Bayo Osipitan SAN adopted the brief of argument settled by Prof
B Taiwo Osipitan SAN, filed on 13th February 2012 and deemed filed on 26th September 2017 and a reply brief filed on 19th January 2018 and deemed filed on 13th February 2018 and six issues for determination were raised which are as follows-

C **(1) Whether the Respondents' cause of action, namely, action in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).**

D **(2) Whether in the light of the concession by the Respondents (in the respondents' brief in the Court of Appeal) that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal (without a respondent's**
E **notice to affirm the Judgment on different ground) wrongly or rightly declined to set aside the Judgment of the trial court (Ground 1)**

(3) Whether the court below rightly or wrongly held that
F **paragraphs 3-14 of appellant's affidavit in support of notice of intention to defend the action were hearsay evidence and therefore inadmissible. (Grounds v and vi).**

(4) Whether the court below rightly or wrongly confirmed the
G **Judgment entered in favour of the respondents by the trial court in the sum of USD $9,186,201.00 and N144,303,981.00 (Grounds iv & ix).**

(5) Whether in absence of specific agreement or evidence of custom and trade usage on payment of pre-payment
H **interest and unliquidated nature of the claim. The court below rightly confirmed the pre and post judgment interests awarded against the appellant by the trial court (Ground viii).**

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(6) Whether the courts below rightly or wrongly found that there was waiver of the time of completion of contract by the appellant.

Learned counsel for the respondents, Peter Olomola Esq adopted their brief of argument filed on 6th November 2017 and in it raised six (6) issues for determination, viz:-

1. **Whether or not the Federal High Court had the jurisdiction to entertain the suit. (Ground iii)**
2. **Whether having regard to the concession by the respondents in their brief of argument that filing of Exhibits/documents was not a condition precedent to the transfer of the suit to general cause list, which formed the basis of the judgment of the trial court, the learned justices of the Court of Appeal should, (without a respondent's notice to affirm the judgment on different ground) not have set aside the judgment of the court below (Ground 1)**
3. **Whether the learned justices of the Court of Appeal rightly or wrongly failed to act on the appellant's unchallenged affidavit showing cause why the appellant should be allowed to defend the suit (Ground v & vi)**
4. **Whether the court below rightly or wrongly affirmed the judgment entered in favour of the respondents by the trial court in the sum of USD $9,186,201.00 and N144,303,981.00 (Grounds iv & ix)**
5. **Whether or not the lower court was right to have affirmed the decision of the trial court to award pre and post judgment interest (Ground vii)**

For ease of reference I shall use the issues as crafted by the appellant.

ISSUE NO 1

Whether the Respondents' cause of action, namely, action in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court.

A Canvassing the position of the appellant, learned counsel contended that from the writ of summons, statement of claim, judgments of the trial court and Appeal Court that the plaintiffs/respondents cause of action is purely contractual i.e. recovery of payment allegedly due to the respondents in respect of services contract allegedly rendered by the respondents on behalf of and for
B the benefits of the appellant at the appellant's request.

That the simple contract involving an agency of Federal Government herein is outside the jurisdiction of the Federal High Court in the wake of the restricted jurisdiction of it pursuant to section 251 of the 1999 Constitution of
C the Federal Republic of Nigeria. He cited **Onuorah vs. K.R.P.C. Ltd** (2005) 6 NWLR (Pt. 921) 393 at 405; **Adelekan O. Ecu-line NV** (2006) 12 NWLR (Pt. 993) 33 at 52 etc.

Learned counsel for the respondents submitted that the determining factor as to whether or not the court is seised of jurisdiction is the plaintiffs'
D claim which is the initiating process. That a close examination of the originating process filed by the respondents at the trial court will reveal that cause of action that was decided at the trial court was not one of simple contract. That in this instance the cause of action as can be garnered from the originating
E process related to the administration or management and control of the appellant. He cited **Isah vs. INEC (2016) 18 NWLR (Pt. 1544) 175; Governor of Kwara State vs. Latiagi (2005) 5 NWLR (Pt. 917) 139; Egbuonu vs. BRTC (1997) 12 NWLR (Pt. 531) 29.** That the Federal High Court not only has jurisdiction but exclusive jurisdiction to entertain the suit.
F He referred to **Oguebego vs. PDP (2016) 4 NWLR (Pt. 1503) 446; Goerge vs. FRN (2014) 5 NWLR (Pt. 1399) 1; Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405 at 427.**

The stance of the appellant that the cause of action of the plaintiffs now respondent arose from a simple contract which is outside the jurisdiction of the
G Federal High Court. That position, the respondents disagree with, contending that the action stemmed from the administration or management and control of the appellant which situates the matter squarely within the jurisdiction of the Federal High Court pursuant to section 25(1) of 1999 Constitution of the Federal Republic of Nigeria or CFRN for short.

H It is to be restated at the risk of unlimited repetition that when the jurisdiction of a court is called to question, the guide is a close look at the plaintiff's claim which is the originating process inclusive of the totality of all that constitute that claim. See **Isah vs. INEC** (2016) 18 NWLR (Pt. 1544) 175;
I **Governor of Kwara State vs. Latiagi; Egbuonu v BRTC** (1997) 12 NWLR

(Pt. 531) 29.

A reference to the full text of section 251(1) (p) of the 1999 Constitution (as amended) would be helpful and I quote:-

"251(1)-

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

(p) The administration or the management and control of the Federal Government or any of its agencies"

A glance at the claim and the accompanying materials show that by letters dated 22nd January 2003 the appellant separately instructed the respondents to reconcile the position of the concessions it gave to Intel Services Limited, Nigeria Liquefied Natural Gas Ltd and Mobil Producing Nigeria Unlimited. It was that decision of the appellant to reconcile the position of the concession that gave rise to the case and in getting to that policy decision appellant utilized the expertise of the respondents in the investigative activity. In giving Notice of Intention to Defend the appellant had stated that its reason is that the Federal Executive Council had referred all contracts awarded by it to the EFCC and the Federal Executive Council has also placed an embargo on payment of contracts awarded during the period which was an administrative decision even though that of the Federal Executive council. Clearly what was at play was an administrative act of a Federal Government Agency within the purview of section 251 of the CFRN and so in the exclusive jurisdiction of the Federal High Court. I refer to **Oguebego vs. PDP** (2016) 4 NWLR (Pt. 1503) 446; **Goerge vs. FRN** (2014) 5 NWLR (Pt. 1399) page 1.

A clearer view on this issue is seen in the case of **Adegbite vs. Amosu** (2016) 15 NWLR (Pt. 1536) 405 at 427 wherein my learned brother, I. T Muhammad JSC stated thus:-

"The Constitution of the Federal Republic of Nigeria 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. Section 251 (1) (p) (q) ® and (s) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)"

The situation herein is well placed in the administrative and management

A activity of the appellant and there is no running away from the fact that it is a matter the Federal High Court not only has jurisdiction to deal with but an exclusive jurisdiction and so the appellant cannot by wishful thinking covert the matter to a simple contract so as to take it out of the powers of adjudication of the Federal High Court. The consequence is that the Federal High Court was
B well placed to assume jurisdiction which it correctly did and that is the end of the debate in that regard. The issue is resolved against the appellant.

ISSUES 2 AND 3

2. **Whether in the light of the concession by the**
C **respondents (in the respondents' brief in the Court of Appeal) that filing of exhibits/documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal,**
D **(without a respondent's notice to affirm the judgment on different ground) wrongly or rightly declined to set aside the judgment of the trial court.**
3. **Whether the court below rightly or wrongly held that paragraphs 3-14 of appellant's affidavit in support of**
E **Notice of Intention to Defend the action were hearsay evidence and therefore inadmissible.**

Learned counsel for the appellant stated that the judgment of the trial court was predicated on the absence of documents in the affidavit in support of Notice of Intention to Defend which led to appellant not being allowed to defend the suit
F and have it transferred to the general cause list. That the respondent's concession of the trial court's stance should inure in the favour of the appellant. He cited **I.H. Ltd vs. Soneb Ent. Ltd** (2010) 4 NWLR (Pt. 1185) 561; **Minister, P.M.R. vs. Expo-Shipping Line Nig. Ltd** (2010) 12 NWLR 261.

That the respondents having not filed a respondents' Notice the Court of
G Appeal should not have affirmed the decision of the trial court on grounds which were different from the grounds relied upon by the learned trial judge. He relied on **Tanko vs. U.B.A Plc** (2010) 17 NWLR (Pt. 1221) 80 (sc); **Shasi vs. Smith** (2009) 18 NWLR (Pt. 1173) 330.

H That the court below gravely erred when it held that the deponent of the affidavit had no personal knowledge of the information thereby rendering the deposition inadmissible on ground of hearsay. He cited sections 88-89 of the Evidence Act; **F.G.N vs. A.I.C Ltd** (2006) 4 NWLR (Pt. 970) 337 at 357; **Braithwaite v M.S.A.L.S.A** (2001) 5 NWLR (Pt. 707) 590 at 607 etc. That
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A there was no counter-affidavit to the affidavit in support of Notice of Intention to Defend and so the dispositions in the affidavit being unchallenged are taken as accepted. He relied on **Agbakoba vs. Director** SSC (1993) 7 NWLR (Pt. 305) 535 at 365; **Ejikeme vs. Ibekwe** (1999) 5 NWLR (Pt. 602) 250 at 256.

B In response, learned counsel for the respondents stated that appellant was not given leave to defend the suit because appellant did not place any material before the court which disclosed any defence to the suit. That it is settled law that the undefended list Procedure does not permit a plaintiff to file any affidavit to controvert facts contained in the affidavit filed in support of the C Notice of Intention to Defend as it is left for the court to determine based on the facts supplied by the parties whether judgment should be given for the plaintiff or whether the matter should be transferred to the general cause list. He cited **Odu vs. Agbor Hemeson** (2004) FWLR (Pt. 188) 935.

That the failure of the respondents to file further affidavit to challenge the D averment in the appellant affidavit in support of Notice of Intention to Defend cannot amount to an admission of facts stated in affidavit in support of Notice of Intention to Defend. He cited **Euro Bati Concepts S.A vs. Tropical Industries Co. Ltd** (2002) FWLR (Pt. 121) 1913 at 1922.

E He stated that it is the law that a defendant who has no real defence to the action brought under the undefended list should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by the delay tactic aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting F his obligation and indebtedness. He cited **Agro Millers Ltd vs. C.M.B** (1997) 10 NWLR (Pt. 525) 469 at 477-478; **Nishizawa Ltd vs. Jethwani** (1984) ALL NLR 470 at 484-485.

On this matter of the denial of leave to the appellant to defend, I shall refer to what the trial court said in refusing the appellant to defend. That court G of trial held thus:-

> **"In fact the defendant did not place any material before the court to show that he is serious with this case or that there is any substantive matter to be heard at trial. This I believe is** H **just filed to frustrate the plaintiff out of their legitimate earnings. I therefore enter judgment in favour of the plaintiff as claimed; as defendant has no reasonable or any defence to this action". (Record of Appeal, page 66).**

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A At page 62 of the Record of Appeal, the learned trial judge reviewed the respondents' arguments as follows:

> **"That the notice of intention is worthless and unreliable and falls short of the expectation of the claim. That this offends**
> B **against the provisions of sections 88 & 89 of the Evidence Act. That the counsel did not disclose the sources of his information as required by law. He cited the case of NIDB vs. FEMBO Nig. Ltd (1997) 2 NWLR (Pt. 489) p.543 to 550 in**
> C **support. That the denial is not from the defendant but the solicitor and does not go to the merit of the matter".**

The position the appellant is canvassing at this stage is not borne out of the record and certainly different from what the trial court and later the Court of
D appeal ruled. In reviewing the facts contained in the affidavit, the court below held that the supporting affidavit of the appellant did not constitute a defence to the respondents' claim which that court referred to as a sham defence rightly rejected by the trial court. Nothing has emerged to give this court herein a
E change from what those courts below found and the issue of the respondents' position being hearsay does not arise.

Again to be said is that in an Undefended List Procedure it is not permitted for a Plaintiff to file an affidavit to controvert facts contained in the
F affidavit of the defendant in support of the Notice of Intention to Defend. It is a matter left for the court to determine on what is already in, if it should transfer the suit to the general cause list or determine it on the claim of the plaintiff in the light of a worthless attempt at defence in the supporting affidavit of Notice to
G Defend where it is available. See **Odu vs. Agbor – Hemeson** (2004) FWLR (Pt. 188) 935 where the court stated as follows:-

> **"Admittedly, the rules under the undefended list procedure do not expressly bar the use of further affidavit as submitted by learned counsel to the appellant but with profound respect**
> H **to counsel. <u>It is not contemplated by the said procedure that triable issues raised by the defendants' affidavit should be rebutted or controverted by a further affidavit by the plaintiff as was done in the instant case</u>. All that the trial court is**
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enjoined to do if the defendants' affidavit in support of the notice to defend discloses a defence is to transfer the suit to the general cause list for hearing and determination. There is no room for a further affidavit by the defendant to controvert the plaintiff's affidavit as such will lead to trial and thus defeat the objective of the speedy trial which the undefended list procedure is intended to achieve. The court below was therefore eminently justified in striking out the appellants' further affidavit."

Again on the point is the case of **Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd** (2002) FWLR (Pt. 121) 1913 where the court at p. 1922 held as follows:

"In the present case, it is very important to further stress that the defences raises by the respondents with regard to their claims for set-off of U.S $9,000.00 and 2% commission against the appellant, while clearly disclosing a defence to the appellant's action on the merit, being plainly triable issues, cannot possibly be determined under the undefended list procedure, as the appellant is disputing the claim. The failure of the appellant to file a further affidavit to controvert the defences raised by the respondents in this respect therefore cannot be regarded as admission of the claims, as the appellant is not at all required to file such further affidavit under Order 23 of the High Court (Civil Procedure) Rules. The learned trial judge was therefore in grave error to have regarded the failure of the appellant to react to the claim of the respondents by the appellant that the set-off being claimed by the respondents is part of the transaction between the parties that gave rise to the appellant's case, the respondents' claim must be proved by evidence before it can be regarded as established which would necessitate the hearing of the entire case or pleadings in order to allow each party the full opportunity of proving the relevant claims".

I see nothing out of the way to impugn what the two courts below did in refusing a transfer of the matter out of the undefended list to the General Cause List and they were well guided that there was no defence upon which they would do that.

These issues also are resolved against the appellant.

ISSUES 4,5 & 6

4. **Whether the court below rightly or wrongly confirmed the judgment entered is in favour of the respondent by the trial court in the sum of USD $9,186,201.00 and N144,303,381.**
5. **Whether in absence of specific agreement or evidence of Custom and Trade usage on payment of pre-judgment interest and unliquidated nature of the claim the court below rightly confirmed the pre and post judgment interest awarded against the appellant by the trial court.**
6. **Whether the court below rightly or wrongly found that there was waiver of the time of completion of contract by the appellant.**

Learned counsel for the appellant contended that there was no consensus *ad idem* on the amount of money payable by the appellant to the respondents for the services allegedly rendered by them to the appellant. That it is trite that unless accepted, a counter offer is incapable of being enforced as a contract. He referred to **N.N.S.C vs. Agricor Incorporation** (1994) 3 NWLR (Pt. 332) 392 at 344; **Council of Yaba Tech vs. Nigertec Contractor** (1989) 1 NWLR (Pt. 95) 99.

That whether the contract was concluded with the agreed 35 days or not is a triable issue. Also whether appellant waived the 35 days completion or not is an issue which should be resolved in favour of the appellant as also whether the appellant accepted the unilateral variation of the consideration payable from 18% to 5% is also a triable issue. He relied on **N.M.C.B. (Nig) Ltd v Obi** (2010) 14 NWLR 169 at 186; **I. H. Ltd vs. Soneb Ent. Ltd** (2010) 4 NWLR (Pt. 1185) 561 at 577.

Learned counsel for the appellant pointed at the fact that no evidence was proffered to show what entitled the respondents to charge interest on the outstanding professional fees and so no basis for the award of 10% yearly pre-

judgment interest in favour of the respondents by the courts below. He cited **Uausa vs. FBN PLC** (2002) 9 NWLR (Pt. 671) 71; **Befareen Pharm Ltd vs. A.I.B Ltd** (2005) 17 NWLR (Pt. 954) 230 at 244.

That waiver can only be used as a shield/defence and never by a plaintiff as a cause of action. That the plea of waiver at this stage is not available to the respondents as a defence or claim. He cited **Bank of the North Ltd vs. Yau** (2001) 10 NWLR (Pt. 721) 408 at 441; **Abalogu vs. SPDC Ltd** (2003) 13 NWLR (Pt. 837) 308 at 334; **Okonkwo vs. CCB Nig Plc** (2003) 8 NWLR (Pt. 822) 347 at 407-408 etc.

For the respondents it was contended that the issue of the non-satisfactory performance of the contract raised by the appellant can best be described as an after-thought in a calculated bid to escape their obligation to pay for the services rendered. That the appellant waiver the right to hold onto the condition of 35 of performance. He cited **Fasade vs. Babalola** (2003) 11 NWLR (Pt. 830) 26; **Adecentro (Nig) Ltd vs. Vice Chancellor OAU** (2005) 15 NWLR (Pt. 948) 290.

That pre-judgment interest is awarded where there is an agreement for payment of interest and as such it must be pleaded and proved and so merely stating a claim for pre-judgment interest without proof of same is not valid. He cited **Adeyemi vs. Lan and Banker (Nig) Ltd** (2000) 7 NWLR (Pt. 663) 33 at 48; **Petgas Res. Ltd vs. Mbanefo** (2007) 6 NWLR (Pt. 1031) 545.

Learned counsel for the respondents stated that a trial court can award judgment interest as the authority to do so is enshrined in the Rules of Court. He cited **B.E.G.H. Ltd vs. U.H.S. & L Ltd** (2011) 7 NWLR (Pt. 1246) 246.

That a party need not plead waiver in pleadings to enjoy the defence it provides as all a party needs do is plead relevant facts and lead evidence in support of the stated facts. He cited **Anto Import Export vs. Adebayo** (2005) 19 NWLR (Pt. 959) 44; **N.P.A Plc vs. Duncan Maritime Ventures** (2010) LPELR – 4602.

There is no use belaboring a point that is manifestly established by the documents or evidence before the court to the effect that there was an existing contractual relationship between the appellant and respondents arising from the letters as in the Record. It was based on these contractual agreements that

A respondents accepted the offer and carried out the assignment outlined in the said letters without the appellant raising an eyebrow only to change course after the completion of the work and submission of the bill of charges.

It follows that this later complaint by the appellant that respondents did B not execute the contract within the agreed 35 days has lead to the conclusion from the conduct of the appellant that it has waived that completion of contract within 35 days. See the case of **Fasade vs. Babalola** (2003) 11 NWLR (Pt. 830) 26, Supreme Court hld as follows:

C **"The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where** D **he has a choice of two, he decides to take one but not both. The exercise has to be a voluntary act. <u>There is little doubt that, a man who is not under any legal disability should be the best judge of his own interest, if therefore, having full knowledge of</u>** E **<u>the rights, interests, profits or benefit conferred upon or accruing to him by and under the law, but he intentionally decides to give up at these, or some of them, he cannot be heard to complain afterwards</u> that he has not been permitted to the** F **exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waited those rights".** See also the case of **Adecentro (Nig) Ltd. vs. C. OAU** (2005) 15 NWLR (Pt. 948) 290.

The only logical conclusion is that appellant is stopped from complaining about G the none completion within 35 days and so has lost out therein.

On the matter of pre-judgment interest, the law is clear that such interest is awarded where there is an agreement for payment of interest, in which case a claim as such must be pleaded and proved as it would not do to just state a claim H for pre-judgment interest without proof of same. However a court can grant pre-judgment interest on a monetary or liquidated sum awarded to a successful party even where such a party did not plead or adduce evidence to prove it as such interests naturally accrue from the failure to pay the sum involved over a I

A period of time thereby depriving a party from the use and enjoyment of the sum involved. That in my humble view is substantial justice. I make reference to the case of **Adeyemi vs. Lan and Banker (Nig) Ltd** (2000) 7 NWLR (Pt. 663) 33 pg 48. Paras D-E, it was held thus:-

B **"…The law on pre-judgment interest is that the award must be based on either statute, contract or mercantile custom or equity and the plaintiff must plead the basis and lead satisfactory evidence. That is so but the law recognizes the**
C **right to interest of a plaintiff in a claim for the return of money from commercial transactions particularly where the defendants has held the money of the plaintiff for some time. In a situation arising from commercial matters I should think**
D **that a party holding on to the funds of another for so long without justification ought to pay him compensation or so doing."**

See also **Petgas Res. Ltd vs. Mbanefo** (2007) 6 NWLR (Pt. 1031) 545. A trial
E court can award judgment interest. The authority to award judgment interest is enshrined in the Rules of Court. Please see the case of **B.E.G.H. Ltd vs. U.H.S & L. Ltd** (2011) 7 NWLR (Pt. 1246) 246. The relevant position contained in the Federal High Court (Civil Procedure) Rules 2000 is found in Order 42 Rule
F 7 this states as follows:-

"The court at the time of making any judgment or Order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be done, reckoned
G **from the date of the judgment or Order, or from some other point of time, as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any judgment, commencing from the date thereof or after wards, as the case may be."**

H On the final point is that it is too late in the day for the appellant to complain about the report and that delay in complaint has constituted a waiver which needs not be pleaded to apply. See **Ekundayo vs. F.C.D.A** (2015) LPELR – 24512 **Auto Import Export vs. Adebayo** (2005) 19 NWLR (Pt. 959)44.

I

A In fact all the issues are against the appellant as the submissions raised cannot stand the law or practice. All the issues resolved against the appellant, it is easily seen that the appeal lacks merit and in line with the better reasoned lead judgment I also dismiss it.

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

INYANG OKORO, (JSC): I read in draft the judgment of my learned brother, C Amiru Sanusi, JSC, just delivered. I am in agreement with His Lordship that this appeal is devoid of merit and deserves an order of dismissal. I adopt both the reasons advanced and the conclusions reached as mine. I dismiss the appeal and I abide by the order as to costs.

D **John Inyang Okoro**
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal lacks merit, E and it is accordingly dismissed by me.

Sidi Dauda Bage
Justice, Supreme Court

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1. SECURITIES AND EXCHANGE COMMISSION
2. ADMINISTRATIVE PROCEEDINGS COMMITTEE OF THE SECURITIES AND EXCHANGE COMMISSION
3. AMOS I. AZI (SECRETARY ADMINISTRATIVE PROCEEDINGS COMMITTEE)

VS

CHRISTOPHER OKEKE

SC. 763/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Filing of brief – Where appellant fails to file his brief – Presumption thereof – Whether the presumption is that the appeal has been abandoned.

APPEAL: Filing of brief – Computation of time thereof – Or 6 Rule 5 SCR 1985 – Whether brief to be filed within 10 weeks of service of record of proceedings on the appellants.

CASE LAW: The principle in Ede vs. MBA (2011) 18 NWLR (Pt.1278) 236 at 277. – Effect where an application for extension of time is pending in a matter where time has expired.

CASE LAW: The principles in Mohammed vs. Hussein (1998) 14 NWLR (Pt.584) 108 and Panalpina World Transport Nig Ltd vs. Olandeen & Ors (2010) 4 C.L.R.N 150 (SC).

CONSTITUTIONARY LAW: Violation of fair hearing – Where a party fails to file his brief – Appeal subsequently struck out – Whether party cannot complain of a violation of fair hearing.

COURT: Litigation time – Management thereof – Whether there is Onus placed on the court to be in control of litigation time and manage it properly – The principles in British America Tabbacco Ltd vs. A-G Ogun State (2011) LPELR - 3891.

COURT: Rules thereof – When not obeyed – Duty of Court thereto.

COURT: Supreme Court – When can review its earlier order – Order 8 Rule 16 SCR 1985 – Relevant Principles thereof.

RULES – Supreme Court Rules 1985 – Or. 6 Rule 3 & Or. 6 Rule 9 thereof.

PRACTICE & PROCEDURE: Striking out and dismissal – Where a suit is struck out, it cannot be construed to mean dismissal – The principles in Obasi Brother Merchant Co. Ltd vs. Merchant Bank of Africa Securities Ltd (2005) All FWLR (Pt. 261) 216 at 231.

RULES: Order 6 Rule 3 Supreme Court Rules 1985 (as amended) - Purport and intent thereof.

RULES: Supreme Court Rules – Or. 6 Rule 3 thereof – Where Supreme Court strikes out appeal suo motu for failure to file appellant's brief – Whether it is decision on the merit which cannot be relisted.

RULES: Supreme Court Rules 1985 – Or. 6 Rule 3 and Or. 6 Rule 9 – Distinction thereof – Power to strike out appeal for failure to file appellant's brief.

RULES: Supreme Court Rules 1985 – Or. 6 Rule 9 thereof – Purport and Import.

Issues for determination

a. Whether this Court has jurisdiction to set aside its own judgment given on grounds of lack of diligent prosecution of appeal.
b. Assuming it has jurisdiction, whether this is an appropriate case in which the discretion should be exercised in favour of the Appellants.
c. In the alternative, whether this Court has power to grant the trinity prayers sought by the Applicants as alternative reliefs.

Facts of the matter

On 29th March, 2013 the appellants herein, who have brought the present application, filed their Notice of Appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 29th January, 2013. The record of appeal was subsequently compiled and transmitted to the Court and the appeal duly entered on 31st December, 2013 – after Nine Months.

On 10th Mar, 2017, about 27 months after their appeal was dismissed on 18th February, 2015 the appellants brought the instant application through their Counsel Fidelis Oditah, QC, SAN, seeking the following reliefs-

1. **AN ORDER** setting aside the decision of this Court given in Chambers on 18 February, 2015 in default of the appellants' Brief.
2. **AN ORDER** restoring this appeal to the Court's list for determination on the merits.
3. **AN ORDER** enlarging time within which the appellants/applicants may file and serve the appellants' Brief of argument for hearing on the merits.
4. **AN ORDER** deeming the already filed and served brief of argument as properly filed and served.
5. **AN ORDER** permitting the departure from compliance with the Rules of this Court and accelerating the hearing of the appeal.

Alternatively,

1. **AN ORDER** extending the time within which the appellants/applicants may seek leave of this Honourable Court to appeal against the Judgment

of the Court of Appeal, Lagos Division in Appeal No. CA/1/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D Bage, JCA

2. **AN ORDER** granting leave to the appellants/applicants to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.
3. **AN ORDER** for the extension of the time within which the appellants/applicants may appeal the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

The application was upon the following grounds:

a. On 18th February, 2015, this Court struck out this appeal on the grounds that the appellants had failed to file their brief of argument as required by this Court Rules.
b. As the apex Court, this Court has inherent powers to set aside its own default judgment given in default of appellants' brief and hear the appeal on the merits.
c. Courts are reluctant to visit the mistake of Counsel on the client especially in matters which concern the protection of the public interests such as are raised in this appeal.
d. This appeal raises very important question of Constitutional and regulatory law, including the following: first, the extent to which the first appellant can exercise its statutory powers under the investments and Securities Act 2007 ("ISA") to protect the investing public and other users of Nigerian Capital Markets in view of Section 251(1)(e) of the 1999 Constitution; and, second, the extent to which the first appellant can apply the administrative sanctions stipulated in the ISA and in its own Rules and Regulations against defaulters, in the light of this Court's decision in the line of cases exemplified by **Garba vs. University of Maiduguri (1986) 1 N.W.L.R (Pt. 18) 550** that an administrative tribunal cannot sanction in respect of conduct which constitutes a crime, given that almost all violations of the ISA and the rules and regulations

made thereunder constitute crimes under the general law. These and other important issues of constitutional and regulatory law deserve to be heard on the merits.

e. The decision anticipated in this appeal will develop and impact heavily on Nigerian constitutional and regulatory law and Nigerian Capital Market in which trillions of pension and other resources are now invested.

f. This appeal also presents this Court with a unique opportunity to clarify and develop the law on administrative discipline and constitutional right to fair hearing given the growing role and significance of administrative institutions in service delivery in Nigeria.

g. It would be tragic for the users of Nigerian Capital Markets if this Court were to pass up the opportunity to decide this appeal on the merits.

h. The Respondent will not be prejudiced if this application were granted and this appeal heard on the merits. The respondent does not appear to have been prejudiced by the unfortunate delay in filing this brief. He did not apply to have this appeal struck out pursuant to Order 6 Rule 9 of the Supreme Court Rules, which is clear evidence that he was not prejudiced by the appellants' default in filing their brief of argument.

i. The appellants are out of time to file and serve the appellants' brief of argument and this application is to enable the appellants to properly file and serve their brief.

j. The delay in filing and serving the brief of argument is due to mistake of appellants' Counsel's junior and the busy schedule of the appellants' Counsel.

k. The grant of this application will enable the appellants/applicants to effectively prosecute the appeal and further the public interest.

l. Alternatively, as a result of the grounds stated above, it has become necessary to seek leave of this Court to follow the correct procedure so as to give the appellant opportunity for this Appeal to be determined on the merits.

Held: *(Unanimously dismissing the application)*

1. *The purport and intent of Or. 6 Rule 3(2) of Supreme Court Rules*
The appellants/applicants had up to 15th March, 2014 – 10 weeks after 31st December, 2013, to file their brief of argument. They never did so. They also did not apply for extension of time within which to file their brief of argument. On 18th February, 2015 (a period of 13 months and 2 weeks i.e after 54 weeks, this Court sitting in Chambers, suo motu dismissed the appeal No. SC.763/2013 for want of prosecution under Order 6 Rule 3(2) of the Rules of this Court, that provides

> **Where the Appellant has failed to file a brief within the period prescribed by this Order and there is no application for extension of time within which to file the brief, the Court may, subject to the proviso to rule 9 of this Order, proceed to dismiss the appeal in Chambers without hearing argument.**

The legislative intent for Order 6 Rule 3(2) of the Rules of this Court is the empowerment of the Court to take the initiative to clear its own docket of dormant or abandoned appeals in which the parties have lost interest. It is to decongest the cause list of such dead woods or moribund appeals. Order 6 Rule 3(2) empowers this Court to act suo motu to clear out abandoned appeals in order to decongest the Court. *(Pp 364 - 365 .Paras F - B).*

2. *Amendment of Or. 6 Rule 9 of SCR*
The indubitable fact is that as at 18th February, 2015, when the appeal was dismissed for want of diligent prosecution, there was no application pending for extension of time within which the appellants may file their brief of argument. It is admitted in paragraph 15 of the supporting affidavit inter alia that the appeal was dismissed "in Chambers on 18th February, 2015, which was just over 10 months after the applicants fell into default of filing the Brief." It is further averred for the applicants, as the appellants, that "there was no application to this Court to exercise its powers to

dismiss the appeal for want of diligent prosecution" and that there was no finding, in apparent misconception that the original proviso to Rule 9(1) of Order 6 is still extant, by this Court that this appeal on its face lacked merit such as to warrant summary dismissal in Chambers for want of filing of the appellant's brief. . I think I should point out, here and now, that by Government Notice No. 111 of 1991 the proviso to the Original Rule 9(1) of Order 6 of the Rules of this Court was deleted. What is now left of the said Rule 9 reads thus-

9. If an Appellant fails to file and serve his brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the Respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.

(Pp 367 - 368 Paras F - C).

3. *Where there is no application for extension of time before matter was stuck out.*

Let me reiterate one fact: at the time the appeal of the applicant was dismissed on 18th February, 2015 there was no pending application for enlargement of time within which the applicants, as the appellants, may file their brief of argument. This much has been admitted by the applicants in paragraph 15 of the supporting affidavit. This is what distinguishes EDE vs. MBA (supra) from the instant application, where prior to the date of the order dismissing the appeal, the appellants had on 6th June, 1993 filed an application for enlargement of time within which to file their brief, and an order to regurlarise their brief already filed. The registry staff had not brought the fact of the existence of this pending application to the attention of the Court. The party adversely affected having been denied fair hearing; the ensuring decision and order were set aside ex debito justitiae. *(P 369 Paras C - E).*

4. *Inapplicable decision*

MOHAMMED v HUSSEINI (supra) is also distinguishable. The trial Court, after entertaining and granting an oral application by the plaintiff's Counsel to set the matter down for hearing in the absence of the defendant, it proceeded to hearing of the matter the same day and entered judgment. The substantive suit was not on the cause list for hearing that day. What necessitated the setting aside of the default judgment was the failure to notify the other side that their matter had been set down for hearing. The case reported as (2005) 2 ALL F.W.L.R (Pt. 261).

The issue in PANALPINA WORLD TRANSPORT NIGERIA LIMITED vs. OLANDEEN & ORS. (supra) is that the trial Court having struck out PANALPINA WORLD TRANSPORT NIGERIA LIMITED as a defendant could subsequently be joined as a party to the appeal at the Court of Appeal which would have had the effect of taking away its accrued statutory right of defence in the matter. *(Pp 369 - 370 Paras F - A).*

5. *It is not proper to construe striking out to mean dismissal*

The issue in OBASI MERCHANT CO. LTD vs. MERCHANT BANK OF AFRICA SECURITIES (supra) seems to be whether the earlier suit No. LD/3359/92 did operate as estoppels per rem judicatam. The said suit was struck out. That is the basis for the statement that it is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute the case and the Court relying on its inherent powers to strike out the case, it amounts to dismissal on the merit.

All of the foregoing cases was decided on its peculiar facts or circumstances and the Rules of those Courts regulating the practice and procedure of the various Courts. None of those Rules, my lords, is akin to or ipssissima verba with Order 6 Rule 3(2) Rules of this Court under which this Court proceeded on 18th February, 2015 to dismiss the applicants' appeal for want of diligent prosecution. *(P 370 Paras A - D).*

Per Eko (JSC)

"The deponent of the supporting affidavit avers in paragraph 15(c) thereat that "there was no application to this Court to exercise its powers to dismiss the appeal for want of prosecution on grounds of failure to file the appellants' brief within the time allowed by the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the appeal. Implicit in this suggestion is innuendo that the Court denied the applicants the opportunity to be heard before it proceeded to dismiss the appeal. Order 6 Rule 5(1) of the Rules of this Court, I earlier reproduced, enjoins the applicants, as appellants, to file their brief of argument "within ten weeks of the receipt of the record of appeal". The record of appeal was transmitted and the appeal was entered on 31st December, 2013. The applicants admit that they had 10 weeks (i.e up to 15th March, 2014) from the said 31st December, 2013 to file their brief of argument. The applicants therefore had an opportunity, or were by Order 6 R 5(1) of the Rules given an opportunity, to file their brief of argument in their appeal. Appeals in this Court are heard on briefs of argument by which each party presents his "succinct statement of his argument in the appeal. A party who has been afforded an opportunity to present a succinct statement of his argument in the appeal and who, nonetheless, failed to utilize the opportunity to be heard in the appeal cannot complain that he was denied his right to fair hearing: OBA JACOB OYEYIPO & ANOR vs. CHIEF J.O. OYINLOYE (1987) 1 N.W.L.R (Pt. 50) 356 (SC); (1987) 2 S.C.N.J. 53.

A party in litigation who throws away or wastes an opportunity to be heard cannot be heard to complain that his right to fair hearing, guaranteed by Section 36(1) of the 1999 Constitution, as amended, has been breached: James EKEREBE vs. EFE; ZOMOR & ORS. (1993) 7 N.W.L.R (Pt. 307) 588 at 601; KADUNA TEXTILES LTD vs. UMAR (1994) 1 N.W.L.R (Pt.

319) 143 at 159. Thus, as Mohammed, JCA (as he then was) put it in ODU'A INVESTMENT CO. LTD vs. JOSEPH TAIWO TALABI (1997) 10 N.W.L.R (Pt. 523) 1 at 51; such a party would be deemed to have waived his right to be heard in the matter and cannot be heard to complain afterwords of any denial of fair hearing which he, himself, had refused to take. See also MAGNA MARTIME LTD. vs. OTEJU (2005) 22 N.S.C.Q.R. 395. In the circumstance the rule should be volenti nou fit injuria. *(Pp 370 - 371.Paras D - D).*

6. *Fair hearing is not violated where a party neglects to prosecute his appeal*

Ordinarily, the violation of the rule of fair hearing renders the **proceedings null and void. The decision of Court in the circumstance, not being on the merits, is liable to be set aside: MOHAMMED vs. HUSSEINI (supra); EDE vs. MBA (supra). The situation, however, is different where a party who has an opportunity to present his case decides, neglects or refuses to present it or utilize the opportunity given to by law to present his case. A party, like the applicants herein, who has failed to neglect to submit his case or appeal for consideration cannot complain of a denial of fair hearing such a failure tantamount to an abandonment of the appeal: OYEDIPO vs. OGUNDARE (supra).** *(P 371.Paras D - F).*

7. *Brief to be filed within 10 weeks of the service of record of Appeal*

The service of the record of proceedings or the record of appeal on the appellant is notice to him, under Order 6 Rule 5(1) of the Rules of this Court, that he must set down his argument in the appeal in writing within 10 weeks from the moment the record of appeal was served on him: OYEYIPO vs. OYINLOYE (supra) per Obaseki, JSC.

The Rules of this Court made by the Chief Justice of Nigeria pursuant to Section 236 of the 1999 Constitution. When, therefore, the Rules, like Order 6 Rule 5 thereof, set the period for filing briefs as succinct statement of the party's argument in the appeal. It serves dual purpose of a party in the appeal an opportunity to present his

argument in the appeal, as well as setting a time table for the presentation of the argument in the appeal. *(Pp 371 - 372 Paras G - A).*

8. *Onus on court to be in control of litigation time and managing it properly*
Section 36(1) of the Constitution prescribes that a party in litigation be given a fair hearing, which includes an opportunity to present his case, within a reasonable time. The time element in fair hearing guarantee in the Constitution is what prompted Ikyegh, JCA, in BRITISH AMERICAN TOBACCO (INVESTMENT) LTD vs. A.G. OGUN STATE (2011) L.P.E.L.R – 3891 (CA) to state I agree with him "for Courts of Law time is very important. Because litigants go to Court expecting quick results from fair and expeditious determination of their disputes, so it is imperative for the Court to be in control of time and to manage it prudently", for the purpose of the determination of matters before them within a reasonable time.
Order 6 Rule 3(2) of the Rules of this Court provides sanction against the appellant who has failed, neglected or refused to file his brief of argument within 10 weeks of the receipt of the record of appeal, as stipulated by Order 6 Rule 5(1). *(P 372 Paras A - D).*

9. *Purport of Or. 6 Rule 9 of SCR 1985*
The sanction under Order 6 Rule 3(2) is quite distinct from the sanction under Order 6 Rule 9. The extant Rules of this court, as amended in 1999 provides in Order 6 Rule 9 thus-

> **If the Appellant fails to file and serve his brief within the time provided for in Rule 5 of these Rules, or within the time as extended by the Court, the Respondent <u>may apply to the Court for the appeal to be struck out</u> for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

Per Eko (JSC)
I had earlier reproduced Order 6 Rule 3(2). The full panel of this Court in CHIME vs. UDE (1996) 7 N.W.L.R (Pt. 461) 379, drawing the distinction between Order 6 Rule 3(2) and 9

states, per Ogundare, JSC, at page 419 –

Rule 9 provides for a situation where an application is made to the Court by a Respondent who alleged that the Appellant has failed to file and serve his brief of argument in time. Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and the parties have lost interest in it and there is need to decongest the cause list of such deadwoods. The two rules are clear and unambiguous – Where the Appellant is in default and has failed to apply for extension of time, the Respondent may apply that the appeal be struck out for want of prosecution (Rule 9). Where, however, the Appellant is in default and neither party makes any move, the Court may dismiss the appeal for want of prosecution (Rule 3(2). *(Pp 372 - 373 Paras D - B).*

10. *When Supreme Court can set aside an earlier order*

The appeal having been dismissed under Rule 3(2) of Order 6, this Court has no jurisdiction to set aside that Order and restore the appeal to the cause list.

In this authoritative pronouncement this Court cited with approval its earlier decisions in OYEYIPO vs. OYINLOYE (supra); IRO OGBU vs. URUM (1981) 4 SC 1; YONWUREN vs. MODERN SIGNS (NIG). LTD (1985) 1 N.W.L.R. (Pt. 2) 244.

The submission for the applicants that the judgment of this Court on 18th February, 2015 was not on the merits, but based on failure to file appellants' brief of argument, itself a procedural step which can be set aside, does not address the effect of Order 6 Rule 3(2) read together with Order 8 Rule 16 of the Rules of this Court. Order 8 Rule 16 provides –

> **The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from accidental slip or omission, or to vary the judgment or Order so as to give effect to its meaning or intention. A judgment or Order shall not be**

varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and different or substituted.

The instant application has not been brought under the "slip-rule" or the exceptions under Order 8 Rule 16. It has also not been brought under the Court's inherent power to set aside a judgment of its own that is a nullity. This Court, like any other Court of record, can ex debito justitiae set aside an order which is made ultra vires or without jurisdiction, the order being nullity: MENAKAYA vs. MENAKAYA (2001) 16 N.W.L.R (Pt. 738) 203; IGWE vs. KALU (2002) 14 N.W.L.R (Pt. 787) 435; OLORUNFEMI vs. ASHO (2000) 2 N.W.L.R (Pt. 643) 143; OGUEZE vs. OJIAKO vs. OGUEZE (1962) 1 S.C.N.L.R. 112. This application has not been brought on any of these grounds. *(P 373 .Paras B - H).*

11. *Duty of court when rules are not obeyed*

It needs only to be stressed that the Rules of Court are statutory instruments, deriving their legitimacy and efficacy directly from the Constitution. They are meant to be obeyed. When they are not obeyed, the court cannot remain passive and helpless. It must sanction the non-compliant party, otherwise the purpose of its enactment will be defeated. The party who fails to obey the Rules of Court must bear the consequences of his failure: OWNERS OF "MV ARABELLA vs. N.A.I.C (2008) 4 SC (Pt. 2) 189 at 205 – 206; RATNAM vs. CUMARASAMY (1965) 1 W.L.R. 8. *(Pp 373 - 374 Paras H - B).*

12. *Presumption where appellant fails to file his briefs*

The undisputed facts in this application remains that over 54 weeks after **receipt of the Record of Appeal, the Applicants herein, as Appellants, failed or neglected to file their brief of argument as required by Order 6 Rule 5(1) of the Rules of this Court. When an Appellant fails to file his brief the presumption is that the appeal has been abandoned and it becomes liable to be dismissed: OYEYIPO vs. OYINLOYE (supra); CHIME v UDE (supra). See also**

ADERIGBIGBE vs. TIAMIYU (2009) 10 N.W.L.R (Pt. 1150) 592; AKIBU & ORS vs. ODUNTAN (2000) 7 S.C.N.J.189; SPARKLING BREWERIES vs. U.B.N (2001) 7 S.C.N.J. 321; CORNELIUS LTD vs. EZENWA (1996) 4 S.C.N.J. 123; NKADO vs. OBIANO (1997) 5 S.C.N.J. 33.

From all I have said above, my conclusion from the decision of the full panels of this court in OYEYIPO v. OYINLOYE (supra); CHIME vs. UDE (supra) is that an appeal dismissed under Or. 6 rule 3(2) of the extant Rules of this Court, cannot be relisted or restored to the cause list. The order dismissing an appeal for failure to file brief of argument is an order on the merits and the Supreme Court by dint of Order 6 Rule 16, Supreme Court Rules, 1985, as amended, cannot review its own judgment or order except under the "slip-rule" or under its inherent powers to set its judgment or order that is manifestly a nullity. Accordingly, an appeal dismissed under Order 6 Rule 3(2), as the instant appeal, cannot be relisted. The dismissal order is final: ALLI vs. AYINDE (2010) ALL F.W.L.R (Pt. 540) 1315 at 1358; KRAUS THOMPSON ORGANISATION vs. N.I.P.S.S. (2004) 17 N.W.L.R. (Pt. 901) 44.

There is no cause shown for me to grant this application. I find no substance in it, and it is accordingly refused and dismissed. The order made in Chambers on 18th February, 2015, dismissing the applicants' appeal remains inviolate. *(P 374 Paras B - H).*

13. *Presumption where appellant fails to file his brief after a long time*

I must say, that the fact that the applicants spent 54 weeks) i.e. over one year from the time they were served with the record of appeal, without caring to file their joint brief of argument is contrary to the provisions of Order 6 Rule 5(1) of Supreme Court Rules, which gives only ten weeks to the appellant within which to file brief of argument from the date the record of appeal was served on them. The long period spent by the applicants without filing brief of argument is too long enough to presume that the appellants/applicants had abandoned their appeal and therefore the appeal is liable to be dismissed. See Nkado vs. Obiano (1997) 5 SCNJ 33.

The incessant delay clearly portrayed the lackadaisical attitude of the applicant in prosecuting the appeal timeously and they therefore do not deserve to be given another chance again, since no cogent reason was advanced by the appellants/applicants to convince this court to restore the appeal or for it to set aside the order of dismissal it made earlier in chambers. *(Pp 375 - 376 Paras G - B).*

Nigerian cases cited

Aderigbigbe vs. Tiamiyu (2009) 10 N.W.L.R (Pt. 1150) 592
Akibu & Ors vs. Oduntan (2000) 7 S.C.N.J.189
Alli vs. Ayinde (2010) ALL F.W.L.R (Pt. 540) 1315
Ekrebe vs. Efeizomor & Ors. (1993) 7 N.W.L.R (Pt. 307) 588
British American Tobacco (Investment) Ltd vs. A.G. Ogun State (2011) L.P.E.L.R – 3891 (CA)
Chime vs. Ude (1996) 7 N.W.L.R (Pt. 461) 379
Cornelius LTD vs. Ezenwa (1996) 4 S.C.N.J. 123
Garba vs. University of Maiduguri (1986) 1 N.W.L.R (Pt. 18) 550
Igwe vs. Kalu (2002) 14 N.W.L.R (Pt. 787) 435
Iro Ogbu vs. Urum (1981) 4 SC 1
Kaduna Textiles Ltd vs. Umar (1994) 1 N.W.L.R (Pt. 319) 143
Kraus Thompson Organisation vs. N.I.P.S.S. (2004) 17 N.W.L.R. (Pt. 901) 44
Magna Martime Ltd. vs. Oteju (2005) 22 N.S.C.Q.R. 395
Menakaya vs. Menakaya (2001) 16 N.W.L.R (Pt. 738) 203
Nkado vs. Obiano (1997) 5 S.C.N.J. 33
Oba Jacob Oyeyipo & Anor vs. Chief J.O. Oyinloye (1987) 1 N.W.L.R (Pt. 50) 356 (SC); (1987) 2 S.C.N.J. 53
Odu'a Investment Co. Ltd vs. Joseph Taiwo Talabi (1997) 10 N.W.L.R (Pt. 523) 1
Ojiako vs. Ogueze (1962) 1 S.C.N.L.R. 112
Olorunfemi vs. Asho (2000) 2 N.W.L.R (Pt. 643) 143
Owners of "Mv Arabella vs. N.A.I.C (2008) 4 SC (Pt. 2) 189
Ratnam vs. Cumarasamy (1965) 1 W.L.R. 8
Sparkling Breweries vs. U.B.N (2001) 7 S.C.N.J. 321
Yonwuren vs. Modern Signs (NIG). LTD (1985) 1 N.W.L.R. (Pt. 2) 244

Nigeria statutes cited

Constitution of Federal Republic of Nigeria 1999 (as amended) S. 236; S. 36(1).

APPEARANCES

Onyeka Enunwa, (Miss) for the Applicants

Olumide Akinnimi, (Esq.) with Hasiya Kontagora (Esq.) for the Respondent.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment): On 29th March, 2013 the Appellants herein, who have brought the present application, filed their Notice of Appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 29th January, 2013. The Record of Appeal was subsequently compiled and transmitted to the Court and the appeal duly entered on 31st December, 2013 – after Nine Months. Order 7 Rule 4(1) of the Supreme Court Rules, 1985, as amended, enjoins the Registrar of the Court below to compile and transmit record "within a period of not more than six months from the date of filing the notice of appeal."

Order 6 Rule 5(1)(a) of the said Supreme Court Rules (hereinafter called "the Rules of this Court") provides-

> **The Appellant shall within ten weeks of the receipt of the Record of Appeal – file in the Court and serve on the Respondent a written brief being a succinct statement of his argument in the appeal.**

The Appellants/Applicants had up to 15th March, 2014 – 10 weeks after 31st December, 2013, to file their brief of argument. They never did so. They also did not apply for extension of time within which to file their brief of argument. On 18th February, 2015 (a period of 13 months and 2 weeks i.e after 54 weeks, this Court sitting in Chambers, suo motu dismissed the appeal No. SC.763/2013 for want of prosecution under Order 6 Rule 3(2) of the Rules of this Court, that provides:

> **Where the Appellant has failed to file a brief within the period prescribed by this Order and there is no application for**

extension of time within while to file the brief, the Court may, subject to the proviso to rule 9 of this Order, proceed to dismiss the appeal in Chambers without hearing argument.

The legislative intent for Order 6 Rule 3(2) of the Rules of this Court is the empowerment of the Court to take the initiative to clear its own docket of dormant or abandoned appeals in which the parties have lost interest. It is to decongest the cause list of such dead woods or moribund appeals. Order 6 Rule 3(2) empowers this Court to act suo motu to clear out abandoned appeals in order to decongest the Court.

On 10th Mar, 2017, about 27 months after their appeal was dismissed on 18th February, 2015 the Appellants brought the instant application through their Counsel Fidelis Oditah, QC, SAN, seeking the following reliefs-

6. **AN ORDER** setting aside the decision of this Court given in Chambers on 18 February, 2015 in default of the Appellants' Brief.
7. **AN ORDER** restoring this appeal to the Court's list for determination on the merits.
8. **AN ORDER** enlarging time within which the Appellants/Applicants may file and serve the Appellants' Brief of Argument for hearing on the merits.
9. **AN ORDER** deeming the already filed and served Brief of Argument as properly filed and served.
10. **AN ORDER** permitting the departure from compliance with the Rules of this Court and accelerating the hearing of the appeal.

ALTERNATIVELY,

4. **AN ORDER** extending the time within which the Appellants/Applicants may seek leave of this Honourable Court to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/1/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D Bage, JCA
5. **AN ORDER** granting leave to the Appellants/Applicants to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie,

JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

6. **AN ORDER** for the extension of the time within which the Appellants/Applicants may appeal the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

The application was upon the following grounds:

m. On 18th February, 2015, this Court struck out this appeal on the grounds that the Appellants had failed to file their Brief of Argument as required by this Court Rules.

n. As the apex Court, this Court has inherent powers to set aside its own default judgment given in default of Appellants' Brief and hear the Appeal on the merits.

o. Courts are reluctant to visit the mistake of Counsel on the client especially in matters which concern the protection of the public interests such as are raised in this appeal.

p. This appeal raises very important question of Constitutional and regulatory law, including the following: first, the extent to which the First Appellant can exercise its statutory powers under the investments and Securities Act 2007 ("ISA") to protect the investing public and other users of Nigerian Capital Markets in view of Section 251(1)(e) of the 1999 Constitution; and, second, the extent to which the First Appellant can apply the administrative sanctions stipulated in the ISA and in its own Rules and Regulations against defaulters, in the light of this Court's decision in the line of cases exemplified by **Garbe v. University of Maiduguri (1986) 1 N.W.L.R (Pt. 18) 550** that an administrative tribunal cannot sanction in respect of conduct which constitutes a crime, given that almost all violations of the ISA and the rules and regulations made thereunder constitute crimes under the general law. These and other important issues of constitutional and regulatory law deserve to be heard on the merits.

q. The decision anticipated in this appeal will develop and impact heavily on Nigerian constitutional and regulatory law and Nigerian Capital Market in which trillions of pension and other resources are now

invested.

r. This appeal also presents this Court with a unique opportunity to clarify and develop the law on administrative discipline and constitutional right to fair hearing given the growing role and significance of administrative institutions in service delivery in Nigeria.

s. It would be tragic for the users of Nigerian Capital Markets if this Court were to pass up the opportunity to decide this appeal on the merits.

t. The Respondent will not be prejudiced if this application were granted and this appeal heard on the merits. The Respondent does not appear to have been prejudiced by the unfortunate delay in filing this Brief. He did not apply to have this appeal struck out pursuant to Order 6 Rule 9 of the Supreme Court Rules, which is clear evidence that he was not prejudiced by the Appellants' default in filing their Brief of Argument.

u. The Appellants are out of time to file and serve the Appellants' Brief of Argument and this application is to enable the Appellants to properly file and serve their Brief.

v. The delay in filing and serving the Brief of Argument is due to mistake by Appellants' Counsel's junior and the busy schedule of the Appellants' Counsel.

w. The grant of this application will enable the Appellants/Applicants to effectively prosecute the Appeal and further the public interest.

x. Alternatively, as a result of the grounds stated above, it has become necessary to seek leave of this Court to follow the correct procedure so as to give the Appellant opportunity for this Appeal to be determined on the merits.

The indubitable fact is that as at 18th February, 2015, when the appeal was dismissed for want of diligent prosecution, there was no application pending for extension of time within which the Appellants may file their brief of argument. It is admitted in paragraph 15 of the supporting affidavit inter alia that the appeal was dismissed "in Chambers on 18th February, 2015, which was just over 10 months after the Applicants fell into default of filing the Brief." It is further averred for the Applicants, as the Appellants, that "there was no application to this Court to exercise its powers to dismiss the appeal for want of diligent prosecution" and that there was no finding, in apparent misconception that the

A original proviso to Rule 9(1) of Order 6 is still extant, by this Court that this appeal on its face lacked merit such as to warrant summary dismissal in Chambers for want of filing of the Appellant's brief. I think I should point out, here and now, that by Government Notice No. 111 of 1991 the proviso to the B Original Rule 9(1) of Order 6 of the Rules of this Court was deleted. What is now left of the said Rule 9 reads thus-

> **9. <u>If an Appellant fails to file and serve his brief within the time provided for in rule 5</u> of these Rules, or within the C time as extended by the Court, <u>the Respondent may apply to the Court for the appeal to be struck out</u> for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

D With the 1991 amendment, therefore, the words: "subject to the proviso to rule 9 of this Order, "appearing in Order 6 Rule 3(2) of the Rules have clearly become otiose: the Proviso to Rule 9 having been deleted.

Applicants' Counsel submitted three issues for the determination of this E application. That is –

d. Whether this Court has jurisdiction to set aside its own judgment given on grounds of lack of diligent prosecution of appeal.
e. Assuming it has jurisdiction, whether this is an appropriate case in which F the discretion should be exercised in favour of the Appellants.
f. In the alternative, whether this Court has power to grant the trinity prayers sought by the Applicants as alternative reliefs.

The importance of issue 1 lies in the fact of its centrality in the application. The G resolution of the issue, one way or the other, will materially impact on the remaining issues. The Applicants, through their Counsel, think that the order made on 18th February, 2015 dismissing their appeal for abandonment or want of diligent prosecution, upon invocation of Order 6 Rule 3(2) of the Rules of this H Court, was a "default judgment". They opine, on authority of **U.T.C v PAMOTE**, (1989) L.P.E.L.R – 3276(SC), that a judgment given against a party for failure to take a procedural step in the litigation is a mere default judgment, being not a judgment on the merits based on the determination of the legal rights of the parties either on law or facts. On the effect of an order of dismissal not on I

A the merits: the order Applicants' Counsel submits, is considered in law to be "a mere striking out." The authorities cited for this submission include **PANALPINA WORLD TRANSPORT NIG. LTD vs. J. B OLANDEEN & ORS.** ("pw1 case") (2010) 4 C.L.R.N. 150 (SC); **OBASI BROTHERS**
B **MERCHANT CO. LTD vs. MERCHANT BANK OF AFRICA SECURITIES LTD** (2005) ALL F.W.L.R(Pt. 261) 216 at 231G; **IHEAKWU vs. NWANKPA** (1966) N.S.C.C 83. An order, regarded not to be on the merits, but a mere default judgment, is liable to be set aside, Applicants' Counsel
C submits relying on **MOHAMMED vs. HUSSEINI** (1998) 14 N.W.L.R. (Pt. 584) 108 (SC); **EDE vs. MBA** (2011) 18 N.W.L.R (Pt. 1278) 236 at 277E.

Let me reiterate one fact: at the time the appeal of the Applicant was dismissed on 18th February, 2015 there was no pending application for enlargement of time within which the Applicants, as the Appellants, may file
D their brief of argument. This much has been admitted by the Applicants in paragraph 15 of the supporting affidavit. This is what distinguishes **EDE v MBA** (supra) from the instant application, where prior to the date of the order dismissing the appeal, the Appellants had on 6th June, 1993 filed an application
E for enlargement of time within which to file their brief, and an order to regurlarise their brief already filed. The registry staff had not brought the fact of the existence of this pending application to the attention of the Court. The party adversely affected having been denied fair hearing; the ensuing decision and
F order were set aside ex debito justitiae.

MOHAMMED v HUSSEINI (supra) is also distinguishable. The trial Court, after entertaining and granting an oral application by the Plaintiff's Counsel to set the matter down for hearing in the absence of the Defendant, it
G proceeded to hearing of the matter the same day and entered judgment. The substantive suit was not on the cause list for hearing that day. What necessitated the setting aside of the default judgment was the failure to notify the other side that their matter had been set down for hearing. The case reported as (2005) 2 ALL F.W.L.R (Pt. 261).

H The issue in **PANALPINA WORLD TRANSPORT NIGERIA LIMITED vs. OLANDEEN & ORS.** (supra) is that the trial Court having struck out **PANALPINA WORLD TRANSPORT NIGERIA LIMITED** as a defendant could subsequently be joined as a party to the appeal at the Court of

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A Appeal which would have had the effect of taking away its accrued statutory right of defence in the matter.

The issue in **OBASI MERCHANT CO. LTD vs. MERCHANT BANK OF AFRICA SECURITIES** (supra) seems to be whether the earlier suit No. B LD/3359/92 did operate as estoppels per rem judicatam. The said suit was struck out. That is the basis for the statement that it is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute the case and the Court relying C on its inherent powers to strike out the case, it amounts to dismissal on the merit.

All of the foregoing cases was decided on its peculiar facts or circumstances and the Rules of those Courts regulating the practice and procedure of the various Courts. None of those Rules, my lords, is akin to or ipssissima verba with Order 6 Rule 3(2) Rules of this Court under which this D Court proceeded on 18th February, 2015 to dismiss the Applicants' appeal for want of diligent prosecution.

The deponent of the supporting affidavit avers in paragraph 15(c) thereat that "there was no application to this Court to exercise its powers to dismiss the E appeal for want of prosecution on grounds of failure to file the Appellants' Brief within the time allowed by the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the appeal. Implicit in this suggestion is invendo that the Court denied the Applicants' Brief within the time allowed by F the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the appeal. Implicit in this suggestion is innuendo that the Court denied the Applicants the opportunity to be heard before it proceeded to dismiss the appeal. Order 6 Rule 5(1) of the Rules of this Court, I earlier reproduced, G enjoins the Applicants, as Appellants, to file their brief of argument "within ten weeks of the receipt of the Record of Appeal". The Record of Appeal was transmitted and the appeal was entered on 31st December, 2013. The Applicants admit that they had 10 weeks (i.e up to 15th March, 2014) from the said 31st December, 2013 to file their brief of argument. The Applicants therefore had an H opportunity, or were by Order 6 R 5(1) of the Rules given an opportunity, to file their brief of argument in their appeal. Appeals in this Court are heard on briefs of argument by which each party presents his "succinct statement of his argument in the appeal. A party who has been afforded an opportunity to present

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A a succinct statement of his argument in the appeal and who, nonetheless, failed to utilize the opportunity to be heard in the appeal cannot complain that he was denied his right to fair hearing: **OBA JACOB OYEDIPO & ANOR vs. CHIEF J.O. OYINLOYE** (1987) 1 N.W.L.R (Pt. 50) 356 (SC); (1987) 2 B S.C.N.J. 53.

A party in litigation who throws away or wastes an opportunity to be heard cannot be heard to complain that his right to fair hearing, guaranteed by Section 36(1) of the 1999 Constitution, as amended, has been breached: James C **AREBE v EFEIZOKOR & ORS**. (1993) 7 N.W.L.R (Pt. 307) 588 at 601; **KADUNA TEXTILES LTD vs. UMAR** (1994) 1 N.W.L.R (Pt. 319) 143 at 159. Thus, as Mohammed, JCA (as he then was) put it in ODU'A INVESTMENT CO. LTD vs JOSEPH TAIWO TALABI (1997) 10 N.W.L.R (Pt. 523) 1 at 51; such a party would be deemed to have waived his right to be D heard in the matter and cannot be heard to complain afterwords of any denial of fair hearing which he, himself, had refused to take. See also MAGNA MARTIME LTD. vs. OTEJU (2005) 22 N.S.C.Q.R. 395. In the circumstance the rule should be volenti nou fit injuria.

E Ordinarily, the violation of the rule of fair hearing renders the proceedings null and void. The decision of Court in the circumstance, not being on the merits, is liable to be set aside: **MOHAMMED vs. HUSSEINI** (supra); **EDE vs. MBA** (supra). The situation, however, is different where a party who F has an opportunity to present his case decides, neglects or refuses to present it or utilize the opportunity given to by law to present his case. A party, like the Applicants herein, who has failed to neglected to submit his case or appeal for consideration cannot complain of a denial of fair hearing such a failure to G tantamount to an abandonment of the appeal: OYEDIPO vs. OGUNDARE (supra). The service of the record of proceedings or the Record of Appeal on the Appellant is notice to him, under Order 6 Rule 5(1) of the Rules of this Court, that he must set down his argument in the appeal in writing within 10 weeks from the moment the Record of Appeal was served on him: OYEYIPO vs. H OYINLOYE (supra) per Obaseki, JSC.

The Rules of this Court made by the Chief Justice of Nigeria pursuant to Section 236 of the 1999 Constitution. When, therefore, the Rules, like Order 6 Rule 5 thereof, set the period for filing briefs as succinct statement of the party's

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A argument in the appeal. It serves dual purpose of a party in the appeal an opportunity to present his argument in the appeal, as well as setting a time table for the presentation of the argument in the appeal. Section 36(1) of the Constitution prescribes that a party in litigation be given a fair hearing, which
B includes an opportunity to present his case, within a reasonable time. The time element in fair hearing guaranteed in the Constitution is what prompted Ikyegh, JCA, in BRITISH AMERICAN TOBACCO (INVESTMENT) LTD vs. A.G. OGUN STAT (2011) L.P.E.L.R – 3891 (CA) to state I agree with him "for
C Courts of Law time is very important. Because litigants go to Court expecting quick results from fair and expeditious determination of their disputes, so it is imperative for the Court to be in control of time and to manage it prudently", for the purpose of the determination of matters before them within a reasonable time.

D Order 6 Rule 3(2) of the Rules of this Court provides sanction against the Appellant who has failed, neglected or refused to file his brief of argument within 10 weeks of the receipt of the Record of Appeal, as stipulated by Order 6 Rule 5(1). The sanction under Order 6 Rule 3(2) is quite distinct from the
E sanction under Order 6 Rule 9. The extant Rules of this Court, as amended in 1991 provides in Order 6 Rule 9 thus-

> **If the Appellant fails to file and serve his brief within the time provided for in Rule 5 of these Rules, or within the time as**
F **extended by the Court, the Respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

G I had earlier reproduced Order 6 Rule 3(2). The full panel of this Court in **CHIME vs. UDE** (1996) N.W.L.R (Pt. 461) 379, drawing the distinction between Order 6 Rule 3(2) and 9 states, per Ogundare, JSC, at page 419 –

H **Rule 9 provides for a situation where an application is made to the Court by a Respondent who alleged that the Appellant has failed to file and serve his brief of argument in time. Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and**
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the parties have lost interest in it and there is need to decongest the cause list of such deadwoods. The two rules are clear and unambiguous – Where the Appellant is in default and has failed to apply for extension of time, the Respondent may apply that the appeal be struck out for want of prosecution (Rule 9). Where, however, the Appellant is in default and neither party makes any more, the Court may dismiss the appeal for want of prosecution (Rule 3(2). – The appeal having been dismissed under Rule 3(2) of Order 6, this Court has no jurisdiction to set aside that Order and restore the appeal to the cause list.

In this authoritative pronouncement this Court cited with approval its earlier decisions in OYEYIPO vs. OYINLOYE (supra); IRO OGBU v. URUM (1981) 4 SC 1; YONORUREN vs. MODERN SIGNS (NIG). LTD (1985) 1 N.W.L.R. (Pt. 2) 244.

The submission for the Applicants that the judgment of this Court on 18th February, 2015 was not on the merits, but based on failure to file Appellants' Brief of Argument, itself a procedural step which can be set aside, does not address the effect of Order 6 Rule 3(2) read together with Order 8 Rule 16 of the Rules of this Court. Order 8 Rule 16 provides –

> **The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from accidental slip or omission, or to vary the judgment or Order so as to give effect to its meaning or intention. A judgment or Order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different from substituted.**

The instant application has not been brought under the "slip-rule" or the exceptions under Order 8 Rule 16. It has also not been brought under the Court's inherent power to set aside a judgment of its own that is a nullity. This Court, like any other Court of record, can ex debito justitiae set aside an order which is made ultra vires or without jurisdiction, the order being nullity: MENAKAYA vs. MENAKAY (2001) 16 N.W.L.R (Pt. 738) 203; IGWE vs. KALU (2002) 14 N.W.L.R (Pt. 787) 435; OLORUNFEMI vs. ASHO (2000) 2 N.W.L.R (Pt. 643) 143; OGUEZE vs. OJIAKO (1962) 1 S.C.N.L.R. 112. This application has not been brought on any of these grounds.

It needs only to be stressed that the Rules of Court are statutory

instruments, deriving their legitimacy and efficacy directly from the Constitution. They are meant to be obeyed. When they are not obeyed, the Court cannot remain passive and helpless. It must sanction the non-compliant party, otherwise the purpose of its enactment will be defeated. The party who fails to obey the Rules of Court must bear the consequences of his failure: **OWNERS OF "MV ARABELLA vs. N.A.I.C** (2008) 4 SC (Pt. 2) 189 at 205 – 206; **RATNAM vs. CUMARASAMY (**1965) 1 W.L.R. 8.

The undisputed facts in this application remains that over 54 weeks after receipt of the Record of Appeal, the Applicants herein, as Appellants, failed or neglected to file their brief of argument as required by Order 6 Rule 5(1) of the Rules of this Court. When an Appellant fails to file his brief the presumption is that the appeal has been abandoned and it becomes liable to be dismissed: OYEYIPO vs. OYINLOYE (supra); CHIME vs. UDE (supra). See also **ADERIGBIGBE v. TIAMIYU** (2009) 10 N.W.L.R (Pt. 1150) 592; **AKIBU & ORS vs. ODUNTAN** (2000) 7 S.C.N.J.189; **SPARKLING BREWERIES vs. U.B.N** (2001) 7 S.C.N.J. 321; **CORNELIUS LTD vs. EZENWA** (1996) 4 S.C.N.J. 123; **NKEDO vs. OBIENO** (1997) 5 S.C.N.J. 33.

From all I have said above, my conclusion from the decision of the full panels of this Court in OYEYIPO v. OYINLOYE (supra); CHIME v UDE (supra) is that an appeal dismissed under 6 Rule 3(2) of the extant Rules of this Court, cannot be relisted or restored to the cause list. The order dismissing an appeal for failure to file brief of argument is an order on the merits and the Supreme Court by dint of Order 6 Rule 16, Supreme Court Rules, 1985, as amended, cannot review its own judgment or order except under the "slip-rule" or under its inherent powers to set its judgment or order that is manifestly a nullity. Accordingly, an appeal dismissed under Order 6 Rule 3(2), as the instant appeal, cannot be relisted. The dismissal order is final: ALLI vs. AYINDE (2010) ALL F.W.L.R (Pt. 540) 1315 at 1358; KRAUS THOMPSON ORGANISATION vs. N.I.P.S.S. (2004) 17 N.W.L.R. (Pt. 901) 44.

There is no cause shown for me to grant this application. I find no substance in it, and it is accordingly refused and dismissed. The order made in Chambers on 18th February, 2015, dismissing the Applicants' appeal remains inviolate. Costs at N500,000.00 shall be paid to the Respondent by the Appellants, jointly and/or severally.

Ejembi Eko
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have read in draft the Leading Ruling just delivered by my learned brother Eko JSC. I am in full agreement with his lordship that the application lacks merit. It is also dismissed by me. I abide by the orders proposed in the leading ruling.

Olabode Rhodes-vivour
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): Having read in draft the lead ruling of my learned brother EJEMBI EKO JSC just delivered, and found the reasoning and conclusion therein to be in consonance with my views on the issues raised in the application, I adopt same as mine in dismissing the unmeritorious application. I abide by the consequential orders made in the lead ruling.

Musa Dattijo Muhammad,
Justice, Supreme Court.

INYANG OKORO, (JSC): My learned brother, Ejembi Eko, JSC obliged me a draft of the lead Ruling just delivered and I am in agreement entirely with the reasoning and the conclusion in the said lead Ruling.

I too will refuse the application as same lacks merit. It is accordingly dismissed. I abide by the other consequential orders in the lead Ruling including the order on costs.

John Inyang Okoro
Justice, Supreme Court.

AMIRU SANUSI, (JSC): I read in advance, the Ruling just rendered by my learned brother Ejembi Eko JSC. The reasoning and conclusion arrived at therein, that the application for the setting aside of this court's order made in chambers be vacated, is without merit and deserves to be dismissed. I shall accordingly dismiss the application.

I must say, that the fact that the applicants spent 54 weeks) i.e. over one year from the time they were served with the record of appeal, without caring to file their joint brief of argument is contrary to the provisions of Order 6 Rule 5(1) of Supreme Court Rules, which gives only ten weeks to the appellant within which to file brief of argument from the date the record of appeal was served on them. The long period spent by the applicants without filing brief of

A argument is too long enough to presume that the appellants/applicants had abandoned their appeal and therefore the appeal is liable to be dismissed. See Nkedo v. Obieno (1997) 5 SCNJ 33.

The incessant delay clearly portrayed the lackadaisical attitude of the
B applicant in prosecuting the appeal timeously and they therefore do not deserve to be given another chance again, since no cogent reason was advanced by the appellants/applicants to convince this court to restore the appeal or for it to set aside the order of dismissal it made earlier in chambers.

C Thus, for these few remarks and the fuller and detailed reasons given in the lead Ruling, I shall also dismiss the application for want of merit. I abide by the order on costs made.

Amiru Sanusi
D *Justice, Supreme Court***.**

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KABIR ABDULLAHI

VS

THE STATE

SC. 955/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings –Attitude of Supreme Court thereto –When Supreme Court may interfere with concurrent findings.

COURT: Approach to justice – Whether the attitude of court has changed from deciding case on mere technicalities – The principle in ***Makeri Smelting Co. Ltd vs. Access Bank (Nig) Plc (2002) 7 NWLR (pt. 766) 447****.*

COURT: Interpretation of statutes - Duty on court thereto – Whether the function of the court is to interpret a statute in accordance with the intention of the legislature – The Principle in ***Ugwu vs. Ararume (2007) 12 NWLR (pt. 1048) 369.***

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where direct and positive – Whether can be relied solely for the conviction of the accused – The principle in ***Peter Iliya Azabada vs. The State (2014) All FWLR (Pt. 751) 1620****.*

CRIMINAL LAW AND PROCEDURE: Criminal cases –Proof thereof – Whether to prove case beyond reasonable doubt – Implication.

CRIMINAL LAW AND PROCEDURE: Murder – Elements thereof – Whether prosecution is expected to establish them beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof – Cause of death – Whether medical report is not only the way of proving cause of death.

CRIMINAL LAW AND PROCEDURE: Proof – Medical evidence – Relevancy – Where medical evidence is not available –Whether cause of death can be inferred from a compelling evidence that the deceased died as a result of an act or omission of the person charged with causing the death.

STATUTE: Criminal Procedure Code – S. 222 thereof – Purport.

STATUTE: Criminal Procedure Code –S. 382 thereof –Nature and purport.

STATUTE: Criminal procedure Code – S.S 288 and 382 thereof –Nature and purport.

WORDS AND PHRASES: Confession –S. 28 of Evidence Act 2011 considered.

Issues for determination

1. **Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1).**

2. **Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect (Grounds 2 and 3)".**

Facts of the matter

This appeal emanated from the judgment of Court of Appeal, Kaduna Judicial Division, Kaduna State, CORAM: UWANI MUSA ABBA AJI, ABDUL ABOKI and HABEEB A.D. ABIRU, JJCA (hereinafter referred to as the "lower court)" delivered on 22nd May, 2015, wherein, the lower court affirmed the decision of the Katsina State High Court of Justice, Katsina Judicial Division (hereinafter referred to as "trial court') delivered on 24th April, 2012.

The lower court affirmed the judgment of the trial court which convicted the appellant herein for the offence of culpable homicide punishable with death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death with one other accused person.

The appellant herein was disgruntled with the judgment of the lower court and appealed to this honourable court based on the notice of appeal adumbrated at pages 157 -161 of the transcribed record of appeal. The said notice of appeal contains only three (3) grounds of appeal.

Statement of Fact Relevant to This Appeal

By a charge dated 19th June, 2008, the appellant with one other accused person were charged by the respondent at the trial court with the act of forming common intention to commit offence of culpable homicide punishable with death under Section 221 of the Penal Code in furtherance of which they allegedly caused the death of one Abubakar Dayyabu by doing an act to wit: by beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of the act and thereby committed an offence punishable under Section 221 of the Penal Code.

The appellant and the other co-accused person (i.e. AUWALU ABUBAKAR) were tried, convicted and sentenced to death by the trial court. The appellants (at the lower court) were dissatisfied with the decision of the

trial court and appealed to the lower court upon four grounds of appeal and five grounds of appeal filed by the 1st and 2nd appellants respectively.

The lower court in its considered judgment dismissed the appeal and affirmed the judgment of the trial court. It is against the said judgment that this appeal before this honourable court was filed.

Held: *(Unanimously dismissing the Appeal)*

1. *A statute is the will of the legislature*

The totality of the evidence presented in this case leaves this court with little or no room to arrive at a different conclusion with the trial and lower court. This stems from the fact that the duty of court is to interpret the statute in accordance with the intention of the law makers. In UGWU vs. ARARUME (2007) 12 NWLR (Pt. 1048) 369 at 498 this court stated thus:-

> **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature"** *(P 208 Paras C - F).*

2. *Attitude of Court has changed from deciding cases on mere technicalities*

Courts generally have deliberately shifted away from narrow technical approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. See MAKERI SMELTING CO. LTD vs. ACCESS BANK (NIG.) PLC (2002) 7 NWLR (Pt. 766) 447 at 476 – 477.

> **"The attitude of the court has since changed against deciding cases on mere technicalities. The attitude of the courts now is that case should always be decided, whenever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a**

> **blunder has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits."**

See also AJAKAIYI vs. IDEHAI (1994) 8 NWLR (Pt. 364) 504; ARTRA IND LTD vs. NBCI (1997) 1 NWLR (Pt. 483) 574; DAKAT vs. DASHE (1997) 12 NWLR (Pt. 531) 46; BENSON vs. NIGERIA AGIP CO. LTD (1982) 5 SC. 1. *(Pp 208 - 209.Paras F - A).*

3. *When Supreme Court may interfere with concurrent findings of facts.*
Further more, the law is that this court will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such findings are perverse, or are not supported by the evidence, or are reached as a result of a wrong application of any principle of substantive law or procedure. See ARABAMBI vs. ADVANCE BEVERAGES IND. LTD. (2005) 19 NWLR (Pt. 959) 1 per Onnoghen, JSC as he then was, (now CJN) (Pt. 46), paragraphs C-E. Also OCHIBA vs. THE STATE (2011) 12 SC (Pt. IV) page 79 per Rhodes-Vivour, JSC (Pages 51-52) paragraphs F-B; CAMEROON AIRLINES vs. OTUTUIZU (2011) 12 SC (Pt. III) 200; OLOWU vs. NIG. ARMY (2011) 12 SC (Pt. 11) 1; AROWOLO vs. OLOWOOKERE & 2 Ors (2011) 11-12 SC (Pt. II) 98. *(P 209 Paras B - D).*

4. *The Nature and purport of S. 222 of the Criminal Procedure Code*
Again, the above finding also becomes inevitable given the provisions of Section 222 of the CPC to the effect that:-

> **"No error in stating either the offence or the particulars required to be stated in the charge and no omission to state in the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was infact misled by such error or omission and it has occasioned a failure of justice".** *(P 209 Paras D - F).*

5. *The Nature and purport of Ss. 288 and 382 of CPC*
Also compelling are the provisions of Sections 288 and 382 of the Criminal Procedure Code, which state respectively (repeated for emphasis).

Section 288 of the CPC

"A court exercising appellate jurisdiction shall not in exercise of such jurisdiction interfere with the finding or sentence or other order of the lower court on the ground that only that evidence has been wrongly admitted or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity. *(P 209 Paras F - I).*

6. *The Nature and purport of S. 382 of Criminal Procedure Code*
Section 382 of the CPC

"Subject to the provisions of herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the appeal or reviewed on account of any error, omission or irregularity in the complaint, summons warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Criminal Procedure Code unless the Appeal Court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity." *(P 210 Para A - D).*

7. *The meaning of confession*
Moreover, by virtue of the provisions of S. 28 of the Evidence Act, confessional statement is tenable and admissible. The section

describes confessional statement thus:-

> **"A confession is an admission made at any time by a person charged with a crime tending to show or suggest the inference that he committed the crime."**

Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. In the instant appeal, it is a combination of a confessional statement and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. This has been settled position in our jurisprudence of criminal justice. See for example PATRICK IKEMSONS & 2 ORS vs. THE STATE (1989) 3 NWLR (Pt. 110) 455 at 476 paragraph D; JOSEPH IDOWU vs. THE STATE (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt. 680) at 48; NKWUDA EDAMINE vs. THE STATE (1996) 3 NWLR (Pt. 438) 530 at 537 paragraphs D – E; SAMUEL THEOPHILUS vs. THE STATE (1996) 1 NWLR (Pt. 423) 139 at 155 paragraphs A – B; and AWOPEJU vs. THE STATE (2002) 3 MJSC 141 at 151. *(P 210 Paras D - H).*

8. *Confessional statement is the best evidence and can be relied solely for the conviction of the accused.*

This court per the learned Onnoghen, JSC, as he then was (now CJN) in PETER ILIYA AZABADA vs. THE STATE (2014) All FWLR (Pt. 751) 1620 paragraph B has made it abundantly clear in the following words:-

> **"The confessional statement of an accused, where it is direct, positive and unequivocal as to the commission of the crime charged is the best evidence and can be relied upon solely for conviction of the accused person. An accused person can be convicted on his confessional statement alone, where the confession is consistent with**

other ascertained facts which have been proved".
"Confession in criminal procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than evidence of an eye witness because the evidence comes from the horse's mouth who is the accused person. There is no better evidence and there is no further proof. Therefore, where an accused person confesses to a crime in the absence of an eye witness to the killing, he can be convicted on his confession alone once the confession is positive direct and properly proved. In other words a free and voluntary confession of guilt, direct and positive and if duly made and satisfactorily proved, is sufficient without corroborative evidence so long as the court is satisfied as to the truth of the confession." *(P 211 Paras A - F).*

Per Bage (JSC)
In the instant appeal, the court is not left in any confusion, as the appellant and his co-accused informed the trial court that, the appellant used the belt to separate the fight between the deceased and co-accused. This is corroborative evidence to the eye witness account of PW.1 and PW.2. These witnesses gave a vivid account of what they saw and heard at scene. They confirmed that the appellant and Auwalu Abubakar (the co-accused) had caused the death of the deceased. Abubakar Dayyabu, by jointly beating him with a belt and other instruments with knowledge that death was the probable consequences of their act. Their evidence was found to be credible, cogent and unequivocal same having not been discredited, or controverted under cross-examination. The appellant had attempted to use motive as a shield, that he used the belt to separate the fight between the deceased and the co-accused person. This court, has consistently maintained that proof of motive on the part of an accused on a charge of murder is not a *sine qua non* to his conviction for the offence yet if evidence of motive is available it is not only a relevant fact but also admissible under Section 9 of the Evidence Act. See: JIMOH ISHOLA vs. THE STATE (1978) 9 AND

10 S.C 81 at 104; YEKINI WAHABI OKUNNU vs. THE STATE (1977) 3 S.C 151 at 161. The appellant did not produce evidence of motive, beyond the mere mention of the use of the belt to separate the fight between the deceased person and the co-accused.

This mention of motive, is not sufficient evidence to dislodge the eye witness account of PW.1 and PW.2, who had witnessed, helplessly, the rain of beating, with the use of the said belt by the appellant which had contributed to the death of the deceased person. *(Pp 211 - 212 Paras F - D).*

9. *Onus on prosecution in criminal cases*

Before concluding, let me state that, it is a cardinal requirement of our criminal justice system that the prosecution must prove its case beyond all reasonable doubt. See MUKA vs. THE STATE (1979) 9-10 SC. 305; ANEKWE vs. THE STATE (1976) 8-10 SC. 225. This means every ingredient of an offence must be established to that standard to proof so as to leave no reasonable doubt of the guilt of an accused. This certainly applied to the cause of death in homicide cases where the prosecution must prove with certainty the cause of death and that it is due to the act of the accused.

It is not a matter of probability but of certainty. *(P 212 .Paras D - G).*

10. *Elements of murder*

It is well settled that a charge of murder is established when the prosecution proves the following beyond reasonable doubt, that (a) the deceased has died, (b) that death of the deceased has resulted from the act of the accused (c) that the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence. See: AKINFE vs. THE STATE (1988) 3 NWLR (Pt. 85) 729; ONAH vs. THE STATE (1985) 3 NWLR (Pt. 12) 236. The prosecution in this case had successfully discharged the burden of proof placed upon it by law and by so doing proved its case against the appellant at the trial court. There were no material

contradiction in the prosecution evidence to warrant any attention by court at trial and at the Court of Appeal. The Court of Appeal was right when it affirmed the decision of the trial court sentencing the appellant to death because there was cogent, credible and unequivocal evidence that linked the appellant with the offence. I do not find any reason to disturb the concurrent findings of the two lower courts, not shown to be perverse, or had occasioned a miscarriage of justice.

Having resolved the two issues in the appeal against the appellant, the appeal is devoid of merit, and it is hereby dismissed. The decision of the lower court affirming the sentence and conviction of the appellant is hereby affirmed by me. *(Pp 212 - 213 Paras G - C).*

11. *Medical evidence is relevant to establish cause of death*
If there is no medical evidence available to establish the cause of death, there must be compelling evidence that the deceased died as a result of an act or omission of the person charged with causing the death of the deceased. Where such evidence is not available the case cannot be said to have been proved beyond reasonable doubt. In examining compelling evidence it must be done fairly to see if inferences consistent with the innocence of the accused person can be made. See Amayo vs. State (2001) 12 SC (Pt. 1) p.1. *(Pp 213 - 214 Paras H - A).*

12. *Evidence of eye witness was not destroyed under cross-examination*
The record showed that PW1 and PW2 were eye witnesses to the killing of the deceased by the appellant and the co-accused and the manner of that killing the accounts rendered by these witnesses especially PW1 and PW2 who saw and heard at the scene was credible, cogent and unequivocal and nothing was done to discredit the said eye witnesses under cross-examination. Therefore the evidence remained unchallenged and the two courts below anchored their findings thereon which concurrent findings are difficult to disturb there being no perversity or miscarriage of justice or that

the findings came from outside the record before. *(P 222 Paras E - G).*

13. *Court can make inference from facts before it*
Also the cry by the appellant of the absence of a medical report on the cause of death has not dainted the weight of evidence as there was more than enough from which the court can infer the cause of death and at whose hand.

The concern of the appellant of the court below stating its view on the cause of death is misplaced as the court was within its powers to make the deduction or inference from the facts available to it. See Ada vs. State (2008) 13 NWLR (Pt. 1103) 149 at 166; Ebeinwe vs. State (2011) 17 NWLR (Pt. 1246) 402 at 416; Alao vs. State (2015) 17 NWLR (Pt. 1488) 245 at 269; Idiok vs. State (2008) 13 NWLR (Pt. 1104) 225 at 240; Ben vs. State (2006) 16 NWLR (Pt. 1006) 582; Owhoruke vs. COP (2015) 15 NWLR (Pt. 1483) 557 at 581; Abogede vs. State (1996) 4 SCNJ 223 at 233; Babatunde vs. State (2014) 2 NWLR (Pt. 1391) 298 at 321. *(Pp 222 - 223 Paras G - B).*

14. *Medical evidence is not only the way of proving cause of death*
Admittedly, in the offence of culpable homicide or murder, the prosecution is duty bound to prove the cause of death of the deceased which also must be linked to the act of the accused person. Cause of death could be established through medical evidence or post mortem report. That however could not be the only method of proving death of a deceased victim, because medical evidence ceases to be of practical necessity especially in situation where the deceased died almost immediately from the act of the accused, as in this instant case. See Ben vs. State (2006) 16 NWLR (Pt. 1006) 582; Uguru vs. State (2002) 9 NWLR (Pt. 771) 90; Alarape vs. The State (2001) LRCN 634; Babuga vs. The State (1996) 7 NWLR (Pt. 460) 279.

In this instant case, there is compelling and reliable evidence from the testimonies of PW1 and PW2 who were eye witnesses to the commission of the offence, who testified that the 1st accused stabbed

the deceased on his back and the deceased fell down, while the second accused (the appellant) continued to beat him with a belt on his forehead. In this instant case therefore, the tendering of medical or post mortem report was not of necessity and therefore not fatal to the case of the respondent/prosecution. *(Pp 223 - 224 Paras G - C).*

15. *Attitude of Supreme Court to concurrent findings*
Finally, it is noted by me, that in this instant appeal there are concurrent findings of both the trial court and the court below confirming the guilt of the appellant or that the respondent did prove its case against him beyond reasonable doubt. This court as a matter of practice and policy does not interfere with or disturb the findings of two lower courts, except in a situation where it finds the findings as perverse or that there is misconception of facts or misapplication of law either procedural or substantive. See Ochiba vs. The State (2011) 12 SC (Pt. IV) 79; Arowolo vs. Olowookere & 2 Ors (2011)11-12 SC (Pt. 11) 98. I am unable to say that any of these viruses exist in the findings of the two courts below as would warrant me to interfere with or disturb such findings. *(P 224 Paras C - F.).*

Representation
O. M. Atoyebi with **D. S. Danboyi, O.D. Anjorin, L.B Tairu and A.T. Ngada**, for the Appellant.

S.B. Umar, D.P.P. Katsina State Ministry of Justice with **Abdurrahman Umar,** ADPP and **M.U. Abdullahi**, State Counsel, Kastina State Ministry of Justice, for the Respondent.

SIDI DAUDA BAGE, (JSC) (Delivering The Lead Judgment):

This appeal emanated from the judgment of Court of Appeal, Kaduna Judicial Division, Kaduna State, CORAM: UWANI MUSA ABBA AJI, ABDUL ABOKI and HABEEB A.D. ABIRU, JJCA (hereinafter referred to as the "lower court)" delivered on 22nd May, 2015, wherein, the lower court affirmed the decision of the Katsina State High Court of Justice, Katsina

Judicial Division (hereinafter referred to as "trial court') delivered on 24th April, 2012.

The lower court affirmed the judgment of the trial court which convicted the appellant herein for the offence of culpable homicide punishable with death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death with one other accused person. The judgment of the trial court is contained at pages 40-54 of the record of appeal while the judgment of the lower court can be found at pages 127-147 of the record of appeal.

The appellant herein was disgruntled with the judgment of the lower court and appealed to this honourable court based on the notice of appeal adumbrated at pages 157 -161 of the transcribed record of appeal. The said notice of appeal contains only three (3) grounds of appeal.

Statement of Fact Relevant to This Appeal

By a charge dated 19th June, 2008, the appellant with one other accused person were charged by the respondent at the trial court with the act of forming common intention to commit offence of culpable homicide punishable with death under Section 221 of the Penal Code in furtherance of which they allegedly caused the death of one Abubakar Dayyabu by doing an act to wit: by beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of the act and thereby committed an offence punishable under Section 221 of the Penal Code.

The appellant and the other co-accused person (i.e. AUWALU ABUBAKAR) were tried, convicted and sentenced to death by the trial court. The appellants (at the lower court) were dissatisfied with the decision of the trial court and appealed to the lower court upon four grounds of appeal and five grounds of appeal filed by the 1st and 2nd appellants respectively. See pages 55 – 65 of the record of appeal.

The lower court in its considered judgment dismissed the appeal and affirmed the judgment of the trial court. It is against the said judgment that this appeal before this honourable court was filed.

Appellants' Issues for Determination

"(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the

material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1).

(b) Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect (Grounds 2 and 3)".

Respondent's Issues for Determination

"(1) The appellant has formulated two issues for the determination of this honourable court which appeared on P. 6 of his brief.

(2) The respondent herein adopts the two issues as formulated by the appellant".

Consideration and Resolution of the Issues

On issue number 1, the contention of the learned counsel for the appellant is that, the prosecution has failed woefully to discharge the burden of proof placed upon it by the law in this matter considering the material contradictions that emanated from the various pieces of evidence adduced by its witnesses. It is trite law that the onus of proof beyond reasonable doubt against the accused person remains on the prosecution throughout, and it does not shift. That is the purport of Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 and Section 135(1) Evidence Act Cap. E14; 2011. See, **UDOSEN Vs. THE STATE** (2007) 4 NWLR (Pt. 1023) 125 at 162 D-G; **THE STATE Vs. AJIE** (2000) 7 SCNJ 1 at 14; **OFORLETE Vs. THE STATE** (2000) 12 NWLR (Pt. 681) 415 at 437 paragraphs B-C and **AIGBADION Vs. THE STATE** (2000) 7 NWLR (Pt. 666) 703 paragraph E and 740 paragraph B. In the instant case the prosecution has not successfully linked the appellant herein with the death of the deceased person and his conviction is liable to be quashed.

The learned counsel for the appellant contended further that, the prosecution witnesses (i.e. PW.1 –PW.5) who testified before the trial court did not establish that there was an agreement (if any) between the appellant herein and the other co-accused person (who is now a convict) to commit any offence

A or to kill the deceased or any person at all in this matter or any other matter.

PW.1 and PW.2 made reference to the appellant herein that he beat the deceased with belt, they did not testify that there was an agreement between the 1st and 2nd accused persons to kill the deceased above all, the evidence adduced
B by the P.W1 and PW.2 concerning the appellant (2nd accused person at the trial court) contradicts each other, therefore their evidence in that respect is not reliable. PW.1 (Rose Friday) gave evidence at pages 10-12 of the record of appeal, while the PW.2 (Hellen Friday) has her own testimony at pages 12-16 of
C the record of appeal. From the evidence of PW.1, the 1st accused person had been at the scene of the crime dragging issues with PW. 1, PW.2, the deceased person, and one Bishir for a long period before the arrival of the 2nd accused person (the appellant herein). It is also on record that PW.1 testified that she went on top of the body of the deceased (Abu) absorbing the beating by the
D appellant however, this aspect of her evidence contradicts that of the PW.2 who was also an eye witness because PW.2 never testified that PW.1 was on top of the body of the deceased to absorb the beating by the appellant herein. This contradiction in the evidence of PW.1 and PW.2 is very fatal and cannot be
E brushed aside because it has created doubt in the mind of the court which should be resolved in favour of the appellant.

It is trite that the trial courts should never form impression or base their decisions on contradictory evidence See **ONUCHUKWU vs. THE STATE**
F (1998) 4 NWLR (Pt. 547) 576 at 588 – 589 paragraphs D-H. In his defence the appellant herein denied the allegation of conspiracy and culpable homicide emphatically and unequivocally. He also denied the allegation of conspiracy and the lower court found that there was no conspiracy between them. His
G evidence remains unchallenged and uncontradicted, the trial court and the lower court ought to have believed and acted on the evidence and their failure to so do has occasioned a great miscarriage of justice against the appellant. See **OKOEBOR vs. POLICE COUNCIL** (2003) 12 NWLR (Pt. 834) 444 at 474 paragraphs F-H; **ARABAMBI vs. ADVANCE BEVERAGES IND. LTD**
H (2005) 19 NWLR (Pt. 959) 1 at 33 paragraphs F-G; **MUKA Vs. THE STATE** (1976) 9-10 sc 193. (The court cannot pick and close which witness to believe among witnesses). Ingredients of conspiracy not established.

Learned counsel further contended that, it is trite law that, when there is

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A contradiction in the evidence of the prosecutions witnesses, reasonable doubt is created which must be resolved in favour of the accused person that is the appellant herein. See **ONUCHUKWU vs. THE STATE** (Supra) **TIJJANI SHEHU vs. THE STATE** (2010) 41 NSCQR 1280 at 1308; **OFORLETE vs.** B **THE STATE** (Supra) (2000) 12 NWLR (Pt. 648) 169 at 177; **INUSA SAIDU vs. THE STATE**(1982) 13 SC 70; **ONIGBOGWU vs. THE STATE** (1974) 9 SC p.1; **MUKA vs. THE STATE** (1976) 9-10 sc 193. It is settled principle of law that where in a criminal charge or in a criminal trial there are C inconsistencies contradictions or conflicts in the prosecutions case, it is not the function of the court to offer explanation, it is for the prosecution to explain the circumstances of the contradiction and prove its case beyond reasonable doubt, court should resolve this issue in favour of the appellant.

On issue two (2), the learned counsel for the appellant contended that D Sections 80 and 81 of the Penal Code relied upon by the lower court are not applicable to the case at hand because the intention of the appellant herein when he intervened in the fight that ensued between the deceased and the 1st accused person (1st appellant at the lower court) was to put an end to the fight by using E belt to separate them as indicated and in the evidence of the 1st accused person (1st appellant at the lower court) at page 40 of the record of appeal, the appellant as DW.1 testified that:-

> **"…Someone tried to stop the fight but he could not. I used a** F **belt to separate them."**

DW. 2 (1st appellant at the lower court) corroborated the evidence of the appellant herein when he testified before the trial court as follows:-

> **"Another person passing by tried to separate us but we did not** G **stop. There is the 2nd accused (the appellant herein) came with a belt and separated us by beating us with the belt."**

The above pieces of evidence were not challenged nor contradicted, they are therefore deemed admitted.

H Learned counsel contended further that it is trite law that prosecution cannot go below "proof beyond reasonable doubt" to ground conviction of the appellant herein otherwise appellants presumption of innocence constitutionally will be tempered with and breached, which is null and void. I See:- **OFORLETE vs. THE STATE** (Supra) and **THE STATE vs. AJIE**

A (Supra). We pray the court to resolve this issue in favour of the Appellant.

In its collective response to the arguments of the appellant, on the two (2) issues, the State through its counsel contended on issue one that, the respondent had at the trial court proved its case against the appellant beyond reasonable B doubt as required by the law. The burden was discharged through credible and qualitative evidence, the evidence of PW.1 and PW.2 at pages 10-14 of the record. The PW.1 and PW.2 were eye witnesses to the incident leading to the death of the deceased in this case. They gave qualitative evidence of what they C witnessed linking the appellant with the charge. Their evidence was never contradicted under cross-examination.

The learned counsel for the respondent further contended that, the appellant's submission on page 11 that the evidence of PW.1 and PW. 2 were contradictory reason being that while P.W.1 informed the court that she went on D top of the deceased to absorb the beatings from the appellant, PW.2 on the other hand did not state such in her evidence.

Our position is that what is contained in the evidence of PW.1 and PW.2 was a mere discrepancy which did not go to the root of the charge or substance E of the case against the appellant.

Such minor discrepancy or contradictions that are not substantial are not fatal to the prosecutions case. See **OKANLAWON vs. THE STATE** (2015) 17 NWLR (Pt. 1489) 445 at 291-292 paragraphs G – A. The learned counsel F for the respondent contended further that, by the combined effect of the Provisions of Sections 80 and 81 of the Penal Code, the appellant was guilty of the offence charged.

The trial court was therefore right in convicting and sentencing him to G death, the lower court was also right when it affirmed the trial court's decision. For ease of reference the sections provide thus:

Section 80:

H **"Whenever an act which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons who join in the act with such knowledge orientation. Is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention"**

I **Section 81:**

A **"When an offence is committed by means of several acts whoever intentionally co-operate in the commission of that offence by doing any of those acts either singly or jointly with any other person, commit that offence."**

B From the evidence of PW.1 and PW.2 it is crystal clear that it was the joint acts of the appellant and his co-accused that caused the death of the deceased. The lower court was therefore right when it affirmed the judgment of the trial court.

C On issue No. 2, the learned counsel for the respondent contended that, the lower court was right when it affirmed the decision of the trial court. The respondent had at the trial court led credible, cogent and unequivocal evidence against the appellant.

D It is on record that PW.1 and PW.2 where eye witnesses to the killing of the deceased by the appellant and his co-accused. These witnesses gave a vivid account of what they saw and heard at the scene, their evidence was credible, cogent and unequivocal same having not been discredited, or controverted E under cross-examination. They remained unshaken throughout the trial. On the unchallenged evidence of the prosecution, See: **ADA Vs. THE STAATE** (2008) 13 NWLR (Pt. 1103) 149 at 166 paragraphs F – G, this court held thus:

F **"A trial court will fail in its duty if it fails, refuses or neglects to convict on the evidence of the prosecution which is unchallenged and uncontroverted".**

See also **EBEINWE vs. THE STATE** (2011) 17 NWLR (Pt. 1246) 402 at 416 paragraphs D-E; **ALAO vs. THE STATE** (2015) 17 NWLR (Pt. 1488) G 245 at 269 paragraphs E – F; **IDIOK vs. THE STATE** (2008) 13 NWLR (Pt. 1104) 255 at 240 paragraphs F-G.

The learned counsel for the respondent submitted finally that it is not the attitude of this court to disturb or overturn the concurrent findings of the two H lower courts unless they are perverse or occasioned a miscarriage of justice. See: **EMEKA vs. THE STATE** (2014) 13 NWLR (Pt. 1425) 614 at 637-638 paragraphs H-B. The Concurrent findings of the two lower courts in the instant case were not perverse. The appeal should be dismissed for lacking in merit and to affirm the decision of the lower court.

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A The totality of the evidence presented in this case leaves this court with little or no room to arrive at a different conclusion with the trial and lower court. This stems from the fact that the duty of court is to interpret the statute in accordance with the intention of the law makers. In **UGWU Vs. ARARUME** B (2007) 12 NWLR (Pt. 1048) 369 at 498 this court stated thus:-

> **"A statute, it is always said, is "the will of the legislature" and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the** C **court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature"**

Courts generally have deliberately shifted away from narrow technical D approach to justice which characterized some earlier decisions to now pursue the course of substantial justice. See **MAKERI SMELTING CO. LTD vs. ACCESS BANK (NIG.) PLC** (2002) 7 NWLR (Pt. 766) 447 at 476 – 477.

> **"The attitude of the court has since changed against deciding** E **cases on mere technicalities. The attitude of the courts now is that case should always be decided, whenever possible on merit. Blunders must take place from time to time, and it is unjust to hold that because a blunder has been committed, the** F **party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits."**

See also **AJAKAIYI vs. IDEHAI** (1994) 8 NWLR (Pt. 364) 504; **ARTRA** G **IND LTD vs. NBCI** (1997) 1 NWLR (Pt. 483) 574; **DAKAT vs. DASHE** (1997) 12 NWLR (Pt. 531) 46; **BENSON vs. NIGERIA AGIP CO. LTD** (1982) 5 SC. 1.

Further more, the law is that this court will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such H findings are perverse, or are not supported by the evidence, or are reached as a result of a wrong application of any principle of substantive law or procedure. See **ARABAMBI vs. ADVANCE BEVERAGES IND. LTD.** (2005) 19 NWLR (Pt. 959) 1 per Onnoghen, JSC as he then was, (now CJN) (Pt. 46), I

A paragraphs C-E. Also **OCHIBA vs. THE STATE** (2011) 12 SC (Pt. IV) page 79 per Rhodes-Vivour, JSC (Pages 51-52) paragraphs F-B; **CAMEROON AIRLINES vs. OTUTUIZU** (2011) 12 SC (Pt. III) 200; **OLOWU vs. NIG. ARMY** (2011) 12 SC (Pt. 11) 1; **AROWOLO vs. OLOWOOKERE & 2 Ors**
B (2011) 11-12 SC (Pt. II) 98.

Again, the above finding also becomes inevitable given the provisions of Section 222 of the CPC to the effect that:-

C **"No error in stating either the offence or the particulars required to be stated in the charge and no omission to state in the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was infact misled by such error or omission and it has occasioned a failure of**
D **justice".**

Also compelling are the provisions of Sections 288 and 382 of the Criminal Procedure Code, which state respectively (repeated for emphasis).

Section 288 of the CPC

E **"A court exercising appellate jurisdiction shall not in exercise of such jurisdiction interfere with the finding or sentence or other order of the lower court on the ground that only that evidence has been wrongly admitted or that there has been a**
F **technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity.**

Section 382 of the CPC

G **"Subject to the provisions of herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the appeal**
H **or reviewed on account of any error, omission or irregularity in the complaint, summons warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Criminal**
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Procedure Code unless the Appeal Court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity."

Moreover, by virtue of the provisions of S. 28 of the Evidence Act, confessional statement is tenable and admissible. The section describes confessional statement thus:-

"A confession is an admission made at any time by a person charged with a crime tending to show or suggest the inference that he committed the crime."

Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. In the instant appeal, it is a combination of a confessional statement and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. This has been settled position in our jurisprudence of criminal justice. See for example **PATRICK IKEMSONS & 2 ORS vs. THE STATE** (1989) 3 NWLR (Pt. 110) 455 at 476 paragraph D; **JOSEPH IDOWU vs. THE STATE** (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt. 680) at 48; **NKWUDA EDAMINE vs. THE STATE** (1996) 3 NWLR (Pt. 438) 530 at 537 paragraphs D – E; **SAMUEL THEOPHILUS vs. THE STATE** (1996) 1 NWLR (Pt. 423) 139 at 155 paragraphs A – B; and **AWOPEJU vs. THE STATE** (2002) 3 MJSC 141 at 151.

This court per the learned Onnoghen, JSC, as he then was (now CJN) in **PETER ILIYA AZABADA vs. THE STATE** (2014) All FWLR (Pt. 751) 1620 paragraph B has made it abundantly clear in the following words:-

"The confessional statement of an accused, where it is direct, positive and unequivocal as to the commission of the crime charged is the best evidence and can be relied upon solely for conviction of the accused person. The accused person can be convicted on his confessional statement alone, where the confession is consistent with other ascertained facts which have been proved".

A **"Confession in criminal procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than evidence of an eye witness because the evidence comes from the horse's mouth who is the accused person. There is no**
B **better evidence and there is no further proof. Therefore, where an accused person confesses to a crime in the absence of an eye witness to the killing, he can be convicted on his confession alone once the confession is positive direct and**
C **properly proved. In other words a free and voluntary confession of guilt, direct and positive and if duly made and satisfactorily proved, is sufficient without corroborative evidence so long as the court is satisfied as to the truth of the confession."**
D

In the instant appeal, the court is not left in any confusion, as the appellant and his co-accused informed the trial court that, the appellant used the belt to separate the fight between the deceased and co-accused. This is
E corroborative evidence to the eye witness account of PW.1 and PW.2. These witnesses gave a vivid account of what they saw and heard at scene. They confirmed that the appellant and Auwalu Abubakar (the co-accused) had caused the death of the deceased, Abubakar Dayyabu, by jointly beating him with a belt and other instruments with knowledge that death was the probable
F consequences of their act. Their evidence was found to be credible, cogent and unequivocal same having not been discredited, or controverted under cross-examination. The appellant had attempted to use motive as a shield, that he used the belt to separate the fight between the deceased and the co-accused
G person. This court, has consistently maintained that proof of motive on the part of an accused on a charge of murder is not a ***sine qua non*** to his conviction for the offence yet if evidence of motive is available it is not only a relevant fact but also admissible under Section 9 of the Evidence
H Act. See: **JIMOH ISHOLA vs. THE STATE** (1978) 9 AND 10 S.C 81 at 104; **YEKINI WAHABI OKUNNU vs. THE STATE** (1977) 3 S.C 151 at 161. The appellant did not produce evidence of motive, beyond the mere mention of the use of the belt to separate the fight between the
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deceased person and the co-accused.

This mention of motive, is not sufficient evidence to dislodge the eye witness account of PW.1 and PW.2, who had witnessed, helplessly, the rain of beating, with the use of the said belt by the appellant which had contributed to the death of the deceased person.

Before concluding, let me state that, it is a cardinal requirement of our criminal justice system that the prosecution must prove its case beyond all reasonable doubt. See **MUKA vs. THE STATE** (1979) 9-10 SC. 305; **ANEKWE vs. THE STATE** (1976) 8-10 SC. 225. This means every ingredient of an offence must be established to that standard to proof so as to leave no reasonable doubt of the guilt of an accused. This certainly applied to the cause of death in homicide cases where the prosecution must prove with certainty the cause of death and that it is due to the act of the accused.

It is not a matter of probability but of certainty. It is well settled that a charge of murder is established when the prosecution proves the following beyond reasonable doubt, that (a) the deceased has died, (b) that death of the deceased has resulted from the act of the accused (c) that the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence. See: **AKINFE vs. THE STATE** (1988) 3 NWLR (Pt. 85) 729; **ONAH vs. THE STATE** (1985) 3 NWLR (Pt. 12) 236. The prosecution in this case had successfully discharged the burden of proof placed upon it by law and by so doing proved its case against the appellant at the trial court. There were no material contradiction in the prosecution evidence to warrant any attention by court at trial and at the Court of Appeal. The Court of Appeal was right when it affirmed the decision of the trial court sentencing the appellant to death because there was cogent, credible and unequivocal evidence that linked the appellant with the offence. I do not find any reason to disturb the concurrent findings of the two lower courts, not shown to be perverse, or had occasioned a miscarriage of justice.

Having resolved the two issues in the appeal against the appellant,

A the appeal is devoid of merit, and it is hereby dismissed. The decision of the lower court affirming the sentence and conviction of the appellant is hereby affirmed by me.

B

Sidi Dauda Bage
Justice, Supreme Court

C **RHODES-VIVOUR, (JSC):** I have had the advantage of reading in draft the leading judgment of my learned brother, **Bage JSC.** I agree with his lordships reasoning and conclusions. The appellant and his co-accused were found guilty and sentenced to death for the offence of culpable homicide contrary to section 221 of the Penal Code. There was no D medical evidence or Postmortem Report of the cause of death, so I ask the question:

> **What evidence is necessary for a conviction for Murder where there is no medical evidence as to the cause of**
E **death?**

If there is no medical evidence available to establish the cause of death, there must be compelling evidence that the deceased died as a result F of an act or omission of the person charged with causing the death of the deceased. Where such evidence is not available the case cannot be said to have been proved beyond reasonable doubt. In examining compelling evidence it must be done fairly to see if inferences consistent with the G innocence of the accused person can be made. See **Amayo vs. State** (2001) 12 SC (Pt. 1) p.1.

PW. 1 testified on oath thus:
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> **"He was trying to stab me on my back but Abu intervened and the 1st accused stabbed him on his back and Abu fell down, the 2nd accused then started beating Abu with a belt**
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on his forehead… Helen and I lifted Abu up and he was bleeding from his mouth and nose and he collapsed… He later on died…"

"He" is the co-accused. The 2nd accused is the appellant and Abu is the deceased. PW1 was cross-examined but surprisingly he was not asked a single question of the role the appellant played which led to the death of the deceased, or how the deceased died. The testimony of PW.1 is unchallenged and it's corroborated by PW.2

DW.1, i.e. the appellant's testimony was that he used the belt to separate them.

There can be no doubt that the deceased (Abu) died as a result of the act of the appellant and the co-accused person. He received severe beating from the appellant to the most vulnerable part of his body, his head, and stab wounds from the co-accused person. This is compelling evidence that the deceased died from the severe beating received from appellant and the co-accused person. Their act caused his death. PW.1 and PW.2 are eyewitnesses to the severe beating received by the deceased. Their evidence is compelling and there is no need for medical evidence to establish cause of death. In the light of eyewitnesses evidence which was unshaken under cross-examination there is absolutely nothing to urge in favour of the appellant.

For this brief reason as well as those more fully given by my learned brother, **Bage, JSC,** I would dismiss the appeal.

Appeal dismissed.

Olabode Rhodes-Vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I am at one with my learned brother, Sidi Dauda Bage JSC, in his reasoning culminating in the dismissal of the appeal of the appellant. To fully register my support for the decision I shall make some comments.

A This appeal came from the judgment of the Court of Appeal Kaduna Division, Coram: Uwani Musa Abba Aji, Abdul Aboki and Habeeb A.D. Abiru JJCA or the court below or lower court delivered on 22nd May, 2015 wherein the lower court affirmed the decision of the Katsina State High B Court, delivered on the 24th April, 2012 convicting the appellant for the offence of culpable homicide punishable by death pursuant to Section 221 of the Penal Code and therefore sentenced the appellant to death.

C The detailed facts leading to this appeal are well captured in the lead judgment and no useful purpose would be derived in repeating same except for when the occasion calls for a reference to any part thereof.

On the 15th day of February 2018, learned counsel for the appellant, D O.M. Atoyebi Esq. adopted the brief of argument filed on 30/12/15 wherein were identified two issues for determination, thus:-

(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed E **upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses. (Ground 1)**

(b) Whether the lower court was right when it affirmed F **the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible and unequivocal evidence to that effect. (Grounds 2 and 3)**

G Mrs. S.B. Umar, learned DPP of Katsina State for the respondent adopted the brief of argument filed on 18/2/2016 and also adopted the two issues as formulated by the appellant which I consider apt for my use.

ISSUE NO 1

H **(a) Whether it can be said that the prosecution successfully discharged the burden of proof placed upon it by the law having regard to the material contradictions that emanated from the evidence adduced by its witnesses.**

I Learned counsel for the appellant contended that the prosecution

A failed woefully to discharge the burden of proof placed upon it by the law in this matter considering the material contradictions that emanated from the various pieces of evidence adduced by its witnesses. That the prosecution has the onus to prove its criminal case beyond reasonable B doubt. He cited **Udosen vs. State** (2007) 4 NWLR (Pt. 1023) 125 at 162.

That in respect of the offence of conspiracy, the essential ingredients of the offence were not made out, such as the agreement by appellant or any other or others to execute an unlawful act and that the C agreed act is unlawful.

For the appellant it was stated that the evidence the prosecution laid out were full of contradictions and created doubt which has to be resolved in favour of the appellant.

D He cited **Onuchukwu vs. State** (1998) 4 NWLR (Pt. 547) 576 at 588-589.

That the testimonies of the Defence witnesses which were unchallenged ought to have been believed and in the light of those, the E prosecution cannot be said to have proved its case against the appellant as required by law. He referred to **Okoebor v Police Council** (2003) 12 NWLR (Pt. 834) 444 at 474; **Arabambi vs. Advance Beverages Ind. Ltd** (2005) 19 NWLR (Pt. 959) 1 at 33; **Muka vs. State** (1976) 9-10 SC 193 F etc.

Responding, learned counsel for the respondent contended that PW.1 and PW.2 were eye witnesses to the incident leading to the death of the deceased in this case and they gave quality evidence of what they G witnessed linking the appellant with the charge and their evidence were not contradicted under cross-examination. That the offence of conspiracy was not part of the judgment at the trial court and so the appellant erroneously in raising the issue at this point.

H He relied on **Obasanjo Bello vs. FRN** (2011) 10 NWLR (Pt. 1256) 605 at 626.

That the fact that the offence of conspiracy was not proved or established against the appellant does not mean the offence of culpable

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homicide was not also proved since the two offences are distinct from each other and so one can be charged, proceeded and proved or established without the other. He relied on **Alufohai vs. State** (2015) 3 NWLR (Pt. 1445) 172 at 189.

He contended further that the contradictions or discrepancies in the evidence of the PW1 and PW2 were minor and being not substantial are not fatal to the prosecution's case. He cited **Okanlawon vs. State** (2015) 17 NWLR (Pt. 1489) 445 at 291-292.

That the trial court and as accepted by the court below was right to have done a proper assessment and evaluation of the prosecution witnesses whose credibility were not dainted as against the feeble denial of the appellant. He cited **Attah Vs. State** (2010) 10 NWLR(Pt. 1201) 190 at 113; **Idiok vs. State** (2008) 13 NWLR (Pt. 1104) 225 at 240; **Jimmy vs. State** (2013) 18 NWLR (Pt. 1386) 229 at 253.

The stance of the appellant is that by the way the charge was crafted, the offence of conspiracy was therein embedded and that the prosecution had not established the essential elements of conspiracy upon which the court could rightly found a conviction. It is necessary to recast the charge for the necessary clarification of what it contained and as to what part of the divide the submissions on either side the charge can be situated. This is because while the appellant contends that conspiracy was imputed, the respondent disagreeing takes the position that the charge was homicide carried out by the appellant and his co-accused and that the fact of the common intention mentioned in the charge did not convert the charge to that of conspiracy. The said charge reads thus:-

> **"That you (1) Auwalu Abubakar and (2) Kabiru Abdullahi all of Sabywar Unguwa Quarters, Katsina on or about 28th October 2005 at the same address, within Katsina Judicial Division, had formed a common intention to commit culpable homicide punishable with death, in furtherance of which you caused the death of one ABUBAKAR DAYYABU of the same address by**

A **doing an act of wit: beating him with a belt and stabbing him with a knife with the knowledge that death will be the probable consequence of your act and thereby committed an offence punishable under section 221 of the**
B **Penal Code." (Underlining is supplied for emphasis).**

Clearly the charge in my humble view did not contain a count for the offence of conspiracy as it is a distinct offence separate from the main offence. The situation is not changed on account of the use of the words,
C "common intention to commit culpable homicide" as those words were an adumbration on how the culpable homicide was effected by the two accused persons. If the prosecution intended to charge for conspiracy, it is such as must be manifestly stated in a separate and distinct count of its
D own and not an appendage. See **Obasanjo Bello vs. F.R.N**(2011) 10 NWLR (Pt. 1256) 605 at 626.

The learned trial judge at the conclusion of his judgment had held thus:-

E **"…I therefore find the accused persons guilty of the offence of culpable homicide punishable by death pursuant to Section 221 of the Penal Code".**

F While sentencing the Appellant and one other the trial Court on page 54 held thus:-

G **"…Having heard the plea of the learned counsel to the convicts and also having considered the fact that the convicts have no previous record of conviction and the tender age of the convicts the court however being tied by**
H **the provisions of the law leaves me no room to manoeuvre but to invoke its provisions do hereby sentence the convicts to death…"**

Indeed the appellant and the other accused were charged for
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culpable homicide punishable with death, convicted and sentenced as such and the issue of the offence of conspiracy did not arise at all either in the charge or the judgment of the trial court. On appeal to the court below it held thus:-

> **"The 1st and 2nd appellants jointly attacked the deceased, the 1st appellant stabbed the deceased with a knife and the 2nd appellant beat him with a belt on his forehead which I believe must have aggravated the cause of death of the deceased as the forehead is another sensitive part of the body."**

It is evident that the offence of conspiracy was not in the view of the Court of Appeal either and its, importation at this Apex Court on appeal through the submission of learned counsel for the appellant would serve no purpose whatsoever as the said offence of conspiracy was not what was presented at the trial court as charge for which the appellant at the trial court stood trial and so any references in that regard are neither here nor there. The reason is obvious as the brief of counsel cannot be given a place not intended for it by law and so cannot assume the position of a charge properly before court. Therefore the submissions of counsel for the appellant as to whether or not the prosecution established the offence of conspiracy go to no issue. See **Alufohai vs. State** (2015) 3 NWLR (Pt. 1445) 172 at 189.

Also to be said is the assertion by learned counsel for the appellant that there were discrepancies and contradictions in the evidence of PW1 as against that of PW2. For effect I shall state some parts of the evidence of PW1:-

> **"On 28th November, 2005, I was walking with Hellen Bishir and Abu. We went to collect cassettes and as we were coming back and the 1st accused came in our middles and removed my cap from my head. I begged him to give me my cap back and Helen also intervened asking the 1st accused why he was behaving that way and asked him to give me my cap he abused**

Hellen. Abu intervened and told the 1st accused to remember that it was fasting period and they were fasting and not supposed to fight. The 1st accused then confronted Abu and fight ensured. The 2nd accused came while I myself and Hellen were trying to separate the fighters. The 1st accused then turned to Hellen, and he brought a knife wanting to stab Hellen but she ran away. The 1st accused stabbed me on the side of my face but the hone of my face prevented penetration of the knife. I was injured. He was trying to stab me on my back but Abu intervened and the 1st accused stabbed him on his back and Abu fell down the 2nd accused then started beating Abu with a belt on his forehead, I went on top of the body of Abu and I was absorbing the beating, the beating stopped…"

PW2 stated thus:

"…2nd accused started beating Abu with the belt on the head…"

On the issue of discrepancy or contradictions in evidence of witnesses and what the effect would be, it needs be reiterated that it is not every discrepancy or inconsistency or contradiction in evidence of a witness or that witness's evidence as against another witness's version that would totally affect the prosecution's case, rather for such a damning effect, the discrepancy or contradiction must be such as has gone to the root of the matter but where such discrepancy or contradiction is not substantial, then it is not fatal to the prosecutions' case. See **Okanlawon vs. State** (2015) 17 NWLR (Pt. 1489) 445 at 291-292; **Jimmy vs. State** (2013) 18 NWLR (Pt. 1386) 229 at 253.

It is therefore seen why the two lower courts' findings and conclusions were in line with Section 80 and 81 of the Penal Code which I shall quote hereunder, viz:-

Section 80:

"Whenever an act which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons who join in the act with such

knowledge orientation is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention".

Section 81:

"When an offence is committed by means of several acts, whoever intentionally co-operate in the commission of that offence by doing any of those acts, either singly or jointly with any other person, commit that offence".

From the above the issue is resolved against the appellant.

ISSUE 2:

Whether the lower court was right when it affirmed the decision of the trial court sentencing the appellant herein to death when there was no cogent, credible an unequivocal evidence to that effect.

For the appellant it was submitted that the court below was wrong when it affirmed the decision of the trial court sentencing the appellant to death despite the fact that there was no cogent, credible and unequivocal evidence before the courts below to that effect. That there was no medical report and the Court of Appeal cannot assume the duty of a medical practitioner to offer medical opinion as done in this case. He cited **Idowu vs. State** (1998) 11 NWLR (Pt. 574) 334 at 365; **Abayomi Adelenwa vs. The State** (1972) 10 SC 12 at 18; **Ogundele vs. Agiri** (2009) 18 NWLR (Pt. 1173) 219 at 252.

That the failure of the prosecution to tender the post mortem report brought into operation the presumption that if it was produced would have been unfavourable to the prosecution. He cited **Section 167 (d) of the Evidence Act, 2011.**

Learned counsel for the appellant stated that in line with the case of **Abey vs. Alex** (1999) 14 WLR (Pt. 637) 148, the prosecution failed to establish a logical link between the act of the appellant and the death of the deceased and so

A appellant is entitled to a discharge and acquittal. He cited **R vs. Nwokocha (1949) 2 WACA 453.**

Learned counsel for the respondent submitted that it is not in all cases where there is no medical report that the cause of death is not established in
B homicide cases as in this case, the evidence of PW1 and PW2 provided the needed material upon which the trial court could find that essential ingredient established. That Section 167(d) of the Evidence Act 2011 did not avail the appellant. He relied on **Ali vs. State** (2015) 10 NWLR (Pt. 1466) 1 at 38; **Aliyu**
C **vs. State** (2013) 12 NWLR (Pt. 1368) 403 at 426; **Jua vs. State** (2010) 4 NWLR (Pt. 1184) 217 at 243.

The record showed that PW1 and PW2 were eye witnesses to the killing of the deceased by the appellant and the co-accused and the manner of that killing the accounts rendered by these witnesses especially PW1 and PW2 who
D saw and heard at the scene was credible, cogent and unequivocal and nothing was done to discredit the said eye witnesses under cross-examination. Therefore the evidence remained unchallenged and the two courts below anchored their findings thereon which concurrent findings are difficult to
E disturb there being no perversity or miscarriage of justice or that the findings came from outside the record before.

Also the cry by the appellant of the absence of a medical report on the cause of death has not dainted the weight of evidence as there was more than
F enough from which the court can infer the cause of death and at whose hand.

The concern of the appellant of the court below stating its view on the cause of death is misplaced as the court was within its powers to make the deduction or inference from the facts available to it. See **Ada vs. State** (2008)
G 13 NWLR (Pt. 1103) 149 at 166; **Ebeinwe vs. State** (2011) 17 NWLR (Pt. 1246) 402 at 416; **Alao vs. State** (2015) 17 NWLR (Pt. 1488) 245 at 269; **Idiok vs. State** (2008) 13 NWLR (Pt. 1104) 225 at 240; **Ben vs. State** (2006) 16 NWLR (Pt. 1006) 582; **Owhoruke vs. COP** (2015) 15 NWLR (Pt. 1483) 557 at 581; **Abogede vs. State** (1996) 4 SCNJ 223 at 233; **Babatunde vs. State**
H (2014) 2 NWLR (Pt. 1391) 298 at 321.

From the foregoing and the better reasoned lead judgment I too find no merit in this appeal which I dismiss as I abide by the consequential orders made.

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Mary Ukaego Peter-Odili
Justice, Supreme Court

INYANG OKORO, (JSC): I had the advantage of reading in draft the lead judgment of my learned brother, Sidi Dauda Bage, JSC just delivered. I am in complete agreement with the reasons adduced to reach the conclusion that this appeal lacks merit and deserves an order of dismissal. Accordingly, I adopt these reasons and conclusion as mine . The decision of the lower court which affirmed the conviction and sentence of the appellant is hereby affirmed by me.

Appeal Dismissed.

John Inyang Okoro
Justice, Supreme Court

AMIRU SANUSI, (JSC): I was supplied before now, with the draft judgment of my learned brother Bage, JSC. His reasoning and conclusion that the appeal is unmeritorious are agreeable to me.

At any rate, I will advance few comments below in support of the lead judgment especially on the issue of medical evidence establishing the cause of the death of the deceased victim. Admittedly, in the offence of culpable homicide or murder, the prosecution is duty bound to prove the cause of death of the deceased which also must be linked to the act of the accused person. Cause of death could be established through medical evidence or post mortem report. That however could not be the only method of proving death of a deceased victim, because medical evidence ceases to be of practical necessity especially in situation where the deceased died almost immediately from the act of the accused, as in this instant case. See **Ben vs. State** (2006) 16 NWLR (Pt. 1006) 582; **Uguru vs. State** (2002) 9 NWLR (Pt. 771) 90; **Alarape vs. The State** (2001) LRCN 634; **Babuga vs. The State** (1996) 7 NWLR (Pt. 460) 279.

In this instant case, there is compelling and reliable evidence from the testimonies of PW1 and PW2 who were eye witnesses to the commission of the offence, who testified that the 1st accused stabbed the deceased on his back and the deceased fell down, while the second accused (the appellant) continued to beat him with a belt on his forehead. In this instant case therefore, the tendering of medical or post mortem report was not of necessity and therefore not fatal to the case of the respondent/prosecution.

Finally, it is noted by me, that in this instant appeal there are concurrent findings of

A both the trial court and the court below confirming the guilt of the appellant or that the respondent did prove its case against him beyond reasonable doubt. This court as a matter of practice and policy does not interfere with or disturb the findings of two lower courts, except in a situation where it finds the findings as perverse or that there is misconception of facts or misapplication of law either procedural or substantive. See **Ochiba vs. The State** (2011) 12
B SC (Pt. IV) 79; **Arowolo vs. Olowookere & 2 Ors** (2011)11-12 SC (Pt. 11) 98. I am unable to say that any of these viruses exist in the findings of the two courts below as would warrant me to interfere with or disturb such findings.

On the whole, for these few remarks and the fuller and more detailed reasons contained in the lead judgment, I shall also adjudge this appeal unmeritorious and dismiss it
C straightaway. The appeal fails and is accordingly dismissed.

Amiru Sanusi
Justice, Supreme Court

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MATTHEW IKPEKPE
VS
1. WARRI REFINERY & PETROCHEMICAL COMPANY LIMITED
2. DR. DENA

SC. 203/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES - VIVOUR	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Leave to appeal – Issue of jurisdiction – Whether does not require leave to be raised at the appellate court.

COURT: Federal High Court – Jurisdiction thereof – S. 251(1) of the CFRN 1999 – Interpretation thereof – Whether does not have jurisdiction involving matters relating to simple contracts.

COURT: Jurisdiction – Fundamental importance thereof.

COURT: Jurisdiction – How determined – Whether it is by considering the claim of the plaintiff.

COURT: State High Court – Jurisdiction thereof – Simple contract – Whether it is a State High Court rather than the Federal High Court that has jurisdiction to entertain matters relating to simple contracts.

PRACTICE AND PROCEDURE: Court of Appeal – Jurisdiction thereof – Where the Court

of Appeal decides that it has no jurisdiction – Whether is proper to proceed and determine case on its merit – Rationale.

PRACTICE AND PROCEDURE: Courts – Determination of Issues – Where issues are placed before intermediate courts – Whether such courts are obliged to determine all issues so placed.

PRACTICE AND PROCEDURE: Preliminary Objection – No argument in support thereof – Whether presumed to be abandoned.

Issues for determination

1. **Whether section 230(1) (P) of the 1979 Constitution as amended by Decree No 107 of 1993 now section 251(1) (P) of the 1999 Constitution applies to action founded on breach of contract and specific performance for which the State High Court enjoys jurisdiction in line with the decision in Felix Onuorah vs. Kaduna Refinery and Petrochemical co. Ltd (2005) All FWLR (pt. 256) 1356.**
2. **Whether the Court of Appeal was right to dismiss the appeal when it did not find it necessary to consider and determine the issues identified by the appellant.**

Facts of the matter

This is an appeal against the judgment of the Court of Appeal Benin Division delivered on 4th March, 2005, wherein the court below set aside the judgment of the trial State High Court for lack of jurisdiction and struck out the claim of the appellant who was the plaintiff at the trial court.

The appellant as plaintiff sued the respondents as defendants before the High Court of Delta State, holden at Warri, claiming the following:-

1. **A declaration that the plaintiff is entitled to be employed by the first defendant as driver with effect from 12th day of June, 1987.**
2. **Order of specific performance of the contract of employment of plaintiff by the first defendant upon the successful medical test the first defendant ordered the plaintiff to undergo as a condition for the said employment as a driver II on the first defendant salary grade level 16/1.**
3. **N500,000.00 against the second defendant being damages in that on the 29th of June, 1987 the second defendant wrongfully and unlawfully and acting ultra vires and arbitrarily withheld the letter of appointment issued by the 1st defendant to the plaintiff employing the plaintiff as a driver II on the first**

defendant salary grade level 16/1

The appellant in this appeal was a casual driver with the 1st respondent, Warri Refinery and Petrochemical Company Ltd; then as Petrochemical section of the NNPC at Ekpan. He applied for employment as driver II on the 1st respondent's salary grade level 16/1. In August, 1986, the appellant was interviewed along with others for regular employment with the Corporation. However, on or about 30th December, 1986, he was dismissed from service. In June, 1987, he was invited by the 1st appellant's letter to attend a medical test, a condition upon handing over to him his letter of employment by the 1st respondent which letter was alleged at the material time to be in the custody of the 2nd respondent, an employee of the 1st respondent assigned to the Petrochemical section of NNPC, Ekpan as its Project Manager. Appellant states that he passed the medical test conducted and medical report was issued to him which automatically entitled him to be employed as a driver II. That the 2nd respondent withheld the letter of employment issued by the 1st respondent to the appellant without any just cause, consequent upon which he instituted the action.

The respondents in their joint amended statement of defence denied the claim and stated that they never issued any employment letter to the appellant and that the medical test conducted by the 1st respondent was one of ***sin quo-non*** for an applicant seeking gainful employment with the corporation and that it is not a guarantee or certainty or an assurance that the applicant is successful when such examination is conducted.

In his judgment, the learned trial Judge

Dissatisfied with the above judgment of the learned trial Judge, the Respondents herein appealed to the Court of Appeal as appellants. The lower court set aside the judgment of the High Court of Delta State on the ground that the said State High Court lacked jurisdiction to entertain the matter and to make the orders it made in the judgment.

Also dissatisfied with the judgment of the court below, the appellant has appealed to this court.

Held: *(Unanimously allowing the appeal)*

1. *Where no argument is adduced in support of preliminary objection, it is presumed to be abandoned*

The above is all that relates to the preliminary objection. There is no argument in support of the said issues raised in the notice of preliminary objection. The only reasonable conclusion would be that it has been abandoned. It is not the duty of the court to proffer argument for the respondents in support of the notice of preliminary objection or the issues raised therein. But even if there was argument in support, the law is trite that issue of jurisdiction is constitutional or statutory and therefore a matter of law. The appellant needed no leave to raise same. Moreover, issue of jurisdiction was the main and probably the only decision of the lower court. It is my view that the said issue 1 was properly raised

by the appellant. See Agbule vs. Warri Refinery & Petrochemical Company Ltd (2012) LPELR – 20625 (SC), (2013) 6 NWLR (Pt. 1350) 318; NNPC & Anor vs. Orhiowasele & Ors (2013) 13 NWLR (Pt. 1371) 211; Wema Securities & Finance Plc vs. Nigeria Agricultural Insurance Co. (2015) LPELR – 24833 (SC); Western Steel Works Ltd & Anor vs. Iron Steel Workers Ltd (No. 1) 1987) 1 NWLR (Pt. 49) 284; Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592.

As the learned counsel for the respondents did not proffer any argument on the preliminary objection, I do not know why he insisted that leave ought to have been obtained. *(Pp 240 - 241 Paras F - B).*

2. *Fundamental importance of jurisdiction*

The importance of the jurisdiction of a court cannot be over emphasized. The law is trite that jurisdiction is a threshold issue and livewire that determines the authority of a court of law or tribunal to entertain a case before it and it is only when a court is imbued or conferred with the necessary jurisdiction by the Constitution or law that it will have the judicial power and authority to entertain, hear and adjudicate upon any cause or matter brought before it by the parties. Where a court proceeds to hear and determine a matter without the requisite jurisdiction, it amounts to an exercise in futility and the proceedings and judgment generated therefrom are null, void and of no effect no matter how well conducted. See Nigeria Deposit Insurance Corporation vs. Central Bank of Nigeria & anor (2002) 7 NWLR (Pt. 766) 272; Shelim & anor vs. Gobang (2009) 12 NWLR (Pt. 1156)435; Utih vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 166, Petrojessica Enterprises Ltd & anor vs. Leventis Technical Co. Ltd (1992) 5 NWLR (Pt. 244) 675. *(P 243 Paras D - G).*

3. *How to determine jurisdiction of Courts*

The next thing I wish to determine is the nature of the claim of the appellant before the trial court. This is so because it is the claim of the Plaintiff that determines the jurisdiction of the court to entertain the suit. See Adetayo & Ors vs. Ademola & Ors (2010) 15 NWLR (Pt. 1215) 169; Abia State Transport Cooperation & Ors vs. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) P. I., Dr. Salik vs Idris & Ors (2014) 15 NWLR (Pt. 1429) 36. *(Pp 243 - 244 Paras G - A).*

4. *Federal High Court does not have jurisdiction to entertain matters relating to simple contracts.*

There is no doubt that by the above provision i.e. section 230(1) (s) of Decree 107 of 1993 which is in *pari material* with section 251(1) (s) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its

agencies shall be brought before the Federal High Court. I have given a thorough examination of a plethora of cases of this court on this issue and there is a consistent pronouncement that the Federal High Court does not have jurisdiction to entertain matters relating to simple contracts. It must not be forgotten that I have already held that the claim of the appellant relates to a simple contract of employment which the appellant sought specific performance. This type of claim, definitely, is not contemplated under section 230(1) (P) (s) of the 1979 Constitution as amended by Decree 107 of 1993. See Onuorah vs KRPC Ltd (2005) All FWLR (Pt. 256) 1356, Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nig. Ltd & anor (2012) 18 NWLR (Pt. 1333) 555; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33.

In Integrated Timber & Plywood Products Ltd vs. Union Bank Nigeria (2006) 12 NWLR (Pt. 995) 483, this court held emphatically that in a simple contract (as in this case), it is the High Court and not the Federal High Court that has jurisdiction to entertain and determine it. See also Eze vs. Federal Republic of Nigeria (1987) LPELR – 1193 (SC) PP 29-30 paragraphs G-F). *(P 245 Paras B - H).*

5. *It is the State High Court that has jurisdiction to entertain matters relating to simple contracts.*

In a simple contract of employment as in the instant case, there is nothing in section 230(1) of the 1979 Constitution (as amended) which shows that the Federal High Court is conferred with exclusive jurisdiction to entertain matters arising therefrom. Rather it is the State High court which continues to have jurisdiction to entertain issues connected therewith as brought by the parties for adjudication. The court below made a grave error as to the claim of the appellant before the trial court. Had the court of Appeal properly located the claim of the appellant, I belief, their decision would have been different.

I am fully convinced that the learned trial Judge had jurisdiction to entertain the claim of the appellant herein. *(Pp 245 - 246 Paras H - B).*

6. *Intermediate courts should pronounce on all issues place before it.*

Eight issues were distilled and placed before the court below for determination. Unfortunately, only one issue (of jurisdiction) was determined by the court blow leaving untouched seven issues. This court has stated in quite a number of cases that intermediate courts should pronounce on all issues placed before it. It should not restrict it to one or more issues which its opinion may dispose of the matter. This is to give the apex court the benefit of their views in the matter should there be the need to consider other issues not determined by the

intermediate court. See Chief Adebisi Adegbuyi vs. All Progressives Congress & Ors (2014) LPELR – 24214 (SC); Xtoudos Services Nig Ltd. vs. Taisei W. A Ltd (2005) WRN 46 at 37; Edem vs. Canon Balls Ltd (2005) 12 NWLR (PT. 938) 27. *(P 246 Paras C - E).*

7. *Matters of simple contract is within the jurisdiction of the State High Court*
Be that as it may, this appeal succeeds on the only issue of jurisdiction determined by the court below. This court is of the firm view that the appellant's claim i.e. enforcement of contract of employment was squarely within the jurisdiction of the Delta State High Court. The learned trial Judge was right to assume jurisdiction in the matter. The court below was therefore wrong to strike out the claim on the ground that the said court did not have jurisdiction to entertain the matter. The judgment and orders of the learned trial Judge are hereby reinstated and the lower court is ordered to determine all the other seven issues presented before it as this matter is remitted back to the Court of Appeal Benin Division f or hearing *de novo*. *(P 246 Paras E - G).*

8. *Proper procedure where the Court of Appeal says that it has no jurisdiction*
I agree with his lordship that it is the State High Courts that have jurisdiction to decide simple contract. I must also observe that this court has said on several occasions that when the penultimate court finds out that it or the trial High Court did not have jurisdiction to hear the case it should say so and proceed to give a decision on the merits. This is the procedure that must always be followed, so that if it turns out that the Court of Appeal was wrong the Supreme Court would have the benefit of a judgment on the merits from that court. Where this is not done as in this case and the Supreme Court finds that the Court of appeal was wrong on jurisdiction, the only order the top court can make is to send the case back to the Court of Appeal. This comes with huge costs and delay. See Isah vs. INEC & 3 Ors (2014) 1-2 SC (Pt. iv) p. 101; Brawal shipping (Nig) Ltd. vs. Onwadike Co. Ltd (2000) 6 SC (Pt. ii) p. 133
In view of the above, my learned brother has found the Court of Appeal to be wrong on jurisdiction and has ordered that court to hear the appeal on its merits. I am in full agreement with his lordship. *(P 247 .Paras A - E).*

9. *Issues of jurisdiction when raised do not require leave*
The issue of jurisdiction is no doubt not just an issue of law, it is a substantial issue of law. Appeal on it is therefore one of law which the appellant, in an appeal from the court below to the appellate court does not need leave first sought and

obtained to appeal on. Ground two, against which the respondent half-heartedly directed his objection also raises a question of law alone. It, therefore, does not need leave of court to be brought. The respondents apparently raised the preliminary objection as a scare-crow. They did not argue it. They have abandoned it. *(P 248 Paras B - C).*

Per Eko (JSC)

"On the merits, the substance of the appellant's suit at the trial court, in my view, was the tort of detinue. The appellant's complaint at trial court was that the 2nd defendant/respondent, a servant of the 1st defendant/respondent had wrongfully detained from him the letter of employment issued to him by the 1st defendant/respondent. It is on this fact that the appellant, as the plaintiff, claimed damages against the respondents, as the defendants at the trial court. The 1st respondent, the employer/master of the 2nd respondent was apparently joined in the suit for purposes of vicarious liability it has for the liability of the 2nd respondent in the alleged tort of detinue. The Federal High Court has no jurisdiction in tort of detinue. The appropriate court , in the circumstance, was the High Court of Delta State Section 230(1) (p) & (s) of the 1979 Constitution, as introduced thereto by Decree 107 of 1993 is *in pari material* with their successors, Section 251(1) (p) & (s) of the 1999 Constitution. By these provisions, the Constitution does not intend to divest the State High Courts of their jurisdiction over disputes relating to torts or simple contracts. This Court makes the point loud and clear in ONUORAH vs. KRPC LTD (2005) ALL FWLR (Pt. 256) 1356 and all the decisions following which cited it with approval. NEPA vs. EDEGBERO (2002) 12 SC (Pt. ii) 119, an earlier decision of this Court, which held that the action for declaration and injunction, the principal purpose of which is the nullification of the decision of the defendant (NEPA, a Federal agency) terminating the appointments of the plaintiffs falls squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended, is only an authority for it decided on the peculiar facts of the case. The facts of this case distinguish it from NEPA vs. EDEGBERO (Supra). In this case the appellant, as the plaintiff, had sued *inter alia* for damages on the premise of the 2nd respondent/defendant wrongful withholding or detaining from him his letter of appointment duly issued by the 1st respondent/defendant, which wrongful act caused him the loss of the appointment. The facts of the instant suit do not fall squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended by Decree 107. That is what distinguishes it from the

EDEGBERO case (supra). This distinction is what makes ONUORAH's case applicable.
The issue at the Lower Court was whether the appellant was entitled to the N300,000.00 awarded to him, as damages for the wrongful act of the respondents, as defendants? The Lower Court, having struck out the suit, did not decide or resolve the question. They should have resolved it, in case they may be wrong as an intermediate court, on the issue of jurisdiction. The appeal before the Lower Court was not an interlocutory appeal but an appeal against final decision. It, therefore, behoved the lower court, an intermediate court, to resolve all the issues before it or express an opinion on the merits of the case. This alternative course was what this court enjoined the Lower Court to take, as can be seen from NIPOL LTD vs. BIOKU INVESTMENT & PROP. CO. LTD (1992) 23 NSCC (Pt. 1) 606 at 618; KATTO vs. CBN (1991) 9 NWLR (Pt. 214) 126 at 149.
It is unfortunate that this case has to be remitted back to the Lower Court to decide the issues they omitted to decide which thereafter could have clothed this court with jurisdiction to review. That is only course open to us, though not economical.

All orders made in the lead judgment, including the order remitting the case back to the lower court to be heard *de novo* on all the other issues, except the issue of jurisdiction just resolved herein by this Court, are hereby adopted. *(Pp 248 - 249 Paras C - H).*

Representation
D. E. Agbaga, (Esq.) for the Appellant.
C. D. Bello, (Esq.) for the Respondents.

INYANG OKORO, (JSC) (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal Benin Division delivered on 4th March, 2005, wherein the court below set aside the judgment of the trial State High Court for lack of jurisdiction and struck out the claim of the appellant who was the plaintiff at the trial court. A perusal of the record of appeal shows the following as the facts leading to this appeal.

The appellant as plaintiff sued the Respondents as defendants before the High Court of Delta State, holden at Warri, claiming the following:-

4. **A declaration that the plaintiff is entitled to be employed by the first defendant as driver with effect from 12th day of June, 1987.**
5. **Order of specific performance of the contract of employment of plaintiff by the first defendant upon the successful medical test the first defendant ordered the**

plaintiff to undergo as a condition or the said employment as a driver II on the first defendant salary grade level 16/1.

6. **N500,000.00 against the second Defendant being damages in that on the 29th of June, 1987 the second defendant wrongfully and unlawfully and acting ultra vires and arbitrarily withheld the letter of appointment issued by the 1st defendant to the plaintiff employing the plaintiff as a driver II on the first defendant salary grade level 16/1**

The appellant in this appeal was a casual driver with the 1st Respondent, Warri Refinery and Petrochemical Company Ltd; then as Petrochemical section of the NNPC at Ekpan. He applied for employment as driver II on the 1st Respondent's salary grade level 16/1. In August, 1986, the Appellant was interviewed along with others for regular employment with the Corporation. However, on or about 30th December, 1986, he was dismissed from service. In June, 1987, he was invited by the 1st Appellant's letter to attend a medical test, a condition upon handing over to him his letter of employment by the 1st Respondent which letter was alleged at the material time to be in the custody of the 2nd Respondent, an employee of the 1st Respondent assigned to the Petrochemical section of NNPC, Ekpan as its Project Manager. Appellant states that he passed the medical test conducted and medical report was issued to him which automatically entitled him to be employed as a driver II. That the 2nd Respondent withheld the letter of employment issued by the 1st respondent to the appellant without any just cause, consequent upon which he instituted the action.

The Respondents in their joint amended statement of defence denied the claim and stated that they never issued any employment letter to the appellant and that the medical test conducted by the 1st Respondent was one of ***sin quo-non*** for an applicant seeking gainful employment with the corporation and that it is not a guarantee or certainty or an assurance that the applicant is successful when such examination is conducted.

In his judgment, the learned trial Judge on page 99 of the record of appeal made the following findings and conclusions:-

"The evidence before me shows that 2nd defendant, Dr. Dena is an employee of 1st Defendant Company. I so find.

As contended in plaintiff's pleadings and in his evidence, 2nd defendant had no mandate or authority by or from 1st Defendant Company to withhold plaintiff's letter of appointment. I so find.

I have earlier found the 2nd defendant did wrongfully withheld (sic) the said letter. I so find again.

As servant of the 1st Defendant Company, 2nd defendant acted in the course of his duty, albeit wrongfully.

2nd defendant's action is wrongful and improper if he had eh authority or mandate of 1st Defendant Company to withhold plaintiff's

letter of appointment Dr. Dena to have come to court to place his evidence before the court to that effect. He appears to have defiantly or arrogantly ignored this proceedings whilst the battle concerning his wrongful act was raging.

The absence of plaintiff's letter of appointment (which 2nd defendant is withholding) has to a large extent, prevented this court from granting the declaration sought by plaintiff. It has made it impossible for the court to ascertain plaintiff's entitlements, i.e. salary on appointment and fringe benefits and allowances. More importantly, plaintiff has suffered hardship and loss of earnings as a result of 2nd defendant's act which is ultra vires and wrongful. Accordingly, plaintiff is entitled to general damages. In plaintiff's alternative claim at paragraph 14(c) of his statement of claim, he claims the sum of N500,000= (five hundred thousand naira) as general damages.

Having regard to all I have said in respect of 2nd defendant's wrongful act, I award the sum of N300,000= (three hundred thousand naira) as general damages against 2nd defendant, Dr. Dena for his wrongful act of arbitrarily withholding plaintiff's letter of appointment in his capacity as servant of 1st defendant company who is vicariously liable."

Dissatisfied with the above judgment of the learned trial Judge, the Respondents herein appealed to the Court of Appeal as Appellants. The lower court set aside the judgment of the High Court of Delta Stat on the ground that the said State High Court lacked jurisdiction to entertain the mater and to make the orders it made in the judgment.

Also dissatisfied with the judgment of the court below, the Appellant has appealed to this court. Notice of appeal was filed on 20th May, 2005 against the judgment of the court below which was delivered on 4th March 2005. There are two grounds of appeal, out of which two issues have been distilled for the determination of this appeal.

On 12th February, 2018 when this appeal was argued, the learned counsel for the appellant, D.E. Agbaga, Esq. adopted the appellant's brief of argument filed on 16th November, 2006. The two issues alluded to above are as follows:-

3. **Whether section 230(1) (P) of the 1979 Constitution as amended by Decree No 107 of 1993 now section 251(1) (P) of the 1999 Constitution applies to action founded on breach of contract and specific performance for which the State High Court enjoys jurisdiction in line with the decision in Felix Onuorah vs. Kaduna Refinery and Petrochemical co. Ltd (2005) All FWLR (pt. 256) 1356.**
4. **Whether the Court of appeal was right to dismiss the appeal when it did not find it necessary to consider and determine the issues identified by the appellant.**

Also, C.C. Bello, Esq. of counsel for the Respondents, on the same date identified and adopted the Respondent's brief of argument he filed on 15th March, 2007 wherein he

formulated two similar issues but couched differently thus:-

1. **Whether the Court of Appeal was wrong in holding that section 230(1) of the Constitution of the Federal Republic of Nigeria 1979 as amended by the Constitution (Suspension and Modification) Decree (Decree 107) of 1993 vested jurisdiction in the Federal High Court rather than the State High Court in the appellant's action seeking declaratory reliefs and specific performance against the respondents when the 1st Respondent is an agency of the Federal Government.**
2. **Whether the Court of Appeal did not consider the appellant's case complaining that the respondents did not appeal against the order of vicarious liability made by the trial court and, in any event, whether the decision of the Court of Appeal on the issue of jurisdiction did not dispose of the entire appeal before it.**

I shall, in the circumstance of this case, determine this appeal on the two issues distilled by both parties. But before then, let me make a few comments in respect of notice of preliminary objection contained on page 4, paragraphs 3.00 – 3.04 of the Respondents' brief. It states:-

"3.00 NOTICE OF PRELIMINARY OBJECTION

6.01 At the hearing of this appeal, the respondents shall raise preliminary objection to the competence of this appeal thus:-

6.02 (1) Grounds 1 and 2 of the grounds of appeal being grounds of mixed law and facts were filed without leave of the Court of Appeal or this Honourable Court contrary to section 233 (3) of the Constitution of the Federal Republic of Nigeria 1999.

6.03 (2) The appellant cannot raise the issue of jurisdiction in his brief as he has done in issue 1 thereof without seeking or obtaining leave of this Honourable Court in that he did not argue of (sic) canvass the said issue in his brief at the Court of Appeal.

6.04 We therefore urge this Honourable Court to strike out he said issue 1 of the appellants' brief of argument and grounds 1 and 2 of the grounds of appeal for being incompetent".

The above is all that relates to the preliminary objection. There is no argument in support of the said issues raised in the notice of preliminary objection. The only reasonable conclusion would be that it has been abandoned. It is not the duty of the court to proffer argument for the respondents in support of the notice of preliminary objection or the issues raised therein. But even if there was argument in support, the law is trite that issue of jurisdiction is constitutional or statutory and therefore a matter of law. The appellant needed no leave to raise same. Moreover, issue of jurisdiction was the main and probably

A the only decision of the lower court. It is my view that the said issue 1 was properly raised by the appellant. See **Agbule vs. Warri Refinery & Petrochemical Company Ltd (2012) LPELR – 20625 (SC), (2013) 6 NWLR (Pt. 1350) 318; NNPC & Anor vs. Orhiowasele & Ors (2013) 13 NWLR (Pt. 1371) 211; Wema Securities & Finance Plc vs. Nigeria Agricultural Insurance Co. (2015) LPELR – 24833 (SC); Western Steel**
B **Works Ltd & Anor vs. Iron Steel Workers Ltd (1987) 2 NWLR (Pt. 179) 188; Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592.**

As the learned counsel for the respondents did not proffer any argument on the preliminary objection, I do not know why he insisted that leave ought to have been obtained. In circumstance therefore, the preliminary objection is devoid of merit and is
C accordingly overruled. I shall now resolve the two issues submitted for determination which I intend to take them together.

On issue one, learned counsel for the Appellant submitted that the case of the Appellant as stated at the trial court is founded on breach of contract of employment and specific performance for which a State High Court enjoys residual jurisdiction. He
D stressed that it is the claim of the party which determines whether a court has jurisdiction or not.

Learned counsel submitted further that the Federal High Court is not conferred with jurisdiction to hear matters of simple contractual relationship between parties as such matters are outside the provisions of section 230(1) and (s) of the 1979 Constitution as
E amended by Decree 107 of 1993 new section 251 (1) of the 1999 Constitution, referring to the case of **Onuorah vs. Kaduna Refinery & Petrochemical Company Ltd (2005) All FWLR (Pt. 256) 1356; 7-UP Bottling Co. vs. Abiola & Sons (2001) FWLR (Pt. 70) 1611; Trade Bank PLC vs. Banilux Ltd (2003) FWLR (Pt. 162) 1871.**

F Concluding on the 1st issue, learned counsel submitted that having regard to the decision of this court in **Onuorah vs KRPC Ltd *(Supra),*** the decision of the court below that the trial court lacked jurisdiction to have tried this case was made in error and ought to be set aside.

On issue 2, the learned counsel for the appellant submitted that the court below erred
G when it declined and/or failed to consider the issues raised by the Appellant (then Respondent) in his brief. That had the court below considered those issues, it would have come to a different conclusion, relying on **I.B.W.A. Ltd vs. Imano Nig. Ltd (2001)FWLR (Pt. 44) 421 at 443 paragraphs D-E and Owoseni vs. Faloye (2005) All FWLR (Pt. 284) 220 at 249 paragraphs F-G.** He urged the court to resolve the two issues in favour of the appellant.

H In his response on the first issue, the learned counsel for the Respondents, C.D. Bello, Esq. submitted that the decision of the Court of Appeal in holding that the judgment of the trial court was a nullity for lack of jurisdiction is correct having regard to the provisions of section 230 (1) of the Constitution of the Federal Republic of Nigeria 1979 as amended
I by the Constitution (Suspension and Modification) Decree (Decree No. 107) of 1993.

A On the essential elements which determine the jurisdiction of a court, learned counsel referred to the cases **of Madukolu vs. Nkemdilim (1962) 2 SCNLR 341 at 348; Odofin vs. Agu (1992) 3 NWLR (Pt. 229) 350 at 365 and Olutola vs. University of Ilorin (2005) 3 MJSC 151 at 164.**

B Learned counsel submitted further that having regard to the principles enunciated in **Madukolu vs. Nkemdilim** ***(supra),*** there are features in the case in hand which affected the competence or jurisdiction of the trial court to try the case in that Decree No. 107 of 1993 had from its commencement date removed from the State High Court's jurisdiction to try causes and matters, amongst others, seeking declaratory reliefs against the Federal Government and its agencies. Learned counsel referred to the case of **NEPA vs.**
C **Edegbero (2013) 1 MJSC 69**. According to him, breach of contract or alleged breach of contract cannot be excluded from the purview of section 230(1) of the 1979 Constitution as amended by Decree No. 7 of 1993.

D On issue 2, learned counsel submitted that after reaching the decision that the trial court lacked the jurisdiction to entertain this matter, it was not necessary for the lower court to go further to consider the arguments in support of other issues in the appeal before it, relying on **UBN vs. Sugunro (2006) 9 MJSC 164 at 175.** He submitted further that the lower court was right in not going further to consider the other issues raised in the appeal having regard to its decision on the issue of jurisdiction which disposed of the entire appeal, citing **7-Up Bottling Company Ltd vs. Abiola & Sons Bottling**
E **Company Ltd (2001) 5 MJSC 93 at 105.** He urged the court to resolve the two issues against the appellant.

The simple and straight forward issue in this appeal is to determine which court has jurisdiction to entertain the claim of the appellant herein. Is it the High Court of Delta State, sitting in Warri or is it the Federal High court? The learned trial Judge of the Delta
F State High Court assumed jurisdiction in this matter and entered judgment for the appellant in part. However, the court below held that the said High Court lacked jurisdiction to entertain the matter and struck out the claim of the appellant. It further held that the suit ought to have been filed at the Federal High Court.

G The importance of the jurisdiction of a court cannot be over emphasized. The law is trite that jurisdiction is a threshold issue and livewire that determines the authority of a court of law or tribunal to entertain a case before it and it is only when a court is imbued or conferred with the necessary jurisdiction by the Constitution or law that it will have the judicial power and authority to entertain, hear and adjudicate upon any cause or matter brought before it by the parties. Where a court proceeds to hear and determine a matter
H without the requisite jurisdiction, it amounts to an exercise in futility and the proceedings and judgment generated therefrom are null, void and of no effect no matter how well conducted. See **Nigeria Deposit Insurance Corporation vs. Central Bank of Nigeria & anor (2002) 7 NWLR (Pt. 766) 273; Chelim & anor vs. Gobang (2009) 12 NWLR (Pt. 1156)435; Utih vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 206, Petrojessica**
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Enterprises Ltd & anor vs. Leventis Technical Co. Ltd (1992) 5 NWLR (Pt. 244) 675.

The next thing I wish to determine is the nature of the claim of the appellant before the trial court. This is so because it is the claim of the Plaintiff that determines the jurisdiction of the court to entertain the suit. See **Adetayo & Ors vs. Ademola & Ors (2010) 15 NWLR (Pt. 1215) 169; Abia State Transport Cooperation & Ors vs. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) P. I., Dr. Salik vs Idris & Ors (2004) 15 NWLR (Pt. 1429) 36.**

From the statement of claim of the appellant (as Plaintiff) before the trial court, it is clear that the 1st Respondent herein had offered to employ the appellant as a driver. The appellant took steps to accept the offer by presenting himself for interview and attending a medical examination as ordered by the 1st Respondent. It must be noted that the appellant had been a casual driver in the 1st Respondent company before seeking a permanent employment. This contract of employment could not be concluded and no satisfactory reason was given for such failure. It is the failure of the Respondents to issue the appellant with appointment letter that has brought the appellant to court to order specific performance. Thus, the Appellant's claim at the trial court zero on breach of contract of employment and specific performance. The court below agrees that the claim of the appellant arose from breach of contract of employment. On page 178 – 179 of the record of appeal, the lower court held as follows:-

> **"In this case, the Plaintiff/Respondent action seeking for a declaration(s) challenging the validity of the executive order or administrative action of the 1st Defendant/Respondent including damages, an agency of the Federal Government of Nigeria** for breach of contract of employment **clearly falls within the purview of Decree 107 of 1993"**
> (underling mine for emphasis)

Having established that the claim of the appellant at the trial court arose from contract of employment and specific performance, is it the Federal High Court or the State High Court which has jurisdiction to entertain the matter?

At this stage, it is pertinent to reproduce the provisions of section 230(1) (P) and (s) of the 1979 Constitution as amended by Decree 107 of 1993 (now section 251(1) (P) and (s) of the 1999 Constitution (as amended). It states:-

> **"230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:-**
> **(P) the administration or the management and control of the Federal Government or any of its agencies,**

(S) any action or proceeding for a declaration affecting the validity of the Federal Government or any of its agencies".

There is no doubt that by the above provision i.e. section 230(1) (s) of Decree 107 of 1993 which is in ***pari material*** with section 251(1) (s) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies shall be brought before the Federal High Court. I have given a thorough examination of a plethora of cases of this court on this issue and there is a consistent pronouncement that the Federal High Court does not have jurisdiction to entertain matters relating to simple contracts. It must not be forgotten that I have already held that the claim of the appellant relates to a simple contract of employment which the appellant sought specific performance. This type of claim, definitely, is not contemplated under section 230(1) (P) (s) of the 1979 Constitution as amended by Decree 107 of 1993. See **Onuorah vs. KRPC Ltd (2005) All FWLR (Pt. 256) 1356, Ports and Cargo Handling Services Company Ltd & Ors vs. Migfo Nig. Ltd & anor (2012) 18 NWLR (Pt. 1333) 555; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33.**

In **Integrated Timber & Plywood Products Ltd vs. Union Bank Nigeria (2006) 12 NWLR (Pt. 995) 483**, this court held emphatically that in a simple contract (as in this case), it is the High Court and not the Federal High Court that has jurisdiction to entertain and determine it. See also **Eze vs. Federal Republic of Nigeria (1987) LPELR – 1193 (SC) PP 29-30 paragraphs G-F).**

In a simple contract of employment as in the instant case, there is nothing in section 230(1) of the 1979 Constitution (as amended) which shows that the Federal High Court is conferred with exclusive jurisdiction to entertain matters arising therefrom. Rather it is the State High court which continues to have jurisdiction to entertain issues connected therewith as brought by the parties for adjudication. The court below made a grave error as to the claim of the appellant before the trial court. Had the court of Appeal properly located the claim of the appellant, I belief, their decision would have been different.

I am fully convinced that the learned trial Judge had jurisdiction to entertain the claim of the appellant herein.

Eight issues were distilled and placed before the court below for determination. Unfortunately, only one issue (of jurisdiction) was determined by the court blow leaving untouched seven issues. This court has stated in quite a number of cases that intermediate courts should pronounce on all issues placed before it. It should not restrict it to one or more issues which its opinion may dispose of the matter. This is to give the apex court the benefit of their views in the matter should there be the need to consider other issues not determined by the intermediate court. See **Chief Adebisi Adegbuyi vs. All Progressives Congress & Ors (2014) LPELR – 24214 (SC); Xtoudos Services Nig Ltd. vs. Taisei W. A Ltd (2005) WRN 46 at 37; Edem vs. Canon Balls Ltd (2005) 12 NWLR (PT. 938) 27.**

Be that as it may, this appeal succeeds on the only issue of jurisdiction determined by

A the court below. This court is of the firm view that the appellant's claim i.e. enforcement of contract of employment was squarely within the jurisdiction of the Delta State High Court. The learned trial Judge was right to assume jurisdiction in the matter. The court below was therefore wrong to strike out the claim on the ground that the said court did not have jurisdiction to entertain the matter. The judgment and orders of the learned trial Judge are B hereby reinstated and the lower court is ordered to determine all the other seven issues presented before it as this matter is remitted back to the Court of Appeal Benin Division f or hearing ***de novo***. I make no order as to costs. This matter shall be given accelerated hearing. Appeal Allowed.

John Inyang Okoro
Justice, Supreme Court

C **Rhodes-Vivour, (JSC):** I had the benefit of reading a draft copy of the leading judgment delivered by my learned brother, **Okoro JSC.** I agree with his lordship that it is the State High Courts that have jurisdiction to decide simple contract. I must also observe that this court has said on several occasions that when the penultimate court finds out that it or the trial D High Court did not have jurisdiction to hear the case it should say so and proceed to give a decision on the merits. This is the procedure that must always be followed, so that if it turns out that the Court of Appeal was wrong the Supreme Court would have the benefit of a judgment on the merits from that court. Where this is not done as in this case and the Supreme Court finds that the Court of appeal was wrong on jurisdiction, the only order the top court can make is to send the case back to the Court of Appeal. This comes with huge E costs and delay. See **Isah vs INEC & 3 Ors (2014) 1-2 SC (Pt. iv) p. 101; Brawal shipping (Nig) Ltd. vs. Onwadike Co. Ltd (2000) 65C (Pt. ii) p. 133**

In view of the above, my learned brother has found the Court of Appeal to be wrong on jurisdiction and has ordered that court to hear the appeal on its merits. I am in full agreement with his lordship. It is for this and the fuller reasoning in the leading judgment F that this appeal succeeds on the sole issue of jurisdiction. I abide by the orders and directives given by this court.

Olabode Rhodes-vivour
Justice, Supreme Court

G **AMIRU SANUSI, (JSC):** His lordship Hon. Justice J. I. Okoro JSC who prepared this Judgment which was just read, had earlier supplied me with its draft. Having read same, I find myself at one with his reasoning and the conclusion reached that this appeal is meritorious. I also shall allow the appeal.

I abide by the consequential orders made therein, including one on costs. Appeal allowed.

H

Amiru Sanusi
Justice, Supreme Court

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EJEMBI EKO, (JSC): I read in draft the judgment just delivered in this appeal by my learned brother, JOHN INYANG OKORO, JSC. As it represents my view in the appeal, I hereby adopt it.

The issue of jurisdiction is no doubt not just an issue of law, it is a substantial issue of law. Appeal on it is therefore one of law which the appellant, in an appeal from the court below to the appellate court does not need leave first sought and obtained to appeal on. Ground two, against which the respondent half-heartedly directed his objection also raises a question of law alone. It, therefore, does not need leave of court to be brought. The respondents apparently raised the preliminary objection as a scare-crow. They did not argue it. They have abandoned it.

On the merits, the substance of the appellant's suit at the trial court, in my view, was the tort of detinue. The appellant's complaint at trial court was that the 2nd defendant/respondent, a servant of the 1st defendant/respondent had wrongfully detained from him the letter of employment issued to him by the 1st defendant/respondent. It is on this fact that the appellant, as the plaintiff, claimed damages against the respondents, as the defendants at the trial court. The 1st respondent, the employer/master of the 2nd respondent was apparently joined in the suit for purposes of vicarious liability it has for the liability of the 2nd respondent in the alleged tort of detinue. The Federal High Court has no jurisdiction in tort of detinue. The appropriate court , in the circumstance, was the High Court of Delta State Section 230(1) (p) & (s) of the 1979 Constitution, as introduced thereto by Decree 107 of 1993 is ***in pari material*** with their successors, Section 251(1) (p) & (s) of the 1999 Constitution. By these provisions, the Constitution does not intend to divest the State High Courts of their jurisdiction over disputes relating to torts or simple contracts. This Court makes the point loud and clear in **ONUORAH vs. KRPC LTD (2005) ALL FWLR (Pt. 256) 1356** and all the decisions following which cited it with approval. **NEPA vs. EDEGBERO (2002) 12 SC (Pt. ii) 119,** an earlier decision of this Court, which held that the action for declaration and injunction, the principal purpose of which is the nullification of the decision of the defendant (NEPA, a Federal agency) terminating the appointments of the plaintiffs falls squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended, is only an authority for it decided on the peculiar facts of the case. The facts of this case distinguish it from NEPA vs. EDEGBERO (Supra). In this case the appellant, as the plaintiff, had sued ***inter alia*** for damages on the premise of the 2nd respondent/defendant wrongful withholding or detaining from him his letter of appointment duly issued by the 1st respondent/defendant, which wrongful act caused him the loss of the appointment. The facts of the instant suit do not fall squarely within the provisions of Section 230(1) (s) of the 1979 Constitution, as amended by Decree 107. That is what distinguishes it from the EDEGBERO case **(supra).** This distinction is what makes ONUORAH's case applicable.

The issue at the Lower Court was whether the appellant was entitled to the N300,000.00 awarded to him, as damages for the wrongful act of the respondents, as defendants? The Lower Court, having struck out the suit, did not decide or resolve the

question. They should have resolved it, in case they may be wrong as an intermediate court, on the issue of jurisdiction. The appeal before the Lower Court was not an interlocutory appeal but an appeal against final decision. It, therefore, behoved the lower court, an intermediate court, to resolve all the issues before it or express an opinion on the merits of the case. This alternative course was what this court enjoined the Lower Court to take, as can be seen from **NIPOL LTD vs. BIOKU INVESTMENT & PROCO LTD (1992) 23 NSCC (Pt. 1) 606 at 618; KATTO vs. CBN (1991) 9 NWLR (Pt. 214) 126 at 149.**

It is unfortunate that this case has to be remitted back to the Lower Court to decide the issues they omitted to decide which thereafter could have clothed this court its jurisdiction to review. That is only course open to us, though not economical.

All orders made in the lead judgment, including the order remitting the case back to the lower court to be heard ***de novo*** on all the other issues, except the issue of jurisdiction just resolved herein by this Court, are hereby adopted. Appeal allowed.

Ejembi Eko
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother **John Inyang Okoro, JSC,** just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal has merit, and it is accordingly allowed by me. I abide by all the orders contained in the lead Judgment.

Sidi Dauda Bage
Justice, Supreme Court

MICHAEL TAIYE
VS

THE STATE

SC. 479/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

CRIMINAL LAW AND PROCEDURE: Armed Robbery – Elements thereof – What prosecution must establish.

CRIMINAL LAW AND PROCEDURE: Burden of proof – Whether prosecution has the burden of proof beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Charge – Unlawful possession of firearms – Onus on accused – How discharged.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Whether sufficient to sustain conviction – Whether need to look for corroboration outside the confessional statement no matter how slight.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Validity thereof – Requisite Test to confirm.

CRIMINAL LAW AND PROCEDURE: Conspiracy – How proved.

CRIMINAL LAW AND PROCEDURE: Proof – How prosecution can prove its case beyond

reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof – Methods thereof – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Prosecution witnesses – Whether prosecution has discretion on the number of witnesses required to prove its case.

CRIMINAL LAW: Conspiracy – Meaning – When committed.

EVIDENCE: Presumption – The doctrine of recent possession – Application thereof.

EVIDENCE: Confessional Statement – Meaning – S 28. of Evidence Act 2011 – Relevant Consideration thereof.

Issue for determination

Whether the prosecution had proved its case beyond reasonable doubt as found by the trial court and subsequently affirmed by the lower court.

Facts of the matter

The appellant was arraigned before the High Court of Delta State (the trial court) and tried on four count charges as follows:-

COUNT NO. 1
STATEMENT OF OFFENCE: COUNT 1
Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and firearms (special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II
Armed robbery, punishable under Section 1(2) (a) of the Robbery and firearms (Special provisions) Act. 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash sums of N100,000.00 (One hundred thousand naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III
Armed robbery, punishable under Section 1(2)(a) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV
Illegal possession of firearms punishable under Section 3(1) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

When the charges were read and explained to the accused person (now appellant) he pleaded not guilty to each of the four counts. His trial thereupon commenced in earnest, wherein the prosecution called three witnesses to prove its case. The appellant as accused person, after the close of the prosecution's case testified for his defence without calling any witness to testify on his behalf. The prosecution at the trial tendered six exhibits including the voluntary confession statement which was marked as Exhibit E. While testifying for his defence, the appellant attempted to retract the confessional statement he made immediately after he was arrested by the police.

The brief facts giving rise to this appeal go this way. On the 11th day of January, 2006 at about 8.00pm the PW1 one police Inspector Sunday Ideho and PW2 Sgt Samuel Imana and other men of Nigeria Police Force while on road patrol along Aka Avenue, stopped an on-coming vehicle, a white Volvo car carrying four passengers therein. The driver of the said vehicle refused to stop. Thereupon, the police men on road patrol became suspicious and thereupon pursued the said Volvo car. In the process exchange of fire ensued between the police men and the people in the said vehicle after which the occupants of the white Volvo vehicle decided to stop and abandoned it and took to their heels each following different directions. Luck ran against the present appellant when he fell into a well near an uncompleted building and the police brought him out of the well and arrested him. When arrested he was found in possession of a locally made gun, and live cartridge. Also when the abandoned Volvo car was searched, two double barrel guns, three live cartridges and three expanded cartridges were recovered. The appellant when arrested that night was found to have bullet wound and on being taken to the police station, the appellant volunteered a statement which was recorded by PW2 which was confessional in nature in that he admitted

committing the offences charged. The said statement was tendered in evidence at the trial court and was admitted as Exhibit E.

At the end of the trial, the learned trial judge Hon. Justice G.E Gbemre found that all the four counts were proved against the accused/appellant by the prosecution/respondent and convicted the appellant and sentenced him to death on the offence of armed robbery and also to various terms of imprisonment in respect of the other three counts charged. Miffed by the convictions and sentences passed on him by the trial judge, the appellant appealed to the Court of Appeal, Benin division. The lower court heard his appeal and on the 7th May 2015 delivered its considered judgment in which it unanimously dismissed the appellant's appeal. The appellant still became disenchanted with the dismissal of his appeal by the court below, hence he further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Onus of proof on prosecution.*
It is well settled principle of law that an accused person is presumed innocent until he or she is proved guilty. The prosecution as the accuser, is always saddled with the heavy burden of proving the guilt of the accused person and the standard of such proof in criminal cases or trial is proof beyond reasonable doubt. See JOSIAH ORUNGUA & ORS VS. THE STATE (1970) ALL NLR 269 OR (1970) LPELR – 2780 (SC). SEE SECTION 135 OF THE EVIDENCE Act 2011 (as amended) and also Section 138 of the Evidence Act 2011 (as amended) and also Section 138 of the same Evidence Act which make provision for the standard of proof. See also OLAYINKA AFOLALU VS. THE STATE (2010) 16 NWLR (Pt. 1220) 584; MILLER VS. MINISTER OF PENSIONS (1947) 2 All ER 372. It should be noted however, that in order to displace the presumption, the evidence adduced by the prosecution must be targeted at the standard of proof beyond reasonable doubt only and NOT proof beyond shadow of any doubt that the accused is guilty of the offence he is charged with. This is so because absolute certainty is impossible in any human adventure inclusive of the administration of criminal justice. *(P 274 Paras B - F).*

2. *Methods of proof in criminal cases*
The law has established or approved three methods of proof of a criminal offence by the prosecution in any criminal trial. These methods include the followings:-
(1) By a voluntary confessional statement of the accused person(s); or
(a) By circumstantial evidence which must be cogent, complete, unequivocal and compelling leading to the unresistible conclusion that the accused and no other person committed the offence but him; or

(b) By evidence of eye-witness or witnesses otherwise known as direct evidence. *(P 274 Paras F - H).*

3. *The confessional statement was voluntarily made by the appellant*

The prosecution in this instance case seems largely to have relied on the voluntary confessional statement volunteered by the accused now appellant, which the trial court admitted in evidence and marked same as Exhibit E. I note that the appellant merely resiled from making it voluntarily at the trial when he stated that he did not make such statement voluntarily to the police when he was arrested. That was what informed the trial court to conduct a trial within trial because the defence at page 34 of the record objected to the admissibility of the said confessional statement because his counsel stated thus "the statement was extracted under force as the IPO tortured the accused". After the mini trial, the trial court admitted the statement in evidence as Exhibit E and the court below agreed with the finding in that regard.

On my part, I have read the said statement and the court proceedings on the trial within trial and I have no reason to depart from the conclusion of the two lower courts on the voluntariness of exhibit E. I am equally satisfied that the prosecution had discharged the burden placed on it by law to prove that the statement was voluntarily made by the appellant. *(Pp 274 - 275 Paras I - D.).*

4. *When confessional Statement is sufficient to grant conviction accused .*

The appellant, during the trial within trial had adequate opportunity to cross examine the prosecution witness who recorded the said statement with regards to his allegation that it was extracted from him, or on the issue of the alleged torture or beating he allegedly received but he did not cross examine that prosecution witness/recorder of the statement (PW2) on that aspect during the trial within trial.

I am mindful of the fact that there are a long line of judicial authorities which had established that a free and voluntary confession by an accused person, if direct, positive and unequivocal and if satisfactorily proved is sufficient to ground a conviction. The law however, made it desirable for the trial court to look for some independent evidence outside the appellant's confession to the police, no matter how slight, to determine if the circumstances made it probable that the confession was in fact, true. See HARUNA VS. A.G FEDERATION (2012) 3 SC (Pt. IV) 40; ASHIWE VS. THE STATE (1983) 5 SC (Reprint) 1; ALARAPE VS. STATE (2001) 2 SC 114; GALADIMA VS. THE STATE (2012) 12 SC (Pt. II) 213; OSUAGWU VS. THE STATE (2003) 1-2 SC (Pt. 1) 37. *(P 275 Paras D - I).*

5. *Requisite Test to confirm the validity of confessional Statement*

However, in numerous judicial authorities of this court it was decided that before relying solely on confessional statement to convict an accused or in the process of evaluation of same, trial courts are desired to subject the confessional statement to the following six tests, which are:

(i) Is there anything outside the confession to show that it is true?

(ii) Is it corroborated?

(iii) Are the relevant statements made in it of facts true as they can be tested?

(iv) Was the prisoner one who had the opportunity of committing the offence(s)?

(v) Is the confession possible? and

(vi) Is it consistent with the other facts which have been ascertained and have been proved?

Once a confessional statement is subjected to these six tests, the Supreme Court/the apex court decrees that same can be relied upon to ground a conviction. See MUSA VS. STATE (2013) 2-3 SC (Pt. II) 75 at 94; NWACHUKWU VS. THE STATE (2007) SCM (Pt. 2) 447 at 455; IKPO VS. STATE (1995) 9 NWLR (Pt. 421) 540 at 554. To my mind, the trial court had subjected Exhibit E to the above tests as endorsed by the court below. *(P 276 Paras A - E).*

6. *What elements prosecution must prove in order to establish the offence of arm robbery*

Now on whether or not the offence of armed robbery was established against the appellant, I must say that evidence abound as produced by the prosecution, to prove the offence of armed robbery against the accused person, (now appellant) as rightly found by the trial court. The elements required to be proved by the prosecution n order to obtain a conviction of the offence of armed robbery under Section 1(2) of the Robbery and Firearms Special Provisions/Act are listed hereunder:-

(a) That there was a robbery;

(b) That at the time of the robbery the accused or any of the accused person was armed with arms or offensive weapon

(c) That the accused facing the trial was the robber or one of the armed robbers.

See **Diva vs. The State (1980)8-11 SC 236; Bozin vs. The State (1985) 2 NWLR**

(Pt. 8) 465; Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561. *(Pp 276 - 277 Paras F - A).*

7. *Meaning of confession.*
As I stated above the prosecution/respondent relied heavily on the confessional statement of the appellant which he made voluntarily. By Section 28 of the Evidence Act, a confession is an admission made at anytime, by a person charged with criminal offence(s) suggesting the inference that he committed the crime he is charged with. I am not unaware that I stated so earlier that before an accused person can be convicted solely on his confessional statement it is desirable for the trial court to see if there is some evidence no matter, how slight, corroborating the contents of the statement which makes it probable that the confession as correct and true. In this instant case, there exist cogent, compelling and credible pieces of compelling circumstantial evidence supporting Exhibit E. For instance, evidence abound that there was theft of the vehicle which when the accused/appellant was arrested he was in possession of the said vehicle and other items therein. *(P 277 Paras A - E).*

8. *The application of doctrine of recent possession*
The doctrine of recent possession of stolen goods knowing same to have been stolen, therefore operates against him. The law is also trite that where a person is found in possession of recently stolen goods, he is presumed to either be the thief or the one who stole it or that he received it knowing it to have been stolen recently. Also some handsets and money were recovered from the car and the appellant respectively and the appellant in Exhibit E owned up when he admitted that the items were among the proceeds of their robbery operation. There was also evidence which revealed that there was exchange of fire between the police and the robbery gang which included the accused/appellant and when the appellant was arrested he was having gunshot injury. The appellant in Exhibit E clearly spelt out the co-accused persons he was in company of who had escaped besides admitting the robbery and other offences charged. He therefore had identified himself to be among the robbers pursued by the police on the fateful day. I therefore am in total agreement with the two lower courts that all the ingredients of armed robber were established or proved against the appellant beyond reasonable doubt. *(P 277 Paras E - I).*

9. *Meaning of conspiracy*

Conspiracy simply means an agreement by two or more persons to do or **cause to be done an illegal act, or an act which is legal but by illegal means. The mere agreement alone constitutes the offence of conspiracy and it is immaterial to prove that the act was in fact committed. See OBIAKOR VS. THE STATE (2002) 6 SC (Pt. II) 33 at 39/40.**

The offence of conspiracy may be committed even if the substantive or main offence was not committed or has been abandoned or aborted. See BALOGUN VS. AG OGUN STATE (2002) 2 SC (Pt. II) 89. *(P 278 Paras A - C).*

10. *How to prove conspiracy*

It needs to be stressed here, that the essential ingredients of the offence of conspiracy to commit armed robbery lies in the agreement and association to do an unlawful thing or act which is contrary to or forbidden by law, whether that thing/act is criminal or not and whether the accused person has knowledge of its unlawfulness. The offence of conspiracy is often not proved through direct evidence but the courts normally infer such agreement or plot from the facts of doing things towards a common purpose. See Clark vs. The State (1986) 4 NWLR (Pt. 35) 381; Odeneye vs. State (2011) SC 1; Nwankwoala vs. The State (2006) All FWLR (Pt. 339) 801. In the instant case and as rightly observed by the trial court and endorsed by the court below, the appellant revealed how the four of them were pursued by the police when they refused to stop when signaled to do so by the police. Also in the appellant's statement (Exhibit E) he revealed how he and his co-conspirators communicated on phones where to meet before the operation at Boloker Market even before they set for the robbery operation. All those pieces of evidence inferentially showed that there was a concert among them on when, how and where to operate the robbery operations. I have no reason therefore to hold differently from the findings of the two lower courts that those pieces of evidence highlighted above, went a long way in proving or establishing the offence of criminal conspiracy beyond reasonable doubt as held by the trial court and upheld by the court below. *(P 278 Paras C - H).*

11. *Onus on Appellant to disprove unlawful possession of firearms*

There is no gain saying that the appellant possessed that gun illegally as he did not adduced any evidence that he had licence to possess such gun or that he was authorized by law to hold such firearms. The burden is therefore on him to establish that his possession of such gun/arm was authorized by law which he failed to so establish or to account for his possession of it. Having failed to so prove, the learned trial judge rightly held that that offence of illegal possession of firearms was proved against him and to convict him accordingly. The lower court was on the other hand, also right in upholding such conviction too. Again I have no reason to depart from the conclusion reached by the two courts below on that too. *(P 279 Paras A - C).*

12. *Prosecution has discretion on witnesses to be called*
With due deference to the learned counsel for the appellant, there is no law which imposes an obligation on the prosecution to call list or host of witnesses. The prosecution is merely needed to call enough material witnesses to prove its case and in doing so it has a discretion in the matter on who to call or who not to call. See ODUNEYE VS. THE STATE (2001) 13 WRN 88; AGBI VS. OGBEH (2006) 11 NWLR (Pt. 990) 65; BABUGA VS. STATE (1996) 7 NWLR (Pt 460) 279. In fact, even a murder case can be established by evidence of only one witness provided his evidence is credible and believed by the trial court. See EFFIONG VS. STATE (1998) 8 NWLR (Pt. 562) 362. *(P 279 Paras D - F).*

13. *Supreme Court does not disturb or interfere with concurrent findings*
Finally, in this instant appeal, observe that there are concurrent findings of two lower court. It is an established practice of this court not to interfere with or disturb the findings of two lower courts except in an exceptional or special circumstances such as where the findings are perverse, or there is misconception of fact or misapplication of law be it substantive or procedural. None of these special circumstances have been shown to have existed in this instant appeal. I therefore do not see any cogent or compelling reason(s) for me to depart or to disturb or interfere with the concurrent findings. See BAMGBOYE VS. UNIVERSITY OF ILLORIN & ANOR (1999) 6 SC (Pt. II) 72; EHOLOR VS. OSAYANDE (1992) 7 SCNJ 217; MBENU & ANOR VS. THE STATE (1988) NWLR (Pt. 84) 615 or (1988) 7 SC (Pt. III) 71.

Thus, in the result, I find this instant appeal to be devoid of any substance or merit. It fails and is accordingly dismissed by me. I affirm the judgment of the lower court, which had also earlier affirmed the convictions and sentences passed on the appellant by the trial court. *(Pp 279 - 280 Paras G - B).*

14. *When Supreme Court will not interfere with concurrent findings*
What is on ground clearly are concurrent findings of fact of the two lower Courts and it is settled that the Apex Court will not interfere with such findings of fact so long as the said findings are supported by legally admissible evidence that are not perverse or have led to a miscarriage of justice. See AGALA VS. OKUSIN (2010) 10 NWLR (Pt. 1202) 412; OSIGWE VS. PSPLS MGT. CONSORTIWN LTD (2009) 3 NWLR (Pt. 1128) 378; ONWUDIWE VS. FRN (2006) 10 NWLR (Pt. 988) 382. *(P 286 Paras D - E).*

15. *How prosecution can prove its case beyond reasonable doubt*
Also to be stated is that it is settled law that the prosecution can prove its case beyond reasonable doubt by any of the combination of the following means:

a) By confession of the accused;

b) By direct evidence of eye witnesses; and

c) By circumstantial evidence.

This court has shown how the proof can be made and sustained. See in Julius ABIRIFON VS. THE STATE (2013) LPELR-20807 (SC), thus Per Muhammad JSC had this to say:

"……. **In Afio vs. The State (1986) 5 SC 194 at 219 – 220.** *(P 286 .Paras E - H).*

16. *Confession occupies a high authenticity of proof beyond reasonable doubt.*

It was stated as follows:

> **"How is a case proved beyond reasonable doubt? A case can be proved by direct oral evidence if the testimony of the witness who saw and heard them are believed, there will be proof beyond reasonable doubt… the local case of Joseph Ogunbadejo vs. The Queen (1954) 14 WACA 458 (otherwise known as APALARA'S case) is an excellent example of proof beyond reasonable doubt based purely on inference from circumstantial Evidence but far above these two methods of proof is voluntary confession of guilt by an accused person if it is direct and positive and satisfactorily proceed should occupy the highest place of authenticity when it comes to proof beyond reasonable doubt. This is why such a confession by itself is sufficient without further consideration to warrant a conviction unless the trial court is satisfied that the case has not been proved beyond reasonable doubt."**

In a nutshell the PW1 and PW2 stated how they caught the appellant with Exhibits A, A1, B, C and D which testimonies were not challenged. PW1 had rendered the account on how appellant was caught with a cut size locally made gun and a live cartridge and during the search of the Volvo car that the appellant and cohorts abandoned, PW1 and others recovered two barrel gun cut to size, three live cartridges and three expended ones. Also that he, PW1 saw the accused in the well and recovered IDI and IDIA from his waist. *(Pp 286 - 287 Paras H - E).*

17. *Confessional Statement Corroborated.*

From the appellant's extra judicial statement, Exhibit E he stated thus: "I was armed with one of the guns while Efe and Andrew were also armed".

Clearly the confessional statement had corroboration in the evidence of PW1and PW2. In fact that is sufficient to ground the conviction and there is no

necessity to call other witnesses since all they would come to say has been fully established and overloading the evidence would serve no useful purpose since what is on ground is sufficient. See Okoroji vs. State (2002) 5 NWLR (Pt. 759) 21 at 28; Omogodo vs. State (1981) 5 SC 5; Akpa vs. The State (2008) 14 NWLR (Pt. 1106) 72.

Indeed what I see is a situation where even without the corroborative evidence above stated, the trial court could safely convict on the free and voluntarily made confessional statement, Exhibit E which is cogent, direct and unequivocal and from the surrounding circumstances has been shown to be true leaving no room for further belabouring the fact. See Nwaebonyi vs. State (1994) 5 NWLR (Pt. 343) 138; Habibu Musa vs. The State (2013) LPELR – 19932; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Hassan vs. State (2001) 15 NWLR (Pt 735) 184.

This is a classic case where the Supreme Court is to keep within the principle already laid down and that is that the concurrent findings of two courts below made from what is on record within the applicable laws in line with evidence and there being no miscarriage of justice, this court has no business interfering.

In conclusion and in line with the well articulated lead judgment, I see no merit in this appeal and I dismiss it. *(Pp 287 - 288 Paras F - C).*

Representation
Ayo Asala with him **E. Odje** for the Appellant
Hon. Peter Mrakpor (Attorney General Delta State, **O.F. Enenmo**, Director DTMOJ, **U.I. Amioku-Eshalommi (Mrs)** Chief State Counsel for the Respondent.

AMIRU SANUSI, (JSC) (delivering The Lead Judgment):

The appellant was arraigned before the High Court of Delta State (the trial court) and tried on four count charges as follows:-

COUNT NO. 1
STATEMENT OF OFFENCE: COUNT 1
Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and firearms (special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II
Armed robbery, punishable under Section 1(2) (a) of the Robbery and firearms (Special provisions) Act. 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash sums of N100,000.00 (One hundred thousand naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III
Armed robbery, punishable under Section 1(2)(a) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV
Illegal possession of firearms punishable under Section 3(1) of the Robbery and firearms (Special provisions) Act Cap 398 volume XXII Laws of the Federation of Nigeria, 1990

PARTICULARS OF THE OFFENCE
Taiye Michael Efe 'm' on or about the 11th day of January, 2006, at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

When the charges were read and explained to the accused person (now appellant) he pleaded not guilty to each of the four counts. His trial thereupon commenced in earnest, wherein the prosecution called three witnesses to prove its case. The appellant as accused person, after the close of the prosecution's case testified for his defence without calling any witness to testify on his behalf. The prosecution at the trial tendered six exhibits including the voluntary confession statement which was marked as Exhibit E. While testifying for his defence, the appellant attempted to retract the confessional statement he made immediately after he was arrested by the police.

The brief facts giving rise to this appeal go this way. On the 11th day of January, 2006 at about 8.00pm the PW1 one police Inspector Sunday Ideho and PW2 Sgt Samuel Imana and other men of Nigeria Police Force while on road patrol along Aka Avenue, stopped an on-coming vehicle, a white Volvo car carrying four passengers therein. The driver of the said vehicle refused to stop. Thereupon, the police men on road patrol became suspicious and

thereupon pursued the said Volvo car. In the process exchange of fire ensued between the police men and the people in the said vehicle after which the occupants of the white Volvo vehicle decided to stop and abandoned it and took to their heels each following different directions. Luck ran against the present appellant when he fell into a well near an uncompleted building and the police brought him out of the well and arrested him. When arrested he was found in possession of a locally made gun, and live cartridge. Also when the abandoned Volvo car was searched, two double barrel guns, three live cartridges and three expanded cartridges were recovered. The appellant when arrested that night was found to have bullet wound and on being taken to the police station, the appellant volunteered a statement which was recorded by PW2 which was confessional in nature in that he admitted committing the offences charged. The said statement was tendered in evidence at the trial court and was admitted as Exhibit E even though, as I stated earlier, he attempted to retract it when giving evidence for his defence.

At the end of the trial, the learned trial judge Hon. Justice G.E Gbemre found that all the four counts were proved against the accused/appellant by the prosecution/respondent and convicted the appellant and sentenced him to death on the offence of armed robbery and also to various terms of imprisonment in respect of the other three counts charged. Miffed by the convictions and sentences passed on him by the trial judge, the appellant appealed to the Court of Appeal, Benin division (the lower or court below). The lower court heard his appeal and on the 7th May 2015 delivered its considered judgment in which it unanimously dismissed the appellant's appeal. The appellant still became disenchanted with the dismissal of his appeal by the court below, hence he further appealed to this court.

Parties filed and exchanged briefs of argument in keeping with the rules and practice applicable in this court. The appellant's brief of argument which was settled by Ayo Asala Esq was filed on 14th September 2015. In the said brief of argument, a sole issue for determination was proposed by the appellant's learned counsel which is set out hereunder:

> **"Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution had proved beyond reasonable doubt the offences of conspiracy, armed robbery and illegal possession of fire arms against the appellant".**

On its part, the respondents filed its brief of argument on 17th December, 2015 which said brief of argument was settled by Peter Mrakpor, the learned Attorney General of Delta State. In the brief of argument also sole issue for determination was raised which reads as below:-

> **"Whether on the evidence of the Respondent's witnesses and the**

confessional statement of the Appellant, the court below was right in affirming the judgment of the trial court which found the Appellant guilty for the offences of conspiracy to commit armed robbery, armed robbery and possession of illegal firearms (sic) (Grounds 1,2 and 3).

Looking at the two sets of issues for determination proposed by the parties, there is no doubt saying that both of them are moreorless the same except the different wordings used in couching them. I shall therefore in considering or determining this appeal, adopt the lone issue raised in the appellant's brief of argument as reproduced supra even though 1, in order to avoid the verbosity used in framing each of them I shall reframe it as follows:

Whether the prosecution had proved its case beyond reasonable doubt as found by the trial court and subsequently affirmed by the lower court."

The learned counsel to the appellant rightly submitted that the prosecution is not relieved of the burden to prove the alleged offences beyond reasonable even where the accused person arrested at the scene of the crime made a confessional statement when or where there is a confessional statement. He argued that the prosecution failed to establish the offences of armed robbery and conspiracy against the appellant and that the two witnesses did not give eye witness account of the armed robbery. He contended that the individuals listed as witnesses were not called to testify in proof of its case. He conceded that even though the prosecution is not bound to call a host of witnesses, but where there is a vital issue for resolution and the presence of a particular witness will clarify it one way or the other, such witness must be called. He cited the case of **OGUDU vs. STATE (2012) All FWLR (Pt. 629) III at 1116-1117 and THE STATE vs. AJIE (2000) FWLR (Pt. 16) 2837 at 2844 parag G.**

He argued that counts 1 and II which deal with substantive offences of armed robbery of specific items cannot be said to have been proved against the appellant beyond reasonable doubt. He submitted that failure of the prosecution to call Felix Izomare and Desmond Denvan who were the victims of the alleged armed robbery as contained in counts II and III, is fatal to the case of the prosecution. He stated that the trial court was wrong when it admitted and relied on Exhibit "E" in holding that the prosecution proved the four counts charge against the appellant beyond reasonable doubt. He contended further, that inspite of the objection to the admissibility of Exhibit "E", the trial court admitted it after the appellant denied making same voluntarily. He argued that the evidence of PW2 revealed that the appellant was weak and feeble, lying down as a result of gunshot as at the time the statement was obtained from him and there is no way, the said statement would have been obtained voluntarily. He urged the court to expunge Exhibit "E" from the record. He contended that there was no other grounds upon which the trial court convicted the appellant and PW1and

PW2 who were called by the prosecution even did not give any evidence relating to counts II & III. He argued that the appellant was not charged for robbing the occupants o the said vehicle and there was nothing in the record to show that the said vehicle was stolen by the appellant. He referred to the judgment of the court below at pages 68-69 of the record and submitted that the above finding is not borne out of the evidence in the record. He contended that there is no evidence on record, that the said vehicle was stolen by appellant for the lower court to rely on Doctrine of recent possession of the Volvo car which is not one of the items listed to have been stolen as contained in the charge.

He argued further the prosecution has failed to prove that the appellant participated in the alleged robbery and submitted that the totality of the evidence against the appellant was founded on suspicion which cannot ground conviction.

The Learned appellant's counsel submitted further, that the court below was wrong in affirming the conviction of the appellant under count IV for illegal possession of firearms as there is even no credible evidence that those exhibits were found in the possession of the appellant. On the offence of conspiracy, he submitted that there is no inference of conspiracy to commit armed robbery when it is clear that the prosecution did not lead distinct evidence in respect of Count I. He therefore argued that once the charge of substantive offence fails, the charge of conspiracy must also fail. He contended that the evidence i.e. Exhibit "E" upon which the lower court upheld the conviction of the appellant for substantive offence is the same with that upon which the appellant was convicted for the offence of conspiracy. He then urged this court to set aside the decision of the two lower courts and discharge and acquit the appellant.

Replying, learned counsel or the respondent submitted that there was cogent, legally reliable and admissible evidence which met the requirements of the law having regard to the charge and ingredients of the offences with which the appellant was charged and upon which the court below upheld the convictions. He referred to the case of **JULIUS ABIRIFON vs. THE STATE (2012) LPELR – 20807 (SC).**

On the offence of armed robbery which relates to count 1, he referred to the evidence of PW1 & PW2 who gave account of how Exhibit "A" and "A1" were found with the appellant and how exhibits B,C &D were found in the Volvo car that was stolen by the appellant and 3 other boys who are now at large and Exhibit "E" which is the appellant's confessional statement made to the police and tendered in evidence through PW2. He referred to the judgment of the trial court at pages 68-69 especially lines 19-21 of pages 69 and that of the court below at pages 129-131 of the record and submitted that the above findings of facts were legally admissible and as such cannot be perverse. He submitted that every finding of facts by the two lower court was tied to a particular piece of evidence and as such the trial judge has duly performed the function of ascription of probative value to it and the court below agreed with the trial court. On the illegal possession of firearms which is the third count, he referred to the testimony of PW1 at 32 line 1-7 of the record at lines 24-25 and the judgment of the trial court at page 70, lines 5-9 and submitted that exhibit "E", as well as

A evidence of PW1 & PW2 had sufficiently established the offence of illegal possession of firearm.

On the count of conspiracy to commit armed robbery which covers count 1, he cited the case of BUSARI vs. State (2015) LPELR – 24 279.

B He also referred to the judgment of the court below at pages 132-134 of the record and urged the court not to disturb the findings of facts by two lower courts moreso, when the courts reached a conclusion that there was conspiracy from vivid and unimpeachable testimonies of PW1 &PW2 as well as the content of Exhibit "E". On the failure to call Felix Izomare and Desmond Denvan, the victims of the robbery to testify for the prosecution, and C with regard to the question whether it is prejudicial to the case of the prosecution, he submitted that the unassailable testimonies of PW1 & PW2 as well as the voluntary confessional statement of the appellant had wholly rendered otiose the need to call them. He cited the case of **LT. F.O ODUNLAMI vs. THE NIG. NAVY (2013) LPELR 20701** where per Fabiyi had thus to say

D **"Perhaps it should be stated that where the prosecution failed to call a particular witness, the accused is at liberty to call him".**

On whether the trial court was right in admitting and relying on Exhibit "E", he submitted that the respondent was able to prove during trial, that the confessional statement was voluntarily obtained and the allegation by the appellant that he was tortured was later E abandoned and the appellant's claim that he was unsettled were mere after-though and at best, evasion of reality.

On the issue of retraction, he submitted that it is not the law, that denial of confessional statement provides grounds or reasons for either rejecting it or rendering it unreliable or incapable of sustaining conviction. He submitted that, that does not preclude a F court from convicting an accused even on his confessional statement alone where it was found to be direct, positive and unequivocal.

He argued that the court below, like the trial court in addition to the confessional statement, relied on such other evidence from the testimonies of the respondent's witnesses to further establish the truth in the appellant's confessional statement and that both courts are G aware of the desirability of having such corroborative evidence before convicting the appellant. He submitted that whether or not a statement of an accused or weight to be attached to it, is a question fact which evaluation and drawing inferences have always been the primary duty of the trial court which had the advantage and opportunity of seeing and watching the witnesses as they testified before it. He then urged this court to resolve this lone H issue in favour of the respondent and dismiss the appeal.

It is well settled principle of law that an accused person is presumed innocent until he or she is proved guilty. The prosecution as the accuser, is always saddled with the heavy burden of proving the guilt of the accused person and the standard of such proof in criminal cases or trial is proof beyond reasonable doubt. See **Joseph Orungu & Ors vs. The State**

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(1970) All NLR 269 or (1970) LPELR – 2780 (SC). See Section 135 of the Evidence Act 2011 (as amended) and also Section 138 of the Evidence Act 2011 (as amended) and also Section 138 of the same Evidence Act which make provision for the standard of proof. See also **Olayinka Afolalu vs. The State (2010) 16 NWLR (Pt. 1220) 584; Miller vs. Minister of Pensions (1947) 2 All ER 372.** It should be noted however, that in order to displace the presumption, the evidence adduced by the prosecution must be targeted at the standard of proof beyond reasonable doubt only and NOT proof beyond shadow of any doubt that the accused is guilty of the offence he is charged with. This is so because absolute certainty is impossible in any human adventure inclusive of the administration of criminal justice.

The law has established or approved three methods of proof of a criminal offence by the prosecution in any criminal trial. These methods include the followings:-

(2) By a voluntary confessional statement of the accused person(s); or

(c) By circumstantial evidence which must be cogent, complete, unequivocal and compelling leading to the unresistible conclusion that the accused and no other person committed the offence but him; or

(d) By evidence of eye-witness or witnesses otherwise known as direct evidence.

The prosecution in this instance case seems largely to have relied on the voluntary confessional statement volunteered by the accused now appellant, which the trial court admitted in evidence and marked same as Exhibit E. I note that the appellant merely resiled from making it voluntarily at the trial when he stated that he did not make such statement voluntarily to the police when he was arrested. That was what informed the trial court to conduct a trial within trial because the defence at page 34 of the record objected to the admissibility of the said confessional statement because his counsel stated thus **"the statement was extracted under force as the IPO tortured the accused".** After the mini trial, the trial court admitted the statement in evidence as Exhibit E and the court below agreed with the finding in that regard.

On my part, I have read the said statement and the court proceedings on the trial within trial and I have no reason to depart from the conclusion of the two lower courts on the voluntariness of exhibit E. I am equally satisfied that the prosecution had discharged the burden placed on it by law to prove that the statement was voluntarily made by the appellant. The appellant, during the trial within trial had adequate opportunity to cross examine the prosecution witness who recorded the said statement with regards to his allegation that it was extracted from him, or on the issue of the alleged torture or beating he allegedly received but he did not cross examine that prosecution witness/recorder of the statement (PW2) on that aspect during the trial within trial.

I am mindful of the fact that there are a long line of judicial authorities which had established that a free and voluntary confession by an accused person, if direct, positive and unequivocal and if satisfactorily proved is sufficient to ground a conviction. The law

A however, made it desirable for the trial court to look for some independent evidence outside the appellant's confession to the police, no matter how slight, to determine if the circumstances made it probable that the confession was in fact, true. See **Haruna vs. A.G Federation (2012) 3 SC (Pt. IV) 40; Ashiwe vs. The State (1983) 5 SC (Reprint) 1; Alarape vs. State (2001) 2 SC 114; Galadima vs. The State (2012) 12 SC (Pt. II) 213;**
B **Osuagwu vs. The State (2003) 1-2 SC (Pt. 1) 37.**

However, in numerous judicial authorities of this court it was decided that before relying solely on confessional statement to convict an accused or in the process of evaluation of same, trial courts are desired to subject the confessional statement to the following six tests, which are:

C **(vii) Is there anything outside the confession to show that it is true?**

(viii) Is it corroborated?

(ix) Are the relevant statements made in it of facts true as they can be tested?

(x) Was the prisoner one who had the opportunity of committing the
D **offence(s)?**

(xi) Is the confession possible? and

(xii) Is it consistent with the other facts which have been ascertained and have been proved?

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Once a confessional statement is subjected to these six tests, the Supreme Court/the apex court decrees that same can be relied upon to ground a conviction. See **Musa vs. State (2013) 2-3 SC (Pt. II) 75 at 94; Nwachukwu vs. The State (2007) SCM (Pt. 2) 447 at 455; Ikpo vs. State (1995) 9 NWLR (Pt. 421) 540 at 554.** To my mind, the trial court had
F subjected Exhibit E to the above tests as endorsed by the court below.

Now on whether or not the offence of armed robbery was established against the appellant, I must say that evidence abound as produced by the prosecution, to prove the offence of armed robbery against the accused person, (now appellant) as rightly found by the trial court. The elements required to be proved by the prosecution in order to obtain a
G conviction of the offence of armed robbery under Section 1(2) of the Robbery and Firearms Special Provisions/Act are listed hereunder:-

(d) That there was a robbery;

(e) That at the time of the robbery the accused or any of the accused person was armed with arms or offensive weapon

H **(f) That the accused facing the trial was the robber or one of the armed robbers.**

See **Diva vs. The State** (1980)8-11 SC 236; **Bozin vs. The State** (1985) 2 NWLR (Pt. 8) 465; **Olayinka vs. The State** (2007) 9 NWLR (Pt. 1040) 561.

As I stated above the prosecution/respondent relied heavily on the confessional

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A statement of the appellant which he made voluntarily. By Section 28 of the Evidence Act, a confession is an admission made at anytime, by a person charged with criminal offence(s) suggesting the inference that he committed the crime he is charged with. I am not unaware that I stated so earlier that before an accused person can be convicted solely on his confessional statement it is desirable for the trial court to see if there is some evidence no B matter, how slight, corroborating the contents of the statement which makes it probable that the confession is correct and true. In this instant case, there exist cogent, compelling and credible pieces of compelling circumstantial evidence supporting Exhibit E. For instance, evidence abound that there was theft of the vehicle which when the accused/appellant was arrested he was in possession of the said vehicle and other items therein. The doctrine of C recent possession of stolen goods knowing same to have been stolen, therefore operates against him. The law is also trite that where a person is found in possession of recently stolen goods, he is presumed to either be the thief or the one that stole it or that he received it knowing it to have been stolen recently. Also some handsets and money were recovered from the car and the appellant respectively and the appellant in Exhibit E owned up when he D admitted that the items were among the proceeds of their robbery operation. There was also evidence which revealed that there was exchange of fire between the police and the robbery gang which included the accused/appellant and when the appellant was arrested he was having gunshot injury. The appellant in Exhibit E clearly spelt out the co-accused persons he was in company of who had escaped besides admitting the robbery and other offences E charged. He therefore had identified himself to be among the robbers pursued by the police on the fateful day. I therefore am in total agreement with the two lower courts that all the ingredients of armed robber were established or proved against the appellant beyond reasonable doubt.

F This brings me to the offence of conspiracy to commit armed robbery. Conspiracy simply means an agreement by two or more persons to do or cause to be done an illegal act, or an act which is legal but by illegal means. The mere agreement alone constitutes the offence of conspiracy and it is immaterial to prove that the act was in fact committed. See **Obiakor vs. The State (**2002) SC (Pt. II) 33 at 39/40.

G The offence of conspiracy may be committed even if the substantive or main offence was not committed or has been abandoned or aborted. See **Balogun vs. AG Ogun State (2002) 2 SC (Pt. II) 89.**

It needs to be stressed here, that the essential ingredients of the offence of conspiracy to commit armed robbery lies in the agreement and association to do an unlawful thing or act H which is contrary to or forbidden by law, whether that thing/act is criminal or not and whether the accused person has knowledge of its unlawfulness. The offence of conspiracy is often not proved through direct evidence but the courts normally infers such agreement or plot from the facts of doing things towards a common purpose. See **Clark vs. The State (1986) 4 NWLR (Pt. 35) 381; Odeneye vs. State (2011) SC 1; Nwankwoala vs. The State (2006) All FWLR**

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(Pt. 339) 801. In the instant case and as rightly observed by the trial court and endorsed by the court below, the appellant revealed how the four of them were pursued by the police when they refused to stop when signaled to do so by the police. Also in the appellant's statement (Exhibit E) he revealed how he and his co-conspirators communicated on phones where to meet before the operation at Boloker Market even before they set for the robbery operation. All those pieces of evidence inferentially showed that there was a concert among them on when, how and where to operate the robbery operations. I have no reason therefore to hold differently from the findings of the two lower courts that those pieces of evidence highlighted above, went a long way in proving or establishing the offence of criminal conspiracy beyond reasonable doubt as held by the trial court and upheld by the court below.

Finally on the offence of illegal possession of firearms, the two prosecution witnesses testified that when the appellant was arrested when he fell inside a well upon being pursued by the police, a gun and some live cartridges were recovered from him along with other items. There is no gain saying that the appellant possessed that gun illegally as he did not adduced any evidence that he had licence to possess such gun or that he was authorized by law to hold such firearms. The burden is therefore on him to establish that his possession of such gun/arm was authorized by law which he failed to so establish or to account for his possession of it. Having failed to so prove, the learned trial judge rightly held that that offence of illegal possession of firearms was proved against him and to convict him accordingly. The lower court was on the other hand, also right in upholding such conviction too. Again I have no reason to depart from the conclusion reached by the two courts below on that too.

It is noted by me that the appellant's learned counsel raised dust on the prosecution's failure to call certain witnesses he named. He suggested that the prosecution's failure to call those named witnesses was fatal to its case. With due deference to the learned counsel for the appellant, there is no law which imposes an obligation on the prosecution to call list or host of witnesses. The prosecution is merely needed to call enough material witnesses to prove its case and in doing so it has a discretion in the matter on who to call or who not to call. See **Oduneye vs. The State (2001) 13 WRN 88; Agbi vs. Ogbeh (2006) 11 NWLR (Pt. 990) 65; Babuga vs. State (1996) 7 NWLR (Pt 460) 279**. In fact, even a murder case can be established by evidence of only one witness provided his evidence is credible and believed by the trial court. See **Effiong vs. State** (1998) 8 NWLR (Pt. 562) 362.

Finally, in this instant appeal, observe that there are concurrent findings of two lower court. It is an established practice of this court not to interfere with or disturb the findings of two lower courts except in an exceptional or special circumstances such as where the findings are perverse, or there is misconception of fact or misapplication of law be it substantive or procedural. None of these special circumstances have been shown to have existed in this instant appeal. I therefore do not see any cogent or compelling reason(s) for me to depart or to disturb or interfere with the concurrent findings. See **Bamgbose vs. University of Illorin & Anor (1999) 6 SC (Pt. II) 72; Ehobor vs. Osayande (1992) 7 SCNJ 217; Mbenu & Anor vs. The State (1988) NWLR (Pt. 84) 615 or (1988) 7 SC (Pt. III) 71.**

A Thus, in the result, I find this instant appeal to be devoid of any substance or merit. It fails and is accordingly dismissed by me. I affirm the judgment of the lower court, which had also earlier affirmed the convictions and sentences passed on the appellant by the trial court. Appeal dismissed.

B **Amiru Sanusi**
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I read in advance the leading judgment delivered by my learned brother, **Sanusi JSC**. I agree with his lordship's reasoning and conclusions that there C is absolutely no merit in this appeal. The appellant's confessional statement, exhibit E and compelling evidence from prosecution witnesses resulted quite rightly in the trial judge finding that the case against the appellant was proved beyond reasonable doubt. This decision was affirmed by the Court of Appeal, and learned counsel for the appellant has been unable to show that concurrent findings of the two courts below were wrong. It is for this D brief observation and the detailed reasoning in the leading judgment that I find no merit in the appeal and dismiss it.

Appeal dismissed.

Rhode-vivour
Justice Supreme Court

E

PETER-ODILI, (JSC): My learned brother, Amiru Sanusi JSC had graciously made available to me the draft of his leading judgment in which he dismissed the appeal of the appellant. I agree with his decision and the reasonings that led to the decision and for measure I shall make a few remarks to underscore my support.

F This appeal is against the judgment of the Court of Appeal, Benin Division or Court below or Lower court delivered on the 7th day of May 2015 affirming the judgment of the High Court of Delta State, Effurun Division delivered on the 14th day of May 2013, convicting and sentencing the Appellant to death by hanging, having been found guilty of the offences of conspiracy to commit armed robbery, armed robbery and possession of illegal firearms.

G The full text on the facts are well set out in the lead judgment and there is no need repeating them here, unless when there comes a need for the utilization of any point thereof.

On the 15th day of February 2018 when the appeal was heard, Ayo Asala, learned counsel for the appellant adopted his brief of argument filed on 14/9/2015 in which he raised a sole issue for determination, viz:-

H **Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution proved beyond reasonable doubt the offences of conspiracy, armed robbery and illegal possession of firearms against the appellant.**

The learned Attorney General of Delta State, Peter Mrakpor Esq. for the respondent

I

A adopted its brief of argument filed on 17/12/2015. In it was formulated a single issue thus:-

Whether on the evidence of the respondent's witnesses and the confessional statement of the appellant, the court below was right in affirming the judgment of the trial court which found the appellant guilty for the offences of conspiracy to commit armed robbery, armed robbery
B **and possession of illegal firearms – Grounds1, 2 and 3.**

In substance the issue as crafted on either side asks the same question and for ease of reference I shall make use of that as drafted by the appellant which is more simply presented.

SINGLE ISSUE

C **Whether having regard to the totality of the evidence from the record, the lower court was right in upholding the decision of the trial court that the prosecution proved beyond reasonable doubt the offences of conspiracy, armed robbery and illegal possession of firearms against the appellant.**

Learned counsel for the appellant, Ayo Asala Esq. contended that the prosecution did
D not prove the charge of armed robbery against the appellant beyond reasonable doubt. That there was no eye witness account and despite the prosecution's assertion that certain individuals were robbed, they were not called to testify. That even though the prosecution is at liberty to call to testify who it wished but it is obligated to call to clarify a vital point that witness whose testimony would flit the balance either way or resolve the issue. He cited
E **Ogundu vs. State (2012) All FWLR (Pt. 629) 1111 at 1116-1117; The State vs. Ajie (2000) FWLR (Pt. 16) 2831 at 2844**.

That the learned trial judge should not have relied on the confessional statement of the appellant, Exhibit E being involuntarily obtained. He referred to **Kaseem vs. State (2009)**
F **All FWLR (Pt. 465) 1749 at 1773.**

Learned counsel for the appellant submitted that even though this appeal is from concurrent findings of two courts below, this is a proper case for the interference of the Supreme Court. He cited **Oguonzee vs. State** (1998) 5 NWLR (Pt. 551) 521; **Aruna vs. State (1990) 6 NWLR (Pt. 155) 125.**

G Learned counsel for the respondent, the Attorney General of Delta State, Peter Mrakpor Esq. submitted that there is nothing upon which this court would base disturbing the concurrent findings of the two lower courts as there is nothing perverse in the findings nor a miscarriage of justice shown. He cited **Peter Iliya Azabada vs. The State (2014) LPELR – 23017 (SC); Habibu Musa vs. The State (2013) LPELR – 19932 (SC)** etc.

H That the evidence of PW1 and PW2 are very explicit on how they arrested the appellant who abandoned a stolen white Volvo car upon being hounded by the two policemen. The two witnesses also testified on how Exhibits A and A1 were found on the appellant and Exhibits B,C and D found in the Volvo car that was stolen by the appellant and three other boys at large. That Exhibit E was properly admitted after a trial within trial and not wrongly taken in by the court.

I

That the findings of the two courts were based on deductions from available evidence and so do not admit of any interference from this court. He cited **Oladipo vs. Moba L.G.A (2010) 5 NWLR (Pt. 1186) 117 at 150.**

Learned counsel for the respondent stated that though Felix Izomare and Desmond Denvan were listed as witnesses and not called did not damage the case of the prosecution since there was enough material placed before the court on which it could arrive at the proper decision. See **Lt. F.O. Odunlami vs. Nigerian Navy (2013) LPELR – 20701 (SC); Victor vs. State (2013) 12 NWLR (Pt. 1369) 465 at 485.**

The charges against the appellant are stated for clarity hereunder, viz:-

STATEMENT OF OFFENCE: COUNT 1
Conspiracy to commit armed robbery, contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap, 398 Volume XXII Laws of the Federation of Nigeria, 1990
PARTICULARS OF OFFENCE:
Taiye Michael Efe (on or about the 11th day of January, 2006 at Effurun within Effurun judicial Division conspired with others now at large to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II
Armed robbery punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 1990.

PARTICULARS OF OFFENCE:
Taiye Michael Efe (m) on the 11th day of January, 2006 at Effurun within Effurun Judicial Division robbed Felix Izomare of two Nokia handsets and cash of N100,000.00 (One Hundred Thousand Naira) while armed with a gun.

STATEMENT OF OFFENCE: COUNT III
Armed robbery, punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Volume XXII, Laws of the Federation of Nigeria 1990.
PARTICULARS OF OFFENCE:
Taiye Michael Efe (m) on the 11th day of January 2006 at Effurun within Effurun Judicial Division robbed Desmond Denvan of his Nokia handset with MTN line and a purse containing the sum of 60 Pounds and at the time of the robbery you were armed with a gun.

STATEMENT OF OFFENCE: COUNT IV
Illegal possession of firearms punishable under Section 3(1) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Volume XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE:

Taiye Michael Efe (m) on the 11th day of January 2006 at Effurun within Effurun Judicial Division unlawfully had in your possession three locally made single barrel cut to size gun.

In respect of the offence of conspiracy to commit armed robbery as stated in count 1, the learned trial judge held thus:-

> **"Usually in conspiracy to commit an offence, there is no written agreement and the agreement can only be inferred from the collateral circumstances and in this case the starting point is the evidence of the prosecution witnesses and both of them reeled out their eye witness testimonies on the day of the incident. Four young men in a vehicle, who were flagged down refused to stop; later open gun fire on the policemen, and upon facing superior fire power, abandoned their vehicle and fled in different directions. Accused was eventually caught inside a well, with a gunshot wounds and on him were Exhibits 'A' and 'A1', i.e. a gun and a bullet. The facts as relayed above can only point to the fact that all the occupants of that vehicle were on a mission to commit armed robbery or had committed armed robbery. The accused made a confessional statement which is Exhibit 'E' and an excerpt from the said Exhibit 'E' states: "…We usually call ourselves on phone and discuss our meeting point before any operation. We have met twice at Bolokor market before going out on robbery operations. The one of yesterday evening (i.e. the present case) made it twice… last night we also met at Bolokor market Warri before we proceeded on the robbery operation that let to my arrest. Andrew is our Armourer; he is the one that use (sic) to keep the guns and also produce it for robbery operations."**

The above shows a clear meeting of the minds and has established all the ingredients of the offence of conspiracy to commit armed robbery. I have been urged by the defence counsel not to look at Exhibit 'E', the confessional statement. A statement by an accused which has been retraced has to pass some test for the court to attach or not to attach weight to the statement. Thus in **Usofor vs. The State** (2005) All FWLR (Pt. 242) Pg. 397 at 411, the court gave the following as the test that the court must apply:-

> **(1) Is there anything outside the confessional statement to show that it is true?**
>
> **(2) It is corroborated?**
>
> **(3) Are the relevant statement made in it of facts true as far as they can be tested?**
>
> **(4) Was the 'Accused' one who had the opportunity of committing the**

offence?

(5) Is his confession possible

(6) Is it consistent with other facts which have been ascertained and have been proved?

If the confessional statement does not pass the test, no conviction can be found on it.

"I have taken cognizance of the test as enunciated above and I have come to the irresistible conclusion which is the proof beyond reasonable doubt that the accused was a conspirator and the offence of conspiracy has been therefore proved and established. Issue 1 is resolved in favour of the Prosecution."

The lower court affirmed the above decision of the learned trial judge. At pages 133 to 134 of the record, the lower court, per Ogunwumiju, JCA held:

Although the offence of conspiracy is distinct from the offence of armed robbery, it is intricately woven together. Once the respondent has firmly established that two or more persons formed the necessary common intent to commit an unlawful act by unlawful means, the charge of conspiracy can be grounded on circumstantial evidence and the trial court may infer conspiracy from facts through which the common purpose was achieve…

I myself could not have put it better than the trial (sic) when his lordship held at page 67 of the record thus:….

It is clear that the possession of a single barrel cut to size gun with a live cartridge found with the appellant and two cut to size gun and three cartridges in the white Volvo car is sufficient evidence to prove the charges of conspiracy and possession of arms against the appellant".

What is on ground clearly are concurrent findings of fact of the two lower Courts and it is settled that the Apex Court will not interfere with such findings of fact so long as the said findings are supported by legally admissible evidence that are not perverse or have led to a miscarriage of justice. See **Agala vs. Olusin (2010) 10 NWLR (Pt. 1202) 412; Osigwe vs. PSPLS Mgt. Consortiwn Ltd (2009) 3 NWLR (Pt. 1128) 378; Onwudiwe vs. FRN (2006) 10 NWLR (Pt. 988) 382.**

Also to be stated is that it is settled law that the prosecution can prove its case beyond reasonable doubt by any of the combination of the following means:

d) By confession of the accused;

e) By direct evidence of eye witnesses; and

f) By circumstantial evidence.

This court has shown how the proof can be made and sustained. See in **Julius Abirifon**

vs. The State (2013) LPELR-20807 (SC), thus Per Muhammad JSC had this to say:

"…… In Afio vs. The State (1986) 5 SC 194 at 219 – 220.

It was stated as follows:

"How is a case proved beyond reasonable doubt? A case can be proved by direct oral evidence if the testimony of the witness who saw and heard them are believed, there will be proof beyond reasonable doubt… the local case of Joseph Ogunbadejo vs. The Queen (1954) 14 WACA 458 (otherwise known as APALARA'S case) is an excellent example of proof beyond reasonable doubt based purely on inference from circumstantial Evidence but far above these two methods of proof is voluntary confession of guilt by an accused person if it is direct and positive and satisfactorily proceed should occupy the highest place of authenticity when it comes to proof beyond reasonable doubt. This is why such a confession by itself is sufficient without further consideration to warrant a conviction unless the trial court is satisfied that the case has not been proved beyond reasonable doubt."

In a nutshell the PW1 and PW2 stated how they caught the appellant with Exhibits A, A1, B, C and D which testimonies were not challenged. PW1 had rendered the account on how appellant was caught with a cut size locally made gun and a live cartridge and during the search of the Volvo car that the appellant and cohorts abandoned, PW1 and others recovered two barrel gun cut to size, three live cartridges and three expended ones. Also that he, PW1 saw the accused in the well and recovered IDI and IDIA from his waist.

From the appellant's extra judicial statement, Exhibit E he stated thus: **"I was armed with one of the guns while Efe and Andrew were also armed".**

Clearly the confessional statement had corroboration in the evidence of PW1and PW2. In fact that is sufficient to ground the conviction and there is no necessity to call other witnesses since all they would come to say has been fully established and overloading the evidence would serve no useful purpose since what is on ground is sufficient. See **Okoroji vs. State (2002) 5 NWLR (Pt. 759) 21 at 28; Omogodo vs. State (1981) 5 SC 5; Akpa vs. The State (2008) 14 NWLR (Pt. 1106) 72.**

Indeed what I see is a situation where even without the corroborative evidence above stated, the trial court could safely convict on the free and voluntarily made confessional statement, Exhibit E which is cogent, direct and unequivocal and from the surrounding circumstances has been shown to be true leaving no room for further belabouring the fact. See **Nwaebonyi vs. State (1994) 5 NWLR (Pt. 343) 138; Habibu Musa vs. The State (2013) LPELR – 19932; Alarape vs. State (2001) 5 NWLR (Pt. 705) 79; Hassan vs. State (2001) 15 NWLR (Pt 735) 184.**

This is a classic case where the Supreme Court is to keep within the principle already laid down and that is that the concurrent findings of two courts below made from what is on

record within the applicable laws in line with evidence and there being no miscarriage of justice, this court has no business interfering.

In conclusion and in line with the well articulated lead judgment, I see no merit in this appeal and I dismiss it.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

INYANG OKORO, (JSC):I read in draft the lead judgment of my learned brother, Amiru Sanusi, JSC just delivered. I agree with the reasoning leading to the conclusion that this appeal is devoid of merit and deserves to be dismissed. I adopt both the reasoning and conclusion as mine. Accordingly, I dismiss this appeal and affirm the judgment of the lower court.

Appeal Dismissed.

John Inyang Okoro
Justice Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add.

The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage
Justice Supreme Court

NIGERIA PORTS AUTHORITY
VS
1. AMINU IBRAHIM AND COMPANY
2. OBOYE AYODE AND COMPANY

SC. 218/2010

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES - VIVOUR JUSTICE, SUPREME COURT
MARY UKAEGO PETER-ODILI JUSTICE, SUPREME COURT
JOHN INYANG OKORO JUSTICE, SUPREME COURT
AMIRU SANUSI JUSTICE, SUPREME COURT
SIDI DAUDA BAGE JUSTICE, SUPREME COURT

ACTION: Undefended list – Duty on Court – Whether must consider only notice of intention to defend in order to determine whether to transfer the case to the general cause list.

ACTION: Undefended list procedure – Purpose thereof.

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

CONTRACT: Variation thereof – When valid – Whether subject to offer and acceptance of parties.

COURT: Federal High Court – Jurisdiction thereof – Management and administration of Federal Agency – S. 251(1) of CFRN 1999 – Whether within the jurisdiction of the Federal High Court.

COURT: Federal High Court – Jurisdiction thereof – Management and Administration of Federal Agency – The principles in Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405.

COURT: Jurisdiction thereof – Federal High Court – S. 251(1) of CFRN 1999 – Purport.

COURT: Jurisdiction thereof – Fundamental nature – Whether can be raised at any stage

of the proceedings.

COURT: Jurisdiction thereof – How determined.

COURT: Post-Judgment interest – Award thereof – The principle in B.E.G.H Ltd vs. U.H.S & L. Ltd (2011) 7 NWLR (Pt. 1246) 246.

EQUITY: Concept of waiver – Purport – The principle in Fasade vs. Babalola (2003) 11 NWLR (Pt. 830) 26.

EQUITY: Waiver – Principles thereof.

JUDGMENT & ORDERS: Pre-Judgment interest – When not pleaded or proved – Whether cannot be granted by court – Relevant principles thereof.

JUDGMENT & ORDERS: Pre-Judgment interest – When can be awarded – Relevant principles thereof.

PRACTICE AND PROCEDURE: Pre-judgment interest – Power of Federal High Court thereto – Order 42 Rule 7 FHCR – Relevant consideration.

PRACTICE AND PROCEDURE: Undefended list – Notice of intention to defend – Where a party files a notice of intention to defend – Whether party must not file documents to disprove the averments in the affidavit in support of undefended list.

PRACTICE AND PROCEDURE: Undefended list – Where defendant files affidavit in his notice of intention to defend – Whether plaintiff does not need to file affidavit controverting same.

PRACTICE AND PROCEDURE: Undefended list – Where plaintiff does not controvert averments in defendant's affidavit – Whether failure does not amount to admission – The principle in Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd (2002) FWLR (Pt. 121) 1913.

Issues for determination

1. **Whether the Respondents cause of action, namely in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).**
2. **Whether in the light of the concession by the Respondents on the**

Respondents' brief in the Court of Appeal that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal (without a Respondent's Notice to affirm the Judgment on different grounds) wrongly or rightly declined to set aside the Judgment of the Trial court (Ground 1)

3. **Whether the court below rightly or wrongly held that paragraphs 3-14 of Appellant's Affidavit in support of Notice of Intention to Defend the action, were hearsay evidence and therefore inadmissible (Grounds V and VI).**
4. **Whether the court below rightly or wrongly confirmed the Judgment entered in favour of the Respondents by the trial court in the sum of USD9,186,201=00 and #144,303,981.00 (Grounds IV & IX)**
5. **Whether absence of specific agreement or evidence of custom and trade usage on payment of pre-Judgment interest and on liquidated nature of the claim, the court below rightly confirmed the pre and post-Judgment interests awarded against the appellant by the trial court (Ground VIII).**
6. **Whether the courts below rightly or wrongly find that there was waiver of the time of completion of contract by the appellant (Ground VII).**

Facts of the matter

This is an appeal against the Judgment of the Lagos division of the Court of Appeal delivered on 8th May 2009 which dismissed the appeal by the appellant before it.

The plaintiffs now respondents, approached the Federal High Court Lagos by filing a suit under the undefended list procedure claiming the under listed reliefs.

(a) An order directing the defendant (now appellant) to pay the sum of USD9, 186,701 to the plaintiff being the agreed fee for the consultancy services rendered by the plaintiffs/respondents to it (the appellant)

(b) Interest on the said sum of USD9,186,701= at the rate of 10% from 27th April 2004 until final liquidation of the debt.

(c) An order directing the defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services entered into by the plaintiffs to the Defendant;

(d) Interest on the sum of #144,303,981 = at the rate of 10% per annum from 27th April 2004 until final liquidation of the debt.

The respondents herein, based their cause of action on the alleged appellant's failure to pay them the agreed fees in respect of professional services they rendered to the appellant in conformity with letter dated 23/1/2003 in which the appellant employed the services of the respondents to reconcile the account position regarding concessions which the appellant gave to Inter Services Limited. Nigeria Liquefied Gas ((LNG) and Mobil Oil Producing Unlimited. The respondents claimed that they satisfactorily executed the job and have thereupon exhibited interim and final bills to the appellant but the latter failed or neglected to pay them despite repeated demands. That failure to settle the claims triggered the plaintiffs/respondents to institute the suit under the Undefended List Procedure against the appellant at the Federal High Court (the trial court) claiming the payment of the aforementioned sums.

Upon being served with the originating process, the appellant filed a Notice of Intention to defend the suit supporting same with an affidavit. The defences raised in the affidavit accompanying the Notice of intention to defend the suit, including the followings:-

(i) That the Respondents did not perform the contract satisfactorily;

(ii) That the Respondents did not execute the contract within the 35 days as earlier agreed upon;

(iii) That there was no extension of time;

(iv) Parties did not agree on the sum of USD9,186,701= and #144,303,981=00 as claimed by respondents

(v) That the respondents unilaterally varied the remuneration payable from 18% to 5% and that the variation was never agreed upon by the appellant.

(vi) That payment of fees was contingent upon recoveries of the identified short falls from the affected companies and no such recoveries were made, hence no money was due for payment to the respondents by the appellant.

In its Judgment, the trial court held that all the above defences did not call for the transfer of the suit filed under the Undefended List procedure to the General Cause List, especially in view of the appellant's failure to exhibit documents in support of the affidavit supporting the notice of Intention to defend the suit. In the result, the trial Judge found in favour of the respondents herein, as plaintiffs thereat.

Aggrieved by the Judgment of the trial court, the appellant appealed to the Court of Appeal, Lagos division which dismissed the appellant's appeal and upheld the decision of the trial court.

Piqued by the Judgment of the Court of Appeal, the appellant further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal).*

1. *The fundamental nature of jurisdiction can be raised at any stage of the proceedings.*
The first issue for determination raised in the appellant's brief of argument and the corresponding issue in the respondents' brief touch on issue of jurisdiction. As rightly pointed out, the parties in this appeal did not raise the issue of jurisdiction in the two courts below. At any rate and notwithstanding the fact that issue of jurisdiction was never raised in the two courts below, in view of its fundamental nature and also since the law is trite that issue of jurisdiction can be raised by any of the parties at any stage of the proceedings even at the Supreme Court, such issue must first of all be addressed by me. See FRANCIS DURWODE VS. STATE (2000) 15 NWLR (Pt. 691) 467. I must however stress here, that it is always ideal and better that issue of jurisdiction is raised at earliest stage of the proceeding in order to avoid wasting the precious time of the court as seemingly done by the appellant in this appeal at the lower court. *(P 324 Paras C - F).*

2. *How to determine jurisdiction*
The approved practice is that when issue of jurisdiction is raised, the court must carefully peruse the claim of the plaintiff in order to determine the crucial issue of jurisdiction. See Shell BP Ltd vs. Onasanya (1979) 10 NSSC 334; Opiti vs. Ogbeiwi (1992) 4 NWLR (Pt 234) 184 at 195; Adeyemi vs Opeyori (1976) 10 SC 455. This is very important, because it is well settled law, that where the court lacks jurisdiction to adjudicate on a cause or matter, everything done in such want of jurisdiction, is a nullity. See Mustapha vs. Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539.

It has long been a settled law, that when a court is faced with question as to whether it has jurisdiction in a matter or not, it is incumbent upon it, to refer to the subject matter of the claim as pleaded by the plaintiff. In the present case, the claim on which the plaintiffs (now respondents) before the trial court upon

which they prayed for the determination of same are reproduced hereunder:-

(a) An order directing the Defendant to pay the sum of USD 9,186,701 to the plaintiffs being agreed fees for the consultancy services rendered by the plaintiffs to the Defendant.

(b) Interest on the said um of USD 9,186,701 at the rate of 10% from 27th April 2004 pending the final liquidation of the debt.

(c) An order directing the Defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services rendered by the plaintiffs to the Defendant

(d) Interest on the sum of #144,303.981 at the rate of 10% from 27th April 2004 pending the final liquidation of the debt (emphasis supplied)

My understanding of the above claims, is that the defendant (now appellant) employed the plaintiffs/respondents to render some consultancy services on its behalf on the agreed sum claimed which said services were rendered by the respondents/plaintiffs, but the defendant/appellant failed or neglected or refused to pay. By not paying the sum claimed, the defendant (now appellant) therefore became indebted to the plaintiffs/respondents. The subject-matter or cause of action, to my mind, is and remains more or less a claim for recovery of such debt owed by defendant/appellant. Therefore in my view even if the lower court referred to the said agreement to be a contract or simple contract such in true sense, is a misnomer or merely a matter of semantic because such transaction does not amount to a simple contract as the appellant is insinuating in order to oust the jurisdiction of the Federal High Court. It is also my considered view, that a close look at the cause of action, leaves no one in doubt, that the cause of action related to or was transmitted out of or from administration or management and control of the appellant/company. *(Pp 325 - 326 Paras F - G).*

3. *The purport of S. 251(1) of CFRN 1999*

The jurisdiction of the Federal High Court especially as it relates to the present suit/action is derived from the provisions of Section 251 (1) of the 1999 Constitution (as amended), which provides thus:-

(a) "Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly the Federal

High Court shall have and exercise Jurisdiction to the exclusion of any court in civil causes and matters.

(b) The administration or management and control of the Federal Government or any of its agencies" *(Pp 325 - 326 Paras H - B.).*

Per Sanusi (JSC):

"From the facts of the instant case, as can be gleaned from the record of appeal, the appellant herein, simply used its administrative powers and instructed vides its letter dated 22/1/2003, to assign the respondents to reconcile the concessions it earlier gave to Intel Services Limited Nigeria Liquefied Natural Gas Ltd and Mobil Production Nigeria Unlimited, because the appellant was desirous of reconciling the position of the concessions it earlier gave those named companies. There is no doubt that the respondents have rendered the service of reconciliation as consultants. I have read the cases of Onuorah vs. K R PC Ltd (2005) 6 NWLR (Pt. 921) 393 at 405; Adelekan vs. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33 at 52; IT PP Ltd vs. UBN PLC (2006) 12 NWLR (Pt 995) 483 FCE Oyo vs. Akinyemi (2008) 15 NWLR (Pt 1109) 21 and Minister of Works vs. Tomes Nigeria Ltd (2002) 2 NWLR (Pt 752) 74, in which this court held that the Federal High Court lacks jurisdiction on matters relating to simple contract. However, as I posited above, the transaction executed by the parties in the present case did not pertain or relate to simple contract. Those cases are therefore distinguishable from the facts of the present case, hence those cases are not relevant or applicable to the facts in the present case. I accordingly so hold.

Again, there is no doubt that the appellant is an agency of the Federal Government, hence the trial court has jurisdiction to adjudicate in the mater by virtue of the provisions of Section 251(1) of the 1999 Constitution (as amended), contrary to the stance held by the learned senior counsel for the appellant. Having said so, I resolve the first issue against the appellant and in favour of the respondents". *(P 326 .Paras B - H).*

4. *A party needs not attach documents to disprove averments in an affidavit under undefended list*

On the second issue, the appellant contends in its Amended Brief of argument, that the trial court basically denied the defendant/appellant leave to defend the suit simply because it failed to attach documents to its affidavit in support of its Notice of Intention to defend the suit. On the other hand, the learned counsel for the respondents contended otherwise. It was argued on behalf of the respondents that the leave was not given to the appellant to defend the suit by

the trial court simply because the appellant failed to place any material before the trial court which disclosed any defence to the suit. In the first place, I must state that it is not the correct position of the law, that a party who has filed a notice of intention to defend must, as a condition precedent attach a document in proof of or to disprove the deposition contained in the affidavit. All that the law requires is to provide sufficient or adequate facts in the said affidavit which call for thorough scrutiny or inquiry. In other words, attachment of documents by the appellant was/is not and was in fact, never given as the reason why the appellant was denied leave to defend the suit. *(Pp 326 - 327 .Paras H - D).*

5. *What court must consider in an undefended list proceedings*

It needs to be emphasised here, that in an action brought under the Undefended List procedure, as in this instant case, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of his Notice of Intention to defend the suit. Once the court comes to the inevitable conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an Undefended suit and enter judgment accordingly without calling the defendant, even if present in court, to answer or be heard. See HAIDO vs. USIMAN (2004)3 NWLR (Pt. 859) 65; NKWO MARKET COMMUNITY BANK NIGERIA LTD vs. PAUL EJIKEME UWABACHI OBI (2010) 14 NWLR (Pt. 1213) 169. Also this court in the case of ACB Ltd vs. GWAGWADA (1994) 5 NWLR (Pt. 342) 25 held that the affidavit in support of the Notice of Intention to Defend must show that the grounds for asking to be heard in defence, are not frivolous, vague or disquiet to delay the trial of the action and it must show that there is dispute between the parties as had been shown in this case. *(P 327 Paras D - G).*

Per Sanusi (JSC):

"From the record of appeal, it is clear from the judgment of the trial court, that non-attachment of the exhibits to the affidavit in support of the suit by the appellant was not given as the reason why the trial court refused to grant leave to the appellant/defendant to defend the suit. The actual reason for the refusal to grant such leave, was clearly stated by the trial court at page 69 of the record where it held thus:-

> **"In fact the defendant did not place any material before the court to show that it is serious with this case or that there is any substantive matter to be heard at trial. This, I believe, is just filed to frustrate the plaintiffs, out of their legitimate earnings. I therefore enter judgment in favour of plaintiffs as claimed, as the**

Defendant has no reasonable or any defence to this action".

Thus, from the above findings of the trial court, failure to attach documents to the affidavit was far from being the reason or withholding leave to the appellant to defend the suit.

On its part, the court below after considering the above findings of the trial court, had this to say at page 6 of the record as below:-

> **"The defence set upon by the appellant was a sham defence and was rightly, rejected by the trial court".**

In fact looking at the judgment of the trial court, there does not seem to be anywhere where the trial court attributed to the non-attachment of some documents to the defendant/appellant's affidavit, as the reason why it withheld or declined to grant leave to the appellant to defend the suit or why it refused to transfer the Undefended List suit to the general cause list. *(Pp 327 - 328 Paras H - E).*

6. *Court never made the assertion that affidavit was hearsay.*

I think if one closely looks at the entire proceedings, especially the judgment of the trial court, one can say that the latter or trial court never made the assertion that the affidavit supporting the notice of intention to defend the suit was hearsay. The trial court attributed its reason for withholding leave to defend, on non-presentation of sufficient materials before it as would warrant or justify it to use its discretion to grant the leave to defend. There was nowhere it was stated by the trial court that it rejected the request to grant leave to defend, because the evidence in the affidavit was hearsay. The refusal to grant the leave to defend as I posited above was purely based on the backdrop that the lower court held that the defence set upon by the appellant was a sham hence it held that the trial court was right in rejecting such purported defence presented by the appellant. *(Pp 328 - 329 .Paras H - B).*

Per Sanusi (JSC)

"I have also closely considered the arguments advanced by both parties learned counsel on the issue of some of the averments raised in the supporting affidavit being or amounting to hearsay evidence. As I stated earlier, the trial court gave its reason for refusing to grant the leave to defend in its Judgment and such reasons did not accord with the allegation that some of the paragraphs amounted to hearsay evidence and therefore inadmissible. To me, that issue of the said paragraphs of the affidavit being or amounting to hearsay evidence is of no moment since that was not the substratum of the decision of the trial court. It is however noted by me, that there was no further affidavit filed to challenge

the averments in the paragraphs under reference in the supporting affidavit filed by the appellant/defendant. It is also noted by me, that despite the absence of any notice of intention to urge the court below to affirm the decision of the trial court on other grounds besides the ones relied on by the trial court, the court below dealt at lengths with the averments in the paragraphs under reference where it stated thus, inter alia:-

> **"A look at the affidavit in support of Notice of Intention to defend reproduced above show that the deponent deposed to all material facts not from his personal knowledge but from information availed him by Appellant's counsel and paragraphs 3 to 14 of the said affidavit all contain acts not within the knowledge of the deponent but information passed to him not from his employer, the Appellant, but from counsel".**

In any case dispite the above observation or findings by the court below, the same court found that the defence posed by the defendant/appellant was a sham as earlier found by the learned trial Judge. It is on that backdrop, that I also regard the issue of hearsay delved into by the lower court as of no moment, since both courts after duly considering the affidavits evidence, resolved or arrived at the correct conclusion that the defendant/appellant's defence was a sham and that no sufficient material was placed before the trial court, hence the trial court rightly denied leave to the appellant to defend the suit, which in my view, was correct. It is also for these reasons that I resolve both the second and third issues for determination against the appellant herein. *(Pp 329 - 330 .Paras C - B).*

7. *When variation of contract must be valid*

There is nothing to be gained by saying, that the submission of the learned senior counsel for the appellant that the agreed percentage payable to the respondents for the recoveries as duly agreed upon by the parties, was 18% and not 5% as presented by the respondents might be its reason for conceding to the payment of the lesser sum of 5%, amounts to variation. For the variation of the agreed sum claimed by the respondents to be valid therefore, the appellant must be informed in writing and it (the latter) must also accept the new or lesser amount of their claim in writing for same to be valid and enforceable, since it is a fresh agreement. It is trite law that agreement for variation of an existing contract must possess the basic characteristics of a valid contract which are known to be offer, acceptance and consideration. See IDUFUEKO VS. PFIZER

PRODUCTS LTD AND ANOR (2014) LPELR 22999 (SC; UNITY BANK PLC VS. OLATUNJI (2015) 5 NWLR (Pt. 1452) 203 at 242.

Now in this instant case, it is a clear as crystal, that vide the correspondences between the parties the agreed sum to be paid for recoveries was 18% and not 5%. That was what the parties accepted. It was based on such agreement that the respondents did their own part of the obligation. The respondents made a move and did claim 5% instead of the agreed 18% payment which was never agreed upon by the appellant, even though it was a reduction of the burden on the obligation on it, the appellant.

However, there appears to be no breach on the part of the respondents in the transaction since they had duly executed the job assigned to them by the appellant creditably well. I do not think it will meet the Justice of the matter to say that the claim for lesser percentage as their entitlements would completely vitiate the entire agreement. The justice of the case is that the court should enforce or revert to the original percentage of 18% payment on the recoveries and recoverable as earlier agreed upon, instead of the 5% reduced amount which as I stated earlier, was never agreed upon in writing and accepted by the appellant since the latter appears to reject it. It will amount to sheer injustice to hold otherwise, since the respondents had apparently fulfilled or satisfied their obligation to the satisfaction of the appellant while the latter reneged its obligation by failing or refusing to pay them their hard-earned entitlements. It is my view therefore, that the lower court had rightly affirmed the judgment entered in favour of the respondents. The fourth issue is therefore hereby resolved against the appellant. *(Pp 331 - 332 Paras A - A).*

8. *When a pre-judgment interest can be awarded*

I have closely examined the Writ taken by the plaintiffs (now respondents) which was filed at the trial court and noticed that such claim of interest was really made by the plaintiffs/respondents against the appellant as defendants thereat.

The law is well settled that before a pre-Judgment interest can justifiable be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally pleaded and proved. See AG Ferrero & Company Ltd vs. Henkel Chemicals Nigeria Ltd (2011) LPELR – 12(sc); Adeyemi vs. Lan Baker Nig Ltd (2000) 7 NWLR (Pt. 663) 33 at 48. *(P 332 Paras D - F).*

9. *Court may grant pre-judgment interest even when not pleaded or prove.*
It is however a valid law, that a court can still grant pre-Judgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest like in this instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his Judgment. See Petgas Res Ltd vs. Mbanefo (2007) 6 NWLR (Pt. 1031) 545. *(P 332 Paras G - H).*

10. *The purport of Ord. 42 Rule 7 of the Federal High Court Rules*
In the present case, the respondents had for quite a long time, submitted their final report to the appellant but the later deliberately refused or neglected to pay them their hard-earned entitlement as agreed upon. Again, by Order 42 Rule 7 of Federal High Court (Civil Procedure) Rules 2000, the trial court has the power to award judgment interest. The provisions read thus:

> **"The court at the time of making any Judgment or order or at any time after wards, may direct the term with which the payment is to be made or other act is done, reckoned from the date of the Judgment or orders, or from some other time as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any Judgment, commencing from the date thereof or afterwards, as the case may be"**

In view of the above provisions, the trial court was therefore right in making the award of interest. The court below was also correct when it affirmed the trial court's order for the award of the said interest in the instant case. As a corollary, this issue must be and is also hereby accordingly resolved against the appellant. *(P 333 .Paras A - D).*

11. *The purport of waiver*
To my mind, waiver or acquiescence presupposes that the person is to be bound where he is fully cognizant or aware of his rights, yet he neglects to enforce such rights, or chooses to benefit instead of another, either by both of which he might claim. See Auto Import Export vs. Adebayo (2005) 19 NWLR (Pt. 959) 44. It is my considered view that waiver is an issue of law, and it is an elementary principle of law, that parties do not plead law but only facts.

The facts exposed by the respondents clearly show that the appellant had

never timeously complained about the late submission of the reports until when the suit was instituted at the trial court. It is my considered view that failure to complain timeously amounted to waiver of the such delay or late submission of the report to it by the respondents as rightly held by the trial court and later endorsed by the learned Justices of the court below. This issue is also hereby resolved against the appellant.

I must state here, that I have duly perused the Appellant's Reply Brief. The said Reply Brief filed by the senior counsel on behalf of the appellant merely contained re-arguments, repetition and or fine-tuning of the arguments earlier proffered in the appellant's main brief. That is not the purport of a Reply brief at all. *(Pp 333 - 334 Paras I - E).*

12. *Attitude of Supreme Court to concurrent findings*

Finally, it is noted by me, that there are concurrent findings of two lower courts in this instant case. As a matter of practice and policy, this court does not normally interfere with or disturb the concurrent findings of two lower courts except on special or exceptional at circumstances, such as where the findings are either perverse or there is misconception of facts, or misapplication of law None of these viruses is prevalent in this case, hence I must refrain from tempering with the findings of the two courts below. *(P 334 Paras E - F).*

13. *The purpose of undefended list procedures*

The procedure under the undefended list is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. So, where the plaintiff satisfied the court with affidavit evidence which the defendant cannot answer, the court would enter judgment for the plaintiff, thereby avoiding a full blown trial with the usual expenses, frustrations and delay. ON the other hand if the defendant files an affidavit which discloses a defence on the merit, he would be granted leave to defend by the court. It prevents worthless and sham defences. See M.C. Investment Ltd & Anor vs. C.I. & C.M. Ltd (2012) 6 SC (Pt. i) p. 188

Both courts below found that the respondents were entitled to their fees for consultancy services. This court agreed with the concurrent findings of both courts below. The attitude of the appellant has been to dribble and frustrate the respondents. Denying them the judgment sum. I am satisfied that the appellant has no defence to the respondents claim, and it is for sham defences such as this that the undefended list was designed for. *(P 335 .Paras B - E.).*

14. *Action was within the jurisdiction of Federal High Court.*
A glance at the claim and the accompanying materials show that by letters dated 22nd January 2003 the appellant separately instructed the respondents to reconcile the position of the concessions it gave to Intel Services Limited, Nigeria, Liquefied Natural Gas Ltd and Mobil Producing Nigeria Unlimited. It was that decision of the appellant to reconcile the position of the concession that gave rise to the case and in getting to that policy decision appellant utilized the expertise of the respondents in the investigative activity. In giving Notice of Intention to Defend the appellant had stated that its reason is that the Federal Executive Council had referred all contracts awarded by it to the EFCC and the Federal Executive Council has also placed an embargo on payment of contracts awarded during the period which was an administrative decision even though that of the Federal Executive council. Clearly what was at play was an administrative act of a Federal Government Agency within the purview of section 251 of the CFRN and so in the exclusive jurisdiction of the Federal High Court I refer to Oguebego vs. PDP (2016) 4 NWLR (Pt. 1503) 446; Goerge vs. FRN (2014) 5 NWLR (Pt. 1399) page 1.

A clearer view on this issue is seen in the case of Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405 at 427 wherein my learned brother, I. T Muhammad JSC stated thus:-

> **"The Constitution of the Federal Republic of Nigeria 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. Section 251 (1) (p) (q) ® and (s) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)"**

The situation herein is well placed in the administrative and management activity of the appellant and there is no running away from the fact that it is a matter the Federal High Court not only has jurisdiction to deal with but an exclusive jurisdiction and so the appellant cannot be wishful thinking covert to the matter to a simple contract so as to take it out of the powers of adjudication of the Federal High Court. The consequence is that the Federal High Court was well placed to assume jurisdiction which it correctly did and that is the end of the debate in that regard. The issue is resolved against the appellant. *(Pp 339 - 340 Paras C - B.).*

15. *Plaintiff is not to file affidavit to controvert affidavit of defendant in his notice of intention to defend.*
Again to be said is that in an Undefended List Procedure it is not permitted for a

Plaintiff to file an affidavit to controvert facts contained in the affidavit of the defendant in support of the Notice of Intention to Defend. It is a matter left for the court to determine on what is already in, if it should transfer the suit to the general cause list or determine it on the claim of the plaintiff in the light of a worthless attempt at defence in the supporting affidavit of Notice to Defend where it is available. See Odu vs. Agbor – Hemeson (2004) FWLR (Pt. 188) 935 where the court stated as follows:-

> **"Admittedly, the rules under the undefended list procedure do not expressly bar the use of further affidavit as submitted by learned counsel to the appellant but with profound respect to counsel. <u>It is not contemplated by the said procedure that triable issues raised by the defendants' affidavit should be rebutted or controverted by a further affidavit by the plaintiff as was done in the instant case</u>. All that the trial court is enjoined to do if the defendants' affidavit in support of the notice to defend discloses a defence is to transfer the suit to the general cause list for hearing and determination. There is no room for a further affidavit by the plaintiff to controvert the defendant's affidavit as such will lead to trial and thus defeat the objective of the speedy trial which the undefended list procedure is intended to achieve. The court below was therefore eminently justified in striking out the appellants' further affidavit."** *(Pp 342 - 343 .Paras E - C).*

16. *Failure of plaintiff to controvert defendant averment does not amount to admission.*
Again on the point is the case of Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd (2002) FWLR (Pt. 121) 1913 where the court at p. 1922 held as follows:

> **"In the present case, it is very important to further stress that the defences raises by the respondents with regard to their claims for set-off of U.S $9,000.00 and 2% commission against the appellant, while clearly disclosing a defence to the appellant's action on the merit, being plainly triable issues, cannot possibly be determined under the undefended list procedure, as the appellant is disputing the claim. The failure of the appellant to file a further affidavit to controvert the defences raised by the respondents in this respect therefore cannot be regarded as admission of the claims, as the appellant is not at all required to file such further affidavit under Order 23 of the High Court (Civil Procedure) Rules. The learned trial judge was therefore in grave error to have regarded the failure of the appellant to react to the claim of the respondents that the set-off being claimed by the**

> **respondents is part of the transaction between the parties that gave rise to the appellant's case, the respondents' claim must be proved by evidence before it can be regarded as established which would necessitate the hearing of the entire case or pleadings in order to allow each party the full opportunity of proving the relevant claims".** *(P 343 Paras C - I).*

17. *The purport of concept of waiver*

There is no use belaboring a point that is manifestly established by the documents or evidence before the court to the effect that there was an existing contractual relationship between the appellant and respondents arising from the letters as in the Record. It was based on these contractual agreements that respondents accepted the offer and carried out the assignment outlined in the said letters without the appellant raising an eyebrow only to change course after the completion of the work and submission of the bill of charges.

It follows that this later complaint by the appellant that respondents did not execute the contract within the agreed 35 days has lead to the conclusion from the conduct of the appellant that it has waived that completion of contract within 35 days. See the case of Fasade vs. Babalola (2003) 11 NWLR (Pt. 830) 26, Supreme Court held as follows:

> **"The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both. The exercise has to be a voluntary act. <u>There is little doubt that, a man who is not under any legal disability should be the best judge of his own interest, if therefore, having full knowledge of the rights, interests, profits or benefit conferred upon or accruing to him by and under the law, but he intentionally decides to give up at these, or some of them, he cannot be heard to complain afterwards</u> that he has not been permitted to the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waited those rights".** See also the case of **Adecentro (Nig) Ltd. vs. C. OAU** (2005) 15 NWLR (Pt. 948) 290.

The only logical conclusion is that appellant is stopped from complaining about the none completion within 35 days and so has lost out therein.

On the matter of pre-judgment interest, the law is clear that such interest is awarded where there is an agreement for payment of interest, in which case a

claim as such must be pleaded and proved as it would not do to just state a claim for pre-proof of same. However a court can grant pre-judgment interest on a monetary or liquidated sum awarded to a successful party even where such a party did not plead or adduce evidence to prove it as such interests naturally accrue from the failure to pay the sum involved over a period of time thereby depriving a party from the use and enjoyment of the sum involved. That in my humble view is substantial justice. I make reference to the case of Adeyemi vs. Lan and Banker (Nig) Ltd (2000) 7 NWLR (Pt. 663) 33 pg 48. Paras D-E, it was held thus:-

> **"…The law on pre-judgment interest is that the award must be based either on statute, contract or mercantile custom or equity and the plaintiff must plead the basis and lead satisfactory evidence. That is so. But the law also recognizes the right to interest of a plaintiff in a claim for the return of money arising from commercial transaction particularly where the defendants has held the money of the plaintiff for some time. In a situation arising from commercial matters I should think that a party holding on to the funds of another for so long without justification ought to pay him compensation for so doing."** *(Pp 345 - 347 Paras H - D).*

18. *A trial court can award pre-judgment interest where approved by rules of court.*
See also Petgas Res. Ltd vs. Mbanefo (2007) 6 NWLR (Pt. 1031) 545. A trial court can award judgment interest. The authority to award judgment interest is enshrined in the Rules of Court. Please see the case of B.E.G.H. Ltd vs. U.H.S & L. Ltd (2011) 7 NWLR (Pt. 1246) 246. The relevant position contained in the Federal High Court (Civil Procedure) Rules 2000 is found in Order 42 Rule 7 this states as follows:-

> **"The court at the time of making any judgment or Order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be done, reckoned from the date of the judgment or Order, or from some other point of time, as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any judgment, commencing from the date thereof or after wards, as the case may be."**

On the final point is that it is too late in the day for the appellant to complain about the report and that delay in complaint has constituted a waiver which needs not be pleaded to apply. See Ekundayo vs. F.C.D.A (2015) LPELR –

24512 Auto Import Export vs. Adebayo (2005) 19 NWLR (Pt. 959)44. *(P 347 Paras D - I).*

Representation
Bayo Osipitan (SAN), with A.M Kayode C.I.A Ofoegbunam and Wole Aroge for the Appellants
Peter Olomola for the Respondents

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): This is an appeal against the Judgment of the Lagos division of the Court of Appeal (lover or court below) delivered on 8th May 2009 which dismissed the appeal by the appellant before it. The brief facts giving rise to the appeal as could be gathered from the record of appeal are summarized below:
The plaintiffs now respondents, approached the Federal High Court Lagos by filing a suit under the undefended list procedure claiming the under listed reliefs.

(a) An order directing the defendant (now appellant) to pay the sum of USD9, 186,701 to the plaintiff being the agreed fee for the consultancy services rendered by the plaintiffs/respondents to it (the appellant)

(b) Interest on the said sum of USD9,186,701= at the rate of 10% from 27th April 2004 until final liquidation of the debt.

(c) An order directing the defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services entered into by the plaintiffs to the Defendant;

(d) Interest on the sum of #144,303,981 = at the rate of 10% per annum from 27th April 2004 until final liquidation of the debt.

It would seem to me that the respondents herein, based their cause of action on the alleged appellant's failure to pay them the agreed fees in respect of professional services they rendered to the appellant in conformity with letter dated 23/1/2003 in which the appellant employed the services of the respondents to reconcile the account position regarding concessions which the appellant gave to Inter Services Limited. Nigeria Liquefied Gas ((LNG) and Mobil Oil Producing Unlimited. The respondents claimed that they satisfactorily executed the job and have thereupon exhibited interim and final bills to the appellant but the latter failed or neglected to pay them despite repeated demands. That failure to settle the claims triggered the plaintiffs/respondents to institute the suit under the Undefended List Procedure against the appellant at the Federal High Court (the trial court) claiming the payment of the aforementioned sums.

Upon being served with the originating process, the appellant filed a Notice of Intention to defend the suit supporting same with an affidavit. The defences raised in the affidavit accompanying the Notice of intention to defend the suit, include the followings:-

(i) That the Respondents did not perform the contract satisfactorily;

(ii) That the Respondents did not execute the contract within the 35 days as earlier agreed upon;

(iii) That there was no extension of time;

(iv) Parties did not agree on the sum of USD9,186,701= and #144,303,981=00 as claimed by respondents

(v) That the respondents unilaterally varied the remuneration payable from 18% to 5% and that the variation was never agreed upon by the appellant.

(vi) That payment of fees was contingent upon recoveries of the identified short falls from the affected companies and no such recoveries were made, hence no money was due for payment to the respondents by the appellant.

In its Judgment, the trial court held that all the above defences did not call for the transfer of the suit filed under the Undefended List procedure to the General Cause List, especially in view of the appellant's failure to exhibit documents in support of the affidavit supporting the notice of Intention to defend the suit. In the result, the trial Judge found in favour of the respondents herein, as plaintiffs thereat.

Aggrieved by the Judgment of the trial court, the appellant appealed to the Court of Appeal, Lagos division (the lower court or court below) which dismissed the appellant's appeal and upheld the decision of the trial court.

Piqued by the Judgment of the lower court, the appellant further appealed to this court initially, the learned appellant's counsel filed a notice of appeal containing two grounds of appeal. However, with leave of this court, the appellant's learned counsel sought and was granted leave to amend its original notice of appeal. Sequel to that, it was allowed to amend and bring in an Amended Notice of Appeal which it filed on 26/6/2011. The Amended Notice of Appeal expanded the grounds of appeal from two to nine grounds. The appellant's learned counsel thereupon, filed an Amended Appellant's Brief of Argument on 13/2/2012 which was deemed filed on 26/11/2017. The said Brief of argument was settled by Prof Taiwo Osipitan, SAN. The learned senior counsel for the appellant distilled six issues for determination out of the nine grounds of appeal. The six issues for determination are reproduced hereunder:-

(1) Whether the Respondents cause of action, namely in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).

(2) Whether in the light of the concession by the Respondents on the Respondents' brief in the Court of Appeal that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal (without a Respondent's Notice to affirm the Judgment on different grounds) wrongly or rightly declined to set aside the Judgment of the Trial court (Ground 1)

(3) Whether the court below rightly or wrongly held that paragraphs 3-14 of Appellant's Affidavit in support of Notice of Intention to Defend the action, were hearsay evidence and therefore inadmissible (Grounds V and VI).

(4) Whether the court below rightly or wrongly confirmed the Judgment entered in favour of the Respondents by the trial court in the sum of USD9,186,201=00 and #144,303,981.00 (Grounds IV & IX)

(5) Whether absence of specific agreement or evidence of custom and trade usage on payment of pre-Judgment interest and on liquidated nature of the claim, the court below rightly confirmed the pre and post Judgment interests awarded against the appellant by the trial court (Ground VIII).

(6) Whether the courts below rightly or wrongly find that there was waiver of the time of completion of contract by the appellant (Ground VII).

As regards the respondents, an Amended Respondents' Brief of Argument filed on their behalf on 6/11/2017 which was settled by one Peter Olomola and Ifeanyi Clinton Uwa. Six issues for determination were also decoded therein, which I shall reproduce hereunder. The issues are:-

(A) Whether or not the Federal High Court had Jurisdiction to entertain the suit (Ground III)

(B) Whether having regard to the concession by the Respondents in

their brief of argument, that filing of Exhibits/Documents was not a condition precedent to the transfer of the suit to general cause list which formed the basis of the Judgment of the trial court, the learned Justices of the Court of Appeal should, without a Respondents' notice to Affirm the Judgment on different ground, not have set aside the Judgment of the court below (Ground 1)

(C) Whether the learned Justices of the Court of Appeal rightly or wrongly failed to act on the Appellant's unchallenged affidavit showing cause why the appellant should be allowed to defend the suit. (Grounds v and vi)

(D) Whether the court below rightly or wrongly affirmed the judgment entered in favour of the Respondents by the trial court in the sums of USD 9,186,201.00 (sic) and #144,303,981.00 (Grounds IV & IX)

(E) Whether or not the lower court was right to have affirmed the decision of the trial court to award pre and post Judgment interest (Ground VIII)

(F) Whether or not the court below was right to have found that there was waiver of the time clause by the appellant. (Ground VII)

Submissions of Learned Counsel of the Appellant on Issues For Determination

ISSUE NO. 1

The first issue raised by the appellant relates to issue of jurisdiction even though it was never raised at the two courts below. As rightly submitted by the learned appellant's counsel, issue of jurisdiction can be raised at any time and before any court including this apex court and same issue can also be raised by the court ***suo motu.*** The learned appellant's counsel submitted that before raising this issue in this court, he sought and obtained leave of this court to raise the issue of jurisdiction for the first time before it. The learned counsel conceded that the Respondents as plaintiffs at the trial court, sued at the Federal High Court, and their cause of action was for recovery of sums of money allegedly due to them from the appellant, according to him, under contract of service rendered to the appellant. He referred to the endorsement on their statement of claim at page 5 of the record of appeal. He submitted that both the trial court and the court of appeal (i.e the lower court) made finings in that regard, in that both courts below in their Judgments/findings referred to the entire

transaction between the plaintiffs and defendant now respondents and appellant respectively as "a contract".

It was further submitted on behalf of the appellant, that it was evidentially shown by the Originating Summons, statement of claim and the Judgments of the two lower courts, that the cause of action in the suit right from the outset was grounded on contract of service relating to recovery of payment allegedly due to the respondents in respect of services contract rendered by the respondents herein, for the benefit of the appellant's letters of request.

The learned counsel for the appellant further argued that since the respondent's cause of action pertains to or was based on simple contract, it thereupon, becomes outside the jurisdiction of the Federal High Court (trial Court) as provided by Section 251 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which clearly prohibits the Federal High Court from assuming jurisdiction on cause of action based on or relating to simple contract. Learned senior counsel on the above submission referred to the underlisted Judicial authorities which decided that case of simple contract devoid of statutory flavor, notwithstanding the inclusion of the Federal Government or any of its agencies as parties, only the State High Court or High Court of the Federal Capital Territory has jurisdiction and NOT the Federal High Court. See the cases of **OMUORAH vs KRPC Ltd (2005) 6 NWLR (Pt. 621) 393 at 405 (pares A-D; ADELECAN O. ECULINE NV (2006) 12 NWLR (Pt. 993) 33 at 52 ITPP Ltd vs. UBN Plc (2006) 12 NWLR (Pt. 995) 504; FCE OYO vs. AKINYEMI (2008) 15 NWLR (Pt. 1109) 21 at 49; MINISTER OF WORKS vs. TOMAS NIG LTD (2002) 2 NWLR (Pt. 752) 744 at 777**. On the authorities of the above listed cases, the learned appellant's senior counsel, urged this court to hold that the trial court lacks Jurisdiction to entertain and determine the matter.

ISSUE NO. 2

Issue No. 2 deals with whether in the light of the concession by the respondents that filing of exhibits/documents is not a condition precedent to the transfer of the suit to general cause list.

On this second issue, the learned counsel to the appellant argued that it was needless for the appellant to exhibit documents to the affidavit attached to its notice of intention to defend the suit before being allowed to defend same. It referred to the reaction of the respondents' Counsel at page 109 of the record, paragraph 5 – 17 where he conceded to his notice for intention to defend the Judgment of the trial court, which was to the effect that the affidavit showing cause must contain documents/exhibits. He therefore submitted that once the respondents' confesses his inability to support the judgment of the trial court the court below should have set aside the judgment. He cited the case of LH LTD vs. SONEB ENT. LTD (2010) 4 NWLR (Pt. 1185)561 SC. He then urged this court to resolve this issue in favour of the appellant.

ISSUE NO. 3

Issue No 3 relates to whether the court below was right to hold that paragraphs 3-14 of the appellant's affidavit in support of the notice of intention to defend the action, was mere hearsay.

Learned senior counsel for the appellant referred to the judgment of the court below at pages 145-146 of the record and submitted that inadmissibility of paragraphs 3-14 of the affidavit in support of notice of intention to defend the suit, was not the basis of the judgment of the trial court. He therefore submitted that a respondent who desired to support the Judgment of a court on ground different from the ground relied upon by the trial court, must file a Respondent's Notice to affirm such decision on such different ground (s). See Order 2 Rule 2 of the Court of Appeal) Rules. He cited the case of D. A (NIG) AIED Ltd vs. Oluwadare (2007) 7 NWLR (Pt. 1033) 336 at 385

He submitted that contrary to the decision of the court below, the contents of the affidavit in support of notice of intention to defend were not exclusively based on some of the paragraphs of the affidavit in support of the notice of intention to defend which restated the contents of the documents which were before the trial court. He then urged this court to also resolve this issue in favour of the appellant.

ISSUE NO. 4

Issue No 4 pertains to whether the court below was right or wrong in confirming the judgment entered in favour of the respondents by the trial court in the sum of USD 9, 186,201.00 and 144,303,981.00.

Here, the learned counsel to the appellant argued that there was no consensus ad idem on the amount of money payable by the appellant to the respondents for the services allegedly rendered by them to the appellant. He argued that the appellant never agreed with the respondents to pay fee calculated at the rate of 5% of the recoveries or the amount recoverable and that 18% was what was agreed upon vide the letter of offer/engagement. He argued that the respondents unilaterally varied the terms of payment from the agreed 18% to 5%. He submitted that unless accepted, a counter offer is incapable of being enforced as a contract. He cited and relied on the case of NNSC v Africo Incorporation (1994) 3 NWLR (Pt. 332) page 392 at 344. He argued that the appellant deposed to the fact that the contract was not satisfactorily executed and the court below ignored the fact that the appellant expected at this stage, to the appellant grant leave to defend the suit to establish the merit of the defence it raised in the affidavit for showing cause. He then urged the court to resolve this issue in favour of the appellant.

ISSUE NO. 5

Issue No 5 deals with the award of pre-Judgment interests. Learned silk for the appellant argued that the respondents did not tender any evidence of agreement by the appellant to pay them interest on the outstanding professional fee and that there was no evidence of custom or

A trade usage which entitles the respondents to charge interest on the outstanding professional fee.

He submitted that the 10% pre Judgment interest award in favour of the respondents is not liquidated sum and the court is limited to the Judgment in respect of liquidated and the ascertained sum of money. He urged the court to resolve this issue in favour of the appellant.

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ISSUE NO. 6

Issue No 6 queries whether there was waiver of time of completion of the contract.

The learned counsel to the appellant argued that the court below wrongly applied the doctrine of waiver and acquiescence against the appellant, when the respondents did not C plead waiver and acquiescence as the basis of their claims at the trial court. He cited the case of **Bank of the North Ltd vs. Yau (2001) 10 NWLR (Pt 721) page 408 at 441** paragraph f. He submitted that where waiver has not been specifically pleaded, the respondent who did not plead waiver is not entitled to rely on same as a defence or claim. He cited the case of **Okonkwo vs. CCB paragraph C (2003) 8 NWLR (Pt. 822) page 47 at 407-408H-B**. He D urged the court to resolve this issue in favour of the appellant and to finally allow this appeal.

In his response to the argument of the learned appellant's counsel, the learned counsel to the respondents, as I stated supra, also formulated 6 issues for determination of the appeal. Their counsel's submissions go as below:-

E **Submissions of Learned Counsel For Respondents**

ISSUE NO. 1

The respondents' Issue No 1 deals with whether or not the Federal High Court had jurisdiction to entertain the suit. The learned counsel for the respondents argued that the cause of action as can be seen from the originating processes, relates to the administration or F management and control of the appellant and not contract per se. He referred to Section 251 of the 1999 Constitution (as amended) and submitted that the claim of the respondents at the trial court bordered on the administration or management control of the appellant. He submitted that even if action was founded on a contract, the Federal High Court would still have jurisdiction to entertain same, as the court has jurisdiction to entertain all matters that G involve the Federal Government or any of its agencies. He urged this court to resolve this issue in favour of the respondents or in the alternative to transfer the matter to High Court of Lagos State, if this court holds that the Federal High Court has no jurisdiction in accordance with Section 22(2) of the Federal High Court Act. 2004.

H ***ISSUE NO. 2***

Issue No 2 relates to whether filing of exhibit/documents was a condition precedent to the transfer of a suit to general cause list. On this issue, the learned counsel to the respondents argued that the suit was not transferred to the general cause list not because the appellant did not attach documents to its affidavit, but simply because the appellant did not place any

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material before the court which discloses any defence to the suit.

Regarding the contention of the appellant that the respondents' argument that the appellant's affidavit in support of notice of intention to defend, contains hearsay evidence, that point was not raised at the High Court. He referred to page 52 of the record where the respondents were reported to have argued that (See pages 543 at 550 of the Record. He also referred to page 62 of the record and submitted that it is misleading for the appellant to say that the issue of affidavit for being hearsay was not raised by the respondents at the High Court and that it was also not correct that the respondents urged the court to give judgment based on fresh ground that the affidavit evidence is hearsay. He urged the court to resolve this issue in favour of the respondents.

ISSUE NO. 3

Issue No 3 pertains to whether the court below was right or wrong to have acted on unchallenged affidavit showing cause why the appellant should be allowed to defend the suit.

The learned counsel to the respondents submitted that in the Undefended List Procedure, a plaintiff is not permitted to file any affidavit to controvert facts contained in the affidavit filed in support of the notice of intention to defend and that it is left for the court to determine the suit based on the facts supplied by the parties whether Judgment should be given in favour of the plaintiff or to transfer the suit to the general cause list. He therefore submitted that failure of the respondents to file further affidavit to challenge the averments in the appellant's affidavit in support of the notice of intention to defend, does not amount to an admission of facts stated therein. He cited referred to the Judgment of the case of **S.A.V vs. Tropical Industry Co. Ltd (2002) FWLR (Pt. 121) 1913.**

Learned counsel contended further, that the respondents are firms of chartered accountants and not recovery agents and that the only means of recovery known to law is through litigation or arbitration and that it will be illegal to instruct the respondents to do recovery. He urged the court to resolve this issue in favour of the respondents.

ISSUE NO. 4

Issue No 4 deals with whether the court below rightly or wrongly affirmed the Judgment entered in favour of the respondents in the sum claimed.

He conceded that the appellant agreed to pay the respondents 18% of recoveries but due to the high amount discovered and in order not to smile a hold in the pocket of the appellant, the respondents wrote to inform the appellant that they were willing to accept a reduced amount of 5% as opposed to the initially agreed 18%. He referred to the contention of the appellant that the respondents varied the contract by reducing the fee and therefore no contract because of the variation. In response to this contention, he submitted that since the appellant is contending that they do not accept the reduction, their recourse has to be made to the old and existing contract. He urged this court to give effect to the earlier contract and hold

A that the respondents are entitled to same. On non-satisfactory execution of the contract, he submitted that the appellant failed to substantiate the claim that the contract was not performed satisfactorily. He argued that there was never at any point in time, the appellant had communicated its alleged dissatisfaction to the respondents services rendered to it. He therefore submitted that the issue of non-satisfactory performance of the contract raised by
B the appellant can, at best, be described as an afterthought or a calculated bid to abdicate in their obligation to pay for the services rendered to it.

On the issue of no recoveries to pay; he argued that the instruction never commissioned the respondents to recover the sums in the Report. He submitted that the respondents are firms of chartered accountants and not a recovery agent and all they were
C instructed to do was to reconcile the appellant's account as state in the letter dated 22/1/2003.

On the issue of non-execution the contract within the agreed 35 days, he submitted that a reasonable conclusion from the conduct of the appellant is that it waived that condition. He cited the case of **FASADE vs. BABALOLA (2003) 11 NWLR (Pt. 830) 26.** He argued that the respondents submitted Interim Report on 16/5/3003, while the Final Report was
D submitted on 27/4/2004 and the appellant without saying that it came in too late a time, hence that was unacceptable. He therefore submitted that the appellant is stopped from raising these issues of contract not being executed within 35 days. He urged the court to resolve this issue in favour of the respondents.

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ISSUE NO. 5

Issue No 5 deals with the award of pre and post judgment interest.

The learned counsel for the respondents submitted that a trial court can award pre-Judgment-interest, as the authority to award judgment is contained in the Rules of Court. He
F referred to Order 42 Rule 7 of the Federal High Court (Civil Procedure) Rules 2004 and the case of **BEGH vs. UHS AL LTD (2011) 7 NWLR (Pt. 12246) 246**.

He therefore submitted that the trial court acted within the ambit of its Rules in awarding interest on the claims of the respondents.

G ***ISSUE NO. 6***

Issue No 6 queries whether or not the court below was right to have found that there was waiver.

The learned counsel to the respondents submitted that the court below was right, having considered the entire facts before reaching to the conclusion that it was too late in the
H day to raise the issue of late submission of reports and that this complaint of the lateness was raised only after the suit was instituted hence, that attitude constituted a waiver. He cited the case of **AUTO IMPORT EXPORT vs. ADEBAYO (2005) 19 NWLR (Pt. 959) 44.**

On the contention of the appellant that waiver is a defence which ought to be pleaded, he contended that a party need not plead waiver in their pleadings in order to enjoy the
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defence. He referred to the case of **Auto Import Export v Adebayo (2005) supra**. He again submitted that issue of waiver is an issue of law and there is therefore no legal obligation on the respondents to have pleaded same. He then urged this court to resolve this issue in favour of the respondents and to finally dismiss the appeal.

Reply of the Appellant

Reply of the appellant on issue 1, relates to facts on issues no 2 and which had already been argued in the appellant's main Brief argument.

On issue Nos. 1 and 2, the respondents' counsel argued that the cases relied upon by the appellant cannot apply to the instant case, as none of those cases deal with pre-Judgment interest awarded as ordered under Undefended list procedure.

On issue No. 6, he argued that in Auto Import Export's case, the suit was commenced by parties on Award and that pleadings merely filed and evidence led at the trial which made it easy for the trial court to resolve the issue of waiver. He therefore submitted that the issue of whether or not the appellant waived the late completion date is not the one that should have been summarily dismissed by the learned trial Judge. He then urged this court to dismiss the appeal.

Resolution of Issues For Determination

The first issue for determination raised in the appellant's brief of argument and the corresponding issue in the respondents' brief touch on issue of jurisdiction. As rightly pointed out, the parties in this appeal did not raise the issue of jurisdiction in the two courts below. At any rate and notwithstanding the fact that issue of jurisdiction was never raised in the two courts below, in view of its fundamental nature and also since the law is trite that issue of jurisdiction can be raised by any of the parties at any stage of the proceedings even at the Supreme Court, such issue must first of all be addressed by me. See **Francis Durwode vs. State (2000) 15 NWLR (Pt. 691) 467**. I must however stress here, that it is always ideal and better that issue of jurisdiction is raised at earliest stage of the proceeding in order to avoid wasting the precious time of the court as seemingly done by the appellant in this appeal at the lower court.

The approved practice is that when issue of jurisdiction is raised, the court must carefully peruse the claim of the plaintiff in order to determine the crucial issue of jurisdiction. See **Shell BP Ltd vs. Onasanya (1979) NSSC 334; Opiti vs. Ogbewi (1992) 4 NWLR (Pt 234) 184 at 195; Adeyemi vs. Opeyori (1976) 9-10 SC 3 at 49.** This is very important, because it is well settled law, that where the court lacks jurisdiction to adjudicate on a cause or matter, everything done in such want of jurisdiction, is a nullity. See **Mustapha vs. Governor of Lagos State (1987) NWLR (Pt. 58).**

It has long been a settled law, that when a court is faced with question as to whether it has jurisdiction in a matter or not, it is incumbent upon it, to refer to the subject matter of the claim as pleaded by the plaintiff. In the present case, the claim on which the plaintiffs (now

respondents) before the trial court upon which they prayed for the determination of same are reproduced hereunder:-

(a) An order directing the Defendant to pay the sum of USD 9,186,701 to the plaintiffs being agreed fees for the consultancy services rendered by the plaintiffs to the Defendant.

(b) Interest on the said um of USD 9,186,701 at the rate of 10% from 27th April 2004 writing the final liquidation of the debt.

(c) An order directing the Defendant to pay the sum of #144,303,981.00 to the plaintiffs being the agreed fee for the consultancy services rendered by the plaintiffs to the Defendant

(d) Interest on the sum of #144,303.981 at the rate of 10% from 27th April 2004 writing the final liquidation of the debt (emphasis supplied)

My understanding of the above claims, is that the defendant (now appellant) employed the plaintiffs/respondents to render some consultancy services on its behalf on the agreed sum claimed which said services were rendered by the respondents/plaintiffs, but the defendant/appellant failed or neglected or refused to pay. By not paying the sum claimed, the defendant (now appellant) therefore became indebted to the plaintiffs/respondents. The subject-matter or cause of action, to my mind, is and remains more or less a claim for recovery of such debt owed by defendant/appellant. Therefore in my view even if the lower court referred to the said agreement to be a contract or simple contract such in true sense, is a misnomer or merely a matter of semantic because such transaction does not amount to a simple contract as the appellant is insinuating in order to oust the jurisdiction of the Federal High Court. It is also my considered view, that a close look at the cause of action, leave no one in doubt, that the cause of action related to or was transmitted out of or from administration or management and control of the appellant/company.

The jurisdiction of the Federal High Court especially as it relates to the present suit/action is derived from the provisions of Section 251 (1) of the 1999 Constitution (as amended), which provides thus:-

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

(b) The administration or management and control of the Federal Government or any of its agencies"

From the facts of the instant case, as can be gleaned from the record of appeal, the appellant

herein, simply used its administrative powers and instructed vides its letter dated 22/1/2003, to assign the respondents to reconcile the concessions it earlier gave to Intel Services Limited Nigeria Liquefied Natural Gas Ltd and Mobil Production Nigeria Unlimited, because the appellant was desirous of reconciling the position of the concessions it earlier gave those named companies. There is no doubt that the respondents have rendered the service of reconciliation as consultants. I have read the cases of **Onuorah vs. K R PC Lt (2005) 6 NWLR (Pt. 921) 393 at 405; Adeleke O. Ecu-Line NV (2006) 12 NWLR (Pt 993) 33 at 52; IT PP Ltd vs. UBA PLC (2006) 12 NWLR (Pt 1109) 21 FCE Oyo vs. Akinyemi (2008) 15 NWLR (Pt 1109) 21 and Minister of Works vs. Tomes Nigeria Ltd (2002) 2 NWLR (Pt 752) 74**, in which this court held that the Federal High Court lacks jurisdiction on matters relating to simple contract. However, as I posited above, the transaction executed by the parties in the present case did not pertain or relate to simple contract. Those cases are therefore distinguishable from the facts of the present case, hence those cases are not relevant or applicable to the facts in the present case. I accordingly so hold.

Again, there is no doubt that the appellant is an agency of the Federal Government, hence the trial court has jurisdiction to adjudicate in the mater by virtue of the provisions of Section 251(1) of the 1999 Constitution (as amended), contrary to the stance held by the learned senior counsel for the appellant. Having said so, I resolve the first issue against the appellant and in favour of the respondents.

ISSUE NO. 2

On the second issue, the appellant contends in its Amended Brief of Argument, that the trial court basically denied the defendant/appellant leave to defend the suit simply because it failed to attach documents to its affidavit in support of its Notice of Intention to defend the suit. On the other hand, the learned counsel or the respondents contended otherwise. It was argued on behalf of the respondents that the leave was not given to the appellant to defend the suit by the trial court simply because the appellant failed to place any material before the trial court which disclosed any defence to the suit. In the first place, I must state that it is not the correct position of the law, that a party who has filed a notice of intention to defend must, as a condition precedent attach a document in proof of or to disproof the deposition contained in the affidavit. All that the law requires is to provide sufficient or adequate facts in the said affidavit which call for thorough scrutiny or inquiry. In other words, attachment of documents by the appellant was/is not and was in fact, never given as the reason why the appellant was denied leave to defend the suit.

It needs to be emphasised here, that in an action brought under the Undefended List procedure, as in this instant case, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of his Notice of Intention to defend the suit. Once the court comes to the inevitable conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an Undefended suit and enter judgment accordingly without calling the defendant,

A even if present in court, to answer or be heard. See **HAIDO vs. USIMAN (2004)3 NWLR (Pt. 859) 62; NKWO MARKET COMMUNITY BANK NIGERIA LTD vs. PAUL EJIKEME UWABACHI OBI (2010) 14 NWLR (Pt. 1213) 169.** Also this court in the case of **ACB Ltd vs. GWAGWADA (1994) 4 SCNJ (Pt 2568)** held that the affidavit in support of the Notice of Intention to Defend must show that the grounds for asking to be heard in B defence, are not frivolous, vague or disquiet to delay the trial of the action and it must show that there is dispute between the parties as had been shown in this case.

From the record of appeal, it is clear from the judgment of the trial court, that non-attachment of the exhibits to the affidavit in support of the suit by the Appellant was not given as the reason why the trial court refused to grant leave to the appellant/defendant to defend C the suit. The actual reason for the refusal to grant such leave, was clearly stated by the trial court at page 69 of the record where it held thus:-

> **"In fact the defendant did not place any material before the court to show that he is serious with this case or that there is any substantive matter to be heard at trial. This, I believe, is just filed to frustrate the** D **plaintiffs, out of their legitimate earnings. I therefore enter judgment in favour of plaintiffs as claimed, as the Defendant has no reasonable or any defence to this action".**

Thus, from the above findings of the trial court, failure to attach documents to the affidavit was far from being the reason or withholding leave to the appellant to defend the suit.

E On its part, the court below after considering the above findings of the trial court, had this to say at page 6 of the record as below:-

> **"The defence set upon by the appellant was a sham defence and was rightly, rejected by the trial court".**

F In fact looking at the judgment of the trial court, there does not seem to be anywhere where the trial court attributed to the non-attachment of some documents to the defendant/appellant's affidavit, as the reason why it withheld or declined to grant leave to the appellant to defend the suit or why it refused to transfer the Undefended List suit to the general cause list. This issue is also resolved against the appellant.

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ISSUE NO. 3

On issue No 3, the learned appellant's senior counsel raised the question whether paragraphs 3 to 14 of the appellant's affidavits in support of notice of intention to defend the suit, were hearsay evidence and therefore not admissible. Here, the appellant hinged his submissions H on what it perceived as the respondents' contention at the lower court that the appellant's counsel or litigation clerk not being party to the transaction entered by the parties, then their evidence was hearsay and therefore inadmissible. I think if one closely looks at the entire proceedings, especially the judgment of the trial court, one can say that the latter or trial court never made the assertion that the affidavit supporting the notice intention to defend the suit

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A was hearsay. The trial court attributed its reason for withholding leave to defend, on non-presentation of sufficient materials before it as would warrant or justify it to use its discretion to grant the leave to defend. There was nowhere it was stated by the trial court that it rejected the request to grant leave to defend, because the evidence in the affidavit was hearsay. The refusal to grant the leave to defend as I posited above was purely based on the backdrop that
B the lower court held that the defence set upon by the appellant was a sham hence it held that the trial court was right in rejecting such purported defence presented by the appellant.

I have also closely considered the arguments advanced by both parties learned counsel on the issue of some of the averments raised in the supporting affidavit being or amounting to hearsay evidence. As I stated earlier, the trial court gave its reason for refusing
C to grant the leave to defend in its Judgment and such reasons did not accord with the allegation that some of the paragraphs amounted to hearsay evidence and therefore inadmissible. To me, that issue of the said paragraphs of the affidavit being or amounting to hearsay evidence is of no moment since that was not the substratum of the decision of the trial court. It is however noted by me, that there was no further affidavit filed to challenge the
D averments in the paragraphs under reference in the supporting affidavit filed by the appellant/defendant. It is also noted by me, that despite the absence of any notice of intention to urge the court below to affirm the decision of the trial court on other grounds besides the ones relied on by the trial court, the court below dealt at lengths with the averments in the paragraphs under reference where it stated thus, inter alia:-

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> **"A look at the affidavit in support of Notice of Intention to defend reproduced above show that the deponent deposed to all material facts not from his personal knowledge but from information availed him by Appellant's counsel and paragraphs 3 to 14 of the said affidavit all**
F **contain acts not within the knowledge of the deponent but information passed to him not from his employer, the Appellant, but from counsel".**

In any case dispite the above observation or findings by the court below, the same court found that the defence posed by the defendant/appellant was a sham as earlier found by the
G learned trial Judge. It is on that backdrop, that I also regard the issue of hearsay delved into by the lower court as of no moment, since both courts after duly considering the affidavits evidence, resolved or arrived at the correct conclusion that the defendant/appellant's defence was a sham and that no sufficient material was placed before the trial court, hence the trial court rightly denied leave to the appellant to defend the suit, which in my view, was correct.
H It is also for these reasons that I resolve both the second and third issues for determination against the appellant herein.

ISSUE NO. 4

This issue relates to the propriety of the affirmation by the lower court of the judgment of the

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A trial court in awarding in favour of the respondents, the sum of $9,186,201:00 and #144,303.981= . The appellant contends that there was no consensus ad idem on the exact amount payable to the respondents by the appellant for the services rendered to it (the appellant) by them (i.e. the respondents). He argued that it never agreed with the respondents to pay them 5% of recoveries or the amount recoverable as claimed by the B respondents. The appellant vehemently contended that what it agreed upon with the respondents as per its letter was simply 18% and NOT 5%. Therefore, the claim of 5% by the respondents tantamount to unilaterally varying the terms of payment from 18% to 5% and that also, amounted to counter offer by the respondents which, of course, require the acceptance of the appellant for same to be enforceable. He cited the authorities of **NNSC vs.** C **Agric Incorporation (1994) 3 NWLR (Pt. 332) 392 at 344;** Council of **Yaba Tech vs. Nigeria tag Contractor (1989)1 NWLR (Pt. 95) 99** Learned counsel for the Appellant contended that in the absence of any acceptance of the counter offer made by the respondents by the appellant on the 5% of recoveries, then the respondents can be said to have based their claims on a non-existent contract, since the basic principles of valid contract which are offer D and acceptance were absent. See **Innih vs. Ferado A & S Ltd (1990) 5 NWLR (Pt. 152) 604 at 622.**

Conversely, the respondents' learned counsel urged that the senior counsel's argument be discountenanced, even though he conceded that the appellant agreed to pay 18% of recoveries. However, in view of the high amount of discoveries and in order to E reduce the burden of payment of the 18% agreed upon earlier, the respondents intimated their willingness to reduce it to 5% only.

There is nothing to be gained by saying, that the submission of the learned senior counsel for the appellant that the agreed percentage payable to the respondents for the recoveries as duly agreed upon by the parties, was 18% and not 5% as presented by the F respondents might be its reason for conceding to the payment of the lesser sum of 5%, amounts to variation. For the variation of the agreed sum claimed by the respondents to be valid therefore, the appellant must be informed in writing and it (the latter) must also accept the new or lesser amount of their claim in writing for same to be valid and enforceable, since it is a fresh agreement. It is trite law that agreement for variation of an existing contract must G possess the basic characteristics of a valid contract which are known to be offer, acceptance and consideration. See **Idufueke Fizer Products Ltd and Anor (2014) LPELR 22999 (SC; Unity Bank PLc vs. Olubiyi (2015) NWLR (Pt. 1452) 203 at 242.**

Now in this instant case, it is a clear as crystal, that vide the correspondences between the parties the agreed sum to be paid for recoveries was 18% and not 5%. That was what the H parties accepted. It was based on such agreement that the respondents did their own part of the obligation. The respondents made a move and did claim 5% instead of the agreed 18% payment which was never agreed upon by the appellant, even though it was a reduction of the burden on the obligation on it, the appellant.

However, there appears to be no breach on the part of the respondents in the I

transaction since they had duly executed the job assigned to them by the appellant creditably well. I do not think it will meet the Justice of the matter to say that the claim for lesser percentage as their entitlements would completely vitiate the entire agreement. The justice of the case is that the court should enforce or revert to the original percentage of 18% payment on the recoveries and recoverable as earlier agreed upon, instead of the 5% reduced amount which as I stated earlier, was never agreed upon in writing and accepted by the appellant since the latter appears to reject it. It will amount to sheer injustice to hold otherwise, since the respondents had apparently fulfilled or satisfied their obligation to the satisfaction of the appellant while the latter reneged its obligation by failing or refusing to pay them their hard-earned entitlements. It is my view therefore, that the lower court had rightly affirmed the judgment entered in favour of the respondents. The fourth issue is therefore hereby resolved against the appellant.

ISSUE NO. 5

On this issue, the appellant queries the affirmation by the court below of the pre and post Judgment interest awarded by the trial court which the lower court endorsed. On this issue, the learned senior counsel for the appellant argued that the payment of such interest was never agreed upon by the parties. He also submitted that no evidence was adduced in support of the claim of such interests on the outstanding professional fees. He further argued that the respondents did not also lead evidence of any precedent on such payment based on any custom or trade as would justify their claim of such interests awarded by the trial court and endorsed or affirmed by the lower court.

I have closely examined the Writ taken by the plaintiffs (now respondents) which was filed at the trial court and noticed that such claim of interest was really made by the plaintiffs/respondents against the appellant as defendants thereat.

The law is well settled that before a pre-Judgment interest can justifiably be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally pleaded and proved. See **AG Terrene & Company Ltd vs. Henkel Chemicals Nigeria Ltd (2011) LPELR – 12(sc); Adeyemi vs. Lancuid Baker Nig Ltd (2000) 7 NWLR (Pt. 663) 3 at 48.**

It is however a valid law, that a court can still grant pre-Judgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest like in this instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his Judgment. See **Petgas Res Ltd vs. Mbaneto (2007) 6 NWLR (Pt. 1081) 545**.

A In the present case, the respondents had for quite a long time, submitted their final report to the appellant but the later deliberately refused or neglected to pay them their hard-earned entitlement as agreed upon. Again, by Order 42 Rule 7 of Federal High Court (Civil Procedure) Rules 2000, the trial court has the power to award judgment interest. The provisions read thus:

B **"The court at the time of making any Judgment or order or at any time after wards, may direct the term with which the payment is to be made or other act is done, reckoned from the date of the Judgment or orders, or from some other time as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any Judgment,**

C **commencing from the date thereof or afterwards, as the case may be"**

In view of the above provisions, the trial court was therefore right in making the award of interest. The court below was also correct when it affirmed the trial court's order for the award of the said interest in the instant case. As a corollary, this issue must be and is also

D hereby accordingly resolved against the appellant.

ISSUE NO. 6

On this issue, the appellant queries whether the court below was correct when it found that there was a waiver of time clause by the appellant. It is clear that vide the agreement entered

E into by the parties in the suit, the respondents were to fully execute the job assigned to them by the appellant within 35 days. However, they submitted their first report on 16/5/2003 and the second on 27/4/2002. The period of the submission of the final report was no doubt outside the agreed period of 35 days. It is note worthy however, that the appellant never complained to the respondents on the submissions of each of the first and final reports outside

F the 35 days earlier agreed upon.

Also when the bill of charges was presented to it, the appellant did not reject it or raise the issue of late submission of such reports at the time of the presentation of the bill of charges. The appellant merely picked or raised the issue of late submission of the reports after the suit was instituted at the trial court which was 2½ years after the submission of the

G final report to it by the respondents. The question is, "Could the attitude of the appellant in that regard amount to waiver?" To my mind, waiver or acquiescence presupposes that the person is to be bound where he is fully cognizant or aware of his rights, yet he neglects to enforce such rights, or chooses to benefit instead of another, either by both of which he might claim. See **Auto Export vs. Adebayo (2005) 19 NWLR (Pt. 159) 544.** It is my considered

H view that waiver is an issue of law, and it is an elementary principle of law, that parties do not plead law but only facts.

The facts exposed by the respondents clearly show that the appellant had never timeously complained about the late submission of the reports until when the suit was instituted at the trial court. It is my considered view that failure to complain timeously

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A amounted to waiver of the such delay or late submission of the report to it by the respondents as rightly held by the trial court and later endorsed by the learned Justices of the court below. This issue is also hereby resolved against the appellant.

I must state here, that I have duly perused the Appellant's Reply Brief. The said Reply Brief filed by the senior counsel on behalf of the appellant merely contained re-
B arguments, repetition and or fine-tuning of the arguments earlier proffered in the appellant's main brief. That is not the purport of a Reply brief at all.

Finally, it is noted by me, that there are concurrent findings of two lower courts in this instant case. As a matter of practice and policy, this court does not normally interfere with or disturb the concurrent findings of two lower courts except on special or exceptional at
C circumstances, such as where the findings are either perverse or there is misconception of facts, or misapplication of law None of these viruses is prevalent in this case, hence I must refrain from tempering with the findings of the two courts below.

On the whole, having resolved all the six issues for determination raised by the appellant against it, it is therefore my Judgment that the appeal is devoid of any merit. It fails
D and is accordingly dismissed by me. I affirm the Judgment of the lower court which had also rightly affirmed the judgment of the trial court. I award cost of #500,000 against the appellant herein, to be paid to the respondents.

Amiru Sanusi
E *Justice, Supreme Court*

RHODES-VIVOUR, (JSC):

I read a draft of the leading judgment delivered by my learned brother Sanusi, JSC. I agree with his lordship's reasoning and conclusions that the respondents' are entitled to their fees for consultancy services rendered to the appellant. I must comment on the procedure under
F the undefended list.

The procedure under the undefended list is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. So, where the plaintiff satisfied the court with affidavit evidence which the defendant cannot answer, the court would enter judgment for the plaintiff, thereby avoiding a full blown trial with the usual
G expenses, frustrations and delay. ON the other hand if the defendant files an affidavit which discloses a defence on the merit, he would be granted leave to defend by the court. It prevents worthless and sham defences. See **M.C. Investment Ltd & Anor vs. C.I. & C.M. Ltd (2012) 6 SC (Pt. i) p. 188**

Both courts below found that the respondents were entitled to their fees for consultancy
H services. This court agreed with the concurrent findings of both courts below. The attitude of the appellant has been to dribble and frustrate the respondents. Denying them the judgment sum. I am satisfied that the appellant has no defence to the respondents claim, and it is for sham defences such as this that the undefended list was designed for.

For these brief reasons as well as those more fully given by my learned brother
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Sanusi, JSC. I, too dismiss this appeal with costs of N500,000 (Five hundred thousand Naira) against the appellant.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amiru Sanusi JSC and to register the support I have for the reasonings. I shall make some remarks.

This appeal is against the judgment of the Court of Appeal Lagos Division or court below or lower court against the appellant in favour of the respondents under the undefended list procedure.

The facts leading to this appeal are well set out in the lead judgment and I shall not repeat them unless there comes a need to refer to any part thereof.

On the 13th day of February 2018 date of hearing, learned counsel for the appellant, Bayo Osipitan SAN adopted the brief of argument settled by Prof Taiwo Osipitan SAN, filed on 13th February 2012 and deemed filed on 26th September 2017 and a reply brief filed on 19th January 2018 and deemed filed on 13th February 2018 and six issues for determination were raised which are as follows-

(1) Whether the Respondents' cause of action, namely, action in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court (Ground III).

(2) Whether in the light of the concession by the Respondents (in the respondents' brief in the Court of Appeal) that the filing of Exhibits/Documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of Appeal (without a respondent's notice to affirm the Judgment on different ground) wrongly or rightly declined to set aside the Judgment of the trial court (Ground 1)

(3) Whether the court below rightly or wrongly held that paragraphs 3-14 of appellant's affidavit in support of notice of intention to defend the action were hearsay evidence and therefore inadmissible. (Grounds v and vi).

(4) Whether the court below rightly or wrongly confirmed the Judgment entered in favour of the respondents by the trial court in the sum of

USD $9,186,201.00 and N144,303,981.00 (Grounds iv & ix).

(5) Whether in absence of specific agreement or evidence of custom and trade usage on payment of pre-payment interest and unliquidated nature of the claim. The court below rightly confirmed the pre and post judgment interests awarded against the appellant by the trial court (Ground viii).

(6) Whether the courts below rightly or wrongly found that there was waiver of the time of completion of contract by the appellant.

Learned counsel for the respondents, Peter Olomola Esq adopted their brief of argument filed on 6th November 2017 and in it raised six (6) issues for determination, viz:-

1. **Whether or not the Federal High Court had the jurisdiction to entertain the suit. (Ground iii)**
2. **Whether having regard to the concession by the respondents in their brief of argument that filing of Exhibits/documents was not a condition precedent to the transfer of the suit to general cause list, which formed the basis of the judgment of the trial court, the learned justices of the Court of Appeal should, (without a respondent's notice to affirm the judgment on different ground) not have set aside the judgment of the court below (Ground 1)**
3. **Whether the learned justices of the Court of Appeal rightly or wrongly failed to act on the appellant's unchallenged affidavit showing cause why the appellant should be allowed to defend the suit (Ground v & vi)**
4. **Whether the court below rightly or wrongly affirmed the judgment entered in favour of the respondents by the trial court in the sum of USD $9,186,201.00 and N144,303,981.00 (Grounds iv & ix)**
5. **Whether or not the lower court was right to have affirmed the decision of the trial court to award pre and post judgment interest (Ground vii)**

For ease of reference I shall use the issues as crafted by the appellant.

ISSUE NO 1

Whether the Respondents' cause of action, namely, action in simple contract for the recovery of professional fees allegedly due to the respondents falls within or outside the Jurisdiction of the Federal High Court.

A Canvassing the position of the appellant, learned counsel contended that from the writ of summons, statement of claim, judgments of the trial court and Appeal Court that the plaintiffs/respondents cause of action is purely contractual i.e. recovery of payment allegedly due to the respondents in respect of services contract allegedly rendered by the respondents on behalf of and for the benefits of the appellant at the appellant's request.

B That the simple contract involving an agency of Federal Government herein is outside the jurisdiction of the Federal High Court in the wake of the restricted jurisdiction of it pursuant to section 251 of the 1999 Constitution of the Federal Republic of Nigeria. He cited **Onuorah vs. K.R.P.C. Ltd** (2005) 6 NWLR (Pt. 921) 393 at 405; **Adelekan O. Ecu-line NV** (2006) 12 NWLR (Pt. 993) 33 at 52 etc.

C Learned counsel for the respondents submitted that the determining factor as to whether or not the court is seised of jurisdiction is the plaintiffs' claim which is the initiating process. That a close examination of the originating process filed by the respondents at the trial court will reveal that cause of action that was decided at the trial court was not one of simple contract. That in this instance the cause of action as can be garnered from the originating process related to the administration or management and control of the appellant.

D He cited **Isah vs. INEC (2016) 18 NWLR (Pt. 1544) 175; Governor of Kwara State vs. Latiagi (2005) 5 NWLR (Pt. 917) 139; Egbuonu vs. BRTC (1997) 12 NWLR (Pt. 531) 29.** That the Federal High Court not only has jurisdiction but exclusive jurisdiction to entertain the suit. He referred to **Oguebego vs. PDP (2016) 4 NWLR (Pt. 1503) 446; Goerge vs. FRN (2014) 5 NWLR (Pt. 1399) 1; Adegbite vs. Amosu (2016) 15 NWLR (Pt. 1536) 405 at 427.**

E The stance of the appellant that the cause of action of the plaintiffs now respondent arose from a simple contract which is outside the jurisdiction of the Federal High Court. That position, the respondents disagree with, contending that the action stemmed from the administration or management and control of the appellant which situates the matter squarely within the jurisdiction of the Federal High Court pursuant to section 25(1) of 1999

F Constitution of the Federal Republic of Nigeria or CFRN for short.

It is to be restated at the risk of unlimited repetition that when the jurisdiction of a court is called to question, the guide is a close look at the plaintiff's claim which is the originating process inclusive of the totality of all that constitute that claim. See **Isah vs. INEC** (2016) 18 NWLR (Pt. 1544) 175; **Governor of Kwara State vs. Latiagi; Egbuonu**

G **v BRTC** (1997) 12 NWLR (Pt. 531) 29.

A reference to the full text of section 251(1) (p) of the 1999 Constitution (as amended) would be helpful and I quote:-

"251(1)-

"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be

H **conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise Jurisdiction to the exclusion of any other court in civil causes and matters.**

(p) The administration or the management and control of the Federal Government or any of its agencies"

I A glance at the claim and the accompanying materials show that by letters dated 22nd January

A 2003 the appellant separately instructed the respondents to reconcile the position of the concessions it gave to Intel Services Limited, Nigeria Liquefied Natural Gas Ltd and Mobil Producing Nigeria Unlimited. It was that decision of the appellant to reconcile the position of the concession that gave rise to the case and in getting to that policy decision appellant utilized the expertise of the respondents in the investigative activity. In giving Notice of
B Intention to Defend the appellant had stated that its reason is that the Federal Executive Council had referred all contracts awarded by it to the EFCC and the Federal Executive Council has also placed an embargo on payment of contracts awarded during the period which was an administrative decision even though that of the Federal Executive council. Clearly what was at play was an administrative act of a Federal Government Agency within the purview of section 251 of the CFRN and so in the exclusive jurisdiction of the Federal
C High Court. I refer to **Oguebego vs. PDP** (2016) 4 NWLR (Pt. 1503) 446; **Goerge vs. FRN** (2014) 5 NWLR (Pt. 1399) page 1.

A clearer view on this issue is seen in the case of **Adegbite vs. Amosu** (2016) 15 NWLR (Pt. 1536) 405 at 427 wherein my learned brother, I. T Muhammad JSC stated thus:-

D **"The Constitution of the Federal Republic of Nigeria 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. Section 251 (1) (p) (q) ® and (s) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)"**

The situation herein is well placed in the administrative and management activity of the
E appellant and there is no running away from the fact that it is a matter the Federal High Court not only has jurisdiction to deal with but an exclusive jurisdiction and so the appellant cannot by wishful thinking covert the matter to a simple contract so as to take it out of the powers of adjudication of the Federal High Court. The consequence is that the Federal High Court was well placed to assume jurisdiction which it correctly did and that is the end of the debate in that regard. The issue is resolved against the appellant.

F **ISSUES 2 AND 3**

2. **Whether in the light of the concession by the respondents (in the respondents' brief in the Court of Appeal) that filing of exhibits/documents is not a condition precedent to the transfer of the suit to general cause list, the learned Justices of the Court of**
G **Appeal, (without a respondent's notice to affirm the judgment on different ground) wrongly or rightly declined to set aside the judgment of the trial court.**
3. **Whether the court below rightly or wrongly held that paragraphs 3-14 of appellant's affidavit in support of Notice of Intention to Defend the action were hearsay evidence and**
H **therefore inadmissible.**

Learned counsel for the appellant stated that the judgment of the trial court was predicated on the absence of documents in the affidavit in support of Notice of Intention to Defend which led to appellant not being allowed to defend the suit and have it transferred to the general cause list. That the respondent's concession of the trial court's stance should inure in the
I favour of the appellant. He cited **I.H. Ltd vs. Soneb Ent. Ltd** (2010) 4 NWLR (Pt. 1185)

561; **Minister, P.M.R. vs. Expo-Shipping Line Nig. Ltd** (2010) 12 NWLR 261.

That the respondents having not filed a respondents' Notice the Court of Appeal should not have affirmed the decision of the trial court on grounds which were different from the grounds relied upon by the learned trial judge. He relied on **Tanko vs. U.B.A Plc** (2010) 17 NWLR (Pt. 1221) 80 (sc); **Shasi vs. Smith** (2009) 18 NWLR (Pt. 1173) 330.

That the court below gravely erred when it held that the deponent of the affidavit had no personal knowledge of the information thereby rendering the deposition inadmissible on ground of hearsay. He cited sections 88-89 of the Evidence Act; **F.G.N vs. A.I.C Ltd** (2006) 4 NWLR (Pt. 970) 337 at 357; **Braithwaite v M.S.A.L.S.A** (2001) 5 NWLR (Pt. 707) 590 at 607 etc. That there was no counter-affidavit to the affidavit in support of Notice of Intention to Defend and so the dispositions in the affidavit being unchallenged are taken as accepted. He relied on **Agbakoba vs. Director** SSC (1993) 7 NWLR (Pt. 305) 535 at 365; **Ejikeme vs. Ibekwe** (1999) 5 NWLR (Pt. 602) 250 at 256.

In response, learned counsel for the respondents stated that appellant was not given leave to defend the suit because appellant did not place any material before the court which disclosed any defence to the suit. That it is settled law that the undefended list Procedure does not permit a plaintiff to file any affidavit to controvert facts contained in the affidavit filed in support of the Notice of Intention to Defend as it is left for the court to determine based on the facts supplied by the parties whether judgment should be given for the plaintiff or whether the matter should be transferred to the general cause list. He cited **Odu vs. Agbor Hemeson** (2004) FWLR (Pt. 188) 935.

That the failure of the respondents to file further affidavit to challenge the averment in the appellant affidavit in support of Notice of Intention to Defend cannot amount to an admission of facts stated in affidavit in support of Notice of Intention to Defend. He cited **Euro Bati Concepts S.A vs. Tropical Industries Co. Ltd** (2002) FWLR (Pt. 121) 1913 at 1922.

He stated that it is the law that a defendant who has no real defence to the action brought under the undefended list should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by the delay tactic aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting his obligation and indebtedness. He cited **Agro Millers Ltd vs. C.M.B** (1997) 10 NWLR (Pt. 525) 469 at 477-478; **Nishizawa Ltd vs. Jethwani** (1984) ALL NLR 470 at 484-485.

On this matter of the denial of leave to the appellant to defend, I shall refer to what the trial court said in refusing the appellant to defend. That court of trial held thus:-

> **"In fact the defendant did not place any material before the court to show that he is serious with this case or that there is any substantive matter to be heard at trial. This I believe is just filed to frustrate the plaintiff out of their legitimate earnings. I therefore enter judgment in favour of the plaintiff as claimed; as defendant has no reasonable or any defence to this action". (Record of Appeal, page 66).**

At page 62 of the Record of Appeal, the learned trial judge reviewed the respondents'

A arguments as follows:

> **"That the notice of intention is worthless and unreliable and falls short of the expectation of the claim. That this offends against the provisions of sections 88 & 89 of the Evidence Act. That the counsel did not disclose the sources of his information as required by law. He cited the case of**
B **NIDB vs. FEMBO Nig. Ltd (1997) 2 NWLR (Pt. 489) p.543 to 550 in support. That the denial is not from the defendant but the solicitor and does not go to the merit of the matter".**

The position the appellant is canvassing at this stage is not borne out of the record and
C certainly different from what the trial court and later the Court of appeal ruled. In reviewing the facts contained in the affidavit, the court below held that the supporting affidavit of the appellant did not constitute a defence to the respondents' claim which that court referred to as a sham defence rightly rejected by the trial court. Nothing has emerged to give this court herein a change from what those courts below found and the issue of the respondents'
D position being hearsay does not arise.

Again to be said is that in an Undefended List Procedure it is not permitted for a Plaintiff to file an affidavit to controvert facts contained in the affidavit of the defendant in support of the Notice of Intention to Defend. It is a matter left for the court to determine on what is already in, if it should transfer the suit to the general cause list or determine it on the
E claim of the plaintiff in the light of a worthless attempt at defence in the supporting affidavit of Notice to Defend where it is available. See **Odu vs. Agbor – Hemeson** (2004) FWLR (Pt. 188) 935 where the court stated as follows:-

> **"Admittedly, the rules under the undefended list procedure do not expressly bar the use of further affidavit as submitted by learned counsel**
F **to the appellant but with profound respect to counsel. <u>It is not contemplated by the said procedure that triable issues raised by the defendants' affidavit should be rebutted or controverted by a further affidavit by the plaintiff as was done in the instant case</u>. All that the trial court is enjoined to do if the defendants' affidavit in support of the notice**
G **to defend discloses a defence is to transfer the suit to the general cause list for hearing and determination. There is no room for a further affidavit by the defendant to controvert the plaintiff's affidavit as such will lead to trial and thus defeat the objective of the speedy trial which the undefended list procedure is intended to achieve. The court below was**
H **therefore eminently justified in striking out the appellants' further affidavit."**

Again on the point is the case of **Euro Bati Concepts S.A. vs. Tropical Industrial Co. Ltd** (2002) FWLR (Pt. 121) 1913 where the court at p. 1922 held as follows:

> **"In the present case, it is very important to further stress that the**
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defences raises by the respondents with regard to their claims for set-off of U.S $9,000.00 and 2% commission against the appellant, while clearly disclosing a defence to the appellant's action on the merit, being plainly triable issues, cannot possibly be determined under the undefended list procedure, as the appellant is disputing the claim. The failure of the appellant to file a further affidavit to controvert the defences raised by the respondents in this respect therefore cannot be regarded as admission of the claims, as the appellant is not at all required to file such further affidavit under Order 23 of the High Court (Civil Procedure) Rules. The learned trial judge was therefore in grave error to have regarded the failure of the appellant to react to the claim of the respondents by the appellant that the set-off being claimed by the respondents is part of the transaction between the parties that gave rise to the appellant's case, the respondents' claim must be proved by evidence before it can be regarded as established which would necessitate the hearing of the entire case or pleadings in order to allow each party the full opportunity of proving the relevant claims".

I see nothing out of the way to impugn what the two courts below did in refusing a transfer of the matter out of the undefended list to the General Cause List and they were well guided that there was no defence upon which they would do that.

These issues also are resolved against the appellant.

ISSUES 4,5 & 6

4. **Whether the court below rightly or wrongly confirmed the judgment entered is in favour of the respondent by the trial court in the sum of USD $9,186,201.00 and N144,303,381.**
5. **Whether in absence of specific agreement or evidence of Custom and Trade usage on payment of pre-judgment interest and unliquidated nature of the claim the court below rightly confirmed the pre and post judgment interest awarded against the appellant by the trial court.**
6. **Whether the court below rightly or wrongly found that there was waiver of the time of completion of contract by the appellant.**

Learned counsel for the appellant contended that there was no consensus *ad idem* on the amount of money payable by the appellant to the respondents for the services allegedly rendered by them to the appellant. That it is trite that unless accepted, a counter offer is incapable of being enforced as a contract. He referred to **N.N.S.C vs. Agricor Incorporation** (1994) 3 NWLR (Pt. 332) 392 at 344; **Council of Yaba Tech vs. Nigertec Contractor** (1989) 1 NWLR (Pt. 95) 99.

That whether the contract was concluded with the agreed 35 days or not is a triable

A issue. Also whether appellant waived the 35 days completion or not is an issue which should be resolved in favour of the appellant as also whether the appellant accepted the unilateral variation of the consideration payable from 18% to 5% is also a triable issue. He relied on **N.M.C.B. (Nig) Ltd v Obi** (2010) 14 NWLR 169 at 186; **I. H. Ltd vs. Soneb Ent. Ltd** (2010) 4 NWLR (Pt. 1185) 561 at 577.

B Learned counsel for the appellant pointed at the fact that no evidence was proffered to show what entitled the respondents to charge interest on the outstanding professional fees and so no basis for the award of 10% yearly pre-judgment interest in favour of the respondents by the courts below. He cited **Uausa vs. FBN PLC** (2002) 9 NWLR (Pt. 671) 71; **Befareen Pharm Ltd vs. A.I.B Ltd** (2005) 17 NWLR (Pt. 954) 230 at 244.

C That waiver can only be used as a shield/defence and never by a plaintiff as a cause of action. That the plea of waiver at this stage is not available to the respondents as a defence or claim. He cited **Bank of the North Ltd vs. Yau** (2001) 10 NWLR (Pt. 721) 408 at 441; **Abalogu vs. SPDC Ltd** (2003) 13 NWLR (Pt. 837) 308 at 334; **Okonkwo vs. CCB Nig Plc** (2003) 8 NWLR (Pt. 822) 347 at 407-408 etc.

D For the respondents it was contended that the issue of the non-satisfactory performance of the contract raised by the appellant can best be described as an after-thought in a calculated bid to escape their obligation to pay for the services rendered. That the appellant waiver the right to hold onto the condition of 35 of performance. He cited **Fasade vs. Babalola** (2003) 11 NWLR (Pt. 830) 26; **Adecentro (Nig) Ltd vs. Vice Chancellor OAU** (2005) 15 NWLR (Pt. 948) 290.

E That pre-judgment interest is awarded where there is an agreement for payment of interest and as such it must be pleaded and proved and so merely stating a claim for pre-judgment interest without proof of same is not valid. He cited **Adeyemi vs. Lan and Banker (Nig) Ltd** (2000) 7 NWLR (Pt. 663) 33 at 48; **Petgas Res. Ltd vs. Mbanefo** (2007) 6 NWLR (Pt. 1031) 545.

F Learned counsel for the respondents stated that a trial court can award judgment interest as the authority to do so is enshrined in the Rules of Court. He cited **B.E.G.H. Ltd vs. U.H.S. & L Ltd** (2011) 7 NWLR (Pt. 1246) 246.

G That a party need not plead waiver in pleadings to enjoy the defence it provides as all a party needs do is plead relevant facts and lead evidence in support of the stated facts. He cited **Anto Import Export vs. Adebayo** (2005) 19 NWLR (Pt. 959) 44; **N.P.A Plc vs. Duncan Maritime Ventures** (2010) LPELR – 4602.

H There is no use belaboring a point that is manifestly established by the documents or evidence before the court to the effect that there was an existing contractual relationship between the appellant and respondents arising from the letters as in the Record. It was based on these contractual agreements that respondents accepted the offer and carried out the assignment outlined in the said letters without the appellant raising an eyebrow only to change course after the completion of the work and submission of the bill of charges.

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A It follows that this later complaint by the appellant that respondents did not execute the contract within the agreed 35 days has lead to the conclusion from the conduct of the appellant that it has waived that completion of contract within 35 days. See the case of **Fasade vs. Babalola** (2003) 11 NWLR (Pt. 830) 26, Supreme Court hld as follows:

B **"The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both. The exercise has to be a voluntary act.**

C **There is little doubt that, a man who is not under any legal disability should be the best judge of his own interest, if therefore, having full knowledge of the rights, interests, profits or benefit conferred upon or accruing to him by and under the law, but he intentionally decides to give up at these, or some of them, he cannot be heard to complain afterwards**

D **that he has not been permitted to the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waited those rights".** See also the case of **Adecentro (Nig) Ltd. vs. C. OAU** (2005) 15 NWLR (Pt. 948) 290.

The only logical conclusion is that appellant is stopped from complaining about the none

E completion within 35 days and so has lost out therein.

On the matter of pre-judgment interest, the law is clear that such interest is awarded where there is an agreement for payment of interest, in which case a claim as such must be pleaded and proved as it would not do to just state a claim for pre-judgment interest without proof of same. However a court can grant pre-judgment interest on a monetary or liquidated

F sum awarded to a successful party even where such a party did not plead or adduce evidence to prove it as such interests naturally accrue from the failure to pay the sum involved over a period of time thereby depriving a party from the use and enjoyment of the sum involved. That in my humble view is substantial justice. I make reference to the case of **Adeyemi vs. Lan and Banker (Nig) Ltd** (2000) 7 NWLR (Pt. 663) 33 pg 48. Paras D-E, it was held thus:-

G **"…The law on pre-judgment interest is that the award must be based on either statute, contract or mercantile custom or equity and the plaintiff must plead the basis and lead satisfactory evidence. That is so but the law recognizes the right to interest of a plaintiff in a claim for the return**

H **of money from commercial transactions particularly where the defendants has held the money of the plaintiff for some time. In a situation arising from commercial matters I should think that a party holding on to the funds of another for so long without justification ought to pay him compensation or so doing."**

I See also **Petgas Res. Ltd vs. Mbanefo** (2007) 6 NWLR (Pt. 1031) 545. A trial court can

award judgment interest. The authority to award judgment interest is enshrined in the Rules of Court. Please see the case of **B.E.G.H. Ltd vs. U.H.S & L. Ltd** (2011) 7 NWLR (Pt. 1246) 246. The relevant position contained in the Federal High Court (Civil Procedure) Rules 2000 is found in Order 42 Rule 7 this states as follows:-

> **"The court at the time of making any judgment or Order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be done, reckoned from the date of the judgment or Order, or from some other point of time, as the court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any judgment, commencing from the date thereof or after wards, as the case may be."**

On the final point is that it is too late in the day for the appellant to complain about the report and that delay in complaint has constituted a waiver which needs not be pleaded to apply. See **Ekundayo vs. F.C.D.A** (2015) LPELR – 24512 **Auto Import Export vs. Adebayo** (2005) 19 NWLR (Pt. 959)44.

In fact all the issues are against the appellant as the submissions raised cannot stand the law or practice. All the issues resolved against the appellant, it is easily seen that the appeal lacks merit and in line with the better reasoned lead judgment I also dismiss it.

Mary Ukaego Peter-odili
Justice, Supreme Court

INYANG OKORO, (JSC): I read in draft the judgment of my learned brother, Amiru Sanusi, JSC, just delivered. I am in agreement with His Lordship that this appeal is devoid of merit and deserves an order of dismissal. I adopt both the reasons advanced and the conclusions reached as mine. I dismiss the appeal and I abide by the order as to costs.

John Inyang Okoro
Justice, Supreme Court

DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage
Justice, Supreme Court

1. SECURITIES AND EXCHANGE COMMISSION
2. ADMINISTRATIVE PROCEEDINGS COMMITTEE OF THE SECURITIES AND EXCHANGE COMMISSION
3. AMOS I. AZI (SECRETARY ADMINISTRATIVE PROCEEDINGS COMMITTEE)

VS
CHRISTOPHER OKEKE

SC. 763/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 11TH MAY, 2018

BEFORE THEIR LORDSHIPS

OLABODE RHODES -VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Filing of brief – Where appellant fails to file his brief – Presumption thereof – Whether the presumption is that the appeal has been abandoned.

APPEAL: Filing of brief – Computation of time thereof – Or 6 Rule 5 SCR 1985 – Whether brief to be filed within 10 weeks of service of record of proceedings on the appellants.

CASE LAW: The principle in Ede vs. MBA (2011) 18 NWLR (Pt.1278) 236 at 277. – Effect where an application for extension of time is pending in a matter where time has expired.

CASE LAW: The principles in Mohammed vs. Hussein (1998) 14 NWLR (Pt.584) 108 and Panalpina World Transport Nig Ltd vs. Olandeen & Ors (2010) 4 C.L.R.N 150 (SC).

CONSTITUTIONARY LAW: Violation of fair hearing – Where a party fails to file his brief – Appeal subsequently struck out – Whether party cannot complain of a violation of fair hearing.

COURT: Litigation time – Management thereof – Whether there is Onus placed on the court to be in control of litigation time and manage it properly – The principles in British America Tabbacco Ltd vs. A-G Ogun State (2011) LPELR - 3891.

COURT: Rules thereof – When not obeyed – Duty of Court thereto.

COURT: Supreme Court – When can review its earlier order – Order 8 Rule 16 SCR 1985 – Relevant Principles thereof.

RULES – Supreme Court Rules 1985 – Or. 6 Rule 3 & Or. 6 Rule 9 thereof.

PRACTICE & PROCEDURE: Striking out and dismissal – Where a suit is struck out, it cannot be construed to mean dismissal – The principles in Obasi Brother Merchant Co. Ltd vs. Merchant Bank of Africa Securities Ltd (2005) All FWLR (Pt. 261) 216 at 231.

RULES: Order 6 Rule 3 Supreme Court Rules 1985 (as amended) - Purport and intent thereof.

RULES: Supreme Court Rules – Or. 6 Rule 3 thereof – Where Supreme Court strikes out appeal suo motu for failure to file appellant's brief – Whether it is decision on the merit which cannot be relisted.

RULES: Supreme Court Rules 1985 – Or. 6 Rule 3 and Or. 6 Rule 9 – Distinction thereof – Power to strike out appeal for failure to file appellant's brief.

RULES: Supreme Court Rules 1985 – Or. 6 Rule 9 thereof – Purport and Import.

Issues for determination

a. Whether this Court has jurisdiction to set aside its own judgment given on grounds of lack of diligent prosecution of appeal.
b. Assuming it has jurisdiction, whether this is an appropriate case in which the discretion should be exercised in favour of the Appellants.
c. In the alternative, whether this Court has power to grant the trinity prayers sought by the Applicants as alternative reliefs.

Facts of the matter

On 29th March, 2013 the appellants herein, who have brought the present application, filed their Notice of Appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 29th January, 2013. The record of appeal was subsequently compiled and transmitted to the Court and the appeal duly entered on 31st December, 2013 – after Nine Months.

On 10th Mar, 2017, about 27 months after their appeal was dismissed on 18th February, 2015 the appellants brought the instant application through their Counsel Fidelis Oditah, QC, SAN, seeking the following reliefs-

1. **AN ORDER** setting aside the decision of this Court given in Chambers on 18 February, 2015 in default of the appellants' Brief.
2. **AN ORDER** restoring this appeal to the Court's list for determination on the merits.
3. **AN ORDER** enlarging time within which the appellants/applicants may file and serve the appellants' Brief of argument for hearing on the merits.
4. **AN ORDER** deeming the already filed and served brief of argument as properly filed and served.
5. **AN ORDER** permitting the departure from compliance with the Rules of this Court and accelerating the hearing of the appeal.

Alternatively,

1. **AN ORDER** extending the time within which the appellants/applicants may seek leave of this Honourable Court to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/1/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D Bage, JCA
2. **AN ORDER** granting leave to the appellants/applicants to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.
3. **AN ORDER** for the extension of the time within which the appellants/applicants may appeal the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

The application was upon the following grounds:

a. On 18th February, 2015, this Court struck out this appeal on the grounds that the

appellants had failed to file their brief of argument as required by this Court Rules.

b. As the apex Court, this Court has inherent powers to set aside its own default judgment given in default of appellants' brief and hear the appeal on the merits.

c. Courts are reluctant to visit the mistake of Counsel on the client especially in matters which concern the protection of the public interests such as are raised in this appeal.

d. This appeal raises very important question of Constitutional and regulatory law, including the following: first, the extent to which the first appellant can exercise its statutory powers under the investments and Securities Act 2007 ("ISA") to protect the investing public and other users of Nigerian Capital Markets in view of Section 251(1)(e) of the 1999 Constitution; and, second, the extent to which the first appellant can apply the administrative sanctions stipulated in the ISA and in its own Rules and Regulations against defaulters, in the light of this Court's decision in the line of cases exemplified by **Garba vs. University of Maiduguri (1986) 1 N.W.L.R (Pt. 18) 550** that an administrative tribunal cannot sanction in respect of conduct which constitutes a crime, given that almost all violations of the ISA and the rules and regulations made thereunder constitute crimes under the general law. These and other important issues of constitutional and regulatory law deserve to be heard on the merits.

e. The decision anticipated in this appeal will develop and impact heavily on Nigerian constitutional and regulatory law and Nigerian Capital Market in which trillions of pension and other resources are now invested.

f. This appeal also presents this Court with a unique opportunity to clarify and develop the law on administrative discipline and constitutional right to fair hearing given the growing role and significance of administrative institutions in service delivery in Nigeria.

g. It would be tragic for the users of Nigerian Capital Markets if this Court were to pass up the opportunity to decide this appeal on the merits.

h. The Respondent will not be prejudiced if this application were granted and this appeal heard on the merits. The respondent does not appear to have been prejudiced by the unfortunate delay in filing this brief. He did not apply to have this appeal struck out pursuant to Order 6 Rule 9 of the Supreme Court Rules, which is clear evidence that he was not prejudiced by the appellants' default in filing their brief of argument.

i. The appellants are out of time to file and serve the appellants' brief of argument and this application is to enable the appellants to properly file and serve their brief.

j. The delay in filing and serving the brief of argument is due to mistake of appellants'

Counsel's junior and the busy schedule of the appellants' Counsel.

k. The grant of this application will enable the appellants/applicants to effectively prosecute the appeal and further the public interest.

l. Alternatively, as a result of the grounds stated above, it has become necessary to seek leave of this Court to follow the correct procedure so as to give the appellant opportunity for this Appeal to be determined on the merits.

Held: *(Unanimously dismissing the application)*

1. *The purport and intent of Or. 6 Rule 3(2) of Supreme Court Rules*
The appellants/applicants had up to 15th March, 2014 – 10 weeks after 31st December, 2013, to file their brief of argument. They never did so. They also did not apply for extension of time within which to file their brief of argument. On 18th February, 2015 (a period of 13 months and 2 weeks i.e after 54 weeks, this Court sitting in Chambers, suo motu dismissed the appeal No. SC.763/2013 for want of prosecution under Order 6 Rule 3(2) of the Rules of this Court, that provides

> **Where the Appellant has failed to file a brief within the period prescribed by this Order and there is no application for extension of time within which to file the brief, the Court may, subject to the proviso to rule 9 of this Order, proceed to dismiss the appeal in Chambers without hearing argument.**

The legislative intent for Order 6 Rule 3(2) of the Rules of this Court is the empowerment of the Court to take the initiative to clear its own docket of dormant or abandoned appeals in which the parties have lost interest. It is to decongest the cause list of such dead woods or moribund appeals. Order 6 Rule 3(2) empowers this Court to act suo motu to clear out abandoned appeals in order to decongest the Court. *(Pp 364 - 365 .Paras F - B).*

2. *Amendment of Or. 6 Rule 9 of SCR*
The indubitable fact is that as at 18th February, 2015, when the appeal was dismissed for want of diligent prosecution, there was no application pending for extension of time within which the appellants may file their brief of argument. It is admitted in paragraph 15 of the supporting affidavit inter alia that the appeal was dismissed "in Chambers on 18th February, 2015, which was just over 10 months after the applicants fell into default of filing the Brief." It is further averred for the applicants, as the appellants, that "there was no application to

this Court to exercise its powers to dismiss the appeal for want of diligent prosecution" and that there was no finding, in apparent misconception that the original proviso to Rule 9(1) of Order 6 is still extant, by this Court that this appeal on its face lacked merit such as to warrant summary dismissal in Chambers for want of filing of the appellant's brief. . I think I should point out, here and now, that by Government Notice No. 111 of 1991 the proviso to the Original Rule 9(1) of Order 6 of the Rules of this Court was deleted. What is now left of the said Rule 9 reads thus-

9. If an Appellant fails to file and serve his brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the Respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.

(Pp 367 - 368 Paras F - C).

3. *Where there is no application for extension of time before matter was stuck out.*

Let me reiterate one fact: at the time the appeal of the applicant was dismissed on 18th February, 2015 there was no pending application for enlargement of time within which the applicants, as the appellants, may file their brief of argument. This much has been admitted by the applicants in paragraph 15 of the supporting affidavit. This is what distinguishes EDE vs. MBA (supra) from the instant application, where prior to the date of the order dismissing the appeal, the appellants had on 6th June, 1993 filed an application for enlargement of time within which to file their brief, and an order to regurlarise their brief already filed. The registry staff had not brought the fact of the existence of this pending application to the attention of the Court. The party adversely affected having been denied fair hearing; the ensuring decision and order were set aside ex debito justitiae. *(P 369 Paras C - E).*

4. *Inapplicable decision*

MOHAMMED v HUSSEINI (supra) is also distinguishable. The trial Court, after entertaining and granting an oral application by the plaintiff's Counsel to set the matter down for hearing in the absence of the defendant, it proceeded to hearing of the matter the same day and entered judgment. The substantive suit was not on the cause list for hearing that day. What necessitated the setting aside of the default judgment was the failure to notify the other side that their matter had been set down for hearing. The case reported as (2005) 2 ALL F.W.L.R (Pt. 261).

The issue in PANALPINA WORLD TRANSPORT NIGERIA LIMITED

vs. OLANDEEN & ORS. (supra) is that the trial Court having struck out PANALPINA WORLD TRANSPORT NIGERIA LIMITED as a defendant could subsequently be joined as a party to the appeal at the Court of Appeal which would have had the effect of taking away its accrued statutory right of defence in the matter. *(Pp 369 - 370 Paras F - A).*

5. *It is not proper to construe striking out to mean dismissal*

The issue in OBASI MERCHANT CO. LTD vs. MERCHANT BANK OF AFRICA SECURITIES (supra) seems to be whether the earlier suit No. LD/3359/92 did operate as estoppels per rem judicatam. The said suit was struck out. That is the basis for the statement that it is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute the case and the Court relying on its inherent powers to strike out the case, it amounts to dismissal on the merit.

All of the foregoing cases was decided on its peculiar facts or circumstances and the Rules of those Courts regulating the practice and procedure of the various Courts. None of those Rules, my lords, is akin to or ipssissima verba with Order 6 Rule 3(2) Rules of this Court under which this Court proceeded on 18th February, 2015 to dismiss the applicants' appeal for want of diligent prosecution. *(P 370 Paras A - D).*

Per Eko (JSC)

"The deponent of the supporting affidavit avers in paragraph 15(c) thereat that "there was no application to this Court to exercise its powers to dismiss the appeal for want of prosecution on grounds of failure to file the appellants' brief within the time allowed by the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the appeal. Implicit in this suggestion is innuendo that the Court denied the applicants the opportunity to be heard before it proceeded to dismiss the appeal. Order 6 Rule 5(1) of the Rules of this Court, I earlier reproduced, enjoins the applicants, as appellants, to file their brief of argument "within ten weeks of the receipt of the record of appeal". The record of appeal was transmitted and the appeal was entered on 31st December, 2013. The applicants admit that they had 10 weeks (i.e up to 15th March, 2014) from the said 31st December, 2013 to file their brief of argument. The applicants therefore had an opportunity, or were by Order 6 R 5(1) of the Rules given an opportunity, to file their brief of argument in their appeal. Appeals in this Court are heard on briefs of argument by which each party presents his "succinct statement of his argument in the appeal. A party who has been afforded an opportunity to present a succinct statement of his argument in the appeal and who, nonetheless, failed to

utilize the opportunity to be heard in the appeal cannot complain that he was denied his right to fair hearing: OBA JACOB OYEYIPO & ANOR vs. CHIEF J.O. OYINLOYE (1987) 1 N.W.L.R (Pt. 50) 356 (SC); (1987) 2 S.C.N.J. 53.
A party in litigation who throws away or wastes an opportunity to be heard cannot be heard to complain that his right to fair hearing, guaranteed by Section 36(1) of the 1999 Constitution, as amended, has been breached: James EKEREBE vs. EFE; ZOMOR & ORS. (1993) 7 N.W.L.R (Pt. 307) 588 at 601; KADUNA TEXTILES LTD vs. UMAR (1994) 1 N.W.L.R (Pt. 319) 143 at 159. Thus, as Mohammed, JCA (as he then was) put it in ODU'A INVESTMENT CO. LTD vs. JOSEPH TAIWO TALABI (1997) 10 N.W.L.R (Pt. 523) 1 at 51; such a party would be deemed to have waived his right to be heard in the matter and cannot be heard to complain afterwords of any denial of fair hearing which he, himself, had refused to take. See also MAGNA MARTIME LTD. vs. OTEJU (2005) 22 N.S.C.Q.R. 395. In the circumstance the rule should be volenti nou fit injuria. *(Pp 370 - 371.Paras D - D).*

6. *Fair hearing is not violated where a party neglects to prosecute his appeal*
Ordinarily, the violation of the rule of fair hearing renders the **proceedings null and void. The decision of Court in the circumstance, not being on the merits, is liable to be set aside: MOHAMMED vs. HUSSEINI (supra); EDE vs. MBA (supra). The situation, however, is different where a party who has an opportunity to present his case decides, neglects or refuses to present it or utilize the opportunity given to by law to present his case. A party, like the applicants herein, who has failed to neglect to submit his case or appeal for consideration cannot complain of a denial of fair hearing such a failure tantamount to an abandonment of the appeal: OYEDIPO vs. OGUNDARE (supra).** *(P 371.Paras D - F).*

7. *Brief to be filed within 10 weeks of the service of record of Appeal*
The service of the record of proceedings or the record of appeal on the appellant is notice to him, under Order 6 Rule 5(1) of the Rules of this Court, that he must set down his argument in the appeal in writing within 10 weeks from the moment the record of appeal was served on him: OYEYIPO vs. OYINLOYE (supra) per Obaseki, JSC.
The Rules of this Court made by the Chief Justice of Nigeria pursuant to Section 236 of the 1999 Constitution. When, therefore, the Rules, like Order 6 Rule 5 thereof, set the period for filing briefs as succinct statement of the party's

argument in the appeal. It serves dual purpose of a party in the appeal an opportunity to present his argument in the appeal, as well as setting a time table for the presentation of the argument in the appeal. *(Pp 371 - 372 Paras G - A).*

8. *Onus on court to be in control of litigation time and managing it properly*
Section 36(1) of the Constitution prescribes that a party in litigation be given a fair hearing, which includes an opportunity to present his case, within a reasonable time. The time element in fair hearing guarantee in the Constitution is what prompted Ikyegh, JCA, in BRITISH AMERICAN TOBACCO (INVESTMENT) LTD vs. A.G. OGUN STATE (2011) L.P.E.L.R – 3891 (CA) to state I agree with him "for Courts of Law time is very important. Because litigants go to Court expecting quick results from fair and expeditious determination of their disputes, so it is imperative for the Court to be in control of time and to manage it prudently", for the purpose of the determination of matters before them within a reasonable time.
Order 6 Rule 3(2) of the Rules of this Court provides sanction against the appellant who has failed, neglected or refused to file his brief of argument within 10 weeks of the receipt of the record of appeal, as stipulated by Order 6 Rule 5(1). *(P 372 Paras A - D).*

9. *Purport of Or. 6 Rule 9 of SCR 1985*
The sanction under Order 6 Rule 3(2) is quite distinct from the sanction under Order 6 Rule 9. The extant Rules of this court, as amended in 1999 provides in Order 6 Rule 9 thus-

> **If the Appellant fails to file and serve his brief within the time provided for in Rule 5 of these Rules, or within the time as extended by the Court, the Respondent <u>may apply to the Court for the appeal to be struck out</u> for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

Per Eko (JSC)
I had earlier reproduced Order 6 Rule 3(2). The full panel of this Court in CHIME vs. UDE (1996) 7 N.W.L.R (Pt. 461) 379, drawing the distinction between Order 6 Rule 3(2) and 9 states, per Ogundare, JSC, at page 419 –

> **Rule 9 provides for a situation where an application is made to the Court by a Respondent who alleged that the Appellant has failed to file and**

serve his brief of argument in time. Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and the parties have lost interest in it and there is need to decongest the cause list of such deadwoods. The two rules are clear and unambiguous – Where the Appellant is in default and has failed to apply for extension of time, the Respondent may apply that the appeal be struck out for want of prosecution (Rule 9). Where, however, the Appellant is in default and neither party makes any move, the Court may dismiss the appeal for want of prosecution (Rule 3(2). *(Pp 372 - 373 Paras D - B).*

10. *When Supreme Court can set aside an earlier order*
The appeal having been dismissed under Rule 3(2) of Order 6, this Court has no jurisdiction to set aside that Order and restore the appeal to the cause list.

In this authoritative pronouncement this Court cited with approval its earlier decisions in OYEYIPO vs. OYINLOYE (supra); IRO OGBU vs. URUM (1981) 4 SC 1; YONWUREN vs. MODERN SIGNS (NIG). LTD (1985) 1 N.W.L.R. (Pt. 2) 244.

The submission for the applicants that the judgment of this Court on 18th February, 2015 was not on the merits, but based on failure to file appellants' brief of argument, itself a procedural step which can be set aside, does not address the effect of Order 6 Rule 3(2) read together with Order 8 Rule 16 of the Rules of this Court. Order 8 Rule 16 provides –

> **The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from accidental slip or omission, or to vary the judgment or Order so as to give effect to its meaning or intention. A judgment or Order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and different or substituted.**

The instant application has not been brought under the "slip-rule" or the exceptions under Order 8 Rule 16. It has also not been brought under the Court's inherent power to set aside a judgment of its own that is a nullity. This Court, like any other Court of record, can ex debito justitiae set aside an order which is made ultra vires or without jurisdiction, the order being nullity: MENAKAYA vs. MENAKAYA (2001) 16 N.W.L.R (Pt. 738) 203; IGWE vs. KALU (2002) 14 N.W.L.R (Pt. 787) 435; OLORUNFEMI vs. ASHO (2000) 2

N.W.L.R (Pt. 643) 143; OGUEZE vs. OJIAKO vs. OGUEZE (1962) 1 S.C.N.L.R. 112. This application has not been brought on any of these grounds. *(P 373 .Paras B - H).*

11. *Duty of court when rules are not obeyed*
It needs only to be stressed that the Rules of Court are statutory instruments, deriving their legitimacy and efficacy directly from the Constitution. They are meant to be obeyed. When they are not obeyed, the court cannot remain passive and helpless. It must sanction the non-compliant party, otherwise the purpose of its enactment will be defeated. The party who fails to obey the Rules of Court must bear the consequences of his failure: OWNERS OF "MV ARABELLA vs. N.A.I.C (2008) 4 SC (Pt. 2) 189 at 205 – 206; RATNAM vs. CUMARASAMY (1965) 1 W.L.R. 8. *(Pp 373 - 374 Paras H - B).*

12. *Presumption where appellant fails to file his briefs*
The undisputed facts in this application remains that over 54 weeks after **receipt of the Record of Appeal, the Applicants herein, as Appellants, failed or neglected to file their brief of argument as required by Order 6 Rule 5(1) of the Rules of this Court. When an Appellant fails to file his brief the presumption is that the appeal has been abandoned and it becomes liable to be dismissed: OYEYIPO vs. OYINLOYE (supra); CHIME v UDE (supra). See also ADERIGBIGBE vs. TIAMIYU (2009) 10 N.W.L.R (Pt. 1150) 592; AKIBU & ORS vs. ODUNTAN (2000) 7 S.C.N.J.189; SPARKLING BREWERIES vs. U.B.N (2001) 7 S.C.N.J. 321; CORNELIUS LTD vs. EZENWA (1996) 4 S.C.N.J. 123; NKADO vs. OBIANO (1997) 5 S.C.N.J. 33.**

From all I have said above, my conclusion from the decision of the full panels of this court in OYEYIPO v. OYINLOYE (supra); CHIME vs. UDE (supra) is that an appeal dismissed under Or. 6 rule 3(2) of the extant Rules of this Court, cannot be relisted or restored to the cause list. The order dismissing an appeal for failure to file brief of argument is an order on the merits and the Supreme Court by dint of Order 6 Rule 16, Supreme Court Rules, 1985, as amended, cannot review its own judgment or order except under the "slip-rule" or under its inherent powers to set its judgment or order that is manifestly a nullity. Accordingly, an appeal dismissed under Order 6 Rule 3(2), as the instant appeal, cannot be relisted. The dismissal order is final: ALLI vs. AYINDE (2010) ALL F.W.L.R (Pt. 540) 1315 at 1358; KRAUS THOMPSON ORGANISATION vs. N.I.P.S.S. (2004) 17 N.W.L.R. (Pt. 901) 44.

There is no cause shown for me to grant this application. I find no substance in it, and it is accordingly refused and dismissed. The order made in Chambers on 18th February, 2015, dismissing the applicants' appeal remains

inviolate. *(P 374 Paras B - H).*

13. *Presumption where appellant fails to file his brief after a long time*
I must say, that the fact that the applicants spent 54 weeks) i.e. over one year from the time they were served with the record of appeal, without caring to file their joint brief of argument is contrary to the provisions of Order 6 Rule 5(1) of Supreme Court Rules, which gives only ten weeks to the appellant within which to file brief of argument from the date the record of appeal was served on them. The long period spent by the applicants without filing brief of argument is too long enough to presume that the appellants/applicants had abandoned their appeal and therefore the appeal is liable to be dismissed. See Nkado vs. Obiano (1997) 5 SCNJ 33.

The incessant delay clearly portrayed the lackadaisical attitude of the applicant in prosecuting the appeal timeously and they therefore do not deserve to be given another chance again, since no cogent reason was advanced by the appellants/applicants to convince this court to restore the appeal or for it to set aside the order of dismissal it made earlier in chambers. *(Pp 375 - 376 Paras G - B).*

APPEARANCES
Onyeka Enunwa, (Miss) for the Applicants

Olumide Akinnimi, (Esq.) with Hasiya Kontagora (Esq.) for the Respondent.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment): On 29th March, 2013 the Appellants herein, who have brought the present application, filed their Notice of Appeal against the judgment of the Court of Appeal, Lagos Division, delivered on 29th January, 2013. The Record of Appeal was subsequently compiled and transmitted to the Court and the appeal duly entered on 31st December, 2013 – after Nine Months. Order 7 Rule 4(1) of the Supreme Court Rules, 1985, as amended, enjoins the Registrar of the Court below to compile and transmit record "within a period of not more than six months from the date of filing the notice of appeal."

Order 6 Rule 5(1)(a) of the said Supreme Court Rules (hereinafter called "the Rules of this Court") provides-

The Appellant shall within ten weeks of the receipt of the Record of Appeal – file in the Court and serve on the Respondent a written brief

being a succinct statement of his argument in the appeal.

The Appellants/Applicants had up to 15th March, 2014 – 10 weeks after 31st December, 2013, to file their brief of argument. They never did so. They also did not apply for extension of time within which to file their brief of argument. On 18th February, 2015 (a period of 13 months and 2 weeks i.e after 54 weeks, this Court sitting in Chambers, suo motu dismissed the appeal No. SC.763/2013 for want of prosecution under Order 6 Rule 3(2) of the Rules of this Court, that provides:

> **Where the Appellant has failed to file a brief within the period prescribed by this Order and there is no application for extension of time within while to file the brief, the Court may, subject to the proviso to rule 9 of this Order, proceed to dismiss the appeal in Chambers without hearing argument.**

The legislative intent for Order 6 Rule 3(2) of the Rules of this Court is the empowerment of the Court to take the initiative to clear its own docket of dormant or abandoned appeals in which the parties have lost interest. It is to decongest the cause list of such dead woods or moribund appeals. Order 6 Rule 3(2) empowers this Court to act suo motu to clear out abandoned appeals in order to decongest the Court.

On 10th Mar, 2017, about 27 months after their appeal was dismissed on 18th February, 2015 the Appellants brought the instant application through their Counsel Fidelis Oditah, QC, SAN, seeking the following reliefs-

6. **AN ORDER** setting aside the decision of this Court given in Chambers on 18 February, 2015 in default of the Appellants' Brief.
7. **AN ORDER** restoring this appeal to the Court's list for determination on the merits.
8. **AN ORDER** enlarging time within which the Appellants/Applicants may file and serve the Appellants' Brief of Argument for hearing on the merits.
9. **AN ORDER** deeming the already filed and served Brief of Argument as properly filed and served.
10. **AN ORDER** permitting the departure from compliance with the Rules of this Court and accelerating the hearing of the appeal.

ALTERNATIVELY,

4. **AN ORDER** extending the time within which the Appellants/Applicants may seek leave of this Honourable Court to appeal against the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/1/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D Bage, JCA
5. **AN ORDER** granting leave to the Appellants/Applicants to appeal against the

Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

6. **AN ORDER** for the extension of the time within which the Appellants/Applicants may appeal the Judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/13/2009 delivered on 29th January, 2013 by Amina Augie, JCA, Ibrahim Musa Saulawa, JCA and S.D. Bage, JCA.

The application was upon the following grounds:

m. On 18th February, 2015, this Court struck out this appeal on the grounds that the Appellants had failed to file their Brief of Argument as required by this Court Rules.

n. As the apex Court, this Court has inherent powers to set aside its own default judgment given in default of Appellants' Brief and hear the Appeal on the merits.

o. Courts are reluctant to visit the mistake of Counsel on the client especially in matters which concern the protection of the public interests such as are raised in this appeal.

p. This appeal raises very important question of Constitutional and regulatory law, including the following: first, the extent to which the First Appellant can exercise its statutory powers under the investments and Securities Act 2007 ("ISA") to protect the investing public and other users of Nigerian Capital Markets in view of Section 251(1)(e) of the 1999 Constitution; and, second, the extent to which the First Appellant can apply the administrative sanctions stipulated in the ISA and in its own Rules and Regulations against defaulters, in the light of this Court's decision in the line of cases exemplified by **Garbe v. University of Maiduguri (1986) 1 N.W.L.R (Pt. 18) 550** that an administrative tribunal cannot sanction in respect of conduct which constitutes a crime, given that almost all violations of the ISA and the rules and regulations made thereunder constitute crimes under the general law. These and other important issues of constitutional and regulatory law deserve to be heard on the merits.

q. The decision anticipated in this appeal will develop and impact heavily on Nigerian constitutional and regulatory law and Nigerian Capital Market in which trillions of pension and other resources are now invested.

r. This appeal also presents this Court with a unique opportunity to clarify and develop the law on administrative discipline and constitutional right to fair hearing given the growing role and significance of administrative institutions in service delivery in Nigeria.

s. It would be tragic for the users of Nigerian Capital Markets if this Court were to pass

up the opportunity to decide this appeal on the merits.

t. The Respondent will not be prejudiced if this application were granted and this appeal heard on the merits. The Respondent does not appear to have been prejudiced by the unfortunate delay in filing this Brief. He did not apply to have this appeal struck out pursuant to Order 6 Rule 9 of the Supreme Court Rules, which is clear evidence that he was not prejudiced by the Appellants' default in filing their Brief of Argument.

u. The Appellants are out of time to file and serve the Appellants' Brief of Argument and this application is to enable the Appellants to properly file and serve their Brief.

v. The delay in filing and serving the Brief of Argument is due to mistake by Appellants' Counsel's junior and the busy schedule of the Appellants' Counsel.

w. The grant of this application will enable the Appellants/Applicants to effectively prosecute the Appeal and further the public interest.

x. Alternatively, as a result of the grounds stated above, it has become necessary to seek leave of this Court to follow the correct procedure so as to give the Appellant opportunity for this Appeal to be determined on the merits.

The indubitable fact is that as at 18th February, 2015, when the appeal was dismissed for want of diligent prosecution, there was no application pending for extension of time within which the Appellants may file their brief of argument. It is admitted in paragraph 15 of the supporting affidavit inter alia that the appeal was dismissed "in Chambers on 18th February, 2015, which was just over 10 months after the Applicants fell into default of filing the Brief." It is further averred for the Applicants, as the Appellants, that "there was no application to this Court to exercise its powers to dismiss the appeal for want of diligent prosecution" and that there was no finding, in apparent misconception that the original proviso to Rule 9(1) of Order 6 is still extant, by this Court that this appeal on its face lacked merit such as to warrant summary dismissal in Chambers for want of filing of the Appellant's brief. I think I should point out, here and now, that by Government Notice No. 111 of 1991 the proviso to the Original Rule 9(1) of Order 6 of the Rules of this Court was deleted. What is now left of the said Rule 9 reads thus-

> **9. If an Appellant fails to file and serve his brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the Respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

With the 1991 amendment, therefore, the words: "subject to the proviso to rule 9 of this Order, "appearing in Order 6 Rule 3(2) of the Rules have clearly become otiose: the Proviso

A to Rule 9 having been deleted.

Applicants' Counsel submitted three issues for the determination of this application. That is –

d. Whether this Court has jurisdiction to set aside its own judgment given on grounds of lack of diligent prosecution of appeal.

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e. Assuming it has jurisdiction, whether this is an appropriate case in which the discretion should be exercised in favour of the Appellants.

f. In the alternative, whether this Court has power to grant the trinity prayers sought by the Applicants as alternative reliefs.

C The importance of issue 1 lies in the fact of its centrality in the application. The resolution of the issue, one way or the other, will materially impact on the remaining issues. The Applicants, through their Counsel, think that the order made on 18th February, 2015 dismissing their appeal for abandonment or want of diligent prosecution, upon invocation of Order 6 Rule 3(2) of the Rules of this Court, was a "default judgment". They opine, on D authority of **U.T.C v PAMOTE**, (1989) L.P.E.L.R – 3276(SC), that a judgment given against a party for failure to take a procedural step in the litigation is a mere default judgment, being not a judgment on the merits based on the determination of the legal rights of the parties either on law or facts. On the effect of an order of dismissal not on the merits: the order Applicants' Counsel submits, is considered in law to be "a mere striking out." The authorities cited for E this submission include **PANALPINA WORLD TRANSPORT NIG. LTD vs. J. B OLANDEEN & ORS.** ("pw1 case") (2010) 4 C.L.R.N. 150 (SC); **OBASI BROTHERS MERCHANT CO. LTD vs. MERCHANT BANK OF AFRICA SECURITIES LTD** (2005) ALL F.W.L.R(Pt. 261) 216 at 231G; **IHEAKWU vs. NWANKPA** (1966) N.S.C.C 83. An order, regarded not to be on the merits, but a mere default judgment, is liable to be set F aside, Applicants' Counsel submits relying on **MOHAMMED vs. HUSSEINI** (1998) 14 N.W.L.R. (Pt. 584) 108 (SC); **EDE vs. MBA** (2011) 18 N.W.L.R (Pt. 1278) 236 at 277E.

Let me reiterate one fact: at the time the appeal of the Applicant was dismissed on 18th February, 2015 there was no pending application for enlargement of time within which the Applicants, as the Appellants, may file their brief of argument. This much has been admitted G by the Applicants in paragraph 15 of the supporting affidavit. This is what distinguishes **EDE v MBA** (supra) from the instant application, where prior to the date of the order dismissing the appeal, the Appellants had on 6th June, 1993 filed an application for enlargement of time within which to file their brief, and an order to regurlarise their brief already filed. The registry staff had not brought the fact of the existence of this pending application to the H attention of the Court. The party adversely affected having been denied fair hearing; the ensuing decision and order were set aside ex debito justitiae.

MOHAMMED v HUSSEINI (supra) is also distinguishable. The trial Court, after entertaining and granting an oral application by the Plaintiff's Counsel to set the matter down for hearing in the absence of the Defendant, it proceeded to hearing of the matter the same day

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A and entered judgment. The substantive suit was not on the cause list for hearing that day. What necessitated the setting aside of the default judgment was the failure to notify the other side that their matter had been set down for hearing. The case reported as (2005) 2 ALL F.W.L.R (Pt. 261).

The issue in **PANALPINA WORLD TRANSPORT NIGERIA LIMITED vs.** B **OLANDEEN & ORS.** (supra) is that the trial Court having struck out **PANALPINA WORLD TRANSPORT NIGERIA LIMITED** as a defendant could subsequently be joined as a party to the appeal at the Court of Appeal which would have had the effect of taking away its accrued statutory right of defence in the matter.

The issue in **OBASI MERCHANT CO. LTD vs. MERCHANT BANK OF** C **AFRICA SECURITIES** (supra) seems to be whether the earlier suit No. LD/3359/92 did operate as estoppels per rem judicatam. The said suit was struck out. That is the basis for the statement that it is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute the case and the Court relying on its inherent powers to strike out the case, it amounts to dismissal on the D merit.

All of the foregoing cases was decided on its peculiar facts or circumstances and the Rules of those Courts regulating the practice and procedure of the various Courts. None of those Rules, my lords, is akin to or ipssissima verba with Order 6 Rule 3(2) Rules of this Court under which this Court proceeded on 18th February, 2015 to dismiss the Applicants' appeal for E want of diligent prosecution.

The deponent of the supporting affidavit avers in paragraph 15(c) thereat that "there was no application to this Court to exercise its powers to dismiss the appeal for want of prosecution on grounds of failure to file the Appellants' Brief within the time allowed by the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the F appeal. Implicit in this suggestion is invendo that the Court denied the Applicants' Brief within the time allowed by the Rules." It is thus suggested, correctly, that this Court proceeded suo motu to dismiss the appeal. Implicit in this suggestion is innuendo that the Court denied the Applicants the opportunity to be heard before it proceeded to dismiss the appeal. Order 6 Rule 5(1) of the Rules of this Court, I earlier reproduced, enjoins the G Applicants, as Appellants, to file their brief of argument "within ten weeks of the receipt of the Record of Appeal". The Record of Appeal was transmitted and the appeal was entered on 31st December, 2013. The Applicants admit that they had 10 weeks (i.e up to 15th March, 2014) from the said 31st December, 2013 to file their brief of argument. The Applicants therefore had an opportunity, or were by Order 6 R 5(1) of the Rules given an opportunity, to H file their brief of argument in their appeal. Appeals in this Court are heard on briefs of argument by which each party presents his "succinct statement of his argument in the appeal. A party who has been afforded an opportunity to present a succinct statement of his argument in the appeal and who, nonetheless, failed to utilize the opportunity to be heard in the appeal cannot complain that he was denied his right to fair hearing: **OBA JACOB OYEDIPO &**

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ANOR vs. CHIEF J.O. OYINLOYE (1987) 1 N.W.L.R (Pt. 50) 356 (SC); (1987) 2 S.C.N.J. 53.

A party in litigation who throws away or wastes an opportunity to be heard cannot be heard to complain that his right to fair hearing, guaranteed by Section 36(1) of the 1999 Constitution, as amended, has been breached: James **AREBE v EFEIZOKOR & ORS**. (1993) 7 N.W.L.R (Pt. 307) 588 at 601; **KADUNA TEXTILES LTD vs. UMAR** (1994) 1 N.W.L.R (Pt. 319) 143 at 159. Thus, as Mohammed, JCA (as he then was) put it in ODU'A INVESTMENT CO. LTD vs JOSEPH TAIWO TALABI (1997) 10 N.W.L.R (Pt. 523) 1 at 51; such a party would be deemed to have waived his right to be heard in the matter and cannot be heard to complain afterwords of any denial of fair hearing which he, himself, had refused to take. See also MAGNA MARTIME LTD. vs. OTEJU (2005) 22 N.S.C.Q.R. 395. In the circumstance the rule should be volenti nou fit injuria.

Ordinarily, the violation of the rule of fair hearing renders the proceedings null and void. The decision of Court in the circumstance, not being on the merits, is liable to be set aside: **MOHAMMED vs. HUSSEINI** (supra); **EDE vs. MBA** (supra). The situation, however, is different where a party who has an opportunity to present his case decides, neglects or refuses to present it or utilize the opportunity given to by law to present his case. A party, like the Applicants herein, who has failed to neglected to submit his case or appeal for consideration cannot complain of a denial of fair hearing such a failure to tantamount to an abandonment of the appeal: OYEDIPO vs. OGUNDARE (supra). The service of the record of proceedings or the Record of Appeal on the Appellant is notice to him, under Order 6 Rule 5(1) of the Rules of this Court, that he must set down his argument in the appeal in writing within 10 weeks from the moment the Record of Appeal was served on him: OYEYIPO vs. OYINLOYE (supra) per Obaseki, JSC.

The Rules of this Court made by the Chief Justice of Nigeria pursuant to Section 236 of the 1999 Constitution. When, therefore, the Rules, like Order 6 Rule 5 thereof, set the period for filing briefs as succinct statement of the party's argument in the appeal. It serves dual purpose of a party in the appeal an opportunity to present his argument in the appeal, as well as setting a time table for the presentation of the argument in the appeal. Section 36(1) of the Constitution prescribes that a party in litigation be given a fair hearing, which includes an opportunity to present his case, within a reasonable time. The time element in fair hearing guaranteed in the Constitution is what prompted Ikyegh, JCA, in BRITISH AMERICAN TOBACCO (INVESTMENT) LTD vs. A.G. OGUN STAT (2011) L.P.E.L.R – 3891 (CA) to state I agree with him "for Courts of Law time is very important. Because litigants go to Court expecting quick results from fair and expeditious determination of their disputes, so it is imperative for the Court to be in control of time and to manage it prudently", for the purpose of the determination of matters before them within a reasonable time.

Order 6 Rule 3(2) of the Rules of this Court provides sanction against the Appellant who has failed, neglected or refused to file his brief of argument within 10 weeks of the receipt of the Record of Appeal, as stipulated by Order 6 Rule 5(1). The sanction under Order

A 6 Rule 3(2) is quite distinct from the sanction under Order 6 Rule 9. The extant Rules of this Court, as amended in 1991 provides in Order 6 Rule 9 thus-

> **If the Appellant fails to file and serve his brief within the time provided for in Rule 5 of these Rules, or within the time as extended by the Court, the Respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of Court.**

I had earlier reproduced Order 6 Rule 3(2). The full panel of this Court in **CHIME vs. UDE** (1996) N.W.L.R (Pt. 461) 379, drawing the distinction between Order 6 Rule 3(2) and 9 states, per Ogundare, JSC, at page 419 –

Rule 9 provides for a situation where an application is made to the Court by a Respondent who alleged that the Appellant has failed to file and serve his brief of argument in time. Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and the parties have lost interest in it and there is need to decongest the cause list of such deadwoods. The two rules are clear and unambiguous – Where the Appellant is in default and has failed to apply for extension of time, the Respondent may apply that the appeal be struck out for want of prosecution (Rule 9). Where, however, the Appellant is in default and neither party makes any more, the Court may dismiss the appeal for want of prosecution (Rule 3(2). – The appeal having been dismissed under Rule 3(2) of Order 6, this Court has no jurisdiction to set aside that Order and restore the appeal to the cause list.

In this authoritative pronouncement this Court cited with approval its earlier decisions in OYEYIPO vs. OYINLOYE (supra); IRO OGBU v. URUM (1981) 4 SC 1; YONORUREN vs. MODERN SIGNS (NIG). LTD (1985) 1 N.W.L.R. (Pt. 2) 244.

The submission for the Applicants that the judgment of this Court on 18th February, 2015 was not on the merits, but based on failure to file Appellants' Brief of Argument, itself a procedural step which can be set aside, does not address the effect of Order 6 Rule 3(2) read together with Order 8 Rule 16 of the Rules of this Court. Order 8 Rule 16 provides –

> **The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from accidental slip or omission, or to vary the judgment or Order so as to give effect to its meaning or intention. A judgment or Order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different from substituted.**

A The instant application has not been brought under the "slip-rule" or the exceptions under Order 8 Rule 16. It has also not been brought under the Court's inherent power to set aside a judgment of its own that is a nullity. This Court, like any other Court of record, can ex debito justitiae set aside an order which is made ultra vires or without jurisdiction, the order being nullity: MENAKAYA vs. MENAKAY (2001) 16 N.W.L.R (Pt. 738) 203; IGWE vs. KALU
B (2002) 14 N.W.L.R (Pt. 787) 435; OLORUNFEMI vs. ASHO (2000) 2 N.W.L.R (Pt. 643) 143; OGUEZE vs. OJIAKO (1962) 1 S.C.N.L.R. 112. This application has not been brought on any of these grounds.

It needs only to be stressed that the Rules of Court are statutory instruments, deriving their legitimacy and efficacy directly from the Constitution. They are meant to be obeyed.
C When they are not obeyed, the Court cannot remain passive and helpless. It must sanction the non-compliant party, otherwise the purpose of its enactment will be defeated. The party who fails to obey the Rules of Court must bear the consequences of his failure: **OWNERS OF "MV ARABELLA vs. N.A.I.C** (2008) 4 SC (Pt. 2) 189 at 205 – 206; **RATNAM vs. CUMARASAMY (**1965) 1 W.L.R. 8.

D The undisputed facts in this application remains that over 54 weeks after receipt of the Record of Appeal, the Applicants herein, as Appellants, failed or neglected to file their brief of argument as required by Order 6 Rule 5(1) of the Rules of this Court. When an Appellant fails to file his brief the presumption is that the appeal has been abandoned and it becomes liable to be dismissed: OYEYIPO vs. OYINLOYE (supra); CHIME vs. UDE (supra). See also **ADERIGBIGBE v. TIAMIYU** (2009) 10 N.W.L.R (Pt. 1150) 592; **AKIBU & ORS vs.**
E **ODUNTAN** (2000) 7 S.C.N.J.189; **SPARKLING BREWERIES vs. U.B.N** (2001) 7 S.C.N.J. 321; **CORNELIUS LTD vs. EZENWA** (1996) 4 S.C.N.J. 123; **NKEDO vs. OBIENO** (1997) 5 S.C.N.J. 33.

From all I have said above, my conclusion from the decision of the full panels of this Court in OYEYIPO v. OYINLOYE (supra); CHIME v UDE (supra) is that an appeal
F dismissed under 6 Rule 3(2) of the extant Rules of this Court, cannot be relisted or restored to the cause list. The order dismissing an appeal for failure to file brief of argument is an order on the merits and the Supreme Court by dint of Order 6 Rule 16, Supreme Court Rules, 1985, as amended, cannot review its own judgment or order except under the "slip-rule" or under its inherent powers to set its judgment or order that is manifestly a nullity. Accordingly, an
G appeal dismissed under Order 6 Rule 3(2), as the instant appeal, cannot be relisted. The dismissal order is final: ALLI vs. AYINDE (2010) ALL F.W.L.R (Pt. 540) 1315 at 1358; KRAUS THOMPSON ORGANISATION vs. N.I.P.S.S. (2004) 17 N.W.L.R. (Pt. 901) 44.

There is no cause shown for me to grant this application. I find no substance in it, and it is accordingly refused and dismissed. The order made in Chambers on 18th February, 2015,
H dismissing the Applicants' appeal remains inviolate. Costs at N500,000.00 shall be paid to the Respondent by the Appellants, jointly and/or severally.

Ejembi Eko
Justice, Supreme Court

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RHODES-VIVOUR, (JSC): I have read in draft the Leading Ruling just delivered by my learned brother Eko JSC. I am in full agreement with his lordship that the application lacks merit. It is also dismissed by me. I abide by the orders proposed in the leading ruling.

Olabode Rhodes-vivour
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): Having read in draft the lead ruling of my learned brother EJEMBI EKO JSC just delivered, and found the reasoning and conclusion therein to be in consonance with my views on the issues raised in the application, I adopt same as mine in dismissing the unmeritorious application. I abide by the consequential orders made in the lead ruling.

Musa Dattijo Muhammad,
Justice, Supreme Court.

INYANG OKORO, (JSC): My learned brother, Ejembi Eko, JSC obliged me a draft of the lead Ruling just delivered and I am in agreement entirely with the reasoning and the conclusion in the said lead Ruling.

I too will refuse the application as same lacks merit. It is accordingly dismissed. I abide by the other consequential orders in the lead Ruling including the order on costs.

John Inyang Okoro
Justice, Supreme Court.

AMIRU SANUSI, (JSC): I read in advance, the Ruling just rendered by my learned brother Ejembi Eko JSC. The reasoning and conclusion arrived at therein, that the application for the setting aside of this court's order made in chambers be vacated, is without merit and deserves to be dismissed. I shall accordingly dismiss the application.

I must say, that the fact that the applicants spent 54 weeks) i.e. over one year from the time they were served with the record of appeal, without caring to file their joint brief of argument is contrary to the provisions of Order 6 Rule 5(1) of Supreme Court Rules, which gives only ten weeks to the appellant within which to file brief of argument from the date the record of appeal was served on them. The long period spent by the applicants without filing brief of argument is too long enough to presume that the appellants/applicants had abandoned their appeal and therefore the appeal is liable to be dismissed. See Nkedo v. Obieno (1997) 5 SCNJ 33.

The incessant delay clearly portrayed the lackadaisical attitude of the applicant in prosecuting the appeal timeously and they therefore do not deserve to be given another chance again, since no cogent reason was advanced by the appellants/applicants to convince this court to restore the appeal or for it to set aside the order of dismissal it made earlier in chambers.

Thus, for these few remarks and the fuller and detailed reasons given in the lead

A Ruling, I shall also dismiss the application for want of merit. I abide by the order on costs made.

Amiru Sanusi
Justice, Supreme Court.

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