

**ABBEY MATHEW
VS
THE STATE**

SC. 176/2014

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

FRIDAY, 8TH MARCH, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
OLUKAYODE ARIWOOLA
JOHN INYANG OKORO
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE**

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

CRIMINAL LAW AND PROCEDURE: Guilt – Proof thereof – How to establish the guilt of an accused person.

CRIMINAL LAW AND PROCEDURE: Murder – Ingredients thereof – What prosecution must establish.

*CRIMINAL LAW AND PROCEDURE: Previous statement of a witness – Where a witness made a previous inconsistent Statement - Whether it can be put to him to test his credibility – The principle in **Madumere and Ors. vs. Okafor & Ors (1996) 4 SCNJ 73.***

PRACTICE AND PROCEDURE: Appeal – Grounds of appeal – Where no issue is formulated from a ground of appeal – Whether such ground is deemed to have been abandoned.

PRACTICE AND PROCEDURE: Appeal – Reply brief – When an appellant is expected to file a reply brief – Whether where the respondent's brief contains issues or points of law not covered in the appellant's brief.

*PRACTICE AND PROCEDURE: Appeal – Reply brief – Whether a reply brief is most unnecessary where there are no new issue in respondent's brief – The principle in **Aliyu Salihu vs. Alhaji A. Wasiu (2016) 8 SCM 180.***

PRACTICE AND PROCEDURE: Evidence – Evaluation thereof – Where evaluation of evidence involves credibility of a witness – Whether an appellate court cannot be involved therein – Rationale.

Issue for Determination

Whether with the totality of evidence on record if properly evaluated by the trial court, the court below was right in affirming the conviction and sentence of the appellant for murder and conspiracy to commit murder.

Facts of the Matter

This is an appeal against the judgment of the Benin Division of the Court of Appeal delivered on 12/12/ 2013 in appeal No:B/317C/2010 Coram: Ibrahim Mohammed Musa Saulawa, JCA; Ayobode Olujimi Lokubo-Sodipe, JCA; Tom Shaibu Yakubu, JCA.

The appellant and two others had been arraigned before the Edo State High Court of Justice, Uromi Judicial Division, holden at Uromi on two count charge of conspiracy to murder, punishable under Section 324 of the Criminal Code, Cap.48 Vol. II Laws of the Bendel State of Nigeria 1976 now applicable to Edo State of Nigeria. And murder punishable under Section 319(1) of the Criminal Code, Cap.48 Vol.II, Laws of Bendel State of Nigeria 1976 as applicable to Edo State.

The three accused persons were tried, found guilty, convicted and sentenced accordingly to 12 years imprisonment with hard labour on Count 1 and to death by hanging on the 2nd count. Appeal by each of the three convicts was dismissed by the court below, leading to the instant appeal by the 2nd convict.

Before the trial court, the prosecution called seven (7) witnesses to establish the charge while the appellant testified, but did not call any other witness. The case of the prosecution is as follows:

The deceased — Chief Samuel Okhuelegbe sometime on 5th October, 2006 had petitioned the Uromi Police Division, reporting a case of malicious damage against the 1st accused, - Iyere Ijeabulu. On 17/10/2006, PW2, having been detailed to investigate the matter proceeded with PW4 to meet with the deceased, petitioner in order to effect the arrest of the suspects. The said Iyere Ijeabulu was then arrested. On their way back to Uromi, between Ebulen and Okigene, a group of youths from Ebole-Uzea, all carrying machetes and numbering over one hundred and fifty persons, who were doing community work on the road, blocked the way and prevented the policemen from taking Iyere Ojeabulu further. In the process, the deceased and the policemen were beaten. The attackers tore the clothes of the deceased, and at a point, the deceased fell down. The PW2 eventually escaped and from his hiding requested for reinforcement from the Divisional Police Office at Uromi. But at the time the policemen arrived the scene, the deceased was no longer where he was with his attackers. They later traced the deceased back to Ebulen village and found him lying

down face up in front of Iyere Ojeabulu (1st accused's) house in the pool of his blood with machete cuts all over his body and with his two legs completely broken. The deceased was then taken to the hospital where he later died.

The appellant and two others including the said Iyere Ojeabulu were charged on the two counts of conspiracy to commit murder and murder. The appellant's defence was total denial. He was however found guilty of the two counts, convicted and sentenced accordingly.

The appeal was however dismissed by the court below leading to the instant appeal.

Held: (*Unanimously dismissing the appeal*)

1. *Abandoned ground of appeal*

As shown above, no issue has been distilled from Ground 4 of the amended notice of appeal meaning that the said ground has been abandoned and liable to be discountenanced and accordingly struck out. See; **Madumere vs. Okafor** (1996) 4 NWLR (pt. 445) 637; **Emespo J. Continental Ltd vs. Corona Shifah Rtsge Sellschaft MBH & Company** (2006) 11 NWLR (Pt.991) 365, (2006) 5 SC (Pt.1) 19; (2006) LPELR – 1126; **Adelekan vs. ECU-line NV** (2006) 12 NWLR (Pt.993) 33; (2006) 5 SC (Pt.11) 32; (2006) LPELR – 113. (*P.....Paras.....*).

2. *When an appellant is expected to file a reply brief*

But it appears that the appellant does not appreciate the essence of a reply brief of argument. Ordinarily, the filing of a reply brief of argument is not mandatory in the sense of being compulsory. But where a respondent's brief of argument raises issues or points of law not covered in the appellant's brief, then an appellant ought to file a reply brief of argument in the best interest of his case. See; **Popoola vs. Adeyemo** (1992) 3 NWLR (Pt. 284) 748; **Alimi Akanbi Dada vs. Chief Jonathan Dosunmu** (2006) 18 NWLR (Pt.1010) 134; (2006) 12 (Pt.2) SCM 108; (2006) 27 NSCQR 485. (*P....Paras.....*).

3. *A reply brief is most unnecessary where there is no new points of argument in the respondent's brief*

In **Aliyu Salihu vs. Alhaji A. Wasiu** (2016) 8 SCM 180; (2016) LPELR – 26062 this court reiterated that a reply brief is to be filed only in response to new argument of the respondent on law that has newly been raised by the respondent but was not covered by the appellant in his brief of argument. Where there has been no such new issue or point of law, a reply brief of argument is most unnecessary and anyone filed in that respect is liable to being discountenanced or ignored by the court. A reply brief is said not to be a repair kit to put right any lacuna in the appellant's brief of argument. See also; **Dr. Augustine N. Mozie & Ors vs. Chike Mbamalu & Ors** (2006) 12 SCM (Pt.1) 306 at 320; **Osuji vs. Ekeocha** (2009) 10 SCM 72 at 85; (2009) 16 NWLR (Pt.1166) 81. A reply brief is not meant to afford the appellant an opportunity for reargument or another bite at the cherry. It is not meant to be used to repeat an

argument or to extend the scope of the argument and submission in the appellant's brief of argument. The appellant's reply brief of argument filed in this case is much more than a reply brief. It is a complete re-argument of the appellant's case all over, which is beyond the scope of a reply. In the circumstance, it is liable to be discountenanced and is accordingly struck out. (*P.....Paras.....*).

4. *The ingredients of the offence of murder*

It has long been established that for the prosecution to secure conviction of a suspect for murder, the following three elements or ingredients must be proved beyond reasonable doubt.

- (1) That the deceased actually died.
- (2) That it was the act of the accused that caused the death of the deceased and;
- (3) That the act of the accused which caused the death of the deceased was intentional and it was with the knowledge that it would result in death or grievous bodily harm would be the probable consequences of the act of the accused.

See; **Alewo Abogede vs. The State** (1996) 5 NWLR (Pt.448) 270 (1996) LPELR – 45; **Igbele vs. The State** (2006) 6 NWLR (Pt.975) 1001 (2006) 3 SCM 143 (2006) LPELR 1441; **Hakeem Fatai vs. The State** (2013) 10 NWLR (Pt. 1361) 1 at 22; (2013) 5 SCM 140 at 155. (*P.....Paras.....*).

5. *How to establish the guilt of an accused person*

The law is trite in criminal trials that the guilt of an accused person charged with the commission of an offence can be established by any or all of the following:

- (a) The confessional statement of the accused;
- (b) Circumstantial evidence and
- (c) Evidence of an eyewitness.

See; **Folorunsho Alufohai vs. The State** (2014) LPELR — 24215; (2014) 12 SCM (Pt.2) 122; (2015) 3 NWLR (Pt.1445) 172; (2015) All FWLR (Pt.765) 198.

On the elements of the offence of murder with which the appellant was charged, there was no controversy on the first ingredient. That is, the fact that the deceased died was conceded by the appellant. Indeed, the trial court noted on page 151 that the learned counsel for the appellant conceded the fact that deceased Samuel Okhuelegbe died. What the court had to consider were the two other ingredients of the crime. This could be done by either direct or circumstantial evidence.

The trial court relied on the testimonies of PW2, PW3, PW4, PW5, PW6 and PW7. Indeed it was noted that PW3 was positive in his evidence of the role played by each accused persons, in particular, the role played by the appellant. Even though the counsel to the appellant had urged the court to reject the testimony of the PW3 for being a relation of the deceased the court refused. (*P....Paras.....*).

6. *Court relied on confessional statement of the appellant to convict him*
Exhibit P3 was the statement of the appellant which was tendered and admitted without objection. In it on pages 27-29 of the record, the appellant admitted that he participated in beating the deceased and that he knew that his death resulted from the beatings. The court relied on the testimony of PW3 and Exhibit P3 to convict the appellant. (P.....Paras.....).
7. *Facts contained in proof of evidence will go to no issue unless tendered*
Learned counsel to the appellant had argued that failure of the trial court to consider the statement on pages 47-48 of the record occasioned miscarriage of justice to the appellant. It is worthy of note that the said document was not tendered or placed before the trial court. Even the proof of evidence, which is to criminal trials what pleadings is to civil trials. The facts contained in the proof of evidence will go to no issue unless they are tendered in evidence during the trial to enable the court consider them with the proceedings. The court cannot go in search of evidence for any of the party before it. Pages 47-48 of the record referred to by the appellant not having been tendered by either party was not part of the proceedings of the appellant's trial. Proof of evidence is to disclose a *prima facie* case sufficiently believed to link an accused with the alleged crime and justify proceeding with the trial. (P.....Paras.....).
8. *Court properly evaluated evidence*
There is no doubt that the trial court considered and properly carried out evaluation of the available evidence adduced before it to arrive at the conclusion that the prosecution proved its case beyond reasonable doubt against the appellant. The court below was therefore right with its conclusion, having properly appraised and evaluated the evidence before the court. The court did not ignore any statement as part of the evidence before the court. (P.....Paras.....).
9. *A previous inconsistent statement can be used to test the credibility of a witness*
Now, learned counsel for the respondent had contended that the only use to which a previous statement, allegedly, made by a witness could be put is to contradict him [that is, the witness] during cross examination. This is correct. In **Madumere and Ors. vs. Okafor and Ors** [1996] 4 SCNJ 73, this court held per Ogwuegbu, JSC,] that:

A previous inconsistent statement can be put to a witness in cross-examination for the purpose of testing his credibility. The statement is not admissible for the purpose of proving the truth of its contents. The fact that the statement was made and is inconsistent with the witness's testimony in the present proceeding is significant. [Italics supplied for emphasis]

Other cases on this question include: *Bayol vs. Ahemba* (1999) 10 NWLR (Pt. 623) 381; *Balogun vs. A. G. Ogun State* [2002] 6 NWLR (Pt. 763) 512; *Obri vs. State* [1997] 7 NWLR (Pt. 513) 352; *Kasa vs. State* [1994] 5 NWLR (Pt. 344) 269; *Romaine vs. Romaine* [1992] 4 NWLR (Pt. 238) 650. (*P.....Paras.....*).

10. *An appellate court cannot evaluate evidence involving credibility of witnesses*
As a general rule, when the question of evaluation of evidence is against the non-evaluation or improper evaluation of the evidence, the appellate court is in as good a position as the trial court to do its own evaluation – **Fatai vs. State** (2013) 10 NWLR (Pt. 1361) 1 at 21 SC.

When it involves the credibility of witnesses, an appellate court cannot do much since it is the trial court that saw them, heard them and watched their demeanour in court that is in the vantage position to believe or disbelieve witnesses; this can never be captured by an appellate court that only has the "cold printed record to contend with" - see **Sogunro & Ors. vs. Yeku & Ors** (2017) LPELR-41905 (SC).

In this case, the trial court believed the prosecution witnesses, therefore, the court below was right not to interfere with its findings and conclusions that had not been shown to be perverse in any way. This court cannot intervene because as Ademola, CJN, observed in **Omisade vs. The Queen** (1964) NSCC (Vol. 3) 170, it is not the function of this court to retry a criminal case on appeal. He further stated that:

If there was evidence before the trial judge from which he could reasonably have come to the conclusion to which he did, the verdict must stand. The law was aptly put by Lord Tucker in the case of R. vs. Aladesuru & Ors 39 C.A.R. 184, which was an appeal from Nigeria. The learned Lord at p. 185 of the report said:

It will be observed that the language of the WACA Ordinance follows the English Criminal Act, 1907, under which it has long been established that the appeal is not by way of re-hearing as in civil appeals from a judge sitting alone, but is a limited appeal, which precludes the court from reviewing the evidence and making its own valuation.

In this case, the Court of Appeal found that that there was evidence from which the trial court could reasonably conclude as it did that the appellant was guilty as charged. Its decision to that effect cannot be faulted and must stand. This court cannot interfere with that finding. (*P.....Paras.....*).

Lead Judgement: **OLUARIWOOLA, (JSC)**

Representations

E. Y. Oboh, (Esq.) with Pius Ezema (Esq.) for the appellants.

E. R. Emukpoekyo (Esq.) with S. N. Ernest Egbua (Esq.) for the respondent.

**ABUBAKAR MOHAMMED
VS
THE STATE**

SC. 225/2013

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIPS

**MUSADATTIJO MUHAMMAD
KUMAI BAYANGAKAAHS
CHIMA CENTUS NWEZE
AMIRU SANUSI
SIDI DAUDA BAGE**

**JUSTICE, SUPREME COURT
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ADMINISTRATION OF JUSTICE: Court – Judicial divisions – Essence – Whether there is one High Court of a State and Judicial divisions are created for mere administrative convenience – Section 272(1) of CFRN 1999 (as amended) considered.

ADMINISTRATION OF JUSTICE: Judicial divisions of a High Court of a State – Whether the Chief Judge can assume jurisdiction in any judicial division of the High Court of a State.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – Where appellant has pleaded guilty to the charge – Whether the contention that the trial court relied on inadmissible evidence to convict is immaterial.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – How made.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – Where accused pleads guilty to the charge – Whether it is in the form of judicial confession.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – Where accused pleads guilty to the charge – Whether it satisfied the burden of proof beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – Where accused pleads guilty to a charge – Whether court should proceed straight and convict him – Exceptions thereto.

CRIMINAL LAW AND PROCEDURE: Plea of guilty – Where accused pleads guilty in a non capital offence – Whether the trial court will proceed to convict the accused without calling on the prosecution to prove the commission of the offence.

CRIMINAL LAW AND PROCEDURE: Unlawful possession of firearms – Strict liability offence – Burden on accused thereto – How discharged.

CRIMINAL LAW AND PROCEDURE: Venue – Armed robbery cases – Whether the entire state constitutes the venue for the trial of armed robbery cases – Section 9 of the Robbery and Firearms Special Provisions Act 2004 considered.

PRACTICE AND PROCEDURE: Exercise of discretion – Interference therein – Where a trial court has properly exercised its discretion in terms of sentencing – Whether the appellate court will not interfere therein.

PRACTICE AND PROCEDURE: Objection by counsel – Where counsel represents a party at the trial court and did not raise objection therein – Whether he will be estopped from raising such objection at the appellate court.

STATUTE: Robbery and firearm special provisions Act – Section 9 thereof – Whether confers jurisdiction on the State High Court.

STATUTE: Robbery and Firearms Special Provision Act 2004 – Section 3(1) thereof – Nature and purport.

Issues for Determination

- 1. Whether the learned justices of the court below were wrong to have affirmed the judgment of the trial court which imposed a 10 year sentence on the appellant without option of fine for the offence of illegal possession of firearms contrary to Section 3 (1) of the Robbery and Firearms (Special Provisions) Act 2004.**
- 2. Whether the learned justices of the court below were wrong to hold that the Taraba State High Court sitting in Jalingo had jurisdiction to try the appellant who committed offences in Wukari Judicial Division of the State.**

Facts of the Matter

This is an appeal from the decision of the Court of Appeal, Yola Division delivered on 8th February, 2013 which affirmed the judgment of the learned trial judge which convicted the appellant alongside 3 others for the offence of conspiracy and unlawful possession of firearms contrary to Section 5(6) and 3(1) of the Robbery and Firearms (Special Provisions) Act 2004. The three other

persons with whom the appellant was charged pleaded guilty and were summarily convicted by the learned trial judge on 29th July 2009. Being dissatisfied with the decision of court below, the appellant filed a notice of appeal dated 12th April 2013 and filed on 15th April, 2013.

The appellant was arraigned alongside three others before the Chief Judge of Taraba State on two counts of conspiracy contrary to Section 5(6) of the Robbery and Firearms (Special Provisions) Act 2004 punishable under same and illegal possession of firearms contrary to section 3(1) of the Act. When arraigned, on 29th July, 2009 before the learned trial judge, the appellant and the other 3 with whom he was charged all pleaded guilty to the charges and were summarily convicted and sentenced to N20,000.00 fine in respect of the offence of conspiracy contrary to Section 5(b) and 10 years imprisonment in respect of the offence of illegal possession of firearms contrary to Section 3(1) of the Robbery Firearms (Special Provisions) Act 2004.

Being dissatisfied with the judgement of the trial court, the appellant filed an appeal at the Court of Appeal, Yola Division vide a notice of appeal dated August 2009. The court below also dismissed the appeal in its judgement of 8th February, 2013. Still being dissatisfied with the judgment of the court below, the appellant filed this appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The Nature and purport of section 3(1) of the Robbery and Firearms (Special Provisions) Act 2004*

The starting point is to reproduce the exact provisions of Section 3 (1) of the Robbery and Firearms (Special Provisions) Act 2004. It states thus:

"3) Punishment for illegal possession of firearms"

"1) Any person having a firearm in his possession or under his control in contravention of the Firearms Act or any order made there under shall be guilty of an offence under this Act and shall upon conviction under this Act be sentenced to a fine of twenty thousand naira or to imprisonment for a period of not less than ten years, or to both."

There is no pretension that the law intends that an offender found guilty under the above provisions is liable to ten years imprisonment with an option of fine of Twenty Thousand Naira, or both. (*P.....Paras.....*).

2. *Appellant has pleaded guilty to the offence*
This is one offence in respect of which the appellant had unequivocally pleaded guilty. The contention of the appellant that the trial court considered materials which were not tendered as evidence before the court in convicting and sentencing the appellant of the offence for which he was charged is, in my view, misplaced. The commission of the offence is not disputed by the appellant who had pleaded guilty to the offence. (*P.....Paras.....*).
3. *The Implication of a plea of guilty*
What formed the basis of the conviction of the appellant is not the weapon but his admission of guilt. The inspection of the weapon was only an opportunity to view the magnitude of the threat to security or peace of the State or Federation that those objects constitute. As observed by the court below, the sentences imposed on the appellant and two others by the trial court was substantially the same and in accordance with the mandatory provisions of the law as quoted above. The case of **OMEGA BANK (NIG) PLC vs. O.B.C.** (2005) All FWLR (Pt.249) 1964 relied upon by the appellant is irrelevant here. The appellant pleaded guilty, but nonetheless contended that it was wrong in law for the trial court to have considered materials which were not tendered and admitted as legal evidence before the court. (*P.....Paras.....*).
4. *Procedure where accused pleads guilty in a non capital offence*
The law is settled. After a plea of guilt by an accused person in non-capital offence, the court must formally proceed to the conviction of the accused without calling upon the prosecution to prove the commission of the offence. See **R. vs. WILSON** (1995) SCNLR P. 462, **SUMMAN YA ISSAH TORRI vs. NATIONAL PARK SERVICE OF NIGERIA** (2008) LPELR - 8475, at pages 44-45. See also Section 187 of the Criminal Procedure Code on guilty plea. (*P.....Paras.....*).
5. *Plea of guilty satisfies the burden of proof*
Admission of guilt on the part of the accused would have satisfied the required burden of proof. The appellant did not deny or challenge the allegation against him. It is therefore absolutely ludicrous to expect a mere slap on the palm by imposing only a fine of twenty thousand naira when the trial court, in its wisdom, and in fair and just exercise of its judicial discretion which is not in any way fettered by the self-admission of the appellant, had carefully decided to abide by the statutory 10 year jail term. (*P.....Paras.....*).
6. *Supreme Court will not interfere in the exercise of judicial discretion which was done properly.*
Therefore, I hold that by virtue of Section 3(1) of the Robbery and Firearms (Special Provisions) Act, the trial court has the option or judicial discretion of imposing a fine

of twenty thousand naira or imprisonment for a term of not less than 10 years or both. The trial court has exercised its judicial discretion fairly and justly giving the circumstances of the case and severity of the offence to which the appellant had already pleaded guilty, it will be inappropriate for this court to interfere with the exercise of judicial discretion unless it was wrongly exercised, which is not the case in this case. See **ANYAH vs. AFRICAN NEWSPAPERS OF NIGERIA LTD** (1992) 6 NWLR (Pt.247) 319 at 334. (*P.....Paras.....*).

7. *Venue of trial in armed robbery cases*

The applicable law, the Robbery and Firearms (Special Provisions) Act provides for the place of trial. Section 9 states clearly that: **"Offences under this Act shall be triable in the High Court of the State concerned"**.

The above is a clear provision as to where the offence in question ought to be tried. The offence was committed in Taraba State. (*P.....Paras.....*).

8. *The essence of judicial divisions*

Section 272(1) of the Constitution of the Federal Republic of Nigeria (as amended) provides for a High Court for each State of the Federation, including Taraba State. There is only one High Court of Taraba State. I'm in total agreement with the position of the court below that:

"The above provisions of our laws especially the Constitution do not oust or limit jurisdiction of the High Court of a State by mere divisions. The whole essence of judicial divisions is for the purposes of administrative convenience. See Odock vs. State (Supra). It is therefore trite that, there is only one High Court in each State of Nigeria. However, judicial divisions are created for administrative convenience to enable the wheel of justice run faster and speedily or smoothly and all divisions are bound by the same Rules. See Shell vs. Tiagbara Edamkue (Supra). See also S.O. Ukpai vs. Okoro & Ors (1983) 2 SCNLR 380 at 388, 390 and 391; and Sken consult Nig Ltd vs. Ukey (1981) 12 SC, at 1."

The judicial divisions of a High Court are mere branches of the same tree, the High Court of the State and under one administrative head, who is the Chief Judge of that State. This appeal presents an interesting twist. This court must not let the opportunity slip by without setting the law on the right path and in the right perspectives. The trial judge in this appeal is the Chief Judge of Taraba State. The Nigerian Constitution provides that the *alter ego* of a State High Court is the Chief Judge of that State. I hereby reproduce the relevant section of the Nigerian Constitution, thus:

PART II: State Courts***A - High Court of a State 270.***

"1) There shall be a High Court for each State of the Federation.

2. The High Court of a State shall consist of -"

"a) a Chief Judge of the State; and

b) such number of judges of the High Court as may be prescribed by a law of the House of Assembly of the State." (P.....Paras.....).

9. *Chief Judge of a State can assume jurisdiction in any judicial division of the state.*

The Chief Judge of a State has no specific or fixed judicial divisions. The Chief Judge sits as the Chief Judge of that State in any civil or criminal matter. He or she superintends the entire judiciary of the State, and may sit to assume jurisdiction to try or hear a civil or criminal case in any of the branches of the court under his or her watch irrespective of nomenclature as 'division', 'zone', or characterisation of such court as 'family court', 'commercial court', 'criminal court' and others. These are permissible arrangements for administrative convenience and prompt, effective dispensation of justice.

A Chief Judge is not Chief Judge for fun. It is constitutional, legally and judicially or procedurally improper to confine the judicial and administrative function of the Chief Judge to a particular division, especially the needless restriction of judicial functions of the Chief Judge to State capitals. The Chief Judge sits as Chief Judge in any division of the State, and does not sit as 'Chief Judge of a division but of the entire judicial architecture of a State.

In this case, the Chief Judge sat and decided the case as Chief Judge of the entire Taraba State. The severity or sensitivity of the particular case often makes this expedient for a Chief Judge to sit over some cases, and should be able to do so in any of the judicial division or segment of that State. In view of the foregoing, I resolve issue two in favour of the respondent. There is no 'High Court of Wukari' but 'High Court of Taraba State sitting in Wukari, or Jalingo. The Chief Judge is that of Taraba State which includes Wukari, Jalingo and other divisions. (P.....Paras.....).

10. *Appellant who pleaded guilty was represented by counsel*

Firstly, the appellant must contend with his plea of guilty to the two counts charge of conspiracy to sell and being in illegal possession of firearms contrary to Sections 5(b) and 3(1) of the Robbery and Firearms (Special Provisions) Act 1990.

It is evident from the record of appeal that the charge was read and fully explained to the appellant in Hausa language and having understood the implication of the charge, he pleaded guilty to same.

The further fact that the appellant was represented by counsel at the trial court, the propriety of the affirmation of which decision by the lower court is being

agitated in this appeal, the chance for success of the appeal is further lessened.

Section 161(2) and 187 of the Criminal Procedure Code provide for criminal trials in the trial court which decision the lower court affirmed. Appellant's conviction and sentence as affirmed by the lower court, is in consequence of the charge being read and explained to him. He pleaded guilty after understanding the import of the charge. The affirmation by the lower court of his conviction and sentence by the trial court, which is in compliance with the powers vested in the two courts under Sections 161(2) and under 187 of the Criminal Procedure Code, is beyond reproach. (*P.....Paras.....*).

11. *The implication of plea of guilty by the accused*
Appellant's plea of guilty is as good as judicial confession, his valid admission of the commission of the two offences in the charge. See **SHARFAL vs. STATE (1992) LPELR - 3038 (SC)** and **SUMANYA ISSAH TORRI vs. THE NATIONAL PARK SERVICE OF NIGERIA (2011) LPELR - 8142 (SC)**. (*P.....Paras.....*).
12. *Counsel is estopped from raising preliminary objection*
It must be restated that appellant was represented by counsel at trial who, this court insists, is duty bound to raise all the objections in the conduct of trial belatedly being presently sought to be addressed. The appellant, whose counsel failed earlier to raise these concerns, is stopped from doing so now. See **MOHAMMED vs. STATE (1991) 5 NWLR (Pt. 192) 438, AKPA vs. STATE (2008) 14 NWLR (Pt. 1106) 72 and ADEKUNLE OLUWAFEMI ALAO vs. THE STATE (2015) 244404 (SC)**. (*P.....Paras.....*).
13. *Procedure where an accused pleads guilty to a charge*
Where an accused person represented by counsel is arraigned and the charge is read and explained to him in the language he understands, and he pleads guilty to the charge, the court shall convict him unless there appears to the court sufficient cause why he should not be convicted. See: **Kolo vs. C. O. P (2017) 9 NWLR (Pt. 1569) 118**. (*P.....Paras.....*).
14. *How plea of guilty is made*
A plea of guilty is valid if made in a very unambiguous and unequivocal way and the same is received by a trial court not labouring under the apprehension of what the law is. See: **Amanchukwu vs. FRN (2009) 8 NWLR (Pt. 1144) 475; Okewu vs. FRN (2012) 9 NWLR (Pt.1305) 327; Adeyemi vs. State (2013) 14 NWLR (Pt. 1373) 129; Daniel vs. FRN (2015) 13 NWLR (Pt. 1475)119 and Baalo vs. FRN (2016) 13 NWLR (Pt.1530) 400**. (*P.....Paras.....*).

15. *The extent of territorial jurisdiction of High Court of Taraba State*

The appellant was charged with being in possession of assorted firearms without licence and he pleaded guilty. The offence is a strict liability offence and the burden was on the appellant to prove that his possession of the firearms was lawful by producing his licence that allowed him to have possession of the firearms.

The attack by the appellant of the venue where he was arraigned i.e. in Jalingo instead of Wukari where the firearms were found is a non issue since the territorial jurisdiction of the Taraba State High Court covers the whole State which includes Wukari and Jalingo. See. Section 272(1) and (2) of 1999 Constitution which provides:-

“272-(1) Subject to the provision of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedingsor to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil and criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction" .
(P.....Paras.....).

16. *Jurisdiction of High Court of a state under section 9 of the robbery and firearms Special Provision Act 1999 (as amended)*

The only valid objection that could have been taken would have been with regard to whether the appellant should have been arraigned before the Federal High Court and not the State High Court since the offence is a Federal offence but the amended section 9 of the Robbery and Firearms (Special Provisions) Act No. 62 of 1999 provides that the offences under the Act shall be triable in the High Court of the State concerned. (P.....Paras.....).

17. *Trial court exercised its jurisdiction properly*

It is provided in section 3(1) of the Robbery and Firearms (Special Provisions) Act that the punishment for illegal possession of firearms is a fine of N20,000.00 or to imprisonment for a period of not less than ten years, or to both. The trial Chief Judge exercised his discretion to impose both a fine for the first and 10 years imprisonment for the second count. The law gives him the latitude to impose both the fine and term of imprisonment and for this court to interfere with that discretion it must be shown that he did not exercise the discretion according to law but rather capriciously. (P.....Paras.....).

Lead Judgement:- DAUDABAGE, (JSC)

Representations

Taiwo Kupolati for the appellant.

M.M. Nwudeen with D. S. Dzege, and Haruna Ibrahim, for the respondent.

ALFA SAKA SALAMI
Vs.
ALHAJI MOHAMMED JODI MAGAJI
Muse family for and on behalf of muse family

SC. 75/2009

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKA' AHS
CHIMA CENTUS NWEZE
AMIRU SANUSI
SIDI DAUDA BAGE

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

ACTION:- Jurisdictional issue – Where raised promptly – Rationale.

ACTION:- Originating process – Defect thereto – Whether can be raised at anytime even for the first time at the Supreme Court.

*CASE LAW:- Signing of originating process – Where an originating process was not signed by a legal practitioner – Implication thereof – The principle in **FBN Plc and Anor Vs. Alhaji Salman Maiwada (2012) 5 SC (Pt. 111).***

COURT:- Approach to justice – Application of substantial justice – Whether cannot be attained by bending the law but by applying it as it is.

COURT:- Fresh issue on appeal – Whether appellate court can suo motu raise issue of jurisdiction on appeal – conditions thereto.

*LEGAL PRACTITIONERS:- Signing of originating process – Where an originating process was signed in the name of a firm – Whether such process is incompetent – The principle in **Okafor vs. Nweke (2007) LPELR 2412 SC***

PRACTICE AND PROCEDURE:- Appeal – Fresh issue thereto – Where party fails to seek

*leave before raising fresh issue on appeal – The principle in **Wema Securities and Finance Plc Vs. NAIC (2015) LPELR – 24833 SC.***

PRACTICE AND PROCEDURE:- Appeal – Raising fresh issue thereto – Whether a party cannot raise fresh issues on appeal without seeking leave except issues pertaining to jurisdiction.

PRACTICE AND PROCEDURE:- Appeal – Where the statement of defence is incompetent – Whether there is no valid pleadings to sustain the defendant's case.

PRACTICE AND PROCEDURE:- Statement of defence – Where statement of defence is incompetent – Whether defendant is deemed to have accepted all the relief in the statement of claim.

PRACTICE AND PROCEDURE:- Appeal – Issues for determination – Where a preliminary objection succeeds – Whether there would be no need to consider the issues raised in the appeal.

*STATUTE:- Legal Practitioners Act – Sections 2(1) and 24 thereof – Where there is non-compliance – Whether affects jurisdiction of a court as a matter of substantive law and not procedural – The principle in **FBN Plc & Anor vs. Alhaji Salman Malwada (2012) 5 SC.***

WORDS AND PHRASES:- “Locus classicus” – Meaning

Issues for Determination

Facts of the matter

At the High Court of Kwara State, Ilorin Judicial Division, [the trial court, for short], the respondent in this appeal, [as claimant], sought declaratory and injunctive reliefs against the appellants herein [as defendants]. In particular, they claimed ownership of the parcel of land at Lao Gbagba village, off Ilorin Airport, Ilorin, Kwara State.

Having lost the case at the trial court, the respondent approached the Court of Appeal, Ilorin Division, [the lower court, for short], which said court allowed his appeal and set aside the trial court's judgement. The lower court, equally, granted the respondent's principal and ancillary claims. This appeal is, therefore, the appellant's expression of his dissatisfaction with the lower court's judgement.

Held: (*Unanimously dismissing the appeal*)

1. *Meaning and purpose of preliminary objection*

A preliminary objection is a pre-emptive strike; its resolution will determine the question whether or not the appeal will be determined on the merit, Jim-Jaja Vs. C.O.P. Rivers State and Ors (2012) LPELR-20621 (SC) 10, paragraph F.

Indeed, that is why I am under obligation to resolve the issues agitated in' the above preliminary objection before taking any further step in the determination of this appeal, Okoi Vs. Ibiag [2002] 10 NWLR (pt. 7760) 455, 468; UBA Plc Vs. ACB [2005] 12 NWLR (pt. 939) 232; Goji Vs. Ewete [2001] 15 NWLR (pt 736) 273, 280.

Once this preliminary objection on the competence of this appeal succeeds, the proceedings in the appeal would be aborted and the need to consider the issues raised therein would automatically abate, L. M. Ericsson Nig Ltd Vs. Aqua Oil Nig Ltd (2011) LPELR-8807, citing *Ananeku Vs. Ekeruo* [2002] 1 NWLR (Pt. 748) 301, 30, *NPA Vs. Eyamba* [2005] 12 NWLR (pt 939) 409; *UBN Vs. Sogunro* [2006] 16 NWLR (pt. 1006) 504, 521-2.

(*P.....para.....*)

2. *Effects where parties failed to seek leave before raising a fresh issue on appeal.*

With due respect, the above arguments of learned counsel for the appellant, hastily beautiful, are not only, opinionated, but are, in actual fact, sophistical. Truth told, his above submissions are characterized by their irreverence to, and profanation of, the inveterate doctrine of *stare decisis*, a doctrine of ancient, albeit, illustrious jurisprudential pedigree, Abacha and Ors Vs. Fawehinmi [2002] 6 NWLR (Pt. 660) 228, 317; Emerah and Sons Ltd Vs. Attorney General Plateau State and Ors [1990] 4 NWLR (Pt.147) 788; Global Trans Oceanic S. A.Vs. Free Ent. (Nig) Ltd [2011J 5 NWLR (Pt. 706) 426, 441; Osakwe Vs. Federal College of Education Asaba [2010] 10 NWLR (pt.1201) 1, 35 - 36.

The arguments of the appellant's counsel had, indeed, been settled by this court in *Wema Securities and Finance Plc Vs. NAIC* (2015) LPELR -24833 (SC). According to the court [per Nweze, JSC]:

... Of course, it is still a valid general principle that where a party seeks to raise a fresh issue on appeal, he must seek the leave of court. Where he fails to do so, the issue, which *ipso facto* is rendered incompetent, would be liable to be struck out, *A-G. Oyo State Vs. Fairlakes Hotel Ltd* [1988] 12 SC (Pt. 1) 1; [1988] 5 NWLR (Pt. 92) 1; *Uor Vs. Loko* [1988] 2 NWLR (pt. 77) 430.

(*P.....para.....*)

3. *Issue of jurisdiction can be raised for the first time before an appellate court*
 However, the issue of jurisdiction constitutes an exception to this general principle for it [such as issue of jurisdiction] could be raised for the first time before an appellate court with or without leave, *Obiakor and Anor Vs. The State* [2002] 10 NWLR (Pt. 776) 612, 626 G; *Gaji Vs. Paye* [2003] 8 NWLR (Pt. 823) 583; *Oyakhire Vs. The State* [2006] 7 SCNJ 319, 327 - 328; [2006] 15 NWLR (pt.1001) 157; *Okoro Vs. Nigerian Army Council* [2000] 3 NWLR (Pt. 647) 77, 90 - 91; *Ajakaiye Vs. Military Governor, Bendel State* [1993J 9 SCNJ 242; *Yusuf Vs. Cooperative Bank Ltd* [1994] 7 NWLR (Pt. 359) 676.

The lower court's view that the issue of jurisdiction could be raised without leave is well-taken. The reason is not far to seek. Due to its fundamental nature, it is exempted from the disabilities and restrictions which hamper other legal points from being canvassed or agitated for the first time on appeal, *Western Steel Works Ltd and Anor. Vs. Iron Steel workers Ltd* [1987] 2 NWLR (pt. 179) 188. In effect, such an issue of jurisdiction could always be raised without leave, *Aderibigbe Vs. Abidoye* [2009] 10 NWLR (pt. 1150) 592, 615 paragraphs. C - G; *Comptroller Nigeria Prisons Services Lagos Vs. Adekanye* [2002] 15 NWLR (pt. 790) 33; *Obatoyinbo Vs. Oshatoba* [1996] 5 NWLR (pt. 450) 531; *Management Enterprises Ltd Vs. Otusanya* [1987] 2 NWLR (pt 179) 188.

In consequence, it can never be too late in law to raise the issue of jurisdiction because of its fundamental and intrinsic nature and effect in judicial administration, *Magari Vs. Matari* [2000] 8 NWLR (pt 670) 722, 735; *Akegbe Vs. Ataga* [1998J 1 NWLR (pt 534) 459, 465; *State Vs. Onagoruwa* [1992] 2 SCNJ 1; *A.G., Lagos Vs. Dosumu* [1989] 3 NWLR (pt 111) 552.
 (P.....para.....)

4. *Appellate court can suo motu raise issue of jurisdiction*
 Indeed, leave of the appellate court is unnecessary since it can itself raise it suo motu as soon as sufficient facts or materials are available for it to do so, *Obikoya Vs. The Registrar of Companies* [1975] 4 SC 31,35; *NNPC Vs. Orhiowasele and Ors* (2013) LPELR -20341 (SC); *Elabanjo Vs. Dawodu* [2006] 15 NWLR (pt. 1001) 76; *Ndaejo Vs. Ogunnaya* [1977] 1 SC 11; *Chacharos Vs. Ekimpex Ltd* [1988] 1 NWLR (Pt. 68) 88; *Bakare Vs. A.G. Federation* [1990] 5 NWLR (pt. 152) 516; *Oyakhire Vs. State* [2006] 15 NWLR(pt. 1001) 157; *Oloriode Vs. Oyebi* [1984] 1 SCNLR 390; *Ezomo Vs.. Oyakhire* [1985] 1 NWLR (pt 2) 193; *Akegbeja Vs. Ataga* [1998] 1 NWLR (pt 534) 459, 468; 469; *Bronik Motors Vs. Wema Bank Ltd* [1983] 6 SC 158; *Senate President Vs. Nzeribe* [2004] 41 WRN 60; *Odiase Vs.*

Agbo (1972) 1 All NLR (pt. 1) 170; *Dickson Moses Vs. The State* [2006] 7 SCM 137, 169.

Thus, although it is desirable that preliminary objections on issues of jurisdiction be raised early, once it is apparent to any party that the court may not have jurisdiction, it can be raised even *viva voce*. What is more, it is always in the interest of justice, where necessary, to raise jurisdictional issues so as to save time and costs and to avoid a trial which may, ultimately, amount to a nullity, *Osadebay Vs. A-G.; Bendel State* [1991] 1 NWLR (pt.169) 525; *Owoniboyos Tech. Services Ltd Vs. John Holt Ltd* [1991] 6 NWLR (pt.199) 550; *Okesuji v. Lawal* [1991] 1 NWLR (pt.170) 661; *Katto Vs. Central Bank of Nigeria* [1991] 9 NWLR (pt. 214) 126; *Utih Vs. Onoyivwe* [1991] 1 NWLR (pt.166) 166).

(P.....para.....)

5. *Effect of signing a court process in the name of a non legal practitioner*
In effect, the preliminary objection of the respondent's counsel is, firmly-anchored on good authorities of illustrious pedigree. As shown above, the learned counsel had cited *Okafor Vs. Nweke* (supra) and other cases on the effect of signing a process in a name other than that of a legal practitioner. That decision, *Okafor Vs. Nweke* (supra), has, actually, assumed a pre-eminent position in the jurisprudence of permissible signatures on court processes. It may, thus, be regarded as the *locus classicus* on this issue. (P.....para.....)

6. *Meaning of "Locus classicus"*
I note in passing that the Latin noun, *locus classicus*, [plural, *loci classici*, which was first used in 1853, means a passage that has become a standard for the elucidation of a word or subject; a classic case or example; the passage regarded as the principal authority on a subject, *Chambers 21st Century Dictionary* (Revised Edition) (New Delhi: Allied Chambers (India) Ltd, 803].

Cases that have followed that authority are legion: they are many, *SLB Consortium Ltd Vs. NNPC* [2011] 9 NWLR (pt. 1252) 317; *Ogundele Vs. Agiri* [2009] 12 SC (pt 1) 13; *Oketade Vs. Adewunmi* [2010] 8 NWLR (pt 1195) 63; [2010] 2-3 SC (pt 1) 140; *First Bank of Nig Plc Vs. Alhaji Salman Maiwada* (supra); *Alawiye Vs. Ogunsanya* (2012) LPELR- SC.229/2007; *Braithwaite Vs. Skye Bank* (2012) LPELR- SC.325/2010; *NNB Vs. Denclag* (2003) 4 NWLR (pt 916) 549; *SPDC Ltd Vs. Sam Royal Hotel Nig Ltd* [2016] 2 -3 SC (pt. 111) 1, 27 -28 and so.

What is more, from the consistent posture of this court in *SLB Consortium Ltd Vs. NNPC* (supra); *Ogundele Vs. Agiri* (supra); *Oketade Vs. Adewunmi* (supra); *First Bank of Nig Plc Vs. Alhaji Salman Maiwada* (supra); *Alawiye Vs. Ogunsanya* (supra); *Braithwaite Vs. Skye Bank* (supra), the appellant's submissions to the contrary are, clearly, preposterous.

(P.....para.....)

7. *Section 2(1) and 24 of Legal Practitioners Act affect the jurisdiction of a court as a matter of substantive law*

In First Bank of Nig Plc Vs. Alhaji Salman Maiwada [supra], this court elevated the position to the level of substantive law beyond procedural technicalities. Listen to the court's reasoning:

The decision in *Okafor Vs. Nweke* (supra), although it has not specifically adverted to the two earlier decisions of [The *Registered Trustees Vs. Akindele* (1967) 1 ANLR 110] and *Cole Vs. Martins* (supra), as it has not expressly overruled any of them, nonetheless, it has *decided that the provisions of Sections 2(1) and 24 of the Act affect the jurisdiction of the court as a matter of substantive law and not as a matter of procedural law* (and so as in certain cases they cannot be waived). Clearly the decision in *Okafor Vs. Nweke* has, impliedly, abandoned and dissented from *the decisions of the two cited cases as no longer good precedent to follow.*

See, *First Bank of Nig Plc Vs. Alhaji Salman Maiwada* (supra) In other words, *FBN Plc and Anor Vs. Alhaji Salman Maiwada* (supra) has, finally, dispelled any lingering uncertainty as to its *imprimatur* on the said *Okafor Vs. Nweke* (supra).

(P.....para.....)

8. *The principle in FBN Plc & Anor Vs. Alhaji Salman Maiwada (2012) 5 SC (Pt. 111) Interestingly, in that case [FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra), an eminent panel of seven distinguished justices of this court, unanimously, endorsed the court's earlier decision.*

Thus, the position is that:

... it is now settled that all court processes ... must be signed in the manner as prescribed by the Act, that is to say, by a person qualified as a legal practitioner and enrolled in the Supreme Court of Nigeria. Any court processes signed in the business names of a firm's name ... having been rendered incurably defective *ab initio* are liable to be struck out.

See, *FBN Plc and Anor Vs. Alhaji Salman Maiwada* (supra)

(P.....para.....)

9. *Substantial justice cannot be attained by bending the law but by applying it as it is Truth told, that this issue goes beyond technicality has been re-iterated by this*

court in *FBN Plc and Anor Vs. Alhaji Salman Maiwada* (supra). Hear this ratiocination on this point:

I agree that the age of technical justice is gone. The current vogue is substantial justice. See: *Dada Vs. Dosumu* [2006] 12 PNJSC 115. But substantial justice can only be attained not by bending the law but by applying it as it is; not as it ought to be. *There is nothing technical in applying the provisions of sections 2(1) and 24 of the Legal Practitioners Act as it is drafted by the Legislature. The law should not be bent to suit the whims and caprices of the parties/counsel. One should not talk of technicality when a substantive provision of the law is rightly invoked.*

FBN Plc and Anor Vs. Alhaji Salman Maiwada (supra)
(P.....para.....)

10. *The appellant was deemed to have accepted the reliefs in the statement of claim where the statement of defence filled was incompetent*

The implication of all I have said above is that the said defendant/appellant's pleading, signed by "PP: Olatoke and Co.," is unknown to our law, *SLB Consortium Ltd Vs. NNPC* (supra); *Ogundele Vs. Agiri* (supra); *Oketade Vs. Adewunmi* (supra); *First Bank of Nig. Plc Vs. Alhaji Salman Maiwada* (supra); *Alawiye Vs. Ogunsanya* (supra); *Braithwaite Vs. Skye Bank* (supra). Hence, the only pleading filed was the statement of claim.

The absence of the statement of defence meant that no issues were joined, in the pleadings, *Egesimba Vs. Onuzuruike* [2002] 15 NWLR (pt. 791) 466. The appellant was, therefore, deemed to have admitted the claim or reliefs in the statement of claim. The only exception, which was not the case at the trial, was where a paragraph of the said statement of claim contained averments that were, notoriously, false to the knowledge of the court. In the natural course of events, a court would not be expected to admit such inadmissible facts. That was not the case at the trial court, *Okoebor Vs. Police Council* [2003] 12 NWLR (pt. 834) 444.

In all, therefore, I agree with the respondent's counsel that the appellant failed to file a competent statement of defence. Thus, all the evidence, the appellant and his witnesses gave at the trial went to no issue. This must be so for, as is well-known, evidence not pleaded goes to no issue, *Emegokwue Vs. Okadigbo* [1973] 4 SC 113; *George Vs. Dominion Flour Mills Ltd* [1963] 1 SCNLR 117; (1963) 1 All NLR 71, 78; *Orizu Vs. Anyaegbunam* 1 LRN 216.

Such evidence, if mistakenly admitted, as the trial court did in the instant case, ought to, and should have, in fact, been ignored by the Judge in coming to his conclusion in the matter before him, *National Investment and Properties Co.*

Ltd Vs. Thompson Organisation Ltd (1969) NMLR 99; Woluchem Vs. Gudi [1981] 5 SC 291; Adenuga Vs. L.T.C (1950) 3 WACA 125. (P.....para.....)

11. *No need to consider issue raised in appeal where the preliminary objection succeeds.*
This first issue in the preliminary objection succeeds. It obviates the need for any voluble comments on the second issue. This arm of the preliminary objection on the competence of this appeal succeeds. The result is that the need to consider the issues raised in the appeal would automatically abate, *L. M. Ericsson Nig Ltd Vs. Aqua Oil Nig Ltd (supra); Ananeku Vs. Ekeruo (supra)0; NPA Vs. Eyamba (supra); UBN Vs. Sogunro (supra).* (P.....para.....)
12. *There was no valid pleading on records to sustain appellant's case*
I am in complete agreement with learned respondent's counsel that appellant's proposed amended statement of defence is a worthless process same having been signed by the firm of Kayode Olatoke & Co instead of a legal practitioner as required by Sections 2(1) and 24 of the Legal Practitioners Act. The effect of this is that there is no valid pleading on record to sustain appellant's case at the trial court or his further agitation at the appellate level. Respondent's reliance on *OKPE Vs. FAN MILK (2016) 12 SC (Pt. III) 1 at 31* in this regard is apposite. (P.....para.....)
13. *Defect in originating process can be raised at any time even for the first time at the Supreme Court*
This is an originating process that goes to the jurisdiction of the court. It can therefore be raised at anytime even for the first time in the Supreme Court. See: *A-G Lagos State Vs. Dosumu (1989) 3 NWLR (Pt. 111) 552; Bakare Vs. A-G Federation (1990) 5 NWLR (Pt. 152) 516; Bronik Motors Vs. Wema Bank Ltd (1983) 6 SC. 158; Oloriode Vs. Oyebi (1984)1 SCNLR 390; Ezomo Vs. Oyakhire (1985) 1 NWLR (Pt. 2) 193.* (P.....para.....)
14. *Rational for raising jurisdictional issue promptly*
Even though it is desirable to take objections on issues of jurisdiction early, once it is apparent to any party that the court may not have jurisdiction, it can be raised at any time and verbally too. It is always in the interest of justice to raise jurisdictional issues in order to save costs and avoid a trial that may ultimately result to a nullity. See: *Utih Vs. Onoyivwe (1991) 1 NWLR (Pt. 166) 166; Osadebay Vs. A-G Bendel State (1991) 1 NWLR (Pt. 169) 525; Owoniboys Tech. Services Ltd Vs. John Holt Ltd (1991) 6 NWLR (Pt. 199) 550; Katto Vs. Central Bank of Nigeria (1991) 9 NWLR (Pt. 214) 126.* (P.....para.....)

15. *Effect where an originating process is signed in the name of a non legal practitioner*

The case of Okafor Vs. Nweke (2007) 10 NWLR (Pt. 1043) 521 and other cases emphasise the effect of any originating process which is signed in the name other than that of a legal practitioner as null and void. Any evidence predicated on the null process would not be of any evidential value since it will not be based on nothing. See: Skenconsult Vs. Ukey (1981) 1 SC 4. (P.....para.....)

Lead Judgement: **CHIMA CENTUS NWEZE, JSC**

Representations:

**Kehinde Shola Afolayan, for the appellant;
Abdulwahab Bamidele for the respondent²⁵**

1. ALHAJI A.R. SULE
2. REGISTRAR, KWARA STATE POLYTECHNIC
3. KWARA STATE POLYTECHNIC
VS.
MR. J. ORISAJIMI

SC. 46/2006

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

ON FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIPS

MUSADATTIJO MUHAMMAD
KUMAI BAYANGAKAAHS
CHIMA CENTUS NWEZE
AMIRU SANUSI
SIDIDAUDA BAGE

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

*CASE LAW:- Defamation – Defence of privilege – Two cardinal conditions – Moral duty to make and interest to so hear – Must co-exist – Principle in **Iloabantie Vs. Ilobanchie (supra)**.*

CASE LAW:- Defence of qualified privilege – Ill-motive or malice – Destroys the defence.

CASE LAW:- Libel – Defence of justification – Implication.

CASE LAW:- Libel – Defence of qualified privilege – What must be shown therein.

CASE LAW:- Libel – Proof of – Elements of

CASE LAW:- Libel – Technical malice and express malice – Meanings and consequences.

CASE LAW:- Public Officers Protection Act-S.2(a) – Not a shield to perpetrators of administrative recklessness etc.

CASE LAW:- Public Officers Protection Act-S.2(a) – Not to benefit a party who acted in abuse of office.

CONSTITUTION:- S.36(1) CFRN – Fair hearing – Whether no one should be condemned unheard.

EVIDENCE:- Action for defamation – Defence of privilege – Must be pleaded

EVIDENCE:- Civil cases – Proof of – On balance of probabilities.

EVIDENCE:- Defence of defamation – Failure to plead same – Consequence of

*EVIDENCE:- Libel – Proof of – On who lies – Principle in **Sketch Vs. Ajagbemokeferi (supra)***

JUDGMENT: Concurrent decisions – When not perverse and supported by credible documentary evidence – Court not to interfere.

JUDGMENT:- Concurrent findings of fact – When can be interfered with by the Supreme Court

JUDGMENT:- Evaluation of evidence – When properly done by the trial court and lower court – Whether appeal on lacks merit?

STATUTE:- Public Officers Protection Act – S. 2(a) what designed for – Acts in good faith.

Issues for Determination

- 1. Whether the learned justice of the Court of Appeal in their majority decision were right in holding that the court has jurisdiction to hear and determine the suit which culminated in this appeal.**
- 2) Whether the learned justices of the Court of Appeal in their majority decision were right in holding that the defence of qualified privilege which was not pleaded cannot avail the appellants.**
- 3) Whether the learned justice of the Court of Appeal were right in holding that the respondent had discharged the onus on him to prove libel."**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Ilorin Division delivered on 5th January 2006 in respect of an appeal filed by the appellant against the judgment of the trial court dated 2nd April, 2004. The Court of Appeal dismissed the appeal and confirmed the judgment of the trial court. Still being dissatisfied, the appellant filed the instant appeal vide a notice of appeal dated 22nd February, 2006.

SUMMARY OF FACTS:

The respondent commenced this suit by a writ of summons dated 30th December 1999 claiming One Million Naira (N1,000,000.00) damages for alleged libel committed by publication in a document dated 18th August 1997. The case of the respondent was that he was employed by the 3rd appellant in 1992 as a Principal Instructor Grade II. His appointment was later terminated by the appellants through Exhibit P5. However, in paragraph 4 of the Exhibit, the 3rd appellant expressed appreciation for the service of the respondent during his tenure. The respondent subsequently secured another employment at the Federal Polytechnic, Offa and applied to the 3rd respondent for the transfer of his cumulative service.

In response to the request, the 3rd appellant published a statement to the effect that the respondent was involved in examination malpractices and financial impropriety. This statement was then published to the Federal Polytechnic, Offa without soliciting for same as contained in Exhibit 2. Consequently, the respondent's employment was terminated. At trial, the court gave judgement in favour of the respondent on the ground that he had proved his claim and that the defences of justification and absolute privilege did not avail the appellants on the ground that they did not prove the truth of the allegations of examination malpractice against the respondent. The appellant appealed to the Court of Appeal which also dismissed the appeal and confirmed the judgment of the trial court in a majority decision, with Aboji John Ikongbeh, JCA dissenting. Still being dissatisfied, the appellant filed the instant appeal.

HELD: *(Unanimously dismissing the appeal)*

1. *Purpose of the Public Officers Protection Act- S. 2(a) therein*

The law is now settled that Section 2(a) of the Public Officers Protection Act had been enunciated by the Supreme Court in the case of **NWANKWERE Vs. ADEWUNMI** per Bret JSC thus:

"The law is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification."

See also **LAGOS CITY COUNCIL (TRADING UNDER THE NAME OF LAGOS CITY TRANSPORT) Vs. S.S.J. OGUNBIYI (1969) All NLR 287 at 289.**
(P.....para.....)

2. *Public Officers Protection act is not for the protection of officer who acted in abuse of office.*

Clearly, the appellants acted in abuse of office and cannot benefit from the protection of Section 2(a) of the Public Officers Protection Act. The intention of the appellants by the content of Exhibit P2 which was sent to a third party, Federal Polytechnic, Offa was to undermine the respondent, as he had never been indicted or queried in respect of the allegation forming the basis of Exhibits P2 and P7 and the respondent had never appeared before any Panel on criminal allegation contained in the exhibits. (P.....para.....)

3. *The three year rule of limitation under Public Officers Protection Act is not a shield to perpetuate abuse of office.*

The issue in this appeal goes beyond the three year rule of limitation of action against a public officer. In the context of this appeal, both the trial court and the court below saw the bigger picture of abuse of office for which the respondent has suffered harm to his reputation and career. The 3-year under the above law cannot and must not be allowed as a shield to perpetuate administrative recklessness or to rob courts of jurisdiction or be used as a basis for declaring a suit incompetent. (P.....para.....)

4. *A defendant must plead facts giving rise to his defence of privilege absolute or qualified – the principle in **Offoboche Vs. Ogoja.***

The law on this issue is long settled. In OFFOBOCHE Vs. OGOJA (Supra), this Court had this to say:

"Where in an action for defamation the defendant raises a defence of privilege, he should as a matter of pleadings aver the facts on which the defence is based ... If it is clear on the face of the statement of claim that the occasion was absolutely privileged, it is sufficient to plead that the statement discloses no cause of action. But otherwise the defendant must plead the facts on which he relies as giving rise to the privilege, whether absolute or qualified. In the absence of such plea, the defendant cannot adduce any evidence at the trial to establish such a defence nor cross-examine the plaintiff's witnesses with a view to a submission that the occasion was privileged. It is not sufficient merely to aver that the defendant pleads the defence of qualified privilege, or to aver that the publication was made on a privileged occasion."

- (P.....para.....)
5. *Effect of failure to specifically plead qualified privilege*
The appellants having failed to specifically plead qualified privilege they cannot be heard to complain that the trial court was wrong. As rightly observed by the court below, the findings of the lower court on this issue is unassailable, sound and logical. The appellant cannot be said to be entitled to the plea of qualified privilege in this case. (P.....para.....)

 6. *Privilege occasion – necessary conditions and factors to be considered by court.*
In ILOABANTIE Vs. ILOBANCHIE (2005) 5 SCNJ 84 at 293-294, the Supreme Court per Pats-Acholonu, JSC stated the legal position by relying on PULLMAN Vs. HILL LTD (1891) 1 Q.B. 528 where Lord Esher M.R. said that:

"An occasion is privileged when the person who makes the publication has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. I believe in considering the defence of privilege, whether qualified or not, there are some empirical factors that should be taken into consideration and these include the interest of any of the persons to whom the document was published and the circumstances of the matter in question. .. the court should consider the motive for the publication to examine whether it is actuated by purely altruistic principles or tendencies or malicious and injurious motive ..."

(P.....para.....)

 7. *Proof of ill-motive or malice destroys defence of qualified privilege*
Defence of qualified privilege is destroyed by ill-motive or malice where this is proved, as the respondent had demonstrated by credible evidence in this case. In OFFOBOCHE Vs. OGOJA, this court clearly set the record straight that malice would defeat the defence of qualified privilege, assuming this is pleaded by the appellant. Whichever way one looks at the circumstances of this case, particularly issue two under consideration, the defence of qualified privilege cannot avail the appellants for the simple fact that it was not specifically pleaded, and assuming it was, it would still have been vitiated by obvious malice and ill-motive given the facts and circumstances of this case. (P.....para.....)

 8. *Cohort are the ingredients of libel*
The onus of proving libel rests on the plaintiff. On the authority OF SKETCH Vs. AJAGBEMOKEFERI (supra), to succeed in a claim premised on libel; the plaintiff must prove the following:

- i) **That the defendant published a statement in a permanent form**
- ii) **That the statement referred to him.**
- iii) **That the statement was defamatory of him in the sense that it lowered him in the estimation of right-thinking members of the society; or it exposed him to hatred, ridicule or contempt, or it injured his reputation in his office, trade or profession, or it injured his financial credit."**

See Also **A.C.B. Ltd Vs. B.B. APUGO (2001) 5 NSCQR 549 at 552.**
(P.....para.....)

9. *Civil cases are proved only on preponderance of evidence*
Civil cases are decided on the balance of probabilities, as the plaintiff is not expected to prove his case beyond reasonable doubt but only on preponderance of evidence. See NSIRM Vs. ONUMA CONSTRUCTION COY. NIG. LTD. (2001) 5 NSCQR 759 at 760. See PETER ADEBOYE ODOFIN Vs. DR. B. JIMOH ONI (2001) FWLR (Pt.36) 807 at 817. (P.....para.....)
10. *When an appellate court will interfere with the findings of a lower court*
This court cannot disturb concurrent finding of fact by the trial court and court below contrary to the supposition of the appellants. The law is trite and well established that an appellate court may interfere with findings of a trial court when such findings have been made on legally inadmissible evidence, or they are perverse or are indeed not based on any evidence before the court. See the cases of SELE Vs. THE STATE (1993) 1 NWLR (Pt.267) P.276 at 282 and IYARO Vs. THE STATE (1998) 1 NWLR (Pt.69) P.256. See also Re: MOGAJI (1986) 1 NWLR (Pt.19) 759; SALAMI Vs. THE STATE (1988) 3 NWLR (Pt.85) 670; MBENU Vs. THE STATE (1988) 3 NWLR (Pt.84) 615. per Nnamani, Pg. 626 para A-B 8, Paras. D-F). (P.....para.....)
11. *When the Supreme Court does not disturb the concurrent decisions of the two lower courts.*
There are clear, direct, credible documentary evidence to justify the decisions of the trial court and court below. We are convinced that the findings are not perverse and are supported by credible documentary evidence, particularly Exhibits P2 and P7. The findings were neither reached as a result of a wrong approach to the evidence; or as a result of a wrong application of evidence; or as a result of a wrong application of evidence; or as a result of a wrong application of any principle of substantive law or procedure which would have warranted

our intervention. See ARABAMBI Vs. ADVANCE BEVERAGES IND. LTD. (2005) 19 NWLR (Pt. 959) 1 per Onnoghen, JSC (P. 46, C- E). See also OCHIBA Vs. STATE 2011 12 SC (Pt.IV) P.79" Per Rhodes-Vivour, JSC (PP. 51-52, Paras. F-B). See also CAMEROON AIRLINES Vs. OTUTUIZU 2011 12 SC (Pt.III) P.200; OLOWU Vs. NIG. NAVY 2011 12 SC (Pt.II) P.1; AROWOLO Vs. OLOWOOKERE & 2 ORS. 2011 11-12 SC (Pt.II) P.98. (P.....para.....)

12. *Effect where the trial court properly evaluated evidence.*

I hold that the trial court properly evaluated the evidence in the suit for the purpose of considering issues raised before it and the court below was right in upholding the decision of the trial court.

In view of the above, and as a consequence thereof, I hold that this appeal is lacking in merit. It therefore fails and is hereby dismissed for reasons as contained in the above analyses. The majority judgment of the Court of Appeal sitting in Ilorin dated 5th January, 2006 is hereby affirmed. (P.....para.....)

13. *The fundamental principle of fair hearing*

It is a fundamental principle of fair hearing enshrined in section 36(1) of the Nigerian Constitution that no one should be condemned unheard. See: Kenon Vs. Tekam (2001) 14 NWLR (Pt. 732) 12. (P.....para.....)

14. *Conditions for the successful defence of qualified privilege*

It should be noted that where the defence pleads justification, it is admitting the fact that the publication is libelous of the plaintiff but that the plaintiff has no reputation whatsoever but if the defence is that of qualified privilege it can only be claimed when it is shown that the occasion of the publication is privileged. An occasion is privileged when the person who makes the publication has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both conditions must exist in order that the occasion may be privileged. See: Iloabachie Vs. Iloabachie (2005) 13 NWLR (Pt. 943) 695. The defence of privilege is destroyed by malice or ill-motive. (P.....para.....)

15. *Express malice must be proved by evidence*

As this court held in *Bakare Vs. Ado Ibrahim* [1973] 6 SC 147:

... 'technical malice' otherwise known as malice in law is always presumed in the plaintiffs favour. While 'express malice,' otherwise known as malice in fact, is never presumed, it must be proved by evidence. In our view, therefore, *it is equitable to expect that just as the defendants (as in this case) are required to give particulars of the facts on which the plea of fair comment is based,*

so also is the plaintiff (where he intends to defeat such defence of fair comment) obliged to deliver a reply alleging malice against the defendants/ and setting out particulars of the facts from which actual malice may be inferred. [Italics supplied for emphasis]

Also, Dawson Vs. Dover and County Chronicle Limited (1913) 108 L.T. 481,484. (P.....para.....)

Lead Judgement: SIDIDAUDABAGE, JSC

Representation

Ganny Ajape, for the appellant.

Registrar: Respondent Served on 13/12/2018.

KUNLE KALEJAIYE

Vs.

- 1. THE LEGAL PRACTITIONERS
DISCIPLINARY COMMITTEE (LPDC)**
- 2. NIGERIAN BAR ASSOCIATION**

SC. 429/2015

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

FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIP

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKAHHS
CHIMA CENTUS NWEZE
AMIRU SANUSI
SIDI DAUDA BAGE**

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

CONSTITUTIONAL LAW:- Constitution of the Federal Republic of Nigeria 1999 – Section 36 thereof – Composition of courts or tribunals – Whether intrinsic to the requirements of S. 36 of the 1999 Constitution.

CONSTITUTIONAL LAW:- Fundamental Rights provisions – Sources thereof – Provisions thereof how interpreted – Whether the provisions of the Fundamental Rights should not be subjected to the austerity of tabulated legalism – Rationale thereof – Need to be guided by internal and domestic decisions.

*CONSTITUTIONAL LAW:- Fundamental rights provisions thereunder – Fair administration thereof – Prominent place thereof in democratic society – Whether cannot be scarified to expediency – The principle in **Kostovski Vs. The Netherlands** (judgement of the European Court of Human Rights of Nov. 20th, 2019 No. 11454/85, para. 44.*

CONSTITUTIONAL LAW:- Interpretation thereof – Fair administration of justice –

Impartiality or independence of courts or tribunals thereto – Whether provides any scope for diluting the impartiality or independence of courts or tribunals to accommodate competing collective goals.

*CONSTITUTIONAL LAW:- The fundamental rights provisions thereof – Approach to interpretation thereof – Need to give due weight to our peculiar circumstances, the generally held norms of soldiery and our values, aspirations and local conditions – The principle in **Onuoha Kalu Vs. State (1998) LPELR – 1655 (SC)***

COURT:- Power to reformulate issues submitted by parties – Purpose thereof – Whether the Supreme Court has the power to reformulate issues submitted by parties for determination.

JUDGMENT AND ORDERS:- Grant of orders by courts – Order nor prayed for – Whether court can grant – Impropriety thereof.

*JUDGMENTS AND ORDERS:- Constitution of the Bench – Variation thereof – Effect on judgment rendered – Whether variation in the bench does not render judgment given unsatisfactory and liable to be set aside – The principle in **Adeigbe & Anor vs. Salami Kusimo & Ors (1965) LPELR- 25226 (SC) and Egba N.A Vs. Adeyanju (1936) 13 NLR 77 and Runka Vs. Katsina N.A. 13 WACA 98.***

JUDGMENTS AND ORDERS:- The doctrine of stane decisis – Effect thereof on adjudication – Whether it does not make adjudication less burdensome, more certain and readily acceptable.

*PRACTICE AND PROCEDURE:- Courts – Need to participate fully in the trial process – The advantages thereof – Violation thereof – Whether constitutes a violation of fundamental rights to fair hearing – The principle in **Woluchem Vs. Gudi (2004) 3 WRN 20, 52-53***

*PRACTICE AND PROCEDURE:- Courts/Tribunals – Trials before it – Need for all members to participate in the trials from the beginning to the end thereof – Failure thereof – Whether constitutes a violation of human rights – Effects thereof – Whether judgment given by tribunal members some of whom were not present throughout the proceedings, and did not hear all the evidence is not a nullity – The principle in **Nana Tawiah Vs. Kwesi Ewudzi 3 WACA 52.***

STATUTES:- The Legal Practitioners Disciplinary Committee (Amendment) Decree No. 21 of 1994 – Section 11(2) thereof – Purport thereof – Composition of the disciplinary Committee – Need to be consistent in hearing or trial proceedings – Inconsistencies thereat – Effect thereof on judgments given by it by members some of whom did not

hear all the witnesses – Whether affects the rule of natural justice – Members thereof who did not participate in all the trial processes and did not hear all the evidence of all the witnesses – Whether can access the credibility of the witnesses.

Issue for Determination

Having regard to the constitution of the Committee, whether its decisions/directions dated 21st May, 2015 are not totally in breach of the appellant's right to fair hearing, and altogether, null and void?

Facts of the Matter

At the Legal Practitioners' Disciplinary Committee, (hereinafter, simply referred to as "the Committee"), Kunle Kalejaiye, the appellant in this appeal, was charged on three-count complaint by the Nigeria Bar Association, (NBA, for short), for engaging in a conduct unbecoming of a legal practitioner contrary to Rules 1, 15, 30, 31, 34, 36 and 55 of the Rules of Professional Conduct for Legal Practitioners [RPC).

As laid, the three counts of the complaint read thus:

1. That you, Kunle Kalejaiye, SAN, as a legal practitioner involved in the election petition before the election petitions tribunal sitting in Osogbo, Osun State, sometimes (sic) in the year 2008 engaged in constant, private and confidential telephone communications with the Chairman of the Election Petitions Tribunal, Hon Justice Thomas Naron, during the pendency of the said petitions without informing the opposing counselor and or allowing the opposing counsel to be present and by so doing, you created the impression of special personal likely favour from the chairman of the petitions tribunal and by so doing *you have failed to maintain the high standard of professional conduct* expected of a legal practitioner, by engaging in a *conduct unbecoming of a legal practitioner* all contrary to Rules 1, 15, 30, 31, 32, 34, 36 and 55 of the RPC, 2001.
2. That you, Kunle Kalejaiye, SAN, as a legal practitioner involved in the Election Petition before the Election Petitions Tribunal sitting in Osogbo, Osun State, sometimes (sic) in the year, 2008, engaged in constant and regular telephone communications with the Chairman of the Election Petitions Tribunal, Hon Justice Thomas Naron, during the pendency of the said petitions conducted yourself in a manner that is likely to *obstruct, delay or adversely affect the administration of justice* and by so doing, you have failed to maintain the high standard of professional conduct expected of a legal practitioner, by engaging in a *conduct unbecoming of a legal practitioner* all contrary to Rules 1, 15, 30, 31, 32, 34 and 55 of the

RPC, 2007.

3. That you, Kunle Kalejaiye, SAN, as a legal practitioner involved in the Election Petition before the Election Petitions Tribunal sitting in Osogbo, Osun State, sometimes (sic) in the year, 2008, engaged in constant, private and confidential telephone communications with the Chairman of the Election Petition Tribunal, Hon Justice Thomas Naron, during the pendency of the said petitions conducted yourself in a way calculated to erode confidence in the Chairman of the Election Petitions Tribunal and by so doing, you have failed to maintain the high standard of a legal practitioner, by engaging in a conduct unbecoming of a legal practitioner all contrary to Rules 1, 15, 30, 31, 32, 34 and 55 of the RPC, 2007.

At the end of it all, the committee found the appellant guilty of infamous conduct in the course of the performance of his duty as a legal practitioner. It, thus, directed the Chief Registrar of the Supreme Court to strike out his name from the roll of legal practitioners in Nigeria. The committee, further, directed that its order as contained in the direction, be published, immediately in any edition of the *Punch* Newspaper.

The said order, the Committee, finally, directed, should be served on Heads of all superior courts of the Federation, the Inspector General of Police and all the Commissioners of Police. This appeal is, therefore, the expression of the appellant's dissatisfaction with the above directions of the Committee.

Held: *(Unanimously allowing the appeal)*

1. *Power of the Supreme Court to reformulate issues submitted by parties.*
 I entertain no doubt that this court is entitled to reformulate issues framed by the parties in order to give them precision and clarity, *Okoro Vs. The State* [1988] 12 SC 191; [1988] 12 SCNJ 191; *Latunde and Anor. Vs. Latunde* [1989] 5 SC 59; [1989] 5 SCNJ 59; *Awojugbagbe Light Industries Ltd. Vs. P.N. Chinukwe and Anor.* [1995] 4 NWLR (pt. 390) 379; [1995] 4 SCNJ 162.
 Others include: *Ogunbiyi Vs. Ishole* [1996] 6 NWLR (pt.452) 12, 24; [1996] 5 SCNJ 143; *Lebile Vs. The Registered Trustees of Cherubim and Seraphim Church of Zion of Nigeria Ugbobla and Ors,* [2003] 1 SCNJ 463. Simply put, therefore, the purpose of reformulating issues is to accentuate the real question in controversy in the interest of accuracy, clarity and brevity, *Musa Sha (Jnr.) and Anor Vs. Da Rap Kwan and Ors* [2000] 5 SCNJ 1. *(P.....para.....)*
2. *The provisions on the fundamental rights in the constitution should not be subjected to the austerity of tabulated legalism*
 This submission is unanswerable. As this court pointed out in *Innocent Nweke Vs. The State* (2017) LPELR - 42103 (SC) [per Nweze, JSC], the right in this

section [that is, Section 36 ... and, indeed, the other fundamental rights guaranteed in Chapter IV of the 1999 Constitution, (as amended), ...]

were greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR, for short] which, in turn, was influenced by the United Nations' Universal Declaration of Human Rights of 1948, see, per Lord Wilberforce in *Minister of Home Affairs Vs. Fisher (1980)* AC 319, 329; also, Chima Centus Nweze, "The New Regime of Human Rights Litigation in Nigeria: Old Rights; New Enforcement Strategies," in Chima Centus Nweze *et al* (eds.), *Beyond Bar Advocacy* (Umuahia, Nigeria: Impact Global Publishers Ltd, 2011) 394; G. Ezejiolor, *Protection of Human Rights Under The Law* (London: Butterworths, 1964) 182.

This background to these guaranteed rights was the proximate impulsion to the formidable prescription that their provisions should not be subjected to "the austerity of tabulated legalism." On the contrary, they [their provisions] ... call for a generous interpretation .. , suitable to give to individuals the full measure of the fundamental rights and freedoms referred to .. ," *Minister of Home Affairs Vs. Fisher (supra)*. (P.....para.....)

3. *The rationale for generous interpretation of the fundamental rights provisions of the constitution*

This court, subsequently, explained the rationale for this interpretive approach in *Kim Vs. State (1992) LPELR- 1691 (SC) 11-12; F-E*. Listen to this eloquent reasoning:

Human rights in our written Constitution mark a standard of behaviour which we share with all civilized countries of the world. Since the United Nations Universal Declaration of Human Rights in 1948, though it 'is still left for various member nations to determine which rights from the plethora of rights then declared they would wish to incorporate into their domestic laws, once incorporated, their application lose the character of insular isolationism. *Rather they assume a universal character in their standard of interpretation and application. ... (P.....para.....)*

4. *Need to have recourse to decisions of international and domestic courts in interpreting the fundamental rights provisions of the constitution.*

Surely, these imperatives of their universal character prompted this court's view that, in interpreting the provisions of the Constitution, particularly, the fundamental rights provisions thereof, it would be well-guided by decisions of international and domestic courts which have interpreted provisions, similarly, worded like the fundamental rights provisions of our Constitution, *Olawoyin Vs. C.O.P.* (1961) LPELR (24984) 4; A-D.

In effect, long before the advocacy for the espousal of a 'global conversation about common legal issues ... ,' see, V. C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010) 102, this court had, admirably, explored the dividends of that comparative approach to judicial dialogue: an approach which it endorsed in *Nafiu Rabiu Vs. The State* [1981] 2 NCLR 293; [1980J 8-11 SC 130; *Senator Adesanya Vs. President of the Federal Republic of Nigeria* [1981] 5 SC 112; *Attorney General of Bendel State Vs. Attorney General of the Federation* [1981] 10 SC 1; *Ogugu and Ors Vs. The State* [1994] 9 NWLR (pt.366) 1, 22-28.

Instructively, this pro-active approach to the 'extraterritorial interpretation' of fundamental rights provisions has gained currency in many disparate jurisdictions. Instances include: The United States of America, *Thomson Vs. Oklahoma* [1988J 487 US 815; *Washing Vs. Glucksburg* (1997) 521 US 702, 718; *Lawrence Vs. Texas* (2003) 539 US 558; *Atkins Vs. Virginia* (2002) 536 US 394; Canada, *US Vs. Burns* (2001) SCR 283; Australia, *Leask Vs. Commonwealth* (1996) 187 CLR 579, 615 - 616; Hong Kong, *Shum Kkwok Sher Vs. HKSAR* (2002) 2 HKLRD 793 etc.

Academic writers have, equally, endorsed this approach; see, for example, N. J. Udombana, *Interpreting Rights Globally; Courts and Constitutional Rights in Emerging Democracies*, (2005) 1 *AHRLJ* 47-69; C. M. Zoethout, 'The Dilemma of Constitutional Comparativism,' *ZaoRV71* (2001) 787- 806; C. M. Zoethout, 'The European Court of Human Rights and Transnational Judicial Dialogue, References to Foreign Law and the Quest for Justification/ (2015) *ICL Journal* 9 (3), 396 -416; A. Stone, 'Comparativism in Constitutional Interpretation,' [2009] *UMelbLRS* 15; S. E. Fields, 'Constitutional Comparativism and the Eight Amendment: How A Flawed Proportionality Requirement can Benefit, from Foreign Law/ *Boston University Law Review* [Vol. 86: 963, 2006J 963 etc.

Clear evidence of this judicial approach could be seen in several decisions of this court [the apex court in Nigeria]. Thus, in the interpretation of certain provisions of our Constitution, it [this court] has had recourse to decisions from such other jurisdictions like Tanzania, *Mbushuu and Anor Vs. The Republic* (decision of the Tanzanian Court of Appeal); Zimbabwe, *Catholic Commission for Justice and Peace Vs. Attorney General Zimbabwe and Ors*,

(1993) (4) SA 239]; South Africa, *State Vs. Makwanyane and Anor* (1995) (6) BCLR 665 (CC); (1995) SACLR LEXIS 218]; India, *Becan Singh Vs. State of Punjab* (1983) (2) SCR 583; the US, *Gregg Vs. Georgia* 428 U.S. 153, 176 -187 (1976); *District Attorney for Suffolk District Vs. James Watson and Ors* (1980) 381 Mass. 648; Hungary, *Jones Vs. Wittenberg* 33 FSUPP. 707.

Others include cases from: Jamaica, *Noel Riley and Ors Vs. AG for Jamaica and Anor* (1983) 1 A.C. 319 (PC) 726; *Earl Pratt and Anor Vs. AG for Jamaica and Anor* (1944) 2 A. C. (PC) 28, 29; Commonwealth of Bahamas, *Fisher Vs. Minister of Public Safety and Immigration and Ors* (1998) 3 WLR 208 (PC); Republic of Trinidad and Tobago, *Lincoln Anthony Guerra Vs. Cipriani Baptist and Ors* (1996) 1 A. C. 396 (PC); see, generally, *Onuoha Kalu Vs. State* (1998) LPELR -1655 (SC) 41 *et seq.* (Ppara.....)

5. *Due weight must be accorded to our peculiar circumstances, generally held norms of society and our values, aspirations and local conditions in interpreting the provisions of the constitution*
This approach notwithstanding, due weight must, always, be accorded to our peculiar circumstances, the generally held norms of society and our values, aspirations and local conditions, *Onuoha Kalu Vs. State* (1998) LPELR -1655 (SC) 40-41; *Nafiu Rabi'u Vs. The State* (supra); *Senator Adesanya Vs. President of the Federal Republic of Nigeria* (supra); *Attorney General of Bendel State Vs. Attorney General of the Federation* (supra); *Ogugu and Ors Vs. The State* (supra). (Ppara.....)
6. *Fair administration of justice cannot be sacrificed to expediency*
It is against the above background that it has been held that the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency, *Kostovski Vs. The Netherlands*, (judgement of the European Court of Human Rights of November 20, 1989, application no. 11454/85, para 44. (Ppara.....)
7. *Fair administration of justice provides no scope for diluting the impartiality or independence of courts or tribunals*
As such, it provides no scope for diluting the impartiality or independence of courts or tribunals in order to accommodate competing collective goals, for example, costs and administrative convenience, G. Steven, 'Constitutionalizing Adjudication under the European Convention on Human Rights,' *Oxford Journal of Legal Studies*, Autumn, 2003, Oxford University Press, 11. (Ppara.....)
8. *The advantages of a judge participating fully in the trial process*
Here, Dahiru, CJ, who did not participate throughout the hearing of the

complaint, but sat with the committee for its decision, may be compared to an appellate court that only has the records before it. His Lordship did not watch the demeanour, candour or partisanship and integrity of the witnesses. In *Woluchem Vs. Gudi* [2004] 3 WRN 20, 52 - 53, this court pointed out the obvious advantages of full participation in the trial process. Hear this:

The learned trial judge, [just like the other members of the committee in the instant case], has the singular advantage of seeing and observing the witnesses. *He watches their demeanour, candor or partisanship, their integrity; manner etc. He can therefore decide on their credibility and this affects a substantial part of his findings of fact.* These advantages are not normally enjoyed by the appellate court. *All it has is the printed record; it does not have the other evidence - evidence of the demeanour of the witnesses and other incidental elements that go to make up the atmosphere at a trial.* It cannot fully appreciate the background against which the evidence was received. *It therefore is in no position to contest the findings of fact which learned trial judge has made based on such evidence that is available before him,* [unarguably, Dahiru, CJ., must have found himself in this predicament at that stage of decision-making].

See, also, *Adele vs. The State* (1995) LPELR – 111 (SC) 9; C-E; *UAC of Nigeria Ltd Vs. Fasheyitan and Anor* (1998) LPELR – 3275 (SC) 14-15; G-A; *Nwankpu and Anor vs. Ewulu and Ors* (1995) LPELR – 2107 (SC) 32. (*P.....para.....*)

9. *A decision reached by a court or tribunal panel members all of whom did not participate fully in the trial process violates fundamental rights of the defendants*
 Learned senior counsel for the appellant, Chief Wole Olanipekun, SAN, derided this as a clear violation of the appellant's fundamental right. I cannot agree more with this eloquent submission. True, indeed, his submission is in the good and hallowed company of the posture of many decisions of superior courts, *Nana Tawiah Vs. Kwesi Ewudzi* 3 WACA 52; *Otwiwa and Anor Vs. Kwaseko* 3 WACA 230; *Chapman Vs. CFAO* 9 WACA 181; *Queen Vs. Governor-in-Council W.R., Exparte Laniyan Ojo* (1962) All NLR 149; *Madukolu Vs. Nkemdilim* (1962) All NLR (Pt. 2) 582; *Mai Rai vs. Bauchi N.A.* (1957) NNLR 31; *Adeigbe and Anor vs. Kushimo and Ors* (1965) All NLR (Reprint) 260; (1965) NMLR 285; *Okotie Chime and Anor vs. Ofili Elikwu and Anor* (1965) ANLR (Reprint) 449.

The decision in *Sokoto State Government Vs. Kamdex* [2007] All FWLR (Pt. 365) 469-483-484 and *UBWA Vs. Tiv Area traditional Council* [2004] MJSC 61, although on the same point of irregularity, deal with the position of

irregularity in the composition of an appellate panel. They, therefore, need not delay us here, see, however, *Shuaibu Vs. N. A. B. Ltd* [1998] 5 NWLR (pt 551) 582, *per contra*. The recent decision of this court in Awolola, *The Ededa of Eda - Oniyo Ekiti Vs. The Governor of Ekiti State and Ors* [Unreported Appeal No. SC 194/2008 decided on December 14, 2018, per Galumje, JSC falls into this category.

(P.....para.....)

10. *Judgment given by a panel of judges/arbitrators all of whom did not hear all the evidence is a nullity*

Indeed, in *Nana Tawiah Vs. Kwesi Ewudzi* (supra), Kingdom, CJ, speaking for the West African Court of Appeal, held that:

... it is clear that at least two of the tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. This vitiates the whole trial, and in my opinion this Court has no option" but to declare the whole proceedings before the tribunal and the provincial commissioner's court a nullity...

Equally, Kingdom, CJ, Nigeria; Petrides, CJ, Gold Coast and Yates, J, in their joint judgement in *Otwiwa and Anor Vs. Kwaseko* (supra), held that:

... the first point they [the appellants] take is that the proceedings before the paramount chief's tribunal were irregular and amount to a nullity because on the various occasions on which the case came before that tribunal, the tribunal was differently constituted, and final judgment was given by a tribunal composed of members some of whom had not been present throughout In view of recent decisions of this court, the respondent is unable to resist this contention, and we uphold it. The appeal is accordingly allowed, and it is declared that the proceedings before the paramount chief's tribunal are a nullity. The judgment of that Tribunal including the order as to costs is set aside; so also is the judgment of the provincial commissioner's court, including the order as to costs...

See, also, *Guide on Article 6 of the European Convention on Human Rights (Right to a fair trial)* at www.echr.coe.int. accessed on March 11th, 2019.

(P.....para.....)

11. *The Supreme Court will not make any order not prayed for*
As the respondent did not ask for the any consequential order, I shall make no further or other, orders as it is not the practice of courts to order what was not prayed for, *Ekpenyong Vs. Nyong* [1975] 2 SC 71; *Ademola Vs. Sodipo* [1992] 7 NWLR (Pt. 253) 251; *Odojin Vs. Agu* [1992] 3 NWLR (pt. 229) 350, 369; *Kalio Vs. Daniel Kalio* [1975] 2 SC 15.

This must be so for, as this court held in *Umokoro Usikaro and Ors. Vs. Itshekiri Communal Land Trustees and Ors* [1991] 12 SCNJ 75,91:

Indeed, for a court to make an order which no party has asked for and which the parties were not heard is a breach of the party's constitutional right of fair hearing. (*P.....para.....*)

12. *The doctrine of stare decisis makes the work of adjudication less burdensome, more certain and readily acceptable*
My lords, compliance with the doctrine of stare decisis not only makes our highly demanding task less burdensome but also makes adjudication more certain and readily acceptable. This court is bound by its previous decisions which, being still extant, are loyally applied. The issue on which the appellant seeks the determination of his appeal having been previously determined by this court in earlier cases, the principle on the basis of which the earlier cases were determined becomes ipso facto applicable to the issue in the case at hand. Most importantly, the issue as determined in the earlier cases are predicated on virtually the same facts as the issue sought resolved in the present case. See *PRINCE J.S. ATOLAGBE & ANOR Vs. ALHAJI AHMADU AWUNI & ORS* (1997) LPELR - 593 (SC) AND *ADETOUN OLADEJI NIGERIA LTD Vs. NIGERIAN BREWERIES PLC* (2007) LPELR - 160 (SC). (*P.....para.....*)
13. *Variation in the bench makes a judgment unsatisfactorily and liable to be set-aside*
In *ADEIGBE & ANOR Vs. SALAMI KUSIMO & ORS* (1965) LPELR - 25226 (SC), this court has held appellant's complaint to be on the soundness of the committee's judgment and not a submission on jurisdiction; that though variations in the bench do not make a judgment a nullity the variations make the judgment unsatisfactory and liable to be set - aside for that reason; that whether judgments which are unsatisfactory because of the variations in the bench are to be set - aside or not depends on the particular circumstances of the case. See also *EGBA N.A Vs. ADEYANJU* (1936) 13 NLR 77, *TAWIAH III Vs. EDWUDZI* 3 W.A.C.A. 52, *OTWIWA Vs. KWASEKO* 3 W.A.C.A. 230, *DAMOAH Vs. DARBIL* 12 W.A.C.A. 167 and *RUNKA Vs. KATSINA N.A.* 13 W.A.C.A. 98. Cited with approval by this court in *ADEIGBE and ANOR Vs. SALAMI KUSIMO & ORS* (supra).

In *RUNKA Vs. KATSINA N.A.* (supra) the West African Court of

Appeal held inter-alia as follows:-

"The question of the effect on the proceedings of an alteration in the constitution of a Court during a trial has been considered by this Court before now.

In 1936 this Court held in *Nana Esseli Tawiah III Vs. Kwesi Ewudzi (1)* that, where certain members of the Tribunal who gave judgment were not present during the whole of the proceedings, the trial was a nullity.

In 1937, in the case of *Akosua Dtwiwa & Another Vs. Adjoa Kwaseko (2)*, this Court held that, as the constitution of the Court of trial had been varied on different dates of the hearing, the trial was a nullity.

In 1943, in the case of *Madam Vakoh Chapman Vs. C.F.A.D. & Another (3)*, it was stated as obiter that a judgment, which was relied on for a plea of *res judicata* and which had been given by a tribunal of which some of the members had not sat to hear the evidence, could no doubt have been set aside on appeal for that reason if there had been an appeal. (But there had not been an appeal).

All the above decisions were about proceedings in Native Courts, but that is only by chance; and the principle would apply to any court. They also all happen to be about civil cases. There is not, as far as we are aware, any decision of this court on the same question about a criminal trial. But in our opinion the principle applies equally to a criminal trial.

There is a reported decision of 1936 of the High Court of the protectorate to this effect. It is the case of *Egba N. A. Vs. A. L. Adeyanju (1)*. That was a criminal trial in a native court. The court at the start was constituted by the president and two members; later on the two members were changed and later again they were changed again (to different ones and not back to the former two). The president sat throughout the trial. The accused was convicted; he appealed to the native court of appeal but his appeal was dismissed, and he further appealed to the High Court.

In the High Court it was held (Graham, Paul, J) that a conviction obtained in such circumstances was bad and must be quashed; and also that even if such procedure were in accordance with native law and custom it was not such native law and custom as that court should uphold, as it was repugnant to natural justice, good conscience and equity.

With this decision we respectfully agree and we adopt it. We think it essential that all the members of the court which gives the judgment

in a criminal case should have heard all the evidence. And as this does not appear to have been so in this case now under consideration, in so far as the circumstances of its trial are apparent to us, we are of opinion that the appeal must be allowed and the conviction quashed."

(P.....para.....)

14. *The composition of the disciplinary committee is intrinsic to the fulfillment of the requirements of Section 36 of the constitution*

The composition of the disciplinary committee is intrinsic to the fulfilment of the requirements of section 36 of the constitution that guarantees fair hearing to the accused. Where the panel is constituted in such a way that it affects a person's right to fair hearing, whatever decision is reached by such a panel will result in a nullity. See: *Dr. O. G. Sofekun Vs. Chief N. O. Akinyemi & Ors* (1980) 5-7 SC 1; *Agbiti Vs. Nigerian Navy* (2011) 4 NWLR (Pt. 1236) 175; *Madukolu Vs. Nkemdilim* (1962) 1 All NLR 587. *Nwalutu Vs. Nigerian Bar Association* Unreported decision No. SC. 30/2016 delivered on 21 February, 2019.

(P.....para.....)

15. *The legal practitioners' Disciplinary Committee must observe the rule of natural justice.*

In *L.P.D.C Vs. Fawehinmi* (1985) 2 NWLR (Pt. 7) 300 this court held that in the exercise of its disciplinary authority over erring legal practitioners), the Legal Practitioners Disciplinary Committee must observe the rules of natural justice. Where the panel which sat and heard the complaint against the erring legal practitioner is different from the panel that found the appellant guilty of infamous conduct, this will render the proceedings and decision reached a nullity. See: *Madukolu Vs. Nkemdilim* and *Nwalutu Vs. Nigerian Bar Association* supra. This is because the rules of natural justice relating to fair hearing has been breached. A person who did not take part when witnesses were called by the complainant and the defence cannot be in a position to decide who has told the truth from the person who was lying.

(P.....para.....)

16. *Credibility of a witness is to be decided by a person who heard evidence on both sides and watched the demeanor of the witness*

Thus, where credibility of a witness is in issue the person who is in the vantage position to decide it will be the one who heard evidence on both sides and watched the demeanor of the witnesses. See: *Adeigbe & Anor Vs. Kusimo & Ors* (1965) All NLR 260; *Sokoto State Government Vs. Kamdex (Nig) Ltd* (2007) 7 NWLR (Pt. 1034) 466; *Arum Vs. Nwobodo* (2013) 10 NWLR (Pt. 1362) 374.

(P.....para.....)

Representations

**Chief Wole Olanipekun, (SAN); J. K. Gadzama, (SAN); Tayo Oyetibo, (SAN) and Duro Adeyele, (SAN); with Akintola Makinde for the appellant;
D. C. Denwigwe, (SAN) for the respondent; with him, J.O Asoluka and C.U Onyeukwu.60**

CHIMA CENTUS NWEZE, JSC (Delivered the lead judgment):

**KWARA STATE JUDICIAL SERVICE COMMISSION
HON. JUSTICE TIMOTHY OYEYEPO (CHAIRMAN, KWARA STATE
JUDICIAL SERVICE COMMISSION)
MRS. OLALRE, SECRETARY JUDICIAL SERVICE COMMISSION
ATTORNEY-GENERAL OF KWARA STATE**

VS

MISS YETUNDE ZAINAB TOLANI

SC. 63/2010

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

FRIDAY 1ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	JUSTICE, SUPREME COURT
KUMAI BAYANG AKAAHS	JUSTICE, SUPREME COURT
KUDIRAT M. O. KEKERE-EKUN	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT
EJEMBI EKO	JUSTICE, SUPREME COURT

CONSTITUTIONAL LAW: Fair hearing – The judicial service commission of a state is a quasi judicial body – Power of dismissal thereof – Whether enjoined to observe the principles of fair hearing.

CONTRACT OF EMPLOYMENT: Statutory employment – Wrongful termination of a servant whose employment is statutorily provided – Whether he is entitled to reinstatement.

*CONTRACT OF EMPLOYMENT: Categories thereof – Principles in **C.B.N vs. Igwillo (2007) 4-5 SC 154 @ 172 lines 25-40.***

*CONTRACT OF EMPLOYMENT: Public office – What constitutes – The principles in **Registered Trustees of the Planned Parenthood Federation of Nig. Vs. Dr. Jimmy Shogboda (2005) 1 WRN 153 at 171 – 172.***

CONTRACT OF EMPLOYMENT: Statutory employment – What constitute – Elements thereof.

COURT: Decision thereof – Perversity – When is a decision said to be perverse.

MASTER & SERVANT: Categories of employment therein – Whether there are three categories of employment in a master and servant relationship – Relevant Principles thereof.

*MASTER AND SERVANT: Ultra Vires Act – Where a master dismisses a servant contrary to the law or statute – Whether the master's act is ultra vires and amounts to a nullity – The principles in **Hart vs. Military Governor River State (1976) N.S.L.L. (Vol. 10) 622.***

PRACTICE AND PROCEDURE: Appeal – Where a lower court arrived at a correct decision by giving wrong reason therefore – Attitude of appellate court thereto – Whether will not set aside decision.

PRACTICE AND PROCEDURE: Appeal – Where mistake of Court does not lead to miscarriage of justice – Whether appellate court will not set aside judgment.

STATUTE: CFRN 1999 (as amended) – S. 197 thereof – Constitutional status of a judicial service commission of a State – Whether not subject to the control of any other authority or body.

STATUTE: CFRN 1999 (as amended) – S. 197 thereof – Functions of the Judicial Service Commission.

STATUTE: CFRN 1999 (as amended) – S. 197(1)(c) thereof – Powers of Kwara State Judicial Service Commission.

WORDS AND PHRASES: “Wrongful” and “Unlawful” – Meaning.

Issue for Determination

Whether the learned justices of the Court of Appeal were right to have reinstated the respondent in the circumstances of this case.

Facts of the Matter

The respondent herein was employed by the appellant as a Magistrate Grade II. Shortly after her employment, the appellants received a petition from one Abdul-Rasaq Tunde Raji alleging that the respondent misrepresented her marital status. The appellant sent the petition to the respondent for her response in line with the rules of fair hearing.

The respondent's reply was not satisfactory to the appellants who terminated her employment which was still on probation.

The respondent, dissatisfied, approached the trial court to challenge the termination and or withdrawal of her appointment. The trial court held inter alia that the termination of the respondent's appointment was wrongful and she should be paid her salaries, allowances and other entitlements for the period of 27/12/2004 up to 11/2/2005 for which she legitimately worked before her appointment was wrongfully terminated. The 1st appellant herein was also ordered to pay the respondent one month salary in lieu of notice being the reasonable length of notice she would have been entitled to bring her contract of employment with the 1st appellant to the end. Dissatisfied with the judgment of the trial court, the respondent herein appealed to the lower court.

This is an appeal against the judgment of the Court of Appeal or Coram: Sotonye Denton-West, I. I Agube, JJCA and C. C. Nweze JCA (as he then was) delivered on the 20th day of January, 2009.

The appellants before this court were the respondents before the court below and at the trial court were defendants while the respondents herein were plaintiffs at the trial High Court presided over by A. A. Adebara J. The claims of the plaintiff now respondent are stated hereunder, viz:-

- “1. A declaration that the purported withdrawal (termination) of the plaintiff's appointment as Magistrate Grade II with the 1st defendant by the defendants through their letter of 8/2/2005 is without any justification known to law, unlawful, ultra vires, illegal, oppressive, uncivilized, barbaric, vicious, unconstitutional and null and void and of no effect.**
- 2. An order of the court setting aside the defendant's letter dated 8/2/2005 purporting to withdraw or terminating the plaintiff's appointment as Magistrate Grade II with**

the 1st defendant.

3. A declaration that the plaintiff is still a Magistrate Grade II in the employment of the 1st defendant and she is entitled to be paid salaries, allowances and all entitlements appertaining to and due to the office of a Magistrate Grade II with the 1st defendant.
4. An order reinstating the plaintiff to her position as a Magistrate Grade II with the 1st defendant.
5. An order of the court directing the defendants to pay to the plaintiff her salaries, allowances and all entitlement as Magistrate Grade II with the 1st defendant with effect from 27/12/2004.
6. An order of injunction restraining the defendants, their servants, agents and privies and other person(s) claiming through or under and or succeeding the defendants from unlawfully and unconstitutionally, withdrawing, terminating and or in any manner or way tempering with, obstructing the commission of the breach, of the plaintiff's appointment at Magistrate Grade II with the 1st defendant.

Held: *(Unanimously dismissing the appeal)*

1. *The definitions of "wrongful" and "unlawful"*
The Blacks Law Dictionary, by Bryan A. Garner 8th Edition, page 1644 at page 1574. had defined "WRONGFUL" and "UNLAWFUL" to be thus:-

"Wrongful" (i) Characterized by unfairness or injustice,
(ii) Contrary to law or unlawful
"(wrongful termination)" and
"Unlawful" "(1) Not authorised by law, illegal
(2) Criminally Punishable
(3) Involving moral turpitude".

The definitions above are so weighty that they cannot, applying as in this case at hand be treated with levity or in a simplistic manner and so since the words 'wrongful' and "unlawful" are ingrained within the

termination or withdrawal from service of the respondent by the appellants, there is no escaping the fact that the complaint by the accusers or appellants must be ventilated in public wherein the respondent would be assured of a fair trial and the necessity for a prior judicial determination before the termination or withdrawal of the service could be visited on her as what she is accused of in the matter of lying on oath is a commission of a criminal offence and it must be dealt with according to law. I am fortified in the case of I. H. A. B. U. H. M. B. vs. ANYIP (2011) 5 SC (Pt.1) 54 at 66, 67; F.C.S.C. vs. Laoye (1989) 2 NWLR (Pt.106) 652 at 706-707. (P.....Paras.....).

2. *Where mistakes did not lead to miscarriage of justice*

The appellants are inviting this court to interfere in the decision of the Court of Appeal because that court had made reference to International Treaties in reaching its decision.

On that, it has to be stated that the references in the lead judgment of the International Treaties and Instruments which the learned justices had placed reliance on are mistakes or errors, such mistakes can only take such pride of place as to fatally affect the decision on appeal where a miscarriage of justice had occurred on account thereof. This is based on the principle that it is not every mistake or error in a judgment or decision that could vitiate such a decision as the mistake has to be shown to have led to a miscarriage of justice or materially or substantially affected the decision making to have such impact. See Owhonda vs. Ekpechi (2003) 9-10 SC 1 at 21 Mrs. JOMBO vs. P.E.F.M.B (2005) 7 SC (Pt.11) 30.

(P.....Paras.....)

.3. *Appellate Court will not reverse right decision of a lower court because it gave wrong reason*

Again for emphasis is that an appellate court such as this Apex one, will not reverse the decision of the court below simply because the conclusion and decision were reached from a wrong reason. This is so because once the decision is correct the wrong channel or route through which that decision was made would not scuttle the said conclusion. See The State vs. John Ogbunjo (2001) 1 SCNJ 90 at 106 per Onu JSC. (P.....Paras.....).

4. *Elements of a statutory employment*

On the question whether or not the employment in issue enjoys statutory flavour, I need to state very humbly too that there are two vital elements that must co-exist before a contract of employment can be said to have statutory flavour and these are:

- (i) **The employer must be a body set up by the Constitution or statute and;**
- (ii) **The statute or regulations made pursuant to the Constitution or principal statute or law must make provision regulating the employment of the staff of the category of the employee concerned especially in matter of discipline. (*P.....Paras.....*).**

Per Peter Odili (JSC)

“It can be seen undoubtedly that the two ingredients are present in the employment under discourse. Firstly, 1st appellant is a creation of Section 197 (1) (c) of and Part II of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999 by virtue of which 1st appellant is vested with the power to appoint, dismiss and exercise disciplinary control over its staff including magistrates.

- 2. **The 1st appellant, pursuant to the powers conferred on it by Paragraph 6 (c) of Part II of the Third Schedule to the Constitution made the Kwara State Judicial Service Regulations 1980 which among other things regulate the appointments, promotion, dismissal and disciplinary measures against the employees of the 1st appellant such as Magistrates.**
- 3. **The appellant was appointed a Magistrate Grade II on Grade level 10 by the 1st appellant vide a letter of 23/12/04 which appointment the respondent accepted by letter of 24/12/04 and she accordingly assumed duties on 27/12/04.**
- 4. **The office or position of a Magistrate is a creation of the combined effect of the provisions of Section 197 (1) (c) of the 1999 Constitution and Part II of the**

Third Schedule thereto, Sections 4 and 8 of the Criminal Procedure Code Law, Cap 43, Laws of Kwara State 1994.

- 5. The office or position of a Magistrate is of a permanent nature with its functions, duties and powers defined or prescribed by Sections 9, 10, 12 (1) 13, 15, 16, 17 and Appendix 'A' to the Criminal Procedure Code Law of Kwara State Cap 43, Laws of Kwara State 1994.**
- 6. By virtue of (3) (4) and (5) above, the respondent is a senior staff of the appellants.**
- 7. As a senior staff with the 1st appellant, which is as creation of Constitution, the respondent, a Magistrate is a Public Officer as defined by Section 318 (1) of the 1999 Constitution**
- 8. I agree with learned Counsel for respondent that from the above highlighted undisputed facts, it is clear that the respondent's employment is clothed with statutory flavour. (P.....Paras.....).**

5. *What constitutes a public office*

I refer to the case of *The Registered Trustees of the Planned Parenthood Federation of Nigeria vs. Dr. Jimmy Shogbola (2005) 1 WRN 153 at 171-172:-*

“The three factors that must co-exist to constitute a public office namely that the office was created by the Constitution, statute or other enabling legislation, secondly that its function, duties and powers are as defined by law and other regulations; and thirdly, that the position must show some permanency.

“A public officer is one in the public services of the government of the Federation or State and as defined under the heading 'Public Services of the Federation' or of the State as per Section 277 (1), (a), (b), (c), (d), (e), (f), (g) of 1999 Constitution”.

(P.....Paras.....).

6. *Categories of employment under master and servant relationship*
Clearly the relationship between the appellants and the respondent, a constitutional body, is neither one of master and servant relationship under common law nor employment where office is held at pleasure. Rather, the relationship between the appellants and the respondent falls squarely on employment protected by statute or with statutory flavour. See the case of E. P. Iderima vs. Rivers State Civil Service Commission (2005) 7 SC (Pt.11) 135 at 151. In the above excerpt the trial court appears to have lost sight of the fact that in the law of master and servant, employment falls into three categories viz:
- (I) A pure master and servant relationship under common law.**
 - (ii) Employment where officer (sic) is held at pleasure.**
 - (iii) Employment protected by statute.**

See Ridge vs. Baldwin & Ors (1964) AC 40, Olanrewaju vs. Afribank (Nig.) Ltd (2001) 7 SC (Pt.III) 1, (2001) 13 NWLR (Pt.731) 691 at Pt.705, Olaniyan vs. University of Lagos (1985) 2 NWLR (Pt.9) 599. In the instant case, since the appellant's employment is governed by the Civil Service Rules, his employment comes under the 3rd category. That is, the employment protected by statute or employment with statutory flavour; see University of Calabar vs. Inyang (1993) 5 NWLR (Pt. 291) 100 at 117; Shitta-Bey vs. Federal Public Service Commission (1981) 12 SC (Reprint) 19". (P.....Paras.....).

7. *What constitutes statutory employment*
I cannot resist the position of this court in the case of Imoloame vs. West African Examinations Council (1992) 9 NWLR (Pt.265) 303 per Karibi-Whyte JSC thus:-

“There is an employment with statutory flavour when the appointment and termination is governed by statutory provision. It is accepted that where the contract of service is governed by provision of statute or where the conditions of service are contained in regulation derived from statutory provisions, they invest the employee with a legal status higher than the ordinary one of master and servant.

They accordingly enjoy statutory flavor”.

(P.....Paras.....).

Per Peter Odili (JSC)

“Indeed there is no need belabouring the situation from the totality of the facts pleaded, evidence adduced and the findings of the two courts below which I have copiously quoted for avoidance of doubt that the said employment was regulated by statute and constitution including the Kwara State Judicial Service Commission Regulations 1980 and so was properly clothed with statutory flavour and the justice of the case impels a reinstatement to service as ordered by the Court of Appeal. See University of Ilorin Teaching Hospital Management and Anor vs. Mr. S. B. Ajide (2005) 15 WRN 113 at 134; CBN vs. Igwillo (2004) 4-5 SC 154.

The conclusion as I see it is that there is no sporting chance to accede to what the appellants are urging the court as the Court of Appeal rightly made its findings from which it came to the correct conclusion that the respondent had a raw deal and that court had no hesitation in saying so as I see no ground to go against what the lower court did. *(P.....Paras.....).*

8. *Termination of appointment cannot be justified*

“The appellants have strenuously argued that the withdrawal of the respondent's appointment is not due to her sex but for failure to declare her marital status. But when DW1, who was Secretary of the Kwara State Judicial Service Commission was cross examined, she admitted that marital status is not a consideration for appointment as a magistrate. It becomes very baffling that her non disclosure of her marital status constituted enough reason to terminate her appointment.

The appellants had no justifiable reason for terminating the appointment. The decision taken by the Kwara State Judicial Service Commission smacks of petty mindedness. She was not employed to superintend a novitiate and so the action taken by the appellants was clearly illegal. *(P.....Paras.....).*

9. *Categories of contract of employment*

The various categories of contracts of employment were held by this court in *C.B.N vs. Igwillo (2007) 4-5 SC 154 © 172 lines 25-40 to be as follows:*

“The law is settled that there are now roughly three categories of contracts of employment viz: (a) those regarded as purely master and servant; those where a servant is said to hold office at the pleasure of the employer; and those where the employment is regulated or governed by statute, often referred to as having statutory flavour; See: *Olaniyan vs. University of Lagos (1985) 2 NWLR (Pt.9) 599*. An employment is said to have statutory flavour when the employment is protected by statute or laid down regulations made to govern the procedure for employment and discipline of an employee. Any other employment outside that category is governed by the terms under which the parties agree to be master and servant.” (Emphasis mine)

See also: *Imoloame vs. WAEC (1992) 9 NWLR (Pt.265) 303; Shitta-Bey vs. The Federal Republic Service Commission (1981) 12 SC 19*; Where the procedure for employment and discipline is clearly spelt out in the relevant statute, the employer must comply strictly with its provisions in dismissing its employee or terminating his employment. See: *Comptroller General of Customs & Ors. vs. Gusau (2017) 4 SC (Pt.II) 128; Bamgboye vs. Unilorin (1999) 10 NWLR (Pt. 622) 290.(P.....Paras.....)*.

10. *Functions of the Kwara State judicial service commission*

The Kwara State Judicial Service Commission is established pursuant to Section 197 (1) (c) of the 1999 Constitution, as amended and Part II of the Third Schedule thereto. By virtue of Paragraph 6 (c) of Part II of the Third Schedule, the powers of a State Judicial Service Commission and exercise include the power to appoint, dismiss and exercise disciplinary control over the Chief Registrars, Deputy Chief

Registrar of High Court, the Chief Registrars of the Sharia Court of Appeal and Customary Court of Appeal, Magistrates, Judges and members of Area Courts, and Customary Courts and all other members of the staff of the Judicial Service of the state not otherwise specified in the Constitution. (P.....Paras.....).

11. *Appellant has statutory appointment*

By her letter of appointment dated 23/12/2004, the respondent was appointed Magistrate Grade II on Grade Level 10. Section 8 of the Criminal Procedure Code of Kwara State, Cap. 43 Vol. 1, Laws of Kwara State of Nigeria, 1994 provides for the cadre of magistrates. The respondent falls within Section 8 (f), that is, magistrate of the second grade. Subsection (2) of Section 8 provides that the Judicial Service Commission may appoint any person to the office of magistrate while subsection (3) provides that such appointment shall be made in compliance with the provision of the Constitution and “of any legislation made in accordance therewith”

I agree with learned counsel for the appellant that being a Magistrate Grade II on Grade Level 10, the respondent is a senior staff of the 1st appellant and a public officer as defined by Section 318 (1) of the 1999 Constitution. I am therefore not in any doubt that her employment was one with statutory flavour. The termination or withdrawal of her employment could only be done in strict compliance with its regulations guiding such matters. (P.....Paras.....).

12. *An act that is ultra vires is a nullity*

What then are the consequences of the illegal and unconstitutional act of the respondents? In Hart vs. Military (Governor of Rivers State (1976) N.S.C.C. (Vol.10) 622; the Supreme Court re-echoed what was said in Shitta Bey's case (1981) 12 SC (Reprint) 26 at 34, when the Military Governor of Rivers State purported to remove Hart from the Public Service of Rivers State as Permanent Secretary in spite of the powers conferred on the State Public Service Commission to do so. Fatai William J.S.C. succinctly put it thus:

***“There is no doubt that what the Military Governor did in the case in hand was ultra vires his constitutional powers.*”**

This renders his order that the appellant should be retired from the public service a nullity.”

See again **U.B.N. (NIG) Ltd vs. Ogboh (1995) 2 NWLR (Pt.380) 647 at 669**; where it was held also that the plaintiff employment being one with statutory flavour it can only be terminated in the manner prescribed by the relevant statute and any other contrary manner of termination is null and void ab inito. (*P.....Paras.....*).

13. *Effect where a servant who has statutory employment is wrongfully dismissed*

The view expressed by the lower court on the reinstatement of the respondent is in line with numerous decisions of this court to the effect that where an employees service is protected by statute and it is wrongfully terminated (or withdrawn, as in this case), he would be entitled to reinstatement See: **C.B.N. vs. Igwillo (supra), Shitta-Bey vs. The Federal Public Service Commission (supra), Olaniyan vs. University of Lagos (supra)**, to name a few.

The respondent's marital status, not having been shown to be a precondition for her employment under regulation 72 of the 1st respondent's regulations, the withdrawal or termination of her employment on the ground that she had lied about same, was ultra vires, null and void. She is therefore entitled to an order of reinstatement as ordered by the lower court. (*P.....Paras.....*).

14. *The status of a judicial service commission*

The **Judicial Service Commission (JSC) of Kwara State** established pursuant to or by **Section 197 of the 1999 Constitution, as amended**, is not just a mere or ordinary State Executive Body. Its duty to act responsibly is adumbrated by **Section 202 of the same Constitution** that charges it, to wit –

In exercising its power to make appointment or to exercise disciplinary control over persons, the State Civil Service Commission, the State Independent Electoral Commission and the State Judicial Service Commission - shall not be subject to the direction and control of any other authority or person. (*P.....Paras.....*).

15. *Powers of judicial service commission*

This great responsibility thrust on it is reflected by the calibre of men and women that its membership is comprised of, as can be seen from Paragraph 5 of Part II B of the Third Schedule to the Constitution. Paragraph 6(C) of Part II B of the Third Schedule to the Constitution defining the power of the JSC provides, inter alia–

The Commission shall have power –

- © **to appoint, dismiss and exercise disciplinary control over ---- magistrates - and all other members of the staff of Judicial Service of the State not otherwise specified in this Constitution.**

Per Ejembi Eko (JSC)

The mere vesting in the JSC by the Constitution the power to exercise disciplinary control over magistrates and/or other officers mentioned in paragraph 6(C) of the Third Schedule thereto connotes the intention of the makers of the Constitution that the JSC, in exercising its power to dismiss or discipline, is a quasi-judicial body. The Public Service Commission of Mid-Western Nigeria vested similar powers of disciplinary control over Public Servants was in WILSON vs. A. G. BENDEL STATE (1985) LPELR - 3496 (SC) held obligated to observe the principles of natural justice in the exercise of its disciplinary powers. It is trite that a body as the JSC that is by law imbued legal authority either to discipline others or to determine any question affecting the civil rights and obligations of individuals is said to exercise judicial functions: LPDC vs. CHIEF GANI FAWEHINMI (1985) LPELR - 1776 (SC); A.G. vs. RYAN (1980) 2 WLR 143.

16. *When is a decision perverse*

Perversity is not an accepted attribute of any judicial or quasi-judicial body. A decision is said to be perverse when the trial body, as the JSC, takes into account matters which it ought not to take into account in its decision, or where its decision is against the weight and trend of evidence, or when the decision taken is spurious and unreasonable: ATOLAGBE Vs. SHORUN (1985) LPELR – 592 (SC).

Per Ejembi Eko (JSC)

“The respondent's appointment as a magistrate was terminated on the ground that she lied on oath in her application Form, Exhibit 9, wherein she stated that she was “SINGLE” for her marital status. The only basis for the finding by the appellant that the respondent lied on oath in Exhibit 9 was the unsubstantiated allegation, contained in an anonymous petition authored by a faceless character named “Abdul-Rasak Tunde Raji”, that the respondent misrepresented her marital status in Exhibit 9. The JSC, the appellant, through her Secretary the DW1, admitted in his testimony that marital status of an applicant for the position of magistrate was not a material fact for consideration for such appointment. The appellant nonetheless relied on such irrelevancy, by their own admission, to terminate the appointment of the respondent as a magistrate. In so doing they jettisoned the very basic rule of common sense or logic that what is alleged without proof can be denied without proof. Sections 134(1) and 135 (now Sections 131(1) and 132) of the Evidence Act, 2004 placed the burden of proving a fact asserted on the party alleging it. It is most preposterous and very perverse for the appellant in their decision to terminate the respondent's appointment to rely on the unfounded rumour peddled by an anonymous petitioner, Abdul-Rasak Tunde Raji. That is what made their decision very unreasonable, particularly in the face of the undiscredited evidence marshaled by the respondent in her defence, even though she was under no obligation to rebut what had not been proved or substantiated against her. The JSC had definitely let down not only the respondent, but the entire body of the magistrates holding their appointment and discharging their functions under it, who fervently looked up to their employer for support and protection in their arduous and hazardous lines of duty. (P.....Paras.....).

Representations

J. A. MUMINI (DPP) Kwara State for appellant and with him is

A. B. Daramola (Esq.)

SALMAN JAWONDO for respondents and with him are:

Abduwasiu Lawal and Andrew Apeh.

PETER-ODILI, (JSC) (DELIVERING THE LEAD JUDGMENT):

**OBIAJULU NWALUTU
VS
1. NIGERIA BAR ASSOCIATION
2. LEGAL PRACTITIONERS DISCIPLINARY
COMMITTEE**

SC. 30/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

THURSDAY 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

**WALTER SAMUEL NKANU ONNOGHEN
OLUKAYODE ARIWOOLA
KUMAI BAYANG AKA AHS
EJEMBI EKO
SIDIDAUDA BAGE**

**CHIEF JUSTICE OF NIGERIA
JUSTICE SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE, SUPREME COURT**

APPEAL: Issues for determination – Where an issue does not arise from a ground of appeal – Whether an appellate Court will not entertain such an issue.

CONSTITUTIONAL LAW: Fair hearing – Breach thereof – Where a petitioner abandoned his petition to LPDC and another witness adopted the content of the said petition – Whether it was improper for the LPDC to act on the hearsay evidence to convict the appellant.

COURT: Composition thereof – Where Membership of a court or a tribunal is differently constituted during proceedings – whether where a court is differently constituted during hearing, the decision arrived thereby is null and void.

COURT: Evaluation of evidence – Credibility of witness – Issue of credibility is sacred to the trial court – Where an absentist panelist makes an impression in his decision on credibility – Whether amounts a breach of fair hearing.

COURT: Evaluation of evidence – How to determined when a testimony of a witness has a probative value – Whether the testimony is cogent.

COURT: Legal Practitioners Disciplinary Committee –Where determines the faith of erring legal practitioners, acts as a quasi-judicial authority –Whether should be guided by the principles of natural justice.

*ELECTION PETITION: Election Tribunal –Quorum – S. 285(3) and (4) of CFRN 1999 – Considerations thereof – The principle in **Alhaji Ahmed Garba Bichi & Ors vs. Alhaji Ibrahim Shekarau & Ors (2009) LPER 3874.***

LEGISLATION: Legal Practitioner Disciplinary Committee – Composition thereof – Whether the extant law is S.10 of Legal Practitioners Act CAP L11 Laws of Federation of Nigeria, 2004.

LEGISLATION: Legal Practitioners Act, 2004 – Whether the current Law applicable to the Composition of the Legal Practitioners Disciplinary Committee.

STATUTE: Legal Practitioner Disciplinary Committee – Composition thereof – Whether amended by Legal Practitioner Decree No. 21 of 1994.

STATUTE: Legal Practitioners Act, 1975 –S. 10 thereof –Purport and Imperatives.

Issues for Determination

- 1. Whether the composition of the Legal Practitioners Disciplinary Committee that heard and determined the petition against the appellant is proper being at variance with the provision of the Legal Practitioners Act CAP 41 Laws of the Federation of Nigeria 2004 as to rob it of jurisdiction.**
- 2. Whether the decision/direction of the Legal Practitioners Disciplinary Committee is supported by credible and admissible evidence.**

Facts of the Matter

On 19 July 2010 the appellant purportedly acting as counsel to Afribank Plc (now Mainstreet Bank Limited) filed a motion on notice for the joinder of Afribank Nigeria Plc as 3rd plaintiff in **Daily Times of Nigeria Plc & Anor vs. Citco Communication** in suit No.

FHC/L/CS/426/2010 before the Federal High Court, Lagos. Subsequently, when Afribank Nigeria Plc got wind of the motion for joinder as a co-plaintiff to the aforesaid suit, the Acting Company Secretary/Legal Adviser of the Bank, Umar Dan-Umma Esq, instructed the Bank's Solicitor Chief A. A. Aribisala SAN in writing on 20th October, 2010 to take immediate and appropriate legal action to redress the unlawful imposition of counsel and purported joinder as co-plaintiff to the action.

Following the instructions received from the Bank, Chief Aribisala wrote a petition on 21st October, 2010 to the 1st respondent complaining that the appellant joined his client, Afribank Nigeria Plc as a co-plaintiff in suit No. FHC/L/CS/426/2010 without instructions. He later filed a motion on 1st November, 2010 to set aside the joinder which was granted on 8th April, 2011 when the Federal High Court set aside its earlier order of joinder of Afribank Nigeria Plc and struck out its name from the suit.

The 1st respondent investigated the said petition and found that a prima facie case of professional misconduct was made out against the appellant necessitating his having to face the 2nd respondent on a complaint of professional misconduct contrary to rules 1, 30 and 47 of the rules of professional conduct in the Legal Practitioners Act 2007.

The 1st respondent called Zibai Blessed Katung, the Assistant Secretary of the Legal Practitioners Disciplinary Committee (LPDC), the body of benchers who adopted his witness statement on oath and tendered Exhibit P1A-P1D, P1E-P176E whilst the appellant also adopted his witness statement on oath and tendered Exhibit D1-D3. The appellant denied the complaint and stated that he was merely following the oral instructions of his erstwhile principal Mr. Chinedu Oranuba who was a Director of Daily Times Plc.

On 30th November, 2015 the 2nd respondent rendered its direction and found the appellant liable for professional misconduct for acting as counsel to Afribank Nigeria Plc without authorization and suspended him from practicing as a Legal Practitioner for 5 years. The appellant was dissatisfied with the final direction of the honourable committee and filed his appeal before the Supreme Court challenge the direction.

Held: *(Unanimously allowing the appeal)*

1. *Appellate court will not entertain an issue which does not arise from a ground of appeal*

Since the appellant did not file a reply in answer to the preliminary points raised by the 1st respondent, he is deemed to have admitted that Issue 1 was not distilled from any of the grounds of appeal and so is incompetent; also no issue was formulated from Ground 2 and the said ground is deemed abandoned. It was held in *Bakare vs. L.S.C.S.C.* (1992) 8 NWLR (pt. 262) 641 that an appeal court will refuse to consider and pronounce on an issue formulated for determination which does not arise from the grounds of appeal filed. See *Aja vs. Okoro* (1991) 7 NWLR (pt. 203) 260; *Adejugbe vs. OLogunja* (2004) 6 NWLR (pt. 868) 46; *Shittu vs. Fashawe* (2005) 14 NWLR (pt. 946) 671. Issue 1 is

incompetent and Ground 2 of the notice of appeal is deemed abandoned. They are struck out. Issue 1 in the 2nd respondent's brief is also struck out as being incompetent. (P.....Paras.....).

2. *The Nature and purport of Legal Practitioners Act No. 15 of 1975.*

Before the decision of this court in Legal Practitioners Disciplinary Committee vs. Chief Gani Fawehinmi (1985) 2 NWLR (pt. 7) 300; (1985) 2 NSCC Vol. 16 page 998 the Legal Practitioners Act No. 15 of 1975 provided in Section 10 the establishment of a Disciplinary Committee and the composition of its membership. Section 10 (1) and (2) provided as follows:-

“10(1) There shall be a committee to be known as the Legal Practitioners' Disciplinary Committee (in this Act referred to as “the Disciplinary Committee”) which shall be charged with the duty of considering and determining any case where it is alleged that a person whose name is on the roll has misbehaved in his capacity as a legal practitioner or should for any other reason be the subject of proceedings under this Act.

(2) The Disciplinary Committee shall consist of:-

- (a) the Attorney-General of the Federation who shall be chairman;**
- (b) the Attorney-General of the states in the Federation.**
- (c) twelve legal practitioners of not less than ten years' standing appointed by the Benchers on the nomination of the Association” .**
(P.....Paras.....).

3. *Composition of Legal practitioners Disciplinary Committee*

The composition of the Legal Practitioners Disciplinary Committee was later amended by the Legal Practitioners (Amendment) Decree No. 21 of 1994 which was published as supplementary to the laws of the Federation of Nigeria 2004. Section 11 (1) & (2) provides as follows:-

“11.(1) There shall be a committee of the body of Benchers to be known as the Legal Practitioners Disciplinary Committee (in this Act referred to as “the disciplinary committee”) which shall be charged with the duty of considering and

determining any case where it is alleged that a person who is a member of the legal profession has misbehaved in his capacity as such or should for any other reason be the subject of proceedings under this Act.

- (2) The disciplinary committee shall consist of:-**
- (a) a chairman who shall not be either the Chief Justice of Nigeria or a justice of the Supreme Court**
 - (b) two Justices of the Court of Appeal one of whom shall be the president of the Court Appeal.**
 - (c) two Chief Judges;**
 - (d) two Attorneys-General who shall be either the Attorney-General of the Federation and the Attorney-General of the State or two State Attorneys-General; and**
 - (e) four members of the association who are not connected with the either the investigation of a complaint against a legal practitioner for determination by the disciplinary committee”. (P.....Paras.....).**

Per Akaahs (JSC)

“The amendment addressed the problem which arose in *L.P.D.C vs. Fawehinmi supra* where the Attorney-General of the Federation was the chairman of the Disciplinary Committee and also initiated disciplinary proceedings against the respondent. The respondent applied to court for an order prohibiting the Disciplinary Committee as constituted from hearing the charges of professional misconduct preferred against him having regard to the principles of natural justice embedded in the principle of memo judex in causa sua (no one can be judge in his own (cause). In seeking the order, the respondent based his application on Section 42(3) of the 1979 Constitution and sought for the enforcement of his fundamental right to fair hearing under Section 33 of the Constitution. He predicated his complaint on the likelihood of bias since the Attorney-general and 3 other members of the committee had actively participated in investigating the matter and had in an earlier occasion expressed strong opinions against the respondent. The trial judge found for the respondent and the Court of Appeal dismissed the appeal filed by the committee. On a further appeal to the Supreme Court., the appeal was dismissed. The court held that in the exercise of its disciplinary authority over erring legal practitioners, the legal Practitioners Disciplinary Committee must observe the rules of natural justice and in that context, it must not only avoid bias but also the likelihood of bias. Thus the Attorney-General of the Federation has ceased to be

the chairman of the Disciplinary Committee. Any direction given by the Disciplinary Committee against a legal practitioner invariably is challenged at the Supreme Court and this is the rationale for excluding the Chief Justice and Justices of the Supreme Court from being members of the Disciplinary Committee. Where any of the members listed in Section 111 (2) (b)-(e) is a complainant he cannot take part in the disciplinary proceedings as such a member. (P.....Paras.....).

4. *The extent law dealing with composition of legal Practitioner Disciplinary Committee*

Learned counsel for the respondents are on firm ground when they argued that this court never held that Decree No. 21 of 1994 was repealed in Aladejobi vs. Nigerian Bar Association (2013) 15 NWLR (pt. 1376) 66 and Rotimi Williams Akintokun vs. Legal Practitioners Disciplinary Committee (2014) 13 NWLR (pt. 1423) 1. The issue which this court dealt with in the two appeals was that an appeal from the direction given by the Disciplinary Committee should be lodged with the Appeal Committee of the Body of Benchers as provided under Section 12 (1) & (2) of the Legal Practitioners Act Cap. L 11, Laws of the Federation of Nigeria 2004. The two decisions have in no way affected the composition of Legal Practitioners Disciplinary Committee as currently constituted. The argument advanced by learned counsel for the appellant in paragraph 5.4 of his brief that the extant law dealing with the composition of the Disciplinary Committee of the Body of Benchers is Section 10 of the Legal Practitioners Act CAP L 11 Laws of the Federation of Nigeria which has the Attorney-General of the Federation as chairman is therefore not correct. The extant law which is in operation is the Legal Practitioners Act 2004 (incorporating the provisions of the Legal Practitioners) (Amendment) Decree No. 21, 1994) published as supplementary to the laws of the Federation of Nigeria, 2004. The Court of Appeal in Chief Andrew Oru vs. Nigerian Bar Association & Anor (2016) All FWLR (pt. 816) 543 reached its decision per incuriam. The honourable committee was properly constituted and had the requisite jurisdiction when it sat and heard the complaint of professional misconduct against the appellant. (P.....Paras.....).

5. *A New chairman could be appointed to deliver judgment of an Electoral Tribunal when the judgment has already been written.*

Learned counsel for the respondents relief on Alhaji Ahmed Garba Bichi & Ors vs. Alhaji Ibrahim Shekarau & Ors (2009) LPER 3874 (CA); 2009 7 NWLR (pt. 1140) 311. This case dealt with an election petition where the 1999 Constitution, the schedule to the constitution and the schedule to the Electoral Act, 2006

provided for the composition and quorum of the National Assembly and the Governorship and Legislative House Election Tribunals. Section 285(3) and (4) of the 1999 Constitution provides:-

“285(3) The composition of the National Assembly Election Tribunal, Governorship and Legislative Houses Election Tribunals shall be as set out in the sixth schedule to this constitution.

(4) The quorum of an election tribunal established under this section shall be chairman and two other members”.

Paragraphs 24(2) and 26(2) of the first schedule to the Electoral Act, 2006 read as follows:-

“24(2) If the chairman of the tribunal or presiding justice of the court who begins the hearing of an election petition is disabled by illness or otherwise, the hearing may be recommended and concluded by another chairman of the tribunal or presiding justice of the court appointed by the appropriate authority.

26(2) After the hearing of the election petition is concluded, if the tribunal or court before which it was heard has prepared its judgment but the chairman or the presiding justice is unable to deliver it due to illness or any other cause, the judgment may be delivered by one of the members, and the judgment as delivered shall be the judgment of the Tribunal or court and the member shall certify the decision of the tribunal or court to the resident Electoral Commissioner or to the commission.

Since a quorum was formed with the chairman and proceedings had been taken up to when judgment was written, a new chairman in the absence of the original chairman could be appointed to deliver the judgment. (P.....Paras.....).

Per Akaahs (JSC)

“In contrast with the above provisions, Section 11(2) of the Legal Practitioners (Amendment) Decree No. 21 of 1994 enumerates the persons who can constitute the Legal Practitioners Disciplinary Committee without stating how many of them can form a quorum. Notwithstanding the fact that the chairman was

present throughout from the time the appellant took his plea in which he denied being liable to the charge of professional misconduct right up to the delivery of the direction the proceedings were tainted by the change in the composition of the committee. One of the committee members, Amina Dyeris-Sijuade was present only once on 30th November, 2015, the date the final direction was delivered (see page 285 of the records). It was only J.B. Daudu Esq. the chairman and Tijani Inuwa-Dutse, a member that were present throughout the proceedings. Where a court of tribunal is differently is differently constituted during the hearing of the case, or on various occasions when it met, or where one member did not hear the whole evidence, the effect on the proceedings is to render them null and void. See: *Adeigbe & Anor vs. Kasimo & Ors* (1965) All NLR 260 *Ubwa vs. Tiv Area Traditional Council & Ors* (2004) 11 NWLR (pt. 884) 427; *Sokoto State Government vs. Kamdex (Nig.) Ltd* (2007) 7 NWLR (pt. 1034) 466.

One important aspect of this case is that Chief A. A. Aribisala SAN who initiated the petition against the appellant did not appear before the committee to adopt his witness dispositions. His non appearance before the committee is tantamount to his abandoning the petition. The appearance of Zibai Blessed Katung, the Assistance Secretary of the Body of Benchers who adopted his witness statement on oath cannot take the place of Chief A. A. Aribisala SAN and despite the deposition in paragraph 11 of his written statement that:-

“That from what I read in the documents in the file, Mr. Obiajulu Nwalutu as a Legal Practitioner, filed processes in Suit No. FHC/L/CS/426/10 – Daily Times of Nigeria Plc & Anor vs. GTCO Communications Ltd & 5 Ors before the Federal High Court, Lagos purporting to represent Messrs Afribank Plc without instructions to do so contrary to the existing laws relevant thereto”.

This would only be a matter of opinion and the only people who could substantiate the allegation of professional misconduct against the appellant would be Chief A. A. Aribisala SAN and more especially Umar Dan-Umma, the Group Company Secretary/Legal Adviser. (*P.....Paras.....*).

6. *Legal Practitioners Disciplinary Committee must be guided by principles of natural justice*

The trial of the appellant is quasi-judicial and the Legal Practitioner Disciplinary Committee being a “court or tribunal” as envisaged under Section 33 (1) of the constitution of the Federal Republic of Nigeria 1979 is more than an

administering authority of the type envisaged under Section 33 (2) thereof. In the unanimous decision of this court in L.P.D.C. vs. Fawehinmi supra it was held that the Legal Practitioners Disciplinary Committee which exercises the important function of considering and determining cases of misconduct alleged against legal practitioners should in every step they take in this important sphere of human activity be guided by the immortal principles of eternal or natural justice. There must be valid and credible evidence adduced before the Legal Practitioner Disciplinary Committee upon which it will base its direction of suspending the appellant from engaging in legal practice for 5 years. As rightly observed by the Legal Practitioners Disciplinary Committee, Chief A. A. Aribisala SAN remains a proposed witness who did not appear to adopt his deposition. It was therefore wrong to use a document attached to the deposition in finding the appellant guilty when the said document was not properly tendered before the Legal Practitioners Disciplinary Committee. (P.....Paras.....).

7. *The current law is Legal Practitioners Act, 2004*

I have to add that the current law applicable to the composition of the Legal Practitioners Disciplinary Committee of the Body of Benchers inter alia, is Legal Practitioners Act, 2004 (incorporating the provisions of the Legal Practitioner Amendment Decree No. 21 1994) published as Supplementary to the Laws of the Federation, 2004 which made the committee that dealt with this matter properly constituted and clothed with the necessary jurisdiction to hear and determine the complaints of professional misconduct against appellant. (P.....Paras.....).

8. *Effect where membership of a panel is differently constituted during proceedings*

However, the problem in this appeal lies in panels that heard the matter being different from that which eventually delivered the decision. It is the contention of appellant that this is a fundamental defect which renders the proceedings and decision reached therein a nullity. The record of proceedings reveals that the membership of the 2nd respondent varied at the sittings except the Chairman of the Committee who sat throughout the trial of appellant. This fact is not denied by the respondents.

What the above facts mean is that it was not all the members of the Committee that heard the witnesses testify nor watched their demeanour. It is settled law that where a court or tribunal or panel or committee is differently constituted, as in this case during the hearing/trial of a case or on various occasions when it sat or where one member did not hear the whole evidence again as in this case the effect on the proceedings including the decision arrived

therein is to render them null and void and of no legal effect whatsoever. See *Ubwa vs. Tiv Area Traditional Council & Ors* (2004) 11 NWLR (pt. 884) 427 *Sokoto State Government vs. Kamdex (Nig) Ltd* (2007) 7 NWLR (pt. 1034) 466. (P.....Paras.....).

Per Eko (JSC)

“I need only add that a Disciplinary Committee comprising several members cannot be said to have, as a body, given a Legal Practitioner being tried for infamous conduct fair trial if, as it is revealed in this case, only one member (the chairman of the committee) consistently sat and took evidence on all the dates the witnesses testified. The issue is not whether the committee, as constituted, had the proper quorum. Rather, it is whether the members of the committee except the chairman, who did not hear all the evidence constituting the totality of the evidence in the proceedings can, with all honesty, decide whether or not the appellant committed the alleged misconduct or infamous conduct on the evidence they did not hear the witnesses testify on. The point I am emphasizing is that the Legal Practitioners Disciplinary Committee (LPDC) is not an appellate, but a first instance, panel. On what evidence does the absentee panelist evaluate the totality of the evidence before coming to his decision? (P.....Paras.....).

9. *How to determine whether testimony of a witness has probative value*

This court in several decisions, including *Dim vs. Enemu* (2009) 42 WRN 1, (2009) 10 NWLR (pt. 1149) 353 at 396, has established what evaluation and ascription of probative value to the testimony of a witness entails thus:

The evaluation and ascription of probative value to the testimony of a witness is within exclusive domain of the trial court that heard and watched the witnesses testify before it. To determine whether a testimony has probative value, the court takes into consideration whether the testimony is cogent, consistent and in accord with reason and in relation to other evidence before it. (P.....Paras.....).

10. *How to determine the credibility of a witness and effect where an absentist panelist makes a decision on credibility*

The court takes into consideration the demeanor, personality under cross-examination in the determination of the issue of credibility of a witness. A determination of the court of credibility is almost sacred.

See also *Onwuka & Ors vs. Ediala & Ors* (1989) 1 NWLR (pt. 96) 1282;

A (1989) 1 NSCC 65. It appears to me, and I so hold, that when a absent
B panelist relies on the colleague present when a witness(es) testified to
 render an opinion that such opinion is premised on hearsay evidence and it
 is perverse. A decision in the circumstance is nothing but a travesty of
C justice. In such circumstance, also, it cannot be said that the person tried by
 the LPDC had received fair trial. Fair hearing, as this court has
 consistently held, involves a fair trial and a fair trial of a case consists of the
 whole hearing. There is no difference between the two: Kano N. A. vs.
 Obiora (1959) 1 NSCC 189; (1959) SCNLR 577; Mohammed vs. Kano N.A.
 (1968) 1 All NLR 424; Unongo vs. Aku (1983) 2 SCNLR 332 at 362 – 363
 Ogboh & Anor. vs. FRN (2002) LPELR-2285 (SC). (*P.....Paras.....*).

11. *LPDC acted on hearsay evidence*

D Finally, the trial of the appellant being quasi-judicial, his “conviction” for
 professional misconduct or infamous conduct can only be sustained upon
 legal evidence properly admitted in the proceedings. No amount of
 hearsay evidence, be it documentary or oral, can take the place of proper
 legal evidence. In the instant case; notwithstanding the fact that Chief A.
E A. Aribisala, SAN, whose petition initiated the proceedings, had
 abandoned same by his failure and/or refusal to appear at the LPDC, the
 LPDC acted on the same as it was adopted by one Zibai Blessed Katung
 before it. At best the petition and/or its existence constituted only real
 evidence. The substance and the truth of contents of the petition, as
 presented to the LPDC by the said Zibai Blessed Katung, would amount to
F nothing but proffering hearsay evidence.

The flaws in the directions of the LPDC pointed out above and in the lead
 judgment of my learned brother, Kumai Bayang Aka'ahs, JSC, which I
 adopt, inform my allowing the appeal and entering in favour of the
 appellant an order acquitting and discharging him of the alleged
 professional misconduct. (*P.....Paras.....*).

G Representations

H. Kareem (Esq.) for the Appellant.

M. E. Oru (Esq.) (with Messrs Lawrence John and Noah Adanu) for 1st Respondent.

H Anozie Obi (Esq.) (with Messrs R. A. C. Uko and Lonji Ayuba) for 2nd Respondent.

I KUMABAYANGAKAAHS, (JSC) (Delivering The Lead Judgment).

OLADIMEJI MOHAMMED EDUN
Vs.
FEDERAL REPUBLIC OF NIGERIA
AND
ZARAB VENTURES LIMITED
Vs.
FEDERAL REPUBLIC OF NIGERIA

SC. 960/2017
&
SC. 961/2017

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER ODILI
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE
EJEMBI EKO
SIDI DAUDA BAGE

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

COURT:- Confessional statement – Where accused makes a confessional statement – Whether there is need for court to test its veracity – Approach thereto.

COURT:- Criminal cases – Duty thereto – Court to consider the confessional statement, the testimony and the totality of evidence – Whether the testimony of accused in court not contained in his confessional statement is not an after thought because it is not contained in his confessional statement.

*CRIMINAL LAW AND PROCEDURE:- Commission of crime – Intent thereto – Whether can be proved by looking at the surrounding circumstances – The principle in **Arebamen Vs. State (1972) 4 SC 14, (1972) LPELR – 542.***

*CRIMINAL LAW AND PROCEDURE:- Commission of offence – Intent thereof – Whether it is subjective and can be inferred from the conduct of the accused – The principle in **Asuquo vs. State (2016) 6 SC (Pt.11) 1.***

CRIMINAL LAW AND PROCEDURE:- Confessional statement – What amounts – Whether it is a statement made by an accused which admits his guilt.

CRIMINAL LAW AND PROCEDURE:- Confessional statement – When to be utilized – Whether must be direct, positive, true and unequivocal.

CRIMINAL LAW AND PROCEDURE:- Criminal misappropriation – Elements thereof – Whether those elements must co-exist for offence to be established.

CRIMINAL LAW AND PROCEDURE:- Criminal misappropriation – S. 308 of Penal Code – Elements thereof – What must be established.

CRIMINAL LAW AND PROCEDURE:- Proof – Burden on prosecution thereto – S. 137(1) of Evidence Act considered – Whether such burden never shifts.

*CRIMINAL LAW AND PROCEDURE:- Proof – Onus on prosecution thereto – Where prosecution proves before the trial court two versions of the same transaction – Whether they must have failed to prove the guilt of the accused beyond reasonable doubt – The principle in **Paul Ameh Vs. The State (1978) 11***

CRIMINAL LAW AND PROCEDURE:- Proof – Standard of proof in criminal cases – Whether it is proof beyond reasonable doubt – S. 131(1) of Evidence Act, 2011 considered.

CRIMINAL LAW AND PROCEDURE:- Prosecution's case – Where there are material contradictions thereto – Whether court cannot pick and choose which to believe.

CRIMINAL LAW AND PROCEDURE:- Restitution – Principles thereof – S. 78 of the Penal Code Law – Whether the person must have been convicted and the convict must have injured the person or some persons.

*CRIMINAL LAW AND PROCEDURE:- Statement of accused – Where contains both admission and denials – Whether prosecution is entitled to use the admissions well – The principle in **Igbi Vs. The State (2000) 2 SCNJ 67***

CRIMINAL LAW:- Breach of contract and breach of trust – Distinction thereof – Whether breach of contract always leads to award of damages and is civil in nature.

CRIMINAL LAW:- Criminal misappropriation – Elements thereof - Whether an owner of property cannot be convicted for misappropriation for his own property.

CRIMINAL LAW: Criminal Misappropriation – Elements thereof – The principle in Samuel Ahmadu Sabo Vs. Commissioner of Police (1973) N.N.L.R. 207

CRIMINAL LAW:- Criminal misappropriation – Entrustment of fund – Whether not necessarily an element of criminal misappropriation.

CRIMINAL LAW:- Criminal misappropriation – Where accused is paid money for construction of bore holes – Whether such money belongs to the accused and cannot be validly accused of criminal misappropriation of same.

CRIMINAL LAW:- Criminal/breach of trust – Nature and purport – S. 311 of Penal Code considered.

STATUTE:- Penal Code – S. 308 thereof – Nature and purport – Whether deals with criminal misappropriation.

STATUTE:- Penal Code – S.16 thereof – When a person is said to do something dishonestly.

WORDS AND PHRASES:- Entrusted – Meaning

WORDS AND PHRASES:- Ownership of property – Connotation - The principle in Suraju Somade & Ors Vs. Otunba Ayo Jaiyesimi & Ors (2006) LPELR – 11866

Issues for Determination

Whether the court below was right to affirm the conviction of the appellant by the trial court for the three count charges of criminal misappropriation and the order of restitution of the Fourteen Million Naira (N14,000,000.00) by the appellant.

Facts of the Matter

These two appeals – SC. 960/2017: Oladimeji Mohammed Edun Vs. Federal Republic of Nigeria, and SC. 961/2017: Zarab Ventures Limited Vs. Federal Republic of Nigeria were argued separately, on 28th November, 2018 before this same panel. The two appeals, having the same substratum, emanate from the charge No. KWS/20C/2015 before the Kwara State

High Court (Coram: M. AbdulGafar, J.) and the appeal No. CA/IL/C.100/2016 at the Court of Appeal, Ilorin Division. Because of the commonality of the facts and the issues in the appeal, including the counsel on both sides in the two appeals, it becomes necessary that judgments in the two appeals be consolidated though the appeals retain their distinct and separate identities.

The appellant in the appeal No. SC.960/2017 was the 1st accused at the trial court, and also the 1st appellant at the lower court. He was the Chief Executive Officer and the Managing Director of Zarab Ventures Limited, the appellant in the appeal No. SC. 961/2017 and the 2nd appellant at the lower court.

The 1st and 2nd accused were jointly tried on a three-count charge at the Kwara State High Court, Ilorin that reads:

COUNT ONE

That you Oladimeji Mohammed Edun, (being MD/CEO and sole signatory of Zarab Ventures Ltd) and Zarab Ventures Ltd on or about December, 16, 2008 in Ilorin within the Ilorin Judicial Division of the High Court of Kwara State while in such capacity did dishonestly misappropriate the sum of N6,000,000.00 (Six Million Naira) which was part of the money entrusted to you by Kwara State MDG's – CGS for the construction of boreholes in some Local Government Area and you thereby committed an offence contrary to Section 308 of the penal code and punishable under Section 309 of the same Act.

COUNT TWO

That you Oladimeji Mohammed Edun (being MD/CEO and sole signatory of Zarab Ventures Ltd) and Zarab Ventures Ltd on or about 18th May 18, 2009 in Ilorin within the Ilorin Judicial Division of the High Court of Kwara State while in such capacity did dishonestly misappropriate the sum of N1,000,000.00 (One Million Naira) which was part of the money entrusted to you by Kwara State MDG's – CGS for the construction of boreholes in some Local Government Area and you thereby committed an offence contrary to Section 308 of the penal code and punishable under Section 309 of the same Act.

COUNT THREE

That you Oladimeji Mohammed Edun (being MD/CEO and sole signatory of Zarab Ventures Ltd) and Zarab Ventures Ltd on or about the May 21, 2009 in Ilorin within the Ilorin Judicial Division of the High Court of Kwara State while in such capacity did dishonestly misappropriate the sum of N7,000,000.00 (Seven Million Naira) which was part of the money entrusted to you by Kwara State MDG's – CGS for the construction of

boreholes in some Local Government Areas and you thereby committed an offence contrary to Section 308 of the penal code and punishable under Section 309 of the same Act.

A total of three (3) witnesses testified for the prosecution. The sole defence witness was the 1st accused.

The 1st accused is the Managing Director/Chief Executive Officer of the 2nd accused (a company registered in Nigeria as a Limited Liability Company under the Companies and Allied Matters Act, as amended). The 1st accused is also a politician. He was a member of the House of Representatives at the National Assembly. He was at some material time a member of the Political Party in power in Kwara State. Through the 1st accused the 2nd accused was awarded contracts for the drilling and provision of 43 motorised boreholes in some Local Government Areas of Kwara State. The contracts were awarded by the Kwara State MDG-CG's at the rate of N2,013,033.75 per borehole, which translated to the total sum of N86,560,451.25. The contracts were awarded in three tranches of 40, 40 and 3 boreholes vide letters dated 27th April, 2009; 3rd July, 2009 and 30th July, 2009. At the material time the PW3, Ademola (Demola) Banu, was the officer in charge of MDG projects. He was also the Special Assistant to the Governor of Kwara State on MDG projects. He later became the Commissioner for Finance in the same regime.

The three (3) charges relate to a total sum of N14,000,000.00 paid in three tranches of N6,000,000.00, N7,000,000.00 and N1,000,000.00 by the 1st accused from the account of 2nd accused allegedly to some officials of Kwara State Government for onward payments to some third parties. The trial court believed the 1st accused on his assertion that he paid the sum of N6,000,000.00 and N7,000,000.00 (a total of N13,000,000.00) to the PW3 and N1,000,000.00 to Tunji Moronfoye, who between 2007-2011 was Special Assistant to the Governor of Kwara State on Millennium Development Goals (MDG). He was later, in 2011, appointed to the Governor's Cabinet as the Commissioner for Information and Communication. Tnji Moronfoye, like the then Governor of Kwara State (said to be Dr. Bukola Saraki), did not testify.

The PW1 and PW2 are both staff of the Economic and Financial Crimes Commission (EFCC). They were in the team that investigated the facts on which the 1st and 2nd accused were charged and tried for criminal misappropriation. The totality of their evidence is that the 1st accused admitted that the contracts were awarded to the 2nd accused for the drilling and provision of 43 motorised boreholes and that some payments for the contracts had been made to the 2nd accused, and further that on three occasions the accused paid sums totaling N14,000,000.00 "to State Officials" out of the contract sum.

HELD: *(Unanimously allowing the appeal)*

1. *The nature and purport of S. 308 of Penal Code*

Section 308 of the statute, which defines the offence of criminal misappropriation provides:

308. Whoever dishonestly misappropriates or converts to his own use any movable property, commits criminal misappropriation. (P.....para.....)

2. *The meaning of the word “entrusted”*

The key phrase in each charge is “the money entrusted to you by Kwara State MDG-“. The word “entrusted” is from the verb – entrust, which connotes a principal making somebody, the third party, responsible for doing something or taking care of somebody. See Black's Law Dictionary 9th Ed. at page 613; Oxford Advanced Learner's Dictionary now 8th Ed. Page 490. (P.....para.....)

3. *Distinction between breach of contract and breach of trust*

I think there is a world of difference between breach of contract and a breach of trust.

A breach of contract, on one hand, is a violation of a contractual obligation by failing to perform one's own promise under the contract by repudiation of the contract agreement. According to Black's Law Dictionary 9th Ed. Page 213, a breach of contract may be non-performance, or by repudiation, or both. Each case gives rise to a civil claim either for damages, or some other remedies including specific performance. A breach of trust, on the other hand, occurs with the trustee's violation of either the trust terms or the trustee's fiduciary obligations: Black's Law Dictionary (supra). (P.....para.....)

4. *The nature and purport of criminal breach of trust*

The prosecutor in his judgment did not consider it appropriate to charge the accused for criminal breach of trust, which by Section 311 of the Penal Code is defined as:

311. Whoever, being in any manner entrusted with property or with any dominion over the property, dishonestly misappropriates or converts to his own use that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of a legal contract express or implied, which he has made touching

the discharge of such trust, or willfully suffers any other person to do so, commits criminal breach of trust.
(P.....para.....)

5. *When accused may be convicted of criminal misappropriation*

In the two offences criminal misappropriation defined by Section 308 of the Penal Code and criminal breach of trust defined by Section 311 of the Penal Code dishonest misappropriation or conversion of property is a common factor. Read, C. J. made it clear in Samuel Ahmadu Sabo Vs. Commissioner of Police (1973) N.N.L.R. 207 and I agree with him, that in each offence, the accused person, allegedly, dishonestly misappropriates or converts to his own use property in his possession and that he may be convicted for criminal misappropriation if he dishonestly misappropriates or converts to his own use property in his possession even though he came into possession of that property by way of entrustment.

In the instant case, none of the three charges gave particulars of the terms the money was entrusted to the accused. The 1st accused in both his *viva voce* evidence and Exhibits 11-14, stated that the PW3, after the contracts were awarded came to him with the story that the Governor of Kwara State intended, and directed as well, that the sums, the subject of the three charges, be paid out of the contract sum to some unnamed local politicians, and that in compliance he withdraw the sums of N6,000,000.00 and N7,000,000.00 and paid the PW3 and another N1,000,000.00 which he paid to Mr. Moronfoye. That was 1st accused's defence to the charge that he dishonestly misappropriated the said sums entrusted to himself and the 2nd accused. The PW3 who should have confirmed the alleged entrustment denied it, and was disbelieved. Thus the 1st accused/DW1's account stands tall and unscathed.

(P.....para.....)

6. *Proof beyond reasonable doubt is standard of proof in criminal cases*

This is a criminal proceeding. Proof beyond reasonable doubt is the standard of proof. Sections 131 (1), 132 and 136 (1) of the evidence Act, 2011 place the burden squarely on the party who asserts the existence of a particular fact to prove the existence of that fact in order to be entitled to judgment.

(P.....para.....)

7. *When a statement made by accused will be regarded as confessional*

A statement made by the accused will not be regarded as “confessional” unless thereby the accused person admits his guilt and/or the commission of the offence he was charged with: Section 28 of the Evidence Act, 2011. A

confessional statement proves the guilt, and not the defence or the innocence of the accused person. (*P.....para.....*)

8. *Elements of criminal misappropriation*
For conviction for criminal misappropriation, contrary to Section 308 of the penal code and punishable under Section 309 of the same penal code, it was necessary to prove or show that the accused person had the necessary intention of causing wrongful gain to himself or another, or of causing wrongful loss to any other person within the context of Section 16 of the penal code that defines or states when a thing is said to be done dishonestly. Sections 308 and 16 of the penal code must be read together since the dishonest misappropriation is *mens rea* of criminal misappropriation: Bakara & Ors Vs. The State (1968) All N.L.R. 354.
(*P.....para.....*)
9. *Statement made by accused is not confessional but mere defence*
I agree with the counsel for the accused/appellants that Exhibits 11-14, heavily relied upon by the two courts below as “confessional statements” made by 1st accused/DW1, are not confessional or admissions of the offence of criminal misappropriation. Rather, they are defences offered by the 1st accused/DW1 that by the payments of the sum totaling N14,000,000.00 to PW3 and Tunji Moronfoye, as directed by the Chief Executive of Kwara State, the accused/appellants never, at all, intended to dishonestly cause wrongful loss to the Kwara State MDG's that awarded the contracts for the drilling and provision of 43 motorised boreholes. (*P.....para.....*)
10. *Effect where prosecution proves before a trial court two versions of the same transaction*
Exhibits 11-14, extra-judicial statements of the 1st accused/DW1, offering explanations and defences to the charges of criminal misappropriation, were tendered and admitted in evidence through the PW2. They form part of the prosecution's case, charge of criminal misappropriation. The effect of Exhibits 11-14 on the prosecution's case is that the prosecution had thereby offered and placed before the trial court two versions of the same transaction – one inculpatory and the other (Exhibit 11-14) exculpatory. In Paul Ameh Vs. The State (1978) 11 SC at 368, this court made it clear that the prosecution would have failed to prove the guilt of the accused person beyond reasonable doubt if they put before the court two versions of the same incident or transaction.
(*P.....para.....*)

11. *Implication where statements of accused contains both admissions and denials*
I am aware that the court in *Igbi Vs. The State* (2000) 2 SCNJ 67 at 73 stated also that when the statement contains both admission and denials the prosecution is entitled to use the admission as well. In the IGBI's the accused denied that he participated in the killing of the deceased. He however, admitted that he was present at the scene of crime. The admission had thus corroborated the evidence of the prosecution witnesses that fixed the accused to the scene of crime.
In the instant case Exhibits 11-14 contain outright denials of the suggestion that the accused dishonestly misappropriated the sums of money the subject of the three charges. They do not admit the criminal misappropriation charged. They at variance with the whole trend of the prosecution's case. The contradiction is therefore material and it casts reasonable doubt on the prosecution's case, which doubt the two courts below ought to have resolved in favour of the accused/appellants: *Onubogu Vs. The State* (1974) 9 NSCC 358. (P.....para.....)
12. *Where there are contradictions the court cannot pick and choose*
The two courts below failed to heed the injunction that when there are material contradictions in the prosecution's case the court cannot pick and choose which account to believe and which account to disbelieve. *Boy Muka Vs. The State* (1976) 10 SC 305. (P.....para.....)
13. *Accused is the owner of money paid to him for construction of boreholes*
For these accused/appellants to be guilty of dishonestly misappropriating the moneys they paid to the PW3 and Tunji Moronfoye the prosecution must prove or establish who was the owner of the moneys misappropriated. The charges suggested that the moneys misappropriated were entrusted to the accused/appellants “for construction of boreholes”. However, undisputed evidence coming from PW1 and PW2, including Exhibits 11-14, suggest that the 2nd accused, *Zarab Ventures Ltd* (whose Chief Executive Officer is the 1st accused), was paid part of the agreed contract sum being the consideration payable to it by the Kwara State MDG for drilling and provision of motorized boreholes. I do not think that the ownership of the money paid to the accused by the Kwara State MDG as consideration for performing the job they were contracted to perform would still remain vested in the said MDG. The said money can also not be said to have been “entrusted” to them “for construction of boreholes”.(P.....para.....)

14. *Entrustment is not necessary element of criminal misappropriation*
On this note let me state, generally, that while entrustment and dishonest misappropriation are the necessary ingredients of the offence of criminal breach of trust entrustment is not necessarily an element of the offence of criminal misappropriation Batsari Vs. Kano N. A. (1966) NNLR 151. (P.....para.....)
15. *An owner of property cannot be convicted for misappropriating his own property*
It is not in our jurisprudence that an owner of a property can be convicted for misappropriating his own property. The Supreme Court of India, in A 1965 SC 1433 at 1436; 1965 CriLJ 431 made a clear statement of the law that an owner of a property cannot be guilty of misappropriation of his own property. The statement accords with common sense and logic. Accordingly I adopt it.
The point I am trying to make is that the ownership of the money paid to the 2nd accused as consideration for the said 2nd accused to drill and provide motorized boreholes remain the property of the 2nd accused and it was being managed by the 1st accused. The two cannot be guilty of misappropriating their own money, at least not in the peculiar facts of this case.
In the event of the accused/appellants failing in their contractual obligations to the MDG's a cause of action for civil breach of contract would have risen for which the remedy for such breach does not lie in criminal proceedings. (P.....para.....)
16. *What a statement of ownership of a property connotes*
However, as to what ownership, of a property connotes I endorse the statement of Amina Augie, JCA (as she then was) in Suraju Somade & Ors Vs. Otunba Ayo Jaiyesimi & Ors (2006) LPELR-11866 (CA). That is:

Ownership generally connotes the totality of or the bundle of the rights of the owner over and above every other person on a thing. It connotes a complete and total right over property. As Tobi, JSC pointed out in Fagunwa Vs. Adibi (2004) 17 NWLR (pt. 903) 544 at 568 – “The property begins with the owner and also ends with him. Unless he transfers his ownership of the property to a third party, he remains the allodial owner”. (P.....para.....)

Per Eko (JSC)

“My Lords, I cannot see how the accused, the allodial owners of the money paid as valuable consideration to them by the Kwara State MDG's for the drilling and provision of motorized boreholes, could be guilty of dishonestly

misappropriating their own money by paying over the sums totaling N14,000,000.00 to the PW3 and Tunji Moronfoye for the purpose of settling some politicians. I agree with the learned counsel for the accused/appellants as owners of their money, out of which the N14,000,000.00 was paid out, are entitled, in their discretion, to deal with the money in any lawful or legitimate manner.

Coming, as I do to the conclusion that the ownerships of the money, out of which the accused/appellants paid N14,000,000.00 to the PW3 and Tunji Moronfoye (be it upon cajolery, coercion or brazen extortion by the PW3) vests exclusively in the accused/appellants, particularly the 2nd accused/appellant. The second issue canvassed by the accused/appellants in their respective briefs is now accordingly spent; and there is now no basis for the order for restitution in the sum of N14,000,000.00 to Kwara State MDG's as compensation pursuant to Section 78 of the penal code ordered by the trial court and affirmed by the lower court. (P.....para.....)

17. *Standard of proof in criminal case is proof beyond reasonable doubt.*
**The relevant sections of the Penal Code for our discourse herein are:-
 Section 308 which provides thus:-**

Whoever dishonestly misappropriates or converts to his own use any property, commits criminal misappropriation". (P.....para.....)

18. *The nature and purport of S. 16 of Penal Code*
Section 16 states as follows:-

"A person is said to do a thing 'dishonestly' who does that thing with the intention of causing a wrongful gain to himself or another or causing wrongful loss to any other person". (P.....para.....)

19. *Order of restitution was wrongly made by the trial court*
In making the order for restitution, the trial court found that the N14,000,000.00 was received from the appellant by PW3 and one one Tunji Moronfoye who were the officials in charge of Kwara State MDGs-CGS at the time material to this case. However, notwithstanding that finding by the trial court, the trial court still made an order of restitution against the appellant and Zarab Ventures Ltd even in the face of evidence before the court that the level of work done by appellant and his company was/is in excess of the sum of N60 Million or N67 Million received by them. (P.....para.....)

20. *Burden on prosecution under S.137(1) of Evidence Act never shifts*
In this the burden of proof on the prosecution to establish the guilt of the accused appellants is beyond reasonable doubt in keeping with Section 137 (1) of the Evidence Act, which burden never shifts and in line with the constitutional rights of the accuse person to the presumption of innocence as expressly stipulated by Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). In line with the prescription of the constitution and the Evidence Act, in discharging this bounden duty, the prosecution must prove the essential elements of the offence strictly as contained in the charge since the purpose of the charge is to give adequate notice to the defence of the case it is up against. I rely on FRN Vs. Usman (2012) All FWLR (pt. 632) 1639 at 1650 per Rhodes-Vivour JSC; Akindele Vs. State (2016) All FWLR (pt. 850) 1047 at 1084; State Vs. Ajayi (2016) 7 SC (pt. 111) 55 at 95; Lawal Vs. State (2016) 6 SC (pt. 11) 121 at 152; Sowemimo Vs. The State (2012) 2 NWLR (pt. 1284) 372 at 400; Okashetu Vs. State (2016) 6 SC (pt. 11) 155 at 191; Okejere Vs. State (2017) All FWLR (pt. 866) 386 at 412-413. (P.....para.....)
21. *Elements of criminal misappropriation*
Taken in context, the appellant is charged pursuant to Section 308 of the Penal Code Law which stipulates that the accused dishonestly misappropriated or converted to his own use any movable property commits criminal misappropriation. Then comes what the essential ingredients of the said offence would be and these are thus:-
- (i) That the property in question is movable;**
 - (ii) That the accused misappropriated it or converted it to his own use;**
 - (ii) That he did so dishonestly. (P.....para.....)**

It is to be noted that those three elements highlighted above must co-exist with none missing for the requirement of the law on proof to be met. In this instance is the crucial question, if those elements were or are in place to support the conviction made at the trial court and affirmed in the appellate court below. What I see as the focal point that persuaded the two courts to the line of thinking they toed is the confessional statement of the appellant in which he admitted making certain payments from the money he had collected from the contract mobilization and made those payments to some officials upon a promise to facilitate the contract mobilization and made those payments to some officials upon a promise to facilitate the contract. (P.....para.....)

22. *Confessional statement must be direct, positive, true and unequivocal*
I need to reiterate that a confessional statement to be so acclaimed and utilized solely it must be direct, positive, true and unequivocal of facts that satisfy the ingredients of the offence the accused person confessed to have committed. Also an accused person can be validly convicted for the offence of criminal misappropriation solely on the basis of his confessional statement if and only if the elements of the offence as contained in Section 16 and 308 of the Penal Code as the appellant was, are inferable from the confessional statement and after the test of veracity of the confession had been carried out by the court and it is found that the confession constitutes true admission of the commission of the offence. See Haruna Vs. A.G. Federation (2012) All FWLR (pt. 632) 1617 at 1635; Ajimobi Vs. INEC (2009) All FWLR (pt. 477) 91 at 105. (P.....para.....)

Per Odili (JSC)

“I must humbly state though what the appellant had admitted to might on the face it look confessional as it may be, it has to be such as the trial court would find within it that the ingredients of the offence have been made out inside the confines of the offences charged. See State Vs. Salawu (2012) All FWLR (pt. 614) 1 at 35 per Adekeye JSC; Amadi Vs. State (1993) 8 NWLR (pt. 314) 644; Alor Vs. State (1997) 4 NWLR (pt. 501) 511; Akindipe Vs. State (2016) All FWLR (pt. 860) 1047 at 1084.

Another way of saying the same thing is that a confessional statement must be direct and positive and admit of all the ingredients of the offence before it can be used solely or partly to convict an accused. See Abiodun Vs. FRN (2009) All FWLR (pt. 483) 1360 at 1379; Akindipe Vs. State (supra) at 1066. (P.....para.....)

23. *Requirement for court to test the veracity of a confessional statement*
The touted confessional statements of the appellants Exhibit 10-14 which the trial court and accepted by the court below as sufficient to base the conviction of the appellant, it has to be pointed out even where the accused has made a confessional statement or one that has the semblance of such. The court before embarking on a conviction solely on that must test the truth or veracity of the confession and in doing so the court must seek any other evidence or circumstances which make it probable that the confession is true and the test includes the following:

- (I) **Whether there was anything outside the confession to show that it is true;**

- (ii) Whether the statement is corroborated, no matter how slightly;
- (iii) Whether the facts contained therein, so far as can be tested, is true;
- (iv) Whether the accused person had the opportunity of committing the offence;
- (v) Whether the confession of the accused person was possible;
- (vi) Whether the confession was consistent with other facts which had been ascertained and proved in the matter.

See *Akindipe Vs. State* (supra) 1070; *Haruna Vs. A.G. Federation* (supra) at 1635; *Ogedengbe Vs. State* (2014) All FWLR (pt. 752) 1724 at 1746-1747; *Mohammed Vs. State* (2014) All FWLR (pt. 747) 663 at 686; *Fabiyi Vs. State* (2015) All FWLR (pt. 797) 777 at 790; *Adeleke Vs. State* (2012) All FWLR (pt. 606) 492 at 509. (*P.....para.....*)

24. *The money subject of the charges was not exclusively owned by Kwara State MDG's - CGs*

I agree with the submission of learned counsel for appellant that since the total contract sum consisted of both the money to be used for the execution of the contract and the appellant's profit margin, it follows that the total sum of N67 Million paid to the appellant by the Kwara State MDG's-CGS under the contract included the corresponding portions of the appellant's profit. It became extremely difficult if not impossible to determine that the amount of N14 Million, the subject of the three count charge in this case, was exclusively that of the Kwara State MDG's-CGS so as to hold the appellant guilty of criminal misappropriation. In other words, there is doubt as to who as between the Kwara State MDG's and the appellant is the owner of the N14 Million and as such the doubt ought to have been resolved in favour of the appellant. See *Isah Vs. State* (2008) NCC 578 at 609, *Onubogu Vs. State* (1974) All NLR 561, *Dickson Vs. State* (2012) All FWLR (pt. 611) 1538 at 1558-1559, *Isiaka Vs. State* (2012) All FWLR (pt. 645) 381 at 394-395, *Ononuju Vs. State* (supra) at 1219.

The court below at page 173 held that:-

“One would reason that profit margin could only be ascertained on completion of the contract, then the appellants would be free to distribute half or their full profit to their colleagues, government officials or even donate the entire profit to charity, their political party or associates. There would be no offence committed. The appellants in my considered view have no excuse to pay out funds meant for a particular purpose to their associates or anybody else.

The appellants' profit margin should be eared before distribution”

is not correct as it is trite that the profit margin/contracts profit is always part of the bill of quantities of any contract of this nature and any part payment made under such a contract includes the part of the profits. This is buttressed by the statement of the appellant in Exhibit 11 where the appellant stated that “we were paid (Fifty Million minus taxes) Sixty Three Million”.

Clearly the court below approached the situation from the wrong angle as in line with the position of the appellant it is a matter of practice and procedure that contract sum of every contract work includes the contractor's profits which is a percentage of the gross contract sum and which percentage depends on the nature of the contract in question. (*P.....para.....*)

Per Odili (JSC)

“Furthermore, it is also the position that for every payment made to the contractor, part of the contractor's profit is included in such payment. This contract for the provision of 43 motorized boreholes was/is not an exception and all the witnesses agreed on this. PW1, PW2 and PW3 all admitted that the contract sum included the appellant's profit margin even though they do not know and or could not remember the exact percentage of the contract sum that represented the appellant's profit margin. See the evidence of PW1 in line 20 on page 72 of the record, PW2 in line 33 on page 73 of the record and PW3 in lines 25-26 on page 76 of the record and the evidence of DW1 in lines 23-24 on page 78 of the record.

Since every payment made to the appellant under the contract include part of the profits, the evidence of the appellant to the effect that what he gave out of the payments received under the contract was part of the appellant's profits cannot be dismissed as an afterthought simply because that aspect is not contained in Exhibits 10-14. (*P.....para.....*)

25. *Court to consider the confessional statement the testimony in court and the totality of evidence*

What is more, an accused person is not expected to merely adopt the contents of his extra judicial statement and so long as what he added in his evidence in court is not inconsistent with his extra judicial statement, the explanation cannot be dismissed as an afterthought simply because it is not contained in his extra judicial statement. What the court is to consider is both the “confession” and testimony of the accused together with the totality of evidence before the court. See *Itu Vs. State (2014) All FWLR (pt. 750) 1245 at 1288.*

The holding of the court below quoted above is perverse as it is against

the trend of evidence on record. See Nobis-Elendu Vs. INEC (2015) All FWLR (pt. 812) 1505 at 1536, Akpata Vs. Ugo (2007) All FWLR (pt. 349) 1203 at 1211. Being a perverse holding which influenced and or determined the final conclusion of the court below, the appellant prays the court to set aside the perverse holding and reverse the conclusion and decision of the court below and allow this appeal. See Odom Vs. PDP (2015) All FWLR (pt. 773) 1962) 1962 at 1984-1985. (P.....para.....)

26. *Court was in error to treat statement of the accused as an admission*
The testing of the veracity of Exhibits 10-14 against other available evidence, Exhibit 10-14 cannot be taken as a clear, positive and unequivocal admission by the appellant of the commission of the offence of criminal misappropriation of money meant for execution of the contract. The court below was therefore in error to have affirmed the decision of the trial court which treated Exhibits 10-14 as admission of commission of the offence charged and the conviction of the appellant solely on the basis of Exhibits 10-14 and the decision is liable to be set aside. I rely on Idowu Vs. State (1998) 11 NWLR (pt. 574) 354 at 363. (P.....para.....)
27. *Intent can be determined by looking at the surrounding circumstances*
With respect to the ingredients of dishonest intention by the appellant to cause wrongful loss to Kwara State MDG's-CGS, it is submitted that no such intention can be inferred from Exhibits 10-14 in this case. On proof or drawing of inference of intention in an allegation of commission of a crime, I refer to the case of Arebamen Vs. State (1972) 7 SC 194, (1972) LPELR-542, 1 at 14-15, where it was held thus: "Intent is of course difficult to prove affirmatively without a confession from the accused and can frequently only be determined by looking at the surrounding circumstances and deciding there from whether the natural inference is that such must have been intention. A material factor must have been the action or conduct of the accused himself....." (P.....para.....)
28. *'Intention' is subjective in nature and can only be inferred from an accused conduct*
In the case of Asuquo Vs. State (2016) 6 SC (pt. 11) 1 at 26-27 the Supreme Court, per Ogunbiyi JSC, said.

"The law is also trite that even the evil does not know the intention of a man. Intention is subjective in nature and can only be inferred from a man's act or conduct and thus necessitating the consideration of certain salient feature depending on the nature of the offence committed". (P.....para.....)

Per Odili (JSC)

“I posit that since the total contract sum of N86,569,540.25 included the appellant's profits of 30% and the total sum of N67 Million received by the appellant under the contract included the appellant's profits of 30% which translates to the sum of N20,100,000.00, the appellant could not be said to have intended to cause wrongful loss to the Kwara State MDG”s-CGS by giving the sum of N14 Million to PW3 and one Moronfonye and or any person at all. The appellant as the owner of the sum of N20,100,000.00 out of the total sum of N67 Million is entitled to deal with his profits the way he conceived of.

From the evidence on record, the appellant had done more work than the sum received from the Kwara State MDG's-CGS, this pointed to and reinforced the fact that there was never any intention on the part of the appellant to cause wrongful loss to the Kwara State MDG's-CGS and or any person and non was actually caused. The above is fortified in Exhibit 5 and 6 tendered by the respondent. From the unchallenged evidence of the appellant and Exhibit 5 and 6, it is clear that out of a total of forty-three (43) motorized boreholes involved, only eight (8) boreholes were not completed by the appellant. The gross contract sum of each boreholes are per Exhibits 2, 3 and 4 on pages 11, 12 and 13 of the record is N2,013,033.75. Thus, the gross total sum of the uncompleted eight (8) boreholes at the gross contract sum of N2,013,033.75 per boreholes is N16,104,270.00.

To cut a long story short, from the evidence and the circumstances of this case, the dishonest intention, a crucial ingredient which the prosecution has the duty to prove cannot be inferred from Exhibits 10-14 as one cannot see the appellant's intention to cause wrongful loss to the Kwara State MDG's-CGS by giving the sum of N14 Million to PW3 and one Moronfoye and or any other person.

In fact if any loss was intended by the appellant, it is that against himself and his company as the amount he parted with was part of his legitimate earnings or entitlements on the contract. Therefore, the essential elements of the offence charge have not been proved beyond reasonable doubt as they are even absent and so the concurrent findings and conclusions of the two courts below stemming from the wrong application of the law and trend of evidence are perverse must suffer a disturbance or interference by this court. See Ugwanyi Vs. FRN (2012) 3 SC (pt.11) 95 at 122-123; Cameroon Airlines Vs. Otutuizu (2011) All FWLR (pt. 570) 1260; Nweze Vs. State (2017) All FWLR (pt. 898) 40 at 74; Olley Vs. Tunji (2013) All FWLR (pt. 687) 625 at 667. (P.....para.....)

29. *Conditions for the application of restitution*

Then comes the issue of the order for the restitution of the sum of N14 Million by the appellant which the trial court ordered and the lower court affirmed. In this, the provision of Section 78 of the Penal Code Law has provided for restitution where the person convicted of an offence under the Penal Code Law may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment.

Clearly for Section 78 of the PCL to apply, the person must have been convicted of an offence under the PCL and the convict must have by his offence injured a person or some persons. It stands to reason that by the finding of in the earlier offence under Section 308 PCL which is to the effect that the offence was not made out therefore the appellant does not qualify to be branded a convict or that by his offence had injured a person or State Government or agency.

Indeed, the provisions of Section 78 of PCL are clear and unambiguous and must be interpreted literally. See *Duru Vs. FRN* (2014) All FWLR (pt. 712) 1677 at 1690; *NDIC Vs. Okem Enterprises Ltd* (2004) All FWLR (pt. 210) 1176; *Abacha Vs. FRN* (2014) All FWLR (pt. 726) 412 at 455. (P.....para.....)

30. *Concurrent findings cannot be sustained*

From the circumstances available and buttressed by the records, the situation on ground is that of a civil contract between the appellant and his company on the one hand with the Kwara State Government MDG's-CGS, which transaction went bad and led to the State Governor canceling the contract mid-stream. That does not criminalize what clearly is a business transaction between parties which became unsuccessful along the way. It is for that reason that one needs a fishing hook to properly bring in the essential ingredients of the offence charged and that being the case this court cannot go along with the concurrent findings and conclusion of the two court below. The bottom line is that an intervention of this concurring findings and earlier positions in the overall interest of justice must be made. (P.....para.....)

Representations:

Salman Jawendo, (Esq.), with I. E. Iyang, (Esq.) for the appellants in both appeals.

Faruk Abdullah, (Esq.), for the respondent in both appeals.

EJEMBI EKO, JSC (Delivered the Lead Judgment):

1. Paul Odimegwa
2. Rev. Augustine Odimegwa
3. Anayo Odimegwa
4. Mr. Ikechukwu Odimegwa
5. Chinedu Odimegwa

VS

1. Daniel Ibezim
2. Henry Ezumba
3. Peter Uchuaka
4. Mr. Jonah Ikedinma

*(Suing for themselves and on behalf
of Members of Umudim Ogbujiasili Kindred
of Ezeannaja-Amada Village, Oraukwu)*

SC. 24/2008

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 8TH MARCH, 2019

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR
OLUKAYODE ARIWOOLA
JOHN INYANG OKORO
CHIMA CENTUS NWEZE
AMINA ADAMU AUGIE

JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT
JUSTICE SUPREME COURT

*ACTION: Locus standi and cause of action – Distinction thereto – The principle in
Adesanya vs. President FRN (1981) 2 SCNLR 358.*

*ACTION: Locus standi and Reasonable cause of action – Both can divest the court of its
jurisdiction – Whether there are distinctions thereto.*

ACTION: Reasonable cause of action – Meaning.

ACTION: Reasonable cause of action and locus standi – Whether there are not coextensive – The principle in A.G, Anambra vs. Eboh (1992) 1 NWLR (Pt. 218) 491.

CUSTOMARY LAW: Family property – Action thereto – Whether any member of a family can sue to protect family property – The principle in Igjie vs. Mbamalu (2006) 15 NWLR (Pt. 1003) 466.

PARTIES: Locus standi – How accurse – The principle in Busari vs. Oseni (1992) 4 NWLR (pt. 237) 557.

PARTIES: Locus standi – How determined – Whether success of the action does not determine locus standi – The principle in A.G Kaduna State vs. Hassan (1985) 2 NWLR (pt. 8) 483.

PARTIES: Locus Standi – Meaning.

PRACTICE AND PROCEDURE: Action – Cause of action and locus standi – How determined – Whether both are determined from the statement of claim.

PRACTICE AND PROCEDURE: Appeal – Where the findings of a lower court are not challenged on appeal – Whether such findings cannot be disturbed by the appellate court.

Issue for Determination

Whether or not the respondents have the locus standi to maintain this suit”,

Facts of the Matter

The parties, who are members of the same “Umudim Ogbujiasili Kindred of Ezeannaja-Amada Village, Oraukwu” were fighting over a piece of land known as and called “Obi-be-Dim Ogbujiasili”. The respondents, for themselves and on behalf of members of the “Kindred” as a body, sued their “Cousins and descendants of a common ancestor [appellants] at the Anambra State High Court.

The appellants, as defendants at the trial court, did not file a statement of defence, rather they raised a preliminary objection by way of motion on notice wherein they prayed the trial court for:

An order of [the] court dismissing the above case on the ground of incompetence and non-disclosure of a reasonable cause of action.

They argued at the trial court that since the respondents brought the suit representing both parties, there are no parties because “*a plaintiff cannot sue himself*”; and that for it to have jurisdiction, “*there must be a dispute between persons of different interest but the quarrel is between the same person and the [trial] court cannot intervene where someone is quarreling with himself*”.

In its **ruling**, the trial court, relying upon Order 3 Rule 1 of the High Court Rules, which says “*any person in whom any relief exists may sue as plaintiff and any person against whom the relief exists, may be sued as defendant*”.

It also held that “*there is a cause of action by the plaintiffs against the named defendants*”.

Dissatisfied, the appellants appealed to the Court of Appeal unsuccessfully and still aggrieved, the appellants have appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Locus standi and reasonable cause of action are not the same*
First of all, the respondents' argument that the appellants having acceded that the said suit disclosed a reasonable cause of action, cannot question their *locus standi* in this court, is misconceived. *Locus standi* and reasonable cause of action may apply to divest a court of jurisdiction but they cannot be equated with each other. (P.....Paras.....).
2. *The meaning of “Reasonable cause of Action”*
“*Reasonable cause of action*” is simply a cause of action with a chance of success - see **Dantata vs. Mohammed** (2002) 5 SC 1 and **Rinco Construction Co. vs. Veepee Industries Ltd.** (2005) 3-4 SC 1. In other words, where the endorsement on the writ of summons and statement of claim discloses a “*cause of action*”, the court, unless precluded by other statutory provisions, can exercise jurisdiction - see **Utih vs. Onoyivwe** (1991) 1 NWLR (Pt. 166) 166 SC. (P.....Paras.....).
3. *The meaning of “Locus standi”*
“*Locus standi*” is Latin for “*place of standing*”, and it means – “*the right to bring an action or to be heard in a given forum*” - see BLack's Law Dictionary, 9th Ed. This concept is predicated on the assumption that no court is obliged to provide remedy for a claim in which the applicant has a remote, hypothetical or no interest see **Att. Gen. Kaduna State vs. Hassan** (1985) 2 NWLR (Pt. 8) 483 SC. (P.....Paras.....).
4. *Distinction between Locus standi and cause of action*
See also **Adesanya vs. President, Nigeria** (1981) 2 SCNLR 358, wherein this court held that a “*fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the High Court not on the issue he*

wishes to have adjudicated”. So, the person instituting an action in court must have legal capacity, otherwise the court is robbed of the jurisdiction to entertain it.

Simply put, *locus standi* beams a searchlight on the party, while “*cause of action*” focuses on the grievance, he wishes to air in court. Thus, both concepts connote different things in law and are distinguishable from each other.

5. *Locus standi and Reasonable cause of action are not coextensive*
See **A.G., Anambra vs. Eboh** (1992) 1 NWLR (Pt. 218) 491, where Uwaifo, JCA (as he then was) said:

The objection as to locus standi was not canvassed on the question whether there was a reasonable cause of action. In the circumstances, argument in respect of that issue must be ignored. The issue of standing to sue must with due care be separated from whether a plaintiff has a reasonable cause of action. They are not coextensive, nor does a finding in favour of the former depend on the examination of the latter. All that is required is to ascertain whether the person, whose standing to sue, is in issue is a proper party to request an adjudication of a particular issue. (P.....Paras.....).

6. *Locus standi and cause of action are both determined from the statement of claim*
In other words, a determination that the plaintiff has *locus standi* does not depend on whether he has a reasonable cause of action. But the statement of claim must do both; it must disclose a cause of action and it must also show the *locus standi* of the plaintiff see **Thomas vs. Olufosoye** (1986) 1 NWLR (Pt. 18) 669 SC. In this case, the appellants only complained to this court that Court of Appeal erred when it “*failed to strike out the suit for want of locus standi*”. (P.....Paras.....).
7. *Effect where the findings of a lower court are not challenged on appeal*
They did not challenge its finding that the respondents had a reasonable cause of action, therefore, the respondents are right, and this court has no business whatsoever to deal with it because it is settled law that if a finding of a lower court is not challenged on appeal, such a finding or decision, rightly or wrongly, must not be disturbed by an appellate court for the purpose of that appeal – see **Oshodi vs. Eyifunmi** (2000) 13 NWLR (Pt. 684) 298 at 332 SC.
In effect, the only question for determination in this appeal is whether respondents had *locus standi* to institute the action at the trial court; not whether they had reasonable cause of action. (P.....Paras.....).
8. *When a plaintiff is said to have locus standi*
It is settled that a plaintiff will have *locus standi* only if he has a special right or

alternatively if he can show that he has sufficient or special interest in the performance of the duty sought to be enforced or where his interest is adversely affected – see **Nyame vs. FRN** (2010) 7 NWLR (Pt. 1193) 344; **Busari Vs. Oseni** (1992) 4 NWLR (Pt. 237) 557 at 587 wherein this court Tobi, JCA (as he then was) stated:

*The determination of locus standi zeroes on two major and telling words. One is “sufficient”. The other is “interest”. They both make up the “sufficient interest” concept. The term sufficient interest is broad and generic. It is also vague and nebulous. It lacks a precise and apt legal meaning. It could only be determined in the light of the facts and circumstances of the particular case. The question of what constitutes sufficient interest is one of mixed law and fact, that is to say, it is not a question of law only or a question of fact only but both. In arriving at a decision one way or the other, the court will be guided by the overall interest of the parties in the litigation process in the absence of a specific enabling statute. This involves two apparently conflicting duties of the court to vindicate the rights of the plaintiff to set the litigation process in motion and the concomitant rights of the defendant not to be dragged into unnecessary litigation by a person, who has no standing in the matter, or a mere busy body parading the corridors of the court - The trial judge, in determining locus standi will be involved in the delicate balancing of divergent interests, which are diametrically opposed - - It is a very complex exercise based on the pleadings of the plaintiff - - In **Maradesa vs. Mil. Gov., Oyo State** (1986) 3 NWLR (Pt. 27) 125, the Court of Appeal held that the term “interest” - - should be regarded as including any connection, association or interrelation between the applicant and the matter to which the application relates. One other test of sufficient interest is whether the party seeking for the redress or remedy will suffer any injury or hardship arising from the litigation. If the court is satisfied that he will so suffer, then he must be heard as he is entitled to be heard.*

A person is said to have an interest in a thing when he has rights, advantages, duties, liabilities, losses or the like connected with it, whether present or future, ascertained or potential; provided that the possibility is not too remote, and the question of remoteness, depends upon the purpose which the interest is to serve – **Imade vs. Mil. Admin. Edo State** (2001) 6 NWLR (Pt. 709) 478. (P.....Paras.....).

9. *The success of the suit does not determine locus standi*
 What is more, the fact that the person may not succeed does not have anything to do with his standing to bring the action – see **A.G. Kaduna State vs. Hassan** (*supra*), wherein Oputa, JSC, also observed as follows:

Another test of standing is whether there exists a dispute between the parties. Proof of a dispute is in effect proof that the judicial intervention is not only helpful but also necessary indeed, for the resolution of the issue. In the Brief filed on behalf of the Appellant, several issues were set out under questions for Determination, one of those issues being:- can the Solicitor-General or officers of his Department exercise the powers under section 191(2) of the 1999 Constitution of the Federal Republic of Nigeria? In the Respondent's Brief, the central issue for determination was put down as:- can the powers conferred on the Attorney General by section 191 of the 1979 constitution be exercised in the absence of an incumbent Attorney General?" On this central issue of great public importance, the Appellant says yes, while the Respondent says No. - There should be someone to decide this dispute one way or the other. The courts below were, therefore, justified in hearing the plaintiff's claim, even if the dispute went beyond the strict legal relationship of the parties, so long as it concerns a real question of substance. (P.....Paras.....).

10. *The two lower courts were right*
 The Court of Appeal may not have specifically dealt with the issue of *locus standi* however, it also held that the appellants' view that *the respondents sued themselves is unacceptable* and I agree completely with these views expressed by the two lower courts. (P.....Paras.....).
11. *The respondents have locus standi*
 Clearly, the appellants may be members of the Kindred, however, the Kindred as a body had a stake in the dispute over the said **Obi**, which they described as a “*Symbol of Unity*” amongst all of them. The truth or otherwise of the assertion is a matter left for the trial; as it is, the respondents have *locus standi* to pursue their claims. (P.....Paras.....).
12. *Cause of action and locus standi are linked to the jurisdiction of a court.*
 It is instructive to note that a cause of action and standing to sue are linked to the issue of jurisdiction of a court. If the plaintiff does not have a cause of action or the standing to sue, the court cannot properly assume jurisdiction to entertain the matter. (P.....Paras.....)

13. *Any member has capacity to sue to protect family property*
 With respect to family property as in the instant case, the law is that a member of a family has the capacity to sue to protect family property. Any member of a family whose interest is threatened by wrongful interference with the family property can sue to protect his interest. He can commence the action with or without the consent of other members of the family. If he does not act, he may find himself being held to be standing by when his rights were being taken away.
See Dadi vs. Garba (1995) 8 NWLR (Pt. 411) 12; Babayeju vs. Chief Ashamu (1998) 9 NWLR (Pt. 567) 546. In the case of Mozie vs. Mbamalu (2006) 15 NWLR (Pt. 1003) 466 at 493 this court, per Tobi, JSC held that “it is good law that members of a family can sue in respect of family property. This was the position of the two courts below and they are right.” (*P.....Paras.....*).
14. *The respondents have locus standi and also reasonable cause of action*
 I endorse the view expressed by the learned justice of the Court of Appeal that “the view canvassed for the appellants that the respondents sued themselves is not acceptable.” I am of the considered view that the suit of the respondents does not only disclose a reasonable cause of action, the respondents have **locus standi** or capacity to commence the action. (*P.....Paras.....*).
15. *Appellants did not challenge findings of the lower court.*
 Like His Lordship noted in the leading judgment, the appellants did not challenge the finding that the respondents had a reasonable cause of action. As such, they are deemed to have accepted the finding, *NBCI vs. Integrated Gas (Nig) Ltd* [2005] 4 NWLR (Pt. 916) 617; *Iyoho vs. Effiong* [2007] 4 SC (Pt. 111) 90; *Adedayo vs. Babalola* [1995] 7 NWLR (Pt. 408) 383. Accordingly, this court would not disturb the said finding, *Oshodi vs. Eyifunmi* [2000] 13 NWLR (Pt. 684) 298, 332. (*P.....Paras.....*).

Representations

Kelechi Dunkwu, (Esq.)

For the **appellants**

J. R. Nduka, (Esq.), with

R. E. Nduka, (Esq.),

For the **respondents**

ADAMU AUGIE, (JSC) (DELIVERING THE LEAD JUDGMENT)