1. **BARR. ENYINNA ONUEGBU**
   Chairman, Ngor Opkpala Local Government Council
2. **MRS. RUBY UCHENNA EMELE**
   Chairman, Isiala Mbana Local Government Council
3. **CHIEF BOB DESMOND UGWUIBE**
   Chairman, Ahiazu Mbaise Local Government Council
4. **NZE CHARLES ONWUNALI**
   Chairman, Okigwe Local Government Council
5. **CHIEF CHARLES EZEKWEM**
   Chairman, Okigwe Local Government Council
6. **CHIEF IKECHI ALBERT NNOROM**
   Chairman, Ehime Mbano Local Government Council
7. **CHIEF NNADIEKWE VICTOR AMOBI**
   Chairman, Nkwere Local Government Council
8. **BARR. F. M. NNADI**
   Chairman, Orsu Local Government Council
9. **CHIEF FISHER EZEUGO**
   Chairman, Onu East Local Government Council
10. **CHIEF JOHN FRANK UGALIEGBULAM**
    Chairman, Oru West Local Government Council
11. **PRINCESS JOAN NZERBE**
    Chairman, Oguta Local Government Council
12. **CHIEF ONYEMA NWACHUKWU**
    Chairman, Mbaitoli Local Government Council
13. **CHIEF SAM AKAMEGWO**
    Chairman, Ikeduru Local Government Council
14. **CHIEF EMMA ODOR**
    Chairman, Owerri Municipal Council
15. **DR. ERIC .K. OGWO**
    Chairman, Owerr North Local Government Council
16. **CHIEF IKECHUKWU AWULONU**
    Chairman, Ihitte Uboma Local Government Council
17. **CHIEF BASIL AMOBI EKWEKE**
    Chairman, Obowu Local Government Council
18. **ENGR IKENNA ELEZIEANYA**
    Chairman, Owerri West Local Government Council

19. CHIEF EDDY IKWUBUO
Chairman, Njaba Local Government Council
20. SIR B.C. NWADIKE
Chairman, Isu Local Government Council
21. CHIEF EZEKIEL CHUKWUKERE
Chairman, Nwangele Local Government Council
22. CHIEF EDWARD CHINEDU
Chairman, Orlu Local Government Council
23. PRINCE C. E. IKEGWURUKA
Chairman, Ohaji/Egbema Local Government Council
24. DR. BEDE NZENWA
Chairman, Ezinihite Local Government Council
25. NKEIRUKKA IBEKWE
Chairman, Onuimo Local Government Council
26. CHIEF KELVIN ERONINI NWANAFORO
Chairman, Ideato South Local Government Council
27. CHIEF BNAVENTURE MBONU
Chairman, Ideato North Local Government Council

VS

1. GOVERNOR OF IMO STATE
2. ATTORNEY-GENERAL OF IMO STATE
3. IMO STATE HOUSE OF ASSEMBLY
4. IMO STATE INDEPENDENT ELECTORAL COMMISSION

In re: Application for the joinder of the
Following as Co-Appellants:

1. Chief (Mrs) Perpetua Maduike
   Vice Chairman, Owerri Municipal
2. Hon. Kenny Ohabour
   Vice Chairman, Okigwe Local Government
3. Hon. Sir Felix Onwuneme
   Vice Chairman, Oru West Local Government

4. Hon. Florence Maduba
   Vice Chairman, Owerri North Local Government
5. Hon. Chiemena Abara
   Vice Chairman, Owerri West Local Government
6. Hon. Uche Oguzie
   Vice Chairman, Ngor Okpala Local Government
7. Hon. Mercy Onyekwere
   Vice Chairman, Njaba Local Government
8. Hon. Chika Obiako
   Vice Chairman, Nwangele Local Government
9. Hon. Fabian Ajuonuma
   Vice Chairman, Obowu Local Government
10. Hon Emeka Nweze
    Vice Chairman, Oguta Local Government
11. Hon. Anayo Okilo
    Vice Chairman, Ohaji/Egbema Local Government
12. Hon. Chidi Alaneme Henry
    Vice Chairman, Onuimo Local Government
13. Hon Megret Onyhebukwa
    Vice Chairman, Orlu Local Government
14. Hon. Ben Eze
    Vice Chairman, Orsu Local Government
15. Hon. Uche Obiozo
    Vice Chairman, Oru East Local Government
16. Hon. Gloria Uche Mbadiwe
    Vice Chairman, Ideator North Local Government
17. Hon. Kevin Ubah
    Vice Chairman, Mbaitoli Local Government
18. Hon. Boniface Nwadike
    Vice Chairman, Isu Local Government
19. Hon. Matthew Ukachu
    Vice Chairman, Isiala Mbano Local Government
20. Hon. Cletus Ugwo
    Vice Chairman, Aboh Mbaise Local Government
21. Hon. Magnus Chigbu

Vice Chairman, Ahiazu Mbaise Local Government
22. Hon. Longunus Amagioyi
Vice Chairman, Ehime Mbano Local Government
23. Hon. Alia Adama C.
Vice Chairman, Ezinihitte Mbaise Local Government
24. Hon. Asams Victor
Vice Chairman, Ikeduru Local Government
25. Hon. Maurice Amaocha
Vice Chairman, Ihitte Uboma Local Government
26. Hon Gabral Anowai
Vice Chairman, Nkwere Local Government
27. Hon. Mrs. Comfort Anyama
Vice Chairman, Ideator South Local Government
28. Robert Azubuike
Councilor, Owerri Municipal Local Government
29. Emetoh Luke K.
Councillor, Owerri Municipal Local Government
30. Oswald Uzoechi M.
Councillor, Owerri Municapl Local Government
31. Alex Nwagwu
Councillor, Owerri Municipal Local Government
32. Patience Nwaosu
Councilor, Owerri Municipal Local Government
33. Sir, Austine Achu
Councillor, Owerri Municipal Local Government
34. Beneth Mere
Councillor, Owerri Municipal Local Government
35. Lucky Osuji
Councilor, Owerri Municipal Local Government
36. Ozurumba D.
Councilor, Owerri Municipal Local Government
37. Chigozie Nwaosu
Councillor, Owerri Municipal Local Government
38. Baeton Udaka
Councillor, Owerri Municipal Local Government

39. Hon. Eve Njamanze
Supervisor, Owerri Municipal
40. Hon. Eze C. K. Oguamanam
Supervisor, Owerri Municipal
41. Hon. Chukwudi Amadi
Supervisor, Owerri Municipal
42. Hon. Ikenna Omeaku
Supervisor, Owerri Municipal
43. Hon. Kelechi Nwachukwu
Supervisor, Owerri Municipal
44. Iheaturu Samuel C.
Councillor, Obowu Local Government
45. Maria Okorie
Councillor, Obowu Local Government
46. Ibeawuchi Inyiama Doris
Councillor, Obowu Local Government
47. Hon. Papa Okewulonu
Councillor, Obowu Local Government
48. Hon Innocent Nwibe
Supervisor, Obowu Local Government
49. Hon. Julius Ogoke
Sup Councillor, Obowu Local Government
50. Hon. Chidi Oguguo
Supervisor, Obowu Local Government
51. Hon. Prisca Iwu
Supervisor, Obowu Local Government
52. Hon. Peter Damian Okafor
Supervisor, Obowu Local Government
53. Hon. Stephen Obasi
Councillor, Isiala Mbano Local Government
54. Asagwora Celestine
Councillor, Isiala Mbano Local Government
55. Michael Ukadike
Councillor, Isiala Mbano Local Government
56. Eze Nwadike

Councillor, Isiala Mbano Local Government
57. Njokwu Cosmas U.
Councillor, Isiala Mbano Local Government
58. Iwuji Amarachi Barnabas
Councillor, Isiala Mbano Local Government
59. Hon. Longinus Ezirim
Supervisor, Isiala Mbano Local Government
60. Hon. Mrs. Grace Orie
Councillor, Isiala Mbano Local Government
61. Hon. Obioma Ihedire
Councillor, Isiala Mbano Local Government
62. Hon. Isuwa Actor
Councillor, Owerri West Local Government
63. Anukam Eze Paul
Councillor, Owerri West Local Government
64. Okoro Jonathan
Councillor, Owerri West Local Government
65. Uzoma Emmanuel C.
Councillor, Owerri West Local Government
66. Okafor Evans C.
Councillor, Owerri West Local Government
67. Anyanwu Iyke
Councillor, Owerri West Local Government
68. Agobi Felicia
Councillor, Owerri Wst Local Government
69. Osuji Anayo Samuel
Councillor, Owerri West Local Government
70. Hon. Barr. Chuma Emeadi
Supervisor, Owerri West Local Government
71. Hon Jane Onuegbu
Supervisor Owerri West Local Government
72. Hon. Emeka Onyewunjo
Supervisor, Owerri West Local Government
73. Manufor Raphael G. C.
Councillor, Owerri North Local Government

74. Hon. Godson Oparauwakwe
Supervisor, Owerri North Local Government
75. Hon. Vital Opara
Supervisor, Owerri North Local Government
76. Hon. Sky Okere
Supervisor, Owerri North Local Government
77. Maduike Ndubuise Emmanuel
Councilor, Ideator South Local Government
78. Ugochukwu Chidi Philip
Councilor, Ideator South Local Government
79. Umeh Bonaventure O.
Councilor, Ideator South Local Government
80. Ogidi John Kennedy
Councilor, Ideator South Local Government
81. Nze Nnamdi Ebbe
Councilor, Ideator South Local Government
82. Uchegbu Noble
Supervisor, Ideator South Local Government
83. Hon. Ernest Duruiheoma
Supervisor, Ideator South Local Government
84. Hon. Amaranna Aladu
Supervisor, Ideator South Local Government
85. Hon. Edwin Nnomadim
Councilor, Oru East Local Government
86. Hon Abraham Obinna
Supervisor, Oru East Local Government
87. Hon. Mrs. Offrijemole
Supervisor, Oru East Local Government
88. Hon. Kizzito Nwokeji
Supervisor, Oru East Local Government
89. Hon. Ukpali Dan
Supervisor, Oru East Local Government
90. Hon. David Ohanyere
Coucillor, Ikeduru Local Government
91. Adol Obinta Iheanachu

Councillor, Ikeduru Local Government
92. Hon. Ernest Iwuji
Supervisor, Ikeduru Local Government
93. Hon. Barnest Oparanze
Supervisor Councillor, Ikeduru Local Government
94. Hon. Evarestus Nwachukwu
Supervisor, Ikeduru Local Government
95. Hon. Hyginus Ohia
Supervisor, Ikeduru Local Government
96. Hon. Martin Nwachukwu
Supervisor, Ikeduru Local Government
97. Okoro Maureen C.
Councillor, Mbaitoli Local Government
98. Odunna Fidelis
Councillor, Mbaitoli Local Government
99. Nwoso Jusatina
Councillor, Mbaitoli Local Government
100. Udochukwu Anusiem
Councillor, Mbaitoli Local Government
101. Ugochukwu Nnah
Councillor, Mbaitoli Local Government
102. Ijeoma Emeka Asoka
Councillor, Mbaitoli Local Government
103. Igbozuruike Israel
Councillor, Mbaitoli Local Government
104. Felix C. Egbujo
Councillor, Mbaitoli Local Government
105. Osauji Adolphus C.
Councillor, Mbaitoli Local Government
106. Hon. Osondu Ozuru
Supervisor, Mbaitoli Local Government
107. Hon. Mrs. Ihuoma Njoku
Supervisor, Mbaitoli Local Government
108. Hon. Mrs. Jovita Ezihe
Supervisor, Mbaitoli Local Government

109. Hon. Chinyere Okwuribe
Supervisor, Mbaitoli Local Government
110. Rt. Hon. Anyionu Paulinus
Councillor, Orsu Local Government
111. Ojimba Joseph
Councillor, Orsu Local Government
112. Nwachukwu Innocent
Councillor, Orsu Local Government
113. Barr. Amaole Raymond
Councillor, Orsu Local Government
114. Engr. Ibekaeme Friday
Councillor, Orsu Local Government
115. Onwuasor Cosmas
Councillor, Orsu Local Government
116. Okafor Ifeoma
Councillor, Orsu Local Government
117. Obiagwu Obinna
Councillor, Orsu Local Government
118. Elekwachi John
Councillor, Orsu Local Government
119. Alagboso Paul
Councillor, Orsu Local Government
120. Onyeziri Anthony
Councillor, Orsu Local Government
121. Hon Joseph Nwadingwu
Supervisor Councillor, Orsu Local Government
122. Hon. Easther Okpara
Supervisor, Orsu Local Government
123. Hon. Emma Okeke
Supervisor, Orsu Local Government
124. Hon. Joe Okwuaka
Supervisor, Orsu Local Government
125. Uche Christopher C.
Councillor, Ideato North Local Government
126. Okeke Thankgod C.

Councillor, Ideato North Local Government
127. Ukeh Ernest E.
Councillor, Ideato North Local Government
128. Christopher Ogbonnaya U.
Councillor, Ideato North Local Government
129. Hon. Mrs. Otty Jacinta Ozoemenam
Supervisor, Ideato North Local Government
130 Hon. Oge Okoli
Supervisor, Ideato North Local Government
131. Hon. Mrs. Elizabeth Asogwu
Supervisor, Ideato North Local Government
132. Hon. Gerald Uzoechi
Supervisor, Ideato North Local Government
133. Hon. Patrick Anyanwu
Supervisor, Ahiazu Mbaise Local Government
134. Hon. Iwu Richard
Supervisor, Ahiazu Mbaise Local Government
135. Hon. Salome Anyanwu
Superior, Ahiazu Mbaise Local Government
136. Hon. Maureen Osuagwu
Supervisor, Ahiazu Mbaise Local Government
137. Hon. Chief Sir Alex D. C. Uche
Supervisor, Ehime Mbano Local Government
138. Hon Lolo Vivian O. Mmadozie
Supervisor, Ehime Mbano Local Government
139. Hon. Noble Nicholas O. Amah
Supervisor, Ehime Mbano Local Government
140. Hon. Denco Curtis Njoku
Supervisor, Ehime Mbano Local Government
141. Hon. Mrs. B. E. Anyanwu
Supervisor, Ezinihitte Mbaise Local Government
142. Hon David Nwachukwu
Supervisor, Ezinihitte Mbaise Local Government
143. Hon. Prince Joe Anyim
Supervisor, Ezinihitte Mbaise Local Government

144. Hon Eugene Iroakazi
Supervisor, Ezinihitte Mbaise Local Government
145. Hon. Prince Joe Anyim
Supervisor, Ihitte/Uboma Local Government
146. Hon. Engr. Theo Dick.
Supervisor, Ihitte/Uboma Local Government
147. Hon Ugochukwu Anyanwu
Supervisor, Ihitte/Uboma Local Government
148. Hon. Chinyere Kenkwo
Supervisor, Ihitte/Uboma Local Government
149. Hon J. C. Onuoha
Supervisor, Ngor Okpala Local Government
150. Hon. Mrs. Ekeoma Eke
Supervisor, Ngor Okpala Local Government
151. Hon. Prince Sabastine Obirieze
Supervisor, Ngor Okpala Local Government
152. Hon. Ebis Eke
Supervisor, Ngor Okpala Local Government
153. Casmir Anele
Supervisor, Ngor Okpala Local Government
154. Hon. Frankln Adolphus
Supervisor, Nwangele Local Government
155. Hon. Getrude Obiefule
Supervisor, Nwangele Local Government
156. Hon. Dandy Onyenaforo
Supervisor, Nwangele Local Government
157. Hon. Aloy Nwagozie
Supervisor, Oguta Local Government
158. Hon. Sunday Miller
Supervisor, Oguta Local Government
159. Hon. Gerald Ossai Ezeani
Supervisor, Oguta Local Government
160. Hon. Chinyere Aguwaru
Supervisor, Oguta Local Government
161. Hon. Obiora Ufure

Supervisor, Oguta Local Government
162. Hon. Ngozi Ojiure
Supervisor, Oguta Local Government
163. Hon. Fred Oppia
Supervisor, Oguta Local Government
164. Hon Ken Ogbuji
Supervisor, Ohaji/Egbema Local Government
165. Hon Ochu Silas
Supervisor, Ohaji/Egbema Local Government
166. Hon. Damian Opara
Supervisor, Ohaji/Egbema Local Government
167. Hon. Chris Ariga
Supervisor, Ohaji/Egbema Local Government
168. Hon Ngozi Eninna
Supervisor, Ohaji/Egbema Local Government
169. Hon. Goddy Nwankwo
Supervisor, Okigwe Local Government
170 Hon. Donatus Ekwebelem
Supervisor, Okigwe Local Government
171. Hon. Simeon Mmaduwuihe
Supervisor, Okigwe Local Government
172. Hon. Ndubuisi Chukwu
Supervisor, Okigwe Local Government
173. Hon Ray Ajonuma
Supervisor, Onuimo Local Government
174. Hon. Kyrian Ogu
Supervisor, Onuimo Local Government
175. Hon. Patrick Chibueze
Supervisor, Onuimo Local Government
176. Hon. Christopher Wasco Eleghu
Supervisor, Onuimo Local Government
177. Hon Donatus Agukwe
Supervisor, Orlu Local Government
178. Hon. Francis Orisakwe
Supervisor, Orlu Local Government

179. Hon. Philip Ilomuanya
Supervisor, Orlu Local Government
180. Hon. Greg Nwadike
Supervisor, Orlu Local Government
181. Hon. Chris Onwuasor
Supervisor Councilor, Isu Local Government
182. Hon. Living Dike
Supervisor, Isu Local Government
183. Hon. Longinus Egwim
Supervisor, Isu Local Government
184. Hon. Prince Judge Anyakudo
Supervisor, Isu Local Government
185. Hon Kingsley Ugochukwu Nwogu
Supervisor, Aboh Mbaise Local Government
186. Hon. Mrs. Nkeiru Ejeh
Supervisor, Isiala Mbano Local Government
187. Hon. Mrs. Grace. Orie
Supervisor Councillor, Isiala Mbano Local Government
188. Hon Obinna Ihedire
Supervisor, Isiala Mbano Local Government
189. Hon. Chinaka Victor
Supervisor, Nkwerre Local Government
190. Hon. Grace Ukaegbu
Supervisor, Nkwerre Local Government
191. Hon. Aloy Nwagozie
Supervisor, Oru West Local Government
192. Hon. Victor Ozor
Supervisor, Oru West Local Government
193. Hon. Eze Nnorom
Councillor, Owerri West Local Government

SC. 537/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 22ND FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE SUPREME COURT**
MARY UKAEGO PETER ODILI	**JUSTICE SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE SUPREME COURT**

CONSTITUTIONAL LAW: CFRN 1999 (as amended) – S.233(5) thereof – Right of appeal to the Supreme Court – Purport and Import.

COURT: Interpretation of Statute – Obligations thereto – Whether to expound the law by giving effect to the words in their ordinary and natural meaning.

COURT: Supreme Court – Interpretation of the Constitution – Approach thereto – Whether to lean where the justice demands a broader interpretation of the constitution rather than a narrow interpretation thereof – The principle in ***Nafiu Rabiu vs. The State (1980) 12 NCR 291.***

PARTIES: Joinder thereof –Where unnecessary party apply to be joined in an action –Whether the non-joinder of unnecessary party will not defeat the action.

PARTIES: Necessary party – Whether it is only a necessary party that can properly be joinED in a suit – The principle in ***FBN Plc vs. Ozokwere (2014) 3 NWLR (pt. 1395) 439.***

PARTIES: Joinder thereof – Necessary parties – How determined – Whether recourse to the subject matter of the suit or the cause of action would be guiding light.

PARTIES: Necessary party – Meaning thereof – The principle in ***Febson Fitness centre vs. Cappa H. Ltd (2015) 6 NWLR(Pt. 1455) 263.***

PRACTICE AND PROCEDURE: Appeal – Leave to appeal as an interested party – Onus on applicant – How discharged.

PRACTICE AND PROCEDURE: Appeal –Leave to appeal as an interested party – Onus on applicants – Whether to show that they are persons who are aggrieved, who have suffered legal grievances, against whom decisions have been pronounced.

PRACTICE AND PROCEDURE: Leave to appeal as an interested party – S. 233(5) of CFRN 1999 (as amended) – What applicant must show – The principle in ***CPC vs. Nyako (2011) All FWLR (Pt. 587) 625****.*

PRACTICE AND PROCEDURE: Leave to appeal as an interested party – Duty on thereto.

STATUTE: Interpretation thereof – The principle in ***Alhaji Karim Adisa vs. Emmanuel Oyinwola & Ors (2000) 6 SC (Pt. 11) 47.***

Issue for Determination

Whether the applicants/persons seeking to be joined are necessary/desirable parties and whether this application for joinder in this appeal is proper in the circumstance.

Facts of the Natter

The 193 applicants, whose names appear on the motion paper filed on 7/6/2018, pray the court for leave to be joined as co-appellants in SC/537/2016 as interested parties in the interest of justice.

In a 22 paragraph affidavit deposed to by Chief (Mrs.) Perpetua Maduike and Hon. Robert Abubike, Vice-Chairman of Owerri Municipal Council, Imo State and Councillor respectively wherein the grouse of the applicants were highlighted.

Held: *(unanimously allowing the application)*

1. *Joinder of unnecessary party will not defeat action*

The point has to be stressed that the non-joinder of an unnecessary party would not defeat an action as the cardinal principle guiding an application of joinder such as the one before court is whether the presence of the party sought to be joined is necessary and if the issues before the court cannot be effectually and effectively determined without the applicants. In that wise once the questions can be settled without the presence of the applicants then the persons seeking to be joined are dispensable. To clear the question whether or not the persons are necessary parties, a recourse to the subject matter of the suit or the cause of action would be the guiding light. See General Electric Co. vs. Akande (2017) All FWLR (pt. 893) 13010 at 1323; Section 23 (1) of Law No. 15 of 2000 as

amended by Section 39 (b) of Law No. 15 of 2009 of Imo State. *(P…….Paras……..).*

2. *It is only a necessary party that can be a proper party in a suit*
The court had stated in no uncertain terms on this issue of necessary **parties in numerous judicial pronouncements but I shall refer to the case of FBN Plc vs. Ozokwere (2014) 3 NWLR (pt. 1395) 439 at 460 as follows:-**

> **"There is a distinction between the desire of making a person a party to a suit and the necessity of making him a party. For a person to be a party to an action, he must be a necessary party so as to be bound by the decisions in the proceedings. If the court can decide the claim of the plaintiff with the parties before it, it will proceed to do just that, irrespective of the fact that the relief sought in the action might affect a person not joined".** *(P……Paras……..).*

3. *The meaning of a necessary party*
Again in Febson Fitness Centre vs. Cappa H. Ltd (2015) 6 NWLR (pt. 1455) 263 at 281 this court held thus:-

> **A necessary party to a suit is a party who is not only interested in the subject matter of the proceedings but also a party in whose absence the proceedings could not be fairly dealt with".**

This application is anchored on the 1999 Constitution (as amended), Section 7 specifically provides thus:-

> **"7. The system of local government by democratically elected local government councils is under this constitution guaranteed; and accordingly, the government of every state shall subject to Section 8 of this constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils".**

It is not in dispute that the applicants emerged as councilors through an electoral process pursuant to the provisions of the constitution as cited above and the 1st respondent had their positions dissolved in a radio broadcast in June 2011 after being sworn in as Governor of Imo State. Then comes up the question if that does not situate the applicants with interest in the ongoing appeal before this court at which the correctness or otherwise of that dissolution of the elected Chairman and Councilors are at the base of the adjudication process. *(P…..Paras……..).*

4. *The purport and import of S. 233(5) of the CFRN 1999 (as amended)*
In the matter of who has an interest upon which he can appeal before the court is provided for under Section 233 (5) of the same 1999 Constitution (as amended) and it provides thus:-

> ***Section 233 (5):***
> **"Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall be exercisable in the case of civil provisions at the instance of a party thereto, or with leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or subject to the provisions of this constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of the State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or person as may be prescribed".**

5. *Principles of interpretation of statutes*
The provisions of the said constitutional stipulations are not in doubt since they are clear, plain and unambiguous and so has to be interpreted simply too, to give effect to those words in their ordinary and natural meaning, thereby expounding the law as it stands. In doing so one is mindful of the words of wisdom in the case of Alhaji Karim Adisa vs. Emmanuel Oyinwola & Ors (2000) 6 SC (Pt. 11) 47 per Ayoola JSC at page 67 thus:-

> ***T*he principle of construction of statutes is so well established. The law presumes against construing statutes so as to oust or restrict the jurisdiction of a superior court of record unless there is explicit expression to that effect in the legislation. In Shodeinde vs. the Registered Trustee of Ahmadiyya Movements in Islam (1980) 12 SC 70, Aniagolu JSC said.**
>
> > **…it is the recognized general law that, prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior tribunal, unless on the face of the proceedings, it is expressly shown that the particular matter is within the cognizance of the court".** *(P……Paras……..).*

6. *Principles of interpretation*
See also Nafiu Rabiu vs. The State (1980) 12 NCR 291 where this court stated thus:-

> **It is the duty of this court which has the ultimate responsibility of declaring and interpreting provisions of the constitution, always to bear in mind that the constitution itself is a mechanism under which laws are to be made by the legislature and not merely an act which declares what the law is. Accordingly, where the question is whether the constitution has used an expression in the wider or narrow sense, the court should always lean, where the justice of the case so demand, to the broader interpretation unless there is something in the context or in the rest of the constitution to indicate that the narrower interpretation will best carry out its objects and purpose".** *(P.....Paras……..).*

7. *What applicant seeking leave to appeal must show*
In CPC vs. Nyako, supra the court held that:

> **"The law is well settled that for an applicant to be entitled to be granted the relief of leave to appeal as person having interest in the matter as prescribed under Section 233 (5) of the Constitution of the Federal Republic of Nigeria, 1999, that applicant must show not only that he is the person having interest in the matter but also that the order or judgment of the court below he is seeking leave to appeal against prejudicially affects his interest. In other words, to succeed in this application, the applicants must show that they are persons who are aggrieved; who have suffered legal grievances; against whom decisions have been pronounced which have wrongfully deprived them of something or wrongly refused them something or wrongly affected their title to something. In short the applicants must be persons whose interests have been prejudicially affected by the decision they are seeking leave to appeal against: Ubagu vs. Ukachi (1964) 1 All NLR 36; Sun Insurance Ltd vs. Ojemuyiwa (1965) 1 NLR 9; Jarmakani Transport Ltd vs. Abeke (1963) 1 All NLR 170 and Maje vs. Johnso (1951) 13 WACA 194 which were decided under the provisions of Section 117 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1963 which are in pari materia with the provisions of Section 233 (5) of the Constitution of the Federal Republic of Nigeria, 1979 and now**

Section 233 (5) of the Constitution of the Federal Republic of Nigeria, 1999 on the definition of the words – "person having interest in the matter".

It needs be brought to the fore once again that the applicants and the appellants are the products of an electoral process of the constitution which position was jettisoned through the radio broadcast of the Governor of Imo State in June 2011. Also to be noted is that Section 233 (5) CFRN 1999 permits any person who has an interest in an appeal before it to apply to join or enter the fray and this notwithstanding that the person seeking to join was not part of the dispute at the trial or the Court of Appeal stage. The main point for such an application and the follow up favourable consideration is the interest of the applicant. Therefore the court has to interpret Sections 6 (6), 7 (1) and 233 (5) CFRN together to bring out the intendment of the legislature while ensuring the protection of the interest of party or parties. This does not detract from the guiding principle that in interpreting statutes, any provision that takes away the jurisdiction of the courts on any matter is strictly construed. That is that at all times in the matter of interpretation of statutes including the constitution a very narrow interpretation that prescribes the jurisdiction of the court is adopted. See Dr. Adewunmi Adeyemi-Bero vs. Lagos State Development Property Corporation & Anor (2013) All FWLR (pt. 701) 1447; Attorney-General Bendel State vs. Attorney-General Federation (1981) 12 SC 314: Barclays Bank vs. CBN (1976) 1 All NLR 326; Alhaji Karim Adisa vs. Emmanuel Oyinwola & Ors (2000) 6 SC (Pt. 11) 47. *(P…….Paras……..).*

8. *Responsibility of the court is to expound the law as it stand*
Again for emphasis is the fact that where in the constitution or statue the words are clear and unambiguous the court can only expound the law giving effect to the words in there ordinary and natural meaning. Stated in a different way, I am saying that the responsibility of the court is to expound the law as it stands. I rely on Ogbunyiya vs. Okudo (1979) All NLR (Reprint) 105; Nwanezie vs. Idris (1993) 3 NWLR (pt. 279) 1: PDP vs. INEC (1999) 11 NWLR (pt. 626) 200; Ifezue vs. Mbadugha (1984) 15 SC 314. *(P…….Paras……..).*

9. *Onus on applicant seeking leave to join as an interested party*
It is now well settled that in an application such as this court is now faced with what is essential for the applicants to show entitlement to the relief seeking to enter the disputation at this Apex level and not earlier either at the trial or court below on appeal is to establish not only that he is a person having interest in the matter but that the order or judgment of the court below he is seeking leave to

appeal against prejudicially affects his interest. This stated in another way is that the applicants have shown that they are aggrieved and have suffered legal grievances against whom decisions have been pronounced which would wrongly deprive them of something or wrongly refused them something or wrongly affected their title to something. Briefly state that the applicants must be persons whose interests have been prejudicially affected by the decision they are seeking leave to appeal against. *(P.....Paras……..).*

10. *Duty on court in an application for leave to appeal as an interested party*
In carrying out its duty within the ambit of what is called for in an application of this nature, the court is enjoined to be guided by the justice of the case and where the occasion warrants where the constitution has used an expression in the wider or narrow sense a broader interpretation may be called for unless in utilizing other related provisions of the constitution or statute a narrower interpretation must be used and no more. See CPC vs. Nyako (2011) All FWLR (pt. 587) 625; Nafiu Rabiu vs. The State (1980) 12 NCR 291.

The bottom line as I see it in this application, having perused the depositions on either side and situating them within the prescription of the constitutional provisions such as Section 233 (5) thereof alongside Section 6 (6) CFRN and what I see as the justice of the matter is that clearly the applicants have interests in the appeal which cannot be safely ignored as the matter cannot be effectually and effectively fully determined without their being let in. The position of the interest is so overriding that the fact of their not being part of the proceedings at either of the two courts below take a second stage not strong enough to deprive them of the entitlement to have their grievances ventilated at this level. See Febson Fitness Centre vs. Cappa H. Ltd (2015) 6 NWLR (pt. 1455) 263 at 281; Chief Rex Kola Olawoye vs. Engineer Raphael Jimoh & 2 Ors (2014) All FWLR (pt. 718) 901 at 961-917; Green vs. Green (1987) 3 NWLR (pt. 61) 480; Uku vs. Okumagba (1974) 9 SC 128; (1974) 1 All NLR (pt.1) 475.

Therefore I have no difficulty in holding that the applicants are necessary and desirable parties whose presence in the adjudication cannot be denied and so in line with the foregoing I grant the application and order as follows:

> **An order granting the applicants leave of the honourable court to be joined as co-appellants in SC 537/2016: Enyinna Onuegbu & Ors vs. Governor Imo State & 3 Ors as interested parties in the interest of justice.** *(P……Paras……..).*

11. *What applicant in an application for leave to appeal as an interested party must show*

What the applicants seeks to meet to be indulged has long been settled by this court. In restating the principle in Congress for Progressive Change & Anor vs. Admiral Murtala Nyako & Anor (2011) LPELR-23009 (SC) the court per Mahmud Mohammed JSC (as he then was) held that an applicant must.

> **"……show not only that he is a person having interest in the matter but also that the order or judgment of the court below he is seeking leave to appeal against prejudicially affects his interest….. the applicants must show that they are persons who are aggrieved, who have suffered legal grievances, against whom decisions have been pronounced which have wrongfully deprived them of something or wrongly refused them something or wrongly affected their title to something…"**

See also Ubagu vs. Okacha (1964) 1 All NLR 35; Ikonne vs. COP & Anor (1986) 4 NWLR (pt. 36) 473 at 497 and Societe General Bank Nigeria Ltd vs. Litus Torunghenefade Afekoro (1999) LPELR-3082 (SC).

Applicants' motion is supported by affidavit sworn to by one of the applicants and with the authority of the others. It comes clearly through from the averments in the supporting affidavit that the applicants are councilors and or chairpersons of Local Government Councils in Imo State affected by the dissolution of the Local Government Councils by the respondents. It is the dissolution of the councils by the respondents that constitute the cause of action in respect of which decisions by the two courts below leave is being sought by the applicants to be co-appellants in this court. In the circumstance, they are, being aggrieved by the decision sought to be appealed against, entitled to the relief they entreat. See Christopher Edet vs. State & Ors (1988) LPELR-1003 (SC) 1 Re Madaki (1996) 7 NWLR (pt. 459) 153 and Contract Resource Nig. Ltd & Anor vs. UBA Plc (2011) LPELR-8137 (SC). *(P……Paras……..).*

Lead Judgement: Peter Odili (JSC)

Representation
G. C. Ugochukwu for Appellants
S. K. Atta for Respondent and with him are **T. J. Banjo, G. C. Akaogu.**

DAVID UCHE IDEH
VS
THE STATE

SC. 924/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY, 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER S. N. ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Issue – Meaning.

*CASE LAW: The principles in **Mboho vs. The State (1966) All NLR 63***

CONSTITUTIONAL LAW: CFRN 1999 (as amended) – S. 36 (6) (b) and (d) thereof – Extent and nature thereof.

CONSTITUTIONAL LAW: CFRN 1999 as amended – Whether does not impose on the courts obligation to investigate and unearthing of facts.

COURT: Supreme Court – Jurisdiction thereof – Whether does not have jurisdiction to entertain appeals direct from the High Court.

COURT: The role of the judge – What is the role of a judge in the accusatorial judicial system – Whether he is to remain passive and not to investigate matters before him.

CRIMINAL LAW AND PROCEDURE: Defence of accused – Onus thereon – Whether accused has the sole burden of proving his defence unassisted by prosecution or court.

CRIMINAL LAW AND PROCEDURE: Insanity – Burden of proof thereof – Whether lies on the accused.

CRIMINAL LAW AND PROCEDURE: Insanity – Nature of plea – How established – S 28 of criminal code of Ogun State considered.

CRIMINAL LAW AND PROCEDURE: Insanity – S.S. 223 and 224 Criminal Procedure law of Ogun State – Duty on trial court thereto.

CRIMINAL LAW AND PROCEDURE: Mental state of accused – Duty of court thereto – When court is to conduct inquiry into the mental state of accused.

CRIMINAL LAW AND PROCEDURE: Plea of insanity – Duty of counsel thereto – Whether should not be raised causally – The principle in ***Sanusi vs. The State (1984) 15 SC 659.***

CRIMINAL LAW AND PROCEDURE: Plea of insanity – Duty on prosecution thereto – Whether prosecution is to assist in the investigation of the case for the benefit of both sides.

CRIMINAL LAW AND PROCEDURE: Psychiatric enquiry of accused – Duty on court thereto – Whether must be based on concrete evidence of insanity placed before court.

PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Attitude of Supreme Court thereto – Whether does not interfere in the absence of special circumstances.

STATUTE: Criminal Procedure Law of Ogun State – S. 222 thereof – Relevant considerations.

Issues for Determination

"Whether the learned justices of the lower court ought to have dismissed the appeal against the refusal by the learned trial judge, to permit the psychological evaluation of the appellant at the instance of the appellant's counsel bearing in mind that it amounts to a breached (Sic) of established procedures under Sections 223 and 224 of the Criminal Procedure Law of Ogun State 2006 and a violation of the Appellant's Fundamental Right to Fair Hearing enshrined under Section 36(6)(b) and 36(6)(d) of the Constitution of the Federal Republic of Nigeria 1999, as amended."

Facts of the Matter

The appellant herein, was arraigned before the Ogun State High Court holden at Abeokuta on the 1st of July 2015 on a one count charge of murder contrary to Section 316 and punishable under Section 319 of the Criminal Law of Ogun State.

The particulars of the offence are that on or about the 28th of March, 2014, at Block 11, Flat B, Laderin Estate, Abeokuta, the appellant murdered Olufunmilayo Timeyin, a retired Chief Magistrate of the Ogun State Judiciary. Appellant pleaded not guilty to the charge. In order to prove its case, the prosecution called nine witnesses and closed its case. The appellant then as an accused testified in his defence and did not call additional witness. Learned counsel for the respective parties addressed the court. In a reserved and considered judgment delivered on the 15th July 2015, **Akinyemi J**. found the appellant guilty as charged and sentenced him to death by hanging by the neck until he be dead.

The appellant's appeal to the Court of Appeal, Ibadan Division was, on the 30th June, 2016 dismissed. He has now brought this appeal.

The appellant was employed as a house help by the deceased who was living in her house with her husband Lawrence Oluwole Timeyin and her Son Olumide Timeyin. On the 19th of March, 2014 when the deceased, her husband and her son had gone out, the appellant who was now alone in the house, used a cutlass to break open the doors to the rooms of the deceased and her son and stole various items which include jewelries, wrist watch, phones, dresses and other Sundry items. He packed these things and was about to leave the house when the deceased's son arrived. He escaped in a hurry with the stolen items in attempt to sell some of the items, he was arrested and handed over to the police, where he was detained at Adigbe police station.

The deceased decided not to pursue the prosecution of the appellant, as she discontinued her complaints to the police. On the 25th March 2014, the appellant was released from detention and was seriously warned not to step into the deceased's house again. On the 27th of March 2014 at about 7.30pm the appellant, despite the warning went to the back of the deceased's house, collected a ladder from an uncompleted building and scaled the fence into the deceased's compound and went straight to the room where he was staying when he was working in the house and slept there till the following day, being 28th of March, 2014. He remained in hiding and was watching the movements of the occupants of the house. The deceased, her husband and her son went out. At about 3.30 pm, the deceased returned and went straight to her apartment and locked the door. The appellant who had sharpened the cutlass which he used to cut grass when he was working in the compound cleverly tapped the gate with the cutlass. The deceased thought there was somebody at the gate and she therefore opened the door of her apartment to see who was at the gate.

The Appellant who was then waiting for her at the entrance of her apartment which was close to the gate, attacked her immediately and dealt several machete blows on the head, neck and other parts of her body. She was shouting for help until when she could no longer shout, when the appellant heard noises at the gate and escaped by scaling the back Fence after he dropped the cutlass. Appellant was pursued and arrested when he ran into the bush.

Held: *(Unanimously dismissing the appeal)*

1. *The accused did not raise plea of insanity*

There is nowhere in the two oral applications made by the learned counsel for the appellant at the trial court that the issue of insanity or natural mental infirmity or even partial delusion was raised. Learned counsel was even more explicit in the second application where he stated. "We have not raised insanity as a plea" Section 222 of the Criminal Procedure Law of Ogun State provides that an accused person shall be deemed to be of unsound mind and consequently incapable of making his defence if by reason of some physical or mental condition he cannot follow the proceedings and make a proper defence. *(P…… paras ……)*

2. *Only the opinion of trial judge is relevant*

Section 223 and 224 of the same Law enjoin a trial judge to do the following when the issue of insanity is raised at the trial, viz:-

(a) When he observes that the accused behaves abnormally, or
(b) When the fact of the mental instability of the accused is raised in the course of the trial, or
(c) When the Counsel to the accused requests for the inquiry.

The three conditions here can only arise when the issue of insanity is raised. For the court to deem an accused person to be of unsound mind and consequently incapable of making his defence by reason of some physical or natural condition, the conduct or behavior of such an accused person must be taken into account by the trial judge, whose opinion only will be relevant. *(P…… paras ……)*

3. *When court can institute an inquiry into psychiatric condition of accused*

Since the learned trial judge was of the opinion that there was no material upon which the appellant would be deemed to be of unsound mind, Section 222, of Criminal Procedure Law of Ogun State has been sufficiently complied with. Sections 223 and 224 of the same law are irrelevant because none of the parties raised the issue of insanity. For a judge to institute an inquiry into psychiatric disposition of an accused, at the instance of his counsel, the learned counsel representing the accused must not be casual in presenting their case of insanity on behalf of his client. *(P…… paras ……)*

4. *Plea of insanity should not be raised casually*

In SANUSI VS. THE STATE (1984) 15 SC 659 at 669, this Court, per Aniagolu JSC said:-

> **"There is a tendency for some counsel to be casual in presenting their case of insanity on behalf of accused persons. Some tend to treat the matter as if all that was required to establish the defence of insanity was to allude to insanity as the accused's defence and proceed to show how unreasonable and motiveless the action of the accused had been, leaving it to the court to infer that anyone guilty of such behavior as the one committed by the accused could not but be insane. Such an approach to the defence of insanity is wrong. "** *(P…… paras ……)*

5. *How to establish plea of insanity*

Section 28 of the Criminal Code of Ogun State provides that a person who is by reason of unsoundness of mind, prevented from exercising control of his own conduct and deprived of the power of passing rational judgment on the character of his actions, cannot be held legally responsible for the Criminal consequences of his actions. Protection is given by this section to an insane person, who although aware of the nature of his act, was mentally incapable of knowing whether his act was wrong or contrary to Law. To establish a defence of insanity it must be clearly pleaded and proved that at the time of committing the act, the accused was suffering from a defect of reason from disease of the mind so as not to know the nature and quality of his act or that what he was doing was wrong. The court is concerned only with the state of mind of the accused at the time of the act. Once the issue of insanity is pleaded, the court must determine whether or not the accused was conscious at the time of doing the act and that the act complained of was one which he ought not to do or which was contrary to the law. *(P…… paras ……)*

6. *Duty on prosecution where plea of insanity is raised*

Although the burden of proof that a person is insane lies on the accused person who must establish that he is insane on balance of probabilities, once the prosecution has been put on notice that a defence of insanity is to be raised at the trial, it has a positive duty to assist in the investigation of the case for the benefit of both sides, by inquiring into any evidence relating to such a defence and by arranging for the observation of the accused by a doctor or psychiatrist with a view to reporting on his mental condition. It will be unjust for the prosecution to leave it to the accused person especially an accused person from a rural community who has no access to legal representation to produce expert evidence of insanity simply because the burden of proof lies on the defence. See Suleiman Vs. The State (1981)1 NCR 242. *(P…… paras ……)*

7. *The role of a judge in an accusatorial judicial system*

In the instant case, not only that the learned counsel for the appellant did not raise any issue of insanity before the trial court, he did not bring to the notice of the prosecution that he was going to raise the issue of insanity.

In our system of criminal trial, the judge as an umpire is not expected to descend into the arena of contest. This illustrates the difference between the accusatorial and the inquisitorial method of trying an accused person. Our system is accusatorial in the sense that the innocence of the accused is presumed until he is proved guilty by the prosecution. The major feature of the system we operate is the passive and inactive role of the Judge which emphasizes the active role of counsel for the prosecution and for the defence. The duty of a Judge is not to investigate matters that are placed before him, but to attentively listen to parties and speaks mainly to deliver his judgments. See GODWIN JOSIAH VS. THE STATE (1985) 16 (PT. 1) 6 SC. 132 at 443; DAVID USO VS. C.O.P. (1972)7 SC. 631 at 46 - 47.

What learned counsel wanted the learned trial judge to do by ordering an investigation when an issue of insanity was not raised before him, was invitation to the learned trial Judge to descend into the arena of contest. The learned trial judge was right when he declined the invitation. *(P…… paras ……)*

Per Calumje (JSC)

"I have stated elsewhere in this judgment that the court is concerned only with the state of mind of the accused at the time of the act. The offence for which the appellant was charged, tried and convicted took place on the 28th March, 2004. Learned counsel for the appellant purportedly called for investigation into the mental status of the appellant on the 15th of June, 2015, well over eleven years. When the appellant gave evidence in his defence, he alluded to some fanciful stories of how he left his parents at the age of twelve years because of certain things that used to happen to him. He told the stories of how he used to scatter everything and people would run from him and that his father used to give him concoctions. He also narrated how he went to stay with his mother's sister and did farming with his father's brother at Oshogbo, but ended up destroying all the goods that his uncle's wife used to sell like oil, garri etc.

Although these stories seem to be a product of tutorials, they could have helped the appellant if his parents, his mother's sisters and his mother's brother were called to testify for the defence in order to confirm the story that he indeed was unstable in the past. The appellant's failure to call these witnesses that witnessed his mental instability has rendered his evidence unreliable. If the application for psychiatric examination is meant to arrest the trial on the ground

that the appellant was not mentally fit to stand trial by reason of insanity, learned counsel, as I have alluded to has not sufficiently provided the materials for the learned trial judge to act upon. The ipse dixit of a counsel that his client is not mentally fit to stand trial and that such information was provided by the said client cannot avail the accused person. For evidence tendered by the accused is suspect and is not usually taken seriously for establishing his insanity. See Onyekwe Vs. The State (1988)1 NWLR (Pt.72)565.

The only source of information available to the learned counsel for the appellant is the appellant himself. This clearly cannot be taken seriously.

The appellant has not denied that he killed the deceased. Despite the fact that the deceased refused to pursue the prosecution of the appellant for the theft of her properties and those of her son and even went to the extent of pleading with the police to release him from detention, yet the appellant had the heart to terminate her life in a gruesome manner on the ground that he had some outstanding unpaid salaries with her, calls for no mercy. The lower court is absolutely right when it affirmed the conviction and sentence passed on the appellant." *(P…… paras ……)*

8. *Attitude of Supreme Court to concurrent findings*

It is not in the character of this court to interfere with the concurrent findings of fact by the High Court and the Court of Appeal in absence of special circumstances. This appeal lacks merit and same shall be and it is hereby dismissed. *(P…… paras ……)*

9. *The meaning of an issue*

An issue for the purpose of an appeal is a substantial question of law or fact or both arising from the grounds of appeal which, when resolved, one way or the other, will affect the result of the appeal. See Chief Imonikhe & Anor. Vs. Attorney-General Bendel State & Ors. (1992) 6 NWRL (Pt. 248) 396 at 407.

Not only is the sole issue in this appeal not precise, it assumes without proof, that the refusal by the trial court to order a psychological evaluation of the appellant breached his right to fair hearing under the Constitution of the Federal Republic of Nigeria, 1999, as amended. *(P…… paras ……)*

10. *Supreme Court has no jurisdiction to entertain appeals direct from the High Court*

Learned counsel, throughout his argument complained of what the trial court did or could not do and ended without reference to the decision of the Court of Appeal. There is no complaint about what the Court of Appeal did or failed to do. In other words, the appeal is not against the Judgment of the Court of

Appeal, but against the judgment of the trial court.

The Supreme Court of Nigeria, is a creature of the Constitution of the Federal Republic of Nigeria 1999 as amended; See section 230 (1) therefor. It derives its powers from the same source: See section 233 (1) of the Constitution (supra). The court of last resort has no jurisdiction to hear appeal from the trial court.

Since the entire argument of the appellant in the sole issue was directed at the judgment of the trial court, the respondent has nothing to reply to in the appeal, which leaves the Judgment of the Court of Appeal intact and subsisting. *(P…… paras ……)*

11. *The nature and purport of S. 36 (6) (b) and (d) of CFRN 1999 as amended*
Section 36(6)(b) and (d) of the 1999 Constitution provides:-

> **"36(6) Every person who is charged with a criminal offence shall be entitled-**
>
> **(b) to be given adequate time and facilities for the preparation of his defence;**
>
> **(d) to examine in person or by his legal practitioner the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution".** *(P…… paras ……)*

12. *When a trial court is to conduct an enquiry of the accused*
The application of sections 223 and 224 of the Criminal Procedure Law of Ogun State enjoin the court trying the accused to conduct an enquiry into the soundness of mind of the accused when:-

> **(a) the court observes that the accused is behaving abnormally;**
>
> **or**
>
> **(b) the fact of the mental instability of the accused is raised in the course of the trial.**
>
> **(c) the counsel for the accused requests for the inquiry. See: Popoola Vs. State (2013) 17 NWLR (Pt. 1382)** 96; **Mboho Vs. The State (1966) All NLR 63.This Court reiterated in Popoola Vs. State supra at page 113 that -**

> **"…The ad hoc procedure which this inquiry is cannot be held in vacuo or on its own without the conditions precedent to its process being present. Those conditions are in the main that the trial judge himself has observed certain abnormal behavior of the accused which convinces him that there may be a danger of the trial not being conducted with a stable accused fit to stand his trial."** *(P…… paras ……)*

Per Akaahs (JSC)

"It is important for the trial Judge to make the observation of any abnormal behaviour being displayed by the accused.

The law presumes that every person is of sound mind until the contrary is proved. So the prosecution does not set out to prove the sanity of the accused; it is the duty of the defence to put up the plea of the unsoundness of mind of the accused for the offence charged in order to put the trial judge on enquiry on whether the accused is incapable of making his defence. And even where the defence of insanity or unsoundness of mind is raised, it is the duty of the trial Judge to decide whether the defence is available to the accused or not.

I had the preview of the judgement of my learned brother, Galinje JSC which was delivered a short while ago in which the appeal was dismissed as lacking in merit. After an exhaustive review of the facts of this case, it was inescapable to find that the appellant's counsel did not provide sufficient materials upon which the trial judge could order for a psychiatric examination of the appellant to determine his mental state at the time of the commission of the offence. Consequently, the trial court refused to accede to the request for a psychological evaluation of the accused and the lower court found no reason to disturb the judgement of the trial court. This court cannot disturb the concurrent findings of the two lower courts. The appeal lacks merit and it is accordingly dismissed." *(P…… paras ……)*

13. *Burden of proof of insanity lies with the accused*

Insanity is a matter of fact, provable by whoever alleges same in order to reduce his criminal responsibility and rebut the presumption of sanity the law ascribes to all, including an accused person. The burden of proving whatever is asserted lies on the party alleging same who desires the court to give him judgment on the fact he asserts: Sections 131 & 132 of the Evidence Act, 2011. *(P…… paras ……)*

14. *Court to maintain its independence and impartiality in the resolution of dispute*

Section 223 of the CPL of Ogun State read together with Section 36(1) & (6)(b) of the Constitution, 1999, as amended, generally do not impose on the trial court

the duty to actively involve itself in the investigation and unearthing of facts either in aid of the prosecution against the person or of the defence against the prosecution. Section 36(1) of the Constitution enjoins the court to maintain its "independence and impartiality" In the determination of the civil rights or obligations of any person, including any question or determination by or against any government or authority. *(P…… paras ……)*

15. *An accused has the burden of proving his defence*

There is no evidence that the trial court issued any order denying the appellant's counsel the right to invite a psychiatrist to examine his client and issue his report upon his observations and conclusion as to the mental condition of the accused person. What I am saying is - an accused person bears the burden of raising and proving his defence to any criminal allegation. Unless he establishes obtrusion he cannot transfer that burden or blame for non-discharge of the burden to either the court of trial or the prosecution.

The point very much harped upon by the appellant's counsel is that, by virtue of Section 223 of the CPL, the trial court owed the appellant, the accused person, a duty to order a psychiatrist to observe the appellant and report on the mental capacity of the appellant to stand trial upon the ipse dixit of the defence Counsel. For Section 223 CPL to apply the judge holding the trial, on his own observation, should first have "reason to suspect that the accused is of unsound mind and consequently incapable of making his defence", It is on this "reason to suspect that the accused. of unsound mind" that agitates the need to "investigate the fact of such unsoundness of mind", This, to me, is a question of discretion which the trial Judge holding the trial cannot, mandatorily, be compelled" to exercise in the guise of providing adequate facilities to the accused for the preparation of his defence under Section 36(6)(b) of the Constitution, 1999, as amended. *(P…… paras ……)*

16. *The principles in* ***Mboho vs. The State (1966) All NLR 63***

In the case of MBOHO Vs. THE STATE (1966) ALL NLR 1965 on 14th April, 1995 when the case came up for trial the learned trial judge, apparently upon reading the extra-judicial statement of the accused contained in the proof of evidence, formed the impression that it was necessary to investigate the fitness of the accused to stand his trial. The trial judge did not take the plea of the accused after the charge was read and explained to the accused. He ordered, thereafter:

> **In view of the statement made by the accused to the police the accused is placed under medical observation for one month from**

today in order to ascertain his fitness to stand trial. The doctor is also ordered to appear on the next adjourned date to give evidence of his findings.

The doctor subsequently gave evidence to the effect that there was "no disturbance of his sensorium" and that "the accused is not suffering from any psychiatric disability and - cannot claim diminished responsibility for any act he may have committed". The trial judge made no specific finding on this report. He merely continued in the trial. The trial, including the conviction, of the accused in the MBOHO case was quashed and fresh trial ordered because of the failure of the trial judge to make specific finding on the question: whether the accused was fit to stand trial, before proceeding to the trial notwithstanding the report of the medical doctor.

In the MBOHO case insanity pleaded formed part of the proofs of evidence before the trial court. There must exist some evidential material on which the mini trial of the question whether the accused was fit to stand trial can proceed. It also appears from the dictum in the MBOHO case that Section 223(1) of the CPL "is clear and wide enough to allow for such investigation at any stage (of the trial) whether before an accused pleads to the charge or after, and event after the court has begun to receive evidence".

The issue in this appeal is really whether the appellant satisfied the trial Judge that there was the need for investigation of the Appellant's mental capacity to stand trial. No doubt the trial judge has some discretion in the matter, and it is judicial. The failure of the trial court in the MBOHO case to exercise the discretion "judicially" by ignoring the existing evidence was the basis for quashing the conviction. In the instant case, the trial Judge denied the application upon considering the facts/evidence in the application. He could not be therefore accused of exercising his discretion judicially and judiciously. There lies the distinction between this case and the MBOHO case on their respective peculiar facts. The MBOHO case does not apply in this case. *(P…… paras ……)*

Lead Judgement: **PAUL ADAMU GALINJE (JSC)**

Representations

MR. F. DALLEY with O. A. Olude for the Appellant.

DR. OLUMIDE AYENI (A.G. OGUN STATE with Adekunle Manuwa, Ishaq Apalando, Abdul Basit AbdulMalik, and Miss Mary Warribo for the respondent

FEDERAL REPUBLIC OF NIGERIA
VS
1. JAMIU ADENIYI
2. AKEEM ADESANYA
3. AMINU ALIYU
4. MUSTAPHA ALONGE

SC. 167/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M/ O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

COURT: Jurisdiction thereof – Indices –What determines.

CRIMINAL LAW AND PROCEDURE: Conviction – Where accused is charged for an offence under petroleum product Distribution (Anti sabotage) Act but was convicted for an offence of forgery under S. 465 of Criminal Code – Impropriaty thereof.

CRIMINAL LAW AND PROCEDURE: Conviction – Where accused is charged for pipeline vandalisation under petroleum Product Distribution (Anti Sabotage) Act – Accused convicted for a lesser offence of forgery under s. 465 of Criminal Code - Power to convict for a lesser offence under S.179 (1) and (2) of Criminal Procedure Act – Whether discretion of court therein was not properly exercised.

CRIMINAL LAW AND PROCEDURE: Conviction – Where accused is convicted of a lesser offence of forgery which was created from a different statute as the principal offence – Whether violates accused right to fair hearing – The principles in ***Nwachukwu vs.***

The State (1986) 4 SC 379- The principles in Okobi vs. The State (1984) LPELR – 2453 SC.

CRIMINAL LAW AND PROCEDURE: Conviction – Where accused was convicted of a lesser offence under a different law from which the main offence was charged – Whether not proper – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Conviction – Where accused was convicted of a different law for a lesser offence from which the principle offence was charged – Impropriety thereof – The principles in ***Anthony Okobi vs. The State (1984) LPELR – 2453(SC).***

STATUTE: Criminal Procedure Act – S.179 (1) and (2) thereof – Import and Imperatives.

Issue for Determination

"(i) Whether the lower court was right to have set aside the conviction of the respondents for a lesser offence of forgery in view of the prosecution's inability to sustain the actual offence charged before the trial court.
(Relates to Ground I).

Facts of the Matter

The respondents and two others were arraigned before the Federal High Court Ilorin, hereinafter referred to as the trial court, on a single charge thus:-

> **"That you Jamiu, Akeem Adesanya, Aminu Aliyu, Endurance Otuya, Mustapha Alonge, Ismaila Adeniran and one Alhaji Yalateef now at large on or about the 31st day of March, 2009 at Ibafo along Ilorin-Ibadan Road, within jurisdiction of this honourable court committed an offence to wit: vandalized NNPC pipeline and through it illegally discharge (sic) for sale at Ogidi, Ilorin where you were arrested. You have by your act willfully obstructed the procurement of petroleum products for distribution between Ilorin - Ibadan Depot and you thereby committed an offence contrary to section 2 of the petroleum and Distribution (Anti Sabotage) Act Cap 12 laws of the Federation of Nigeria 2004.**

To prove its case, the appellant called eight (8) witnesses and tendered nine (9) Exhibits PWIA - PW7B, including the statements of the accused persons.

The respondents who pleaded not guilty to the charge gave evidence in their own defence.

In its judgment at the end of trial, including the addresses of counsel, delivered on 15th June 2010, the trial court discharge the accused person on the main offence charged but convicted them for the lesser offence of forgery.

Dissatisfied with the trial court's judgment, the respondents' appealed to the Court of Appeal sitting at Ilorin, hereinafter referred to as the lower court, on their respective notices against the conviction and sentences. Their appeal succeeded.

Aggrieved by the decision of the lower court the appellant, by its notice containing three grounds filed on the 6th January 2012, has appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Indices of Courts jurisdiction*

I cannot agree more with learned respondents' counsel that the lower court is right in setting aside the trial court's decision arrived at in the exercise of a jurisdiction it truly lacks.

It is long settled that a court is said to have the requisite jurisdiction to apply a substantive law in a case or matter brought to it and therefore competent to determine same if:-

(i) The court is properly constituted as regards members and their qualifications.

(ii) That the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the case court from exercising its jurisdiction.

(iii) That the case comes before the court initiated by due process of the law and upon fulfillment of any condition precedent to the exercise of its jurisdiction. See Madukolu vs. Nkemdilim (1982) 1 ALL WLR 162 at 595, Rossek vs. ACB Ltd (1993) 8 NWLR (Pt 312) 382 and Awoniyi vs. Registered Trustees of the Rosicrucian Order, Amore (2010) 10 NWLR 522. (Underlining supplied for emphasis). *(P……Paras……).*

2. *Court cannot convict accused on an offence not charged*

My lords, the issue this appeal raises is not whether the trial court is competent to convict the respondents for the offence of forgery in respect of which they were not formally charged. The real issue for determination, had parties read the judgment of the lower court wisely is whether the trial court or indeed this court has any jurisdiction to convict the respondents for a lesser offence that has

not been provided for under the Petroleum and Distribution (Anti Sabotage) Act Cap 12 Laws of the Federation of Nigeria 2004 by virtue of which they were arraigned and tried.

In the case at hand, the lower court while allowing the appeal and setting aside the trial court's conviction and sentences of the respondents, per Ita George Mbaba JCA who read the court's lead judgment delivered on the 19th December 2011 and with whom Tijjani Abdullahi (of blessed memory) and Joseph Shagbaor Ikyegh JJCA concurred, authoritatively concluded its judgment at page 340 of the record of appeal thus:-

> **"At the point the learned trial judge found that the evidence adduced against the appellants could not sustain the charge upon which they were arraigned, that is, vandalizing of NNPC pipeline and procuring PMS therefrom illegally, he had a duty to terminate the trial and discharge and acquit the appellants. Taking upon himself, as he did at page 227 of the record, to imagine the offence of forgery, after he had also acknowledged that the appellants were not charged for that, an proceeding, as he did to convict them (appellants) thereof, without subjecting them to trial on that offence, made the learned trial judge a judge in his own cause, as the offence of forgery was a charge by the court, a charge which had not been investigated, and the appellants not accorded a right to be heard before their conviction.**

The effect of failure by the prosecution to prove or establish the essential ingredients of a charge is the dismissal of the charge and the accused being given the benefit of the doubt, by being discharged and acquitted……" (Underlining supplied for emphasis).

3. *Conditions for the application of S.179 of Criminal Procedure Act*

It is the foregoing decision of the lower court that the learned appellant's counsel insists is perverse. I am unable to agree with him. Learned counsel seems to ignore the view of this court on the vexed Section 179(1) &(2) of the Criminal Procedure Act in Nwachukwu vs. The State (supra) he a p p o s i t e l y relies on thus:-

> **"The operative words are "lesser and not 'another' offence". Thus where the accused has notice of an aggravated offence, he also has notice of the lesser offence for which he could be**

> **convicted. The assumption, which is legitimate, is that accused would have challenged the more serious offence and must be fully aware of the case against him in respect of the lesser offence. It is therefore important to observe from the judicial decisions and the provisions that for Section 179 of the Criminal Procedure Act to apply, the following conditions must be observed -**
>
> **Firstly, the indictment in respect of which the accused is subsequently convicted for a lesser offence must contain words to include both offences.**
>
> **Secondly, the evidence led and facts found, though insufficient for conviction of the aggravated offence charged, must support the conviction for the lesser offence. Thirdly, it is in all cases not necessary to charge the accused with the lesser offence with which he is being convicted. This last mentioned is ordinary common sense. The greater includes by necessary implication the lesser." (underlining supplied for emphasis). *(P……..Paras…….).***

4. *Accused cannot be convicted on a different law from which he is charged*
In Anthony Okobi vs. The State (1984) LPELR-2453 (SC) this court has held per Obaseki JSC at page 23 of the report on this very issue as follows:-

> **"I am, of the settled view that this court has no jurisdiction to entertain any application to convict the appellant of a lesser offence under the criminal code at the hearing of an appeal against a conviction for an offence under the provisions under the Robbery and Firearms (Special Provisions) Act. There being no provision under the Robbery and Fire Arms (Special Provisions) Act Permitting such a course of action, it will amount to a denial of justice to the appellant to convict him of an offence under a law different from that under which he was tried for the sole purpose of securing his conviction."**

To legitimately convict for a lesser offence under a different law and for which the respondents are not charged, his lordship propounded further thus:-

> **"The jurisdiction being exercised by the High Court of the State in the trial for offences under the Armed Robbery & Firearms (Special Provision) Act is the jurisdiction upon the High Court by**

> **the Robbery and Firearms (Special Provision) Act ..... As the Act gave no jurisdiction to convict of offences other than those set out in the Act, the High Court cannot by the application of Section 179 of the Criminal Procedure law exercise the jurisdiction conferred to convict of an offence not under the Act…. Stealing is the only lesser constituent offence of robbery in respect of which a conviction could be entered by virtue of Section 179 of the Criminal Procedure Law. Obtaining by false pretence is not a constituent offence, neither is cheating a constituent offence of robbery although they carry less penalties and punishment." (Underlining supplied for emphasis).**

The court concluded thus:-

> **"To enable the court utilize its powers under Criminal Procedure Law to advantage, the offence should and must be charged under the two laws in the alternative. The court is not a prosecutor but an adjudicator and it borders on persecution for the court to invoke its powers under a law with which the prosecutor decided not to proceed or prosecute." (Underlining supplied for emphasis).** *(P……Paras……).*

5. *The lesser offence and the aggravated offence must be created by the same statute*
The lower court's judgment the appellant asserts is perverse necessarily has to be assessed in the light of the two decisions of this court in Nwachukwu vs. The State (supra) and Okobi vs. The State (supra) which bind this court as well. It is beyond any contention that the offence of forgery under Section 465 of the Criminal Code for which the trial court convicted the respondents does not fall within the purview of the "lesser" offence in the contemplation of Section 179(2) of the Criminal Procedure Act by virtue of which the court purports to have proceeded. In the two decisions of this court under reference the point has been emphasized that to exercise the jurisdiction which enures to it under Section 179(2) of the Criminal Procedure Act, the offence for which the trial court convicts the respondents must be a "lesser" one in relation to the "aggravated" offence they are charged with. More importantly, the lesser offence must, like the aggravated one, be provided for by the same statute. The essence of these safeguards is to ensure that, in compliance with the constitutional right requirement to fair hearing guaranteed to him under Section 36 of the 1999 Constitution as amended, an accused is heard, his input obtained before a decision one way or the other is made. *(P……Paras……).*

Per Muhammad (JSC)

"In the case at hand, the respondents while charged for an offence under the Petroleum Distribution (Anti Sabotage) Act are convicted for an offence contrary to Section 465 of the Criminal Code, a different statute, and for which they are not charged. They are not heard as the Constitution requires they must. The lower court is, therefore, right in the circumstance to set aside the trial court's conviction and sentence of the respondents in the exercise of the jurisdiction it does not have.

The fact remains that respondents could not have been legitimately convicted for offences that were not, as required by Section 36(1) and (6) of the 1999 Constitution, brought to their attention expressly or impliedly and in respect of which they did not have the time and opportunity to defend themselves. And that is the import of the lower court's decision, which abides the many judgments of this court, characteristics that bestows on it sustainable impeccability.

Per Muhammad (JSC)

"It is common ground in the findings of the two courts below, trial and appellate that the offence of pipeline vandalisation as charged was not proved. Even though the trial court did not find that the evidence of the prosecution witnesses established a lesser offence of forgery, It was at the conviction stage that the forgery was introduced by the learned trial judge and the respondents convicted thereby and the court proceeded to sentence him in that regard with the court hanging onto Section 179 (1) and (2) of the CPA.

I shall for clarity quote the said section of the CPA:

Section 179 (1) of the CPA says:

1. **"In addition to the provision herein before specifically made, whenever a person is charged with an offence consisting of several particulars a combination of same only of which constitutes a complete lesser offence in itself and such combination is proved he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with".**
2. **When a person is charged with an offence and facts are proved which reduce it to a lesser offence he may be convicted of the lesser offence although he was not charged with it.** *(P……Paras……..).*

6. *Power of Court in exercise of its jurisdiction to punish for a lesser offence*
That use of Section 179 CPA forms the area of departure between the two courts below as the Court of Appeal in its decision stated emphatically that forgery is not a lesser offence to pipeline vandalisation on which, the prosecution having failed to prove the vandalisation, the offence of forgery can be said to have been made. In this, the Court of Appeal cannot be faulted as the application of Section 179 CPA is not done at large without conditions. That section of the CPA empowers the courts to convict for a lesser offence which are supported by proven facts where the person charged with an offence consisting of several particulars or where the offence proved reduces the offence charged to a lesser offence in respect of which the accused was charged. *(P……Paras……..).*

Per Odili (JSC)
"To the case at hand, the offence charged being Pipeline Vandalisation does not relate nor have any common features with forgery under Section 465 of the Criminal Code and so what the trial court did in convicting for forgery while the offence charged is that of pipeline vandalisation is clearly done legally not permissible. As I am grappling to impart, the particulars in the lesser offence for use must have some related features with the other offence charged in such way that in trying to establish the charge of arraignment, the prosecution while not succeeding in that offence may have established the lesser offence and so the court can thereby act. Clearly the offence of pipeline vandalisation bears distinct features unrelated with the features of forgery and so an importation of forgery in place of pipeline vandalisation would do violence to the prosecution. The situation is not like a charge of murder and manslaughter or the outcome of armed robbery as against simple robbery and so like grievous harm to simple hurt. The simple position is that there must be synergy between the particulars of the offence charged and the lesser offence which the court would utilise for penalty. It is not a procedure done arbitrarily unmindful of the disconnect between the two offences, the one charged and the lesser offence. See Samuel Torhamba vs. IGP (1956) NNLR 87 at 94; Nwachukwu vs. The State (1986) 17 (Pt. 1) SC 602; Maja vs. Stocco (1968) NCR 112 at 222-223; Okwuwu vs. The State (1964) 1 All NLR 361.

In the final analysis it is easy to say that forgery is not a lesser offence or carved out of the offence of pipeline vandalisation and so what the Court of Appeal did cannot be faulted". *(P……Paras……..).*

Per Ekun (JSC)
"This issue was dealt with extensively in a recent decision of this court in SC.

727/2013: Ahmed Salihu vs. The State, delivered on 23/3/2018. The lead judgment was written by my learned brother, CHIMA CENTUS NWEZE, JSC. In my contribution I held *inter alia* as follows:

> **"The power of a court to convict an accused person for a lesser offence than the one charged is based on certain guidelines. Where the court exercises this power, the evidence in support of the lesser offence must consist of a combination of some of the essential elements of the original offence charged. The particulars of the lesser offence must be capable of being subsumed in that original charge such that it is possible to carve out the particulars of the lesser offence from the particulars of the original charge. See: N.A.F. vs. Kamaldeen (2007) 7 NWLR (Pt. 1032) 164 @ 190 D-F; Adeyemi vs. The State (1991) 6 NWLR (Pt. 195) 1; Agugun vs. The State (2007) 2 SC 113; Nwachukwu vs. The State (1986)2 NWLR (Pt. 25) 765.**
>
> **….It is also pertinent to note that where it is intended to convict for a lesser offence, that lesser offence must have been created by the same law governing the substantive offence. This position was illustrated very clearly in Okobi vs. The State (1984) 15 SC 520; (1984) LPELR -2453 (SC) 1 @ 23 A-C…"It is quite evident and I agree with the lower court, that there is no *nexus* between the offence of forgery under Section 465 of the Criminal Code and the offence of sabotage under Section 2 of the Petroleum Product and Distribution (Anti-Sabotage) Act. The preconditions for the conviction of the respondents for a lesser offence were not present in this case. I resolved this issue and consequently the entire appeal against the appellant, as the decision of the lower court has not been shown to be perverse. *(P…..Paras…..)*.**

Lead Judgement: DATTIJO MUHAMMAD, (JSC)

Representation
J. A. MUMINI, (DPP KWARA STATE) with F. O. Adeleru (SC1) for the appellant.
YUSUF KADIRI, for the respondent.

GIDADO ADAMU
VS
THE STATE

SC.72/2017

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY 21ST FEBRUARY 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

COURT: Decision thereof – Where trial court relied on a document that was not part of record of appeal – Effect – Whether appellate Court would discountenance decision based on non-existent record.

CRIMINAL LAW AND PROCEDURE: Conviction – Whether can be based on the evidence of a single witness – Conditions thereof.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: Interpretation of statement – Where statement of accused was interpreted into another language – Interpreter not called as a witness – Whether statement is hearsay evidence.

CRIMINAL LAW AND PROCEDURE: Medical report – Where identity of the deceased, nature of injury and cause of death were not proved – Whether non tendering of medical report procured during investigation amounts to withholding evidence.

CRIMINAL LAW AND PROCEDURE: Proof – Burden of proof – Ways by which prosecution may discharge burden of proof.

CRIMINAL LAW AND PROCEDURE: Proof – Onus on Prosecution – How discharged.

CRIMINAL LAW AND PROCEDURE: Statement of accused – Interpretation thereof – Where interpreter was not called as a witness – The principles in ***Queen vs. Zakwakwa (1960) 1 NSCC 8; Nwali vs. State (1991) 3 NWLR (pt. 182) 663.***

CRIMINAL LAW AND PROCEDURE: Statement of accused – Interpretation thereof – Where interpreter of a statement of accused was not called to testify – Whether statement so admitted is hearsay – The principle in ***Queen vs. Zakwakwa of Yoro (1960) 1 NSCC 8.***

CRIMINAL LAW AND PROCEDURE: Statement of accused – Interpretation thereof – Where interpreter was not called as a witness – "Effect – The principle in ***Rex vs. Gidado (1940) 6 FSC 12, (1960) SCNLR 36.***

CRIMINAL LAW AND PROCEDURE: Statement of accused – Interpretation thereof – Where interpreter was not called as witness during hearing –Whether admitted statement is hearsay – Rationale thereof – The principle in ***FRN vs. Usman (2012) 8 NWLR (pt. 1301) 141.***

CRIMINAL LAW AND PROCEDURE: Statement of accused – Where accused statement is interpreted in another language – Conditions for admissibility – Effect of non compliance.

CRIMINAL LAW AND PROCEDURE: Statement of accused – Where statement is interpreted into another language – Necessity for calling interpreter as a witness –Whether to forestall the admissibility of hearsay evidence – The principle in ***Ifaramoye vs. State (2017) 8 NWLR (pt. 1568) 457.***

EVIDENCE: Confessional Statement – How to determine its validity – What court should do – Necessary tests thereto.

EVIDENCE: Confessional Statement – Where direct and positive – Whether can be relied on without corroboration.

EVIDENCE: Proof – Cause of death – Whether medical report is not the only means by which cause of death can be determined.

EVIDENCE: Vital witness – Meaning.

EVIDENCE: Withholding thereof – Where prosecution failed to tender recovered weapon of crime during proceedings – Whether it amounts to withholding evidence – The principle in ***Umar vs. State (2014) LPELR – 224666.***

STATUTE: Evidence Act, 2011 – S. 28 thereof – Definition of "confession".

Issues for Determination

1. **Whether having regard to the facts and circumstances of the case, the Court of Appeal was right in affirming the trial court's judgment admitting and relying on the extra judicial confessional statement of the appellant (Exhibit GA1) in the absence of an Hausa Language version of Exhibit GA and without the interpreter and recorder of Exhibit GA1 being called as a witness. (Ground 1)**
2. **Whether the respondent proved the case of culpable homicide against the appellant beyond reasonable doubt, as required by law to justify the conviction and sentence of the Appellant to death by hanging, considering the totality of the evidence at the trial? (Grounds 2 and 3).**
3. **Whether the defence of *alibi* validly raised by the appellant does not avail him in the circumstances of this appeal? (Ground 4).**

Facts of the Matter

This appeal is against the decision of the Court of Appeal, Yola Division, delivered on 22/3/2016, which affirmed the judgment of the High Court of Taraba State, Jalingo Judicial Division, delivered on 20/5/2014 convicting the appellant of the offence of culpable homicide punishable with death under Section 221(b) of the Penal Code and sentencing him to death.

The appellant was alleged to have stabbed one Shuaibu Ahmed on the ribs with a knife on 30th September 2011 at about 7pm at Namnai Village in Gassol Local Government Area within Jalingo Judicial Division, which act resulted in his death. The appellant pleaded not guilty to the charge. The prosecution called one witness, Sgt. Danjuma Manga, one of the Investigating Police Officers. The extra judicial statement of the appellant was tendered through him and marked Exhibit GA1. The appellant testified on his own behalf and called no other witness.

At the conclusion of the trial the appellant was found guilty as charged and sentenced to death. The learned trial judge relied heavily on the appellant's statement in reaching the guilty verdict. He considered and rejected the defence of provocation allegedly raised in the said statement.

His appeal to the lower court was unsuccessful, hence the further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Elements of culpable homicide*

As stated earlier, the appellant was charged with culpable homicide punishable with death under Section 221(b) of the Penal Code. In order to secure a conviction, the prosecution must prove the following essential elements of the offence beyond reasonable doubt:

(i) The death of a human being;
(ii) That the death was caused by the accused;
(iii) The act of the accused which resulted in the death of the human being was done with the intention of causing death or grievous bodily harm; or
(iv) The accused knew that death would be a probable but not just likely consequence of his act.

See: Maiyaki vs. The State (2008) 7 SC 128 @ 129; Usman vs. The State (2013) 12 NWLR (Pt. 1367)76; Bright vs. The State (2012) 8 NWLR (Pt. 1302) 297 @ 302. *(P…..Paras……..).*

2. *How prosecution may discharge onus of proof*

In discharging this burden the prosecution usually adopts one or a combination of the following methods:

1. By direct eye-witness evidence.
2. By circumstantial evidence.
3. By the confessional statement of the accused.

See: **Emeka vs. State (2001) 14 NWLR** (pt. **734) 666 @ 683; Abirifon vs. The State (2013)13 NWLR (Pt. 1372) 587; Igabele vs. The State (2006) 6 NWLR (Pt. 975) 100 @ 120 - 121 H - A.** *(P……Paras……..).*

3. *Meaning of confession*

In the instant case, the two lower courts placed substantial reliance on the appellant's alleged confessional statement. The trial court referred to the statement as Exhibit GA while the lower court referred to it as Exhibit GA1.

Section 28 of the Evidence Act, 2011 defines a confession as *"an admission made at any time by a person charged with a crime, stating or suggesting the*

inference that he committed the crime." **Section 29 (1) and (2) of the Act provides that a confession is relevant and admissible in evidence, so long as it is voluntarily made and not as a result of threat or inducement. Where a court is satisfied that a confession was freely and voluntarily made and that it is direct, positive and unequivocal as to the accused person's participation in the crime alleged, it may rely solely on the confession to ground a conviction. See: Igbinovia vs. The State (1981) LPELR - 1446 (SC) @ 17 B - D; Onyejekwe vs. The State (1992) 4 SCNJ 1 @ 8; Omoju vs. FRN (2008) 2 SCN 164 @ 177; Adeyemi vs. The State (2014) 13 NWLR (Pt. 1423) 132. These authorities illustrate the substantial weight accorded to a confessional statement in the process of evaluating the evidence adduced by the prosecution.** *(P……Paras……..).*

4. *Where accused's statement was interpreted and the interpreter not called as a witness*

In order to ensure the correctness and accuracy of a statement made by an accused person and to protect his right to fair hearing guaranteed by Section 36(6) of the 1999 Constitution, as amended, where he volunteers a statement in a language other than English Language, which is the language of the court, the statement in the original language in which it was recorded as well as its translation into English Language must be tendered in court. It affords the accused person the opportunity to challenge in court if the need arises, his statement as originally recorded or its translation. It enables the court to be satisfied that it is his true statement. For this reason, it was held by this court that the recorder of the statement as well as the interpreter must be produced in court as witnesses, otherwise the statement remains hearsay and inadmissible in evidence. See: F.R.N vs. Usman (2012) 8 NWLR (Pt. 1301) 141 @ 159 - 160 D - B; 161 C - G; 163 C - H; Nwaneze vs. The State (1996)2 NWLR (Pt. 428) 1 @ 20; Queen vs. Zakwakwa (1960) Vol. 1 NSCC 8 @ 9. *(P……Paras……..).*

5. *Trial court relied on document that was not part of record*

In resolving issue 1, I held that the lower court erred in affirming the appellant's conviction based on Exhibit GA1 because of the discrepancy in the record as to which statement made by the appellant was before the court. The statement relied upon by the trial court did not form part of the record before the court below. Furthermore, while the trial court admitted in evidence a statement marked Exhibit GA1, said to have been recorded by PW1 on 14/10/2011, in the course of its judgment it referred to Exhibit GA, which has not been shown to be part of the record before this court or the court below. *(P……Paras……..).*

6. *Tests to determine whether confessional statement is true*

It is also settled law that where a court relies on a confessional statement in convicting an accused, it ought to subject the statement to some tests to satisfy itself that the alleged confession is true. This test requires the consideration of some other evidence outside the confession, no matter how slight. The court is enjoined to consider the following:

1. **Whether there is anything outside the confession which shows that it may be true;**
2. **Whether the confessional statement is corroborated;**
3. **Whether the relevant statements of fact made in it are most likely true as far as they can be tested;**
4. **Whether the accused had the opportunity of committing the offence;**
5. **Whether the confession is possible; and**
6. **Whether the alleged confession is consistent with other facts that have been ascertained and established.**

See: **R. vs. Sykes (1913) Cr. Aim. Rep. 233; Ubierho vs. The State (2002) 5 NWLR (Pt. 819) 644 @ 655; Nwachukwu vs. The State (2007) 17 NWLR (Pt. 1062) 31.** *(P…….Paras……..).*

7. *Conviction can be based on the evidence of a single witness*

There was no independent evidence before the court as to the identity of the person taken to the hospital by PW1 or what caused his death. Benjamin James who supplied information to PW1 did not testify. He was the only eye witness to the incident.

It is correct, as submitted by learned counsel for the respondent that there is no particular number of witnesses required to discharge its burden of proving its case beyond reasonable doubt. What is important is the quality of the evidence adduced. It is for this reason that a conviction may be based on the evidence of a single witness if it is credible. See: Akalezi vs. The State (1993) 2 NWLR (Pt. 273) 1; Adisa vs. The State (2014); LPELR - 24221 (SC) @ 28 - 29 F – A; Afolalu vs. The State (2010) 16 NWLR (Pt. 1220) 584. However, where a vital and material witness is not called, the failure could be fatal to the prosecution's case. See: Alake vs. The State (1992) LPELR - 403 (SC) Smart vs. The State (2016) LPELR – 40728 (SC) @ 17 D - E; State vs. Nnolim (1994) 5 NWLR (Pt. 345) 394. *(P…….Paras……..).*

8. *The meaning of a vital witness*
A material or vital witness is one whose evidence may determine the case one way or another. See: Hassan vs. The State (2016) LPELR - 42554 (SC) @ 18 B - C; Smart vs. The State (supra); Ochiba vs. The State (2011) 17 NWLR (Pt. 1277) 663.

In the instant case, PW1 did not witness what transpired. He relied on information given to him by Benjamin James. His evidence as regards what transpired between the appellant and the deceased is therefore hearsay. The evidence of Benjamin James, an eye witness, was therefore vital. I am of the considered view that the failure to call him to testify in this case was fatal. *(P……Paras……).*

9. *Medical report is not the only means by which the cause of death can be determined*
There is no rule that the weapon used in the commission of an offence must be tendered or that a medical report is the only means by which the cause of death can be determined. Whether or not they are material depends on the facts and circumstances of each case. See: Olayinka vs. The State (2007)9 NWLR (Pt. 1040) 561 @ 514; Bille vs. The State vs. (2016) LPELR - 40663 (SC) @ 51- 52 B - G; Babarinde vs. The State (2014) 3 NWLR (Pt. 1395) 568. A medical report may not be necessary where there is other evidence upon which the cause of death can be inferred to the satisfaction of the court. See: Onitilo vs. The State (2017) LPELR – 42576 (SC) @ 19 B - F; Bille vs. The State (2016) LPELR – 40832 (SC); Alarape vs. The State (2001) 5 NWLR (Pt. 705) 79.

The tendering of the medical report as to the cause of death of the deceased in this case would have been of immense assistance to the court in the absence of any eye witness testimony. The alleged confessional statement of the appellant not having been subjected to the required test, the lower court ought not to have affirmed the conviction based on it. There is some doubt in this case which ought to have been resolved in the appellant's favour. *(P……Paras……).*

10. *Confessional statement can be used without corroboration*
Certain legal principles need be set out in order to find the route to unravel the puzzle at play in this appeal. In that regard, I would restate what has become trite that the law is that once an accused person makes a statement under caution admitting the charge or creating the impression that he committed the offence with which he is charged. Again, now settled in law that an accused person can be convicted on his confession once it is voluntarily made if it is direct, positive, duly made and satisfactorily proven and in this situation a conviction of guilty will be secured without corroborative evidence. See Hassan

vs. The State (2001) 15 NWLR (Pt.735) 184; Gira vs. The State (1996) 4 NWLR (Pt.443) 375. *(P……Paras……..).*

11. *The ingredients of culpable homicide*
The point above made, then a reference to the charge under Section 221 of the Penal Code upon which the appellant is arraigned, the trial concluded with him convicted for culpable homicide punishable with death. The ingredients of the offence are hereunder stated thus:-

(a) That the death of a human being actually took place;
(b) That such death was caused by the accused;
(c) That the act of the accused that caused the death

was done with the intention of causing death; or that the accused knew that death or grievous bodily harm would be the probable consequence of his act. See the cases of Okolo Ochemaje vs. The State (2008) 15 NWLR (Pt.1109) 57; Akpan vs. The State (2008) LPELR-368 (SC), Tajudeen lliyasu vs. The State (2015) LPELR - 24403 (SC). *(P……Paras……..).*

12. *The meaning of confessional statement*
By virtue of Section 28 of the Evidence Act, a confessional Statement is one made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. Such a statement is admissible once it is direct and positive relating to the acts of the accused, with knowledge or intention, stating or suggesting the inference that he committed the offence. I place reliance on Akpan vs. State (1992) 7 SCNJ 22; Yusuf vs. State (1976) 6 SC 167; Ogoala vs. The State (1991) 2 NWLR (Pt.175) 509.

The above said then comes the statement admitted at the trial court as Exhibit 'GA1', which on the face of it is confessional and therefore raises the questions, whether it falls in the category of a voluntarily made confessional statement that could on its own alone guarantee a conviction or one needing corroborative evidence to support that indeed that statement is true, representing what the accused appellant said in admission to the crime. The appellant answers in the negative while the respondent takes the contrary, opposite view. *(P……Paras……..).*

13. *Procedure where accused's statement is interpreted in another language*
The facts borne out of the record situated with what the law has provided which is that the confessional statement of the accused such as the case in hand taken with the aid of an interpreter in a language different from English, two

statements must be tendered, one in the language of the appellant and the other, the English translation in order that the requirement of the onus of proof beyond reasonable doubt can be taken to have been discharged. That not having been done, is fatal to the case of the respondent as the one version of English is rendered in admissible. *(P……Paras……).*

14. *Effect where interpreter of statement was not called as a witness*
The apex court, in the case of Olanipekun vs. State (2016) 13 NWLR (Pt.1528) 100 at 117 paras. C-G Per Akaahs, JSC, held as follows:-

> **"English is the official language of the Court and it does not matter that the statement was said to have been recorded in pidgin English.**
>
> **The issue of fair hearing would have arisen if the appellant did not understand English at all and the statement had to be recorded in the language he speaks or understands and later translated into English. See Section 36 (6) of Constitution of the Federal Republic of Nigeria (as amended). I am not unaware of the decisions in Queen vs. Zakwakwa of Yoro (1960) 1 NSCC 8 reported as Zakwakwa vs. Queen (1960) SCNLR 36 and Nwali vs. State (1991) 3 NWLR (Pt.182) 663, the two cases stress the importance of getting the original statement and the translation and those who did the translations produced in court for purpose of comparison and testing the veracity of the translated versions. Thus in Queen vs. Zakwakwa of Yoro (supra) the conviction of the appellant was based on his statement recorded in Mumuye and later translated by different people into Hausa and English. His conviction was set aside because the person's who translated the statement from Mumuye to Hausa and from Hausa to English was/were not called to be cross-examined".** *(P…..Paras……..).*

15. *Effect where interpreter of statement was not called as a witness*
The situation reiterated by my learned brothers of this court in these current times has been an age long principle which has remained almost cast in iron and nothing has happened to have the position reversed and so I refer to the case of Queen vs. Zakwakwa of Yoro (1960) Vol.1 NSCC page 8 at page 9:-

> **"There is considerable doubt whether the statement of the appellant, which is the only direct evidence of his striking**

> **Zonvanya, was properly proved. The appellant made it in Mumuye. According to the evidence of L/Cpl. Umoru and L/ Cpl. Sabana Jalingo, it was L/Cpl. Umoru who translated from Mumuye to Hausa. The Hausa version was recorded by L/Cpl Sabana. According to the English version (Exhibit 3A) of the statement, however, which is certified as a correct translation by Cpl. Adeyi Ajumbi, it was P. C. Musa Sansidang who translated from Mumuye to Hausa, and Exhibit 3A purports to show that P. C. Musa signed below the Hausa version and above the signature of L/Cpl. Sabana (at that time a police constable) who recorded the Hausa version. It seems extremely unlikely that L/Cpl. Sabana would have allowed anyone except the actual interpreter to sign under the words "Interpreted by me". If it was P. C. Musa who did the interpretation, and not L/Cpl. Umoru, then since P. C. Musa was not called as a witness and subject to cross-examination, the Hausa version and the English version are hearsay.**
>
> **For these reasons, we yesterday allowed this appeal, set aside the conviction and discharged the appellant."**

Following in the heels of the stated principle above and showcased in those cases cited, clearly the Exhibit GA1 which the respondent holds up as a confessional statement is neither admissible on its own nor can be used as a proper confessional statement on which a conviction can be secured. The situation is considered so dire that it does not matter that no objection was raised to its being tendered and admitted as the court is obliged to reject it nonetheless in the interest of justice and where it has been admitted, it must be expunged from record. See Zubairu vs. State (2015) 16 NWLR (Pt.1486) 504 at 525; Onochie vs. Odogwu (2006) 2 SC (Pt.11) 153; Olayinka vs. State (2007) 9 NWLR (Pt.1040) 561 at 577-578. *(P……Paras……..).*

16. *Rationale for calling an interpreter of statement to give evidence during hearing*
For a fuller effect, my learned brother, Amina Augie JSC had set out an elaborate explanation of the position of the law on this matter which I cannot resist as it lays bare what the going position is. See Ifaramoye vs. State (2017) 8 NWLR (Pt.1568) 457 at 482- 484 thus:

> **"The appellant submitted that the respondent's argument negates a rule that a statement is inadmissible unless a person,**

> **who translated it, is called with the person, who wrote it down – Olalekan vs. state (supra) which is to forestall the admission of hearsay evidence and ensure that innocent accused persons are not convicted on a mere ipse dixit of ruthless policemen masquerading as the "Confessional statement" of an accused.** *(P.....Paras……).*

Per Odili (JSC)

"He argued that miscarriage of justice is not a test/ground for the admission of such statements in criminal trials; that once the document is wrongfully admitted in violation of established rules of evidence, a party is entitled rex debitio justitia to have it expunged, and the court can suo motu expunge the documents from evidence, Ogudo vs. State (2011) Vol. 202 LRCN 1, (2011) 18 NWLR (Pt. 1278) 1; Olayinka vs. State (2007) 9 NWLR (Pt. 1040) 561; and that the prosecution is duty-bound to abide by the rules of evidence in proving its case, and to this end, failure to call the recorder and translator of Exhibits B-B1 renders it inadmissible in evidence.

What does the law say? Whose argument would prevail? This is not a novel issue, and there are a number of authorities from those days of the West African Court of Appeal (WACA) to the present day of this court, from which we can find answers. There is Rex vs. Gidado (1940) 6 FSC 12, (1960) SCNLR 36; Nwaeze vs. State (1996) 2 NWLR (Pt.428) 1, and the case of FRN vs. Usman (supra), cited by the appellant, to name a few.

In Gidado's case (supra), the interpreter was not called, and in allowing the appeal, WACA very aptly held as follows:-

> **It seemed to us that this failure on the part of the trial judge to appreciate the inadmissibility in evidence of alleged statements by the appellant, when such statements were not confirmed and established by the persons acting as interpreters, was fatal to the conviction herein in that the learned trial judge misdirected himself in accepting such statements as having been proved".**

In Queen vs. Zakwakwa of Yoro (supra), the accused person had made his statement in Mumuye. Two police witnesses said it was L/Cpl. Umoru, who translated it into Hausa, but the said statement showed PC Musa as the interpreter into Hausa, and he was not called. The statement was the only direct evidence of the assault admitted by the appellant charged with murder. In allowing the appeal, the Federal Supreme Court held that if it was PC Musa, who did the interpretation and not Umaru, then since Musa was not called as a witness and subject to cross examination, the Hausa and the English version are

hearsay.

In Nwaeze vs. State (supra) the statement was tendered and admitted in evidence through the interpreter, who could not testify at the trial because he was sick. This court held at page 14 paras. C-D that:

> **"The court below was perfectly right in holding that the statement, Exhibit "A", was inadmissible as the interpreter of the statement made by the appellant from Igbo to English to the investigating Police officer who recorded it in English, was not called to testify on the point. The legal position is that if the statement of an accused is made in a language, other than English and it is interpreted into English by an interpreter to the recorder, the interpreter must be called to give evidence on the point at the trial of the accused otherwise the contents of the statement will be hearsay and the statement will be inadmissible".** *(P……Paras……).*

17. *Rationale for disallowing interpreted statement of accused where interpreter was not called as a witness*

In FRN vs. Usman (supra), the statements were recorded in English through two interpreters, who interpreted from Hausa to English and vice versa, but the two did not testify in court. The court below held that the conviction could not stand in the absence of their evidence and set aside the judgment of the trial court and then acquitted and discharged the respondents. In affirming that decision, this court Per Rhodes-Vivour, JSC, at page 159-160 paras. D-A explained the rationale behind it in explicit details, as follows:-

> **"I must do some explanation. The Police Officer detailed or directed to obtain a statement from the accused person may not understand the language spoken by the accused person, and so the service of an interpreter is needed. The interpreter acts as interpreter between the Police Officer and the accused person. The interpreter understands the language spoken by the accused person and the English language. He speaks to the accused person in the accused person's local dialect and tells the police officer in English exactly what the accused person said. The police officer records it in English and that is the statement of the accused person. Usually the statement is recorded in the local dialect with English translation and both documents are admissible in evidence as the statement of the accused person. Before these**

documents are admissible in evidence the police officer who recorded the statement and the interpreter must testify in court. This is vital testimony. In court, the interpreter is expected to tell the court the questions he asked the accused person on behalf of the Police officer and the response given by the accused person. It is only when this is properly done that it can be said that the truth of the statement has been established. The court would have no difficulty concluding that the statement is a correct reproduction of what the accused person told the interpreter. When the purpose for tendering a statement is to establish the truth of its contents, and the statement was obtained with the help of an interpreter, both the interpreter and the person who recorded the statement must give evidence in court. The statement is hearsay and in admissible if the interpreter does not testify in court ..... " See also FRN vs. Usman (2012) 8 NWLR (Pt.1301) 141. *(P……Paras…….).*

Per Odili (JSC)

"From the legal principle on what should obtain in respect to an extra-judicial statement of the accused and in this instance the appellant, procured in a language different from the language of the court and in evidence is even a conflict as to who obtained the said statement as PW1 claimed he did which the statement Exhibit GA1 which he tendered showed otherwise including divergent dates. Again, the interpreter and the proper recorder were not called to testify and be cross-examined nor the two different languages versions rendered, Hausa and English respectively, it follows that the Exhibit GA1 is not admissible but having been admitted albeit inadvertently has to be expunged and cannot be categorized as a confessional statement for the purpose of sustaining the conviction of the appellant as the trial court had done and the court below fell into the same error. See State vs. Azeez & Ors. (2008) 14 NWLR (Pt.1108) 439-483; Chukwu vs. The State (1996) 7 NWLR (Pt.463) 686 at 701; Ifaramoye vs. State (2017) 8 NWLR (Pt.1568) 457 at 484-485; FRN vs. Usman (supra) 160.

To tie up the situation, I would say that the erroneous findings of facts by the two courts below classified as concurrent findings of fact are clearly perverse and therefore call for the interference of this court as not doing so would lend the weight of this court to what has been a clear manifestation of a miscarriage of justice with the bounden duty of this court to disturb those findings and the conclusion that resulted therefrom.

See Ifaramoye vs. State (supra), Zubairu vs. State (super) 525; Alarape

vs. The State (2001) 5 NWLR (Pt.705) 79; Adekoya vs. The State (2013) All FWLR (Pt.662) 1632 at 1651 - 1652.

It is clear that the touted confessional statement, Exhibit GA1 having fallen short of what an admissible statement obtained in the circumstances it was done in this case, being inadmissible but having been admitted suffers an automatic expurgation and therefore of no moment or use for the purpose of discharging the onus of proof on the respondent and the question that would naturally arise is if there is any independent evidence on which the prosecuting respondent can hold onto bearing in mind the essential elements of the offence under Section 221 of the Penal Code and which three ingredients which are:-

a. That the victim died;
b. that the death of the deceased resulted from the act of the accused person; and
c. That the act of the accused was intended with knowledge that death or grievous bodily harm was the probable consequence.

It has to be reiterated that all three elements stated above must co-exist with none missing or tainted with some doubt or uncertainty in proof of the guilty of the accused. See Tunde Adava & Anor. vs. The State (2006) 9 NWLR (Pt.984) 152 at 167; Rabi Isma'il vs. The State (2011) LPELR - 9352 (SC) pages 18-19. *(P.....Paras……..).*

Per Odili (JSC)

"From the record, three witnesses were listed including one Benjamin James, stated as only eye witness at the scene of crime according to the evidence of PW1 but only PW1 testified. It is true that prosecution is not obliged to call all listed witnesses nor the need for a host of witnesses to get a conviction but where there is a particular vital witness whose evidence is very crucial and important to the case of the prosecution in proof of the guilt of the accused, then such a witness must be called as failure to do so would occasion a fatality in proof of the charge as it would produce the presumption of withholding evidence suggestive of the fact that if that evidence were produced it would work against the prosecution and favour the accused. See Section 167 (d) of the Evidence Act, 2011.

Stated another way is that the vital witness is that witness whose evidence is fundamental as it determines the case one way or the other and failure to call that vital witness by the prosecution is fatal to its case. See Ogudo vs. State (2011) 18 NWLR (Pt.1278) 1 at 31; State vs. Azeez (2008) 14 NWLR

(Pt.1108) 439 at 475; **Zubairu vs. State** (2015) 16 NWLR (Pt.1486) 504 at 525. *(P.....Paras…….).*

18. *Failure to tender recovered instruments amounts to withholding evidence*
Another point that is to be brought out is that PW1 in evidence stated that he recovered the weapon used in the crime that is the knife but curiously it was not tendered in court. This particular situation is on all fours in the matter considered by this court in the Umar vs. State (2014) LPELR- 224666 (SC) page 56 -59 Per I. T. Muhammad JSC wherein he stated thus:-

> **"As regards the PW2, Corporal Benjamin Dole, who was the investigating Police Officer (IPO), who in the discharge of his duty, obtained statements from the accused (now appellant), from the PW1, one Joseph Nnosiri the victim in whose the alleged robbery occurred and recovered a dagger, obtained from the accused (now appellant at the time of arrest, which was also identified as weapon used by the appellant to stab the PW1. The appellant counsel in their brief of argument filed on the 27/2/12 stated that at trial of the accused (appellant), the PW2 refused to tender the dagger in evidence, which was the alleged instrument used in proof of the commission of offence. By refusing or failing to tender the dagger in evidence, it meant that either it is not true that the dagger was indeed recovered from the appellant, or there is no dagger at all anywhere. In either case the presumption in law under Section 149 (d) of the Evidence Act 2004 is that the respondent withheld such evidence such that it if had been produced it would have been against the case of the respondent. Again, in the same vein the prosecution or state (now respondent) in this court refused or failed to tender in evidence the statement obtained from PW1 at the Panti Police Station on the 28th of May, 2006, and his earlier statement made at Ejigbo Police Station on the 11th of May, 2006. The learned counsel argued failing to put the statements in evidence had meant could go against respondent.**

The respondent in their brief of argument filed on the - 28th of March, 2012, did not take a reply to appellant on these facts". *(P……Paras……..).*

19. *Effect of failure of prosecution to tender document and weapons recovered during investigation*

My learned brother, I. T. Muhammad JSC may have had the case in hand in mind when he went on in the case of People of Umar vs. State (supra) when he stated in relation to the provisions of Section 149 (d) of the Evidence Act as follows:-

> **"In the instant appeal before this court, the failure or the refusal of the prosecution (respondent in this court) to tender both the statement of PW1 and the dagger alleged to have been recovered from the appellant meant if either was tendered in court it would either be adverse to it, or go against it. Again, this no doubt had an adverse effect on the 2 ingredients of the offence of robbery under Section 1 (2) of the Robbery and Firearm Special provisions Act Cap. R11 2004".**
>
> **I am in agreement with the court below in its decision to apply the provision of Section 149 (d) of the Evidence Act. Perhaps it was because of fear of contradiction or rather, negation of what was alleged that was why the statements of PW1 and that of the respondent and other corroborating evidence were withheld by the prosecution. It is to be noted that courts of law are paragons of justice. They rely on what is produced before them as evidence cannot be given in air. In the type of case on appeal, such evidence must be given through a person and Section 149 (d) of the Evidence Act can be accomplished by calling a particular object or document which if not tendered will be fatal to the prosecution's case. The objects alleged to have been recovered and the statements of both the PW1 and the respondent ought to have been tendered by the prosecution. They were not so tendered through the relevant witnesses who testified. This, certainly, devastated the quality of the oral evidence led before the trial court thereby laying no foundation upon which the learned trial judge would rely on to convict. I cannot but decide this issue against the appellant. This issue is captured by the appellant in his issue No.2 which corresponds to respondent's issue No.1".** *(P…..Paras……).*

20. *Failure to tender medical report amounts to withholding of evidence*
Another important aspect of this case is the absence of the medical report which the prosecution failed to produce and in such a situation this court had stated in Zubairu vs. State (2015) 16 NWLR (Pt.1486) 504 at 525-526 thus:-

> **"Another important omission in the chain of evidence led by the prosecution is the evidence of the deceased's medical record. There is evidence that he was taken, first to the Police Station and from there to the hospital. In fact, the proof of evidence has a list of exhibits in which item 2 is "Medical Report of Murtala Muhammed (the deceased)". The report was not tendered in court nor was the doctor who issued it and who must have attended to the deceased called to give evidence.**
>
> **Without the evidence of the police investigation, it is a matter of conjecture to say that the person who was taken to the police station from the scene of crime was also the person who was taken to the hospital and was the person who died thereat. Medical evidence, if tendered would have established the identity of the person who died, the date of death, the cause of death which is a medical question and the manner of death to be determined from the nature and location of injuries on the body of the deceased; that is the question whether the injuries the deceased died of could have been inflicted on him by another person or was self inflicted. These are issues the court cannot assume. Specifically what happened to the person taken to the police station before he was taken to the hospital is a matter for speculation.**

I will leave the matter here because a little digging may turn up a stone that does not belong in the soil. Suffice it to say that the evidence of police investigation as well as the evidence of what happened between the police station and the hospital, the Medical report showing the identity of the deceased and the date of death and the cause and manner of death are pieces of evidence available but were deliberately withheld by the prosecution.

> **It is safe to presume that the said pieces of available evidence were deliberately withheld by the prosecution because if produced, they would have had adverse effect on its case. See Section 167 (d) of the Evidence Act 2011 which provides that the court may**

presume that: "(d) evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it…" (Underlining for emphasis). *(P…..Paras..).*

Per Odili (JSC)

"The issue of these vital pieces of missing evidence and witness that would have created some linkage to the crime if produced is clearly a question that cannot go any other way than against the respondent and for which the intervention of this court is called for in the mistaken concurrent findings of facts and conclusion by the two courts below.

In respect of the alibi raised in defence by the appellant again, the PW1 chose not to believe him and did not bother to investigate in spite of the timeous putting across of the alibi and the details proffered. What transpired in this regard is that the appellant fulfilled his duty not only to say he was not at the scene of crime at the relevant period but gave particulars of where he was and with whom thereby discharging his responsibility and placing the ball in the court of the prosecution who now had the bounden duty to investigate to confirm the appellant's assertion or debunk same. Of course it is to be said that failure of the prosecution to investigate the alibi would have serious consequences which may be fatal unless the prosecution can adduce strong evidence pinning the appellant to the scene in which case the alibi would be said to have been demolished. That I dare say is not the case here as there really has been nothing connecting the appellant to the crime and so the natural consequences of fatality of the case of the prosecution in the absence of the alibi being investigated. See Akindipe vs. State (2016) 15 NWLR (Pt.1536) 470 at 502; Idemudia vs. State (2015) 17 NWLR (Pt.1488) 375 at 396; State vs. Azeez &. 2 Ors. (2008) 14 NWLR (Pt.1108) 439 at 465; Onuchukwu vs. State (2016) 8 NWLR (Pt.1515) 459 at 479; Augustine Onuchukwu &. 2 Ors vs. The State (1998) 4 NWLR (Pt.547) 576. *(P……Paras……).*

21. *Failure to investigate alibi raised by accused is fatal to the case of prosecution*

Clearly the findings of fact on this issue of the defence of alibi which the appellant raised and which the courts below ignored are perverse and I do not hesitate in disturbing those findings as the prosecution failing to investigate the alibi raised by the appellant, at the earliest opportunity and with full particulars is fatal to prosecution's case since there is nothing with which in that failure upon which the prosecution can fix the appellant at the scene of crime and at the material time. *(P……Paras……..).*

22. *Ways by which prosecution may prove the guilt of accused*

It is long settled that the prosecution on whose shoulders the burden of proving' the charge against an accused beyond reasonable doubt may do so in any of or a combination of the three ways, to wit:-

(i) By direct evidence from witnesses to the commission of the crime by the accused;

(ii) The direct, positive and unequivocal voluntary confessional statement of the accused satisfactorily established as having been made by the accused;

(iii) Circumstantial evidence which points to the accused alone as being the perpetrator of the offence. See Emeka vs. State (2001) 14 NWLR (Pt. 734) 666 at 683 and Julius Abirifon vs. The State (2013) LPELR - 20807 (SC).

In the case at hand the respondent relied on DW1 alone, the recorder of appellant's supposed confessional statement, exhibit GA1, through whom the exhibit was tendered and admitted without objection. It is evident from the record that whereas the trial court relied on exhibit GA as being the confessional statement as to convict the appellant, the lower court, on the other hand, purports to rely on exhibit GA1 as appellant's confession in affirming the trial court's decision.

The pertinent question that has no answer here is which of the two, exhibit GA and GA1, is the confessional statement of the appellant. Respondent's admission that appellant's confessional statement had not been transmitted to the lower court is certainly most devastating to its cause. It, throws away respondent's entire case. In the first place, the trial court is without jurisdiction of convicting the appellant on exhibit GA which, manifestly, was never the statement recorded by DWI from the appellant. Similarly, the lower court is devoid of the jurisdiction of affirming a conviction by its reliance on a process totally different from the one appellant's conviction hinges and which document is neither before the court nor part of the record of appeal.

Having relied on such a non existing process, appellant's supposed confessional statement, respondent cannot be said to have proved its case against the appellant beyond reasonable doubt at the trial court which convicting of the appellant the lower court, in turn, can affirmed.

It is for the foregoing and the fuller reasons outlined in the lead judgment that the perverse concurrent findings of the two lower courts are hereby interfered with and set-aside. Bashaya vs. State (1998) LPELR-755 (SC)

and Adio & Anor vs. The State (1986) 2 NWLR (Pt. 24) 581 at 589. *(P……Paras……).*

Lead Judgement: OLATOKUNBO KEKERE-EKUN, (JSC)

Representations

L. O. FAGBEMI (ESQ.) for the appellant.

Y.N; AKIRIKWEN (ESQ.), HON. A. G. TARABA STATE for the respondent with HAMIDU AUDU (ESQ.) CD. PP Ministry of Justice Taraba State), C. R. SHAKI ESQ (SC1) and E.T ANDERIFUN ESQ (SC1).

IMO AKPAN BASSY
VS
THE STATE

SC.900/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY, 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

APPEAL: Concurrent findings – Where not perverse – Attitude of Supreme Court thereto.

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

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Admissibility thereof –When to raise objection thereto – Whether at the point when statement is sort to be tendered.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Duty on Court thereto –Whether to determine if the circumstances made it probable that his confession was infact true.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Duty on Court thereto – Whether court to apply six tests on confessional statement.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Objection thereto –Whether the voluntariness of a confessional statement is tested at the point of tendering – The principles in ***Oseni vs. The State (2012) Vol. 208 LRCN 151 at 183****.*

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Probability and validity of – Where court has applied the six tests to determine the validity and probability of a confessional statement – Whether the confessional statement can be relied upon.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where tendered without objection – Whether court can convict on it alone – The principle in ***Egharevba vs. The State (2016) Vol. 258 LRCN 187****.*

CRIMINAL LAW AND PROCEDURE: Conviction – It is the quality of evidence and not the number of witnesses which is relevant in securing conviction –Whether the evidence of one witness which is cogent and compelling will sustain conviction.

CRIMINAL LAW AND PROCEDURE: Intention to kill – Where appellant threw a deceased persons into a river – Whether the appellant has the intention to kill.

CRIMINAL LAW AND PROCEDURE: Murder – Elements thereof –What prosecution must prove.

CRIMINAL LAW AND PROCEDURE: proof – Burden of proof in criminal cases – S. 135 Evidence Act, 2011 –Whether prosecution has the onus to prove criminal cases beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof – Modes of proving criminal cases – Whether the law recognizes three modes of proving criminal cases.

CRIMINAL LAW AND PROCEDURE: Proof of Criminal Cases – Modes thereof – Relevant Considerations.

EVIDENCE: Confessional statement – Admissibility thereof – Relevant conditions thereto.

EVIDENCE: Confessional Statement – Nature required to sustain conviction – Whether must be free, direct, positive and unequivocal.

EVIDENCE: Confessional Statement – Where voluntarily made –Whether it is the best evidence.

EVIDENCE: Presumption – The Doctrine of "Last Seen" – Purport.

Issue for Determination

"Whether the Court of Appeal was right in affirming the conviction of the appellant for murder having regard to the evidence before the court." (Distilled from Grounds 1 - 7 of the notice of appeal)

Facts of the Matter

This is a criminal appeal against the judgment of the Calabar division of the Court of Appeal ("the lower or court below" for short) delivered on 26th day of April, 2016 which affirmed the decision of the Akwa-Ibom State High Court, Uyo judicial division (Coram Imeh E. Umanah J) of 30th day of June, 2011 in Suit *No.HU/21C/2007* wherein the accused person now appellant, was convicted of the offence of murder and sentenced to death. The offence with which the accused/appellant was charged and tried was that of murder, contrary to Section 323 (1) of Criminal Code, Cap 38 Vol. II, Laws of Akwa-Ibom State.

The facts of the case leading to this appeal as could be are briefly put thus:-

The case of the prosecution is that one Emem Effiong Etuk (an estranged wife of the accused (complainant) travelled to pay a visit to the accused person/ appellant who was keeping custody of her two children, namely Philip Imon Akpan and Magdalene Imoh Akpan at Udem Ebom, after she was informed that the accused/appellant had relocated to Mbiabong (the last known address of the accused) to the said Ndom Ebom. It was also the case of the prosecution that the complainant did not meet the two children and when she asked of their whereabouts the appellant could not give reasonable or satisfactory explanation. Sequel to that, the complainant reported a case of child stealing at Ifia-gon Police station and the accused/appellant was thereupon arrested. The appellant initially informed the police that he sold the two children to one "Alhaji" at the cost of #100,000=. The case was later transferred to the State CID where the accused person thereupon volunteered two statements, dated 16/12/2007 and 17/1/2007 both of which were tendered at the trial and admitted as Exhibits A and B respectively.

In Exhibit A, the appellant stated that he sold the two children, but further investigation revealed that he actually killed the two children to which he later confessed in Exhibit B. Both of them were aged three years at the time of their untimely death. Investigation further revealed that the appellant threw them into the river leading to the High Sea at Orono.

During the trial, the appellant as accused person, testified for his defence, wherein he stated that the cause of their death was due to accident which occurred while travelling by water with the two children in a boat. At the end of the trial the trial judge found the appellant guilty of murder and sentence him to death.

Dissatisfied with his conviction and sentence to death by the trial court, the appellant unsuccessfully lodged an appeal at the lower court below.

Held: *(Unanimously dismissing the appeal)*

1. *Prosecution has the burden to prove criminal cases beyond reasonable doubt*
The law is trite, that in all criminal cases in common law countries like Nigeria which operates from time immemorial, common law jurisprudence, the burden of proof is always on the prosecution. This notion is entrenched in Section 135 of the Evidence Act which further put the standard of such proof to be beyond reasonable doubt. See Ogundiyan vs. The State (1991)3 NWLR (pt.181)519 or (1991)4 SCNJ 44 or (1991)3 SC 100. It needs to be emphasised however, that the burden of proof always remains on the prosecution, except of course, in few limited circumstances such as in the defence of insanity in which the law presumes an accused person to be sane and therefore it casts the burden of establishing the contrary on the accused. See The State vs. Idapu Emine & Ors (1992) NWLR (Pt.256)658 or (1992) LPELR - 3218 (SC). *(P…….Paras……..).*

2. *Modes of proving criminal cases*
The law recognises three ways of proving criminal offences namely:-

- **(a) Through confessional statement of the accused person; or**
- **(b) By direct eye witness account of the commission of the offence charged, or**
- **(c) through circumstantial evidence.**

See Akpa vs. State (2008)39 WRN 27; (2008)14 NWLR (pt.1106)72; Bassey vs. State (2012)12 NWLR (pt.1314)209; Haruna vs. AG Fed (2012)9 NWLR (Pt.1306) 419. *(P…….Paras……..).*

3. *Ingredients of murder*
The law is well settled that in murder cases, (as in this instant case) the prosecution, in order to obtain conviction must prove the under mentioned ingredients of the offence of murder, beyond reasonable doubt. They include the following:-

- **(1) That the deceased died**
- **(2) That the death of the deceased was caused by the act(s) or omission of the accused person/appellant.**
- **(3) That the act or omission of the accused/appellant was intentional or with knowledge that death or bodily harm was its probable consequence.**

See Okin Nsibehe Edoho vs. The State (2010) 14 NWLR (Pt. 1214) 65 1; Audu vs. State (2003) 7 NWLR (Pt. 820) 516; R. vs. Nwokocha (1949) 12 WACA 453; R vs. Owe (1961) 2 SCNLR 354; State vs. Omoni (1969) 2 All NLR 766. *(P……..Paras……….).*

4. *The issue of death was proved*
When being cross examined, DW1 (appellant) stated that the children died in 1991. The court also, found that those pieces of evidence were neither contradicted nor challenged.

The appellant, as per his confessional statement Exhibit B also admitted that he threw his two deceased children into the river. It should be noted that the said confessional statement Exhibit B was voluntarily made by the accused/appellant and admitted in evidence without any objection. To my mind therefore, the first element of whether death had been established, had been adequately proved through those pieces of evidence highlighted above. *(P…..Paras……).*

5. *Nature of confessional statement required to convict accused*
As I stated earlier, one of the three methods of proving criminal offence is through confessional statement. The law is trite however that such confessional statement in order to be relied on to convict an accused must be voluntarily made and must also be free, direct, positive and unequivocal and if satisfactorily proved. *(P…..Paras……).*

6. *Court to determined the probability of a confessional statement*
The law however made it desirable for the trial court to look for some independent evidence outside the confession no matter how slight in order to determine if the circumstances made it probable that his confession was in fact true. See Haruna vs. AG Federation (2012)3 SC (Pt. IIV) 40; Ashiwe vs. The State (1983)5 SC Reprint); Alarape vs. State (2001)2 SC 114; Galadima vs. The State (2012)12 SC (Pt.II) 213; Osuagwu vs. The State (2003)1-2 SC (Pt.1)37. *(P……..Paras…).*

7. *Test which determined the validity and probability of a confessional statement*
However, in multiplicity of judicial authorities of this court, it has been decided that before relying solely on confessional statement to convict an accused or in the process of evaluation of same, trial courts are desired to subject the confessional statement to the following six tests; namely:

(a) Is there anything outside the confession to show that it is true?

(b) Is it corroborated
(c) Are the relevant statements made on it in fact true as they can be tested?
(d) Was the accused one who had the opportunity of committing the offence?
(e) Is the confession possible; and
(f) Is it consistent with the other facts which have been ascertained and have been proved?
(P……..Paras……..).

8. *Effect where court applied six tests to determine the validity and probability of a confessional statement*
Once a confessional statement is subjected to these six tests, this court has held that same can be safely relied upon to ground a conviction. See Musa vs. State (2013)2-3 SC (Pt. II)75 at 94; Nwachukwu vs. The State (2007)7 SCM (pt.2)447 at 455; Ikpo vs. State (1995)9 NWLR (Pt.421)540 @ 554. From the judgment of the trial court, it is clear that the trial court applied the above tests before it relied and acted on Exhibit B, especially considering the fact that the appellant stated how the two children died when he threw them into the river in Uyo Oron sometimes in 2005 and that he did so as a result of his poor condition that he had no money to feed them and that his parents died and he had no other supporters. On the second ingredient of murder, I am also fully convinced that the two children died as a result of the dastardly act of the appellant simply on the flimsy excuse of alleged impecuniosity or poverty. The second ingredient of the offence of murder has also been established. I am also convinced that the act of the accused/appellant was intentional. He committed the offence without any provocation or physical attack before throwing the two 3years old twins into the river. Surely, by his act, the appellant knew or had reason to believe that death was going to be the resultant effect of his cruel act. *(P……Paras……..).*

9. *The purport of the doctrine of "last seen"*
Again in this present case, the 'Doctrine of Last Seen' is also apposite and applicable. The doctrine means that a person last seen with a deceased bears full responsibility of his death. In short, where an accused person was the last to be seen in the company of the deceased and circumstantial evidence overwhelmingly leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give proper explanation as to how the deceased died. See Haruna vs. AG Federation (supra). In the absence of sufficient explanation, the trial court in this case was right in drawing the inference that it was the appellant that killed his two children. See Igabele vs. State (2006)6 NWLR

(pt.975)100; Sabina Chikaodi vs. The State (2012) LPELR - 7867 SC; Obosi vs. State (1955) NMLR 140. From the facts and circumstances of this case the two deceased children were throughout their lives in custody of their father, the accused/appellant herein and he confessed throwing them into the river. There is therefore the presumption that he was the one who murdered them since he failed to rebut such presumption. He is therefore culpable as he had advanced no evidence to exculpate himself from guilt. The circumstantial evidence is overwhelming and points to no one else but the accused/appellant. See Rabi Ismail vs. The State (2011)LPELR 93S2(SC). Thus, in the light of all that I have posited above, I am fully convinced that all the three ingredients of the evidence of murder have been established beyond reasonable doubt against the appellant, as would justify the trial court to convict the accused as charged. The lower court was also correct in affirming the conviction and sentence made/done by the trial court in this instant appeal. I therefore have no hesitation in resolving the lone issue in favour of the respondent against the appellant. *(P.....Paras.....).*

10. *Attitude of Supreme Court to Concurrent findings*
It is noted by me, that there are in this instant case concurrent findings of two lower courts. As a matter of practice, this court is always hesitant to interfere with or disturb the concurrent findings of two lower courts except, of course, where such findings are perverse or misapplication or misconception of law is prevalent. There does not appear to be any of such defects in this instant appeal as would warrant my interference with such findings. I therefore decline to tamper with or disturb the decision of the two lower courts. *(P.....Paras.....).*

11. *Essential elements of murder*
It is now beyond per adventure and trite in law that in a charge of murder such as the one under consideration, the prosecution is required to prove the essential elements of the offence beyond reasonable doubt which are thus:-

- **a) That the death of a human being has taken place or that the deceased had died;**
- **b) That the death of the deceased was caused by he accused person;**
- **c) That the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.** *(P.....Paras.....).*

12. *Modes of proving criminal offences*
In establishing those basic ingredients above stated the methods or any of which or all the methods may be deployed in proof thereof and these are, confessional statement of the accused person, circumstantial evidence and evidence of an eyewitness. See Oketaolegun vs. The State (2015) Vol. 247 LRCN 1 at 41; Akinlolu vs. The State (2016) Vol.251 LRCN 1 at 40; Njoku vs. The State (2013) 2 NWLR (Pt.1339) 548 at 577; Okanlawon vs. The State (2015) Vol. 248 LRCN 1 at 45; Alufohai vs. The State (2015) 3 NWLR (Pt.1445) 172. *(P.....Paras.....).*

13. *It is the quality of evidence and not the number of witnesses that sustain criminal prosecution*
Again, to be said is that it is no longer a matter for debate in respect of the credibility of the evidence for the purpose of securing a conviction of an accused person which depends not on the number of witnesses that testify on the point but where only one witness credible to such an extent that it is accepted and believed by the trial court would be sufficient to justify a conviction. In other words what is important is not the number of witnesses but the quality of evidence proffered even if from only one witness, cogent and compelling that would suffice. See Oketaolegun vs. The state (supra); Nwaeze vs. State (1996) 2 NWLR (Pt. 428)1.

In respect to the number one of the essential elements in a charge of murder which is that the deceased had died. In this both the prosecution through the evidence of PW1 and the defence with the testimony of the appellant himself confirmed the death of the deceased children. In fact from the record, the appellant as DW1 stated as follows:-

> **"I know Philp Imoh Akpan. I know them as my children, They are all dead".**

Under cross-examination the appellant had responded that they died in 1991.

Nothing was presented in contradiction to those facts which remained uncontroverted and so the findings of the two courts below rendering futile any attempt to disturb the concurrent findings in that regard. See Egharevba vs. The State (2016) Vol. LRCN 187 at 205; Akinlolu vs. The State (supra) **Ikpo vs. The State** (2016) Vol. 260 LRCN 77 at 110. *(P.....Paras.....).*

Per Odili (JSC)
"The appellant had viewed the trial court's use of Exhibit B and the jettisoning of Exhibit A as a picking and choosing of which evidence in a contradictory scenario to use. The position asserted by the appellant's learned counsel is not as

cut and dried as he would want to be accepted as the appellant himself had cleared what would have been an inconsistent situation, one statement to the other by explaining why the earlier information of selling the children to the Alhaji as against the latter of throwing them into the river. What the appellant in effect had done was to urge for a rejection of Exhibit A and for the court to take Exhibit B as his positive, direct and unequivocal confession representing what really transpired. Of note is that the Exhibit B was admitted in the presence of learned counsel for the appellant without objection and the voluntariness of the statement not in doubt. In reiteration, once a confessional statement is in such good stead having been tendered and admitted without objection the court can rely on it and go further to utilise solo, placing a conviction on it without the need for corroboration from an independent price of evidence and this not withstanding a retraction of the statement by the accused/appellant.

Stated differently, once the court is satisfied with the truth of the confession as in the case at hand the court can safely convict on it without corroborative evidence as a confession being the best evidence as it is an admission against self by the accused. See Isah vs. Kano State (2016) Vol. 260 LRCN 118 at 142; Egharevba vs. The State (2016) Vol. 258 LRCN 187 at 213; Onyenye vs. The State (2012) Vol. 212 LRCN 107.

The effect of the foregoing is that the second ingredient of the offence has been established, that is that the death was caused by the act of the appellant.*(P……Paras……..).*

14. *Appellant intended to kill the deceased*

The situation in this regard is not farfetched in that a person throwing two children who are tender aged at three years into the river, the clear intendment is the death and nothing less for the victims. Nothing else can be factored as the possible consequence of the act of the appellant casting his two children into the river which flows into the being sea than the death of the said two children of tender age. Even from his admission in his confessional statement can be deduced that death by drowning was the expected outcome of his act as he stated that it would be a waste of time for the police to seek to see or find the children because of the passage of time and water must have carried them away. The third element is in place and with it the completion of the establishment beyond reasonable doubt of the three essential elements of the offence of murder. *(P……Paras……..).*

15. *When to raise objection to the admissibility of confessional statement*

The appellant's counsel had raised the point of the objection to the admissibility of the statement not having been raised late in the day at the defence stage, in this I would go along with learned counsel for the respondent that the appellant

left the matter too late in the day. This is already an over flogged and now well rested issue that the voluntariness and the objection thereto on an extra judicial statement must come at the time of the tendering of the statement as thereafter becomes too late for the objection on voluntariness to be addressed and if the concern now brought up so late is a resiling of the statement i.e. that the appellant had not made the statement, the admissibility is not affected rather what would be in consideration is the weight to be attached to the statement which would be admitted. *(P……Paras……..).*

16. *The voluntariness of a statement is tested when the statement is sort to be tendered*
See Oseni vs. The State (2012) Vol.208 LRCN 151 at 183 and 184 A. The court in considering the principle on admissibility of extra-judicial statement or confession of an accused person held inter alla;

> **"Another principle of the criminal law which has been consistently repeated in our law report is: at what time does an accused person object to the admissibility of a statement credited to him as a confession? This court in its several decisions answered the question in the following words: the question of the voluntariness of a confessional statement is tested at the time the statement is sought to be tendered in evidence. In the instant case, the confessional statement were tendered (sic) without any objection from the defence. None of the prosecution witnesses were cross-examined as to their involuntariness. It was until the prosecution had closed its case and the appellants were testifying in their own defence in the witness box that the issue was belatedly raised. The trial judge was right to dismiss this aspect of the defence case as an afterthought having regard to the qualitative evidence tendered by the prosecution and accepted by the trial court on the subject".** *(P……Paras……..).*

17. *Court may rely on confessional statement alone to convict*
Also my lords, in the case of Egharevba vs. The State (supra) at page 213 AF, this court reiterated the above principle when it held inter alia as follows:

> **"Once a confessional statement is tendered and admitted without objection by the defence, it is good evidence and can be relied upon. The court can even utilize it alone, place a conviction**

without corroboration even if alone, place a conviction without corroboration even if the appellant had retraced the making thereof".

At the defence stage where the circumstances surrounding the making of the statement of the appellant is being raised is too late and would not affect the admissibility of the confessional statement Exhibit B. See Igri vs. State (2012) 6-7 NJSC (Pt.111) page 107 at 113-114; Ayinde vs. The State (1972) 3 SC 153 at 158-159, Nwokoronkwo vs. The State (1972) 1 SC 135; Archibong vs. The State (2006) 5 SC (Pt.111) 1; Princewill vs. State (1994) 6 NWLR (Pt.353) 703.

The conclusion as I see the situation is that the concurrent findings of the two courts below cannot be faulted in any way by this court and nothing on which this court can effect a disturbance

or interference with those findings and the only option is to leave them as they are and affirm the decision. *(P……Paras……..).*

18. *Confessional statement voluntarily made is the best evidence*

The appellant himself had volunteered his statement in Exhibits A and B wherein he owns up to the killing his two children by drowing them in the river at Orono. The law does not prohibit convicting the appellant on Exhibits A and B, his voluntary confessional statement, the two courts found to be direct, positive and unequivocal. Indeed the principle is that such confessional statements voluntarily established to have been so made constitute the best evidence against the appellant to be relied upon by the two courts. See Tirimisiyu Adebayo vs. The State (2014) LPELR - 22988 (SC) and Tajudeen Fabiyi vs. State (2015) LPELR -24834 (SC).

I am unable to agree with learned appellant's counsel that notwithstanding the direct and unequivocal confessional statements of the appellant further evidence outside the statements is necessary to sustain appellant's conviction. *(P……Paras……..).*

19. *When a confessional statement is admissible*

The law is that a confessional statement is relevant and admissible in evidence if it is positive and direct and constitutes one or all the elements of the offence charged and if the court is satisfied that is was voluntarily made. See: Ikpo vs. The State (2010) 2-3 SC (Pt.111) 88; Nwaebonyi vs. The State (1994) 23/24 LRCN 163; Yesufu vs. The State (1976) 6 SC 163. Exhibit B was admitted in evidence without objection.

The confessional statement, Exhibit B, is a clear and unequivocal admission that the appellant murdered his twin children by throwing them in

the river. It was sufficient to sustain the conviction.

Nevertheless, it was subjected to the six-way test enunciated in the case of R vs. Sykes (1913) 8 Cr. App. Rep. 233 and found to be true. A significant factor is that the appellant himself testified that the twins were dead and there was evidence before the court that the children had not been seen since 1991. *(P……Paras……..).*

20. *The application of the doctrine of "last seen*

As stated in the lead judgment, the doctrine of "last seen" also applies in this case. It was held by this court in Haruna vs. A.G. Federation (2012) 9 NWLR (Pt.1306) 419, that the doctrine of "last seen" means that the law presumes that the person last seen with the deceased bears full responsibility for his death. It will apply where the circumstantial evidence is overwhelming and leads to no other conclusion than that the accused killed the deceased. It is also the law that in such circumstances, it is the duty of the appellant to give an explanation as to how the deceased met his death. Where no such explanation is forthcoming, the court is entitled to draw the inference that the accused person killed the deceased. See also: Igabele vs. The State (2006) 6 NWLR (Pt. 975) 100; Onitilo vs. The State (2017) 6-7 SC (Pt. 111). The appellant confessed that he threw the children into the river and also admitted in Exhibit B that he lied when he earlier told the Police he sold them to one Alhaji. *(P……Paras……..).*

21. *Concurrent findings are not perverse*

In the instant case there are concurrent findings of fact by the two lower courts, which will not be disturbed unless they are shown to be perverse on the ground that the findings are not supported by the evidence on record or that there has been an error of law or procedure that has resulted in a miscarriage of justice. See: Omotola vs. The State (2009) 7 NWLR (Pt. 1139) 148; Iyaro vs. The State (1988) 1 NWLR (Pt. 69) 256; Onitilo vs. The State (supra).

The appellant has not shown that any of these special circumstances exist to warrant interference by this court. I therefore join my learned brother in dismissing this appeal for lack of merit. The judgment of the lower court is affirmed. *(P……Paras……..).*

Lead Judgement: AMIRU SANUSI, (JSC)

Representations

C. A Wogu for the appellant

Uwemedimo Nwoko, (AG Akwa-Ibom State) with him Joseph Umoren (DPP. Akwa-Ibom State) Godwin Udom (PSC) and Maria Akpan (SSC) for the respondent.

1. MRS. AISHA ABDURAHMAN
2. SARWIYAT ABDURAHMAN
VS
MRS. SHADE THOMAS

SC. 383/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 22ND FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
KUMA BAYANG AKAAHS	**JUSTICE SUPREME COURT**
EJEMBI EKO	**JUSTICE SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE SUPREME COURT**

APPEAL: Concurrent findings- Attitude of Supreme Court thereto – Principles thereof.

APPEAL: Leave to appeal – Where grounds are of facts – Whether leave of Court is required to file the appeal – S.233(2) of CFRN 1999 (as amended) considered.

CONTRACT: Rescission thereof – How determined – Whether there must be an entirely new agreement inconsistent with the old.

CONTRACT: Rescission thereof – Where there is no new agreement that rescinded the terms of original agreement – Whether rescission of original agreement cannot be said to have occurred.

EVIDENCE: Cross-examination – Where evidence extracted during cross-examination was based on pleadings and contradictions thereof resolved during re-examination – Whether admission of evidence has not occasioned miscarriage of justice.

EVIDENCE: Relevancy –Where a facts is inconsistent with fact in issue – S. 9(a) of Evidence

Act 2011- Whether such a facts is relevant and admissible.

LANDLORD AND TENANT: Nature of relationship – Whether the relationship between landlord and tenant is contractual.

LANDLORD AND TENANT: Tenancy Agreement – Rescission thereof – Where tenant unilaterally returns keys of the premises to the Landlord –Whether the mere fact of the tenant returning keys to the landlord does not translate to his rescission of the tenancy agreement.

LANDLORD AND TENANT: Unilaterally surrender of premises – Where tenant unilaterally surrenders premises to landlord before expiration of tenancy - Whether there will be no refund of the entire rent but rather rent in respect of the unexpired term.

PRACTICE AND PROCEDURE: Appeal – Where a finding by a trial court is not challenge on appeal – Whether such finding cannot be disturbed by an appellate court.

Issues for Determination:

1. **Whether the tenancy agreement, Exhibit D1, had been rescinded or merely varied;**
2. **Whether the trial court was right in relying on DW1's evidence that the property in question was let out only in November, 2005 (when the fact on which the evidence was premised was not pleaded; and**
3. **Whether upon proper evaluation of the totality of the evidence the trial court ought to have concluded that the parties had agreed to rescission of the original agreement (Exhibit D1) and accordingly entered into fresh terms where it was (explicitly or impliedly) agreed that 1st claimant would be fully reimbursed for the utilized portion of the term granted.**

Facts of the Matter

The appellants were the claimants at the High Court of Lagos State. They initiated their suit by way of Writ of summons specially endorsed with statement of claim. There existed between them, on one hand, and the respondent a tenancy arrangement whereby the appellants agreed to take lease of the respondent's property situate at No. 51B, Bishop Oluwole Street, Victoria Island, Lagos, for two years at agreed annual rent of N2,000,000.00 and the rents for the two years (N4,000,000.00) payable in advance. The agreed rental period was 1st April 2004 to 31st March, 2006. The applicant paid the two years in advance. The 1st appellant was to be the tenant in possession. In February, 2004, the 1st appellant took

possession.

The 1st appellant was subsequently appointed as Executive Director of Petroleum and Pipeline Management Company (PPMC), by which appointment she was entitled to official accommodation provided by the PPMC. She was infact given accommodation elsewhere in Victoria Island.

In July, 2004 the 1st appellant formally notified the respondent that by her appointment, as Executive Director of PPMC which entitled her to an alternative accommodation she would be unable to move into respondent's No. 51B, Bishop Oluwole Street, Victoria Island. She requested for the refund of the two years' rents she paid. The respondent's solicitors, vide their letter dated 11th April, 2004, Exhibit D1, acknowledged 1st appellant's letter and the right of the appellants to the refund of the rents for the unutilized term until 31st March, 2006. The appellants, as admitted by CW.1 at the trial court at page 135 of the record, were in possession for 5 months as at July, 2004 they surrendered the keys. The respondent's offer to refund N560,000.00 part of the N4,000,000.00 rents paid after a new tenant took lease of the property was not acceptable to the appellants.

The property at 51B, Bishop Oluwole Street, Victoria Island, remained unlet, according to the DW1's statement on oath verifying paragraphs 8 and 9 of the statement of defence, until February, 2006. Upon the respondent's insistence that the appellants were not entitled to more than the N560,000.00 she offered, the appellants took out the writ of summons claiming:

1. **The sum of N4,000,000.00 (Four Million Naira) being the money admitted owed the claimants by the defendant.**
2. **Interest on the sum of N4,000,000.00 (Four Million Naira) at the rate of 25% from 1st April, 2004 till judgment or sooner payment and 10% after judgment until final liquidation.**
3. **Solicitors' fees being the sum of N500,000.00 (Five Hundred Thousand Naira).**

At the trial court the appellants posited on rescission of the tenancy agreement by the parties thereto. The trial court, believing the evidence of DW1, dismissed the appellants' contention that the parties mutually rescinded the tenancy agreement. It found, on the other hand, "that there was only a variation of the agreement which is subsisting" between the parties herein who were also parties to the tenancy agreement.

On the above findings of fact the trial court came to the final judgment, on the facts that the claimants, herein the appellants, "failed to prove (on the) balance of probability that they are entitled to more than the sum of N560,000.00 which (was) – earlier paid by the defendant" (respondent) to them "as refund in respect of the demised property. Aggrieved by the final judgment the appellants appealed on three grounds of appeal to the lower court.

Okoro, JCA (as he then was), whose judgment was unanimously concurred by the other two justices, resolved both issues against the appellants, hence this further appeal.

Held: *(Unanimously dismissing the appeal)*

1. *Appeal requires leave*

I entertain serious doubts about the competence of this appeal, brought majorly on issues of fact as of right. These two issues of fact require leave first sought and granted either by the lower court or this court, pursuant to Section 233(2) of the constitution, before this appeal can be said to be competent. The sooner this court stamped its feet on this specie of abuse of court process which has thereby congested it, the better for all concerned and the administration of justice generally.

2. *Principles relating to concurrent findings by Supreme Court.*

This further appeal challenges the concurrent findings of fact by the trial court and the Court of Appeal (the lower court). Over the years since the Privy council was the final court certain principles had been evolved on how the apex court would deal with appeals against concurrent findings of fact.

They are:

1. **Concurrent findings on facts by the courts below <u>prima facie</u> entitle the respondent to a dismissal of the appeal: Adansi vs. Brenase PC No. 23 of 1953; Williams vs. Johnson (1937) 2 WACA 253.**
2. **Concurrent findings of fact will not be disturbed unless there are special circumstances warranting the departure from the general rule; Ebu vs. Ababio PC No. 8 of 1953; Ometa vs. Numa (1934) 11 NLR 18; Dawodu vs. Danmole (1962) 1 All NLR 695.**
3. **The apex court will decline to review the evidence for the third time unless there are special circumstances which would justify a departure from that practice: Nanka-Bruce vs. Gbeke PC No. 56 of 1948.**
4. **There is a presumption that the decision of a judge on the facts is right and that presumption must be displaced by the person seeking to upset the judgment on the facts: Williams vs. Johnson (supra).**

3. *Facts which are inconsistent with any fact in issue is relevant*

I agree with the lower court that the respondent, from the foregoing, "offered sufficient explanation to cure any ambiguity arising from the facts elicited during cross-examination". The rule in Boy Muka & Ors vs. The State (1976) 9-10 SC 305; Onubogu & Anor vs. The State (1974) LPELR-2700 (SC): that where

a witness is inconsistent in his evidence, without explanation the court will not pick and choose which piece of his evidence to believe or disbelieve, will only apply if the DW1 did not utilize the opportunity to explain the seeming ambiguity over whether it was in November, 2005 or February, 2006 that the property was re-let to the new tenant. From the explanation the two courts below were not left to speculate on that point. Evidience either elicited under cross-examination that tends to be admission against interest viz-a-viz pleaded facts, or that explains an ambiguity created by pleaded facts or evidence already given by the witness, is related to the facts in issue. It is therefore relevant and admissible in evidence. Section 9(a) of the evidence act, 2011 providing that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant, is elastic enough to make the admission by the DW1 that the property was let out in November 2005," seemingly, contrary to the averment in paragraph 8 of the statement of defence that "the said property – until sometime in February, 2006 remained unlet and vacant despite efforts" a relevant fact admissible in evidence. In the circumstance, Woluchem vs. Gudi (1981) NSCC 214, cited by the appellants in support of their contention that evidence of matters not pleaded goes to no issue, is not relevant.

The appellants did not challenge or in any way dispute the finding of the lower court that the DW1, "when she stated that she was paid with effect from November, 2005, was actually being fair to the appellants in order to refund part of their rent to them". The truth and equity of that finding of fact lie in the fact, in the words of the appellants themselves –

The tenancy was commenced on 26th February, 2004 and would lapse on the 24th February, 2006.

It is therefore clear, as found by the lower court that the operational date "November, 2005" was fairer to the appellants than "February, 2006".

4. *Effect where discrepancy in evidence was resolved during cross-examination*

I will not, my Lords, disturb the finding of the lower court that "the evidence extracted during cross-examination is based on the pleadings and where there was any discrepancy the respondent clearly resolved it under re-examination". The finding of fact is neither perverse nor has it occasioned a miscarriage of justice to the appellants. The proof of any of these constitutes special circumstances warranting the departure from the general rule that the two courts below, in their concurrent findings of facts, are correct and right: Nanka – Bruce vs. Gbeke (supra); Williams vs. Kamson (supra); Efe vs. The State (1976) 10 SC 643; Michael Ebeinwe vs. The State (2011) LPELR-985 (SC).

5. *Relationship between landlord and tenant is contractual*

I agree, straight away, with the appellant that "the relationship between a Landlord and a tenant is contractual". In the instant case the relationship between the appellants and the respondent was reduced into writing, Exhibit D1. The agreement provided that the tenancy was for two years commencing from February, 2004 to January, 2006. I agree with the respondent that "it is not in contention that the contract was fully performed by the parties on both sides by the act of payment of rents (by the appellants) to the respondent and the delivery of possession-of the property to the appellants". The appellants, after 5 months of possession, signified their intent no longer to remain in possession. They gave keys to an agent with the understanding that the property would be re-let to enable the appellants recoup their rents, already paid, for the unexpired period. I have just, under issue 2, found that the property was only re-let with effect from November, 2005. The respondent paid to the appellants N560,000.00 from November, 2005 as rent for 3 months unexpired.

6. *There was no new agreement which rescinded the terms of exhibit D1*

The crux of Issue 1 is the question was there any rescission of the tenancy agreement, Exhibit D1? It is a question of fact. The lower court made some pertinent observations on which it found and held that the contract in Exhibit D1 was not mutually rescinded by the parties thereto. Firstly, on the authority of Isiyaku vs. Zwingina (2003) 6 NWLR (pt. 817) 560, it re-stated the law clearly that none of the parties to the contract is allowed to unilaterally alter the terms of the contract without the consent of the other. The lower court also from "the whole gamut of the record of appeal" found no document showing that the parties herein had mutually rescinded their agreement in Exhibit D1. That is, that there is no new agreement on which rescission of the agreement in Exhibit D1 can be inferred. It found, therefore, that the appellants had woefully failed to prove the existence of any "new agreement. This finding of fact is not perverse. I have also not found from the whole gamut of the printed record any evidence of a new written agreement that rescinded the terms of the contract in Exhibit D1. The ipsit dixit of the appellants on this very contentious issue is the alleged return of keys after 5 months into the contract and their formal notice in July, 2004 of their intention no longer to continue with the tenancy.

7. *The mere fact of the tenant returning keys to the Landlord does not translate to his rescission of tenancy agreement.*

Their contention that the respondent regained possession of the property is on the basis of the keys they returned. The mere fact of the tenant returning keys to the landlord does not translate to his rescission of the tenancy agreement:

Oastler & Ors. vs. Hendersen (1876-1877) 2 QBD 575. Similarly, a unilateral termination of tenancy agreement does not metamorphose to the rescission of the tenancy agreement: Ajax vs. Awa (1967) LLR 152.

I do not think that the appellants have been able to show effectively that there was a formal rescission of the agreement in Exhibit D1 by a new written or formal agreement.

8. *Extrinsic evidence is inadmissible to vary the terms of a written contract.*
Again, there was no challenge to the holding of the lower court, at page 265 of the record, to wit:

> **Again, the general rule is that where parties, as in this case, have embodied the terms of their agreement or contract in a written document, extrinsic evidence is not admissible to add to, vary, substract or contradict he terms the written instrument. See Olaloye vs. Balogun (1990) 5 NWLR (pt. 148) 24: Union Bank of Nig. Ltd vs. Ozigi (1994) 3 NWLR (pt. 333) 385; Mrs. O. O. Layade vs. Panalpina World Transport Nig. Ltd. (1996) 6 NWLR (pt. 456) 544. In Layade's case (supra the Supreme Court held that where parties enter into a contract they are bound by the terms of the contract and that it will be unfair to read into such a contract the terms on which there was no agreement.**

9. *A finding by a trial court not appealed cannot be disturbed by an appellate court.*
Neither in the notice of appeal nor in their brief did the appellants make any attempt, albeit feeble, to attack the foregoing decision, that crucially was fatal to their case. The law, as re-stated by Musdapher, JSC, in Jimoh Michael vs. The State (2008) LPELR-1874 (SC) @ page 7, is that where there is an appeal on some points only in a decision, the appeal stands or fails on those points appealed against only, while the other points or decision not appealed remain unchallenged. Such point or decision unchallenged is taken as acceptable to the parties, particularly the appellant. In otherwords, a finding or decision of the court below not challenged on appeal must not, rightly or wrongly, be disturbed by the appellant court: Oshodi vs. Eyifunmi (2000) LPELR-2805 (SC); Nwabueze vs. Okoye (1988) 4 NWLR (pt. 91) 664. And as I stated elsewhere a party to the proceeding who does not appeal a particular adverse finding or decision, or who takes no steps to have it reviewed is deemed to accept the verdict against him: Ezerioha & Ors vs. Ihezuo (2009) LPELR-4122 (CA). A finding of fact or point in a decision not appealed persists and remains binding on the parties to the suit. *(P……Paras……..).*

10. *How to determined rescission of contract.*
The existence of a contract or agreement, is one of fact. The two passages in Chitty on Contracts, Volume 1, 30th Edition at pages 1462 paragraphs 22-026 and 1463 paragraphs 22-028 cited to us by the appellant's counsel on when a rescission is said to occur and its legal consequences emphasis the existence of an agreement subsequent to the original. The intention of the parties to rescind their original agreement will "be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances". There must be a subsequent agreement from which rescission will be presumed. That new agreement must be entirely inconsistent with the old, and it goes to the root of by the appellants herein.

Per Onnoghen (CJN)
I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Ejembi Eko, JSC and I agree that the appeal is devoid of any substance.

The existence of a tenancy agreement between the parties in respect of the named property is not in dispute. It is also not in dispute that the appellants unilaterally handed over the keys of the premises to an agent of the respondent with instruction that the said agent should find another tenant to let out the property to so that appellants can recover their money from the new tenant for the unutilized period of the tenancy. The agent to whom the appellants handed the keys with instruction to let out the premises is not a party to the tenancy agreement. Handing over the keys to the agent and the instruction to let out the premises took place when the respondent was in the United Kingdom, not in Nigeria nor is there any suggestion that the respondent communicated with either the appellant or the agent at the material time.

The relevant question in the circumstances is can the appellants by handing over the keys of the premises to the agent with instructon to let the premises terminate the tenancy agreement bearing in mind that neither the appellants nor the agent communicated with the respondent over the handover of their keys and the accompanying instructions. In my view the answer is in the negative. The agent had no instruction for the respondent to accept surrender of the premises and/or let in a new tenant to pay the appellants for the unexpired term of the tenancy. In the circumstances respondent cannot be held bound by the transaction between the appellants and the agent which transaction the respondent did not authorize or consent to. In the Old English case of Common vs. Hartley (1859) 9 CB 634 it was held that the delivery of possession by tenant to landlord and the landlord's acceptance of possession effect a surrender of the

premises by operation of law. The converse is the case here. The keys of the premises were delivered to a 3rd person and ipso facto it cannot be said that the respondent accepted the same.

Per Akaahs (JSC)

The claim was for the refund of the N4,000,000.00 paid as rent and the witness admitted they were in occupation for 5 months. The only justification the appellants had for demanding for the full payment of the N4,000,000.00 was because the respondent had agreed to pay N560,000.00 for the unused period of the lease.

The admission by ICW that there was no agreement that the defendant was going to refund the rent put paid to the claim that once the claimant returned the keys to the defendant and demanded for a refund, the tenancy between the parties was determined. The lower court per Okoro JCA (as he then was) in dealing with the issue said at pages 266-267 of the records:-

> **"There is no doubt that Exhibit D1 is the tenancy agreement entered into between the 1st appellant and the respondent herein. It is also not contentious that about five months into the tenancy agreement, the 1st appellant (as tenant) unilaterally purported to have rescinded the agreement by turning in possession and returning the keys of the demised premises to the respondent. What is however in contention is that whereas the appellant contend that the respondent agreed to refund the entire rent of N4,000,000.00 (Four Million naira) only to the appellants, the respondent insists that she agreed to refund the rent for the unexpired period with effect from when a new tenant will be let into the property ….. I agree with the learned counsel for the respondent that the appellants failed to show when and where the new agreement was made and what was the mode or form of the new agreement."**

11. *Effect where tenant unilaterally surrenders the premises to the Landlord*

The lower court stated the correct position of the law which holds that in Landlord and tenant relationship, there is no provision for refund of rents if a tenant unilaterally surrenders the premises after the contract has been executed. Where such a situation occurs, the usual practice is that the tenant will be entitled to receive repayment of rent of the unexpired term from the date the premises is re-let before the expiration of the tenancy. See Nigerian Construction

and Holding Company Ltd vs. Owoyele (1988) 4 NWLR (pt. 90) 588 at 603.

12. *There was variation by operation of law.*
It is unreasonable for a tenant to expect full refund of the rent after taking possession of the premises for some months and deciding to terminate the tenancy simply because he has secured an alternative accommodation. It does not make sense to accommodate such a proposition. It is feasible to entertain such a claim only if the Landlord is guilty of frustrating the contract.

The lower court meticulously considered what happened to Exhibit D1 and rightly in my view came to the conclusion that there was a variation by operation of law as found by the learned trial judge.

Lead Judgment : EJEMBI EKO, (JSC)

Representations
F. A. Daley, (Esq.) with **O. Olude, (Esq.),** for the Appellants
H. O. Igbokwe, (Esq.), for the Respondent

NATIONAL JUDICIAL COUNCIL
VS.
1. HON. JUSTICE YA'U IBRAHIM DAKWANG
2. GOVERNOR OF PLATEAU STATE
3. ATTORNEY-GENERAL OF PLATEAU STATE
4. THE CHIEF JUDGE OF PLATEAU STATE

SC. 140/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY, 21st FEBRUARY, 2019

BEFORE THEIR LORDSHIPS:

KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAG	**JUSTICE, SUPREME COURT**

APPEAL: Issues for determination – Formulation thereof – Whether an issue can be formulated from two grounds of appeal one alleging error of law and the other alleging misdirection in facts.

CONSTITUTIONAL LAW: CFRN 1999 as amended – S. 294 (2) thereof – Nature and purport.

COURT: Decision thereof – Where a judge who did not participate in taking evidence at the trial participated in the delivery of judgment – Whether distinct from where comprising several members where he did not contribute an opinion in a matter participate in the hearing of the appeal – Implication of distinction.

COURT: Judicial Discretion – How exercised – principles thereof.

PRACTICE AND PROCEDURE: Amendment – General principle thereof.

PRACTICE AND PROCEDURE: Appeal – Filing of notice of appeal – Where parties were described as plaintiff and defendant in a notice of appeal – Whether it is a mere misnomer that will not invalidate the notice of appeal.

PRACTICE AND PROCEDURE: Appeal – Raising questions thereof – Whether court will not allow questions that were not raised at the trial court to be raise on appeal – Exception thereto.

PRACTICE AND PROCEDURE: Appellate Court – Decision thereof – Majority opinion is decision of court – Whether the opinion of a single judge who did not participate in the hearing will not affect the validity of majority opinion.

PRACTICE AND PROCEDURE: Court – Decision thereof – Whether evidence was taken while court was differently constituted – Whether decision of court in the circumstance is a nullity – The principles in ***Adeigbe & Anor Kusimo & Ors (1965) 4 NSCC 188.***

PRACTICE AND PROCEDURE: Court of Appeal – Decision thereof – Where a panel which gave judgment is differently constituted from that which heard the appeal – Whether it is a mere irregularity – The principles in ***Shuaibu vs. Nigeria Arab Bank Ltd (1998) 5 NWLR (Pt. 551) 582***

PRACTICE AND PROCEDURE: Court of Appeal – Decision thereof – Whether decision shall be determined by the opinion of majority of its members – S. 294 (3) of CFRN 1999 as amended considered.

PRACTICE AND PROCEDURE: Court of Appeal – Decision thereof – Whether members who wrote the judgment and those who read it are not the same – Whether judgment is a nullity – The principle in ***Ubwa vs. Tiv Area Traditional Council and Sokoto State Government Vs. Kamdex Nig. Ltd.***

WORDS AND PHRASES: "Judicial Discretion" – Meaning

Issues for Determination

Facts of the Matter

The 1st respondent in this appeal was the plaintiff in the Federal High Court, Jos Judicial Division in Suit No. FHC/J/CS/7 /2007. He was a judge of the High Court of Plateau State at all material times sitting in High Court No.6.

Sometimes in 2006, the Governor of Plateau State, Chief Joshua Chibi Dariye was

purportedly impeached and removed from office. Following the furore generated by the impeachment saga which also led to the removal of the Chief Judge, Hon. Justice Lazarus Dakyen (of blessed memory) and the appointment of the 1st respondent as Acting Chief Judge by the Governor the appellant (herein) pursuant to the powers vested in it under paragraph 21(d) of the third schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended), set up a sub-committee at its meeting of 5th December, 2006 to look into the impeachment saga, and inquire whether the judicial officers involved had misconducted themselves. At the end of the investigation, the National Judicial Council (NJC) found that the 1st respondent was guilty of misconduct. It suspended him from office and subsequently recommended that he be compulsorily retired.

The plaintiff (now 1st respondent) aggrieved by the decision to remove him from office as a judge filed the suit before the Federal High Court challenging his suspension and removal from office. Pleadings were filed and exchanged.

In paragraph 21 of the statement of claim the plaintiff averred thus:-

> **"21. At the meeting of the 1st defendant on 20/12/2006 no decision was taken regarding the removal of the plaintiff from office and no recommendation to that effect was made by the 1st defendant to the 2nd defendant" (See page 8 of the record).**

The matter proceeded to trial and at the conclusion of the evidence, the parties addressed the court. The trial judge delivered his judgement on 22nd October, 2007 whereby he dismissed the plaintiff's suit.

Being aggrieved by the decision of the trial court, the plaintiff filed an appeal via his notice of appeal dated 22nd November, 2007. At the Court of Appeal, the appellant filed an application praying the court amongst other things, for leave to raise and argue on appeal fresh issues which were not raised in his pleadings before the lower court and to amend the statement of claim to reflect the fresh issues raised and to file and argue additional grounds of appeal. The two sets of respondents filed their counter- affidavits in opposition to the application. The application was argued.

On 13th July, 2011, the court below delivered its ruling wherein it granted the applicant's requests to raise and argue fresh issue on appeal and also amend the statement of claim. The panel that took the application consisted of coram: M. Dongban-Mensem, Ndukwe-Anyanwu and A. Yahaya JJCA but Philomina Ekpe JCA who did not participate in the hearing of the application joined M. Dongban-Mensem and Ndukwe- Anyanwu JJCA to grant the prayers sought in the application. The 1st defendant/respondent being dissatisfied with the ruling obtained leave of the Supreme Court on 12th December, 2012 to appeal against the said ruling.

Held: *(Unanimously dismissing the appeal)*

1. *An issue can be formulated from tow grounds of appeal one alleging error of law and the other alleging misdirection in facts.*

It is not correct, as learned counsel for the respondent has argued, that an issue for determination cannot be formulated from two grounds of appeal, one alleging error of law and the other alleging misdirection in facts. What the courts have always maintained is that one ground of appeal cannot allege both error in law and misdirection of facts. The decision in labiyi Vs. Anretiola (1992) 8 NWLR (Pt. 258) 139 where it was held that "a ground of appeal which is a misdirection is different from, and in fact, mutually exclusive of, one which is an error in law" cannot extend to formulation of issues except where the issue formulated is not related or does not flow from the ground of appeal. See: Modupe Vs. State (1988) 4 NWLR (Pt.87) 130; Ugo Vs. Obiekwe (1989) 1 NWLR (Pt. 99) 566.The issues that should be formulated by either party to an appeal should reflect and substantiate the grounds of appeal. See: Dibiamaka Vs. Osakwe (1989) 3 NWLR (Pt. 107) 101; Niger Progress Ltd Vs. N.E.L. Corporation (1989) 3 NWLR (Pt. 107) 68. Argument in an appeal are based on the issues framed and the grounds of appeal give way once issues relating to them have been framed. See: A-G, Bendel State Vs. Aideyan (1989) 4 NWLR .(Pt 118) 646.

2. *A mere misnomer cannot invalidate a notice of appeal*

It is this ruling and not the judgement of the Federal High Court which the applicant was seeking extension of time within which to seek leave to appeal against when it filed its motion on 16th April, 2012. The use of the word "plaintiff" instead of "appellant" is therefore a mere misnomer which cannot render the notice and ground of appeal incompetent. The applicant was fully aware of the necessity to seek leave before appealing on grounds of mixed law and fact and was also conscious of the fact that leave was needed to appeal against the exercise of discretion by the lower court and since it did not file the application within the stipulated period, the applicant had to ask for the three reliefs as prerequisites to appeal namely:-

(a) Extension of time within which to seek leave to appeal.
(b) Leave to appeal and;
(c) Enlargement of time to file the notice of appeal.

Thus section 233 of the Constitution was fully complied with before the motion which was heard in Chambers was granted on 12th December, 2012. I therefore find no merit in the preliminary objection filed by the 1st respondent and it is accordingly overruled.

3. *The nature of S. 294 (2) of CFRN 1999 (as amended)*

Section 294(2) of the 1999 Constitution provides that:-

> **"294 Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or he may state in writing that he adopts the opinion of any other Justice, who delivers a written opinion:-**
>
> > **Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgement is to be delivered and the opinion of a justice may be pronounced or read by any other justice whether or not he was present at the hearing".**

The proviso to Section 294(2) allowed Hon. Justice Philomina Ekpe JCA or any other justice of the Court of Appeal who did not participate in the hearing of the motion, to pronounce the opinion of Hon. Justice A. D. Yahaya JCA who was absent when the ruling was delivered on 13/7/2011. But the contribution which Hon. Justice Philomina Ekpe JCA read did not show she was doing so with the mandate of Hon. Justice A. D. Yahaya JCA but as her own contribution. She stated thus:-

> **"I had a preview of the lead judgement delivered by my learned brother Monica Dongban-Mensem JCA. I agree with her reasoning and conclusions and also abide by her orders herein."**

Certainly this contribution cannot by any stretch of imagination be attributable to Hon. Justice A. D. Yahaya JCA but rather that of Hon. Justice Philomina Ekpe JCA who would be presumed to have taken part in the hearing of the application.

4. *A decision shall be determined by the opinion of the majority of its members*
Section 294(3) appears to have provided a leeway for sustaining a decision that has been given in circumstances such as this because it provides as follows:-

> **"294(3) A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members."**

Opinions are however divided as to whether the judgement of the majority will be tainted by the decision of a judge who though not on the panel when the matter was heard rendered his opinion as if he participated in hearing the

matter.

5. *Effect where judgment of court of appeal is delivered by a judge who did not participate on the appeal*

The cases such as Ubwa vs. Tiv Area Traditional Council and Sokoto State Government Vs. Kamdex Nig. Ltd supra cited by learned counsel for the appellant would suggest the view that such a judgement should be declared null and void.

In his leading judgement in Ubwa Vs. Tiv Area Traditional Council supra, Kutigi JSC (as he then was) held at page 437

> **"The entire proceedings before the Court of Appeal were a nullity because all the members who heard the appeal and those who wrote the judgements were not the same. In other words all the members who wrote the judgements were not all present throughout the hearing of the appeal which includes delivery of judgement. The judgement of the Court of Appeal delivered on 14th February, 2000 is therefore a nullity".**

6. *Effect where a judge who did not participate in the hearing of the appeal participated in writing of the judgment*

There is a school thought that thinks that even if the panel that gave judgement was differently constituted from the one that heard the appeal, this ipso facto, will not result in rendering the judgement a nullity but irregular and Hon, Justice Ogundare JSC (of blessed memory) belongs to this school of thought. He expressed this view in his concurring judgement in Shuaibu Vs. Nigeria Arab Bank Ltd (1998) 5 NWLR (Pt. 551) 582 where Y. O. Adio JCA who was not in the panel that took the appeal wrote a contributory judgement agreeing with the leading judgement and Hon. Justice Okezie who took part in the appeal had also concurred with the leading judgement.

On appeal to this Court, Wali JSC who delivered the leading judgement dismissed the appeal by holding that section 258(3) of the 1979 Constitution which is in pari materia with Section 294(3) of the 1999 Constitution clearly provides a solution to a situation like the one at hand. In his contribution, Ogundare JSC said at page 603:-

> **"To my mind, it would appear that the Hon. Justice Adio JCA who was present at the oral hearing of the appeal participated in judgement. The questions then arise: would his participation amount to the proceedings in the Court of Appeal being null and**

> **void as contended by the appellant in the appeal before us? Or would the proceedings just be merely irregular, as contended by the respondent?"**

His answer was that the complaint at best was an irregularity and the explanation to this stemmed from the fact that no evidence was taken in the matter and this was based on the observation by Ademola CJN.

7. *Effect where a court is differently constituted when evidence was taken*
In Adeigbe & Anor Vs. Kusimo & Ors (1965) 4 NSCC 188 where he said at page 191-

> **"…… where a court is differently constituted during the hearing of a 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".**

8. *Majority opinion is the judgment of an Appellate Court*
The test has always been whether the complaint is extrinsic or intrinsic in the adjudication process. Where it is extrinsic, the proceedings including judgement are irregular but where it is intrinsic the judgement would be declared null and void. The interference by another Judge who did not participate in the hearing of the appeal will not adversely affect the view of the majority whether he concurs with the leading judgement or not. I share in this exposition of the law since the opinions of the majority is the judgement of the court. Essentially, an Appeal Court deals only with the records and does not form opinion on the credibility of any witness. See: Arum Vs. Nwobodo (2013) 10 NWLR (Pt. 1362) 374. Consequently the ruling delivered on 13/7/2011 is not a nullity notwithstanding the fact that Hon. Justice Philomina Ekpe JCA did not participate in the hearing of the application before concurring in the grant of the application by Justices Monica Dongban- Mensem and U.I. Ndukwe-Anyanwu JJCA.

9. *Amendment can be allow at any stage of proceedings even on appeal*
Both the parties and the court are bound by the pleading of the parties to a suit; and the court cannot base its judgement on a matter or fact not pleaded. Amendment of pleadings for the purpose of determining the real issues in controversy between the parties ought to be allowed at any stage of the proceedings, including on appeal unless such amendment will result in injustice or surprise, or embarrassment to the other party; or the applicant is acting mala fide or by his blunder the applicant has done some injury to the

respondent which cannot be compensated by way of costs or otherwise. See: Adetutu Vs. Aderohunmu (1984) 15 SCNLR 389; Laguro Vs. Toku (1992) 2 NWLR (Pt. 223) 278; Metal Const. (W. A) Ltd Vs. Migliore (1990) NWLR (Pt. 126) 299; Mamman Vs. Salaudeen (2005) 18 NWLR (Pt. 958) 478.

10. *Generally court will not allow questions to be raised for the first time on appeal*

It is also the rule that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court However, where the question involves substantial point of law, substantive or procedural, and it is plain that no further evidence would be adduced to thrash the issue, the court will allow the question to be raised so as to prevent an obvious miscarriage of justice. See: Intercontinental Bank Plc Vs. Olam (Nig.) Ltd (2013) 6 NWLR (Pt. 1351) 468; Ibrahim Vs. Lawal (2015) 17 NWLR (Pt. 1489) 490.

The fresh issues which the applicant sought leave of the lower court to raise namely the violation of the appellant's right of fair hearing, the denial of the plaintiff's opportunity to make representations on the report of the investigative committee of the 1st defendant are substantial issues of law that have been raised. The only reason advanced by learned counsel for the appellant is that evidence would be required to determine the participation of legal practitioners at the meeting of 20/12/2006. This is not enough reason why I should interfere with the discretion granted to the applicant to raise the fresh issues on appeal. The court below properly exercised its discretion In granting leave to the applicant to amend the pleadings and raise fresh issues of law which were not argued before the Federal High Court.

11. *The meaning of "Judicial Discretion"*

He dealt with all the Issues raised in the appeal, eloquently too, and I will only comment on *"discretion",* which is the power or right to decide according to one's Judgment; freedom of judgment or choice. *"Judicial discretion"* is defined in Black's Law Dictionary 9th Ed., thus:

> **The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.**

The operative words therein are - *"a court's power to act or not act, when a litigant is not entitled to demand the act as a matter of right".*

12. *How discretion is exercised*

It is also a well-established principle that all judicial discretions must be exercised according to common sense, and according to justice. If there is any miscarriage of justice in the exercise of such discretion, it is within the competence of an appellate court to have it reviewed - see Odusote Vs. Odusote (1971) ANLR 221 and Echaka Cattle Ranch Vs. N.A.C.B. (1998) 4 NWLR (Pt. 547) 526, wherein Iguh, JSC, stated:

> **In matters of discretion - - the Court cannot be bound by a previous decision to exercise its discretion in a particular way - - Accordingly, since the circumstances constantly change or are never exactly the same, it is for the trial court to meet the ends of justice and to be fair and just in all the circumstances of each and every case. While it is the law that the exercise of its discretion by the trial court may be reviewed on appeal, an appellate court must not interfere unless it can be shown that such discretion was not exercised judicially and judiciously, that is to say, if the exercise was mala fide, arbitrary, illegal either by the consideration of extraneous or irrelevant matters or failure to consider material issues, or otherwise that it was inconsistent with the ends of justice.**

In this case, there is no question that the court exercised its discretion, judicially and judiciously, in granting the application to raise and argue fresh issues of appeal, etc., and this court cannot, therefore, interfere.

12. *Dichotomy between where a member who did not hear evidence participated in delivering judgment and an appellate court where one of the members who did not participate in the hearing gave an opinion*

However, let me add by way of emphasis that in this jurisdiction, for purposes of implication or consequence, there is dichotomy between where a trial court whose member did not hear the evidence on which it predicated its decision and an appellate court comprising several members where one of the members contributed an opinion in a matter he did not participate in the hearing of the appeal. The latter case is the subject of this appeal. In ARUM Vs. Nwobodo (2013) 10 NWLR (pt. 1362) 374, this Court per Aka'ahs, JSC at pages 401 - 402 brought out the distinction, as regards the effect, after he -

> **---- took time to explain the difference between the cases where the judgment is declared null and void and those where the judgment is considered to be unsatisfactory or irregular on**

account of the variation in the trial bench in these words:

> **"In the first of these cases, in which the defendant's witnesses were not heard by two members of the court the principle was enunciated that a judgment could not be allowed to stand which was given by judges who had not heard all the evidence; in the other four cases, the Appeal Court expressly held that the proceedings were a nullity on that account ... "**

Per Eko (JSC)

"The picture that emerges from a discussion of the decided cases including the notorious case of Gabriel Madukolu Vs. Johnson Nkemdilim, (1962) ANLR 581; [(1962) 2 SCNLR 341] (supra) where Bairamian F. J. after enumerating the features that make a court competent and ending with the statement -

> **"Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication"**

is that <u>if the composition of the panel changes while oral evidence is still being taken and the reconstituted panel reaches a decision, that decision will be declared a nullity. The reason is not far to seek. A trial Court basically deals with evaluation of evidence and one of the key ingredients to be considered is the credibility of witnesses where their demeanour forms an integral part of that evaluation. Where the evaluation is based purely on the printed records, the overriding consideration is whether the burden of proof has been discharged. Where the latter is the case, it does not matter if the panel that heard the case varies, the judgment would at best be declared irregular but would not be nullified unless the irregularity occasioned a miscarriage of justice</u>. *[Emphasis supplied]*

Per Eko (JSC)

This distinction between the two instances where the quorum of a trial court or panel is altered between the hearing of the evidence to the final decision; and where the quorum of an appeal panel that heard the appeal on the printed evidence is altered by a member who did not hear the appeal contributing an opinion in the final judgment has always to be borne in mind. In the latter case, it is not the rule that "one apple spoils the lot". Section 294(3) of the

Constitution seems to offer the antidote to the attack in instant case thus -

> **(3). A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members.**

The much therefore that happens to the opinion of Ekpe, JCA that strayed into the judgment, the subject of this appeal, is that it will be severed and struck out for being incompetent. The opinions of the other two justices would remain extant and subsist as the valid judgment of the Court of Appeal.13. *Decision was not a nullify*

By the provision of Section 294(3) of the 1999 Constitution of the Federal Republic of Nigeria, a decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members. In the instant case the opinion of Dongban-Mensem and A.O. Yahaya JJCA constituted the decision of the lower court. It therefore does not matter whether Philomina Ekpe JCA delivered judgment or not. The circumstance of this case is what Section 294 (3) of the Constitution was promulgated to cure. The decision of the Court of Appeal certainly cannot be a nullity. See Shauibu Vs. Nigeria Arab Bank Ltd (1998) 5 NWLR (Pt. 551) 502.

Lead Judement: KUMAI BAYANG AKAAHS, (JSC)

Representations
Rotimi Oguneso (SAN) (with him Babayemi Olaniyan (Esq.) for the appellant.
Bitrus Fwanshak (Esq.) (with him Youn'an Dabok (Esq.) for 1st respondent.
N. D. Shaseet DCR & LR Plateau State (with J. O. Longden (Esq.) for 2nd, 3rd and 4th respondents.

NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC)
VS
1. ROVEN SHIPPING LTD
(Owners of "MT Venturer")
2. DIGNITY SHIPPING LTD
(Owners of "MT Dignity")

SC.815/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALUMJE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where there is no error in law or procedure – Whether Supreme Court will not disturb concurrent findings.

LEGAL PRACTITIONERS: Signing of legal process – Where a firm rather than a legal practitioner known to law signs a process –Whether process incompetent – The principles in ***Okafor vs. Nweke (2007) 10 NWLR (pt. 1043) 521.***

LEGAL PRACTITIONERS: Signing of legal process –Where a firm signs a legal process rather than a legal practitioner known to law – incompetency thereof – The principle in ***SIB consortium vs. NNPC (2011) 9 NWLR (pt. 1252) 317****.*

PRACTICE AND PROCEDURE: Originating process – Incompetency thereof – Whether court of appeal was right to declare an originating summons filed before the trial court incompetent as it is a jurisdictional issue.

PRACTICE AND PROCEDURE: Arbitration – Where arbitrators made a decision on the construction of a document referred to it – Whether will not be interfere with by court even if it would have come to a different conclusion.

PRACTICE AND PROCEDURE: Arguments of parties – Where court is to resolve issues of law or jurisdiction – Whether court not to restrict itself to argument of parties.

PRACTICE AND PROCEDURE: Court – Raising issues suo motu – Where a court suomotu raises an issue of jurisdiction or law – Whether it is not mandatory to call on parties to address court.

PRACTICE AND PROCEDURE: Issues for determination – Court of Appeal is enjoined to pronounce on all issues placed before it for determination – Rationale therefore – The Principle in ***Adegbuiyi vs. Ape (2014) LPELR -24214 (SC).***

PRACTICE AND PROCEDURE: Raising issue suo motu – Where Court raise an issue suo motu without calling on parties to address it – Whether failure does not always occasion miscarriage of justice as every case must be treated based on its peculiar facts – The principle in ***Imah vs. Okagbe (1993) 9 NWLR (Pt.136) 159 and 178 and Akpunonu vs. Bekaert Overseas (1995) 5 NWLR (Pt. 393) 42****.*

WORDS AND PHRASES: Miscarriage of Jusitce – Connotations thereof – The principle in ***Gbadamosi vs. Dairo (2007) 3 NWLR (Pt. 1021) 282 SC****.*

WORDS AND PHRASES: Suo Motu – Meaning – Purport and imperatives.

Issue for Determination

Whether the learned justices of the Court of Appeal were justified in declaring the proceedings at the Federal High Court null and void, when neither of the parties had raised the issue of incompetence of the court processes and had not been afforded an opportunity of addressing the court on the issue and after the Court of Appeal had itself delved into the merits of the case.

Facts of the Matter:

The respondents, by a Charter party on the **"Shell Time 3"** Form, dated 1/11/1995, agreed to charter a Tanker Vessel - *"MT Venturer",* to the appellant for the carriage of petroleum products from the:

> **Coastal refineries to places within Nigeria and the West African sub-region and any other locations named by the Pipelines and Products Marketing Company [PPMC] in Europe/Africa/Asia and South America.**

By an Addendum dated **2/12/1996,** the charter party was amended by substituting *"MT Venturer'* with another Vessel- *"MT Dignity',* and the effective date for the said substitution was **1/8/1996.**

Upon the determination of the Charter party, respondents submitted their final invoices that included claims for interest on hire payments, which interest they alleged began to accrue after 90days from the due date of payment at the rate of 12% per annum.

The appellant disputed their entitlement to interest in view of the provision of **Clause 15** of the Charter party, which says that:

> **In default of punctual or regular payment as herein specified, the owner shall notify the charterers whereupon the Charterers shall make payment of the amount due within forty-five (45) days of the receipt of notification from the owner, failing which the owner shall have the right to withdraw the vessel from the service of the Charterer. Charterers shall not be liable to pay owners interest accruing on any delayed payment as above.**

But the respondents contended that they are entitled to interest payments under **Clause 18** of the Charter party, which states that:

> **Notwithstanding any provision to the contrary in this charter, owners hereby agree to 90 days credit in the payment of charter fees free interest.**

The dispute was referred to arbitration and the arbitrators by a split decision of 2-1 ruled that the respondents are entitled to interest.

The appellant then filed the application at the Federal High Court, which led to this appeal, praying that the said award be set aside.

In his ruling delivered on **6/2/2006,** the learned trial judge, Okeke, J., held that the Federal High Court *"has no jurisdiction to set aside the Arbitral Award':* and he refused the said application.

Dissatisfied, the appellant appealed to the Court of Appeal, The appeal was further dismissed by Court of Appeal.

Still dissatisfied, the appellant filed a notice of appeal to the Supreme Court.

Held: *(Unanimously dismissing the Appeal)*

1. *The meaning of suo motu and Implication thereof*

Now, *suo motu* is a latin term meaning" *on its own motion',* and it is used in situations where a court acts on its own initiative. Yes, a court has jurisdiction to raise an issue *suo motu,* but there is a rider; when a court raises an issue *suo motu.* Parties must be given opportunity to react to the issue before a decision is taken.

In other words, it is not competent for the court to raise the issue and decide it without hearing the Parties. as doing so will be in breach of the party's right to fair hearing. This is why this court has always said that on no account should a court raise any point *suo motu* and no matter how clear that point may appear to be, proceed to resolve it, one way or the other. without hearing the parties - see Oje vs. Babalola (1991) 4 NWLR (Pt. 185) 267 at 280 SC.

But then again, every case is determined on its own merits, and what may go for one case, may not go for another. *(P……Paras…..).*

2. *Court of Appeal enjoined to pronounce on all issues paced before it*

Yes, the Court of Appeal should pronounce on all the issues, and should not restrict itself to one or more, which in its opinion, may dispose of the matter - see Adegbuyi vs. APC (2014) LPELR- 24214(SC) and Brawal Shipping (Nig.) Ltd. vs. F.I. Onwadike Co. Ltd. (2000)11 NWLR (Pt. 678) 387SC, wherein Uwaifo, JSC, observed:

> **It is no longer in doubt that this court demands of, admonishes the lower court to pronounce, as a general rule, on all issues properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues decided by them could be faulted on appeal- - Failure to do so may lead to miscarriage of justice and, certainly, will have that result if the issues not pronounced upon are crucial.** *(P…..Paras……).*

3. *The connotation "miscarriage of justice"*

The term "miscarriage of justice" *refers* to a legal act or verdict, which is clearly mistaken, unfair or improper, and this is declared when the court, after an examination of the entire case, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing Party, would have been reached in the absence of the said error - see Gbadamosi vs. Dairo (2007) 3 NWLR (Pt. 1021) 282 SC, wherein Tobi, JSC, explained that:

> **Miscarriage of justice connotes decision or outcome of legal proceeding that is prejudicial or inconsistent with the substantial rights of the Party. Miscarriage of justice means a reasonable probability of more favorable outcome of the case for the Party alleging it. Miscarriage of justice is injustice done to the Party alleging it. The burden of proof is on the Party alleging that the justice has been miscarried**. *(P…..Paras……..).*

4. *Effect where a firm signs a legal process*

No doubt, the parties stated the correct position of the law as it is, but as I said earlier, every case is decided on its own merits, and in this case, all their arguments pale into insignificance when it is considered that the decision in question is specifically in respect of an incompetent originating process, which is a different kettle of fish altogether. As the Court of Appeal pointed out, Section 2(1) of the Legal Practitioners Act Cap L11, 2004, provides as follows:

> **Subject to provisions of this Act, a person shall be entitled to practice as barrister and solicitor if, and only if, his name is on the roll.**

And Section 24 of the same Act (Interpretation Section) says that:

> **In this Act, unless the context otherwise requires, the following expressions have the meaning assigned to them respectively, that is to say - - "Legal Practitioner" means a person entitled in accordance with the provisions of this Act to practice as a barrister or solicitor, either generally or for the purposes of any particular office or proceedings**.

This court has considered the above provisions of the said Act in quite a number of cases. For instance, in the well-known case of Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521, wherein a motion on notice was signed by "J.H.C. Okolo. SAN & Co", this court per Onnoghen, JSC (as he then was), categorically stated as follows-

> **The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise, he cannot engage in any form of legal practice in Nigeria. The law does not say that what should be in the roll should be the signature of the legal practitioner but his**

> **name. That apart, it is very clear that by looking at the documents, the signature which learned counsel claimed to be his really belongs to J.H. C. Okolo, SAN & Co or was appended on its behalf since it was signed on top of that name. Since both counsel agree that J.H.C. Okolo. SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. Okolo. SAN & Co cannot legally sign and/or file any process in the Courts and as such the motion on notice - - notice of cross-appeal and brief of argument - - all signed and issued by the firm known and called J.H. C. Okolo, SAN & Co are incompetent in law particularly as the said firm of J.H.C. Okolo, SAN & Co is not a registered legal practitioner.** *(P……Paras……..).*

5. *A legal process signed by a firm is incompetent*

See also SLB Consortium vs. NNPC (2011) 9 NWLR (Pt. 1252) 317, wherein this court aptly observed as follows on a similar issue –

> **The signature of "Adewale Adesokan & Co" on the originating summons of the appellant robbed the process of competence *ab initio* as the said firm is not a registered legal practitioner enrolled to practice law as Barrister and Solicitor in the Supreme Court. In the prevailing circumstances all the proceedings, which rested on the inchoate originating summons, were deemed not to have taken place in law. One cannot put something on nothing and expect it to stand. This is as stated in UAC vs. Macfoy (supra).**

One cannot put something on nothing and expect it to stand, which is what both Parties appear to have lost sight of, as they focused their attention on everything else except the elephant in the room.

The parties skirted around the Issue without saying anything about the motion on notice, filed on 27/7/2004 at the trial court, which is signed by an unknown person "for Seyi Sowemimo, SAN".

The said application is the originating process in this case, and it is settled that such a process signed by an unknown person, is incompetent and incurably bad - see SLB Consortium Ltd. vs. NNPC (supra), wherein this court made it very clear that" once it cannot be said who signed the process, it is incurably bad".

This is so because a signature identifies a document as an act of a particular person and without a signature, the document cannot pass as the act

of such an unnamed person; it is, therefore, totally useless - Tsalibawa vs. Habiba (1991) 2 NWLR (Pt. 174) 461. *(P……Paras……..).*

6. *Court of Appeal was right to declare originating process incompetent*

The point being made is that the Court of Appeal cannot close its eye to an originating process that is *ex-facie* incompetent, and it is settled that it has inherent power to strike it out on that ground - see Anadi vs. Okoli (1977) NSCC (Vol. 11) 117. To make myself clear, I am not saying that the Court of Appeal was right to raise the said issue *suo motu and* decide same without hearing from parties.

What I am saying is that faced with the originating process filed by the appellant at the trial court, which is incompetent and incurably bad, the Court of Appeal was standing on firm ground when it declared the proceedings at the trial court *"null and void,* because the issue in question touches on jurisdiction, which is aptly described as the pillar upon which the entire case stands.

Per Augie (JSC)

"In effect, once it is shown that the court lacks jurisdiction, the foundation of the case is not only shaken, the case crumbles. In other words, there is no case before the court for adjudication - see Ministry of W. & T., Adamawa State vs. Yakubu (2013) 6 NWLR (Pt. 1351) 481 SC, where this court very aptly observed as follows:

> **The fatal effect of the signing of an originating process by a law firm is that the entire Suit was incompetent ab initio. It was dead at the point of filing. This highlights the painful realities that confronts a litigant when counsel fails to sign processes as stipulated by law. The originating process, as in this case, is fundamentally defective and incompetent. It is inchoate legally non-existent and can therefore not be cured by way of an amendment.**

In this case, there is no question that the originating process filed by an unknown person" for Seyi Sowemimo, SAN" was dead at the point of filing and there was no remedy that could bring it to life.

The suit filed by the appellant at the trial court" *was grossly incompetent',* and the Court of Appeal was right to hold that the "*loophole renders the entire proceedings [therein] null and void".* *(P…..Paras……..).*

7. *There was no violation of principles of interpretation*

It is true therefore that the provisions of these clauses are clear and

unambiguous. There is no doubt too that the provisions of Rider Clause 15 are subject to the provisions in Rider Clause 18.

There is nothing, in my view, in the manner of construction of these two provisions, that contravenes the established principles of Construction or the cannon of interpretation recognized by law. *(P……Paras……..).*

8. *Award was properly made*

It is on the basis of this that the partial award was made. I find no reason to disturb this. There is nothing to show that there is any error of law on the face of the award. At least the appellant has been unable to establish any. *(P……Paras……).*

9. *Court will not interfere with decision of construction by arbitrators*

From the concurrent findings of fact, I daresay, including those of the Arbitration Tribunal that the question referred for arbitration had to do with the construction of the crucial clauses in the arbitration clause. On this it is settled in law that when it is a decision as released by the arbitrator upon the point on construction it cannot be set aside by the court even if the court would have come to a different conclusion. I refer to Comptoir Commercial & Ind. S.P.R. Ltd vs. Ogun State Water Corporation (2002) 9 NWLR (Pt.773) 629 at 656; Taylor Woodrow (Nig.) Ltd vs. S.E. GMBH (1993) 4 NWLR (Pt.286) 127 at 145. *(P……Paras……)*

Per Odili (JSC)

"The appellant had raised an issue of internal inconsistency between rider clauses 15 and 18 which learned counsel for the respondents had put up a dispatching superior argument which I go along with that the clauses are mutually exclusive and apply in different circumstances clearly explained by the arbitrators. For effect Rider Clause 15 makes provision a remedy available to the ship-owner in the event of default on the part of the Charterer in the prompt payment of hire and gives the ship-owner an option of withdrawing its vessel from the charterer where the charterer fails to pay the amount due within 45 days of receipt of notification and in this circumstance, the withdrawal of the vessel, the charterer shall not be liable to pay interest hence the use of the word "above" in rider clause 15.

Again clear in the document is that where the ship-owner opts not to utilize the remedy of withdrawing its vessel for default in payment of charter hire as provided for clause 15, the ship-owner is then entitled to charge interest after the expiration of 90 days after sending notice of default in payment to the charterer. The implication of the withdrawal of the vessel for default in

payment of hire would have the effect of terminating the charter party and so by refusing to exercise their right to withdraw their vessel from the appellant as so provided for in clause 15, the respondents had evidently elected to treat the charter contract as subsisting.

The point has to be made in view of the facts on ground supported by the said clause 15 that when one is faced with two alternative and mutually exclusive courses of action and that party chooses one and had communicated that option taken to the other party in such a way as to lead him to believe that he has made his choice, the path elected has been made completely bare and not in doubt. See The Mrhailos Xilas (1979) 2 Lloyds Report 303 at 314. *(P…….Paras……..).*

10. *There was no contradiction in the contract*

I would hasten to state that the argument put forward by the appellant's learned counsel that there was an introduction of something new in the contract terms of the parties by the courts below and the tribunal is unsustainable from the record and Rider Clause 18 was always in the contract, not inconsistent with clause 15 as Rider Clause 18 provided in clear terms that interest would be paid for hire payment delayed for over 90 days. See Baker Marine (Nig.) Ltd vs. Chevron (Nig.) Ltd (2006) 13 NWLR (Pt.997) 276 at 287. *(P…….Paras……..).*

11. *Court cannot disturb concurrent findings*

Clearly the concurrent findings of fact of the two courts below in line with the Tribunal's findings are justified by the evidence and no error of law, substantive and procedural that could lead to a miscarriage of justice, therefore, this court cannot disturb those findings. See Odeh vs. FRN (2008) 13 NWLR (Pt.1103) 1 at 35. *(P……Paras……..).*

12. *Failure of court to call on parties to address it on an issue which court raised suo motu does not often lead to a miscarriage of justice*

Indeed, it is desirable for a court raising an issue on its own steam or suo motu to give opportunity to the parties to address on the point. Generally such failure to get the parties address on the issue so raised by the court could occasion a miscarriage of justice has not taken place and the decision reached therefrom is not perverse or defective then that inadvertence to call for the prior addresses of the counsel of the parties would not have a fatal effect. See the decision of the Supreme Court in Imah vs. Okogbe (1993) 9 NWLR (Pt.316) 159 at 178 and Akpunonu vs. Bekaert Overseas (1995) 5 NWLR (Pt.393) 42 at 64 where the Court of Appeal observed as follows:-

> **"It is pertinent to state that the failure of the court to give such opportunity to parties does not in every case 'Occasion a substantial miscarriage of justice. Each case depends on its own merit. Therefore, it is not sufficient merely to show that the court committed an error of law. The appellant must further show that the error of law in the case in question occasioned a miscarriage of justice" .**

See also Olubode vs. Salami (1985) 2 NWLR (Pt.7) 282 and Usman vs. Garke (1999) 1 NWLR (Pt.587) 466 at 482.

In the case at hand, I can with humility safely say no miscarriage of justice occurred when the Court of Appeal raised the issue of competence and considering it proceeded to strike out the application to set aside the arbitral award. I say so because in keeping with the principle well laid down over time by this court and the courts in the hierarchy of courts in the Nigerian judicial system, the court below had considered all the issues placed before it and the justice of the matter visible and so the issue brought suo motu by the court was to bring an area that should not be left unattended though not raised by any side. It was not such an area as would have changed the fortune of the appellant and so no harm was done as far as the adjudication in the face of the court or what would have changed the result or outcome of the appeal. See Agbareh vs. Mimra (2008) 2 NWLR (Pt.1071) 378) (SC). *(P……Paras…….).*

13. *A court may raise issues of law and jurisdiction suo motu without given* ***parties opportunity to be heard.***

Now, it is beyond contention that the requirement of giving parties the opportunity to address a court on an issue raised by the court suo motu is a general rule which, like all others, has exceptions. Decisions of this court abound specifying these exceptions. See EFFIOM vs. C.R.S.I.E.C. (2010) 14 NWLR (Pt. 1213) 106, TUKUR vs. GOVERNMENT OF GONGOLA (No. 2) (1989) 4 NWLR (Pt. 117) 517 and BOLA OMONIYI vs. JACOB ADEGBOYEGA ALABI (2015) LPELR-24399 (SC). It has been held by this court, in these decisions, that the principle that whenever a court raises an issue not within the contemplation of parties and suo motu parties should be given a hearing before a decision on the issue so raised applies mainly to issues of fact and that, in special circumstances, an issue of law or jurisdiction may be raised suo motu and without hearing the parties decided upon the issue so raised.

In the case at hand the issue raised by the lower court and In respect of which parties were not heard is jurisdictional, relating to the competence of

appellant's application at the trial court, an initiating process, having been signed by a person unknown to law which, on similar process, this court in EMMANUEL OKAFOR & ORS vs. AUGUSTINE NWEKE & ORS (2007) LPELR - 2412 (SC) held:-

> **"Since both counsel agree that J.H.C. Okolo SAN & Co. is not a legal practitioner recognized by the law, it follows that the said J.H.C. Okolo SAN & Co cannot legally sign and/or file any process in the courts and as such the motion on notice filed on 19th December 2005, notice of cross appeal and applicant brief of argument in support of the said motion, all signed and issued by the firm known and called J.H.C. Okolo SAN & Co. are incompetent in law particularly as the said firm of J.H.C. Okolo SAN & Co is not a registered legal practitioner ."**

Appellant's application by virtue of which the proceedings at the trial court was purportedly commenced, an originating process, being incompetent cannot give rise to competent proceedings. The appeal at the lower court can only be heard and determined if same had arisen against the competent decision of the trial court. Having not so arisen, it is incompetent no matter how well determined the appeal had otherwise been. A decision arrived at a court without jurisdiction being null and void ab initio can never be the basis of a competent appeal or further litigation. See Fadiora vs. Gbadebo (1978) 11 SC 121 and Bamishebi vs. Faleye (1987) 2 NWLR (Pt. 54) 51. *(P……Paras……..).*

Per Galumje (JSC)

"This court has laid to rest the vexed issue of signing a court process by a person whose name is not on the roll of legal practitioners in Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521. In that case a motion on notice signed by J.H.C Okolo SAN & Co. was held to be incompetent and the trial court that heard the application lacked jurisdiction to do so. In Katto vs. CBN (1991) LPELR – 1678 (SC) this court held:-

> **"It must be emphasized that the question of jurisdiction is that which the court can take suo motu at any stage of the proceedings… Jurisdiction is fundamental. It is the fiat, the stamp of authority to adjudicate. If it is not there the court labours in vain and all it does amounts to nothing, a nullity. However, in taking the question of jurisdiction suo motu prudence and the principle of fair hearing demand that counsel**

> **be given opportunity to be heard on the issue before a decision is arrived at. This court will however not set aside a correct decision that the trial court had no jurisdiction merely on the ground that counsel were not invited to address the trial court on it." See Osadebay vs. A.G. Bendel State (1991) 1 NWLR (Pt. 169) 525; Owoniboys Technical Services Ltd vs. John Holt Ltd (1991) 6 NWLR (Pt. 199) 550; Katto vs. CBN Ltd (1991) 9 NWLR (Pt. 214) 126; Osafile vs. Odi (No. 1) (1990) 3 NWLR (Pt. 137) 130.**

The application that was signed by an unknown person was part of the record that was transmitted to the Court of Appeal. It was a document that existed in the litigation. By looking at the document and making prouncement on it, the Court of Appeal clearly did not raise the matter suo-motu. In Ikenta Best Nigerian Ltd vs. Attorney General Rivers State (2008) 6 NWLR (Pt. 1084) 612 at 642 paras A-C, this court per Tobi JSC held:

> **"A court can only be accused of raising an issue, matter or fact suo motu, if the issue, matter or fact did not exist in the litigation. A court cannot be accused of raising an issue, matter or fact suo motu if the issue, matter or fact exist in the litigation. A judge, by the nature of his adjudicatory functions, can draw inferences from stated facts in a case and by such inferences, the judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are introduced suo motu. That is not correct."** *(P……Paras…….).*

14. *Court not to restrict itself to argument of parties in resolving issues of Law or jurisdiction.*

It has not been denied that the application, subject matter of this appeal was in the record that was transmitted to the Court of appeal. A court of law is eminently qualified and entitled to look at the content of its file or records and or refer to it in consideration of any matter or issue before it. See Agbareh vs. Mimra (2008) All FWLR (Pt. 409) 559 at 589 paras D-F. The application aforesaid was a process filed by the appellant at the trial court. It is therefore unimaginable how the appellant's right to fair hearing could have been infringed by the lower court in the circumstance in which parties were not called upon for further address. The duty of the court is to resolve issues before it and in so doing it should not restrict itself to the limit of the arguments of parties on the issues, especially where they are issues of law and also touching on the jurisdiction of the court.

The issue involved in this case clearly touches on the competence of the application, which is an originating process. Even if the parties were given the opportunity to address the court, there was no way the application could have been turned into a signed document by a legal practitioner. The issue in contention is an issue of law, concerning a document that was in the court's file. It was therefore not necessary for the lower court to hear the parties before declaring the application incompetent. *(P……Paras……).*

Lead Judgement: **ADAMU AUGIE, (JSC)**

Representations
O. S. Sowemimo, (SAN) with Remi Coker, (Esq.) for the appellant
Victor Ogude, (Esq.), with Hycernt Uba. (Esq.), and Kehinde Wilkey, (Esq.), for the respondent.

WOME MOSES, Esq.
Vs.
NIGERIAN BAR ASSOCIATION [NBA]

SC.941/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

THURSDAY 21ST FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

WALTER SAMUEL NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

ACATION: Preliminary objection – Approach thereto – Where upheld, normally leads to the action being struck out.

CASE LAW: Principles in ***Fawehinmi vs NBA (1989)2 NWLR (Pt. 105) 558***

PARTIES: Competency thereof – Where an action is instituted by a competent party – Whether such action is properly constituted.

PARTIES: Legal personality thereof – LPDC is created by a statute – Whether can be sue and be sued in its name.

PARTIES: Nigerian Bar Association – Not a juristic person – Where a non juristic person is a respondent on appeal – Effect thereof.

STATUTE: Legal Practitioners Act – S. 10 (1) b thereof – Whether is the source of jurisdiction of Legal Practitioner Disciplinary Committee.

STATUTE: Legal Practitioners Act – S. 11 (1) thereof – Whether created the Legal Practitioners Disciplinary Committee.

WORDS AND PHRASES: Artificial person – Meaning.

Issue for Determination

Whether NBA has a legal personality which can sue or be sued.

Facts of the Matter

The appellant, a legal practitioner practicing in Port Harcourt. Rivers State, represented a Member of the Rumu-Amadi Family at the High Court of Rivers State, in a case involving family land.

The appellant's client lost at the High Court and he appealed to Court of Appeal. when things got out of hand, leading up to a petition written by the representatives of the family to the chairman of the respondent [the NBA]'s Port-Harcourt Branch.

In the Petition dated **23/3/2013,** it was alleged that while the matter was on appeal, appellant partitioned the family land and sold plots of land; and he misrepresented himself as the family's lawyer and began negotiating more sales without valid authority.

The Petition was referred to the Disciplinary Committee of the NBA, who after its investigations, made the following findings:

> **Parties were invited by the panel to give oral evidence. A thorough examination of the evidence, both oral and documentary, by the Panel revealed that the land for which the respondent received advanced payment and issued receipt therefor was part of the land in dispute, now on appeal. It is, therefore, the conclusion of the panel that the respondent [i.e appellant] tampered with the subject of litigation, contrary to Rules 30 and 32(k) of the Rules of Professional Conduct for Legal Practitioners 2007.**

Armed with the said report of its disciplinary committee, the NBA [respondent] filed a complaint against the appellant at the Legal Practitioners Disciplinary Committee [LPDC]: it states as follows:

> **1. That you Wome Moses, Esq., Male, a Legal Practitioner, practicing in Port-Harcourt, Rivers State retained by Franklin Amadi represented the aforesaid Franklin Amadi in a case involving family land of Rumu- Amadi Family in the High Court of Rivers State and that the Suit was decided against your client and you thus appealed to the Court of Appeal and that while the Appeal is pending, you assisted your client in partitioning the land and sold the plots of land to unsuspecting members of the public and by so doing, you have failed to maintain the high**

standard of professional conduct expected of a Legal Practitioner by engaging in an illegal conduct all contrary to Rules 1, 15(i) and (j): 55 and liable under Section 12 of the Legal Practitioners Act 2004 as Amended.

2. That you Wome Moses, a legal practitioner practicing in Port-Harcourt in a suit involving landed property owned by Amadi family and known as Rumu-Amadi Family land without the authority of the Family partitioned the land and sold plots of the land while the appeal filed by you is pending and by so doing have conducted yourself in a manner inconsistent with your status as a Minister in the Temple of Justice and in a manner that will adversely affect the administration of justice all contrary to Rules 1, 30, 32 (k) 55 and liable under Section 12 of the Legal Practitioners Act 2004 as amended.

In its final direction delivered on 11/11/2015, the LPDC found him guilty of infamous conduct in the course of performing his duty as a legal practitioner *"as set out in* counts 1 and 2 of the complaint'; and it directed the Chief Registrar of the Supreme Court to strike out the name of the appellant from the roll of legal practitioners.

The appellant appealed to this court with a notice of appeal containing six grounds of appeal. However, the respondent raised a notice of preliminary objection in its brief of argument praying that the notice of appeal and "appellant's purported brief of argument' be struck out and dismissed for being incompetent as the court lacks jurisdiction to hear the matter or alternatively, strike out the suit because NBA is not a juristic person and cannot sue or be sued *eo nomine.* The grounds for the objection are that:

There is no valid appeal before this court. The appeal is incompetent as no person whether natural or artificial has been named in this Suit. It was held in Fawehinmi Vs. NBA (No.2) (1989) 2 NWLR (Pt. 105) 558 that the NBA cannot be sued *eo nomine* in that case - - A person who should commence an action in court must be a person known to the law, i.e. a legal person. If it is successfully shown that a party to an action is not a legal person, the party should be struck out of the suit.

Held: (*Unanimously dismissing the appeal)*

1. *Preliminary objection is proper and must be taken first*

The preliminary objection takes priority because it is well settled that where one party is not a legal person capable of exercising any legal rights and obligations under the law, the other party can always raise this fact as a preliminary objection, which if upheld, normally leads to the action being

struck out - see Admin/Execs Estate, Abacha Vs. Eke-Spiff & Ors. (2009) 7 NWLR (Pt. 1139) 97SC. In other words, respondent's objection must be considered first.

2. *The facts of* ***Fawehinmi vs. NBA (1989) 2 NWLR (Pt. 105) 558***
In that case, Fawehinmi Vs. NBA (No.2) ***(supra),*** **NBA filed an application at the Lagos State High Court for an order** ***inter alia,*** **striking out its name on the ground that it is not a juristic person, and so cannot be sued. The learned trial judge, Johnson, CJ, held:**

> **It is my considered view, having taking account of the implication of the different legislations recognizing, imposing duties and granting privileges to the association as a body, that it is meant to give the association, even though unincorporated, a legal personality and I so hold. I, therefore, rule on that issue that 1st defendant [NBA] is a juristic person and properly sued by the applicant as a defendant in this suit.**

The Court of Appeal, however, held to the contrary that the NBA is NOT a juristic person and so, it cannot be sued legally in its name. In agreeing with the Court of Appeal, this court explained that -

> **The constitution of the NBA is not a statutory instrument - - It is a pure and simple private document which members of NBA, were entitled to draw up in exercise of their right to provide a constitution for the association to regulate its affairs. It was accorded its due superior position by the Legal Practitioners Act in the conduct of [its] affairs by the General Council of the Bar. This does not make the NBA a juristic person. It only gives the body recognition as a legal entity - - The fact that the legislature has in the legal Practitioners Act and the Legal Education (Consolidation etc.) Act given NBA representation on the Body of Benchers and Council of Legal Education is not an indication that the Legislature constituted the Association a suable entity.**

So, this court made it clear in Fawehinmi Vs. NBA (No.2) that NBA, the respondent in this appeal, is not a juristic or artificial person.

3. *The definition of an articial person*
An artificial person is defined in Black's Law Dictionary. 9th Ed., as:

> **An entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or a less as a human being.**

Per Augie (JSC)
"In Fawehinmi Vs. NBA (No.2) *(supra),* Karibi-Whyte, JSC, observed:

> **Chief Fawehinmi submitted that membership of the Association is regulated by statutes, Legal Practitioners Act and the Constitution of the NBA. The basis for this submission is because Article 4 of the constitution of the association provides that – every person duly enrolled by virtue of the Legal Practitioners Act shall be a member of the association "I do not think this article can be construed as having any statutory effect or to have converted a non-statutory provision of the constitution of the association (the constitution not being a creation of a statute), into a statutory provision. Membership of the association on being a legal practitioner is automatic, but this is merely a pre-condition of membership - - as provided by article 4 of the [association's] constitution, which is not a statutory provision. What regulates membership of the association is the provision of its constitution and not the provision of the Legal Practitioners Act 1975. The fact that reference is made to membership of the association in a legislation did not alter the true legal situation. The recognition accorded the association and its constitution did not give statutory effect to [its] constitution or make the association a statutory body. Our constitution in item 48 of the second schedule provides that incorporation of professional bodies can only be attained through a legislation of national assembly. This has not been done in this case.**

The bottom line is that the respondent cannot be sued in its name, which is what this court held in Fawehinmi Vs. NBA (No.2) *(supra),* decided in April 1989 and it is safe to say that nothing has changed since then for this court to hold otherwise today in February 2019. The decision still stands; the respondent is not a juristic person."

4. *LPDC is a legal person*

From his argument, which is clearly misconceived, it seems that the Appellant did not consider the status of the NBA and LPDC in the eyes of the law, and the different roles assigned to each one.

The NBA is not a juristic person but the same cannot be said for the LPDC, which was created by the Legal Practitioners Act. So, the LPDC is a legal person, which means it can sue and be sued in its name - see LPDC Vs. Fawehinmi (1985) 2 NWLR (Pt. 7) 300 SC.

They also play different roles in the disciplinary proceedings on professional misconduct. By virtue of rules 2A (2) and 3 of the Legal Practitioners (Disciplinary Committee) Rules, as amended, a complaint received by any of the persons specified in rule 2A (1), shall be forwarded to the NBA, which shall cause the complaint to be investigated. In any case where "in pursuance of Section 10 (I) of the Legal Practitioners Act', the NBA is of the opinion that a *prima facie* case is shown against a legal practitioner, the NBA shall forward a report of such a case to the Secretary of the LPDC.

5, *LPDC is created by statute*

And Section 11 (1) of the said Legal Practitioners Act provides that:

> **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 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. So, the NBA plays its part and the LPDC is left to decide the case.**

6. *Source of jurisdiction of LPDC*

As this court stated in Okike Vs. LPDC (2005) 15 NWLR (Pt. 949) 471:

> **It is not the charge forwarded to the respondent [the LPDC] that gives it jurisdiction to "try" a legal practitioner against whom a complaint is made, but Section 10(1) (b) of the Legal Practitioners Act.**

7. *Effect where an incompetent party is a respondent on appeal*

However, the appellant has also argued that since the NBA was the complainant at the LPDC, and this is an appeal and not a trial. Parties to this

appeal cannot be changed or altered at this stage. I am baffled, and it appears to me that the import of the finding that the respondent is not a juristic person, is lost on the appellant.

The issue is not whether the parties can be changed or not. The issue is whether the appeal is competent bearing in mind that the NBA, who cannot be sued in its name, is the only respondent, and the LPDC, who could be sued in its name, is not a respondent.

Per Augie (JSC)

"It is well settled that for an action to be properly constituted so as to vest jurisdiction in the court to adjudicate on the matter, there must be a competent plaintiff and a competent defendant, and where either of them is not a legal person, the action is liable to be struck out for being incompetent - see Agbonmagbe Bank Vs. General Manager, G. B. Ollivant Ltd. & Anor. (1961) All NLR 125.

In this case, there is only one appellant and one respondent, who is a non-juristic person, and as it cannot be sued in its name, it must be struck out as a party to this appeal. It also follows as a matter of course that the appeal itself must be struck out as well.

The outcome would have been different if the LPDC was also made a party to the appeal along with the NBA or even on its own (the cases referred to above had LPDC as a party to the appeal)."

8. *When an action is competently constituted in terms of parties.*

The position of the law is that once there is a plaintiff or defendant with requisite juristic capacity to sue and be sued, such an action would be properly constituted as to parties, and the action cannot be defeated on the ground of want of capacity to sue and be sued - see Nigerian Nurses Assoc. & Anor Vs. A-G . Fed. (1981) 11-12 SC 441.

In the final analysis, the objection raised by the respondent to the competency of the Appeal is sustained. The respondent is struck out as a party to the appeal and the appeal is struck out.

9. *NBA is not a juristic person*

It should be noted that the legal Practitioners Disciplinary Committee (LPDC) is not a party to the action leading to this appeal. The respondent is simply the Nigerian Bar Association (NBA), which by law is not a juristic person as it can neither sue nor be sued in a court of law - see the case of Fawehinmi Vs. Nigerian Bar Association (NBA) (No.2) (1989) 2 NWLR (Pt. 105) 558 at 595.

Per Eko (JSC) (Obiter)

In the course of preparing this opinion I came across the *obiter dictum* of Oputa, JSC in Fawehinmi Vs. LPDC (1985) 2 NWLR (Pt. 7) 300 to 391, to wit:-

> **Discipline in the Legal Profession is very necessary. I seriously doubt if this discipline can be achieved under the present law – Act No. 15 of 1975. There is an urgent need for an amendment of the Law (the Legal Practitioners Act) to provide for two ancillary but yet independent bodies namely:**
>
> **a. An investigating panel which will conduct one necessary investigations regarding allegations of misconduct against a legal practitioner. If this panel is satisfied that there is a *prima facie* case made out, then it will prefer charges. But it will not "consider or determine" those charges. That function which is really adjudicative will then be left to the second body:-**
>
> **b. The Legal Practitioners Disciplinary Tribunal. This tribunal will then try the legal practitioner and if it finds him guilty, it will feel free to impose the appropriate penalty. To ensure the observance of the rules of natural justice, no one person will serve on both bodies. This will inspire confidence. That is the position in England; that was the position in Nigeria under the 1962 Legal Practitioners Act.**

I share this sentiment. I wish to add that if the Nigeria Bar Association (NBA) cannot be made a corporate entity either by legislation or under the Companies And Allied Matters Act (CAMA), then like the Legal Practitioners Disciplinary Committee (LPDC), the Legal Practitioners Investigating Panel (or Committee) should be clothed with juristic personality and clearly empowered as such to be also the prosecuting body on behalf of the NBA. In the event of an appeal against the direction of the LPDC, such arrangement obviates the confusion as to who the respondent is or should be. This is necessary in view of Order 2, Rule 8 of the Rules of this Court that provides -

> 8. **Notice of appeal, application for leave to appeal, briefs and all other documents whatsoever prepared In pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these rules, shall reflect the same titles as that which obtained at the court of trial.**

Lead Judgement: AMINA ADAMU AUGIE, (JSC):

APPEARANCES:
Okey Owhonda. (Esq.) with Eric Chukwelu. (Esq.) for the appellant
Doyin Rhodes-Vivour. (Esq.) for the respondent