

**MTN NIGERIA COMMUNICATION LTD
Vs.
CORPORATE COMMUNICATION INVESTMENT LTD**

SC.674/2014

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH MARCH 2019

BEFORE THEIR LORDSHIPS

**IBRAHIM TANKO MUHAMMAD
MARY UKAEGO PETER-ODILI
KUDIRAT M. O. KEKERE-EKUN
AMIRU SANUSI
EJEMBI EKO**

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

*CASE LAW: Estoppel by conduct – The principle in **Street Vs. Fantastic Holding Ltd. (2011) NSWSC 1097***

*CONTRACT: Memorandum of Understanding – Where made subject to a formal contract – Implication – The principle in **BPS Construction and Engineering Co. Ltd. Vs. F.C.D.A (2017) 10 NWLR (Pt. 1572) 1***

COURT:- Evaluation of evidence – Perverse findings – Nature thereof.

COURT:- Inferences – Power thereto – Whether Courts have powers to draw inferences from proved facts.

COURT:- Supreme Court – Where there are concurrent findings – Whether Supreme Court will not interfere – Exceptions.

COURT:- Intermediate Court – Issues submitted for determination – Where a court is not a final court on the subject matter, it should endeavour to proffer an opinion on all the issues submitted to it – Rationale.

DAMAGES:- Award thereof – Where a party pleads and gives uncontradicted evidence on damages – Whether the trial court is bound to accept the evidence unless there is something inherent to disprove it.

DAMAGES:- Award thereof – Whether at the discretion of the trial court – Implication thereof.

DAMAGES:- General damages – Object thereof – Whether to compensate the plaintiff as much as money can do so, for the damages, loss or injury he has suffered.

*EQUITY:- Agreement between parties – Where a party has benefitted from an agreement – Whether it is morally despicable for the party to contend that the agreement is null and void – The principle in **Adedeji Vs. N.B.N Ltd. (1989) 1 NWLR (Pt. 96) 212.***

EQUITY:- Estoppel by Conduct – Where parties entered and concluded all essential terms of an agreement which however was not signed and executed by the defendant – Defendant relies on his non-execution as defence to the agreement – Whether defendant cannot be allowed to use his wrong doing as a weapon.

*EVIDENCE:- Cross-examination – Evidence procured therefrom – Whether it is as valid and authentic as evidence procured from examination – in chief – The principle in **Gaji Vs. Paye (2003) 8 NWLR (Pt. 823) 583.***

PRACTICE AND PROCEDURE:- Appeal – Nature thereof – Whether it is a continuation of the original action – Implication.

PRACTICE AND PROCEDURE:- Appeal – Where there is no appeal on specific findings made by the trial court – Whether those findings are deemed accepted.

PRACTICE AND PROCEDURE: Appellate proceedings – Where a trial court gives a right decision – Whether it is immaterial that it gave a wrong reason – Relevant principles thereof.

*PRACTICE AND PROCEDURE:- Breach of contract – Award of damages – Guiding principles – The principle in **Ijebu-Ode L.G.A Vs. L.G Adedeji Balogun & Co Ltd (1991) 1 NWLR (Pt. 166) 136.***

*PRACTICE AND PROCEDURE:- Cross-Examination – Evidence elicited therefrom – Where evidence of a defence witness under cross-examination supports facts pleaded by plaintiff – Whether such evidence forms part of the evidence produced by the plaintiff – The principle in **Adeosun Vs. Governor, Ekiti State (2012) 4 NWLR (Pt. 1291) 581.***

PRACTICE AND PROCEDURE:- Declaratory reliefs – Onus on claimant – Whether he must succeed on the strength of his case and not on the weakness of the defence.

PRACTICE AND PROCEDURE:- Evidence – Depositions of witnesses on oath – Whether the front loaded depositions of a witness on oath, constitutes his evidence in chief in the proceedings.

PRACTICE AND PROCEDURE:- Evidence – Evidence elicited under cross-examination – Whether it is relevant and admissible where it goes to support the pleadings of a party cross-examining him.

PRACTICE AND PROCEDURE:- Evidence – Where statement of defence is declared incompetent – Effect of evidence adduced therefrom – Whether any evidence based on the statement of defence is inadmissible.

PRACTICE AND PROCEDURE: Evidence – Where the defendant's statement of defence is incompetent – Whether evidence of defendant under cross-examination is admissible where it supports the plaintiff's pleadings.

PRACTICE AND PROCEDURE:- Pleadings – Whether parties are required to plead facts and not evidence.

STATUTE:- Evidence Act – S. 169 thereof – Principles of estoppel by conduct.

Issues for Determination

- (1) Whether the Court of Appeal was right when it acted on extraneous matters including the evidence of the D. W 1 at the trial in reaching its decision to affirm the judgment of the trial court? (Grounds 6 and 11).**
- (2) Whether the Court of Appeal was right in holding that the document which was admitted in evidence at the trial as Exhibit 'A' created an implied, binding and enforceable contract between the appellant and the respondent? (Grounds 1,5,7,8,9,10).**
- (3) Whether the affirmation of the award of general damages made to the respondent against the appellant and the award of costs made against the appellant is justified? (Grounds 2,3 and 4).**

Facts of the Matter

The claimant/respondent sued the defendant/appellant at the High Court of Rivers State sitting in Port-Harcourt claiming some declaratory and injunctive reliefs, as well as damages for wrongful termination of contract. Pleadings were filed and exchanged the parties called one witness each in proof of their respective cases. Several documents were tendered including Exhibit A, The Trade Partner agreement.

In the course of writing the judgment, the learned trial judge observed that Exhibit A was not signed by the appellant.

The court invited the parties to address him on Exhibit A. In its judgement, the trial court dismissed the case of the appellant, who unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

HELD: *(Unanimously dismissing the appeal)*

1. *Where a court is not the final court on the subject matter it should endeavour to proffer an opinion on all the issues submitted to it.*

What is quite apparent from the portions of the judgment reproduced above, is that the learned trial judge considered only the pleadings and evidence led by the claimant in reaching his decision on the expenses incurred. He was being cautious, since his was not the final court, by considering the pleadings and evidence led by the appellant in the event that he was overruled on the incompetence of the statement of defence. This approach is in keeping with the advice often given by this court that where a court is not the final court on the subject matter, it should endeavour to proffer an opinion on all the issues submitted to it so that the appellate court would have the benefit of the court's reasoning in the event that it does not agree with the position of the court on the issue of competence, jurisdiction, locus standi, etc.

The learned trial judge also stressed that he would have reached the same conclusion with or without the evidence of DW1 and the statement of defence.

The lower court agreed with the finding of the learned trial judge on the incompetence of the statement of defence and the fact that the evidence of DW1 was of no moment.

It follows that what was in issue before the lower court was whether the finding of the trial court based on the pleadings and evidence of the appellant alone, was justified. *(P.....para.....)*

2. *Appellate court is interested only when a wrong decision is given*
As rightly, submitted by learned counsel for the respondent, an appellate court is more concerned with whether the decision reached by the lower court is correct and not necessarily whether a wrong reason was given for reaching a right decision. See: Arisa Vs. The State (1988) 3 NWLR (Pt.83) 386; Ojengbede Vs. Esan & Anor. (2001) 18 NWLR (Pt. 746) 771. If the decision is right, it will be

upheld notwithstanding the fact that a wrong reason was given for the decision. It is only where the misdirection has caused the court to come to a wrong decision that it would be material. See: Oladele & Ors Vs. Aromolaran II & Ors. (1996) 6 NWLR (Pt.453) 180. (P.....para.....)

3. *Distinction between evidence elicited by evidence in chief and evidence elicited by cross-examination*

Having carefully read the judgement of the court below, it would appear that the appellant's main quarrel is with the finding that DW1 admitted that the respondent was entitled to the sum of N100 million for the SIM Cards it reactivated and also testified as to what the respondent would have earned if the contract had been carried out as provided in Exhibit A. It is pertinent to note that neither of the courts relied on the reply to the statement of defence or the further depositions of DW1 in support of the said reply. What they referred to were admission made by Owl in the course of cross examination.

On the issue of evidence elicited from a witness under cross examination, I do not agree with learned senior counsel for the appellant that because the evidence in Chief of DW1 was found to be of no moment, having been hoisted upon an incompetent statement of defence, the cross examination of the witness should also be jettisoned. The purpose of evidence in chief is to lead evidence in support of a party's pleadings. The purpose of cross examination is to discredit the witness of one's opponent and make his testimony unworthy of belief. Cross-examination of a witness may also enhance the case of the party cross-examining by affirming supporting his position. (P.....para.....)

4. *Effect of evidence elicited under cross-examination*

His Lordship Onnoghen, JSC (as he then was) provided an illuminating explanation on the treatment of evidence elicited under cross-examination in the case of: Akomolafe Vs. Guardian Press Ltd. (2010) 3 NWLR (Pt.1181) 338 @ 351 F-H, as follows:

"On the issue as to whether both parties called evidence in support of their pleadings, as held by the lower court, it is settled law that evidence elicited from a party or his witness(es) under cross examination, which goes to support the case of the party cross-examining, constitute evidence in support of the case or defence of that party. If at the end of the day the party cross-examining decides not to call any witness, he can rely on the evidence elicited from cross examination in establishing his case or defence. In such a case, you cannot say that the party calls no evidence in support of his case or defence. One may however say that the party called no witness in

support of his case or defence, not evidence, as the evidence elicited from his opponent under cross examination which are in support of his case or defence constitute his evidence in the case.

There is however a catch to this principle, The exception is that the evidence so elicited under cross examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties.”
(P.....para.....)

5. *Evidence procured from cross-examination is as valid and authentic as evidence procured from examination-in-chief*

I have considered the authority of Gaji Vs. Paye (supra) relied upon by learned senior counsel for the respondent and which learned senior counsel for the appellant sought to distinguish on the basis that evidence elicited under cross-examination is only relevant if it arises from issues joined between the parties. In other words, that it is only where both parties have filed pleadings that issues can be joined and the party cross-examining may rely on evidence elicited under cross-examination. With due respect to learned senior counsel, the submission does not reflect the decision of this court in that case. His Lordship, Niki Tobi, JSC held at page 611 A-8 of the report:

“Evidence procured from cross examination is as valid and authentic as evidence procured from examination-in-chief. Both have the potency of relevancy and relevancy is the heart of admission in the law of Evidence. Where evidence is relevant, it is admissible and admitted whether it is procured from examination-in-chief or cross-examination.” (Underlining mine)

For this reason, lawyers are often advised to be wary of questions they put to witnesses under cross-examination, particularly when they do not know the answer the witness would give. This is because the response to a question put to a witness under cross-examination may turn out to sound the death knell for his opponent's case. (P.....para.....)

6. *Evidence elicited from the cross-examination of a defence witness, which is in line with the facts pleaded by the plaintiff, forms part of the evidence produced by the plaintiff in support of his case. Again, in Adeosun Vs. Governor, Ekiti State (2012) 4 NWLR (Pt. 1291) 581 @ 602 A-B, it was held per Onnoghen, JSC (as he then was):*

" ..It is settled law that evidence elicited from the cross-examination of a defence witness, which is in line with the facts pleaded by the plaintiff, forms part of the evidence produced by the plaintiff in support of facts pleaded in the statement of claim and can be relied upon in proof of the facts in dispute between the parties." (Underlining mine)

From the authorities cited above, it is clear that the claimant was fully entitled to rely on evidence elicited from DW1 under cross-examination, which supported the claimant's pleadings.

In paragraph 19 of the statement of claim, it is averred that "the defendant is indebted to the claimant to the tune of N100,000.000.00" for the SIM Kit activation exercise and other repaid activation bonuses. The appellant's witness, under cross-examination admitted that the respondent was entitled to N100,000.000.00 for the exercise. It is an admission against interest. In paragraph 21 (c) of the statement of claim, the respondent claimed the sum of N500,000,000.00 as general damages for the unwarranted and abrupt cancellation of its orders. Under cross-examination, DW1 admitted that a trade partner could make a commission of up to N500 million depending on the volume of the order placed by the trade partner or its sales. These are not extraneous matters. They are facts pleaded by the claimant. It was entitled to rely on the evidence elicited from DW1, which supported its pleadings.

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

7. *Parties are required to plead facts and not evidence*

I have considered the index of evidence compiled by learned senior counsel for the appellant regarding evidence, which in his opinion is based on facts not pleaded. It is important to note that parties are required to plead facts and not evidence. The court is also entitled to draw inferences from the evidence before it, which the lower court did in this case. I am not satisfied that the lower court relied on extraneous matters in reaching its decision. (P.....para.....)

8. *The position of the Supreme Court has always been to refrain from interfering in concurrent findings.*

My Lords, although the parties have made copious submissions in respect of this issue, it must be borne in mind that this court is not hearing the case afresh. There are concurrent findings of the two lower courts. The position of this court has always been to refrain from interfering with concurrent findings of fact unless it is shown that the findings are perverse. (P.....para.....)

9. *When a finding is perverse*

A finding is perverse

- (i) *Where it is not supported by evidence on the record;*
- (ii) *Where it does not reflect a proper exercise of judicial discretion;*
- (iii) *Where evidence has been wrongly admitted or rejected the trial;*
- (iv) *Where there has been an erroneous appraisal of facts leading to erroneous conclusion;*
- (v) *Where the finding has been reached as a result of a wrong application of some principles of substantive law or procedure.*

See: *Ayeni Vs. Adesina* (2007) ALL FWLR.(Pt.370) 1451 @ 1457-1458; *Woluchem Vs. Gudi* (1981) 12 SC 214 @ 326; *Adegbite Vs. Ogunfaolu* (1990) 4 NWLR (Pt.146) 578; *Itu Vs. The State* (2016) 5 NWLR (Pt.1506) 443.

It is not the duty of this court to embark on a fresh appraisal of the evidence merely to reach a different conclusion or to substitute its views for the views of the trial court or the court below. (*P.....para.....*)

10. *Nature of an appeal*

It is also trite that an appeal is a continuation of the original action. The parties are therefore confined to their case as pleaded and presented at the court of first instance. See: *Ngige Vs. Obi* (2006) 14 NWLR (Pt.999) 1 @ 225; *Adegoke Motors Vs. Adesanya* (1989) 3 NWLR (Pt. 109) 250 @ 266; *Alhassan Vs. Ishaku* (2016) LPELR - 40083 (SC) @ 680. (*P.....para.....*)

11. *Front loaded deposition on oath of a witness in support of his pleadings, constitute his evidence in chief in the proceedings*

It is relevant to note that all the exhibits tendered by the respondent in support of its pleadings, including Exhibits A & B, were admitted in evidence without objection from the appellant. Learned senior counsel for the appellant contended that the respondent failed to lead evidence to demonstrate the terms of Exhibit A. With due respect to the learned silk, he appears to have overlooked the fact that the front loaded deposition on oath of a witness in support of his pleadings, constitutes his evidence in chief in the proceedings. (*P.....para.....*)

Per Ekun (JSC)

“The terms of Exhibit A were therefore pleaded and Exhibit A was before the court to support the pleading along with the written deposition of the witness. The evidence in chief of CW1, as per his written deposition made on 13/5/2011 and his evidence under cross- examination were summarised by the learned

trial judge at pages 148-158 of the record. It is therefore not correct, to contend that the terms of Exhibit A were not demonstrated before the court. It must also be recalled that there were no pleadings on behalf of the appellant to counter the pleadings of the respondent. Furthermore, the authenticity of Exhibit A was never challenged by the appellant at the trial court. The learned trial judge noted this at page 176 of the record, reproduced earlier in this judgement. It was in the course of writing the judgment that the His Lordship, on observing that Exhibit A was not signed by the appellant, adjourned the delivery of the judgment and invited the parties to address him on the evidential weight to be attached to it.

Exhibit A therefore stands as the contract between the parties. The appellant's witness, DW1, confirmed under cross-examination that Exhibit A was relied upon by the appellant to issue Exhibit B. The learned trial judge found this to be so when he held at page 176 of the record:

" ... the defendant in alleging that its relationship with the claimant has been terminated relied on Exhibit A. See the letter of termination of the agreement sent to the claimant by the defendant Exhibit B. In this regards, in so far as the claimant and the defendant transacted their business in compliance with the terms of Exhibit A and the defendant relied on Exhibit A in terminating its relationship with the claimant the fact that the defendant did not sign Exhibit A is of no moment. This is because equity looks at that which ought to be done."

The appellant did not appeal the finding of the trial court that Exhibit B was issued to terminate Exhibit A. The appellant did not deny terminating its agreement with the respondent nor did it tender any other agreement to show that it was not Exhibit A that was terminated by Exhibit B. It did so by the written deposition of CW1 adopted and relied upon at the trial and the exhibits tendered. (P.....para.....)

12. *Onus on party seeking declaratory reliefs*

The law is that a party seeking declaratory reliefs must succeed on the strength of his own case and not on the weakness of the defence, if any. He has an obligation to prove his claims to the satisfaction of the court notwithstanding any admission made by the defendant. This is because the grant of a declaratory relief is discretionary. See: Okoye Vs. Nwankwo (2014) LPELR - 23172 (SC) @ 71-72 D-B (2014 15 NWLR (Pt.1429) 93, Kwajaffa & Ors. Vs. B.O.N. Ltd. (2004) 13 NWLR (Pt. 889) 146; Emenike Vs P.D.P (2012) 12 NWLR (Pt.1315) 556.

The respondent had done what was required by tendering evidence in support of its claims. It had pleaded and led evidence to prove that Exhibit A was terminated by Exhibit B. The admission of this fact by the appellant's witness

bolstered the respondent's claim. It was entitled to rely on the admission as additional support for its case. (P.....para.....)

Per Ekun (JSC)

“I am of the considered view that as the authenticity of Exhibit A was never in issue before the trial court, it cannot be made an issue before this court.

The main reason why the appellant challenged the findings of the two courts with regard to Exhibit A, is that it was one of the terms of agreement that it would take effect from the date the last person signs and that since it did not sign the document after it was signed by the respondent, the document was inadmissible and could not be relied upon as a valid contract between the parties. The reasoning of the learned trial judge was that Exhibit A was prepared by the appellant without any input from the respondent. It was sent to the respondent for its signature signifying its acceptance. The respondent complied. The court held that the appellant, for reasons best known to it, did not sign the document but continued carrying on business with the respondent in accordance with its terms. It held that the appellant would not be allowed to take advantage of its own wrong doing by deliberately refusing to sign the document.

The court below dealt with this issue extensively at pages 323-333 of the record and agreed with the court below that in the circumstances of this case, the appellant ought not to be allowed to take advantage of its wrong doing by deliberately refusing to sign Exhibit A.

The question to be asked is whether these findings are perverse? I think not. Both the court below and the trial court reiterated severally that the appellant did not challenge the authenticity of Exhibit A and no questions were put to CW1 under cross-examination to challenge same.

I am of the considered view that what is critical in this case, as held by the learned trial judge, is that Exhibit A was prepared solely by the appellant. It was forwarded to the respondent for its signature, signifying its assent to the terms stated therein. The respondent duly signed through its chief executive officer and returned it to the appellant. The appellant did not sign and did not give any indication to the respondent that there was any change to their existing position. The last paragraph of Exhibit B states:

“further note that all commissions and discounts, if any due to you under the agreement shall be computed and paid in due course.”

Contrary to the contention of learned senior counsel for the appellant, the portion of Exhibit B referred to supports the finding of the two lower courts that the appellant continued to do business with the respondent despite not signing Exhibit A.

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

13. *The nature and purport of S. 169 of the Evidence Act, 2011*
These averments and the evidence in respect thereof in the written deposition of CW1 stand unchallenged and uncontradicted.
Section 169 of the Evidence Act provides:

"When one person has either by virtue of an existing court judgement deed or agreement or by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such persons representative in interest to deny the truth of that thing."

This is the purport of the foreign authorities relied upon by the lower court in the Australian cases of PRA Electrical Pty Ltd. Vs Perseverance Exploration Pty Ltd. & Anor. (2007) VSCA (Victorian Supreme Court of Appeal) 310 and Wayne Edward John Street Vs. Fantastic Holdings Ltd. (2011) NSWSC (New South Wales Supreme Court) 1097. Although of persuasive authority only, they were appropriately relied upon in this case. (*P.....para.....*)

14. *The principle in Street Vs. Fantastic Holding Ltd. (2011) NSWSC 1097*
In Street Vs. Fantastic Holdings Ltd. (supra), the respondent sought to enforce an agreement for a lease which it had signed and returned to the landlord even though the landlord had not signed. The respondent's lease was coming to an end. There were negotiations in respect of the renewal. All the essential terms of the agreement had been agreed upon. The landlord sent the formal lease agreement containing all the terms to the tenant to sign, which it did. A second lease agreement had to be sent because the earlier one was misplaced. The respondent signed and returned it. Even though the landlord did not sign, the tenant continued to occupy the premises after the expiration of the previous tenancy and paid rent in accordance with the new lease agreement. The landlord sought to rely on the fact that the agreement was only intended to come into force after final execution by both parties. The court held, *inter alia*:

" having completed the negotiation stage, the parties were of "one mind" as to the terms of the lease with nothing remaining outstanding other than formal execution. In sending the tenant the lease document the landlord was making a final offer in a form capable of acceptance, leaving nothing further for negotiation.

Therefore, signing the agreement would, objectively be regarded as a mere formality."

In the instant case, the offer was being made by the appellant. The respondent accepted the offer by appending its signature thereto. At that stage the negotiation aspect of the contract was complete, particularly as by signing, the respondent had agreed to all the terms and conditions therein.

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

15. *Effect where a Memorandum of Understanding is subject to a formal contract*
The recent decision of this court In BPS Construction and Engineering Co. Ltd. Vs F.C.D.A (2017) 10 NWLR (Pt.1572) 1, relied upon by learned counsel for the appellant, is distinguishable from the facts of this case as the subject matter involved a memorandum of understanding wherein the parties agreed that it was subject to the signing of formal agreement on terms to be mutually agreed between the parties. In other words, the MOU represented a preliminary understanding between the parties with the intention of subsequently entering into a formal contract. (P.....para.....)
16. *Appellant cannot be allowed to use his wrongdoing as a weapon against the respondent.*
In the instant case, as held in Alfotrin Ltd. Vs A.G. Federation & Ors. (1996) 9 NWLR (Pt.475) 634 @ 656 H, there was a concluded bargain which had settled all the essential conditions necessary to be settled and left no vital term or condition unsettled. As observed earlier, the appellant did not deny the fact that it continued trading and carrying on business with the respondent in accordance with Exhibit A.
I agree entirely with the two lower courts, that the appellant could not be allowed, by deliberately withholding its signature, to take advantage of its wrongdoing and use it as a weapon against the respondent. (P.....para.....)
17. *It is morally despicable for a person who has benefitted from agreement to turn around and say that the agreement is null and void*
See: Adedeji Vs. N.B.N Ltd. (1989) 1 NWLR (Pt.96) 212 @ 226-227 E-A, where it was held, *inter alia*, that it is morally despicable for a person who has benefitted from an agreement to turn around and say that the agreement is null and void, or unenforceable, as contended in this case. (P.....para.....)
18. *Concurrent findings are perverse*
I am not persuaded that the concurrent findings of the two lower courts in this regard are perverse. The lower court rightly affirmed the finding of the trial court that Exhibit A was a binding contract between the parties and that in issuing Exhibit B it failed to comply with clause 16.2 of Exhibit A, which required it to give the respondent 60 days written notice before terminating the

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

19. *The object of the award of General Damages is to compensate the plaintiff*
The object of an award of general damages is to compensate the plaintiff, as far as money can do so, for the damages, loss or injury he has suffered. The guiding principle is restitution in *integrum*. It envisages that a party which has been damnified by the act which is called in question must be put in the position he would have been if he had not suffered the wrong which he is now being compensated for. In other words the loss inevitably and unavoidably flowing from the breach. See: Chief S.I. Agu Vs. General Oil Ltd. (2015) LPELR -24613 (SC) @ 31-32 G-B; NEPA Vs. R.O. Alii & Anor. (1992) 10 SCN J 34; Ijebu-Ode L.G. Vs. Adedeji Balogun & Co. Ltd (1991) 1 NWLR (Pt.166) 136.
 (P.....para.....)

20. *Guide for assessment of damages in breach of contract*
In Ijebu-Ode Vs. L.G. Adedeji Balogun & Co. Ltd. (supra), it was held, per Karibi-Whyte, JSC at 158 F-G:

"In cases of breach of contract assessment of damages is calculated on the loss sustained by the injured party which loss was either in the contemplation of the contract or is an unavoidable consequence of the breach."

See also: Shell B.P. Vs. Jamal Engineering Ltd. (1974) 9 SC 191, 1 ALL NLR (Pt.1) 489. (P.....para.....)

21. *Award of damages is within the discretionary powers of the court*
It is also trite that an award of damages is within the discretionary powers of the court. The exercise of such discretion must however be based on the evidence before the court. See: British Airways Vs. Atoyebi (2014) 13 NWLR (Pt.1424) 253; Hamza Vs. Kure (2010) 10 NWLR (Pt. 1203) 630; Okoko Vs. Dakolo (2006) 14 NWLR (Pt. 1000) 401.

Per Ekun (JSC):

"The court below found and held, in affirmation the judgement of the lower court, that the learned trial Judge took into consideration the fact that the respondent pleaded and testified that it would have earned N100 million from the SIM Kit activation exercise and from other repaid activation bonuses if the appellant had not abruptly terminated the contract and that His Lordship also took into consideration all the immediate losses which were reasonably within the contemplation of the parties at the time of the contract.

The learned trial judge considered clause 5 sub-clauses 5.1.1, 5.1.4, 5.1.5, 5.1.8, 5.1.9, 5.1.10, 5.1.13 5.1.16, 5.1.29, 5.1.32 and 5.1.33 of Exhibit A, which the respondent was required to comply with and which includes the provision of distribution outlets, the provision of all necessary human and other resources required to effectively, sell, supply and or distribute the appellant's products and services; to make investments in structural facilities, business tools and system requirements which include (a) computers with internet access, (b) credit/debit card scanners for electronic payment; (c) printers for production of sales orders, etc. These requirements are no doubt capital intensive.

His Lordship noted that these items and those set out in Exhibit G2 were required to be supplied/complied with and had to be in place for the effective running of the appellant's business. The respondent pleaded the expenses incurred in paragraph 18 of its statement of claim and supported it with the witness statement of CW1, which was his evidence in chief. The learned trial judge observed that CW1 was not cross-examined to establish that the respondent did not comply with clause 5 and in particular the sub-clauses referred to. (*P.....para.....*)

22. *Effect of uncontradicted evidence on damages*

The respondent's claim for damages was uncontradicted. Where the claimant pleads and gives evidence in support of his claim for damages and his evidence is uncontradicted, the trial court is bound to accept the evidence unless there is something inherent in the evidence which disproves it. See: -1jebu-Ode L.G. Vs. Adedeji Balogun & Co. Ltd. (supra) at 159 A-B; 165 C-O; Incar Nig. Ltd. Vs. Adegboye (1985) 2 NWLR (Pt. 8) 453 @ 461-462 B-C.

The court below found no reason to disturb the exercise of discretion by the learned trial judge. I am equally not persuaded to do so. The respondent's evidence on the claim for general damages was uncontradicted. Indeed the appellant's witness admitted the respondent's entitlement to N100 million for SIM Kit activation, thereby confirming the respondent's natural loss arising from breach of the contract between them. (*P.....para.....*)

23. *Effect where there is no appeal against specific findings made by the trial court*

The excerpts above of the trial court findings and conclusions were not appealed against at the lower court which throws up the settled law that where there is no appeal against specific findings of fact made at the trial court, those findings remain for all time unassailable and deemed accepted as representing the true state of affairs. It therefore becomes futile trying to smuggle those same issues at another level of appeal since they have in effect been conceded by the party against whom they were decided and remains valid and binding on all parties forever. I rely on Anyanwu Vs. Ogunenwe (2014) All FWLR (Pt.738) 1012 at 1037; Nwankwo Vs. Yar'Adua (2010) All FWLR (Pt.534) 1; L.A. & A.C. Ltd Vs.

U.B.A. Plc (2014) All FWLR (Pt.739) 1080 at 1094. (P.....para.....)

24. *Cross-examination answers are not usually pleaded*
The appellant had urged the court to expunge the facts admitted by the witness of the appellant under cross-examination as they were not pleaded. On this point I agree with learned counsel for the respondent that that argument just cannot fly as cross-examination answers are not usually pleaded since a party cannot be in the know or anticipate the mind of the other as to predicting what would be asked in cross-examination therefore if as happened in this case the amount claimed by the respondent and admitted by the appellant's witness under cross-examination tallied with each other, there is no need for further pleading and it is to the advantage of the respondent and nothing stops the court utilising it as it is as valid as examination in chief. See Adeosun Vs. Governor of Ekiti State (2012) 4 NWLR (Pt.1291) 581, at 600; Gaji Vs. Paye (2003) 8 NWLR (Pt.823) 583 at 611; Mobil Oil (Nig.) Ltd Vs. National Oil & Chemical Marketing Co Ltd (2000) 9 NWLR (Pt.671) 44 at 52. (P.....para.....)
25. *An appellate court should be concerned with the rightness or wrongness of the decision*
The grouse of the appellant as I can see, seems based on the reasons on which the appeal court came to its decision as the appellant is not happy with the court's utilization of the evidence of DW1 in justifying the award made against the appellant. This makes one remind himself that what an appellate court is concerned with should at all times be the rightness or wrongness of the decision and not necessarily the reasons for the conclusion or decision. This is so because, once the decision is right it would be upheld at the higher level irrespective of the fact that a wrong reason was given for that decision. See Dickson Arisa Vs. The State (1988) 7 SCNJ 760 at 84; Akpere Vs. Barclays Bank (1977) 1 SC 57; Osakwe Vs. Governor of Imo State (1991) 5 NWLR (Pt.191) 318 at 333-334; Anekwe Vs. Nweke (2014) All FWLR (Pt.739) 1154 at 1175; Amadi Vs. Nwosu (1992) 5 NWLR (Pt.241) 273; Nitel Ltd Vs. Ikpi (2007) 8 NWLR (Pt.1035) 96 at 109-110.
26. *Reasons for sustaining the contractual relationship between the parties.*
Overall, there is no difficulty in agreeing with the decision of the court below which affirmed the decision of the High Court with regard to the contractual relationship between the parties for the following reasons:-
- (1) **there is consideration;**
 - (2) **the fundamental terms are certain;**
 - (3) **there is acceptance by due signature of respondent;**
 - (4) **intention to create legal relationship and offer based on the**

- sending of the agreement for respondent's signature by the appellant who drafted same.
- (5) the appellant and respondent started adhering to the terms of Exhibit 'A';
 - (6) the appellant used the services under Exhibit "A" by the fact that the services rendered previous agreements were recognized by exhibit "A" when it stated in Clause 34 (b) that;

“Notwithstanding Clause 34(a) which terminated the previous agreement, the trade partner shall still be entitled to all commissions and discounts earned prior to the termination referred to in 34(a)”. (P.....para.....)

27. *Effect where appellant did not disturb concurrent findings*

The above were concurrently accepted by the two courts below and no reason has been brought before this court in persuasion to disturb those findings and a long line of cases is on record that when such a situation occurs, this court as any other appellate court should not disturb such findings. See *Ibuluya Vs. Dikibo* (2010) 18 NWLR (Pt.1225) 627 at 650 and 651.

In the final analysis, this appeal lacks merit and in line with the well rendered lead judgment, I too dismiss it as I abide by the consequential orders made. (P.....para.....)

Per Eko (JSC)

“The totality of the evidence, including the admission against interest made by the DW.1, suggested that the parties transacted business on the basis of Exhibit A. Exhibit 8, which purportedly invoked the termination clause in Exhibit A, to terminate Exhibit A clearly and strongly suggest that the appellant, like the respondent, regarded Exhibit A as a binding contract. Exhibit A was tendered and admitted in Evidence without objection.

Though not mutually executed Exhibit A was regarded by the parties as their binding contract. Equity acts in personam and therefore takes as done that which ought to be done, if from the conduct of the parties such inference can be drawn. In the instant case such facts abound on which the two courts below concurrently found that the parties intended to be bound by Exhibit A and that Exhibit A would be the basis of their mutual transaction, whether or not the document was formally executed. Again, equity acting in personam would look at the intent of the parties and the substance and not at the form. In the instant case insistence on compliance with all formalities of executing a written agreement will be oppressive to the respondent. The appellant, in the court of justice, will not be allowed to take advantage of the respondent on his own

iniquity by his ingenious booby trap by which he deliberately withheld his signature while at the sametime it made the respondent go with the impression that the relationship is governed or regulated by Exhibit A.

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

28. *Principles of estoppel by conduct*

Section 169 of the Evidence Act, 2011, which codified the principle of estoppel by conduct, will not countenance the present posture of the appellant and allow it resile out of Exhibit A. For clarity Section 169 of the Evidence Act is hereinbelow reproduced:

169. When one person has, either by virtue of an existing Court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing. *(P.....para.....)*

29. *Concurrent findings on damages are correct*

The facts on which the evidence of the CW.1 was predicated were not traversed. His deposition on oath was also not traversed. These indubitable facts, supported by the evidence of DW.1 under cross-examination, amply support the decision of trial court affirmed by the lower court. The damages awarded are supported by available legal evidence. The concurrent findings of fact, as they relate to the award of damages, are unassailable. *(P.....para.....)*

Representations

D. C. Denwigwe, (SAN). for the appellant with J.O. Asoluka (Esq) and C.U. Onyeukwu (Esq.)

Nyengierefaka Joshua (Esq.) for the respondent.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC (Delivered the Lead Judgment):

**OBINNA JOHN
VS
THE STATE**

SC. 363/2014

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 8TH MARCH, 2019

BEFORE THEIR LORDSHIPS

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

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

CONSTITUTIONAL LAW: Fair hearing – Unnecessary resort thereto – The principle in Adebayo vs. A.G Ogun State (2008) LPELR – 80 (SC) 23.

COURT: Approach to justice – Whether have departed from era of technicalities.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Proof thereof – Failure to tender weapons used in armed robbery – Whether not fatal to the case of prosecution.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Proof thereof – Onus on prosecution – Whether bound to establish elements of offence beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Charge – Objection thereto – Where appellant did not object to the charge when his plea is being taken – Whether the appropriate time to object to a charge is when the charge is being read.

CRIMINAL LAW AND PROCEDURE: Charge – Objection thereto – Whether any objection to a former defect in a charge shall be taken after the charge have been read to the accused and not later – S. 383 of CPC considered.

CRIMINAL LAW AND PROCEDURE: Charge – Objection thereto – Whether the appropriate time to object to a charge is when it is being read – The principle in Okewu vs. Federal Republic of Nigeria (2012) 9 NWLR (pt. 1305) 327.

CRIMINAL LAW AND PROCEDURE: Charge – Purpose thereof.

CRIMINAL LAW AND PROCEDURE: Trial court – Where there are defects, omissions and errors in the charge at the trial court – Purport of S. 382 of the CPC – Relevant principles thereof.

EVIDENCE: Confessional statement – Whether the best evidence in our criminal procedure. PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Interference therein – Whether Supreme Court will only interfere in concurrent findings where they are perverse.

Issue for Determination

Whether the appellant's trial was a nullity because the charge was signed for, and on behalf of, Mrs G. E. Dashe of the ministry of Justice?

Facts of the Matter

The accused/appellant was charged at the High Court, Plateau State for armed robbery contrary to and punishable under Section 1(2)(a) of Robbery and Firearms Act, Cap 398, Laws of the Federation of Nigeria, 1990.

In proof of its case, the prosecution called three witnesses and tendered certain exhibits. On his part, the appellant testified as a sole witness.

At the close of trial, the trial court convicted the appellant as charged. He unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal).*

1. *The elements of armed robbery*

It is no longer in doubt that case law has identified these constitutive ingredients of the offence of the armed robbery, namely, that there was a robbery or series of robberies; that the robbers were armed and that the accused persons committed the said offence, *Osugwu vs. State* (2016) LPELR – 40836 (SC) 12 – 13; *Suberu vs. The State* [2010] 8 NWLR (Pt. 1197) 586; *Nwachukwu vs. The State* (1985) 3 NWLR (Pt. 11) 218; *Alabi vs. The State* [1993] 7 NWLR (Pt. 307) 511; *Olayinka vs. The State* [2007] 9 NWLR (Pt. 1040) 561.

Others include: *Bozin vs. State* (1985) 2 NWLR (Pt. 8) 465, 467; *Okosun vs. AG, Bendel State* (1985) 3 NWLR (Pt. 12) 283; *Ikemson vs. State* (1989) 3 NWLR (Pt. 110) 455; *Adeosun vs. State* (2007) 46 WRN 1; *Afolalu vs. The State* [2010] 16

NWLR (Pt. 1220) 584; Aruna vs. The State [1990] 6 NWLR (Pt. 155)125; Okosi vs. AG, Bendel State [1989] 1 NWLR (Pt. 100) 642. (*P.....Paras.....*).

2. *Onus on prosecution to establish elements of armed robbery beyond reasonable doubt*

In order, therefore to secure the conviction of an accused person for the offence of armed robbery, the prosecution must satisfy the requirements of these ingredients beyond reasonable doubt. Where this is not done, the case must fail. Put, differently, it is the prosecution's proof of these ingredients beyond reasonable doubt that would warrant a guilty verdict from the court of trial, Osuagwu vs. State (supra); Afolalu vs. The State (supra); Isiaka vs. State (2013) LPELR – 20521 (SC); Bozin vs. State (supra) at 467; Alabi vs. State (supra); Olayinka vs. State [2007] 9 NWLR (Pt.1040) 561; Osetola and Anor vs. The State [2012] 17 NWLR (Pt. 1329) 251,275.

At the trial court, PW1 and PW2, victims of the offence testified. Their unequivocal testimonies, which were not impeached, identified the appellant as the man who robbed them. They testified that the appellant was armed when he robbed them. Their testimonies were not discredited in anyway as to diminish their testimonies were not discredited in any way as to diminish their probative value as testimonies of eye witnesses, Ukosi vs. The State (supra). (*P.....Paras.....*).

3. *Failure to tender weapons used in armed robbery is not fatal*

The appellant's counsel wasted so much energy on the trial court's rejection of the gun that was produced. However, the rejection does not detract from the fact the appellant was armed when he robbed the victims. In any event; the prosecution's failure to tender the weapon used is not fatal to the beautiful case it presented, Abiodun vs. The State [2013] 4 SCNJ 153, 168. The lower court, rightly, affirmed the findings of the trial court. In effect, the appellant was battling with concurrent findings which he could not prove to be perverse, Ndidi vs. The State (supra). (*P.....Paras.....*).

4. *Principles of fair hearing inapplicable*

Unable to impugn the concurrent findings on any rational ground, learned counsel for the appellant drummed up the issue of appellants drummed up the issues of appellant's fair hearing. The answer to this weak-kneed attempt is to remind him of the inapplicability of the fair hearing doctrine to his case, like this court did in Adebayo vs. AG, Ogun State (2008) LPELR - 80 (SC) 23-24.

For its bearing on the fortune of the appellants' case, I crave your Lordships' indulgence to quote this court's view *in extenso*:

I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair

hearing to bamboozle the adverse party and the court, with the view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.

They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a causal principal of law available to a party to be picked up at will in the case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision *available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case.* Let litigant who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking. [Italics supplied for emphasis]. (P....Paras....).

5. *Effect of errors defects or omissions in charges at the trial court*

It is this same impression that led to the extensive arguments in the appellant's brief on the absence of signature in the charge. Now, just like Section 166, 167 and 168 of the old Criminal Procedure Law, Section 382 of the Criminal Procedure Code, which was applicable in Plateau State, at the relevant time, dealt with the effect of errors, defects or omissions in charges at the trial court, *Okewu vs. FRN* [2012] 9 NWLR (Pt. 1305) 327, 369; *John Agbo vs. State* [2006] 1 SCNJ 332, 335-337; *Uwaekweghinya vs. State* [2005] 3 SCJN 32, 42.

Thus, in order to accentuate the irrelevance of the submissions of the appellant's counsel, it is necessary to adumbrate on the import of this section of the Criminal Procedure Code (supra). By virtue of section 36 (6) (a) of the constitution of the Federal Republic of Nigeria, 1999 (as amended), every person who is charged with any offence shall be entitled to be informed, promptly, in the language he understands, and in detail, of the nature of the offence.

Only one or two cases may be cited here to illustrate this point, *Amala vs. State* [2004] 12 NWLR (Pt. 888) 520; *Ezeze vs. State* [2004] 14 NWLR (Pt. 894) 491; *Okeke vs. State* [2003] 15 NWLR (Pt. 842) 25; *Madu vs. The State* (2012) LPELR -7867 (SC); *Solola Vs. The State* [Pt.2005] 11 NWLR (Pt. 937) 460. Ostensibly, therefore, the statutory prescription that every charge shall state the offence for which the accused person is standing trial stems from this constitutional mandate.

Occasionally, however, charge so drafted may contravene any of the rules of drafting charges, such as the rules against ambiguity; duplicity; misjoinder of offenders and misjoinder of offences, see, generally, Bob Osamor, *Fundamentals of Criminal Procedure Law in Nigeria* (Ojodu, Lagos: Dee-Sage Nigeria Limited, 2004) 188; O. Doherty, *Criminal Procedure in Nigeria Law and Practice* (London: Blackstone Press limited, 1999) 227; O. Onadeko, *The Criminal Trial Procedure* (Lagos: Lannon Nigeria Ltd, 1998). This is the context in which section 383 (supra) has to be viewed. (*P.....Paras.....*).

6. *An objection to a charge shall be taken after the charge have been read to accused and not after*

By Section 383 (supra), any objection to a charge for any formal defect [surely, an allegation bordering on the absence of the signature of a known legal practitioner is a formal defect] on the face thereof shall be taken immediately after the charge had been read over to the accused person and not later. Put differently, an accused person is under obligation to raise any objection to any formal defect to a charge before he takes his plea, *Ogunye vs. The State* [1999] 5 FWLR (Pt.604) 545; *Adeniji vs. The State* [2001] 13 NWLR (Pt.730) 375; *OKeke vs. The State* (2003) 5 SCM 131, 185-186; *Solola and Anor vs. The State* (2005) 6 SCM 137, 147; *Okewu vs. FRN* (2012) 9 NWLR (Pt. 1305) 327, 369.

Where he fails to do so, he is presumed to have understood the charge preferred against him, *Ogunye vs. The State* (supra); *Adeniji vs. The State* (supra); *OKeke vs. The State* (supra); *Solola and Anor vs. The State* (supra); *OKewu vs. FRN* (supra).

Simply put, therefore, the learned DPP for the respondent was right in his submission that since counsel for the appellant did not raise any objection to the alleged defect in the charge, he cannot now canvass it here, *Uwaekweghinya vs. State* (supra); *Timothy vs. FRN* [2013] 4 NWLR (Pt. 1344) 213, 231-243; *Agbo vs. State* (supra).

In all, I find no merit in this appeal. It is, accordingly, dismissed. I affirm the concurrent judgments of the lower courts. Appeal dismissed. (*P.....Paras.....*).

7. *Appellant did not object to the reading of the charge when his plea was being taken*

It is note worthy that the appellant did nto object to the reading of the charge when his plea was being taken at the commencement of his trial. The charge was read clearly and he did not complain about the contents or the body of the charge. He pleaded NOT GUILTY to the charge which meant that he understood the charge and was not misled in any way. It is trite law that the appropriate time to complain or object to a charge either as drawn up or formulated, is the time the charge is being read and before the plea. See; **Elijah Ameh Okewu vs. The Federal Republic of Nigeria**

(2012) 4 SCM 18; (2012) 2 SC (Pt. 11) 1; (2012) 2 SCNJ 126; (2012) 49 NSCQR 330.

Therefore, it was too late in the day for the appellant to be complaining about the charge on appeal. At the very best, whatever complaint the appellant had about the arraignment ought to have been taken before the trial judge and considered with the trial of the main complaint by the prosecution and a ruling given by the trial court.

In the circumstances, I have no reason to interfere or tamper with the concurring decisions of the courts below, as there was no evidence of miscarriage of justice or breach of fair hearing. (*P.....Paras.....*).

8. *Supreme Court will rarely interfere in concurrent findings of fact*
It is trite law that this court would rarely interfere with concurrent findings of facts by the two courts below except where such concurrent findings of facts appear to be perverse, occasion a miscarriage of justice, unreasonable and against the evidence adduced, or in violation of some principle of law and procedure. In such circumstances, this court would not allow such perverse findings to stand. See **Ogbu vs. State (1992) 8 NWLR (Pt. 259) 255; Ogba vs. State (1992) 2 NWLR (Pt. 222) 164; Bright vs. State (2012) 8 NWLR (Pt. 1302) 297 Ikenta Best (Nig.) Ltd. vs. Attorney-General Rivers State (2008) 6 NWLR (Pt. 1084)**. (*P.....Paras.....*).
9. *Courts have departed from era of technicalities*
It has also become trite that our courts have long departed from the era of technicalities to doing substantial justice between parties. See **Omoju vs. FRN (2008) 7 NWLR (Pt. 1085) 38; Oloruntoba-Oju vs. Abdul- Raheem (2009) 13 NWLR (Pt. 1157) 83**. (*P.....Paras.....*).
10. *Appellant failed to raise objection before plea*
The main complaint advanced by the appellant in this appeal upon which he wants this court to interfere with the concurrent findings of the two lower courts is that the charge was not signed by any known legal practitioner. This observation was brought to the fore long after the appellant (as accused) had taken his plea and subsequently convicted for the offence preferred against him, after trial. On this point, I agree with the submission of the respondent's counsel that the appellant having failed to raise objection to the charge before plea, it has become too late to object. (*P.....Paras.....*).
11. *The appropriate time to object to a charge is at the time it is being read*
In the case of **Okewu vs. Federal Republic of Nigeria (2012) 9 NWLR (Pt. 1305) 327 at 352 paragraphs E**, this court per Ariwoola, JSC observed that:

“If there had been any defect or an ambiguity in the charge, the

appellant should not have responded with his plea when the charge was read. He should have objected at the reading of the charge. The appropriate time to complain or object to a charge as drawn up, is at the time it is being read and before the plea.”

The above observation of His lordship is the extant position of the law. This court cannot depart from it, moreso, as the charge did not offend any known rule of drafting of charges and the irregularity so complained of did not occasion a miscarriage of justice. (*P.....Paras.....*).

12. *A confessional statement is the best evidence in our criminal procedure*

I have also considered the import of Exhibit 3 which is the confessional statement of the appellant together with the unimpeached testimonies of PW1 and PW2. I am satisfied as the two lower courts before now that the confession as per Exhibit 3 is unequivocal and true. It is in-tandem with the testimonies of PW1 and PW2 which have established as rightly found by the lower courts that the appellant committed the offence for which he is being charged with.

It is settled law that a confessional statement is the best evidence in our criminal procedure. Once it is admitted in evidence; the trial court can safely convict an accused person based on his confessional statement. **See Solola vs. State (2005) 11 NWLR (Pt. 937) 460. Igri vs. State (2012) 16 NWLR (Pt. 1327) 522 at 542.**

I hold therefore, that in view of the fact that the charge preferred against the appellant disclosed an offence known to law and the irregularity observed thereon, long after plea had been taken, did not occasion any miscarriage of justice against the appellant and the fact that the appellant unequivocally confessed to the commission of the offence in Exhibit 3 which was corroborated by the testimonies of PW1 and PW2, there is therefore no reason to interfere with the concurrent findings of facts of the two courts below. (*P.....Paras.....*).

13. *The purpose of a charge*

The important thing about “the Charge” in a criminal case is that it must tell the accused person enough, so that he may know the case alleged against him and prepare his defence – see **Ogbomor vs. State (1985) 1 NWLR (Pt. 2) 223**, wherein Oputa, JSC, further explained that:

The fact that a charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. The charge must not, therefore, have defects or errors, which could mislead the accused. The emphasis is not, on whether or not there were defects, errors or omissions in the charge, but on whether or not those defects,

errors or omission could and did in fact mislead the defence. Subject to the above, a defect, error or omission, which does not prejudice the defence, is no ground for quashing the conviction on a charge for a known offence. (P.....Paras.....).

14. *Any objection to a charge for any formal defect shall be taken immediately after the charge has been read*

It is also settled that any objection to a charge for any formal defect on the face of it shall be taken immediately after the charge has been read over to the accused; not later. In this case, the appellant's timing or stage of making his objection is what put the spanner in the works.

The said charge described an offence known to law; it was read to the appellant; and having understood same, he pleaded not guilty. As the respondent pointed out, neither the appellant nor his counsel objected to the alleged defect in the charge, and it is too late to object. (P.....Paras.....).

Representations

Kekemeke, (Esq.), for the appellant;

with him, Maxwell Chukwujama;

G. D. Fwomyon, DPP, Plateau State, for the respondent; with him,

G. E. Dashe, DDCR/LR and E. I. Angai, DDL.

CENTUS NWEZE, (JSC) (DELIVERING THE LEAD JUDGMENT):

**SIKIRU AFOLABI SUBERU
VS**

- 1. POLARIS BANK LTD**
- 2. KUNLE SABADE**

SC.46/2004

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**WALTER SAMUEL NKANU ONNOGHEN
KUMAI BAYANGAKAAHS
JOHN INYANG OKORO
SIDIDAUDA BAGE
UWANIMUSA ABBA-AJI**

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

EQUITY: Acquiescence – Where appellant did not bother about the interest charge by the bank but pleaded for time to repay the debt – Whether appellant cannot later question the interest rate charge by the bank as he has acquiesced thereto.

PRACTICE AND PROCEDURE: Appeal – Issues for determination – Issues for determination should be based on grounds of appeal – Whether issue not derived from grounds of appeal is incompetent.

PRACTICE AND PROCEDURE: Appeal – Issues for determination – It is desirable to indicate a ground from which an issue is derived – Whether failure to so indicate is not fatal because it is a rule of practice.

PRACTICE AND PROCEDURE: Appeal – Preliminary objection thereto – How raised – Whether can be raised in respondent's brief.

Issue for Determination

- 1. Whether the court below was right to have struck out issue 1 of the appellant's issue for determination.**

2. Whether the court below did considered (sic) or adequately considered issue 3 raised by the appellant before it.

Facts of the Matter

The plaintiff/appellant sued the defendants/respondents at the High Court of Oyo State for Declaratory and Injunctive reliefs in respect of a legal mortgage between him and the 1st defendant's bank. The declaration claimed was in respect of the interest chargeable, he also claimed refund of excess interest paid as well as an injunction restraining the defendants from selling his property by public auction.

The first defendant counter claimed for the outstanding sum standing in the plaintiff's account.

At end of trial, the trial court delivered judgment in favour of the first defendant's bank. The plaintiff/appellant appealed to the Court of Appeal which dismissed his appeal, hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Issues should be based on grounds of appeal*

It is settled law that the formulation of an issue/issues should be based on the grounds of appeal and if an issue does not relate to or arise from the grounds, that issue is incompetent and should be struck out. See: Akere vs. Governor of Oyo State (2012) 12 NWLR (Pt. 1314) 240; Eta vs. Dazie (2013) 9 NWLR (Pt. 1359) 248; Daniel Vs. INEC (2015) 9 NWLR (Pt. 1463) 113; Nsirim vs. Amadi (2016) 5 NWLR (Pt. 1504) 42; Orji Vs. Amara (2016) 11 NWLR (Pt. 1522) 84; Afolabi vs. State (2016) 11 NWLR (Pt. 1524) 497; Aerobell (Nig.) Ltd vs. NDIC (2017) 5 NWLR (Pt. 1558) 203; Sogunro vs. Yeku (2017) 9 NWLR (1570) 290. (P.....Paras.....).

2. *Failure to indicate ground from which an issue is derived is not fatal*

It is desirable to indicate the ground from which an issue was formulated. However failure to so indicate the ground will not be fatal or render the issue incompetent for it is a rule of practice that is only meant for convenience. See: Aerobell (Nig.) Ltd vs. NDIC supra at page 229.

From the grounds of appeal reproduced above, issue 1 is derived from ground 3(c) while issue 2 is discernable from Ground 3(b) of the notice of appeal. No new issues have been raised which require leave of either the lower court or this court before they can be argued. I hold that the preliminary objection has no merit and it is hereby dismissed. (P.....Paras.....).

3. *A notice of preliminary objection can be given in respondent's brief*
Order 3 Rule 15(1) and (3) Court of Appeal Rules 1981 provides:

"Ord. 3 Rule 15(1) A respondent intending to rely upon a

preliminary objection to the hearing of the appeal shall give the appellant three (3) clear days notice thereof before hearing setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the registrar within the same time.

(3) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such order or orders as it thinks fit.”

This provision came up for consideration in this court in *Oforkire vs. Maduike* (2003) 5 NWLR (Pt. 812) 166 and in his leading judgement Mohammed JSC held at page 178 applying *Nsirim vs. Nsirim* (1990) 3 NWIR (Pt. 138) 285 that-

“ I agree with learned counsel that a party in the Court of Appeal having a preliminary objection against any of the grounds of appeal must give the appellant three days notice before the objection is heard. The notice of preliminary objection can be given in the respondent's brief, but a party filing it in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise it will be deemed to have been waived and therefore abandoned.”
(P.....Paras.....).

4. *It was wrong for lower court to strike out issue 1*
Learned counsel for the respondents did not inform the court that she had filed a preliminary objection to the, grounds of appeal. By not referring to the preliminary objection filed and argued in the respondent's brief, the preliminary objection was deemed abandoned and the court below should not have considered it and ruled on it in the course of the judgement. Having upheld the preliminary objection, the lower court proceeded to strike out issue 1. It was therefore wrong to strike out the said issue. (P.....Paras.....).
5. *The primary role of supreme Court as an appellate court*
The primary role of this court before arriving at its decision will be to seek to know the following namely:-
 - (i) The evidence before the trial court
 - (ii) Whether it accepted or rejected any evidence upon the correct perception
 - (iii) Whether it correctly approached the assessment of the value on it;

- (iv) Whether it used the imaginary scale of justice to weigh the evidence on either side and
- (iv) Whether it appreciated upon the preponderance of evidence which side the scale weighed, having regard to the burden of proof. See: *Kim vs. Emefo* (2001) 4 NWLR (Pt. 702) 147; *MISR (Nig.) Ltd vs. Ibrahim* (1975) 5 SC 55; *Egonu vs. Egonu* (1978) 11-12 SC 111; *Agbonifo vs. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325 and *Elewaju vs. Onisaodu* (2000) 3 NWLR (Pt. 647) 95. (*P....Paras.....*).

6. *Appellant acquiesced on the interest rate charged by the respondent*

There is concurrent finding of facts by the trial court and the court below that the interest rate chargeable on the loan was not stated in exhibit A and the 9% which the plaintiff/appellant asserted was the interest was not static. The two courts also found that the defendant always gave the plaintiff his statement of account and he also received Exhibit D. He wrote exhibits F, G, J, K, L to the defendant accepting the balance and pleaded for time to pay the debt but did not bother to know the rate of interest. Based on these findings the two courts found that the appellant acquiesced on the interest the bank was charging and it was therefore late in the day to rework or reverse all the excess interest charged on the account.

There is ample evidence to support the conclusion arrived at by the two lower courts that the appellant tacitly consented or acquiesced to his loan account being bombarded by varying rates of interest and instead of protesting, he pleaded for time to liquidate the debt. This court finds no reason whatsoever to interfere with the findings or the application of the legal principles which the two courts below applied. The trial court considered the evidence before it and correctly approached the assessment of the said evidence and applied the law to the evidence. The lower court affirmed the findings made by the trial court and the application of the law. This court finds no reason to interfere with what the two lower courts have done. (*P.....Paras.....*).

7. *Appellant did not protest the arbitrary interest rates charged by the respondent*

It was the appellant who tendered Exhibit "D" while the 1st respondent tendered Exhibit 0-07. The debit balance in the account as at 31/8/94 is N511,548.02 in both Exhibits D and 0-07. In Exhibits D the account was wrongly debited on 8/10/94 and this was corrected in Exhibit 0-07. The learned trial judge entered judgement for the defendant/counter claimant for the debit in the plaintiff's account as at 31/8/1994.

The appellant ought to have protested the arbitrary interest he was being charged on the loan but instead chose to plead for time to repay the amount which he never did. His protest came too late and there is nothing this

Court can do to assist him. The appeal therefore lacks merit and it is accordingly dismissed. I shall make no order on costs. (*P.....Paras.....*).

Per Uwani (JSC)

“It must be noted that the parties agreed on the interest of 9% per annum from the sum of N40,000 loan granted the appellant. By Exhibit L, there was acceptance by the appellant of the debt with the charges thereof. There were also series of correspondences from the appellant acknowledging indebtedness and without protest of the interest rate evidenced by Exhibits B, C, D, E, F, G, H, J and K. It is settled that a party cannot take advantage of an irregularity which he has acquiesced to. See *Per UWAIS, J.S.C in NOIBI vs. FIKOLATI & ANOR (1987) LPELR- 2064(SC)*.

It is not disputed that Exhibit A did not state interest rate chargeable while the 9% interest rate was not static. So, what was the basis then for charging the interest to the total tune of N511,540.02. Interest in loan transactions are chargeable by statute or commercial practice. While it is expected that such interest charged must be agreed upon by the parties, it has been held that interest may be charged even, where no express interest is-made a term of the facility. The Supreme Court, per Obaseki, JSC in *BARCLAYS BANK (NIG) LTD vs. ABUBAKAR (1977) LPELR-750 (SC), (1977) 10 S.C. 7* put it this way:

Where there is no express agreement, it is settled law that the Bank is entitled to charge compound interest on the basis that there is a custom to that effect or that the customer has impliedly consented where without protest he allows his account to be debited.

See also *DIAMOND BANK LTD vs. PARTNERSHIP INVESTMENT CO LTD (2009) LPELR-939(SC)*. A bank's power to charge interest on loans, overdraft and other advances has become a matter of law, vested in the Central Bank of Nigeria and not just a matter of mutual consultation between the bank and its customer. See *UNION BANK vs. OZIGI (1994) 3 NWLR (Pt.333) 385. (P.....Paras.....)*.

8. *Approach of court to dispute between bank and customer*

Where there is a dispute between a bank and its customer in relation to recovery of loan advanced by the banker to customer, the questions the Court should normally consider are: 1. Was the defendant granted a loan by the plaintiff; 2. If so, how much was the loan; 3. What was the interest agreed; and, 4. How much, if any, has the defendant paid out of the loan. See *FBN PLC vs. OBEYA (1998) 2 NWLR (PT: 537) 205 AT 207; A.C.B. PLC vs. NWANNA TRADING STORES*

(NIG) LTD (2007) 1 NWLR (Pt. 1016) 596. The Appellant can definitely not answer any of this questions to his favour. The concerned of every debtor should be on how to settle his indebtedness and not to run around flooding the courts with issues. The case of the appellant is grossly unmeritorious and time wasting. (P.....Paras.....).

Representations

Prince Abioye A. Oloyede - Asanike for the appellant.

Victor Opara for the respondents.

KUMAI BAYANG AKAAHS, (JSC) (DELIVERING THE LEAD JUDGMEN)

1. THE GOVERNOR OF IMO STATE
2. THE ATTORNEY GENERAL OF IMO STATE
3. ENVIRONMENTAL TRANSFORMATION COMMITTEE
(CARRYING ON UNDER THE NAME IMO ENTRACO)
4. THE MINISTRY OF PETROLEUM AND
ENVIRONMENT, IMO STATE

VS.

1. E.F.NETWORK (NIG) LTD
2. MR. GIDEON EGBUCHULAM

SC.1001/ 2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 8TH MARCH, 2019

BEFORE THEIR LORDSHIPS

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

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

CONSTITUTIONAL LAW: Fair hearing – Breach thereof – Where appellants participated in the trial and had every opportunity to cross examine the witnesses called by the respondents but failed so to do – Whether cannot complain of the breach of their right to fair hearing.

CONSTITUTIONAL LAW: Fair hearing – How determined – Whether only the facts of the case can influence and determine the application of fair hearing – The principle in Major Bello M. Magaji of Imo State & anor vs. Chief B.A.E Nwauwa (1997) LPELR – 1870.

CONSTITUTIONAL LAW: Fair hearing – Nature thereof – Whether it means trial conducted according to all legal rules formulated for the attainment of justice.

CONSTITUTIONAL LAW: Fair hearing – Not mere rhetorics – Whether it is the fundamental right of individual guaranteed in the constitution.

CONSTITUTIONAL LAW: Fair hearing – Where a party is given opportunity to be heard – Whether he should not complain of denial of fair hearing.

*CONSTITUTIONAL LAW: Fair hearing – Whether it is a locomotive of justice – The principle in **Adebayo vs. A-G, Ogun State (2008) 7 NWLR (pt. 1085) 201.***

PRACTICE AND PROCEDURE: Appeal – Where Court of Appeal did not make any finding on an issue – Whether appeal cannot lie on that issue to the Supreme Court.

PRACTICE AND PROCEDURE: Preliminary objection – Where respondent files notice of preliminary objection but later argued the preliminary objection in his respondent's brief – Whether the argument in the respondents brief supercedes the notice of preliminary objection.

STATUTE: CFRN 1999 (as amended) – S. 36(1) thereof – Whether deals with principles of fair hearing.

*WORDS AND PHRASES: Fair hearing – Meaning – The principle in **Isaiyaku Muhammed vs. Kano N.A. (1968) 1 ALLNLR 424.***

Issues for Determination

Whether the court below was right in upholding that the commencement of this suit did not rob the trial court of the requisite jurisdiction to entertain same, the way it was commenced

Whether the court below was right in upholding that the refusal of the appellants' application for extension of time and leave to defend the suit did not deny the appellants their constitutional right to be heard in the matter.

Facts of the Matter

The claimants/respondents sued the defendants/appellants at the High Court of Imo State sitting at Owerri for some reliefs under the

undefended list. The trial court ordered for pleadings.

The plaintiff filed his statement of claim while the defendant refused or neglected to file his statement of defence.

After a prolong delay by the defendant, trial commenced, the defendant still did not file his statement of defence.

At the end of trial, judgment was given in favour of the claimant/respondent. The defendant's appeal to the Court of Appeal was dismissed, hence, these further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Argument on the preliminary objection in the respondents' brief supercedes notice earlier given*

Ordinarily, the accepted practice is that the respondent should argue his preliminary objection in his brief of argument to which the appellant will reply. That procedure adopted by the respondents obviates the need to separately file a notice of preliminary objection. The arguments on the preliminary objection in the respondents' brief of argument ordinarily supersedes the notice earlier given. See; Lawan Abdullahi Buba Wassah & Ors vs. Tukshahe Kara & Ors (2014) LPELR – 24212 (2014) 12 SCM 258.

In the result, the appellants' argument on this point is, to say the least, a misconception and does not hold water. (P....Paras.....).

2. *Appeal does not lie from the trial court to the Supreme Court*

It is noteworthy that the Ground 4 of the notice of appeal to this court is on the award of N200,000,000 as special and general damages in favour of the respondents by the trial court. This same point was raised as Ground 4 in the appeal to the court below on page 175 of the record. However, the appellants did not raise any issue from the said ground and same was adjudged abandoned and was accordingly struck out. In which case, the court below was never given the opportunity to make an opinion on the issue and therefore not appellable. This court does not have competence to consider the decision of the trial court upon which the court below never took a decision. It goes without saying that appeal lies only from the decision of the court below not from the trial court. Appeal does not lie on that point to this court not having been taken by the court below. It amounts to new point and there are procedure by which an appellant can raise a new point which was not taken before the court below in this court. Those

steps must be taken before raising the new point in this court. See; *Nigeria Engineering Works Ltd. vs. Denap Ltd. & Anor* (2001) 12 SC (Pt.11) 1361 (2001) 18 NWLR (Pt.746) 726; *Raphael Agu vs. Christian O. Ikewibe* (1991) 3 NWLR (Pt.180) 385.

In the circumstance the point in Ground 4 did not arise in the decision of the court below, rendering the ground incompetent and liable to being struck out. (*P.....Paras.....*).

3. *Writ of summons was not struck out*

One thing is worthy of note in the proceedings. The writ of summons dated 27th September, 2011, was separately filed and paid for, distinct from the motion *exparte* and other processes. In other words the writ was not attached merely as an exhibit.

Therefore, when the motion *exparte* was considered by the trial court and refused, it was only the application, the supporting affidavit and address of counsel in support that were struck out but not the writ of summons which was already given suit No.HOW/538/2011. As a result, when the trial court ordered that the claimants shall file their statements of claim and other required processes, for the matter to be heard on pleadings and serve same on the defendants, the statement of claim dated 9th November, 2011, list of witnesses, written statement under oath of the sole witness and list of documents to be relied upon at the trial, contained on pages 15 to 50 of the record, all processes filed on 17th November, 2011. There is no doubt, that the respondents when filing the processes to commence this action at the trial court, had complied with the rules of court — Order 3 Rule 2 subrule 1(a)-(d) of the Imo State High Court (Civil Procedure) Rules. Otherwise, subrule 2 of Order 3 rule 2 prohibits the Registry from accepting the processes where the claimants failed to comply with the rule. It reads thus:

“Where a claimant fails to comply with rule 2(i) above, his originating process shall not be accepted for filing by the registry”

No wonder, the court below had found on page 28 as follows:

“This was an unusual situation because the court did not place the suit on the undefended list, waiting for the defendants to file notice of intention to defend the action, and an affidavit disclosing a defence on the merit. It means that from the 25/10/2011 when the application was refused and the trial court ordered for filing of statement of claim and front loading, the writ of summons, which had to be served together with the statement of claim and other front loaded processes was then validly endorsed and served as per the order of court.

If there was any defect or non compliance with the rules, the process would have been rejected by the Registrar.”

There was nothing wrong with the procedure for commencement of this action to rob the trial court of its competence or jurisdiction to entertain the respondents' claim against the appellants. The trial court properly assumed jurisdiction as invoked by the claimants by writ of summons pursuant to Order 3 Rule 2 of the Imo State High Court (Civil Procedure) rules. And the court below was right in affirming the decision to assume jurisdiction on the matter. Accordingly, issue No.1 is resolved against the appellants in favour of the respondents. (P.....Paras.....).

4. *Appellants constitutional right to fair hearing was not breached*
As earlier noted, the appellants were the defendants to the respondents' claim before the trial court. They were duly served with the claims of the respondents for them to respond. They participated in the trial and had every opportunity to cross examine the witness called by the respondents but refused so to do. They are now complaining of not being heard, in breach of their constitutional right. This is far from being correct. (P.....Paras.....).

5. *The nature and purport of S.36(1) of CFRN 1999*
Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides as follows:

“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality” (Underlining mine).

6. *The meaning of fair hearing*
What then is fair hearing? This has long been answered by the court, in Isaiyaku Muhammed vs. Kano N. A. (1968) 1 All NLR 424 at 426, per Ademola, CJN delivering the judgment of this court as follows:

“It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the case.”

7. *Fair hearing is said to mean trial conducted according to all legal rules*
The term “fair hearing” has also been judicially interpreted to involve

situations, whether having regard to all the circumstances of a case, the hearing may be said to have been conducted in such a manner that an impartial observer will come to the conclusion that the court or tribunal was fair to all the parties to the proceedings. Indeed, it is said to mean a trial conducted according to all the legal rules formulated to ensure that justice is done to all the parties to a cause or manner. See; *Military Governor of Imo State & Anor vs. Chief B.A.E. Nwauwa (1997) LPELR – 1876. (P.....Paras.....)*.

8. *Only the facts of the case can influence and determine the application of fair hearing*
Generally, a hearing cannot be said to be fair if any of the parties in a case is refused a hearing or denied the opportunity to be heard, present his case or call his witnesses.

However, in *Major Bello M. Magaji vs. The Nigerian Army (2008) 8 NWLR (Pt. 1089) 338; (2008) 34 NSCQR (Pt.1) 108; 5 SCM 156, (2008) LPELR – 1814*, the court opined that it has become a fashion for litigants to resort to their right to fair hearing on appeal, as if it is a magic wand to cure all their inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation, in the interest of fair play and justice.

The court had hold further as follows:

“Fair hearing is not a cut-and-dry principle which parties can, in the abstract, always apply to their comfort and convenience. It is principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case.” Per Tobi, JSC.

In this matter, one wonders what the appellants take the court for. There is no doubt that the trial court had been too patient with the appellants in accommodating their lack of diligence and seriousness in the manner they had handled the matter. The trial court gave the appellants opportunity to be heard but they failed to cease the opportunity. All parties in a matter are entitled to fair hearing. In other words, both the plaintiffs and the defendants are entitled to be treated fairly. Both are entitled to justice and this must be seen to be done. It is rather most unfortunate, the way the counsel to the appellants handled the case from the trial court until now. It certainly leave much to be desired. The appellants should have themselves to blame for the outcome of the case with the lackadaisical way they handled the matter. (*P.....Paras.....*).

9. *A party given opportunity to be heard should not complain of denial of fair hearing*
It is note worthy that the statement of claim was filed on 17/11/2011 claiming an

outstanding contract sum on the contract dated 15/9/2007 between the parties in the case. Judgment was delivered on 11/2/2014 in favour of the respondents. We are now in March, 2019. I believe that the respondents are equally entitled to be fairly treated and the two lower courts have done justice in this matter. The appellants were not denied their constitutional right to be heard. Right to be heard could mean opportunity to be heard. Where a person is given the opportunity but fails to utilize it, it is too bad for such a person. He should not be taken serious when complaining of being denied fair hearing. (P.....Paras.....).

Per Nweze (JSC)

“The complaint on the breach of the appellants' right to fair hearing reminds me of the eloquent formulation in *Adebayo vs. AG, Ogun State* (2008) LPELR - 80 (SC) 23- 24. For its bearing on the fortune of the appellant's case, I crave Your Lordships' indulgence to quote this court's view *in extenso*:

I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.

They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the Constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision *available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case*. Let litigants who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking. [Italics supplied for emphasis]

From all indications, the appellant have “nothing useful to advocate in favour of [their appeal]... .[Accordingly, they are advised to] leave the fair hearing constitutional provision alone because it is not available to [them] just for the asking.” (P....Paras.....).

10. *Fair hearing is a fundamental right of individual guaranteed in the constitution*

The appellants are in this court holding a banner with lack of fair hearing on it. But fair hearing is not an expression of mere rhetoric or empty verbalism but a fundamental right of the individual guaranteed in the Constitution, a breach of which will nullify the proceedings in favour of a victim. It cannot be construed outside the facts, and a Party alleging the breach must show clearly that the said right is violated or breached – see *Gbadamosi vs. Dairo (2007) 3 NWLR (Pt. 1021) 282 SC*.

In other words, it is not enough for a party alleging such a breach to merely wave the banner of fair hearing, and expect this court to jump to attention and decide the case in his favour, just for the asking. The facts of his case must show that the said right was indeed violated. But more often than not, the cry of lack of fair hearing is misleading. (*P.....Paras.....*).

11. *Fair hearing is a machinery or a locomotive of justice*
See *Adebayo vs. A-G., Ogun State (2008) 7 NWLR (Pt. 1085) 201*, wherein this court per Tobi, JSC, hit the nail on the head, as follows:

Parties, who have bad cases, embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in the litigation - - They rake the defence in most inappropriate cases because they have nothing to canvass in their favour - - The fair hearing provision in the Constitution is the machinery or locomotive of justice, not a spare part to propel or invigorate the case of the user. It is not a causal principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. - - It is a formidable and fundamental constitutional provision available to a party, who is really denied fair hearing because he was not heard or that he was not properly heard in the case. Let litigants, who have nothing useful to advocate in favour of their case, leave the fair hearing constitutional alone because it is not available to them just for the asking.

In this case, it is quite clear that the trial court bent over backwards to accommodate the appellants, who were nonchalant about the case. They failed to utilize the opportunity given to them by the trial court, and cannot be heard to say that their right to fair hearing was violated. (*P.....Paras.....*).

Representations

M. O. Nlemedin A.G. Imo State with C. O. Onwusor (Esq.)

State Counsel for the appellants. F. R. Onoja (Esq.) with E. D. Moi-Wuyen (Esq.), A. O. Otori

(Esq.)
& A. E. Ohiani (Esq.) for the respondents.

OLUARIWOOLA, (JSC) (DELIVERING THE LEAD JUDGMENT)

**THE STATE
Vs.
HON. FRANK OKIYE**

SC. 261/2014

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIPS

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

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

LEGAL PRACTITIONERS:- Authority of counsel – Extent and scope – The principle in Afegbai Vs, Edo state (2001) 14 NWLR (Pt. 733) 425

LEGAL PRACTITIONERS:- Authority of counsel – Where a counsel announces his appearance – Whether it raises the presumption of his authority.

SERVICE: Originating process – Where there is no proof of service of an originating process – Whether any step taken in the proceedings will amount to a nullity.

SERVICE:- Proof of service – Where counsel was served on behalf of party in open court – Whether the requirement of endorsement of duplicate by party served was no longer necessary.

SERVICE:- Substituted service – Where party was served through his counsel by order of court – Whether service thereto was proper.

Issue for Determination

Whether having regard to the circumstances of this case, the service of the criminal summons on the respondent through his counsel was proper and therefore dispensed with the need for personal service as required by law.

Facts of the Matter

The Honorable Attorney General of Edo State rendered a Legal Advice to the effect that the speaker of the Edo State House of Assembly, Rt. Hon. Zakawanu Garuba and two other had a prima facie case of conspiracy and assault established against them. Base on the advice of the House of Assembly, The Attorney General made an application to the Court for the issuance of criminal summons against the law markers.

Accordingly, the court issued the summons as applied which could however not be served on the accused persons. Consequently, the prosecution filed an application for substituted service, which was withdrawn on the undertaken by accused counsel to produce the accused persons in court. In spite of this, the accused failed to appear on several occasions, the prosecution applied for bench warrant against the accused which was granted at the trial court.

The learned senior counsel who represented the accused withdrew his appearances. The new counsel for the accused filed an appeal to the Court of Appeal which set aside the bench warrant. Aggrieved by this decision, the state has now appealed to Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *Effect where there is no proof of service of an originating process before proceedings are taken*

When an originating process required by law to be served in this case the notice to show cause is not served before an order is made, it is a fundamental defect as a matter of substantive law. In this case, the notice to show cause in the lower court was issued on 02/06/2011. It is evident that there was no proof of service of the required originating process on the appellant. The bench warrant issued in the absence of service of the notice to show cause on the appellant was thus issued in violation of the law and has to be set aside.” *(P.....para.....)*

2. *The extent of authority of counsel*

It is not in doubt that the summons to show cause was not served directly on the respondent. At the risk of sounding repetitive, when the ex-parte application for substituted service of the summons to show cause was being moved by the state counsel, Imadegbelo SAN held himself out as the legal practitioner representing the respondent and offered to collect the summons on behalf of the respondent. Dealing with the scope and amplitude of authority of counsel, Karibi-Whyte JSC in *Afegbai Vs. A-G Edo State (2001) 14 NWLR (Pt. 733) 425 at 456* referred to paragraph 1181 Halsbury's Laws of England 4th Edition and emphasised as

follows:

"The client's consent is not needed for a matter which is within the ordinary authority of counsel thus if in court in the absence of the client, a compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound."

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

3. *Presumption of authority of counsel*

Once a counsel is instructed and announces his appearance, this raises the presumption of his authority and he assumes full control of his client's case. See: Adekanye Vs. Federal Republic of Nigeria (2005) 15 NWLR (Pt. 949) 433; Federal Republic of Nigeria Vs. Adewunmi (2007) 10 NWLR (Pt. 1042) 399.

A whole year after he voluntarily accepted the summons on behalf of the respondent, there was no word from Imadegbelo SAN of his inability to intimate the respondent of the summons to show cause and for the latter to appear in court in obedience of the summons. It was not until the state counsel applied for the bench warrant against the respondent that Imade Esq. who apparently is not from the Chambers of Imadegbelo SAN informed the court that the summons was yet to be served on the respondent. *(P.....para.....)*

4. *Court was right in issuing bench warrant because respondent was properly served by substituted means*

This in my view is hearsay evidence and the trial court was not bound to accept such evidence. Learned senior counsel had not written to the court to inform the court he was debriefed by the respondent for accepting the summons on his behalf. If such information was forthcoming from the counsel, the court would have been put on notice that perhaps counsel exceeded the scope of his authority and take steps to serve the summons on the respondent either personally or through substituted means. Since the law recognised that the respondent could be served the summons through substituted means and that had been done on 20th July, 2010, the court was perfectly right to invoke section 96 of the Criminal Procedure Law of Bendel State 1976 to issue the bench warrant for his arrest.

Although it is true that the summons to show cause must be served on the respondent, it is not correct to say that there was no proof that he was served. *(P.....para.....)*

5. *Where endorsement of duplicate is not necessary*

The requirement that the duplicate of the process must be endorsed by the person serving it was no longer necessary since it was his counsel who was clothed with ostensible authority to act on his behalf who received it on his behalf in open court. The court was therefore satisfied that the respondent had

knowledge of the summons but deliberately refused to appear in court to show cause.

I find that the appeal has merit and it is accordingly allowed. The order setting aside the bench warrant issued against the respondent to appear in court to show cause was made in error and it is hereby set aside. The bench warrant issued by the trial court for the apprehension of the respondent to appear in court to show cause is hereby restored. (*P.....para.....*)

Representations:

Funmi Falana (Esq.) (with Messrs Deji Morakinyo and Femi Adedeji) for the appellant.

Zakawanu I. Garuba (Esq.) (with Messrs Kingsley Idahosa, Oziegbe Omo-Egharevba, Haliru E. Garuba and Kassim Oshiobugie) for the respondent.

KUMAI BAYANGAKAAHS, JSC (Delivered by the lead judgment):

1. TONY CHIBUEZE OKOLONWAMU
 2. ARTHUR OKOLONWAMU
- VS
1. MRS. THERESA NKEM OKOLONWAMU
 2. NGOZI ROSEMARY OKWUASABA
(Nee Okolonwamu)
 3. UCHE OKOLONWAMU
 4. IFEOMA OKOLONWAMU
 5. OFILI OKOLONWAMU
 6. NWABUIKE OKOLONWAMU
 7. NONSO OKOLONWAMU
 8. OKWUDILI GODFREY ODUAH
 9. ANTHONY IKEDIASHI
 10. THEOPHILUS OKONKWO
 11. PROBATE REGISTRAR

SC. 354/2014

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 8TH MARCH, 2019

BEFORE THEIR LORDSHIPS

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

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

APPEAL: Grounds of Appeal – Meaning.

APPEAL: Grounds of Appeal – Particulars thereof – Whether should not be divorced from the main ground – The principle in Nyako vs. Adamawa State House of Assembly & Ors (2016) LPELR – 41822.

*COURT: Supreme Court – Appellate Jurisdiction thereof – Whether appellate jurisdiction of the Supreme Court on facts only exist where there has been leave – The principle in **Akpasubi vs. Umweni (1982) 11 SC.***

PRACTICE AND PROCEDURE: Appeal – Grounds of fact – A ground dealing with application of Customary law – Whether it is a grounds of fact.

PRACTICE AND PROCEDURE: Appeal – Grounds of fact – Where a ground question whether the deceased was on sound mind when he made a will – Whether such a ground involves the evaluation of evidence and therefore a ground of fact.

*PRACTICE AND PROCEDURE: Appeal – Grounds of appeal – Classification thereof – Applicable principles – The principle in **Dairo vs. Union Bank (2007) 16 NWLR (pt. 1059) 99.***

PRACTICE AND PROCEDURE: Appeal – Grounds of Appeal – where involve facts or mixed law and fact – Whether leave is required thereto.

PRACTICE AND PROCEDURE: Appeal – Grounds of appeal- Classification thereof – Whether it is difficult to decipher a grounds of law from a ground of fact or a ground of mixed law and fact.

PRACTICE AND PROCEDURE: Appeal – Requirement for leave – Where an appellant files his appeal without leave where leave is a condition precedent – Whether would have his process thrown out.

*PRACTICE AND PROCEDURE: Appeal – Where grounds of appeal are filed without leave when leave is required – whether the appeal so filed is incompetent and robs appellate court of jurisdiction – The principle in **Ukpong vs. Comm. For Finance and Econ. Dev. (2006) 19 NWLR (Pt. 1013) 187.***

*PRACTICE AND PROCEDURE: Appeal- Grounds of appeal – Classification thereof - How to determine matters of law and facts – The principle in **Metal Const. W.A. Ltd vs. Migloire.***

*PRACTICE AND PROCEDURE: Evaluation of facts – Where facts of a case have been correctly apply by a trial court – Whether appellate court will not interfere therein – The principle in **Board of Custom of Exercise vs. Barau (1982) NSCC (Vol. 13) 358.***

STATUTE: CFRN 1999 (as amended) – Section 233(3) thereof – Whether not alter and must be complied with – Appeal with leave of the Supreme Court.

Issue for Determination

Whether appellants are entitled to maintain the appeal without leave of court”.

Facts of the Matter

The plaintiffs/appellants sued the defendants/respondents at the Asaba High Court, Delta State whereby they challenged the validity of the will of Tony Nokwai Okolonwamu which was in favour of the respondent. They claimed that their late father (deceased) did not make the will.

Consequently, they claimed some declaratory and injunctive reliefs in respect of the said will. The first to tenth respondent contended that their late father (deceased) never married the mother of the plaintiffs, they also counter claimed against the plaintiff and sought some declaratory and injunctive reliefs in respect of the estate of the deceased.

At the conclusion of hearing, in which the first set of respondent first opened their evidences, the trial court dismissed the appellants' claims.

The appellants unsuccessfully appealed to the Court of Appeal, hence this further appealed to the Supreme Court.

Held: *(Unanimously striking out the appeal)*

1. *The meaning of a “ground of Appeal”*

What is a ground of appeal? Basically, a ground of appeal consists of error of law or fact, which an appellant sees as a defect in a judgment, and which he relies upon in asking an appellate court to set it aside — see **Metal Const. W. A. Ltd. vs. Migliore: Inre Ogundare** (*supra*), cited by appellants. (*P.....Paras.....*).

2. *Particulars should not be independent complaint from the ground of appeal*

The appellant must also itemize the error or misdirection in the particulars to the ground(s) of appeal. Such particulars should not be independent complaints from the ground of appeal but ancillary to it — see **Globe Fishing Ind. Ltd. vs. Coker** (1990) 7 NWLR (Pt. 162) 265 and **Nyako vs. Adamawa State House of Assembly & Ors** (2016) LPELR- 41822 (SC), wherein this court per M. D. Muhammad, JSC, observed—

The complaint of an appellant can hardly be understood where there is a dichotomy between the mother/main ground and its “children” or particulars. The law does not allow a party to divorce the particulars of a ground from the main ground. They are the specifications of errors or misdirection, which show what the complaint against the decision is. To determine whether or not a ground of appeal is relevant to the issue formulated in an appeal, that ground must be read in conjunction with the particulars to

make it a complete ground and must be based on the issue in controversy between the parties.

In other words, in determining whether a ground of appeal alleges an error in law or fact, the ground must be construed together with the particulars of error alleged because its classification as a ground of law can only give competence to an appeal without leave, if the nature of the misdirection or error clearly stated in the particulars bears out the category assigned - **Garuba vs. Omokhodion** (2011) 6-7 SC (Pt. V) 89. (P.....Paras.....).

3. *Effect where leave if not obtain to file a ground of fact or mixed law and facts*
In other words, as the respondents rightly submitted, where the ground of appeal involves questions of fact or of mixed law and fact, leave to appeal must be obtained from Court of Appeal or this court. (P.....Paras.....).
4. *Appellate jurisdiction of the Supreme Court on question of fact only exist where there has been leave *
See **Garuba vs. Omokhodion** (*supra*), **Irabor vs. Ogaïamien** (1999) 8 NWLR (Pt. 616) 517, **Uchendu vs. Ogboni** (1999) 5 NWLR (Pt. 603) 337 and **Akpasubi vs. Umweni** (1982) 11 SC 113, where Eso, JSC, observed:

The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Federal Court of Appeal or this court to title a ground of fact. The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Federal Court of Appeal or of this court. No appeal on questions of fact lies to this court without such leave. In other words, where, as it would appear to me in this case, question of fact has been brought before this court without leave, the court has no jurisdiction.

So, this court has no jurisdiction to entertain an appeal on ground of fact or mixed law and fact unless the said leave is sought and obtained. (P.....Paras.....).

5. *Effect where appeal is filled without leave*
See **Ukpong vs. Comm., for Finance and Econ. Dev.** (2006) 19 NWLR (Pt. 1013) 187, wherein Onnoghen, JSC (as he then was) observed:

Where an appeal is to be with leave but none was obtained, the condition precedent for the validity of such an appeal has not been fulfilled and as a result the appeal is, in law, said to be incompetent

and the appellate court is in consequence without jurisdiction to entertain same. (P.....Paras.....).

6. *It is not easy to decipher a question of facts from a question of law*
Are the grounds of appeal raised in the appellants' notice of appeal grounds of law, as they said, or grounds of fact or mixed law and fact, as alleged by the first set of respondents? This is not an easy question because there is a thin line that runs between the said categories that makes it difficult to decipher a question of law from a question of fact. (P.....Paras.....).
7. *Court of Appeal does not interfere with application of facts by trial court*
 See **Board of Custom & Excise vs. Barau** (1982) NSCC (Vol. 13) 358, wherein this court per Eso, JSC, aptly observed as follows on the issue:

The Court of Appeal has to decide first, as a matter of law, that a trial court failed to make use of the advantage it had of seeing the witnesses before it before proceeding to substitute as a matter of fact, its own finding made on the printed evidence. It is only where there is a wrong application of such facts that the Court of Appeal interferes. Where, however, the Court of Appeal finds as a matter of law that the facts have been correctly applied, it does not interfere. The court does not proceed any further to deal with facts. This fine distinction is very important for it goes into the jurisdiction, which a Court of Appeal, exercises under the Constitution. While appeal to the Court of Appeal on the issue of law is as of right, an appeal on the facts is with leave of the court from where the appeal lies or the court to which the appeals lies. Where therefore a trial court fails to apply the facts, which it has found, correctly to the circumstances of the case before it, and there is an appeal to a Court of Appeal, which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes in such case and there is a further appeal to a higher Court of Appeal on the application of the facts, the ground of appeal alleging such misdirection by the lower Court of Appeal is a ground of law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required.

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

8. *Principle of classification of grounds of appeal*
See also **Dairo vs. Union Bank** (*supra*), ((2007) 16 NWLR (Pt. 1059) 99, wherein this court listed the following principles to serve as a guide:
- i. *Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground of appeal is a ground of mixed law and fact. See Maigoro vs. Garba (1999) 10 NWLR (Pt. 624) 555.*
 - ii. *A ground of appeal, which challenges the findings of fact made by the trial court or involves issues of law and fact, is a ground of mixed law and fact - Maigoro vs. Garba (supra).*
 - iii. *Where the evaluation of facts established by the trial court before the law in respect thereof is applied, is under attack or question, the ground of appeal is one of mixed law and fact. See Maigoro vs. Garba (supra).*
 - iv. *Where evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact simpliciter - Ogbechie vs. Onochie.*
 - v. *Where it is alleged that the trial court or an appellate court misunderstood the law or misapplied the law to the admitted or proved facts, such a ground of appeal is one of law simpliciter. See Nwadike & Ors. vs. Ibekwe & Ors. (1987) 12 SC (Pt. 1) 164.*
 - vi. *It is a ground of law if the adjudicating tribunal or court took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although in applying the correct criteria, it gave wrong weight to one or more of the relevant factors. See O' Kelly vs. Trusthouse Forte P.L.C. (1983) 2 All ER 456 at 486; Nwadike & Ors. vs. Ibekwe & Ors. (supra) pp. 491-492.*
 - vii. *Several issues that can be raised on legal interpretation of deeds, documents, term of art, words or phrases, and inferences drawn from therefrom are grounds of law. See Ogbechie vs. Onochie (supra).*
 - viii. *It is a ground of law where the ground deals merely with a matter of inference even if it is limited to admitted or proved and accepted facts. See Nwadike & Ors. vs. Ibekwe & Ors. (supra).*
 - ix. *Where it is alleged that there was no evidence or no admissible*

evidence upon which a finding or decision was based, this is regarded as a ground of law. See Ogbechie vs. Onochie (supra) where ESO, JSC, citing with approval an article by C. T. Emery in Vol. 100 LQR held:

If the tribunal purports to find that a particular event occurred although it is seized of no admissible evidence that the event did in fact occur, it is question of law. (P.....Paras.....).

9. *How to determine matters of law and facts*

In **Metal Const. W.A. Ltd. vs. Migliore**: Inre Ogundare (*supra*), Obaseki, JSC, explained:

Matters of fact have to be ascertained, failing admission, by competent and relevant evidence given by witnesses, experts or provided by deeds, records, reports, etc. Matters of law have to be ascertained, failing admission, by interpretation of statutes, cases and other authoritative sources of law aided by argument of counsel to parties in the litigation. The interpretation of documents is always a question of law. An appeal on matters of fact allows investigation at the hearing of the appeal of the evidence and the proper inferences from it whereas an appeal on a point of law limits consideration of the appeal to such questions as to whether facts admitted or held proved, justify or permit by the rules of law a particular decision or disposal of the case before the court. In a secondary sense, any matter to be decided on evidence and inference therefrom is a matter of fact and other matters are matters of law. In many circumstance questions of mixed fact and law arise. A decision of a trial judge is normally a mixed finding.

10. *Ground on evaluation of evidence is a ground of facts*

As much as I agree with the appellants that the complaint therein does not border on the exercise of discretion, I agree with the respondents that it is, indeed, against the concurrent findings of two lower courts, which makes **Ground 1** a ground of fact or mixed law and fact, not law.

They are clearly questioning the findings of the lower courts on the issue of whether the said deceased was of sound mind when he made the **Will** in question, which involved the evaluation of evidence.

Without setting forth the concurrent findings of the two lower courts, on which the complaints in **Grounds 2 - 8** of the grounds of appeal are based on, it is

clear from the said grounds of appeal read together with their Particulars of Error and/or Misdirection that the appellants' complaints are directed against the evaluation of evidence tendered at the trial court, which raise questions of fact; not questions of law. (*P.....Paras.....*).

11. *Customary law is a question of fact which must be proved and ascertained*

What is more, the reference to Section 3(1) of the said Wills law in **Ground 3** does not make it a ground of law since their complaint is against the lower courts' findings touching on Asaba Customary law, and it is trite law that customary law is a question of fact, which must be proved or ascertained by evidence – see **Ojiogu vs. Ojiogu & Anor (2010) 9 NWLR (Pt. 1198) 1 SC**. In other words, their argument that the said grounds of appeal border on the legal validity of the said Will, its due execution, etc., so, they are grounds of law, totally lacks merit.

Evidently, all the eight grounds of appeal raise questions of fact, which has been brought to this court without leave. Consequently, this court lacks the jurisdiction to look into any of the questions raised. The preliminary objection is sustained, and the appeal is struck out. (*P.....Paras.....*).

12. *The valid constitution has section 233(3) which be complied with*

I must observe that there are constitutions in circulation that do not have a section 233 (3). It is now settled that the correct version of our Constitution has a section 233 (3), and so there must be compliance by all appellants. It follows that where an appeal can only be heard after leave has been sought and obtained by the appellants, the court would have no jurisdiction to hear the appeal if the condition precedent is not first of all obtained. Such an appeal is incompetent and should be struck out. See **Abubakar vs. Dankwambo (2015) 18 NWLR (Pt.1491) p.213**.

All the eight grounds of appeal raise questions of fact. The appellants failed to obtain leave.

In the absence of leave a condition precedent was not fulfilled before the appeal was filed.

Consequently in the absence of leave this court has no jurisdiction to hear the appeal. (*P.....Paras.....*).

13. *Leave is required where ground of appeal involves question of fact or mixed law and fact*

It is settled law that where the ground of appeal involves questions of fact or mixed law and fact, leave to appeal must be sought and obtained.

Failure to obtain leave renders the appeal incompetent. Indeed, it is a constitutional requirement that where an appeal to this court is not as of right, leave must be obtained either from the Court of Appeal or this court. See **Garuba vs.**

Omokhodion (2011) 6-7 SC (Pt.4) 89. Akpasubi vs. Umweni (1982) 11 SC 113; Ukpong vs. Comm., for Finance and Economic Development (2006) 19 NWLR (Pt.1013) 187.

A careful perusal of the 8 grounds of appeal raised by the appellants in their notice of appeal, as comprehensively analysed by my learned brother, would reveal that all they are questions of tact, which require leave. The consequence of the appellants' failure to obtain leave before bringing this appeal to this court is that the appeal would be thrown out. (*P.....Paras.....*).

14. *An appellant who files ground of appeal without obtaining leave where leave is a condition precedent would have his process thrown out.*

In the case of **Abubakar vs. Dankwambo (2015) 18 NWLIR (Pt.1491) 213 at 234**, this court per Rhodes-Vivour, JSC observed that:

“the position of the law is that where leave which means permission is a pre-condition before an appellant can file a notice of appeal containing grounds of mixed law and fact, an appellant who files a notice of appeal without satisfying or obtaining that pre-condition would have his process thrown out.”

The appellants have not fulfilled the pre-condition required to invoke the jurisdiction of this court to determine this appeal. Jurisdiction is fundamental. It is the very foundation upon which the appeal thrives. This court therefore cannot exercise jurisdiction to determine this appeal same being incompetent.

On the whole I agree with the finding of my learned brother that the failure of the appellant to obtain leave before bringing this appeal has robbed this court of jurisdiction to determine same. The appeal is incompetent and is hereby struck out.

Representations

Ike Odionu, (Esq.),

For the **appellants**

E. Ohwovoriole, (SAN), **with**

M. O. Omorogbe, (Esq.), **and**

B. I. Reuben, (Esq.),

For the **First to Tenth respondents**

P. A. Okoh, (Esq.),

(*P.S.C., Delta State Ministry of Justice*)

For the **Eleventh respondent.**

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

**UNITY BANK PLC
VS
COLONEL BELLO MOHAMMED AHMED (RTD)**

SC.64/2015

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12TH APRIL, 2019

BEFORE THEIR LORDSHIPS

**WALTER S. N. ONNOGHEN
KUMAI BAYANGAKAAHS
JOHN INYANG OKORO
SIDIDAUDA BAGE
UWANIMUSAABBAAJI**

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

BANKING: Banker customer Relationship – Whether regulated and guided by contract of parties.

*BANKING: Banks charges – Whether the law will frown at arbitrary charges by banks on the account of their customers – The principle in **UBN Plc vs. Ajabule (2011) LPELR – 8239.***

*BANKING: Interest on debt – Where a bank claims interest on overall debt – Onus on bank thereto – How discharged – The principle in **Wema Bank Plc vs. Osilaru (2008) 4 WRN 160.***

BANKING: Interest rate – Where parties have by agreement fixed the interest rate – Whether bank cannot unilaterally charge, vary or alter the rate of interest.

CONTRACT: Agreement by parties – Construction thereof – Whether it is not proper to read extraneous meanings into the agreement by parties.

CONTRACT: Terms thereof – Whether parties are bound by terms of their contract including interest rate chargeable.

COURT: Agreement by parties – Whether does not involve in writing and rewriting for parties.

Damages: General damages – Whether not a fixed amount – Discretionary power of court thereto.

EVIDENCE: Proof of particular facts – S.140 of Evidence Act 2011 – Where particular facts are within the knowledge of a party – Whether the burden of proving such facts are within him.

PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Attitude of Supreme Court thereto.

PRACTICE AND PROCEDURE: Appeal – Reply brief – When necessary.

PRACTICE AND PROCEDURE: Appeal – Reply brief – Where the respondent's brief raises fresh point of law – Whether failure of appellant to file reply brief amounts to admission of those fresh points of law – Or. 18(5) of Court of Appeal Rules considered.

PRACTICE AND PROCEDURE: Civil Cases – Proof thereof – Whether keeps shifting from one party to another.

STATUTE: AMCON Act – S. 31 thereof – Nature and purport.

Issues for Determination

- 1. Whether the failure of the appellant to file a reply brief or make oral presentation in response to the points canvassed on Exhibits A and B in respondent's brief diminished the lower-court's duty to give due consideration to Exhibit "H" which shows the outstanding sum and accrued interest (sic) (Grounds 1 and 2).**
- 2. Whether it was the onerous duty of the appellant to join AMCON in Suit No. KB/HC/12/2013 considering the State of the evidence and statutory provisions before the trial and lower courts (sic) (Grounds 3 and 4).**
- 3. Whether the non-payment of filing fee on a specific monetary claim/relief is not substantial enough, to rob the courts of jurisdiction in considering the said monetary relief (sic) (Ground 5)."**

Facts of the Matter

This is an appeal against the decision of Court of Appeal, Sokoto division delivered on the 3rd of December, 2014 in which the court below dismissed the appeal of the appellant filed against the judgement of the Kebbi State High Court: sitting in Birnin Kebbi delivered on 28th November, 2013.

The respondent filed a writ and statement of claim against the appellant claiming two (2) declarations and five (5) orders. The principal claim of the Plaintiff is for an order directing the defendant now appellant to release to the respondent title document covered by Certificate of Occupancy No. BI/G/0494 with immediate effect and to pay the respondent the sum of N500,000.00 (Five hundred thousand Naira) as general damages. The trial court gave judgment for the respondent. Being dissatisfied with the decision of the trial court, the appellant filed an appeal at the court below. The lower court also gave judgment for the respondent in its judgment delivered on 3rd December, 2014. Still being dissatisfied, the appellant lodged further appeal to the Supreme Court

Held: *(Unanimously dismissing the appeal)*

1. **In civil cases burden of proof keeps oscillating**

I have carefully considered the arguments respectively put forward by both the appellant and respondent. The starting point is to realise that failure of the appellant to adduce credible evidence to defeat the respondent's claims is fatal. This is because a party in a civil suit has the option of shifting the burden of proof by adducing cogent, concrete and credible evidence to contradict the content of an exhibit, like Exhibits A, B and H in this circumstance. In civil suits, unlike criminal cases, the burden of proof keeps oscillating among the parties. The Evidence Act 2011 says it all in Sections 131-134. For the purpose of burden of proof in civil suit, the Act states thus:

"131. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

132. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

133. Burden of proof in civil cases.

- (1) **In civil cases the burden of first proving existence or non - existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.**
- (2) **If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.**
- (3) **Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.**

134. **Standard of proof in civil cases. The burden of proof shall be discharged on the balance of probabilities in all civil proceedings.”**

The burden of proof placed on the respondent would appear discharged if considered against the backdrop of the veracity of the content of Exhibits A and B and the effect of Exhibit H on same. (P.....Paras.....).

2. *When a party is expected to file a reply brief*
The appellant is right that it is not the law that appellant must file a reply brief. However, a party against whom an adverse submission or argument has been made by a respondent has the option to further reply on points of law to clarify certain new issues in the respondent's brief. An appellant who chooses not to exercise the option of reply on points of law cannot be heard to complain of injustice. (P....Paras.....).
3. *Failure to file reply brief may amount to admission*
Reply brief is cognisable by virtue of Order 18 (5) of the Court of Appeal Rules, 2011. The respondent is therefore right to argue that the effect of failure of the appellant to file a reply on points of law to deal with new issues raised by the respondent as to Exhibits A and B which are read in consonance with Exhibit H necessarily means that the new issues as raised are admitted by the appellant. (P....Paras.....).

4. *Dispute among parties to be resolved by reference to documents*
The nature of the contractual relationship between the appellant and respondent is banking. Banking procedures and loan transaction and/or documentations are part of the most formal, and the most regulated aspects in banking, Thus, the law is fairly certain that any disagreement between the parties on any point arising from out of the contract are to be resolved by making reference to their documents or agreements, in this case Exhibits 'A' and 'B'. (P....Paras.....).

5. *It is not proper to read extraneous meanings into agreements*
It is absurd and ludicrous to attempt to read extraneous meanings into the agreements of parties, see UNION BANK (NIG) PLC vs. AJABULE (2012) 7 WRN 1 at 8:5; ILORIN SOUTH LOCAL GOVERNMENT vs. SAMAD P.C CO, LTD (2008) WRN 51 132 at 138:3. (P.....Paras... ..).

6. *Onus on bank claiming interest on overall debt*
The tenure of the transaction between the appellant and respondent is such that a date has been fixed for the expiry of the relationship as far as the subject matter of this suit is concerned, The decision of the court in WEMA BANK PLC vs. OSILARU (2008) 4 WRN 160 at 170: 11 is particularly instructive:

"Any bank which is claiming a sum of money on the basis of the overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit balance was arrived at".

The above, precisely, is the position in this case. Similarly the same scenario played out in the case F.B.N vs. MAMMAN (2001) 3 NWLR 58 at 59:2 where the court observed in a similar situation, like in the instant case, that there was no explanation as to how the interest charges built up and rose to the figure in question. (P....Paras.....).

7. *The nature and purport of S. 31 of AMCON Act*
There is no other inference to be drawn on appellant's obvious concealment of documents of transfer of the respondent's liabilities to AMCON given the provision of section 31 of AMCON Act, which states thus:

"31. Where the Corporation has acquired an eligible bank asset, the eligible financial institution from which the eligible bank asset was, acquired shall deliver to the Corporation or its nominee all its books and records in relation to the eligible bank asset concerned and any

document of title that the eligible financial institution holds in respect of any property that is subject to a security which is part of the eligible bank asset and execute all such instruments necessary to properly document the acquisition.” (P.....Paras.....).

8. *Procedure where particular facts are within the knowledge of a party*
In view of the above, I am in complete agreement with the respondent's position that contrary to the argument of the appellant's argument, Section 31 of AMCON Act envisages the execution of all such documents necessary to properly document acquisition of the Respondent's property shall be effectuated. Failure of the appellant to present this fact to the trial court or the respondent but only to insist that there was an acquisition by AMCON, amounts to facts within the knowledge of the appellant pursuant to Section 140 of the Evidence Act, 2011. The section states that:

**"140. Proof of facts especially within knowledge:
 When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."
 (P....Paras.....).**

9. *Discretionary power of court in the award of general damages*
The respondent's submission that relief 7 was for general damages which is not a fixed amount awardable by a court, but solely at the discretion of the court, is not only sound in law and procedure but also unassailably logical. The essence, meaning and scope of powers of a court in the award of speculative claims or reliefs such as general damages, which parties often arbitrarily increase, has been well espoused in a line of legal authorities, see for example the case of MTN (NIG) COMM. LTD vs. A.C.F.S LTD (2014) 40 WRN 123 at 130:4 on 154, Lines 40-45; HON. JUSTICE ALOYSIUS O.H. UKACHUKWU vs. CHIEF HOPE UZODINMA & ANOR (2007) LPELR-8200. (P.....Paras.....).
10. *When appellate court will interfere with concurrent findings*
The appellant has also invited this court to interfere in the finding of fact of the lower court with a view to reversing same. The principle of law on this request is settled beyond speculative conjecture. An appellate court should *ex debitojusticiae* interfere where there has been a miscarriage of justice as where the judgment appealed is perverse or not the result of a proper exercise of judicial discretion.

The Supreme Court will not readily set them aside or substitute its own views unless there is no evidence to support the findings. See in re: MOGAJI (1986) 1 NWLR (Pt.19) 759; SALAMI vs. STATE (1988) 3 NWLR (Pt.85) 670;

MBENU vs. STATE (1988) 3 NWLR (Pt.84) 615. “Per Akaahs, JSC. (P. 18, Paras.D-F).

On when this court may or may not interfere in finding of facts, See ARABAMBI vs. ADVANCE BEVERAGES IND. LTD. (2005) 19 NWLR (Pt.959) 1 per Onnoghen, JSC (P. 46, C-E). See also OCHIBA vs. STATE 2011 12 SC (Pt.IV) P.79" per Rhodes-Vivour, JSC. (PP. 51-52, paras. F-B). See also CAMEROON AIRLINES vs. OTUTUIZU 2011 12 SC (Pt.III) P.200; OLOWU vs. NIG. ARMY 2011 12 SC (Pt.II) P.1; AROWOIO vs. OLOWOOKERE & 2 ORS. 2011 11-12 SC (Pt.II) P.98.

None of the circumstances to warrant interference with concurrent findings of the two courts below exist in this appeal. This court has therefore declined to interfere.

In concluding this judgement, I observe that whichever way one considers this appeal, it is lacking in fundamental components of justice and cannot stand in law, fact and logic. It must therefore fail. I hold that this appeal fails in whole and is accordingly dismissed. (P.....Paras.....).

11. *Parties are bound by terms of their contract*
Where the relationship between the parties is contractual, the parties are bound by the terms of the contract, including the agreed rate of interest chargeable in the facility granted. A unilateral change in the interest rate is tantamount to writing a new contract, the new interest rate is on offer which must be accepted by the offeree to be enforceable. A different situation would arise where there is no express agreement on the rate of interest to be charged on the facility granted to the customer. In such a case the customer is taken to impliedly consent to the rate of interest charged. See Barclays Bank DCO vs. Hassan (1961) 1 All NLR 836. (P.....Paras.....).
12. *No basis for Supreme Court to disturb concurrent findings*
This appeal is against the current findings of the courts below - The trial court and the Court of Appeal. There is no showing that the findings are either perverse or beset by substantial error either in the substantive or procedural law which would result to injustice to the appellant if not corrected. There is, therefore, no basis for this court to disturb the said findings. See Akinsonya vs. U.B.A. Ltd. (1986) 4 NWLR (pt. 35) 273. Bankole vs. Pelu (1991) 8 NWLR (pt. 211) 23. Lokoyi & Anor. vs. Olojo (1989) 8 SC 61 at 68. (P....Paras.....).
13. *Court cannot write and rewrite agreement for parties*
It is trite law that where parties have voluntarily entered into an agreement and duly endorse it, the full intent and purpose of that agreement must be honoured in good faith. The law cannot be used as an instrument of fraud and the court would not engage itself in the act of writing and rewriting agreements for

parties. In the case of *Ajagbe vs. Idowu* (2011) 12 NWLR (Pt. 1276) 422 at 444, this court per Muktar, JSC (as he then was) observed as follows:-

" It is not the function of the court to re-write a contract for the parties. See *Union Bank of Nigeria vs. Sax Nig Ltd* (1994) 9 SCNJ at 13; (1994) 8 NWLR (Pt.361) 15, but where the intention as expressed in a transaction, a legal interpretation of the nature of the agreement between the parties under law, will be pronounced by the court."

For the avoidance of doubt, I am of the considered view that parties in this appeal are bound by the terms of Exhibits A and B which were voluntarily signed by them with the intent to regulate their relationship. This court cannot re-write the terms and conditions contained in Exhibits A and B. Again, the failure of the appellant to file a reply brief to deal with the new issues raised by the respondent with regard to Exhibits A and B, is detrimental to case of the appellant.

I find no reason to differ with the reasoning of my learned brother in the lead judgment or to interfere with the concurrent findings of the two lower courts. (*P.....Paras.....*).

14. *Banker customer relationship is regulated and guided by contract of parties*
It must be noted that the cause of action herein is on breach of banker-customer relationship that is purely guided and regulated by contract of the parties. See *BALOGUN vs. NATIONAL BANK OF NIGERIA LTD* (1978) 11 NSCC 35, *AFRIBANK NIG PLC vs. A.I. INVESTMENT LTD* (2002) 7 NWLR (Pt. 765), 40. Nothing can be implied into it once it is in black and white. Thus, by Exhibits A and B, the parties are bound by what is readable and not what cannot be seen. The date and time fixed for the expiry of the relationship between the appellant and the respondent must be read as revealed in the contract. In the said exhibits, the tenure was to end on 14/7/2001 and 28/11/2000 respectively. Reading anything other than this cannot be allowed as the parties are bound by their agreement, unless where communicated or acquiesced by the respondent.
The charging of interest is not unilaterally done by the bank and at the mercy of the customer but based on clearly spelt out terms. This is not the case herein. The issue of charging interest rate by the Banks is always at the heart of every controversy relating to overdrafts and loans. (*P....Paras.....*).
15. *Law will frown at arbitrary charges by banks on the account of their customers*
In the case of *UBN PLC vs. AJABULE* (2011) LPELR-8239 (SC), Adekeye, JSC held that:

"Section 15 of the Bank Act 1969 mandates all licensed banks to charge interest rates on advances, loans, credit facilities or deposits in accordance with the Central Bank of Nigeria Guidelines on minimum and maximum rates of interest. Where the terms of the agreement between the bank and the customer are clear with regard to the agreed rate of interest and there is no provision for variations, the bank cannot vary the agreed interest rate of accord with the guidelines of the Central Bank on interest rate. The law will always frown at any arbitrary charges by banks on the account of their customers." (P.....Paras.....).

16. *The banks cannot unilaterally charge, vary or alter the rate of interest fixed by parties*

Where a facility is granted to a customer and by agreement, the interest rate to be charged was fixed for the facility, a bank or financial institution has no right to unilaterally change, vary or alter the rate of the interest to be charged on the facility without consultation and/or consent of the customer. See NBN LTD. vs. ARISON TRADE & ENGINEERING CO. LTD. (2006) ALL FWLR (326) 377; UBN LTD. vs. SAX NIG. LTD. (1991) 7 NWLR (Pt. 207) 227; UBN LTD. vs. OZIGI (1991) 2 NWLR (Pt. 176) 677; ADIBI vs. FBN LTD. (1986) 2 CA (Pt. 11) 247; SJ MASKIN vs. OLAOGUN ENT. (1999) 10 - 12 SC 46. The appellant is bound by the interest rate agreed to with the respondent and cannot change a rate different from the one contained in their agreement without the consent or at least knowledge of the respondent. (P.....Paras.....).

17. *Where there is a breach of contractual relationship by bank damages must naturally follow*

It must not be emphasized that where there is a breach of the contractual relationship by the bank, damages must naturally follow. A judge may with reason make an award of any such sum as he considers the circumstances of the breach of contract warrants although there has been no proof of any actual loss. See ALLIED BANK OF NIGERIA LTD vs. JONAS AKUBEZE (1997) 6 SCNJ 116. The award of damages is inescapable where there is proof of breach. (P.....Paras.....).

APPEARANCES

Ferdinand Okotete with R. T. Mustapha, for the appellant.

Hussaini Zakariyau with M. E. Sheriff, and Ezra Enwerem, for the respondent.

DAUDABAGE, (JSC) (DELIVERING THE LEAD JUDGMENT)

1. UYAEMENAM NWORA

2. ERIC OZUMBA

3. EMESIOKEKE

4. GABRIEL OKOYE

5. NWUDE IGWEONUWU

(for themselves and as representing Okpuloji Abba Town)

VS.

1. NWEKE KNWABUEZE

2. PHILIPOORO

3. REUBEN IFEKA

(for themselves and on behalf of Umugama Village
Ukwulu

VS.

1. NWOYE OFOEDU

2. EKEMEKA OMOGU

3. ICHIE TITUS OKEKE

4. EUGUNE OTINABO

(for themselves and on behalf of Oranto and Akpu Village, Ukpo)

SC. 589/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH FEBRUARY, 2019

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
KUDIRAT M.. O. KEKERE-EKUN
CHIMACENTUS NWEZE
AMINAADAMU AUGIE
PAULADAMU GALUMJE**

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

ACTION: Abuse of process – Indices – Where an application is brought in the court of appeal to discharge an order of stay of execution after the determination of the appeal – Whether it does not constitute an abuse of process.

*ACTION: Applicable law – The distinction between substantive law and law governing practice and procedure – Whether it is the substantive law in force while the cause of action arose and the procedural law in force when the action is being heard that apply to an action – The Principles in **Owata vs. Anyigor (1993) 2 NWLR (Pt. 271).***

*ACTION: Applicable law – The distinction between substantive law and law governing practice and procedure – Whether it is the substantive law enforce when the action is being heard that applies to an action – The principle in **Nwora vs. Nwabueze (2013) 16 NWLR (Pt. 137).***

*ACTION: Cause of Action – Meaning – The principles in **A.G. Lagos State vs. Eko Hotels Ltd and Anor (2006) LPELR 3161 (SC) (2006) 18 NWLR (Pt. 1011) 378.***

CONSTITUTIONAL LAW: CFRN 1999 (as amended) – S. 243 (b) thereof – Whether provides for procedural law for the time being relevant to the practice and procedure of the court of appeal.

*CONSTITUTIONAL LAW: Fair hearing – Principles thereof – Improper application by counsel – The principles in **Adebayo vs. A.G. Ogun State (2008) LPELR – 80 (SC) 23 – 24.***

*COURT: Jurisdiction – Rules of court – Whether rules of court, they do not themselves, and of themselves alone confer jurisdiction on a court – The principles in **Odom vs. PDP (2015) 6 NWLR (Pt. 1456) 527.***

*PRACTICE AND PROCEDURE: Execution – Stay thereof – Whether an appellate court is not competent to other stay of execution of an injunction when the appeal has not been entered – The principles in **Stanbic IBTC Bank Vs. Long Term Global Capital Ltd & Anor (2006) LPELR (4051 (CA)***

PRACTICE AND PROCEDURE: Applicable rules of procedure – Whether the applicable rules of procedure are those in force when the action is being heard and not those in force when the cause of action arose.

*PRACTICE AND PROCEDURE: Appeal – Appellate court – When seized of the appeal – Whether it is when the record is transmitted – The principle in **Dinyadi and Anor Vs. INEC 7 Ors (2011) 10 NWLR (Pt. 1255) 237.***

PRACTICE AND PROCEDURE: Applications to an appellate court – Where records of appeal not yet transmitted to the appellate court appellant filed an application at the appellate court for an order of retrial – Whether all applications at this stage should be directed to the trial court.

PRACTICE AND PROCEDURE: Execution – Stay thereof – Whether an order for stay does not survive after an appeal is determined.

PRACTICE AND PROCEDURE: Filing of processes – Where a notice of appeal is filed at the Supreme Court instead of at the lower court – Whether that fact alone does not make such a notice incompetent nor take away the jurisdiction of the court.

PRACTICE AND PROCEDURE: Filing of processes – Where appeal has been entered – Whether it is proper to file processes at the appellate court.

PRACTICE AND PROCEDURE: Setting aside the decision – A court can set aside its own decision in certain circumstances – Whether applies when decision set to be set aside is null and void ab initio

PRACTICE AND PROCEDURE: Trial de novo – Where an application is brought in a lower court for an action to be commence de novo – Whether the procedure is for the trial court to set aside its previous decision.

RULES OF COURT: Court of Appeal Rules, 2011 – Or. 8, r. 4 thereof – purport – Whether places responsibility for compilation of record on appellant.

STATUTE: Provisions therein – When mandatory – Whether when non compliance with it will act done under the statute void.

WORDS AND PHRASES: Cause of Action: Meaning.

WORDS AND PHRASES: Fair hearing – Meaning – The principle in INEC Vs. Musa (2003) 3 NWLR (Pt. 806) 72

Issues for Determination

- (i) Whether the appellants discharged the mandatory duty of compiling and transmitting the record of appeal to the lower court after the Registrar of the High Court of Anambra State failed and neglected to do so.*

- (ii) *Whether the lower court denied the appellants the right of fair hearing in all the circumstances of this appeal.*
- (iii) *Given the peculiar facts and circumstances of this appeal, whether the lower court was not right to have dismissed the appellants' application dated 19th September, 2013.*
- (iv) *Having dismissed the substantive appeal, whether the setting aside of order of stay of execution of the judgment of the trial court was not proper in the circumstances.*

Facts of the Matter

The Anambra State High Court delivered judgment in a consolidated land suit in favour of the respondent.

Consequently, the appellant herein appealed to the Court of Appeal Enugu Judicial Division. The Court of Appeal ordered the Chief Registrar of Anambra State High Court to compile and transmit the Record of Appeal. The Chief Registrar however wrote a letter to the Deputy Chief Registrar Court of Appeal to the effect that he could not trace the record in the said case.

Base on this, the appellants prayed the Court of Appeal to order the Chief Judge of Anambra State to reassign the case to another judge, the application was struck out because the appeal have not been entered at the registry of the Court of Appeal. The Court of Appeal struck out the appeal base on Notice of Non-compliance with conditions of appeal filed by registrar of the trial court.

Meanwhile, appellant applied to the Supreme Court against the ruling of the Court of Appeal which refused to order the Chief Judge to re-assign the case. Again the appellant applied against the striking out of the appeal, which the Supreme Court allowed and struck out the Certificate of Non-Compliance. The second set of respondent prayed the Court of Appeal to strike out the appeal which was adjudged by the Supreme Court to the pending. The Court of Appeal dismissed the appellant motion which once again sought for an order directing the Chief Judge of Anambra State to transfer the suit to another court. The appeal was dismissed for failure to transmit record to the Court of Appeal. It is against this decision that the appellant once more appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Notice of appeal filed at the Supreme Court is not by that fact alone incompetent*
The filing of a notice of appeal at the lower court is merely a procedural convenience which is put in place in order to reduce congestion at the Supreme Court registry and to relieve litigants from the hardship they will encounter by traveling from various parts of the country to Abuja to file the notice of appeal. even when the notice of appeal is filed at the Court of Appeal it is titled 'In the

Supreme Court of Nigeria, Holden at Abuja”. It is therefore a process of this court which ordinarily should be filed in the registry of this court. The fact that Order 8 Rule 2 (7) of the Supreme Court Rules provides for the filing of the notice of appeal at the registry of the lower court, does not take away the jurisdiction of this court. Jurisdiction of this court to hear appeals from the Court of Appeal is donated by Section 233(1) of the Constitution and cannot be taken away, merely because an appellant has filed his notice of appeal at the registry of this court.

2. *Rules of court by themselves do not confer jurisdiction on a court*

This court emphatically rejected a call to decline jurisdiction because a notice of appeal was filed in the registry of this court in Odom Vs. PDP (supra) where Muhammad, JSC held:-

“It must outrightly be stressed that a party's right of appeal is constitutionally guaranteed. Learned appellants/cross respondents counsel must be reminded that though it is of utmost importance to comply with rules of court, the fact remains that being rules of procedure, they do not themselves, and of themselves alone confer jurisdiction on a court. They merely regulate the exercise of the jurisdiction the constitution or the statutes vests in the court. Unless it is expressly stated that non-compliance with the rules particularly renders a cause incompetent, the court's preoccupation must be the doing of substantial justice between the parties in respect of the dispute the court is asked to resolve. In the case at hand, appellants/cross respondents preliminary objection, given the fundamentality of the cross appellant's right of appeal as guaranteed by the constitution, cannot be given the effect the appellants/cross respondents urge on us. The filing of this appeal at this court's registry instead of the lower court's registry should not, by itself alone, make us jettison the cross/appellant's right of appeal. After all, rules of courts have never been the source of the court's jurisdiction. This court will not abandon its jurisdiction because of the cross appellant's non-compliance with the rules which require that the appeals be filed at the lower court. The rules are in pace to regulate practice of the court in the exercise of the jurisdiction the constitution confess on it. These rules should not provide the means of compromising the appellant's right of appeal as conferred by the constitution.”

3. *Where appeal is entered, notice of appeal should be filed at the appellate court*
See Ogunremi Vs. Dada (1962) 1 ALL NLR 663 at 671, I entirely agree and associate myself with my learned brother, Muhammad JSC, provided the notice of appeal is filed within the prescribed period allowed for filing of appeal. I am also in agreement with learned senior counsel for the appellant who submitted that after the appeal was entered in this court, the lower court no longer had jurisdiction to accept papers relating to the appeal. The proper venue was the Supreme Court and the appellant was right to have filed the notice of appeal in the registry of this court.
4. *Relevant rules of procedure are those applicable when the action is being heard*
I agree with the learned senior counsel and the learned counsel for the respondents that the rules of procedure applicable to the hearing of any matter is the existing rules of procedure at the time of the hearing of the case and not the rules of procedure that existed at the time the cause of action arose.
5. *There is distinction between substantive law and law governing practice and procedure*
This is the position this court has adopted in a myriad of decided cases. In Owata Vs. Anyigor (supra), this court clearly stated the position of the law as follows:-

“It seems to me that Chief Ezeofor's contention is founded on the well settled law that the action is governed by the law applicable and in force at the time the cause of action arose. In this proposition he is on firm ground. All the decided cases cited and relied upon by Chief Ezeofor were decided on this principle. It is however not the same principle when the procedure governing the action is being considered. There is a clear distinction between the substantive law applicable and the rule of law governing practice and procedure. It is similarly well settled that the rule governing practice and procedure is the rule in force at the time of the trial or the application is heard. Unless there is any provision to the contrary. This is based on the principle that there is no vested right in any course of procedure. See Costa Rica Erlanger (1874) 3 Ch D. 69. A litigant only has the right to rely on the procedure prescribed for the time being, where the procedure is altered, he must proceed according to the altered manner.”

6. *There is distinction between substantive law and law governing practice and procedure*
In Nwora Vs. Nwabueze (supra) this court, per Mohammad JSC (as he then was) restated the position of law as follows:-

“The law is well settled that an action is governed by the substantive law applicable and in force at time the cause arose. See Agbajo Vs. Attorney General of the Federation (1986) 2 NWLR (Pt. 23) 528 and Savannah Bank of Nigeria Ltd Vs. Pan Atlantic Shipping & Transport Agencies Ltd (1987) 1 NWLR (Pt. 49) 212. In the same vein, it is also settled that the rule governing practice and procedure in an action or in an application, is the rule in force at the time of the trial of the action or at the time the application is heard, unless there is any provision to the contrary.”

7. *The Nature and purport of S. 243 (b) of CFRN 1999 (as amended)*
These decisions have the backing of Section 243 (b) of the Constitution of the Federal Republic of Nigeria 1999 which stipulates that any right of appeal to the Court of Appeal from the decisions of the Federal High Court a High Court conferred by this constitution shall be exercised in accordance with any act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal. it is so clear that the “rules of court for the time being in force,” means the rules of court in force at the time of adjudication.
8. *The meaning of cause of action*
Learned counsel for the appellant seems to confuse what cause of action is and how substantive and procedural laws are applied in matters before the courts. Cause of action is defined by Black's Law Dictionary 9th edition as a group of operative facts giving rise to one or more bases for suing. The appellants first application in which they sought for an order directing the Chief Registrar to compile and transmit the record of appeal, and the subsequent application for an order to compel the Chief Judge of Anambra State High Court to assign the claim of the appellants to another judge for trial de novo were not claims against any party, as such none constituted a cause of action that required the application of any substantive law.
9. *The meaning of cause of Action*

In A.G Lagos State Vs. Eko Hotels Ltd & Anor (2006) LPELR 3161 (SC) (2006) 18 NWLR (Pt. 1011) 378 this court, per Onnoghen JSC (as he then was) defined cause action at page 438 paragraphs E – F as follows:-

“... a cause of action consists of every fact which it would be necessary to prove, if traversed, in order to support his claim for judgment and that the accrual of the cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action. It is very clear from a community reading of decisions of the courts on the issue that cause of action always deals with events in the immediate past, not in the future.”

It is generally the claim of the plaintiff that determines the cause of action between the parties. See Egbe Vs. Adefarasin (No. 2) (1987) 1 NWLR (Pt. 47). In the instant case, the appellants' grievances are centered around their consolidated appeals and compilation and transmission of the record of appeal which are essentially procedural matters. These matters were never causes of action between the parties in the appeal. The cause of action as between the parties had been adjudicated upon at the trial court. The record of appeal had not been transmitted to the Court of Appeal, as such the lower court could not have had jurisdiction to determine a matter that had not been placed before it.

Per Galumje (JSC)

“Learned senior counsel for the appellants insisted that the lower court's order of 10th February 2005 in which the Chief Registrar of the trial court as directed to compile and transmit record within 30 days remain valid and subsisting and that, that order had place the responsibility of compiling and transmission of the record on the registry. It is his view that the Court of Appeal Rules 2011 is subordinate to that order. This is clearly a misunderstanding of the issues involved in this case. That directive of the lower court was limited to 30 days, and after 30 days, the order had become spent. The only option at this stage was to visit sanction on the erring registrar who failed to obey the court order. The registrar had properly explained why he could not obey the court's order, and that must have been the reason for the court's failure to sanction him. The order of the court that had become spent 30 days after it was made in 2005 cannot be superior to the Court of Appeal Rules 2011, and same cannot be valid and subsisting.”

10. *Appellate court is seized of the appeal when record is transmitted*

The appellants' first application at the lower court in 2004 for an order directing the chief judge to assign the consolidated suits to another judge for hearing de novo, was rightly in my view struck out, as there was no record placed before the lower court to enable it determine the application. In *Dingyadi & Anor Vs. INEC* 7 Ors (2011) 10 NWLR (Pt. 1255) 347 per Adekeye JSC stated at page 395 paras C – D as follows:-

“Where an appeal has been entered the effect is that, the appellate court which has received the record of appeal is said to be seised of the whole proceedings in the sense that the res in the appeal has automatically passed into the custody of the said appellate court.”

See also *Ogunremi Vs. Dada* (1962) 2 SCNLR 417; *Ezeokafor Vs. Ezeilo* (1999) 9 NWLR (Pt. 619) 513. It is therefore very clear that where appeal has not been entered at the appellate court, that appellate court will have no jurisdiction to entertain any applications concerning the appeal, except as provided by the rules of the appellate court or any other enabling law. Order 4 Rule 10 of the Court of Appeal Rules 2011 provides that an appeal shall be deemed to have been entered in the court when the record of proceedings in the court below has been received in the registry of the court. Order 4 Rule 11 of the same rules states as follows:-

“After an appeal has been entered and until it has been disposed of, the court shall be seized of the whole of the proceedings as between the parties, thereto, except as may be otherwise provided in these rules, every application therein shall be made to the court below, but any application may be filled in the court below for transmission to the court.”

11. *Power of appellate court to order stay of execution or injunction*
In *Stanbic IBTC Bank Vs. Long Term Global Capital Ltd & Anor* (2006) LPELR 4051 (CA) it was held:-

“Before an application for stay of execution, proceedings or for injunction pending appeal becomes competent, an appeal against the decision sought to be stayed must have been entered in the court. It will be an error to grant an injunction pending an appeal when there is no competent appeal against the decision sought to be stayed.”

Per Galumje (JSC)

“In Biocon Agrochemicals Nig Ltd & Ors Vs. Kudu Holdings PTY Ltd & Anor (1996) LPELR – 783 (SC) this court, per Kutigi JSC (as he then was) held:-

“I must also add that the true position here now is that this court has already received the record of appeal compiled by the appellants/applicants and the appeal having been entered in the cause list; any application thereof including applications for stay of proceedings should be made direct to this court.”

The effect of these pronouncements by the Court of Appeal and this court clearly shows that applications in the appeal can only be filed and determined in the appellate courts, only if the appeal is entered. The application to direct the chief judge of Anambra State High Court would have been appropriately commenced at the trial court where the appeal was still domiciled. A refusal would have given the appellant the right of appeal. While the appeal against the refusal to direct the chief judge to assign the case to another judge was pending in this court, the assistant Chief Registrar's certificate of non-compliance with conditions of appeal dated 27th January 2009 moved the Court of Appeal to strike out the substantive appeal on the consolidated suit. The appellants appeal against the striking out of the appeal against the decision on the consolidated suit was allowed by the Supreme Court and the substantive appeal was reinstated.

On the 10th of September, 2013, the appellants' instead of pursuing their appeal which was reinstated, filed an application at the Court of Appeal in which they sought for an order directing the chief judge of Anambra State to assign the case to be heard de novo and accelerated hearing of the case. The two sets of respondents filed applications dated 13th June, 2013 and 11th July, 2013 respectively praying for an order dismissing the appeal for failure to compile and transmit record of appeal under Order 8 Rule 18 of the Court of Appeals, as well as vacating the Order for stay of execution granted by the trial court.”

Per Galumje (JSC)

“The lower court rightly in my view refused to grant the application to order the trial court to hear the consolidated case de novo. There was no material before the lower court upon which it would have exercised its jurisdiction to grant the application, since the appeal had not been entered.

By Order 8 Rule 4 of the Court of Appeals 2011, where at the expiration

of 60 days after the filing of the notice of appeal, the registrar has failed and/or neglected to compile and transmit the records of appeal in accordance with the preceding provisions of this Rule, it shall become mandatory for the appellant to compile the records of all documents and exhibits necessary for his appeal and transmit to the court within 30 days after the registrar's failure or neglect. The appellants in this case filed their appeal on the 18th of November, 1999 and as at the time the applications to dismiss the appeal were filed on the 13th of June 2013 and 11th of July 2013, the cumulative period of the registrar and the appellants within which to compile and transmit the records of appeal had elapsed.

By Order 8 Rule 18 of the Court of Appeal Rules 2011, the appeal was liable to be dismissed at the instance of the respondents' application by motion on notice. The respondents did apply for the appeal to be dismissed and the lower court had no option as the period between the time the appeal was filed and when the applications for its dismissal were filed is staggering and there was no evidence that the records would be compiled and transmitted within a reasonable period. It was not the business of the lower court to know why the records were not available, since there was no record before it, to guide which direction it would take.”

12. *Where appeal is domiciled at the lower court all application should be directed to it*
An appellate court can order as a last resort, for a retrial of a case if part or portion of the record transmitted to it is lost and all effort to trace it failed. Where the parties agree that the portion of the record that is missing is inconsequential, and that the hearing of the appeal cannot result in miscarriage of justice, the court can hear the appeal on incomplete record. However where no record is transmitted at all, as in this case, all applications including application for the case to be heard de novo must be made to the trial court where the appeal is domiciled. An appellate court will have no materials upon which it will assume jurisdiction in the appeal. I therefore find nothing wrong with the decision of the lower court in refusing the application for an order of trial de novo and for dismissing the pending appeal before it for failure to compile and transmit the records of appeal after fourteen years of filing the appeal.

13. *Procedure where application is brought in a trial court for trial de novo*
Where an application to hear the case de novo is made before the trial court, that court must first of all set aside its judgment before making an order for trial de novo. This is to avoid any confusion that may arise if subsequently the lost judgment is found. A situation will arise where there may be two competing

judgment, especially where there is variation in the latter judgment.

14. *Circumstances when a court is to set aside its own decision*
The question now is whether the trial court is competent to set aside its judgment?

As a general rule, every court of record has inherent jurisdiction, on application, and in appropriate cases and circumstances, to set aside its judgment or decision. This jurisdiction may be exercised, where for instance, the judgment or decision sought to be set aside is null and void ab initio or there was a fundamental defect in the proceedings which vitiates and renders the same incompetent and invalid. See *Alao Vs. ACB LTd* (2000) 2 SCNQR 1067 at 1071; *Odofin & Ors Vs. Abraham Olabanji & Anor* (1996) 3 NWLR (Pt. 435) 126; *Skenconsult (Nig) Ltd Vs. Ukey* (1981) 12 SC 1.

Per Galumje (JSC)

“I have held elsewhere in this judgment that the rules applicable at the hearing date of a matter is the prevailing rule at the time of hearing and not the rule applicable at the time the matter was filed. Rules of court are dynamic and they are issued from time to time in order to cure certain acts of mischief by litigants. In this matter the appeal was filed on the 18th November, 1999. The appellants appeal for and obtained a stay of execution of the judgment that had adjudged them trespassers on a piece of land, upon which title was declared in favour of the two sets of respondents. Thereafter the appellants stayed away from the court and refused to take steps to fulfill the condition of the appeal for four years until on the 31st of October, 2003 when they deposited the sum of N10,000 on the prompting of the respondents who wrote and complained to the chief registrar about the appellants' failure to take steps to prosecute the appeal. Clearly this is the kind of mischief that was intended to be cured by Order 8 Rule 4 of the Court of Appeal Rules 2011. Rules of court are meant to be obeyed as they have the force of law, and where there is no compliance with the rules of court, sanctions prescribed for their breach must be invoked. Such invocation of sanctions prescribed by the rules of court does not constitute a breach of fair hearing to any of the parties to the action. Even where the registrar of court bears the burden of compiling of record, the appellants must take time to find out the status of his appeal, where the prescribed time for compilation and transmission of record had elapsed. Appellant who fails to do so is either negligent or he is acting deliberately to prevent the successful party from reaping the fruit of the judgment. No reasonable tribunal will allow that to happen.

15. *Meaning of fair hearing*

Learned counsel for the appellant has argued that the decision of the lower court occasioned a gross violation of the appellants' rights to fair hearing and of appeal. This is an unfair criticism of the decision of the lower court. Fair hearing is defined by Black's Law Dictionary 9th Edition at page 789 as a judicial or administrative hearing conducted in accordance with due process. In INEC Vs. Musa (2003) 3 NWLR (Pt. 806) 72 at 195 para H, this court defined fair hearing thus:-

“Fair hearing, in essence, means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of fair hearing principles”.

In the instant case there was no evidence that the appellants were denied the opportunity to be heard. The opportunity available to them was to be exercised in accordance with the rules of procedure at the lower court. They failed to submit themselves to the rules of the court, as such they cannot blame anybody for their predicament.

16. *The nature and purport of Or. 8, r. 4 of court of Appeal Rules, 2011.*

The decision in Engineering Enterprises Ltd Vs. Attorney General of Kaduna State (1987) 2 NWLR (Pt. 57) 381 at 391 in which this court laid the responsibility of compiling and transmission of the record of appeal to the registry of the Court of Appeal on the registrar of the trial court alone was decided under the 1981 Court of Appeal Rules and the decision in FBN Plc Vs. May Med. Clinics and diagnostic centre (supra) was delivered under the 2002 Court of Appeal Rules which did not have provisions that donated responsibility to the appellants to compile and transmit record of appeal. Order 8 Rule 4 of the Court of Appeal Rules 2011 makes it mandatory for the appellant to compile and transmit record of appeal, where the registrar fails or neglected to do so.

This is what the rule says:-

“Where at the expiration of 60 days after the filing of the notice of appeal the registrar has failed and or neglected to compile and transmit the records of appeal in accordance with the preceding provisions of this rule, it shall become mandatory for the appellant to compile the records of all documents and exhibits necessary for this appeal and transmit to the court within 30 days

after the registrar's failure or neglect.”

17. *Where a provision in a statute is said to be mandatory Handbook on the construction and interpretation of the laws (1896) at page 334; states as follows:-*

“A provision in a statute is said to be mandatory when disobedience to it, or want of exact compliance with it, will make the act done under the statute absolutely void.”

Although the constitution has given every aggrieved person the right to appeal, such appeal must be prosecuted in accordance with due process. These processes are put in place for speedy and orderly disposal of these appeals. Where appeals are not prosecuted in line with due process it is liable to be struck out. Learned senior counsel ought to know that the Court of Appeal had limitation in entertaining most of the applications that were brought before it since the appeal had not been entered in that court, yet he chose to go to that court instead of going to the trial court. He had himself to blame for the outcome of what transpired at the Court of Appeal.

18. *Order of stay of execution does not survive after an appeal*
It is an elementary but fundamental principle of our adversary system that an applicant is bound by the prayers in his motion. See *A.C.B Ltd Vs. A.G Northern Nigeria (1969) N.M.L.R 321*. In the instant case, the appellants having asked for stay of execution pending the determination of appeal, cannot be heard to argue that the stay of execution is still valid and subsisting after the appeal which they referred to had been determined. The order of stay as reproduced above had no chance of surviving the appeal. See *Arojoye Vs. UBA (Nig) Ltd & Anor (1986) 2 NWLR (Pt. 20) 101; NBN Ltd Vs. N.E.T Ltd (1986) 3 NWLR (Pt. 31) 667 at 670*.

An order for stay of execution of judgment cannot be made in vacuum as it cannot stand alone. An order of stay of execution pending appeal only prevents the beneficiary of a judgment or order from putting into operation the machinery of the law, the legal process of warrants of execution pending the determination of appeal. See *Okoya & Ors Vs. Santilli & Ors (1990) LPELR 2504 (SC)*.

With the dismissal of the Appeal No. CA/E/30/2009, even if nothing was said about the order of stay of execution, that order stood vacated. I am therefore surprised that learned senior counsel has argued forcefully that the order remains valid and subsisting and that the lower court had no jurisdiction to vacate same. Clearly when the appeal was dismissed, there was nothing upon

which the order of stay could be situated that could make it stand. Pronouncement of their lordships that the order of stay was vacated was just a mere formality which the lower court had absolute jurisdiction to so pronounce.

19. *When abuse of court process occurs*

The learned senior counsel's argument that the respondent's applications to vacate the order of stay of execution of judgment and the court's ruling constituted an abuse of court process, is clearly misconceived. The ruling or judgment of a court could contain errors of law or facts, but itself cannot constitute an abuse of court process.

It could be an abuse of court process, if someone collects a copy of the ruling or judgment and uses it improperly before another court against another person, primarily to accomplish a purpose for which it is not deigned. Abuse of court process is an improper or tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the scope of the process. I do not see how, by any stretch of imagination, the ruling of the lower court could be termed an abuse of court process. The application for the vacation of the order of stay of execution were made consequent upon the dismissal of the appeal, and to that extent, they did not in anyway constitute an abuse of court process. Those applications were based on the Court of Appeal Rules and so I hold.

Per Ekun (JSC)

“Suffice it to say that the law is quite well settled that while the substantive law applicable to a cause or matter is the law in force at the time the cause of action arose, see: *Adah Vs. NYSC* (2004) 13 NWLR (Pt. 891) 639 @ 648 A – E, any law that affects the practice and procedure of the court may have retroactive or immediate effect. See: *Chigbu Vs. Tonimas Nig. Ltd* (2006) 9 NWLR (Pt. 984) 189 @ 2111 A-B; *Ojokolobo Vs. Alamu* (1987) 3 NWLR (Pt. 61) 377 @ 394 E – G. expressed differently, it is the state of the law at the time the jurisdiction of the court is invoked or at the time the suit is heard, that governs the practice and procedure of the court.”

20. *There is a distinction between substantive law and adjectival governing practice and procedure*

It is obvious that the arguments, brilliant as they are, did not draw a distinction between the substantive law applicable to causes of action and the adjectival rules governing practice and procedure.

Both in England and in Nigeria, superior courts have made it, abundantly, clear that the applicable law to a cause of action is the law

prevailing at the time the cause of action arose notwithstanding that the law had been revoked at the time the action is being tried, *Smith Vs. Callander* (1901) AC 297; *Re Snowdon Colliery Co. Ltd* (1992) 94 LJ Ch 1 305; *Governor of Oyo State Vs. Folayan* [1995] 9 SCNJ 50, 64; *Mustapha Vs. Governor of Lagos State* [1987] 2 NWLR(pt. 58) 539; *Areemo II Vs. Adekanye and Ors* [2004] 7 SC (Pt. 11) 28, 37–38; (2004) LPELR- 544 (SC); *Alao Vs. Akano* [1988] 1 NWLR (Pt. 71) 431; *Uwaifo Vs. Attorney Gneeral Bendel State* [1982] 3 SC 221.

On the other hand, since there is no vested right in any course of procedure, *Costa Rica Vs. Erlanger* (1874) 3 Ch. D 69, the rule governing practice and procedure is the rule in force at the time of trial or the application is heard, unless there is any provision to the contrary, *Owata vs. Anyigor* [1993] 2 NWLR (Pt. 276) 380, 391; G – H; [1993] 2 SCNJ 1, 10 – 11; *Rossek and Ors Vs. ACB Ltd and Ors* [1993] 10 SCNJ 20; *Agbajo Vs. A.G for the Federation* [1986] 2 NWLR (Pt.23) 528; *Uwaifo Vs. AG. Of Bendel State* [1982] 13 SC 221; [1983] 4 NCLR 1; *Savannah Bank of Nigeria Ltd Vs. Pan Atlantic Shipping and Transport Agnecies Ltd* [1987] 1 NWLR (Pt. 49) 212; *Olaniyi Vs. Aroyehun* [1991] 5 NWLR (Pt. 194) 652, 691, thus, where the procedure is altered, he must proceed according to the altered manner, *Attorney-General Vs. Sillem* (1864) 10 H.L.C. 704.

In all, it is a fundamental principle of our law that rights of parties in an issue in litigation are decided on the basis of the substantive or organic law in force at the time of the act in question. This distinguishes them from adjectival or procedural law where the rule governing practice and procedure is the rule in force at the time of trial or the application is heard, unless there is any provision to the contrary, *Lami koro Ojokolobo and Ors Vs. Lapade Alamu and Anor* (1987) 3 NWLR (t. 61) 377; *Kpema Vs. The State* [1986] 1 NWLR (Pt. 17) 396; *Obadiara Vs. Uyigwe* [1986] 3 SC 39; *Adeyeye Vs. Ajiboye* [1987] 3 NWLR (Pt. 61) 432, 444.

21. *Improper application of principles of fair hearing*

Now, the strenuous submissions of the appellant's senior counsel to the effect the lower court's decision violates the appellants' right to fair hearing reminds me of the eloquent formulation in *Adebayo Vs. AG, Ogun State* (2008) LPELR – 80 (SC) 23 – 24. For its bearing on the fortune of the appellants' case, I crave your lordships' indulgence to quote this court's view *in extenson*.

“I have seen in recent times that parties who have had cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.

They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. They fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a causal principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision available to a party who is ready denied fair hearing because he was not heard or that he was not properly heard in the case. Let litigates who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking.”
[Italics supplied for emphasis]

Representations

CHIEF WOLE OLANIPEKUN (SAN) with Akintola Makinde (Esq); Olajide Salami (Esq); Obemipo Olorunfemi (Esq) and Kolawole Aro (Esq) for the Appellants.

DR. J.O. IBIK (SAN) and Namdi Ibegbu (SAN) with Patrick Agu (Esq); O. J. Ibik (Esq) and Daniel Nwachukwu for the 1st sets of Respondents.

MR. JOHN EGWUONWN (SAN) with Chief G. Tagbo Ike; Chief I. M. Anah; A.C Ozioko and J.I. Ekeoma for the 2nd sets of Respondents.

PAULADAMU GALINJE, (JSC) (Delivering the lead judgment):

**YAKUBU ALI
VS
THE STATE**

SC. 762/2013

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 12th APRIL 2019

BEFORE THEIR LORDSHIPS

**WALTER SAMUEL NKANU ONNOGHEN
MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKAAHS
JOHN INYANG OKORO
UWANI MUSA ABBA-AJI**

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

*CRIMINAL LAW AND PROCEDURE: Capital offences – Right to counsel thereto – Where court assigned counsel to represent appellant and other accused persons in a charge of capital offence – No objection was raised thereto – Whether appellant cannot be heard to contend on appeal that his right to fair hearing was breached thereby – The principle in **Yakubu vs. State (2014) All FWLR (Pt. 732) 1680.***

CRIMINAL LAW AND PROCEDURE: Capital offences – Right to counsel thereto – Whether court cannot impose a particular counsel on the accused.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Corroboration thereof – Where a co-accused makes an admission – Whether it may amount to corroboration of the confessional statement of an accused.

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Whether does not affect admissibility but goes to weight to be attached to confessional statement – The principle in **Oseni vs. State (2012) 5 NWLR (pt. 1293) 351.***

CRIMINAL LAW AND PROCEDURE: Conspiracy – How proved – Whether usually inferred from the conduct of the accused person.

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Where it is shown that accused persons have common intention – Whether all of the accused are criminally responsible for the death of the deceased caused by one of the accused – The principle in **Alarape vs. State (2001) 5 NWLR (pt. 705) 79.***

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Where one of the accused persons to the knowledge of others is armed – Whether they are criminally responsible for the unlawful use of the weapon – The principle in **Alarape vs. State (2001) 5 NWLR (pt. 705) 79.***

CRIMINAL LAW AND PROCEDURE: Preliminary enquiring – Abolition thereof – Proper procedure thereafter – Section 185(b) of CPC considered.

CRIMINAL LAW AND PROCEDURE: Right of counsel there to – Where accused was assigned a counsel to represent him and other accused persons in a charge or capital offence – Whether this does not amount to the breach of accused fair-hearing unless there was a conflict in the defence of the accused person and that of other accused persons.

EVIDENCE: Confessional statement – Admissibility thereof – Whether the retraction or denial of a confessional statement does not make it inadmissible.

EVIDENCE: Presumption – Concurrent judgments – Whether there is a presumption that facts found in the concurrent judgments are correct – Onus on appellant thereto.

PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Attitude of Supreme Court thereto – Whether will not disturb concurrent findings – Exceptions thereto.

STATUTE: CFRN 1999 (as amended) - Section 36(6)(c) – Nature and purport thereof – Right to counsel of one's choice.

STATUTE: Criminal Procedure Code – Nature and purport – The right to be represented by a counsel in a capital offence.

Issues for Determination

- 1. Whether having regard to the entire circumstances of this case, the court below was correct in holding that the appellant gave his consent to the assignment, by the trial court of Chief Oyibo to represent him as counsel and that no miscarriage of justice or denial of fair hearing had been shown by the assignment of one counsel to represent the appellant and the other accused persons**

(Grounds 1 and 2).

2. **Whether the court below was right in holding that the trial court complied with the provisions of section 191 of the Criminal Code at the trial of the appellant (Ground 4).**
3. **Whether in the entire circumstances of this case the court below was correct in affirming the conviction and sentence of the appellant for conspiracy, culpable homicide punishable with death and armed robbery (Grounds 3 and 5).**

Facts of the matter

The accused appellant and five others were arraigned at the Kogi State High Court sitting at Egbe for conspiracy culpable homicide punishable under Sections 97, 221(a) and 298(b) respectively of the Penal Code.

The three count charge stated that the accused conspired to commit Armed Robbery, culpable homicide and Armed Robbery. In proof of its case, the prosecution called nine witnesses and tendered several exhibits. At the end of trial, the trial court found each of the accused person guilty as charged and convicted each to ten years imprisonment.

The appellant who was fourth accused person at the trial, unsuccessfully appealed to the Court of Appeal hence, these further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The nature and purport of section 36(6)(c) of CFRN 1999 (as amended)*
Section 36 (6) (c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

“Every person who is charged with a criminal offence shall be entitled to defend himself in person or by a legal practitioner of his own choice”. *(P.....Paras.....).*

2. *The nature and purport of section 186 of CPC*
Section 186 Criminal Procedure Code makes it mandatory for a person accused of an offence punishable with death to be represented, by counsel at his trial and where he is not so represented, the court has a duty to assign one to him. The section stipulates:-

“186 where a person is accused of an offence punishable with death, if the accused is not defended by a legal practitioner, the court shall assign a legal practitioner for his defence.”
(P....Paras.....).

3. *There was no conflict where appellant was assigned a counsel who represented him and other accused persons*

Where an accused person show preference for a particular legal practitioner to handle his defence, his wishes must be obeyed by the court by giving him adequate time to brief the legal practitioner he wants to handle his defence but where, as in this case, the appellant was asked: “Where is your counsel?” and he replied: “I have none”, it became incumbent on the court to assign a legal practitioner to handle the defence because the second count accused him of committing an offence punishable with death. The interpretation of section 186 CPC cannot be stretched to the limit that the Court must assign one legal practitioner to represent each accused where there are more than one accused persons in a joint trial. The legal requirement of section 186 was satisfied when the court assigned Chief Oyibo to defend him. The court even went further to enquire if any of the accused had any objection to Chief Oyibo being asked to represent them, but none of them raised such an objection. None of them sought for an adjournment and was refused to contact the counsel that would represent him. There is therefore no denial of fair hearing as alleged by learned counsel for the appellant. Apart from alleging lack of fair hearing, learned counsel for the appellant has not been able to pinpoint which defence the appellant intended to advance which was in conflict with that of other accused that would have necessitated appointing different counsel for the other accused persons. See: *Ngoroh & Anor vs. King* (1951) 13 WACA 256 at 258; *Gyang & Anor vs. Queen* (1954) 14 WACA 584 and *State vs. Gwonto* (1983) 1 NCR 251 at 265. The complaint of lack of fair hearing tantamounts to crying wolf only where there is none. The appellant and the accused did not testify in their defence and each of them denied making the extra judicial statement which implicated the co-accused. Had the appellant testified in his defence and implicated any other accused, it is then that the conflict in representation would have become manifest. Issue 1 is resolved against the appellant. (*P.....Paras.....*).

4. *Failure of counsel to raise objection when necessary does not amount to denial of fair hearing*

When this issue was raised in *Yakubu vs. State* (2014) All FWLR (Pt. 732) 1680, my learned brother, Kekere-Ekun JSC in resolving the issue said at page 1691 *supra*.

“It is noteworthy that, the appellant and the other accused persons were represented by counsel throughout the trial and in particular, on 12th May, 2004. Learned counsel did not raise any objection when the court read out its record nor did he apply to call the appellant or any other witness in his defence. Indeed in the course of addressing the court, he asserted that the appellant and the other accused persons were not bound to say even a word in their defence. (See page 121, lines 9. 12 of the record), I agree with

the lower court that there was sufficient compliance with the provisions of the law in the circumstances of this case, particularly as the appellant was represented by counsel.

If as argued by learned counsel for the appellant the learned trial Judge went over his head and put the wrong options to the appellant directly, he owed it as a duty to his client to raise an objection which he failed to do. The contention that the appellant was denied a fair hearing, thereby rendering the trial a nullity is misconceived.

I participated in the appeal and I endorsed the judgment of my learned brother, Kekere-Ekun JSC not only with regard to the issue raised but the entire judgment. (*P.....Paras.....*).

5. *Procedure to be adopted where preliminary enquiry is abolished*
The appellant in this appeal was the 4th accused in *Yakubu vs. State supra*. My stand then has not changed. The learned trial judge substantially complied with sections 191(1) and 235 (1) CPC in drawing the appellant's attention to the vital evidence that had been adduced by the prosecution that required his response. I only need to add that since the holding of preliminary enquiry has been abolished, all that the prosecution does is to apply under section 185 (b) CPC for leave to prefer the charge without holding a preliminary enquiry and once the trial judge grants leave, the charge is read to the accused and thereafter his plea is taken and the prosecution proceeds to call its witnesses to prove the charge. This was the procedure that was adopted in this case. (*P....Paras.....*).
6. *When a condition is to nullify judicial proceedings*
It has been held that for a condition to nullify judicial proceedings it must be a substantive provision which affects the jurisdiction or competence of the court, or a procedural defect in the proceedings which would result in a miscarriage of justice and none has been shown in this appeal. See: *Kajubo vs. State (1988) 1 NWLR (Pt. 73) 721*; *Ejelioku vs. State (1993) 7 NWLR (Pt. 307) 554*. (*P.....Paras.....*).
7. *Conspiracy is proved by circumstantial evidence*
The offence of conspiracy is often proved by circumstantial evidence, usually inferred from the overt acts of the accused persons. It is complete by the agreement to do the act or make the omission complained about. See: *Njovens & Others vs. The State (1973) NLR 371 at 404*; *Omotola vs. The State (2009) 7 NWLR (Pt. 1139) 148*. The learned trial judge relied on cogent and material evidence adduced at the trial from which he drew the inference of the commission of the offence by the appellant e.g. the evidence of PW1, PW2, PW7 and the confessional statement of the appellant (Exhibit 28A and 28B) PW1

testified that on the night of 5/5/2001 and the early hours of 6/5/2001 at about 12.45 a.m., while on guard at Ise Oluwa Sawmill, Egbe in Kogi State, he saw a vehicle parking at the entrance of the gate of the Sawmill, and two persons emerged from the vehicle. They stopped and started moving towards the Sawmill holding lamp and a gun. He immediately took to his heels and after running for 300 yards, he heard the shout from Mohammed Shuaibu (Baba Muri) who was later found dead with his head battered and a wooden plank with blood stains found near his corpse. His hands and legs were tied with a rope. The evidence showed that the 1st accused was arrested in the vehicle at the Sawmill that night by the police and PW7 testified that on receiving intelligence report in the morning around 6 am on 6/5/2001 the appellant was arrested bare footed at the garage in Egbe while trying to flee the town and immediately he was accosted by the police he said in Yoruba “Akeem lo pa man yen. Ebami wa Akeem o wa lodo wa” meaning that Akeem (i.e. the 3rd accused at the trial) killed the man. PW4 testified that when they got to the police Station, the D.P.O. directed that the 1st accused be brought out from the cell and when he was shown to the appellant, 2nd and 5th accused, they confirmed that the 1st accused (who had admitted earlier that he conveyed the accused in the army truck) was among the group. (*P.....Paras.....*).

Per Akaah's (JSC)

“The inference drawn by the lower court proved the conspiracy which the appellant and the other accused hatched to go for the robbery operation in Ise Oluwa Sawmill in Egbe. In the process of the robbery they killed Mohammed Shuaibu. The 1st accused no doubt participated in the conspiracy to rob the Ise Oluwa Sawmill since he took the co-conspirators to the vicinity of the sawmill but there is no certainty that he knew or consented to the killing of Mohammed Shuaibu since the wooden plank which was used in hitting the deceased on the head was not part of the weapons they took along with them from the truck.

The lower court correctly found that a court can convict an accused person based on his confessional statement alone, if it is voluntarily made. The appellant had objected to the admissibility of Exhibit 28A and 28B on the ground that he made the statement under duress and this prompted the trial within trial. Before this court, learned counsel has asked that Exhibit 28B be expunged because the appellant was not cautioned before he made Exhibit 28B. The appellant's conviction was not based solely on Exhibits 28A and 28B. What the appellant stated in Exhibit 28A and 28B was corroborated. The contents of the statement are true and it is an account of what the appellant and the other accused did. He was together with the other accused persons when Mohammed Shuaibu was dealt the fatal blow head in the course of the robbery.

8. *Effect where one of the accused persons is armed and caused harm therewith*
In Alarape vs. State (2001) 5 NWLR (Pt. 705) 79 it was held by the majority decision (with Kutigi JSC dissenting) that where two or more persons set out to steal and one of them is known by the others to be armed with a lethal weapon, all of them may be held criminally responsible for any consequences which result in the use of the weapon by the one who carried it, even if there is no evidence to show that there was any express pre-concerted agreement that he was to use it. See: Gyang vs. Queen (1954) 14 WACA 584; Ofor vs. Queen (1955) 15 WACA 4 at 5 and Digbehin vs. Queen (1963) 2 SCNLR 3. (P.....Paras.....).
9. *Effect where accused persons have common intention*
The brief facts in Alarape vs. State supra were that the four appellants after their meeting in the house of the 1st appellant went out together at midnight for an unlawful purpose in conjunction with one another. In order to foster or achieve their common intention, one of them carried a lethal weapon, a dane gun, which the 1st appellant successfully used to facilitate or aid their escape and avoid being caught or arrested when they were disturbed and hotly chased by the deceased and the other night guards. In the leading judgment, Iguh JSC held:-

“I think that this is a proper case where section 8 of the Criminal Code, Law of Ogun State, the Provisions of which are in pari material with those of section 8 of the criminal code Cap 77) Cap 77, Laws of the Federation of Nigeria, must apply. In my view, the gun, though fired by the 1st appellant at all material times, is deemed in the eyes of the law to have been fired by the rest of his gang. The 1st appellant was no more than the hand by which the other appellants struck and all are liable to be convicted for the murder of the deceased.

In his contributory judgment in support of the majority decision Belgore JSC (as he then was) said:-

“When the appellants set out on the fateful night they not only knew they were out to commit an offence but armed in case they were confronted in carrying out their design. They were confronted by vigilantes, and the deceased, a member of the vigilantes as shot at point blank range by 1st appellant who took the gun from 4th appellant. That was the common purpose – to confront by any force whoever obstructed their escape. (R vs. Ofor (1955) 15 WACA 4; R vs. Bada 10 WACA 249. It does not matter which of the accused did what, so far there was a common purpose as the gang of these appellants went out fully armed to

confront any person who would try to prevent or obstruct their escape.

In the present appeal, the common purpose was manifested when the appellant and the other three accused decided to tie up the deceased's hands and legs and one of them used the wooden plank to hit him on the head while others were engaged in loosening the engine which was rolled towards where the truck was parked and carrying off the sewing machine. This was to facilitate not only the theft but their escape.

If the appellant had registered a protest when the deceased was being hit with the plank on the head, there would have been a clear manifestation that his intention was to steal and not inflict any injuries on the deceased. His acquiescence to the use of the plank on the deceased's head implies consent. (P.....Paras.....).

10. *Offences were proved against the appellant*
All the ingredients of the offences of conspiracy to rob Ise Oluwa Sawmill against the appellant and the other accused was proved; so also the culpable homicide punishable with death and armed robbery proved against the appellant and the other three accused who walked into the Ise Oluwa Sawmill on the night of 5th/6th May, 2001. (P.....Paras.....).
11. *Court cannot foist legal representation on accused person*
The law does not require the trial judge to seek the consent of the accused person to the appointment of a particular legal practitioner to represent him. However, if the accused raises objection to being represented by a particular lawyer the court cannot foist the same counsel on him. That was, however, not the case here, and learned counsel for the appellant did not complain of inadequate representation in the appointed counsel. (P.....Paras.....).
12. *Supreme Court will not disturb concurrent findings*
It is a settled position of law that this court would rarely interfere or disturb concurrent findings of facts of the two lower courts except where such concurrent judgments appear to be perverse, occasion a miscarriage of justice, is unreasonable and against the evidence adduced, or violates some principle of law and procedure, then this court would not allow such judgment to stand. (P.....Paras.....).
13. *Denial or retraction of confessional statement does not make it inadmissible in law*
In the instant appeal, the trial judge rightly assigned a legal practitioner for the defence of the appellant and his co-accused. In line with section 36(6)(c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section

186 of the Criminal procedure Code. The Prosecution tendered exhibits 28A and 28B which are the appellant's extra-judicial statements which were corroborated by his co-accused persons. The denial or retraction of the said confessional statements does not render them inadmissible in law. The statements were properly admitted after the learned trial judge had conducted a trial-within trial.

More importantly, the statements in Exhibits 28A and 28B were corroborated by other accused persons. (P....Paras.....).

14. *Denial or retraction goes to weight to be attached to confessional statement*
It is settled principle of law that even without corroboration, a confessional statement is sufficient to support a conviction so long as the court is satisfied of its truth. See Oseni vs. State (2012) 5 NWLR (Pt 1293) 351; Mohammed S. Yahaya vs. The State (1986) 12 SC. 282 at 290. In the case of Oseni vs. State (Supra), Adekeye, JSC. Observed at page 387 that:

There is no evidence stronger than a person's own admission or confession. Such a confession is admissible. A confession made in judicial proceedings is of great force or value than all other proofs. A Confession is more often denied or retracted. The denial or retraction is a matter to be taken into consideration to decide what weight could be attached to it.” (P.....Paras.....).

15. *Admission by a co-accused may corroborate the confessional statement of an accused person*
Apart from the confession, the statements of the appellant were sufficiently corroborated by his co-accused. In law, an admission of an offence by co-accused persons may amount to sufficient corroboration of statement made by an accused person even though retracted. Iko vs. State (2001) 14 NWLR (Pt. 732)221. (P.....Paras.....).

16. *There is a presumption that facts found in the concurrent judgment are correct*
This instant appeal was brought, notwithstanding the hackneyed stance and dicta of this court on concurrent findings of fact by the trial and the intermediate courts that there is a presumption that the facts found as established in the concurrent judgments are correct, and that the apex court will not lightly interfere with the concurrent findings of fact. The established judicial policy for decades is that the apex court, unless the appellant shows exceptional circumstances, will not hear arguments seeking to disturb concurrent judgments of the two courts below on pure questions of fact. The derivative principle from this policy is that concurrent findings of facts by the two courts below prima facie entitle the respondent to a dismissal of the appeal. The parties

are in consensus in this appeal that the only issue calling for the determination of the appeal is whether the two courts below were right in their concurrent judgments on facts that the prosecution had proved the guilt of the appellant beyond reasonable doubt. The appellant still has the burden of showing in what circumstances the two courts were wrong on the facts they found against him in order to justify this court disturbing those concurrent judgments on the facts. See Per Eko, JSC in Tobi vs. State (2019) LPELR – 46537 (SC). (P.....Paras.....).

Counsel appearing

Zakari Sogfa (Esq.) With Joel Ali (Esq.) for the Appellant.

H.E. Yusufu Solicitor – General of Kogi State with F.M. Sidi, Legal Officer for the Respondent.

BAYANG AKAHHS, (JSC) (DELIVERING THE LEAD JUDGMENT):

**YOHANNA DANJUMA
Vs.
THE STATE**

SC.655/2016

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

FRIDAY, 15TH MARCH, 2019

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUMAI BAYANG AKAAHS
CHIMA CENTUS NWEZE
AMIRU SANUSI
SIDIDAUDABAGE**

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

CRIMINAL LAW AND PROCEDURE: - Conspiracy – Proof thereof – Whether seldomly proved by direct evidence.

*CRIMINAL LAW AND PROCEDURE: - Conviction for a lesser offence – Relevant principles thereto – Whether particulars of offence charged and particulars of lesser offence must be similar – The principles in **Agumadu Vs. Queen (1963) LPELR – 15440 (SC)***

CRIMINAL LAW AND PROCEDURE: - Criminal Cases – Proof thereof – Onus on accused – Whether has the burden of proving a particular fact.

CRIMINAL LAW AND PROCEDURE: Criminal Cases – Proof thereof – Section 135(1) Evidence Act 2011 – Whether criminal offences must be strictly proved by cogent and convincing evidence.

CRIMINAL LAW AND PROCEDURE: - Criminal offences – Modes of proof thereof – Whether circumstantial evidence is one of the ways of proving criminal offences.

CRIMINAL LAW AND PROCEDURE: - Proof – Onus on prosecution- Where prosecution has discharged onus of proof – Duty on court thereto.

CRIMINAL LAW AND PROCEDURE:- Confessional Statement – Nature and Purport – Section 28 of Evidence Act considered – Whether a confessional statement alone can sustain a conviction.

CRIMINAL LAW AND PROCEDURE:- Guilt of accused – Modes of proof thereof

CRIMINAL LAW AND PROCEDURE: - Criminal Cases – Proof thereof – Standard thereto – Whether Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.

*EVIDENCE:- Circumstantial evidence – Meaning – The principle in **Adebayo Vs. The State (2007) All FWLR (Pt. 365) 498.***

*EVIDENCE:- Confessional Statement – Where it is direct, positive and unequivocal – Whether it is the best evidence – the principle in **Peter Iliya Azabada Vs. The State (2014) All FWLR (Pt. 751) 1620.***

PRACTICE AND PROCEDURE: - Appeal – Concurrent findings – Where appellant failed to prove that concurrent findings were perverse – Whether Supreme Court will not interfere therein.

PRACTICE AND PROCEDURE:- Appeal – Concurrent findings – Onus on appellant thereto – Where appellant failed to fault concurrent findings – Whether Supreme Court will not interfere therein.

STATUTE: Criminal Procedure Code – Section 218 thereof – Conviction for a lesser offence – Applicable principle thereof.

STATUTE: - Evidence Act – Section 135(1) thereof – Standard of Proof in criminal cases.

Issue for Determination

"Whether given the circumstances of this case, the Court below was right in affirming the judgement of the trial court which convicted and sentenced the appellant for the offences of criminal conspiracy and culpable homicide not punishable with death punishable under Sections 97 and 224 of the Penal Code Law."

Facts of the Matter

The accused appellant and another were arraigned before the High Court of Kaduna State for the offences of culpable homicide punishable under Section 221 of the Penal Code Laws of Kaduna State.

In proof of its case, the prosecution called five witnesses and tendered documents including the confessional statement of the appellant. In defence, the appellant testified in person and called no other witness. At the end of trial, the accused appellant was convicted for conspiracy and culpable homicide not punishable with death. He unsuccessfully appealed to the Court of Appeal hence this further appeal to the Supreme Court.

HELD: *(Unanimously dismissing the appeal)*

1. *Offence must be strictly proved by cogent and convincing evidence*
The offence for which the appellant is charged is a very serious one, and by virtue of Section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota of doubts or scepticism in the minds of the parties and members of the public, and I dare say this court. (P.....para.....)

2. *The nature and purport of Section 135(1) of Evidence Act 2011*
 The section provides:

Standard of proof where commission of crime in issue; and burden where guilt of crime etc asserted.”

“135. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of Section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.”

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

3. *Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.*
It is now well settled that in our criminal jurisprudence, in order for the prosecution to succeed whenever the commission of a crime is in issue against an accused person, he is under a duty to establish its case beyond reasonable doubt. It must however be noted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. I need to emphasize that in criminal proceedings, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and this would be achieved by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See YONGO Vs. COMMISSIONER OF POLICE (1992) LPELR - 3528 (SC), (1992) 4 SCNJ 113, OGUNDIYAN Vs. THE STATE (1991) LPELR - 2333 (SC), (1991) 3 NWLR (Pt.181) 519, AKIGBE Vs. IOG (1959) 4 FSC 203, ONUBOGU

Vs. THE STATE (1974) 9 SC 1 at 20, BABUGA Vs. THE STATE (1996) LPELR - 701 (SC), (1996) 7 NWLR (Pt.460) 279. (P.....para.....)

4. *Accused may have the burden of proving a particular fact*
To all intent and purposes, the burden of proving the commission of a crime by the prosecution has constitutional limitation to the extent that where the burden shifts or a written law assumes or imposes the duty of proof of a particular fact on the accused person, the burden is not displaced by presumption of innocence. Section 36(5) provides that:
- "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts." (P.....para.....)**
5. *When prosecution discharges onus of proof*
The adversarial system of adjudication in our criminal justice set up is well established that the onus of proof is firmly rested on the prosecution following the constitutional presumption of innocence of the accused person until proven guilty. Thus, once the onus is discharged, there is little option for the court as in the instant case. The totality of the evidence presented in this case leaves this court with little or no room to arrive at a different conclusion with the trial court and court below. (P.....para.....)
6. *Circumstantial evidence is one of the ways of proving commission of an offence*
The appellant made heavy weather of the failure of the prosecution to prove the offence of conspiracy. This is a cheap attempt to becloud the issue in this appeal. This is because the prosecution had been able to deploy an array of proofs. The respondent's case was predominantly based on circumstantial *evidence*, which is one of the ways to *prove* commission of an offence, See ADEBAYO Vs. THE STATE (2007) All FWLR (Pt.365), 498-519. (P.....para.....)
7. *How the guilt of accused may be proved*
The penal provisions of our land give the prosecution the choice or options for proving its case beyond reasonable doubt. A prosecutor may deploy all three options or a combination of options. The guilt of an accused may be proved by:
- (i) a confessional statement of the accused;
 - (ii) evidence of an eye witness; or
 - (iii) Circumstantial evidence."

See **IGRI Vs. THE STATE (2012) 16 NWLR (Pt.1327) 522; OGUNO Vs. THE STATE (2013) 15 NWLR (Pt.1376) at 1; IBRAHIM Vs. THE STATE (2014) 3 NWLR (Pt.1394) 305; OGEDENGBE Vs. THE STATE (2014) 12 NWLR (Pt.1421) 338 and UMAR Vs. THE STATE (2014) 13 NWLR (Pt.1425) at 497. (P.....para.....)**

8. *Nature and purport of a confessional statement*

The evidence adduced by the prosecution in proving its case at trial was in several folds. There is the side of confessional evidence of the appellant which is neither denied nor challenged as contained in Exhibit 4 and 4A. This alone could ground conviction. By virtue of the provisions of Sections 28 of the Evidence Act, confessional statement is tenable and admissible. The section describes a confessional statement thus:

"A confession is an admission made at any time by a person, charged with a crime stating or suggesting the inference that he committed that crime."

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

9. *Confessional Statement where direct positive and unequivocal is the best evidence*

See also **PETER ILIYAAZABADA Vs. THE STATE (2014) All FWLR (Pt.751) 1620, Para B where this court, per the learned Onnoghen, JSC (as he then was) declared that:**

"The confessional statement of an accused, where it is direct, positive and unequivocal as to the commission of the crime charged, is the best evidence and can be relied upon solely for the conviction of the accused person. This court in **Akpan Vs. State (1992) 6 NWLR (Pt. 248) 439 at 468 paras. D-E thus stated that: It**

is an old established principle of our law as applied in our courts that an accused person can be convicted on his confessional statement alone, "where the confession is consistent with other ascertained facts which have been proved... Confession in criminal procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than evidence of an eye witness because the evidence comes from the horse's mouth who is the accused person. There is no better evidence and there is no further proof." (P.....para.....)

10. *Trial court was right in imposing a lesser sentence on appellant*
The respondent had contended, and rightly so, that the appellant's conviction and sentence were justified by the trial court which found that on page 104 of the record that, the appellant simply acted rashly and thus convicted him of a lesser offence by virtue of Section 218(2) of the Criminal Procedure Code. I can't agree less with the respondent that the trial court was perfectly in order when it found the appellant guilty of a lesser offence of culpable homicide not punishable with death pursuant to Section 218(2) of the Criminal Procedure Code having found that there was no intention to kill the deceased, but that the appellant acted rashly and his action led to the death of the deceased. (P.....para.....)
11. *Conspiracy is seldomly proved by direct evidence*
By way of restating the position of this court on the issue of conspiracy as held in OKANLAWON Vs. THE STATE (2015) 17 NWLR (Pt.1489) at 445, Para C-D and KAYODE BABARINDE & ORS Vs. THE STATE (2014) 3 NWLR (Pt.1395) 568 at Page 594 per Kekere-Ekun, JSC, because of the nature of the offence of conspiracy, it is rarely or seldomly proved by direct evidence but by circumstantial evidence and inference from certain acts. (P.....para.....)
12. *Meaning of "Circumstantial Evidence"*
In ADEBAYO Vs. THE STATE (2007) AI FWLR (Pt.365), 498-519, circumstantial evidence was described thus:

"Circumstantial evidence is a series of circumstances leading to the in reference or conclusion of guilt when direct evidence is not available. Evidence which although not directly establishing the existence of facts requited to be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is sometimes regarded as of higher probative value than direct evidence, which may or can (be perjured or mistaken."

In view of the above and given the circumstances of this case, the trial court was perfectly in order to infer conspiracy from the circumstances of this case, particularly the invasion of the deceased house by appellant and his co-accused and the act of beating which was the unintended consequences of the beating that eventually resulted in the death of the deceased. (P.....para.....)

13. *Appellant failed to disprove concurrent findings*

These are findings of facts for which the trial court and court below have found concurrently on both counts for which the appellant was charged.

In view of the foregoing, I wish to restate that it is my considered view that the judgment of the trial court cannot be faulted at all and the lower court was right in affirming and endorsing it. The appellant has failed to convince us that this is a situation in which this court should interfere in the concurrent findings of fact. The law is settled that if there are concurrent findings of fact made by the High Court and Court of Appeal, the Supreme Court will not readily set them aside or substitute its own views unless there is no evidence to support the findings. See In Re: MOGAJI (1986) 1 NWLR (Pt.19) 759; SALAMI Vs. THE STATE (1988) 3 NWLR (Pt.85) 670; MBENU Vs. THE STATE (1988) 3 NWLR (Pt.84) 615."Per Akaahs, JSC. (Pt.18, Paras. D-F). See also MINI LODGE LTD Vs. NGEI (2009) 18 NWLR (Pt.1173) 254 Per Musdapher, JSC (P.33, Paras. B-D).

The respondent has proved the ingredients of the offence for which the appellant was charged as required by law and the court below was right in affirming the conviction and sentence of the appellant for the offence of conspiracy to commit an illegal act under Section 97 and culpable homicide not punishable with death under Section 221 of the Penal Code Law of Kaduna State. (P.....para.....)

14. *Appellant did not prove perversity of concurrent findings*

It must be emphasized that the appeal is against the concurrent findings of facts by the two courts below which, except where shown by the appellant to be perverse, has to prevail. In the case at hand, therefore, the appellant having failed to show that the concurrent findings of the two courts below are perverse does not deserve to succeed in his appeal. See ODEH Vs. FRN (2008) LPELR - 2205 (SC) and AMAREMOR Vs. STATE (2014) LPELR - 22591 (SC).

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

15. *Principles applicable in conviction for a lesser offence*

In decisions of this court too numerous to readily count, the power to convict for a lesser offence that is proved in place of a greater offence charged enures to the courts by virtue of Section 218(2) of the Criminal Procedure Code. The principle has been stressed that before an accused can be convicted for a lesser

offence by virtue of Section 218(2) of the criminal procedure code, the ingredients of the lesser offence must not only be embedded in the aggravated offence charged, the lesser offence must also be shown to have been committed in the same circumstance as the aggravated offence. See **AGUGUA Vs. STATE (2017) LPELR-42021 (SC)** and **THE NIGERIAN AIR FORCE Vs. KAMALDEEN (2007) 2 SC 113**.

In the instant case, the appellant is charged under Section 221 of the Penal Code which attracts the death penalty. The two courts below, in the absence of proof of appellant's intention to cause the death of the deceased, convicted him for the lesser offence under Section 222(7) of the same code. Undoubtedly, the lesser offence under Section 222(7) of Penal Code, the appellant is convicted for instead of the aggravated one he is charged with under Section 221 of the very code is a combination of some of the particulars that make up the offence charged. Put differently, the particulars of the lesser offence he is convicted for are some of the particulars of the offence charged.

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

16. *Particulars of offence charged and particulars of lesser offence must be similar*
In AGUMADU Vs. QUEEN (1963) LPELR- 15440 (SC), this court, while considering Section 179 of the Criminal Procedure Act that is in *pari materia* with Section 218 relied upon by the two court in convicting the appellant for the lesser offence, inter-alia held:-

"When one is considering action under Section 179 one should write out the particulars of which the offence charged consists and see whether it is possible to delete some words out of those particulars and have a residue of particulars making up the lesser offence of which it is proposed to convict."

If we delete intention on the part of the appellant to cause the death of the deceased from the particulars which constitute the offence under Section 221 of the Penal Code, we shall be left with those particulars of the lesser offence under Section 222(7) the appellant's is, though not charged, convicted for. The lower court's correct application of Section 218(2) of the Penal court is, therefore, unassailable. See **NWACHUKWU Vs. STATE (1986) LPELR - 2085 (SC)** and **IBRAHIM Vs. STATE (1991) 4 NWLR (Pt. 186) 399**. *(P.....para.....)*

17. *Decision of lower court is not perverse*
Beyond appellant's voluntary confessional statements admitting the commission of the offence, there is the direct evidence of PW1, an eye witness, stating clearly appellant's act that led to deceased's death. The lower court's affirmation of appellant's conviction and sentence, learned respondent's

counsel is right, cannot be said to be perverse. No being so, the decision cannot be interfered with. See *ATOLAGBE Vs. SHORUN (1985) LPELR - 592(SC)* and *FRN Vs. FAITH IWEKA (2011) LPELR- 9350 (SC)*. (*P.....para.....*)

18. *Concurrent findings were not shown to be perverse*

Where an appeal is against two concurrent judgements, the appellant must show that the findings were perverse and there was no evidence to support such findings before an appellate court can interfere with the said findings. See: *Mbenu Vs. State (1988) 3 NWLR (Pt. 84) 615*. The appellant has failed to discharge this burden.

The appellant made a confessional statement which was tendered as Exhibit 4 and 4A. Apart from his confessional statement, PW1 gave an eye witness account of how the incident occurred that led to the death of Makama Adamu, the deceased. He recalled that he was in his house on 1/2/2008 and about 6 a.m, he heard shouts coming from the direction of Makama Adamu's house. He said the distance between his house and that of Makama Adamu is about 5 metres. He first went and informed his father about the cry and the latter instructed him to rush to the scene. On getting there he met the three accused who had carried Makama Adamu from inside the house and were beating him. He then separated them. His father arrived later. His father is the village head who directed him (PW1) to inform the District Head of Ancha District. The district head in turn directed him to contact the junior brother of the deceased and to also report the case at the Police Station which he did. He, along with Ayuba Mairabo met the deceased lying down and made arrangements to take him to the hospital. The deceased died on the same day the fight took place. (*P.....para.....*)

19. *Conspiracy is proved by circumstantial evidence*

His lordship observed in the leading judgement that, because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain acts. This is true. As this court held in *Sopakiriba Igbikas Vs. State [Appeal No: SC. 316/2014 delivered on February 17th 2017]*:

....the category of evidence known as circumstantial evidence, which is, more often than not, the best evidence, *Obosi Vs. State (1965) NMLR 119; Ukorah Vs. State [1977] 4 SC 167; Lori Vs. State (1980) NSCC 269; Onah Vs. State [1985] 3 NWLR (Pt.12)236; Ebenehi Vs. State [2009] All FWLR (pt 486) 1825, 1832-1833; Ijioffor Vs. State [2001] 9 NWLR (pt. 718) 371, 385*, is the evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics, *Ijioffor Vs. State (supra) 385*.

The reason is not far-fetched. In their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person caused the death of the deceased person, *Idiok Vs. State* [2008] All FWLR (pt. 421) 797, 818.

Put, simply, it means that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence, *Omotola and Ors Vs. State* [2009] 7 NWLR (pt. 1139) 148, 178; (2009) LPELR -2663 (SC) 42-43. Where such circumstances are established to the satisfaction of the court, they may be properly acted upon, *Wills on Circumstantial Evidence* [Seventh edition] 324; A. Okekeifere, *Circumstantial Evidence in Nigerian Law* (Port Harcourt: Law-house Books, 2000) 1; *Omotola Vs. State* (supra) 178. (P.....para.....)

Representations

B. Nwosu for the appellant,

A. Yahaya for the respondent.

SIDIDAUDABAGE, JSC (Delivered The Lead Judgement):