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KINGSLEY OMOREGIE
AND
THE STATE

SC.334/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 2ND JUNE, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
PAULADAMU GALINJE	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

COURT: Circumstantial evidence – Duty thereof – Where a court relies on circumstantial evidence to convict – Whether to be careful therewith – Rationale.

COURT: Evidence – Circumstantial – Where not conclusive – Attitude of court thereto.

CRIMINAL LAW AND PROCEDURE: Commission of crime – How established in criminal proceedings.

CRIMINAL LAW AND PROCEDURE: Onus on a person last seen with deceased – Application thereof – Principle in ***Stephen Haruna Vs. The A.G Federation (2012) LPELP 782 (SC)***

EVIDENCE: Circumstantial evidence – Nature – Significance – When can it be acted upon – Relevant considerations thereof.

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

WORDS AND PHRASES: Circumstantial evidence – Meaning.

Issue for Determination

Whether the court below (Court of Appeal) was right in convicting the appellant of attempted murder and sentencing him to life imprisonment considering the evidence.

Facts of the Matter

This appeal is against the judgment of Court of Appeal, Ibadan Division delivered on the 24th of April, 2008 which partially affirmed the judgment of the High Court of Ogun State delivered on 7th March, 2005.

The appellant herein and his co-accused Shina Oketaologun were arraigned before the trial court sitting at Ijebu-Ode (coram Ibikunle Adesalu J) on a two count charge of conspiracy to commit murder and murder contrary to Section 324 and Section 316(2) respectively, punishable under Section 319(1) of the Criminal Code Law Cap 29 Laws of Ogun State of Nigeria. Both of them were accused killing one Chief Engineer Samuel Fatuga.

The case of the prosecution was that the appellant was an employee of the deceased as the latter's bus driver. He, in company of the co-accused Shina Oketaologun, together formed common agreement, left Ibadan for the deceased residence in Ijebu-Ode, Ogun State. On arriving at the compound of the deceased, PW1 said he saw them and was surprised to see the appellant who had earlier been accused of stealing the deceased person's bus. Being apprehensive of what might have brought appellant to the deceased person's compound, the PW1 stated that he went and informed the members of the Vigilante Group town on the need to arrest the appellant and the co-accused. On returning to the compound along with the members of vigilante group, the PW1 testified that they found the deceased in pool of his own blood. He stated that on sighting him and the vigilante group members, the appellant and his co-accused ran into the rooms and then ran out of the compound through the back

door in a bid to escape but they were apprehended by the members of the vigilante group who surrounded the compound of the deceased. Recovered at the scene, were a yellow marine rope used in tying the deceased to the railings of the stair case and a knife used in stabbing the deceased on his chest and abdomen.

During the trial, the prosecution in an effort to prove the charges against the appellant and the co-accused, called five witnesses.

The appellant on the other hand testified on his own behalf denying the charges framed against him. He testified that he merely went to the deceased's house on appointment given to him by the deceased to go there and collect his outstanding wages. At the conclusion of the trial, the trial court found the appellant and the co-accused guilty and convicted them of both counts of conspiracy to commit murder and of murder and sentenced each of them to five years imprisonment for the first count of conspiracy to commit murder and to death by hanging for the second count of murder.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal, Ibadan Division. On hearing his appeal, the Court of Appeal substituted the appellant's conviction of murder with that of attempted murder and committed the death sentence to that of life imprisonment. However, still dissatisfied with the lower court's decision, the appellant further appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *Accused (appellant)t and co-accused were fixed at the scene of crime*

   Well, on the first issue raised in the Reply brief with regard to the place or places the deceased was stabbed as raised in the Respondent's brief, I think Whether the appellant and the co-accused went there on appointment or on their own volition for whatever reason, is not material. What is material was that they were fixed at the scene of the crime on that fateful day before the deceased was murdered in cold blood. I will say no more on that.
   P 17 Paras E – G.)

2. *How to establish or prove of commission of a crime*

The law is well established, that in criminal trials, proof of commission of a crime by an accused person can be established in any of the following ways or methods, namely:

1. **Through the testimony of an eye witness or witnesses who witnessed the act of the commission of the offence, by the accused person: or**
2. **By confessional statement made voluntarily by the person accused of the commission of the offence, or**
3. **By circumstantial evidence.** *(Pp 17 – 18 paras G – A)*

3. *The nature and significance of circumstantial evidence*

However, in the case of proof by reliance on circumstantial evidence, that circumstantial evidence to be relied upon by the prosecution, must be credible, cogent and also must irresistibly point to the guilt of the accused and to no other person. In fact, it is stated in the parlance of criminal jurisprudence that circumstantial evidence is often regarded as a reliable and acceptable mode of proof of a criminal case and the court can accept and act on it, provided it is cogent and admissible. ***See*** **Shuaibu Abdu Vs. The State (2016)LPELR 4461 (SC), Usman Vs. State (2013)12 NWLR (Pt. 1367)76; Maigari Vs. State (2010)16 NWLR (pt.1220)439; Nwaeze Vs. State (1996)2 NWLR (pt.428); Haruna Vs. AG Federation (2012) 9 NWLR (pt.1306)419.** *(P 18 paras B – D.)*

4. *Duty on court when relying on circumstantial evidence*

There is no gainsaying that in the absence of eye witness account, a trial court is at liberty to draw some inferences from facts presented before it in proof of the guilt of an accused person where there is no direct evidence coming from any witness or witnesses. Be that as it may, before a court can safely rely on circumstantial evidence to convict an accused person, such court must be extra-ordinarily careful and also be cautious in order not to convict an innocent

person or person who is totally not responsible for the commission of the crime and for that reason, the trial court must very narrowly examine the circumstaffence that he knew nothing about. The circumstantial evidence mntial evidence before relying on same to convict the accused person, simply because such evidence might be susceptible to fabrication just in order to rope in an innocent person into the commission of the oust therefore be unequivocal and must have probative value. *(Pp 18 – 19 paras H – ……)*

5. *Attitude of court where circumstantial evidence is not conclusive*
Again, the law is trite, that where the circumstantial evidence is not conclusive or is capable of having two interpretations of showing the innocence of the accused and at the same time of his guilt. In such situation, the court must cast benefit of doubt in his favour to exonerate and acquit him. ***See*** **State Vs. K Rs (1957) FSC 83; Lori Vs. State (1980)11 SC 81; Ijioffor Vs. State (2001)3 NWLR (pt.699)55.** *(P 19 paras C–D)*

Per Sanusi (JSC)

"In this instant case, PW1 testified that the appellant and the co-accused met him at the compound of the deceased on 27/8/2002 and on seeing him, he became surprised to see the appellant visiting the said compound because he had earlier on been accused of stealing the deceased's vehicle. For that reason, he became apprehensive and suspicious hence he left the compound to invite members of vigilante group. On returning with the vigilante members to the compound, they met the door of the compound locked, hence he jumped over the gate to get access into the house. When he climbed the balcony and entered inside the house, he met the deceased lying in pool of blood, tied to the railings with a rope. When the appellant cited him, he escaped through the back door but was arrested by vigilante group members who had surrounded the house. The deceased was then rushed to the hospital where he later died.

On the other hand, the appellant stated that he went to the deceased's compound because he was phoned by the latter to go there to collect his salary arrears. He testified that even when he and his co-accused entered, they met the deceased laying in pool of blood. He said on seeing them, they became afraid and tried to run away.

The learned trial judge considered these vital pieces of evidence of both sides and evaluated them.

Now, considering the surrounding circumstances of the case, especially the two scenario presented by both the appellant and the PW1, I am of the firm view, that the above finding of the trial court cannot be faulted. The lower court was also correct in endorsing such finding. The appellant, on citing the PW1, tried to run away through the back door. Although mere attempt to escape by accused is not necessarily a conclusive evidence that he is the culprit, the court can however infer from such conduct that he must be aware of something before attempting to run away. If he was innocent he would have remained there to offer some explanation. Again, evidence abound that the appellant locked the gate of the compound so as to prevent anybody coming into the house. To my mind, if they had no guilty intention there would have been no need to lock the gate of the compound at that material time. It is therefore unequivocal, that it was the appellant that attacked the deceased, tied him up and stabbed him with knives, inflicting some injuries on him, which certainly led to his death as rightly found by the trial court and affirmed by the lower court." *(Pp 19 – 20 paras E – G.)*

6. Onus on persons who were last seen with deceased.

It is clear, that the appellant and his co-accused person were the last persons to be with the deceased from the evidence adduced by the prosecution. *In the case of* Stephen Haruna Vs. The Attorney General of the Federation (2012)LPELP 782 SC, this court had this to say:

"The law requires as person last seen with the deceased,

whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased. Onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased."

***See* Igabele Vs. The State (2006)6 NWLR (pt. 975)100 at 127-128; Okoko & Anor Vs. The State (1964)1 All NLR 416; Madu Vs. State (2012)LPELR 7867 (SC); Ismail Vs. The State (2011)LPELR 9352 (SC).** *(Pp 20 – 21 Paras G – B)*

7. From medical evidence the prosecution did not prove murder but rather manslaughter.

Finally, it is evident that the deceased person despite the injuries inflicted on him, did not die instantly. Rather, he died in the hospital. The medical report issued by PW5 one Dr. Izegbu Matthew Chukwuma who conducted post-mortem examination on the corpse of the deceased clearly showed vide Exhibit D, that the deceased died due to "acute cardiopulmonary failure due to diabetes/hypertension with stab and injuries status post up" PW5 further testified that the injuries were not self inflicted. Again he opined that it could not be said with absolute certainty, that it was the stab wounds inflicted on the deceased that caused his death. Thus, from the medical evidence adduced in the case at the trial court through Exhibit D and the testimony of PW5, it can safely be deduced that the appellant and the co-accused by their action, had the knowledge or intent to cause grievous bodily harm only. Certainly, the deceased person's ailments of diabetes and hypertension must have contributed to his unfortunate death. The prosecution, in the light of the aforesaid, cannot be said to have proved the offence of murder or intentionally killing the deceased. At best, the prosecution merely proved the offence of manslaughter as rightly found by the two lower courts. *(P 21 Paras C – G)*

8. Definition of circumstantial evidence

By definition:

> **"a circumstantial evidence is nothing more than evidence of surrounding circumstances which by their nature is capable of establishing a proposition, such as the criminality of an accused with the highest exactitude. It is a combination of evidence of circumstances against an accused when taken together, creates strong conclusions of his guilt with high degree of certainty. It is by application very sparingly used for possible fear of fabrication and casting suspicion on an innocent person."**

***See* Oketaolegun Vs. State 2015 All FWLR (Pt. 797) page 677.**
(P 22 Paras H – I)

9. When circumstantial evidence is to ground conviction

For circumstantial evidence to ground a conviction, it must lead to one irresistible conclusion, that is, the guilt of the accused. Any slight doubt must leave room for an acquittal.

I wish to say at this point that I have had to air my view in the sister case of Oketaolegun Vs. State under reference supra and delivered on the 3rd July, 2015. The circumstantial evidence in this case, like the sister case, is overwhelming and leaves no doubt that the appellant and his companion had the 1st opportunity to commit the crime. The prosecution did prove the appellant's guilt beyond all reasonable doubt.

The appellant herein, like the colleague in the sister case, has every cause and reason to celebrate his escaping death. The favour done him is unprecedented. For whatever reason the lower court committed him to life imprisonment instead of death, he should live to appreciate the favour of God upon him.*(P 23 Paras I – C)*
Per Galinje (JSC)

"The Law is settled that in criminal cases, the burden of proof that the accused committed the offence for which he is charged lies squarely on the prosecution, who must prove its case beyond reasonable doubt and a general duty to rebut the presumption of innocence constitutionally guaranteed to the accused person. This burden never shifts. *See* Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria, Section 35(2) of the Evidence Act, Alabi Vs. The State (1993) 7 NWLR (Pt.307) 511 at 531 paras A-C, Solola Vs. The State (2005)5 SC (Pt.1)135.

Although the confessional statement of the appellant was rejected at the trial court, the evidence of Pw1 and the appellant were so relevant to the determination of the appeal. Pw1 in his evidence said, when he climbed onto the balcony, because the collapsible door had been locked from inside, he saw the appellant and the co-accused escape through the back door. This piece of evidence was confirmed by the appellant in his evidence in chief, when he stated at page 75 paragraph 1 of the record as follows:

> ***"We entered the compound of the deceased and saw PW1 sitting under a tree. I greeted PW1 and entered the house. As two of us were going on the steps we saw the deceased sitting on the steps with blood over him and we became afraid and I told 2nd accused that we should go through the back door so that people would not suspect us. The deceased when we saw him sitting on the steps was in a pool of blood but was conscious. When we got outside the house both of us were deliberating how to get the money for the repairs of the car at Ibadan."***

Apart from the fact that the appellant admitted going through the back door with his accomplice, as alluded to by the PW1, the appellant could have inquired from the deceased what happened to him since he was conscious, and would have raised alarm in order to

attract the neighbours attention, with a view to conveying the deceased to the hospital. Instead of doing that he and his accomplice chose to escape from the scene." *(Pp 23 paras G – F)*

10. Attitude of Supreme Court to concurring findings.

From the circumstances of this case, the High Court and the Court of Appeal came to conclusion that the appellant's conduct was suspicious enough as to suggest that he and his accomplice carried out the attack on the deceased. This is clearly a concurrent finding of the two lower courts which this Court, has in a number of cases, held that it cannot interfere unless there is exceptional circumstance. ***See*** **Ibodo Vs. Enarofia (1980)5-7 SC 42; Enang Vs. Adu (1981)11-12 SC 25; Sosanya Vs. Onadeko (2005) 8 NWLR (Pt.926)185; Dogo Vs. State (2001)3 NWLR (Pt.699)192, Ubani Vs. State (2003)18 NWLR (Pt.851)224 Nkebisi Vs. State (2010)5 NWLR (Pt.1188)471; Olaiya Vs. State (2010)3 NWLR (Pt.1181)423.**

I find no reason to interfere with the findings of the two lower courts on this score. However, the doctors report Exhibit 'D' did not completely attribute the cause of death of the deceased to the injuries inflicted on the deceased by the appellant. It follows therefore that the appellant did not cause the death. I therefore agree with the lower court that the prosecution only established the case of attempted murder against the appellant. *(P 25 paras C – G)*

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Nwaeze Vs. State (1996)2 NWLR (pt.428);
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Okoko & Anor Vs. The State (1964)1 All NLR 423;
C *Olaiya Vs. State (2010)3 NWLR (Pt.1181)416;*
Shuaibu Abdu Vs. The State (2016)LPELR 4461 (SC);
Solola Vs. The State (2005)5 SC (Pt.1)135;
Sosanya Vs. Onadeko (2005)8 NWLR (Pt.926)185;
D *State Vs. K Rs (1957) s FSC 83;*
Lori Vs. State (1980)11 SC 81;
Stephen Haruna Vs. The Attorney General of the Federation (2012) LPELP 782 SC;
E *Ubani Vs. State (2003)18 NWLR (Pt.851)224;*
Ugwumba Vs. STATE (1993)5 NWLR (pt.295)660; and
Usman Vs. State (2013)3 NWLR (pt. 1367) p. 76.

F **Nigerian Statutes cited in this Judgment**
1999 Constitution of the Federal Republic of Nigeria Section 36(5); Evidence Act Section 35(2); and

G **Representation**
R.A. Aladesanmi with him **G.A. Okewole** for the appellant.
Bola Olotu with him **Chinenye Aneke**, **N.I. Lanyaps f**or the respondent.

H **AMIRU SANUSI JSC: (Delivering the Lead Judgment):** This appeal is against the judgment of Court of Appeal, Ibadan division (the lower court) delivered on the 24th of April, 2008 which partially affirmed the judgment of the High Court of Ogun State (the trial court) delivered on 7th March, 2005.
I The appellant herein and his co-accused Shina Oketaologun were

A arraigned before the trial court sitting at Ijebu-Ode (coram Ibikunle Adesalu J) on a two count charge of conspiracy to commit murder and murder contrary to Section 324 and Section 316(2) respectively, punishable under Section 319(1) of the Criminal Code Law Cap 29 Laws of Ogun State
B of Nigeria. Both of them were accused killing one Chief Engineer Samuel Fatuga.

FACTS OF THE CASE

C The case of the prosecution was that the appellant was an employee of the deceased as the latter's bus driver. He, in company of the co-accused Shina Oketaologun, together formed common agreement, left Ibadan for the deceased residence in Ijebu-Ode, Ogun State. On arriving at the compound
D of the deceased, PW1 said he saw them and was surprised to see the appellant who had earlier been accused of stealing the deceased person's bus. Being apprehensive of what might have brought appellant to the deceased person's compound, the PW1 stated that he went and informed the
E members of the Vigilante Group town on the need to arrest the appellant and the co-accused. On returning to the compound along with the members of vigilante group, the PW1 testified that they found the deceased in pool of his own blood. He stated that on sighting him and the vigilante group
F members, the appellant and his co-accused ran into the rooms and then ran out of the compound through the back door in a bid to escape but they were apprehended by the members of the vigilante group who surrounded the compound of the deceased. Recovered at the scene, were a yellow marine
G rope used in tying the deceased to the railings of the stair case and a knife used in stabbing the deceased on his chest and abdomen.

During the trial, the prosecution in an effort to prove the charges against the appellant and the co-accused, called five witnesses.

H The appellant on the other hand testified on his own behalf denying the charges framed against him. He testified that he merely went to the deceased's house on appointment given to him by the deceased to go there and collect his outstanding wages. At the conclusion of the trial, the trial
I court found the appellant and the co-accused guilty and convicted them of both counts of conspiracy to commit murder and of murder and sentenced

each of them to five years imprisonment for the first count of conspiracy to commit murder and to death by hanging for the second count of murder.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal, Ibadan division ("the court below" or "lower court" for short). On hearing his appeal, the court below substituted the appellant's conviction of murder with that of attempted murder and committed the death sentence to that of life imprisonment. However, still dissatisfied with the lower court's decision, the appellant further appealed to this court.

In keeping with the rules and practice application in this court, parties to this appeal filed and exchanged briefs of argument which were later with leave of this court, subsequently amended. The appellant's amended brief of argument settled by one Rotimi Aladesanmi Esq. was filed on 20/3/2014. On its part, the respondent filed its amended respondent's brief dated 20/4/2014, on 23rd April, 2014 through one Bola Olotu Esq. who was also the learned counsel who settled the said Amended Respondent's Brief of Argument.

In the Appellant's Amended Brief of Argument, two issues for the determination of the appeal were formulated which read thus:

> ***1. Whether the evidence by the prosecution was clear, cogent and compelling enough to found the conviction and sentence of the appellant as pronounced by the lower court.***
>
> ***2. Whether the necessary ingredients of an intent to kill was established, to justify the appellant's conviction for attempted murder.***

The appellant's learned counsel has married issue No. I to grounds of appeal Nos 2, 3, 4, 5 and 6, while issue No.2 was tied by him to grounds 1 and 7.

On its part, the respondent in its amended respondent's brief of argument proposed a lone issue for the determination of the appeal and the lone issue is set out below:

A

"Whether the court below (Court of Appeal) was right in convicting the appellant of attempted murder and sentencing him to life imprisonment considering the evidence.

B

Looking at the two sets of issues raised by the parties, I think the issue raised by the respondent is the same with the first issue raised in the C appellant's amended brief of argument. That issue has also in my view, subsumed the second issue formulated by the appellant. I will therefore treat this appeal on the guidance of the respondent's sole issue for determination.

D

SUBMISSIONS OF COUNSEL

The learned counsel for the appellant submitted rightly too, that the case for the prosecution was built on circumstantial evidence predicted on the E testimony of PW1. He argued that the case of the prosecution was unreliable and therefore the findings of the two courts below were perverse and have led to miscarriage of justice. He highlighted the fact that in order to secure a conviction on circumstantial evidence in criminal trial, the F evidence adduced must be compelling and must lead to irresistible conclusion that the accused and no other one else could have committed the crime but him and where a court is asked to draw certain inferences, such must be based on natural course of human conduct. The learned counsel G contended that the deceased was not alone in his compound, as PW1 and the son of the deceased gave their addresses of abode as the same with that of the deceased as No. I Falaoya Street, Ukoto via Ijebu-Ode. He therefore urged this court to consider the possibility of someone particularly the H PW1, of committing the crime before the arrival of the appellant and the co-accused at the compound. He argued that no money or any valuable was recovered from them and no blood stains were seen on their clothes and their finger prints were also not seen in the two knives allegedly found at the I scene of the crime. He stated that there was no how stains of blood that splashed on the walls without same touching the appellant and his co-

accused who were alleged to have inflicted the knives stabs on the deceased.

The learned counsel for the appellant, referred to alleged inconsistency in Exhibit A, the statement of PW1 to the police that the appellant was arrested by people who surrounded the deceased person's house but while testifying in court, he stated that the appellant was arrested by members of the vigilante group.

Still on inconsistency, the appellant's learned counsel cited an example where in Exhibit A the PW1 stated that the deceased was found lying in pool of blood whereas in his testimony at the trial court, he stated that he saw the deceased sitting down with his heads tied to the railing of the step and that he untied the rope and took him to the hospital. He argued that there were apparent inconsistencies in those pieces of evidence adduced by the prosecution and also there were no explanations given by the prosecution on the contradictions between the evidence given by PW1 in court and his earlier statement to the police and that those contradictions were material ones hence for that reason they should be resolved in favour of the appellant.

He urged that this court should disregard the testimony of PW1 for being unreliable and not worthy of any credit, adding that the lower court was in great error in using the circumstantial evidence to affirm the conviction of the appellant by the trial court. He stated that there was no evidence to suggest that the appellant did anything to the deceased to raise the inference that he murdered the deceased. He opined that mere running away from the *lexus criminis* is not conclusive or indicative that the person so running away, is the culprit. He cited the case of **Ugwumba Vs. State (1993)5 NWLR (pt.295)660 at 671**. He contended that the case as presented by the prosecution raised serious doubt, hence the lower court ought to have resolved such doubts in favour of the appellant.

In further submission, the learned appellant's counsel argued that the prosecution failed to establish through clear, cogent and compelling evidence the crime the appellant was charged with, tried, convicted and sentenced. He said that even if the appellant had actually stabbed the deceased, (which he denied) the attempted murder for which the lower

court convicted him was also not proved against him. He then contended that the conviction on attempted murder could not therefore stand, hence this appeal should be allowed and the appellant be discharged and acquitted.

Responding to the above submissions by learned counsel for the appellant, the respondent's learned counsel conceded rightly in my view, that there was no eye witness account led by it in proof of the offences the appellant was charged with. He however, argued that it had led circumstantial evidence in proof of its case at the trial court which the lower court rightly believed, accepted and relied on to convict the appellant of attempted murder and sentenced him to life imprisonment. He submitted that the circumstantial evidence led was also so cogent and compelling as could lead to the inference by the trial court from the facts proved before it that the appellant did commit the crimes he was charged with and to convict him. *See the case of* **Chima Uwaffor Vs. State (2001) FWLR (pt.99)1451 at 1478.**

The learned counsel for the respondent further submitted that both the trial and lower courts had ably thoroughly evaluated the evidence of the appellant in the circumstances of the case before reaching their logical conclusions. He said the facts and circumstances of the case as presented by the prosecution through the evidence it adduced or led, which was not rebutted, had duly established or proved the case against the appellant that he and his co-accused killed the deceased through the infliction of wounds with knife used in stabbing him to death. By the action and conduct of the appellant and the co-accused, they had really manifested their intention to kill the deceased. He referred to the case of **Jegede Vs. State (2001)FWLR (PT.66)722.**

Finally, the learned counsel for the respondent submitted that where the prosecution adduced evidence which suggests the conviction of lesser offence than that for which the accused was charged with, an appellate court can still convict the appellant of for such lesser offence. He cited and relied on the case of **Lukman Osetola Vs. State (2012)All FWLR (pt.560) 1237 at 1264**. He then urged this court to affirm the decision of the court below.

Suffice it to say, that the appellant had on 23/5/2014, filed an Appellant's Reply Brief of argument. In the said Reply Brief, the learned counsel for the appellant argued that the Respondent's counsel proffered evidence which was not borne out of the record. He referred to Paragraph 4.11 of the Respondent's brief of argument while relying on the testimony of PW5 to the effect that there was surgical incision from upper to lower abdomen. He argued that there was no evidence of the foregoing before the lower court as it only emanated from the counsel for the respondent who was trying to paint a picture of fact and analysis which were not borne out of the record. He argued further, that the respondent's counsel misconstrued the evidence of PW5 in the record as shown at Paragraph 4.15 of the Respondent's brief of argument. Learned appellant's counsel also stated that appellant's testimony that he was called by the deceased to come and collect arrears of salary, was never denied by the prosecution which was acknowledged by the lower court at page 180 lines 16 to 18 of the Record. He argued that all these go a long way to show the veracity of the appellant's case and to explain that the presence of the appellant at the deceased person's house on the fateful date was purely an appointment.

Well, on the first issue raised in the Reply brief with regard to the place or places the deceased was stabbed as raised in the Respondent's brief, I think whether the appellant and the co-accused went there on appointment or on their own volition for whatever reason, is not material. What is material was that they were fixed at the scene of the crime on that fateful day before the deceased was murdered in cold blood. I will say no more on that.

The law is well established, that in criminal trial, proof of commission of a crime by an accused person can be established in any of the following ways or methods, namely:

b. Through the testimony of an eye witnessor witnesses who witnessed the act of the commission of the offence, by the accused person: or

3. By confessional statement made voluntarily by the

person accused of the commission of the offence, or

4. By circumstantial evidence.

However, in the case of proof by reliance on circumstantial evidence, that circumstantial evidence to be relied upon by the prosecution, must be credible, cogent and also must irresistibly point to the guilt of the accused and to no other person. In fact, it is stated in the parlance of criminal jurisprudence that circumstantial evidence is often regarded as a reliable and acceptable mode of proof of a criminal case and the court can accept and act on it, provided it is cogent and admissible. *See* **Shuaibu Abdu Vs. The State (2016)LPELR 4461 (SC), Usman Vs. State (2013)3 NWLR (pt. 1342)607; Maigari Vs. State (2010)16 NWLR (pt.439)49; Nwabueze Vs. State (1996)2 NWLR (pt.428); Haruna Vs. AG Federation (2012)9 NWLR (pt.1306) 419.**

The bone of contention between the parties is whether the circumstantial evidence relied upon by the prosecution (now respondent) was sufficient to warrant the conviction of the appellant by the trial court which was later substituted or commuted by the lower court.

As I have highlighted above, the prosecution now respondent, relied on circumstantial evidence since there was no eye witness who witnessed the commission of the offence. Both parties are agreed on that fact. There was also no confessional statement made by the appellant that was admitted in evidence since the trial court refused to admit the statement the appellant made to the police at the earliest period of police investigation, for the reason that the rules laid down by the Police regulations and authorities were not duly followed during the process of recording such statement. For that reason, the trial court rejected the statement the appellant initially made to the police during investigation. This, therefore, goes to show that the prosecution merely relied on circumstantial evidence, particularly the evidence of PW1 who was its key or star witness. There is no gainsaying that in the absence of eye witness account, a trial court is at liberty to draw some inferences from facts presented before it in proof of the guilt of an accused person where there is no direct evidence coming from any witness or witnesses. Be that as it may, before a court can safely rely on

circumstantial evidence to convict an accused person, such court must be extra-ordinarily careful and also be cautious in order not to convict an innocent person or person who is totally not responsible for the commission of the crime and for that reason, the trial court must very narrowly examine the circumstantial evidence before relying on same to convict the accused person, simply because such evidence might be susceptible to fabrication just in order to rope in an innocent person into the commission of the offence that he knew nothing about. The circumstantial evidence must therefore be unequivocal and must have probative value. Again, the law is trite, that where the circumstantial evidence is not conclusive or is capable of having two interpretations of showing the innocence of the accused and at the same time of his guilt. In such situation, the court must cast benefit of doubt in his favour to exonerate and acquit him. *See* **State Vs. K Rs (1957) s FSC 83; Lori Vs. State (1980)11 SC 81; Ijiofor Vs. State (2001)3 NWLR (pt.690)55.**

In this instant case, PW1 testified that the appellant and the co-accused met him at the compound of the deceased on 27/8/2002 and on seeing him, he became surprised to see the appellant visiting the said compound because he had earlier on been accused of stealing the deceased's vehicle. For that reason, he became apprehensive and suspicious hence he left the compound to invite members of vigilante group. On returning with the vigilante members to the compound, they met the door of the compound locked, hence he jumped over the gate to get access into the house. When he climbed the balcony and entered inside the house, he met the deceased lying in pool of blood, tied to the railings with a rope. When the appellant cited him, he escaped through the back door but was arrested by vigilante group members who had surrounded the house. The deceased was then rushed to the hospital where he later died.

On the other hand, the appellant stated that he went to the deceased's compound because he was phoned by the latter to go there to collect his salary arrears. He testified that even when he and his co-accused entered, they met the deceased laying in pool of blood. He said on seeing them, they became afraid and tried to run away.

The learned trial judge considered these vital pieces of evidence of

A both sides and evaluated them. The trial judge then found inter alia:

> ***"PW1 was not the first person to see the deceased in that terrible condition going by the evidence of the accused persons. It was the accused person that were the first to see the deceased. I am of the view therefore that the accused persons had the opportunity to commit the crime."***

Now, considering the surrounding circumstances of the case, especially the two scenario presented by both the appellant and the PW1, I am of the firm view, that the above finding of the trial court cannot be faulted. The lower court was also correct in endorsing such finding. The appellant, on citing the PW1, tried to run away through the back door. Although mere attempt to escape by accused is not necessarily a conclusive evidence that he is the culprit, the court can however infer from such conduct that he must be aware of something before attempting to run away. If he was innocent he would have remained there to offer some explanation. Again, evidence abound that the appellant locked the gate of the compound so as to prevent anybody coming into the house. To my mind, if they had no guilty intention there would have been no need to lock the gate of the compound at that material time. It is therefore unequivocal, that it was the appellant that attacked the deceased, tied him up and stabbed him with knives, inflicting some injuries on him, which certainly led to his death as rightly found by the trial court and affirmed by the lower court.

It is clear, that the appellant and his co-accused person were the last persons to be with the deceased from the evidence adduced by the prosecution. *In the case of* **Stephen Haruna Vs. The Attorney General of the Federation (2012)LPELP 782 SC**, this court had this to say:

> ***"The law requires as person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased. Onus is always on the person last seen with the***

deceased to offer a minimum explanation of what he knows about the death of the deceased."

See **Igabele Vs. The State (2006)8 NWLR (pt. 975)100 at 127-128; Okoko & Anor Vs. The State (1964)1 All NLR 423; Madu Vs. State (2012)LPELR – 7867 (SC); Ismail Vs. The State (2011)LPELR 9352 (SC).**

Finally, it is evident that the deceased person despite the injuries inflicted on him, did not die instantly. Rather, he died in the hospital. The medical report issued by PW5 one Dr. Izegbu Matthew Chukwuma who conducted post-mortem examination on the corpse of the deceased clearly showed vide Exhibit D, that the deceased died due to **"acute cardio-pulmonary failure due to diabetes/hypertension with stab and injuries status post up"** PW5 further testified that the injuries were not self inflicted. Again he opined that it could not be said with absolute certainty, that it was the stab wounds inflicted on the deceased that caused his death. Thus, from the medical evidence adduced in the case at the trial court through Exhibit D and the testimony of PW5, it can safely be deduced that the appellant and the co-accused by their action, had the knowledge or intent to cause grievous bodily harm only. Certainly, the deceased person's ailments of diabetes and hypertension must have contributed to his unfortunate death. The prosecution, in the light of the aforesaid, cannot be said to have proved the offence of murder or intentionally killing the deceased. At best, the prosecution merely proved the offence of manslaughter as rightly found by the two lower courts. In that regard, I resolve the sole issue raised by the respondent which as I said, had subsumed the two issues raised in the appellant's brief, in favour of the respondent, against the present appellant.

On the whole, the judgment of the lower court is hereby affirmed. The appeal therefore fails and is dismissed. The conviction and the substituted sentence of the appellant to life imprisonment made by the lower court is hereby affirmed by me.

Appeal is dismissed accordingly.

Amiru Sanusi
Justice, Supreme Court

RHODES-VIVOUR, JSC: I read in draft the Leading Judgment delivered by my learned brother SANUSI, JSC. I agree with the conclusion already expressed. There is nothing further that can be usefully said.

Appeal dismissed.

Olabode Rhodes-vivour
Justice Supreme Court

BATA OGUNBIYI, JSC: I read in draft the lead Judgment of my learned brother SANUSI, JSC. I subscribed to same that the appeal is devoid of any merit and should be dismissed.

The circumstances of this case in the absence of any direct eye witness to the murder of the deceased, has to be resolved on circumstantial evidence.

By definition:

> ***"a circumstantial evidence is nothing more than evidence of surrounding circumstances which by their nature is capable of establishing a proposition, such as the criminality of an accused with the highest exactitude. It is a combination of evidence of circumstances against an accused when taken together, creates strong conclusions of his guilt with high degree of certainty. It is by application very sparingly used for possible fear of fabrication and casting suspicion on an innocent person."***

See **Oketaolegun Vs. State 2015 All FWLR (Pt. 797) page 677.**

For circumstantial evidence to ground a conviction, it must lead to one irresistible conclusion, that is, the guilt of the accused. Any slight doubt must leave room for an acquittal.

I wish to say at this point that I have had to air my view in the sister

case of **Oketaolegun Vs. State under reference supra** and delivered on the 3rd July, 2015. The circumstantial evidence in this case, like the sister case, is overwhelming and leaves no doubt that the appellant and his companion had the 1st opportunity to commit the crime. The prosecution did prove the appellant's guilt beyond all reasonable doubt.

The appellant herein, like the colleague in the sister case, has every cause and reason to celebrate his escaping death. The favour done him is unprecedented. For whatever reason the lower court committed him to life imprisonment instead of death, he should live to appreciate the favour of God upon him.

On my own part, therefore, I have no reason to depart from the decision of the lower court but endorse same also.

My brother SANUSI, JSC has done justice to the appeal and I endorse his reasoning and conclusion as mine and dismiss the appeal accordingly in terms of the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

ADAMU GALINJE, JSC: I have had a preview of the draft copy of the judgment just delivered by my learned brother, SANUSI JSC, and I entirely agree with the reasoning contained therein and the conclusion arrived thereat.

The Law is settled that in criminal cases, the burden of proof that the accused committed the offence for which he is charged lies squarely on the prosecution, who must prove its case beyond reasonable doubt and a general duty to rebut the presumption of innocence constitutionally guaranteed to the accused person. This burden never shifts. *See* **Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria, Section 35(2) of the Evidence Act, Alabi Vs. The State (1993) 7 NWLR (Pt.307) 511 at 531 paras A-C, Solola Vs. The State (2005)5 SC (Pt.1)135.**

Although the confessional statement of the appellant was rejected at the trial court, the evidence of Pw1 and the appellant were so relevant to the determination of the appeal. Pw1 in his evidence said, when he climbed

onto the balcony, because the collapsible door had been locked from inside, he saw the appellant and the co-accused escape through the back door. This piece of evidence was confirmed by the appellant in his evidence in chief, when he stated at page 75 paragraph 1 of the record as follows:

> ***"We entered the compound of the deceased and saw pw1 sitting under a tree. I greeted pw1 and entered the house. As two of us were going on the steps we saw the deceased sitting on the steps with blood over him and we became afraid and I told 2nd accused that we should go through the back door so that people would not suspect us. The deceased when we saw him sitting on the steps was in a pool of blood but was conscious. When we got outside the house both of us were deliberating how to get the money for the repairs of the car at Ibadan."***

Apart from the fact that the appellant admitted going through the back door with his accomplice, as alluded to by the PW1, the appellant could have inquired from the deceased what happened to him since he was conscious, and would have raised alarm in order to attract the neighbours attention, with a view to conveying the deceased to the hospital. Instead of doing that he and his accomplice chose to escape from the scene. The Learned trial judge at page 91 of the record had this to say:

> ***"I cannot agree with Mr. Jolaoso that the accused persons behave (sic) reasonably in escaping without first raising alarm because 1st accused was afraid and so that they might not be held responsible Mr. Oyefeso's submission was that the accused persons did when (sic) ran away for fear of being held responsible is out of the ordinary human experience ….. A reasonable person would have raised an alarm if he had good intentions."***

The Court of Appeal at page 180 of the record agreed with the trial court

A when it said:

> ***"Since it was the 1st Appellant's evidence that it was the deceased who telephoned him (1st Appellant) to go to Ijebu-***
> B ***Ode on 27/8/02 to collect his arrears of salary the deceased was owing, one would have expected that the reasonable thing he should have done on sighting the deceased in a pool of blood was to raise alarm instead of escaping through the***
> C ***back door."***

From the circumstances of this case, the High Court and the Court of Appeal came to conclusion that the Appellant's conduct was suspicious
D enough as to suggest that he and his accomplice carried out the attack on the deceased. This is clearly a concurrent finding of the two lower courts which this Court, has in a number of cases, held that it cannot interfere unless there is exceptional circumstance. *See* **Ibodo Vs. Enarofia**
E **(1980)5-7 SC 42; Enang Vs. Adu (1981)11-12 SC 25; Sosanya Vs. Onadeko (2005)8 NWLR (Pt.926)185; Dogo Vs. State (2001)3 NWLR (Pt.699)192, Ubani Vs. State (2003)18 NWLR (Pt.851)224 Nkebisi Vs. State (2010)5 NWLR (Pt.1188)471; Olaiya Vs. State (2010)3 NWLR**
F **(Pt.1181)423.**

I find no reason to interfere with the findings of the two lower courts on this score. However, the doctors report Exhibit 'D' did not completely attributes the cause of death of the deceased to the injuries inflicted on the
G deceased by the appellant. It follows therefore that the appellant did not cause the death. I therefore agree with the lower court that the prosecution only established the case of attempted murder against the appellant.

For the reasons I have set out herein and the more detailed reasoning
H in the judgment of my learned brother SANUSI JSC, this appeal shall be and it is hereby dismissed.

Paul Adamu Galinje,
Justice, Supreme Court

I **DAUDA BAGE, JSC:** I have had the benefit of reading in draft the lead

A Judgment of my learned brother AMIRU SANUSI, JSC, just delivered. His Lordship has comprehensively considered and ably solved the issues in contention in this appeal. I agree with the reasoning and conclusion that the judgment of the lower Court is affirmed. The conviction and the substituted
B sentence of the appellant to life imprisonment made by the lower court is also affirmed by me. Appeal dismissed.

Sidi Dauda Bage,
Justice, Supreme Court

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MATHIAS GARUBA IDOKO
AND
THE STATE

SC. 594/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where shown to be perverse and have occasioned a miscarriage of justice – Attitude of the Supreme Court thereto.

CONSTITUTIONAL LAW: Fair hearing – Accused not given sufficient notice of the offence he is convicted – Whether procedure in breach of S. 36 (a) (a) of CFRN 1999 (as amended)

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CONSTITUTIONAL LAW: Fair hearing – Audi Alteram Partem – Meaning, essence and imperatives.

CONSTITUTIONAL LAW: Fair hearing – Where it is said that accused is entitled to fair hearing – Import thereof.

CONSTITUTIONAL LAW: Fair hearing – "The accused must be given full opportunity of exculpating himself" – Meaning – Relevant

considerations thereof.

COURT: Conviction for a lesser offence – Power of court thereto – Relevant principles thereof.

CRIMINAL LAW AND PROCEDURE: Conviction for an offence not charged – Application of S. 217 CPC – Conditions thereof – Principles in Ezechukwu Vs. C.O.P. (1996) ? NWLR (Pt. ?) 96

EVIDENCE: Confessional statement – Meaning – S. 28 of Evidence Act 2011- – When confessional statement sufficient to convict an accused – Relevant considerations thereof.

LEGISLATION: Conflict of laws – Where a law is in conflict with the Constitution – Whether such a law is null and void to the extent of its inconsistency with the Constitution – Relevant considerations thereof.

STATUTE: Criminal Procedure Code – SS 216 and 217 thereof – Purport – The principles in Ekechukwu Vs. Commissioner of Police 1966 NNLR 96.

STATUTE: Criminal Procedure Code – SS 216 and 217 thereof – Purport

STATUTE: Criminal Procedure Code: Sections 216 and 217 thereof – Application – Conditions thereof – The principles in Ezechukwu Vs. C.O.P. (1996)? NWLR (Pt.?) 96

STATUTE: Robbery and Firearms Act – S.5 thereof – Purport and imperatives.

Issue for Determination

Whether the appellant was properly convicted of the offence of conspiracy on the available evidence proffered by the prosecution.

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal holden at Makurdi delivered on 19th December, 2013, affirming the conviction and sentence of the appellant by the Benue State High Court for conspiracy to commit robbery an offence punishable under Section 5(a) and (b) of the Robbery and Firearms (special provisions) Act Cap 398 Laws of the Federation, in the latter's decision of 26th February 2003. The summary of the facts that brought about the appeal are hereinunder stated.

The appellant along with five others were initially charged for conspiracy and armed robbery punishable under Sections 1 and 5 of the robbery and firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990. At the close of the case for the prosecution three out of the accused persons were discharged for want of sufficient evidence. The appellant and the two others against whom a prima case was established were asked to enter their defence.

At the end of trial, the court relying on Section 216 and 217 of the Criminal Procedure Code along with Section 5(1)(a) and (b) of Armed Robbery (Special Provisions) Act Cap 398 Laws of the Federation without having formally charged the appellant for conspiracy convicted him for the offence and, by virtue of the conviction, found him principally liable for the offence of armed robbery that he was formally charged for.

The Court of Appeal dismissal of appellant's appeal against his conviction by the trial court informs his instant appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. Any law which is in conflict with the constitution is null and void

Let me outrightly state the principle that the Constitution is our supreme law and any law that stands in conflict with it is null and void to the extent of the inconsistency. ***See*** **Nwaigwe Vs. Okere (2008) LPELR-2095 (SC); National Union of Electricity Employers & Anor Vs. Bureau of Public Enterprises (2010) LPELR-1966 (SC); (2010) 7 NWLR (Pt. 1194) 538 and AG, Ondo State V. AG, Federation & Ors (2002) 9 NWLR (Pt 772) 222.** *(P 51 paras C – E)*

2. *Interpretation of SS 216 and 217 of the Criminal Procedure Code*

Suffice it for now to refer to the instructive decision of the High Court of the then Northern region in R. Ekechukwu Vs. Commissioner of Police 1966 NNLR 96 on the interpretation to place on Sections 216 and 217 of the Criminal Procedure Code. The court, inter-alia, held at 99, 101-102 of the report as follows:

> ***"The next issue is whether the appellant could, in law, have been convicted under Section 319A of the Penal Code by virtue of Sections 216 and 217 of the Criminal Procedure Code ……***
>
> ***So far as we are aware there is only one reported case in which the effect of Section 217 was raised. This was in the Supreme Court in Okwuwa Vs. The Queen 1965 N.M.L.R. 53. But the court expressly decided the issue under another section and observed that section 217 'raises difficult questions' and hoped 'that the law officers will review section 217'……...***

The Indian courts have held that where there has been a conviction by virtue of Section 237 an appeal court will apply Section 232 and satisfy itself that the appellant has not been misled in his defence by the absence of the charge; vide Mallu Gope Vs. Emperor A 1929 P. 712.

We follow these Indian authorities and think that the position in Northern Nigeria may be stated as follows. In general, if, during the course of a trial, there is evidence of facts to prove an offence with which the accused person is not charged the court should frame a new charge under Section 208 of the Criminal Procedure Code and comply with that Section and the relevant sections which follow. The Court may, however, apply Section 217 to convict of an offence with which the accused is not charged provided (1) it had been

doubtful which of several different offences the facts which could be proved would constitute and (2) such doubt applied only to the law and not to the facts; that is to say the facts charged must have given the accused person notice of the offence with which he is to be convicted. If there is an appeal against a conviction made by virtue of Section 217 the appeal court will apply Section 222 and if it considers that the appellant was misled in his defence by the absence of a charge and a failure of justice has been occasioned it will either quash the conviction or order a retrial.

We have already said that a charge of criminal breach of trust gave the appellant no notice of the ingredients of the offence of unlawful possession. It follows, in our view, that the appellant was misled in his defence and a failure of justice was occasioned. We would add that, in any event, we do not think in the case before us there was doubt, when the charge was framed, as to which of several offences the facts, if proved, would constitute." *(Pp 51 – 52 paras E – I)*

Per M.D. Muhammed (JSC)

"My lords, in the instant case none of the two conditions which justify a trial court's invocation of Sections 216 and 217 of the CPC to convict an accused are evident. The trial and ultimate conviction and sentence of the appellant is consequent upon the leave sought and obtained by the prosecuting counsel in the chambers of the Benue State Attorney General Pursuant to rule 3(2) of the Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules 1970. In support of respondent's application for the leave are the names of the accused persons including that of the appellant, the witnesses to testify at the trial as well as the proof of evidence the witnesses are to give at trial. The respondent cannot be heard to argue that it has any doubt as to which offence the facts against the appellant, if proved, would constitute. In Exhibit B, the only evidence that seems to avail the respondent, the appellant appears to confess to agreeing to commit armed robbery generally

and not in relation to the specific robberies contained in the 4th and 5th charge. Nothing in the evidence on record suggests in the least that he was a party to the two robberies under the 4th and 5th heads of charge. The respondent, in the face of these facts, cannot also be heard to say that it is in doubt, were it to be taken that appellant's confession in exhibit B relates to the robberies in the 4th and 5th charge, and it is not, as to what law provides for the offence the appellant is to be charged. I am of the firm and considered view that given the facts on which the appellant is charged he did not have the necessary notice of the offence with which he is convicted. It is, therefore, reasonable to accept the suggestion of his being misled in his defence and conclude that a failure of justice has indeed been occasioned.

Both courts, I must finally say, wrongly relied on Section 5(b) of the Armed Robbery (Special Provisions) Act to convict the appellant on the basis of exhibit B which they accept as sufficient proof of conspiracy against the appellant. That conclusion only avails the two courts where the fact of the offence of conspiracy is formally charged, pleaded to and established by evidence. Then and only then would Section 5(b) of the Robbery Act become operative. It is not the case here as earlier stated in this judgment."
(P 53 paras A – I)

3. *It was wrong to convict the appellant of conspiracy where the facts of the offence were not charged, pleaded to or established by evidence.*

Finally, since the appellant herein has not been given sufficient notice of the offence he is convicted for to facilitate his defence, the conviction runs against Section 36(6) (a) of the 1999 Constitution and is, to that extent, null and void.

In sum I find the appeal meritorious, and allow same. Resultantly, the conviction and sentence of the appellant by the trial court as affirmed by the lower court is hereby set aside.
(Pp 53 – 54 paras I – B)

4. *Where concurrent findings by the lower courts should be disturbed*

It is noteworthy to state that this appeal poses an exception to the general state of the law that concurrent findings of fact by the two lower courts should not be disturbed ordinarily, unless a substantial error, apparent on the face of the record of proceeding is shown or when such findings are perverse and or have occasioned a miscarriage of justice. See the case of Military Governor of Lagos State Vs. Adeyiga (2012) 5 NWLR (Pt. 1293) 291 at 334-336 and 338.

Also in the case of Adenoke Vs. State (2015) 7 NWLR (Pt. 1458) 237 at 286 for instance, this court had the following to say:

> **"*The Supreme Court will rarely upset the findings made by the trial court and affirmed by the Court of Appeal. This is so because such findings were arrived at after cross examination and observation of the witnesses by the trial judge. Such concurrent findings of the two courts below ought to carry much weight in an appeal court which did not have the opportunity or advantage of the trial court."***

See further the cases of Shurumo Vs. State (2010) 19 NWLR (Pt. 1226) 73 at 100 101; Sobakin Vs. State (1981) 5 SC 75 and Igwe Vs. State (1982) 9 SC 174. *(Pp 54 – 55 paras D – A)*

Per Ogunbiyi (JSC)

"For all intents and purposes, and following from the foregoing authorities therefore, the appeal court should be wary to interfere with findings of fact made by a trial court. See also the decisions in the cases of Kodilinye Vs. Odu (1935) 2 WACA 336 and Yesufu Vs. Adama (2010) 5 NWLR (Pt. 1188) 522.

From all indication, the decision in the appeal under consideration does not come within the foregoing authorities but is rather shown to be unreasonable because from the record before us, it is not supported by any evidence. It is also not a result of genuine

exercise of a judicial discretion and hence has resulted in a gross miscarriage of justice.

It is borne on the record that the appellant herein did confess in general terms to an agreement to rob in his statement Exh. B. The question however is, was there any formal charge against the appellant for a specific offence of conspiracy to commit robbery, and which he had confessed to in Exhibit B?

At page 69 of the record for instance, the trial court had this to say:

> **"As I have already noted, the offences the accused persons have confessed to, by the available evidence, are of conspiracy and armed robberies at Nos. 2 of Otia 'F' and Otia 'F' 7B. There is no specific charge of conspiracy which is the only point upon which the 2nd accused has confessed."**

Exhibit B, in a nutshell could be interpreted to mean that the appellant and his cohorts did conspire to form a robbery gang. The issue before us is nothing to do with belonging to a gang of armed robbers. To be guilty of conspiracy, you must have done something in furtherance of an illegal agreement. There must be evidence that transcends merely belonging to an armed robbery gang. There is no specific act done by the appellant as having been in furtherance of the agreement.

It is not show also that the appellant agreed that PW1 and PW2 should be robbed specifically. The prosecution must not only show that an offence was committed but must proceed further and link the appellant to the commission of the offence thereof."
(Pp 55 – 56 paras A – A)

5. The lower court erred by convicting the appellant of conspiracy he was

not charged

As rightly submitted by the appellant's counsel, Section 216 and 217 of the Criminal Procedure Code cannot provide or prove a canal which will allow the Court to convict the appellant of the offence of conspiracy to rob, which he was not at any time charged with. See the decision of this Court in Ajayi Vs. The State (2013) 9 NWLR (Pt. 1360) 589 at 614 per Fabiyi, JSC. The said sections supra, have no bearing to the case under consideration and I so hold. Hence the lower court erred and fell into the same trap as the trial court by convicting the appellant and thus occasioning a miscarriage of justice against him. In other words his constitutional right as provided by Section 36(1) of the Constitution 1999 (as amended) was violated with impunity.

The two lower courts were concurrent on a wrong conclusion and this court must interfere appropriately with their judgments in order to do justice to the appellant. *(P56 paras A – E)*

6. *The nature of a confessional statement*

A confessional statement is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. See Section 28 of the Evidence Act, 2011. A confessional statement is sufficient to ground a conviction if proved to be voluntary, positive, unequivocal and amounts to an admission of guilt. *See* Osetola & Anor. Vs. The State (2012) 6 SCNJ 329; Dogo Vs. The State (2013) 3 SCNJ 144; Nwachukwu Vs. The State (2002) 7 SCNJ 124.

The conundrum in this appeal is that in Exhibit B, the appellant's extra judicial statement, which was admitted in evidence as a confessional statement, the appellant did not actually confess to the commission of any robbery or conspiracy thereto.
(Pp 56 – 57 paras H – B)

Per Kekere-Ekun (JSC)

"The learned trial Judge found that there was no evidence linking the appellant with the charge of armed robbery in counts 4 and 5 of the charge but held that the offence of conspiracy was made out by the alleged confession in Exhibit B. with due respect to their lordships of the court below who affirmed this view, the finding was erroneous. There is nothing in Exhibit B to suggest that the appellant conspired with anyone to commit the armed robberies charged in counts 4 and 5. He was never charged with the offence of conspiracy which would have afforded him an opportunity to plead thereto and to defend himself.

It is settled law that an accused person may be convicted of a lesser offence as disclosed by the evidence where the evidence is held to be insufficient to justify a conviction for the principal offence See: Ahmed Sule (alias Eza) Vs. The State (2001) 12 SCNJ (Pt. 135)1; Adeyemi Vs. The State (1991) 6 NWLR (Pt. 195) 1; Nwachukwu Vs. The State (1986) 2 NWLR (Pt. 25) 765." *(Pp 57 – 58 paras G – B)*

7. The purport of SS 216 and 217 of the Criminal Procedure Code

Section 216 of the Criminal Procedure Code (CPC) seeks to address a situation where several offences might have been committed and the prosecution is in doubt as to which of the possible offences the available facts, if proved, could constitute. It permits the prosecution to charge the accused with all or any one or more of such offences. He may also be charged in the alternative.

By Section 217 of the CPC, where the scenario in Section 216 occurs and the accused is charged with one of several possible offences but from the evidence the accused is shown to have committed a different offence, with which he could have been charged but was not, he may be convicted of that other offence although not charged with it. *(P 58 paras C – C)*

8. Conditions to be satisfied before an accused is convicted for an offence

not charged.

In Ezechukwu Vs. C.O.P (supra), the Court of Appeal held that where Section 217 is to be relied upon in convicting an accused person of an offence with which he was not charged it must be apparent (1) that it had been doubtful which of several offences the facts which could be proved would constitute and (2) such doubt must apply only to the law and not to the fact; that is to say the fact charged must have given the accused person notice of the offence with which he is to be convicted. I think this view accords with sound reasoning and I adopt it. *(Pp 58 paras E – G)*

Per Kekere-Ekun (JSC)

"Applying the guidelines enunciated above, I am of the view that the sections are inapplicable in the present circumstance. No link was established between the content of Exhibit B, (which the court solely relied on to convict the appellant) and any offence at all. In particular there is no link between Exhibit B and the offence of armed robbery charged in counts 4 and 5 of the charge.

I am in agreement with my learned brother in the lead judgment that the invocation of Sections 216 and 217 of the Criminal Procedure Code by the trial court as affirmed by the court below amounted to a breach of the appellant's fundamental right to fair hearing guaranteed by Section 36(6) of the 1999 Constitution, as amended and thereby occasioned a miscarriage of justice."
(Pp 58 – 59 paras G – B)

9. The import of fair hearing

When it is said that the accused is entitled to fair hearing, particularly the *audi alteram partem* component of it, it means, in the words of Ogundare J (as he then was) in Akintemi & Ors Vs. Prof. Onwumechili & Anor (1981) 2 OY. S.H.C 457that he should be adequately informed of the case against (him); and (he) must be given an opportunity of meeting such a case. *(P 59 paras F – H)*

Per Eko (JSC)

"The facts of this case may well be illustrative. Paul Usoro and two others were law students of University of Ife, Ile-Ife. They were executives of Law Student Society, Paul Usoro being the President. In that capacity they reported allegations of widespread examinations in all classes of the Faculty of Law, particularly part III. They gave names of students who would be able to give evidence. The Vice-Chancellor was minded to set up the Adegbola Panel to investigate the allegation. Paul Usoro was the first to testify. None of the witnesses who testified received any charge or complaint against him nor was anyone of them asked to defend himself before the panel. Upon receiving the report of Adegbola Panel; the Vice-Chancellor, without showing the report to the students and calling on them to offer any explanation, issued a letter placing each of them on suspension immediately. On their application for an order of *certiorari* to issue, on the ground that their rights to fair hearing had been violated, their suspension and the offensive report were quashed." *(Pp 59 – 60 paras H – C)*

10. The accused person must be given full opportunity of exculpating himself
Meaning

The dictum of the Privy Council in Kandy Vs. Government of Malaya (1962) AC 322 further illustrates the importance of *audi alteram partem* in fair hearing. At page 337 of the report the law lords stated:

> ***If the right to be heard is to be a real right which is worth anything, it must carry with it the right in the accused man to know the case which is made against him.***

The proof of evidence must contain the statements of witnesses to

testify against him and any other evidential materials to be used against him in the bid of the prosecution to prove the allegation or the charge against him beyond reasonable doubt. This is what it means when it is said that the accused person must be "given a full opportunity of exculpating himself". *(P 60 paras C – F)*

11. The indices of Audi Alterem partem

The right conferred on the accused person by Section 36 (6)(a) & (b) of the Constitution is not a mere cosmetic or fanciful right, it is for real. In his book: Judicial Review of Administrative action, Prof. S.A. de Smith maintains, and I agree, that:

> ***A person who is entitled to the protection afforded by the audi alteram partem rule must not only be given adequate opportunity to know the case he has to meet; he must also be given an adequate opportunity to answer it.***

That is the right, in the totality, violated in Akintemi Vs. Prof. Onwumechili. ***See also*** **Kandy Vs. Government of Malaya (supra); Adedeji Vs. Police Service Commission (supra).** *(P 61 paras B – E)*

Per Eko (JSC)

"The issue thrown up in this case is whether Sections 216 and 217 of the Criminal Procedure Code (CPC) Law of Benue State have the potency to diminish the efficacy, purpose and intent of Section 36 (6)(a) and (b) of the Constitution? The CPC, particularly its provisions contained in Sections 216 and 217 thereof, are subordinate to any constitutional provisions by virtue of Section 1 (1) and (3) of the Constitution, Section 36 (6)(a) and (b) of the Constitution shall override Sections 216 and 217 of the CPC if they are inconsistent with the provisions of Section 36 (6)(a) and (b) of the Constitution; and they are to the extent that they purport to enable and empower the court to convict an accused "person of the offence

which he is shown to have committed although he was not charged with it". For instance, on a charge of house breaking or burglary it will be outrageous and most perverse for the court in, in the purported exercise of its discretion under Section 217 of the CPC, to convict the accused person for rape, if it appears from the evidence that he committed that offence "although he was not charged with it". It may, though be different if the offence the accused person is convicted of is an element of the offence of the bigger offence he was charged with.

The very essence of *audi alteram partem* is that the accused person should not be misled in his defence by the absence of a charge which certainly potentiates failure of justice. Where, as in the instant case, the appellant is shown to have been misled in his defense by the absence of the charge of the offence he was convicted of, by the invocation of Section 217 of the CPC, and a miscarriage of justice has been occasioned thereby, the appellate court will intervene and quash the conviction and sentence." *(P 61 paras F – C)*

Nigerian cases cited in the Judgment

Abdullahi Vs. The State (2008) 17 NWLR (Pt 1115) 203;
Abiodun Vs. State (2013) All FWLR 1257;
Adedeji Vs. Police Service Commission (1967) 1 All NLR 67; (1968) NMLR 102;
Adeleke Vs. State (2013) 16 NWLR (Pt 1381) 556;
Adenike Vs. State (2015) 7 NWLR (Pt. 1458) 237;
Adeyemi Vs. The State (1991) 6 NWLR (Pt. 195) 1;
Ahmed Sule (alias Eza) Vs. The State (2001) 1 SCNJ 1;
Ajayi Vs. The State (2013) 9 NWLR (Pt 1360) 589;
Akintemi & Ors Vs. Prof. Onwumechili & Anor (1981) 2 OY. S.H.C 457;
Cross River State Vs. Young (2013) 11 NWLR (Pt 1364) 1;
Dogo Vs. The State (2013) 3 SCNJ 144;
Ezechukwu Vs. C.O.P (1996) NWLR 96;
Igwe Vs. State (1982) 9 SC 174;
Isiyaku Mohammed Vs. Kano N.A (1968) 1 ALL NLR 424;
Kodilinye Vs. Odu (1935) 2 WACA 336;

Military Governor of Lagos State Vs. Adeyiga (2012) 5 NWLR (Pt. 1293) 291;
National Union of Electricity Employers & Anor Vs. Bureau of Public Enterprises (2010) LPELR-1966 (SC); (2010) 7 NWLR (Pt. 1194) 538;
Njoku Vs. The State (1992) 1 NWLR (Pt 262) 71;
Njokwu Vs. The State (2013) 9 NWLR (Pt 1360) 417;
Nwachukwu Vs. The State (1986) 2 NWLR (Pt. 25) 765;
Nwachukwu Vs. The State (2002) 7 SCNJ 124;
Nwaigwe Vs. Okere (2008) LPELR-2095 (SC);
Okwuwa Vs. The Queen 1965 N.M.L.R. 53;
Ondo State V. AG, Federation & Ors (2002) 9 NWLR (Pt 772) 226;
Osetola & Anor. Vs. The State (2012) 6 SCNJ 329;
Osuagwu Vs. State (2013) ALL FWLR 1603;
R. Ekechukwu Vs. Commissioner of Police 1966 NNLR 96;
Shodiya Vs. State (2013) ALL FWLR 1530;
Shurumo Vs. State (2010) 19 NWLR (Pt. 1226) 73;
Sobakin Vs. State (1981) 5 SC 75; and
Yesufu Vs. Adama (2010) 5 NWLR (Pt. 1188) 522.

Foreign cases cited in the Judgment
Mallu Gope Vs. Emperor A 1929 P. 712;
Kandy Vs. Government of Malaya (1962) AC 322

Nigerian statutes cited in the Judgment
1999 Constitution Sections 36(1),36(6) (a), 36(6)(a) and (b);
Criminal Procedure Code Section 216 and 217;
Evidence Act, 2011 Section 28;
Robbery and firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990 Section 5(a) and (b); Sections 1 and 5.
Robbery and Firearms Act 1990 Section 1(2) (a); and
Robbery Firearms (special provisions) Act Cap 398 Laws of the Federation.

Representations
A. O. Maduabuchi (Esq.), with **Emeka Okoye (Esq.)**, **Mrs Uchenna Onyedi,**

Chibueze Ndidigwe (Esq.), Evelyn Joseph (Miss), and **Robert Shiaondo (Esq.)**, for the appellant.
Sir M.O. Atubu, DPP Benue MOJ, **J.O. Ewurum (Mrs),** PSC State Course II for the respondent.

DATTIJO MUHAMMED, JSC (Delivering the Lead Judgment): This is an appeal against the judgment of the Court of Appeal holden at Makurdi delivered on 19th December, 2013, affirming the conviction and sentence of the appellant by the Benue State High Court for conspiracy to commit robbery an offence punishable under Section 5(a) and (b) of the Robbery Firearms (special provisions) Act Cap 398 Laws of the Federation, in the latter's decision of 26th February 2003. The Court of Appeal from which the appeal arose will, in the judgment, be referred to as the lower court while the Benue State High Court will be referred to as the trial court. The summary of the facts that brought about the appeal are hereinunder stated at once.

The appellant along with five others were initially charged for conspiracy and armed robbery punishable under Sections 1 and 5 of the robbery and firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990. At the close of the case for the prosecution three out of the accused persons were discharged for want of sufficient evidence. The appellant and the two others against whom a prima case was established were asked to enter their defence.

At the end of trial, the court relying on Section 216 and 217 of the Criminal Procedure Code along with Section 5(1)(a) and (b) of Armed Robbery (Special Provisions) Act Cap 398 Laws of the Federation without having formally charged the appellant for conspiracy convicted him for the offence and, by virtue of the conviction, found him principally liable for the offence of armed robbery that he was formally charged for.

The lower court's dismissal of appellant's appeal against his conviction by the trial court informs his instant appeal to this Court.

At the hearing of the appeal, parties having filed and exchanged their briefs adopted and relied on same as their respective arguments for and against the appeal. The lone issue formulated by the appellant and on the

basis of which the appeal will be determined reads:

> ***"Whether the appellant was properly convicted of the offence of conspiracy on the available evidence proffered by the prosecution."***

On the sole issue, learned appellant's counsel submits that in criminal trials the burden lies on the prosecution to establish the gift of the accused person beyond reasonable doubt. In the case at hand, it is argued, it is wrong of the lower court to have affirmed the trial court's conviction of the appellant given the evidence on record. It is a negation of the appellant's constitutional right to fair hearing under section 36(1) of the 1999 Constitution for him to be convicted for an offence he was not charged. Citing the decisions in **Njokwu Vs. State (2013) 9 NWLR (Pt 1360) 417 at 448** and **Cross River State Vs. Young (2013) 11 NWLR (Pt 1364) 1 at 28,** learned counsel submits that the lower court's affirmation of the conviction cannot stand.

Further arguing the issue, learned counsel contends that Section 216 and 217 of the Criminal Procedure Code on which the trial court's findings at page 71 of the record, as affirmed by the lower court is based, stand in manifest conflict with Section 36(6)(a) and (b) of the 1999 Constitution. The constitutional provision requires that an accused be told his offence at the earliest possible time to enable him prepare his defence. Failure to do this, it is argued, is fatal to any conviction.

Lastly, learned counsel contends that Exhibit B, appellant's extra judicial statement, does not, on the authorities, constitute a confession of an agreement by the appellant to be a member of any armed robbery gang. In the absence of such an agreement, it is further argued, there cannot be the offence of conspiracy that the appellant has been convicted for by the two courts below. Relying on **Ajayi Vs. The State (2013) 9 NWLR (Pt 1360) 589 at 614; Adeleke Vs. State (2013) 16 NWLR (Pt 1381) 556** and **Abdullahi Vs. The State (2008) 17 NWLR (Pt 1115) 203 at 221** learned appellant's counsel urges that in the absence of any evidence that an armed robbery had infact been committed pursuant to any agreement between the

appellant and his two co-accused, the findings of the two courts below though concurrent cannot stand. Learned counsel prays the court to resolve the sole issue in favour of the appellant and in the result allow the appeal.

Responding under respondent's 2nd and 5th issues, it is submitted that Exhibit B, appellant's extra-judicial statement, constitutes a confession and may alone lawfully sustain appellant's conviction for the conspiracy he admitted. Being clear, direct and unambiguous, appellant's confessional statement, learned respondent's counsel submits, provides the best proof of the offence so admitted. Citing inter-alia **Njoku Vs. The State (1992) 1 NWLR (Pt 262) 71, Nwachukwu Vs. State (2002) 102 LRCN 213; Shodiya Vs. State (2013) ALL FWLR 1530** and **Abiodun Vs. State (2013) All FWLR 1257 at 1261** learned counsel submits that the two courts' reliance on Exhibit B to convict the appellant is lawful more so when the confession has been tested with other relevant facts in the testimonies of PW1 and PW2 to show that the confession is indeed true. True the appellant might not have been formally charged with the offence of conspiracy in relation to the 4th and 5th counts that survived against the appellant and the two others, however Sections 216 and 217 of the Criminal Procedure Code the trial court relied to convict the appellant, it is further submitted, do not in any way offend Section 36(6) (a) of the 1999 Constitution to justify setting aside the lower court's affirmation of the trial court's conviction of the appellant. Relying on the cases of **Isiyaku Mohammed Vs. Kano N.A (1968) 1 ALL NLR 424 and Osuagwu Vs. State (2013) ALL FWLR 1603;** learned counsel concludes that the appeal is unmeritorious and that it be dismissed.

My lords, the narrow issue in this appeal is whether in the absence of a formal charge for the offence of conspiracy to commit the substantive offence of armed robbery and notwithstanding the provision of Section 36(6) (a) of the 1999 Constitution the trial court's conviction of the appellant by virtue of Section 216 and 217 of the Criminal Procedure Code for the conspiracy as affirmed by the lower court should endure.

The appellant in his extra judicial statement, Exhibit B recorded on 20-10-2001 and fully reproduced in the trial court's judgment, see pages 63-

A 64 of the record, in admitting an agreement between him and others to commit armed robbery, inter-alia stated as follows:

> ***"…… Sometimes a month ago, myself Olarewaju and***
> B ***Emmanuel we were going through deport road and along the road we saw a gun, a short pistol. As we picked the pistol I gave it to Emmanuel Ogboji, Emmanuel and Olarewaju are arrested by the police as armed robbers …… I told***
> C ***Emmanuel and Olarewaju that we should buy bullets so that we use it for armed robbery operation ……. I did not come to report to police because we want to use the gun for armed robbery with Olarewaju, Ali Idankpo, Igoche Ojobor,***
> D ***Abdulraman Jibril and Emmanuel Ogboji……..."***

Having found the foregoing statement of the appellant as well as those of his co-accused to be confessional, the trial court at page 67 of the record of
E appeal proceeded to deploy same firstly as follows:

> ***"I have already made a note of how short of linking any of the accuse persons to the 1st, 2nd and 3rd charges the oral***
> F ***testimonies before me are. I say the same also of the extra-judicial statements of the accused persons. None of them has admitted being a party to the specific offences charged in the 1st, 2nd and 3rd charges which are exclusively in relation to the***
> G ***incident that happened at No. 1 Achigili Street, Otukpo on or about the 18th day of October, 2001. In relation to these charges, I discharge and acquit each and everyone of the 1st, 2nd and 3rd accused person."***

H

On the 4th and 5th heads of charge the trial court held in relation to the appellant inter-alia thus:

> ***"On the part of the 2nd accused, the second part of exhibit 'B'***
> I ***which he made on 20-10-2001 and which, as I have already***

noted, was put in evidence without objection, also positively, unequivocally and conclusively admitted that he was a part of a conspiracy with some named persons, including the 1st and 3rd accused persons to commit armed robbery in which he was only yet to physically take part. Whether or not this admission by him is sufficient to hold him liable for any offence(s) on account of the trial in hand is a question which I will still return to answer in this judgment."

The court's answer as to appellant's culpability continues at pages 69-70 of the record of appeal as follows:

"The question then is whether or not the accused persons can be convicted of conspiracy in the circumstances of this case even though they have not been specifically charged with the offence.

The provisions of Sections 216 and 217 of the Criminal Procedure Code are relevant in this regard. …… Under these provisions read together, a trial court has the power to convict an accused for any offence disclosed by evidence even though not specifically charged with it. In the instant case, even though Exhibit 'A' 'B' and 'C' each has admitted some robberies not charged, the reason why those admitted facts cannot form the basis of any conviction is because there are no facts by which the admissions can be tested.

The same cannot however be said of the conspiracy which the accused persons have all admitted. The offence was complete upon their agreement. There are outside the confessions showing that robberies were indeed committed at No. 2 Otia 'F' and at Otia 'F' 7B in furthermore of the agreement. I see the offence of criminal conspiracy to commit armed robbery established against each and every

A ***one of the 1st, 2nd and 3rd accused persons. And having also found that the offences of armed robberies in the 4th and 5th charges were indeed committed by the 1st and 3rd accused persons in furthermore of a standing conspiracy between***
B ***themselves and others including the 2nd accused, I see no escape route for the later in relation to those specific charges even though he claims not to have participated in the robberies."***

C

The court concluded as follows:

"In summation, after perusing the charges and
D ***considering the entire case for the prosecution as well as the defences of the respective accused persons, I am satisfied that the offences of conspiracy and armed robberies respectively punishable under Sections 5(b) and***
E ***2(a) of the Robbery and Firearms (Special Provisions) Act Cap 398 of the Federation of Nigeria 1990 have each been established against each of the accused persons. They are each accordingly hereby convicted as charged and also for***
F ***conspiracy punishable under Section 5(b) supra."***

In affirming the trial court's forgoing findings the lower court at pages 127-128 of the record of appeal held thus:

G

"I shall, notwithstanding the above conclusion which settles the Issue in discourse still proceed to consider the issue of conviction for conspiracy for armed robbery and
H ***the imposition of a sentence for armed robbery even though not so charged.***

Section 1(2) (a) of the Robbery and Firearms Act 1990
I ***under which count 4 is brought provides as follows:***

A

'1(2) (a) if the offender mentioned in sub-section (1) of this section is armed with any Firearms or any offensive weapon, or is in company with any person

B *so armed; or -----(b)*

(b) at or immediately before or immediately after the robbery the said offender wounds or uses any personal violence to any person, the offender shall

C *be liable upon conviction under this Act to be sentenced to death.'*

'5. Any person who ------ (a) ----- 'b' conspires with any

D *person to commit such an offence whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offence as a principal offender and*

E *shall be liable to be proceeded against and punished accordingly under this Act.'*

What the afore quoted provisions of Section 5 of the

F *Robbery and Firearms Act portends is that the law automatically deems an accused person who from the evidence led in a principal offence to have conspired in the commission of that offence to be presumed guilty without*

G *more. That simply means that the evidence disclosing conspiracy against an accused whether principally charged or not would be taken as evidence alluded to after a specific charge. This is a specific statutory provision*

H *which is akin to or similar to the related provision of Section 216 and 217 of the Criminal Procedure Code, discussed supra.*

The offence of conspiracy arising from the principal

I *charge(s) brought to the Notice of the Accused/Appellant*

and upon which a plea had been taken, cannot be said to be in violation of the constitutional guarantee for fair hearing or a violation to the Criminal Procedure Code provisions relating to arraignment, plea to specific allegation's e.t.c."

Now, it is glaring from the record of this appeal that there is no formal charge for conspiracy to which the appellant has pleaded. It is equally glaring that though he has been formally charged for armed robbery under the 4th and 5th heads of charge, exhibit B, his extra judicial statement, the two courts below adjudge confessional, does not allude to any of the armed robbery offences contained under the 4th and 5th heads of charge. Both courts have, relying on Sections 216 and 217 of the Criminal Procedure Code read along with Section 5(1) of the Armed Robbery (Special Provisions) Act Cap 389, Laws of the Federation, however, convicted the appellant for the offence of conspiracy to commit the armed robberies in relation to the 4th and 5th heads of charge and for the principal offence thereunder. Learned appellant's counsel insists that the concurrent findings of the two courts are not sustained by virtue of Sections 216 and 217 of the Criminal Procedure Code read along with Sections 1(2) (a) and 5 of the Armed robbery (Special Provisions) Act which findings in any event offend Section 36(6) (a) of the 1999 Constitution.

Resolving this issue requires a communal reading of Sections 216, 217 of the Criminal Procedure Code, Sections 1 and 5 of the Armed robbery (Special Provisions) Act as well as Section 36(6) (a) of the 1999 Constitution all of which Sections are hereunder reproduced for ease of reference:

SECTIONS 216 AND 217 OF THE CRIMINAL PROCEDURE CODE.

A

"Section 216 CPC. If a single act or series of acts is of such a nature that is doubtful to which of several different offences the facts which can be proved will constitute, the
B *accused may be charged with having committed all or any one or more of such offences and any number of such charges may be tried together; or he may be charged in the alternative with having committed someone or other of the*
C *said offences.*

Section 217 CPC. If in the case mentioned in section 216 the accused is charged with one offence and it appears in
D *evidence that he committed a different offence with which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with*
E *it."*

SECTIONS 1 AND 5 OF ARMED ROBBERY (SPECIAL PROVISIONS) ACT

F

"Section 1. Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than twenty-one years.
G *Section 5. Any person who ----------*
(a) Aids, counsels, abets or procures any person to commit an offence under section 1, 2, 3 or 5 of this Act; or
H *(b) Conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offence as a principal*
I *offender and shall be liable to be proceeded against and punished accordingly under this Act."*

SECTION 36(6) (A) OF THE 1999 CONSTITUTION

> ***"-(6) Every person who is charged with a criminal offence shall be entitled to***
> ***(a) to be informed promptly in the language that he understands and in detail of the nature of the offence."***

Let me outrightly state the principle that the Constitution is our supreme law and any law that stands in conflict with it is null and void to the extent of the inconsistency. *See* **Nwaigwe Vs. Okere (2008) LPELR-2095 (SC); National Union of Electricity Employers & Anor Vs. Bureau of Public Enterprises (2010) LPELR-1966 (SC); (2010) 7 NWLR (Pt. 1194) 538 and AG, Ondo State V. AG, Federation & Ors (2002) 9 NWLR (Pt 772) 222.** I will come back to this. Suffice it for now to refer to the instructive decision of the decision of the High Court of the then Northern region in **R. Ekechukwu Vs. Commissioner of Police 1966 NNLR 96** on the interpretation to place on Sections 216 and 217 of the Criminal Procedure Code. The court, inter-alia, held at 99, 101-102 of the report as follows:

> ***"The next issue is whether the appellant could, in law, have been convicted under Section 319A of the Penal Code by virtue of Sections 216 and 217 of the Criminal Procedure Code ……***
>
> ***So far as we are aware there is only one reported case in which the effect of Section 217 was raised. This was in the Supreme Court in Okwuwa Vs. The Queen 1965 N.M.L.R. 53. But the court expressly decided the issue under another section and observed that section 217 'raises difficult questions' and hoped 'that the law officers will review section 217'……...***
>
> ***The Indian courts have held that where there has been a conviction by virtue of Section 237 an appeal court will apply***

Section 232 and satisfy itself that the appellant has not been misled in his defence by the absence of the charge; vide Mallu Gope Vs. Emperor A 1929 P. 712.

We follow these Indian authorities and think that the position in Northern Nigeria may be stated as follows. In general, if, during the course of a trial, there is evidence of facts to prove an offence with which the accused person is not charged the court should frame a new charge under Section 208 of the Criminal Procedure Code and comply with that Section and the relevant sections which follow. The Court may, however, apply Section 217 to convict of an offence with which the accused is not charged provided (1) it had been doubtful which of several different offences the facts which could be proved would constitute and (2) such doubt applied only to the law and not to the facts; that is to say the facts charged must have given the accused person notice of the offence with which he is to be convicted. If there is an appeal against a conviction made by virtue of Section 217 the appeal court will apply Section 222 and if it considers that the appellant was misled in his defence by the absence of a charge and a failure of justice has been occasioned it will either quash the conviction or order a retrial.

We have already said that a charge of criminal breach of trust gave the appellant no notice of the ingredients of the offence of unlawful possession. It follows, in our view, that the appellant was misled in his defence and a failure of justice was occasioned. We would add that, in any event, we do not think in the case before us there was doubt, when the charge was framed, as to which of several offences the facts, if proved, would constitute." (Underlining supplied for emphasis).

I adopt the forgoing entirely.

My lords, in the instant case none of the two conditions which justify

A a trial court's invocation of Sections 216 and 217 of the CPC to convict an accused are evident. The trial and ultimate conviction and sentence of the appellant is consequent upon the leave sought and obtained by the prosecuting counsel in the chambers of the Benue State Attorney General
B Pursuant to rule 3(2) of the Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules 1970. In support of respondent's application for the leave are the names of the accused persons including that of the appellant, the witnesses to testify at the trial as well as the proof of
C evidence the witnesses are to give at trial. The respondent cannot be heard to argue that it has any doubt as to which offence the facts against the appellant, if proved, would constitute. In exhibit B, the only evidence that seems to avail the respondent, the appellant appears to confess to agreeing
D to commit armed robbery generally and not in relation to the specific robberies contained in the 4th and 5th charge. Nothing in the evidence on record suggests in the least that he was a party to the two robberies under the 4th and 5th heads of charge. The respondent, in the face of these facts, cannot
E also be heard to say that it is in doubt, were it to be taken that appellant's confession in exhibit B relates to the robberies in the 4th and 5th charge, and it is not, as to what law provides for the offence the appellant is to be charged. I am of the firm and considered view that given the facts on which the
F appellant is charged he did not have the necessary notice of the offence with which he is convicted. It is, therefore, reasonable to accept the suggestion of his being misled in his defence and conclude that a failure of justice has indeed been occasioned.

G Both courts, I must finally say, wrongly relied on Section 5(b) of the Armed Robbery (Special Provisions) Act to convict the appellant on the basis of exhibit B which they accept as sufficient proof of conspiracy against the appellant. That conclusion only avails the two courts where the
H fact of the offence of conspiracy is formally charged, pleaded to and established by evidence. Then and only then would Section 5(b) of the Robbery Act become operative. It is not the case here as earlier stated in this judgment.

I Finally, since the appellant herein has not been given sufficient notice of the offence he is convicted for to facilitate his defence, the

A conviction runs against Section 36(6) (a) of the 1999 Constitution and is, to that extent, null and void.

In sum I find the appeal meritorious, and allow same. Resultantly, the conviction and sentence of the appellant by the trial court as affirmed by
B the lower court is hereby set aside.

Musa Dattijo Muhammad,
Justice, Supreme Court

C **BATA OGUNBIYI, JSC:** I have had the privilege of reading in draft the lead judgment of my learned brother Musa Dattijo Muhammad, JSC. I agree entirely that the concurrent findings of the lower courts are perverse and have occasioned a gross miscarriage of justice against the appellant,
D and should be set aside.

It is noteworthy to state that this appeal poses an exception to the general state of the law that concurrent findings of fact by the two lower courts should not be disturbed ordinarily, unless a substantial error,
E apparent on the face of the record of proceeding is shown or when such findings are perverse and or have occasioned a miscarriage of justice. See the case of **Military Governor of Lagos State Vs. Adeyiga (2012) 5 NWLR (Pt. 1293) 291 at 334-336 and 338.**

F Also in the case of **Adenike Vs. State (2015) 7 NWLR (Pt. 1458) 237 at 286** for instance, this court had the following to say:

> ***"The Supreme Court will rarely upset the findings made***
> G ***by the trial court and affirmed by the Court of Appeal. This is so because such findings were arrived at after cross examination and observation of the witnesses by the trial judge. Such concurrent findings of the two***
> H ***courts below ought to carry much weight in an appeal court which did not have the opportunity or advantage of the trial court."***

See further the cases of **Shurumo Vs. State (2010) 19 NWLR (Pt. 1226)**
I **54 at 100 – 101; Sobakin Vs. State (1981) 5 SC 75 and Igwe Vs. State**

(1982) 9 SC 174.

For all intents and purposes, and following from the foregoing authorities therefore, the appeal court should be wary to interfere with findings of fact made by a trial court. See also the decisions in the cases of **Kodilinye Vs. Odu (1935) 2 WACA 336 and Yesufu Vs. Adama (2010) 5 NWLR (Pt. 1188) 522.**

From all indication, the decision in the appeal under consideration does not come within the foregoing authorities but is rather shown to be unreasonable because from the record before us, it is not supported by any evidence. It is also not a result of genuine exercise of a judicial discretion and hence has resulted in a gross miscarriage of justice.

It is borne on the record that the appellant herein did confess in general terms to an agreement to rob in his statement Exh. B. The question however is, was there any formal charge against the appellant for a specific offence of conspiracy to commit robbery, and which he had confessed to in Exhibit B?

At page 69 of the record for instance, the trial court had this to say:

> ***"As I have already noted, the offences the accused persons have confessed to, by the available evidence, are of conspiracy and armed robberies at Nos. 2 of Otia 'F' and Otia 'F' 7B. There is no specific charge of conspiracy which is the only point upon which the 2nd accused has confessed."***

Exhibit B, in a nutshell could be interpreted to mean that the appellant and his cohorts did conspire to form a robbery gang. The issue before us is nothing to do with belonging to a gang of armed robbers. To be guilty of conspiracy, you must have done something in furtherance of an illegal agreement. There must be evidence that transcends merely belonging to an armed robbery gang. There is no specific act done by the appellant as having been in furtherance of the agreement.

It is not show also that the appellant agreed that PW1 and PW2 should be robbed specifically. The prosecution must not only show that an

offence was committed but must proceed further and link the appellant to the commission of the offence thereof.

As rightly submitted by the appellant's counsel, Section 216 and 217 of the Criminal Procedure Code cannot provide or prove a canal which will allow the Court to convict the appellant of the offence of conspiracy to rob, which he was not at any time charged with. See the decision of this Court in **Ajayi Vs. The State (2013) 9 NWLR (Pt. 1360) 589 at 614 per Fabiyi, JSC.** The said sections supra, have no bearing to the case under consideration and I so hold. Hence the lower court erred and fell into the same trap as the trial court by convicting the appellant and thus occasioning a miscarriage of justice against him. In other words his constitutional right as provided by Section 36(1) of the Constitution 1999 (as amended) was violated with impunity.

The two lower courts were concurrent on a wrong conclusion and this court must interfere appropriately with their judgments in order to do justice to the appellant.

With the few words of mine and while adopting the comprehensive reasoning and conclusion arrived at in the lead judgment of my brother, as mine, I also will allow this appeal and set aside the concurrent judgments by the two lower courts. I further abide by all orders made in the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

KEKERE-EKUN, JSC: My learned brother, MUSA DATTIJO MUHAMMAD, JSC has obliged me with a draft of the judgment just delivered. I agree with the reasoning and conclusion that there is merit in the appeal and it should be allowed.

A confessional statement is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. See Section 28 of the Evidence Act, 2011. A confessional statement is sufficient to ground a conviction if proved to be voluntary, positive, unequivocal and amounts to an admission of guilt. *See* **Osetola & Anor. Vs. The State (2012) 6 SCNJ 329; Dogo Vs. The State**

(2013) 3 SCNJ 144; Nwachukwu Vs. The State (2002) 7 SCNJ 230.

The conundrum in this appeal is that in Exhibit B, the appellant's extra judicial statement, which was admitted in evidence as a confessional statement, the appellant did not actually confess to the commission of any robbery or conspiracy thereto. The statement, which can be found at page 12 of the record reads as follows:

> ***"That I am a motor mechanic. I know one Lawrence Achikwu and Olarewaju Akogwun, we are both living in the same area Zone H/B. sometime ago, about three week now, I, Emma and Olarewaju were moving towards deport road and we saw on the ground one pistol gun-along deport road then I told others that we should pick the gun and buy some bullets. We did not buy any bullets. After taking I did not learn how to shot the gun. In fact the gun is my own, I gave the gun to Emmanuel Adakole to keep for me. Emmanuel gave the gun to Adakole to keep for him. The operation they did at Otia Igbanomaje I did not share any money or with Lawrence and Olarewaju, John did not gave me any money. I have never gone out with Olarewaju and Emmanuel and I never to …….. thief it is a serious affair with the latest problem, I am not a member of any Armed Robbery gang. The boys I cannot tell whether they have robbery gang, I was operated since three weeks ago. So I cannot robber joined bad gang. That is all."***

The learned trial Judge found that there was no evidence linking the appellant with the charge of armed robbery in counts 4 and 5 of the charge but held that the offence of conspiracy was made out by the alleged confession in Exhibit B. with due respect to their lordships of the court below who affirmed this view, the finding was erroneous. There is nothing in Exhibit B to suggest that the appellant conspired with anyone to commit the armed robberies charged in counts 4 and 5. He was never charged with the offence of conspiracy which would have afforded him an opportunity to

plead thereto and to defend himself.

It is settled law that an accused person may be convicted of a lesser offence as disclosed by the evidence where the evidence is held to be insufficient to justify a conviction for the principal offence See: **Ahmed Sule (alias Eza) Vs. The State (2001) 12 SCNJ 1; Adeyemi Vs. The State (1991) 6 NWLR (Pt. 195) 1; Nwachukwu Vs. The State (1986) 2 NWLR (Pt. 25) 765.**

Section 216 of the Criminal Procedure Code (CPC) seeks to address a situation where several offences might have been committed and the prosecution is in doubt as to which of the possible offences the available facts, if proved, could constitute. It permits the prosecution to charge the accused with all or any one or more of such offences. He may also be charged in the alternative.

By Section 217 of the CPC, where the scenario in Section 216 occurs and the accused is charged with one of several possible offences but from the evidence the accused is shown to have committed a different offence, with which he could have been charged but was not, he may be convicted of that other offence although not charged with it.

In **Ezechukwu Vs. C.O.P (1996) NWLR 96 @ 101,** the Court of Appeal held that where Section 217 is to be relied upon in convicting an accused person of an offence with which he was not charged it must be apparent (1) that it had been doubtful which of several offences the facts which could be proved would constitute and (2) such doubt must apply only to the law and not to the fact; that is to say the fact charged must have given the accused person notice of the offence with which he is to be convicted. I think this view accords with sound reasoning and I adopt it.

Applying the guidelines enunciated above, I am of the view that the sections are inapplicable in the present circumstance. No link was established between the content of Exhibit B, (which the court solely relied on to convict the appellant) and any offence at all. In particular there is no link between Exhibit B and the offence of armed robbery charged in counts 4 and 5 of the charge.

I am in agreement with my learned brother in the lead judgment that the invocation of Sections 216 and 217 of the Criminal Procedure Code by

A the trial court as affirmed by the court below amounted to a breach of the appellant's fundamental right to fair hearing guaranteed by Section 36(6) of the 1999 Constitution, as amended and thereby occasioned a miscarriage of justice. For these reasons and for the more elaborate reasons well
B adumbrated in the lead judgment, I allow the appeal. The concurrent findings of the two lower courts are hereby set aside. I abide by the consequential orders made in the lead judgment.

Kudirat M. O. Kekere-Ekun
C ***Justice, Supreme Court***

EJEMBI EKO, JSC: I had the privilege of reading in draft the judgment just delivered in this appeal by my learned brother, MUSA DATTIJO
D MUHAMMAD, JSC. The judgment represents all that I need to say in this appeal.

I will only add a few words of mine. The facts are well stated in the said judgment.

E The narrow question is: whether by the resort of the courts below to Section 216 and 217 of the Criminal Procedure Code (CPC) Law of Benue State to convict, and affirm the conviction, of the appellant of the principal offence of conspiracy to commit armed robbery, which in the first place he
F was not charged with, the right of the appellant to fair hearing guaranteed by Section 36 of the Constitution had been violated?

When it is said that the accused is entitled to fair hearing, particularly the *audi alteram partem* component of it, it means, in the words of
G Ogundare J (as he then was) in **Akintemi & Ors Vs. Prof. Onwumechili & Anor (1981) 2 OY. S.H.C 457**that he **s**hould be adequately informed of the case against (him); and (he) must be given an opportunity of meeting such a case.

H The facts of this case may well be illustrative. Paul Usoro and two others were law students of University of Ife, Ile-Ife. They were executives of Law Student Society, Paul Usoro being the President. In that capacity they reported allegations of widespread examinations in all classes of the
I Faculty of Law, particularly part III. They gave names of students who would be able to give evidence. The Vice-Chancellor was minded to set up

the Adegbola Panel to investigate the allegation. Paul Usoro was the first to testify. None of the witnesses who testified received any charge or complaint against him nor was anyone of them asked to defend himself before the panel. Upon receiving the report of Adegbola Panel; the Vice-Chancellor, without showing the report to the students and calling on them to offer any explanation, issued a letter placing each of them on suspension immediately. On their application for an order of *certiorari* to issue, on the ground that their rights to fair hearing had been violated, their suspension and the offensive report were quashed.

The dictum of the Privy Council in Kandy Government of Malaya (1962) AC 322 further illustrates the importance of *audi alteram partem* in fair hearing. At page 337 of the report the law lords stated:

> **If the right to be heard is to be a real right which is worth anything, it must carry with it the right in the accused man to know the case which is made against him.**

The proof of evidence must contain the statements of witnesses to testify against him and any other evidential materials to be used against him in the bid of the prosecution to prove the allegation or the charge against him beyond reasonable doubt. This is what it means when it is said that the accused person must be "given a full opportunity of exculpating himself". Ademola CJN in **Adedeji Vs. Police Service Commission (1967) 1 All NLR 67; (1968) NMLR 102,** citing with approval **Kandy Vs. Government of Malaya (supra)** stated the law on this thus-

> **The accused person must know the name of his accuser and all what he said about him before it could be said that he was given a full opportunity of exculpating himself.**

Section 36 (6)(a) & (b) of the 1999 Constitution demand no less in the provisions to wit:

> **(6) Every person who is charged with a criminal offence shall be entitled to**

(a) to be informed promptly in the language that he understands and in detail of the nature of offence;

(b) to be given adequate time and facilities for the preparation of his defence.

The right conferred on the accused person by Section 36 (6)(a) & (b) of the Constitution is not a mere cosmetic or fanciful right, it is for real. In his book: Judicial Review of Administrative action, Prof. S.A. de Smith maintains, and I agree, that:

> **A person who is entitled to the protection afforded by the *audi alteram partem* rule must not only be given adequate opportunity to know the case he has to meet; he must also be given an adequate opportunity to answer it.**

That is the right, in the totality, violated in **Akintemi Vs. Prof. Onwumechili.** *See also* **Kandy Vs. Government of Malaya (supra); Adedeji Vs. Police Service Commission (supra).**

The issue thrown up in this case is whether Sections 216 and 217 of the Criminal Procedure Code (CPC) Law of Benue State have the potency to diminish the efficacy, purpose and intent of Section 36 (6)(a) and (b) of the Constitution? The CPC, particularly its provisions contained in Sections 216 and 217 thereof, are subordinate to any constitutional provisions. By virtue of Section 1 (1) and (3) of the Constitution, Section 36 (6)(a) and (b) of the Constitution shall override Sections 216 and 217 of the CPC if they are inconsistent with the provisions of Section 36 (6)(a) and (b) of the Constitution; and they are to the extent that they purport to enable and empower the court to convict an accused "person of the offence which he is shown to have committed although he was not charged with it". For instance, on a charge of house breaking or burglary it will be outrageous and most perverse for the court in, in the purported exercise of its discretion under Section 217 of the CPC, to convict the accused person for rape, if it appears from the evidence that he committed that offence "although he was

not charged with it". It may, though be different if the offence the accused person is convicted of is an element of the offence of the bigger offence he was charged with.

The very essence of *audi alteram partem* is that the accused person should not be misled in his defence by the absence of a charge which certainly potentiates failure of justice. Where, as in the instant case, the appellant is shown to have been misled in his defense by the absence of the charge of the offence he was convicted of, by the invocation of Section 217 of the CPC, and a miscarriage of justice has been occasioned thereby, the appellate court will intervene and quash the conviction and sentence. Section 217 of the CPC cannot be invoked, if I may borrow the analogy, by the court, like the umpire in a volleyball tournament, using the rules of soccer or football.

It appears to me that the prosecution, in this case, failed to prove any of the specific charges the appellant was alleged to have committed with others. The learned trial judge had thereafter looked into Exhibit B made by the appellant on 20th October, 2001 wherein the appellant had stated.

> **Sometimes a month ago, myself Olarewaju and Emmanuel were going through Deport Road and along the road we saw a gun, a short pistol. As we picked the pistol I gave it to Emmanuel Ogboji Emmanuel and Olarewaju are arrested as armed robbers.**
>
> **I told Emmanuel and Olarewaju that we should buy bullets so that we use it for armed robbery operation-**
>
> **I did not come to report to police because we want to use the gun for armed robbery with Olarewaju Ali Idankpo, Igoche Ojober, Abdulrahaman, Jibril and Emmanuel Ogboji**

This general conspiracy was not part of the specific charges the appellant faced or defended at his trial. He was not charged and he did not defend any

allegation on this general and non specific agreement to use the pistol for armed robbery operation. He was not notified that the facts he averred in Exhibit B shall form the basis of any criminal charge against him. Section 36 (6)(a) of the Constitution makes it obligatory that the prosecutor shall inform the accused person, as the appellant was, in detail of the nature of the offence. That is the function of the prosecutor. That function is not shared by the trial court or judge with the prosecutor. Sections 216 and 217 of the CPC do not, in my view, make the trial court or judge partake of the functions of the prosecutor. For purposes of *nemo judex in causa sua,* the trial court or judge cannot step into the arena to fish for charges to fix the accused person. The trial court or judge, whenever it or he steps into arena ceases thereby to be regarded as impartial.

I completely, therefore, concur with the judgment just delivered in this appeal by my learned brother, MUSA DATTIJO MUHAMMAD, JSC. I also allow the appeal, and consequently set aside the conviction and sentence of the appellant by the trial court as affirmed by the Court of Appeal.

Ejembi Eko
Justice, Supreme Court

1. MR. IRE MATTHEW OWURU
2. PEOPLES DEMOCRATIC PARTY
AND
1. HON. AGI MICHAEL ADIGWU
2. INDEPENDENT NATIONAL ELECTORAL COMMISSION

SC. 197/2016

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 23RD JUNE, 2017

BEFORE THEIR LORDSHIPS

WALTER S. NKANU ONNOGHEN	**CHIEF JUSTICE OF NIGERIA**
MUSA DATTIJO MUHAMMED	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

COURT: Adjudication – Need to do substantial rather than technical justice.

COURT: Court of Appeal – Duty to consider all issues submitted to it for consideration – Whether there is an exception thereto – The principle in ***Federal Ministry of Health and Anor Vs. Comet Shipping Agencies Ltd. (2009) 9 NWLR (Pt. 1145) 193***

COURT: Issues for determination – Failure to consider all issues formulated for determination – Where issues not considered are adjudged not to be relevant – Whether failure thereof does not amount to breach of fair hearing.

COURT: Judicial powers – S. 6 of the Constitution of Federal Republic of

Nigeria 1999 – Purpose – Whether intended to do justice to all manner of persons before the Court.

COURT: Perverse decision – Where court proceeds to determine whose name should be forwarded to INEC without first determining who won the primary election – Whether not proper approach – Whether decision liable to be set aside.

EVIDENCE: Unchallenged depositions – Where an averment in a counter affidavit is not challenged by filing a further affidavit – Whether such deposition is deemed accepted.

Issues for Determination

"1. Whether the court below was right in identifying only 2 (two) issues for determination out of the 10 (10) issues submitted by the appellants when the said two issues did not address all the complaints of the appellants and whether same did not amount to denial of fair hearing to the appellants.

2. Whether the court below having found that there was uncontroverted affidavit evidence that the 1st appellant won the Primary Election of the 2nd appellant could still rely on Exhibit E to declare the 1st respondent the winner and whether such finding is not perverse.

3. Whether having regard to Exhibits 6, 6A and 9 which all confirmed that the 1st appellant won the Primary Election, of the 2nd appellant, the court below was right in affirming the judgment of the trial court that the 1st respondent was the winner of the 2nd appellant's Primary Election."

Facts of the matter

The appeal is against the judgment of the Court of Appeal holding at Makurdi in Appeal No. CA/N/95/16 delivered on 15th day of December, 2015, dismissing the appeal of the appellants and upholding the judgment of the trial Federal High Court also sitting in Makurdi. The facts leading to this appeal are inter alia as follows:

> **By an originating summons filed on 25th March, 2015, the 1st respondent herein as plaintiff, presented two questions to the trial court for determination and sought the following reliefs against the defendants (now appellants and 2nd respondent:**
>
> **i.** ***A declaration that the plaintiff is the validly nominated candidate of the 2nd defendant to contest the April 11th, 2016 House of Assembly Election in Oju 11 State Constituency.***
>
> ***ii.*** ***A declaration that being the validly nominated candidate of the 2nd defendant to contest the April 11th, 2015 House of Assembly Election in Oju II name ought to have been forwarded to the 3rd defendant as the 2nd defendant's candidate to contest the April 11th, 2015 Oju II State Constituency.***
>
> ***iii.*** ***A declaration that the 1st defendant was not qualified to have contested at the State House of Assembly Primary Election of the 2nd defendant for Oju II State Constituency held 29th day of November, 2014 and or be returned as the winner of the said Primary Election.***
>
> ***iv.*** ***An order directing the defendants to recognize and deem the Plaintiff as the candidate of the 2nd defendant to contest the April 11th, 2015 House of Assembly Election in Oju II State Constituency.***

v. An order restraining the 3rd defendant from issuing a Certificate of Return to the 1st defendant in the event that the State Assembly Election scheduled to hold on April 11th, 2015 is held and the 2nd defendant wins in Oju II State Constituency before the determination of this suit.

vi. An order directing the 3rd defendant to issue a Certificate of Return to the plaintiff in the event that the State House of Assembly election scheduled to hold on April 11th, 2015 holds before the determination of this suit and the 2nd defendant wins in Oju II State Constituency."

The appellants as 1st and 2nd defendants flied their counter affidavits comprising of the following:

a. Counter affidavit of Mr. Ire Matthew Owuru
b. Affidavit of Edo Samuel Adamu (the Electoral Officer) who conducted the Primary Election with Mr. Barry Ogbaka.
c. Affidavit of Okpenge Friday Ogor (a delegate who voted at the Primary Election).
d. Affidavit of Okpe Joseph Enyi (a delegate who voted at the Primary Election).
e. Affidavit of Alobo Ode, the agent of the 1st defendant Parties also filed their respective addresses.

The case then proceeded to trial at the conclusion of which the learned trial Judge, in a judgment delivered on the 8th day of July 2015, granted the 1st respondent's relief numbers 1, 2 and 6 above, but refused the others. The appellants appeal to the Court of Appeal was not successful hence this further appeal to the Supreme Court.

Held: *(Unanimously allowing the appeal)*

1. *As a general rule, Court of Appeal is bound to consider all issues submitted to it for consideration except in the clearest of cases*

There is no doubt that the learned trial Judge, in entering judgment for the plaintiff (now 1st respondent) relied heavily on Exhibit $ (Electoral Guidelines for Primary Election 2014) of the 2nd appellant and Exhibit E (the result sheet signed by the Returning Officer). It follows that any issue on appeal which centres and considers the above position would do justice to the case. All other issues would be to my mind, mere embellishment. It is interesting to note that the minority judgment of the court below which the appellants accept as the correct position in this matter, also determined the appeal based on the two issues adopted by the majority decision.

May I state here that the grouse of the appellants in this issue is that the court below did not consider all the ten issues submitted to it but only chose two which according to the learned counsel for the appellants, did not fully address their grievances? It has nothing to do with the court formulating issues outside those presented by the parties. This must be noted. *(Pp 83 – 84 Paras G – B)*

Generally speaking, the Court of Appeal being an intermediate court has a duty to consider all issues placed before it by the parties for determination. The reason is to give the apex court the benefit of their view on all the issues should there be a further appeal to the Supreme Court. There is, however, an exception. In Federal Ministry of Health & Anor Vs. Comet Shipping Agencies Ltd. (2009) 9 NWLR (Pt. 1145) 193 at 220 this court held as follows:

> ***"In respect of the second issue of the parties, generally, it is settled that except in this court, all issues, ought and must be considered or dealt with by the intermediate court. In other words, unless or except in the clearest of cases an intermediate court such as the Court of Appeal, should endeavour to resolve or pronounce on all issues put before it."***

See also **Ifeanyichukwu (Osondu) Co. Ltd. Vs. Soleh Boneh Nig. Ltd (2000) 5 NWLR (Pt. 656) 322; Owodunni Vs. Registered Trustees of Celestial Church of Christ & 3 Ors (2000) 10 NWLR (Pt. 675) 315 at 326.** *(Pp 84 – 85 paras E – A)*

Per Onnoghen (CJN)

"Now, is this case within the exception granted above i.e. "in the clearest of cases"? Looking at the real issue in contest between the parties right from the trial court to the court below, which I had earlier set out in this judgment, it is clear that the two issues adopted by the court below capture the main issue in controversy. As I said earlier, the other issues were mere embellishments. It must be noted that in election matters, as observed by the court below, time is of the essence. Brevity is therefore the watch word. It does not leave room for multiplicity of issues. As observed by this court in Ugo Vs. Obiekwe & Anor (1989) 1 NWLR (Pt. 99) 566, multiplicity of issues tends to reduce most of them to trifles. Most appeals are won on a few cogent and substantial issues, well framed researched and presented rather than on numerous trifling slips.

It is therefore my view that failure to consider all the ten issues did not occasion any miscarriage of justice neither have the appellants shown how it adversely affected their case. Afterall, the minority judgment which is in their favour was based on the said two issues adopted in the majority judgment. There is nothing to show that appellants were denied fair hearing merely by not resolving all the ten issues. Where a judge or court fails to consider an issue adjudged not to be relevant or crucial to the determination of the case or appeal before the court the non-reference to it is not a denial of fair hearing and will not amount to miscarriage of justice. *See* Federal Ministry of Health & Anor Vs. Cornet Shipping Agencies Ltd (supra) at P. 222 Paras C-E.

The summary of all I have said above is that the court below did not err in deciding the appeal on issues one and two only as the

two issues captured the main issue in controversy between the parties, the outcome of the appeal notwithstanding. Issue one is thus resolved against the appellants." *(P 85 paras A – H)*

2. *Averments in the affidavit which are not challenged are deemed accepted*

Given the above scenario, it is my view that the 1st respondent shot himself in the foot when he failed to refute or challenge in a further affidavit in response to the 1st appellant's counter affidavit the weighty allegations against his supposed victory at the primary election. It must be noted that an affidavit evidence constitutes evidence and must be so constituted. Therefore any deposition made in an affidavit which is not challenged or controverted is deemed admitted. *See* Ajomale Vs. Yaduat (NO2) (1999) 5 NWLR (Pt. 191) 266; Magnusson Vs. Koiki (1993) 9 NWLR (Pt. 317) 287; Henry Stephens Engineering Ltd. Vs. Yakubu Nig. Ltd. (2009) 10 NWLR (Pt. 1149)Pg.416 and Tukur Vs. UBA (2013) 4 NWLR (Pt. 1343) 90.

The court below found as a fact that the 1st respondent failed to respond to critical facts or evidence contained in the counter affidavit of the 1st appellant. The lower court also found as a fact that the said failure was fatal to the case of the 1st respondent. However, the Court of Appeal went on to say that the uncontroverted depositions in the appellants' affidavit were 'besides the point' Reason" Because the issue before the court was not to determine who won the election but whose name ought to be forwarded to the 2nd respondent as 2nd appellant candidate based on the declaration contained in Exhibits E and F. *(Pp 90 – 91 paras H – E)*

Per Onnoghen (CJN)

"In my respectful view, this is where the error was committed by the court below. How could the court determine the name of the person who ought to have been forwarded to the 2nd respondent without first

and foremost deciding who won the primary election? This is much more demanding in view of the conflicting evidence adduced in the appellants' counter affidavit and the affidavit of the first respondent. Each contended that he won the primary election. It is my considered view that all the exhibits attached to both affidavits ought to, have been given due consideration before arriving at a decision and not to sheepishly follow the 2nd appellants' guidelines for the conduct of Primary Elections in 2014. This error made the court below to affirm the decision of the learned trial judge to adopt Exhibit E as the basis for entering judgment for the plaintiff (now 1st Respondent), without more.

There was nothing before the trial court to contradict the contents of the counter affidavit of the appellants that Exhibit E was conducted by BARRY AGBAKA who had earlier failed to sign the declaration of result sheet (Exhibit 9). Exhibits 6 and 6A were reports of independent observers i.e. INEC and the Police respectively. These corroborated the evidence of the appellants that the 1st appellant scored eleven (votes) against ten (10) votes scored by the 1st respondent. It is my view that the court below and indeed the trial court ought to have given these exhibits a dispassionate attention. Their failure to accord these exhibit due attention made their findings and conclusions perverse which indeed led to serious miscarriage of justice." *(Pp 91 – 92 Paras E – B)*

3. *Judicial powers are meant to do justice*

The powers granted the courts in Section 6 of the Constitution of the Federal Republic of Nigeria 1999, (as amended) are meant to be used to do justice to all manner of persons. Therefore, at all times, the courts must be vigilant to make sure that every person who comes to the Temple of Justice receives his due share. If the majority judgment of the Court of Appeal on this matter is allowed to stand, it would mean that the 1st appellant, whom the court below admitted won the primary election, would be denied of his electoral victory

just because the Returning Officer refused to sign the result sheet as directed by the appeal panel of the 2nd appellant when it forwarded the name of the 1st appellant to the 2nd respondent (INEC) there is nothing left to be decided in the cross appeal. *(P 92 paras C – E)*

Per kekere-Ekun (JSC)

"The suit at the trial court was instituted by way of originating summons with affidavits in support and in opposition thereto. Documents were attached to the affidavits and marked as Exhibits. In actions commenced by originating summons, the affidavits evidence takes the place of pleadings. The averments are on oath and are of the same evidential value as a witness statement on oath frontloaded in a suit commenced by writ of summons in which pleadings are filed. The counter affidavit serves as a statement of defence. Thus, every material averment in any affidavit filed in respect of an originating summons must be specifically denied by the adverse party otherwise the averments will stand unchallenged and will be deemed admitted. ***See*** **Inakoju Vs. Adeleke (2007) 4 NWLR (Pt. 1025) 423 @ 684-685 H-B; E-G; Ogoejeofo Vs. Ogoejeofo (2006) 3 NWLR (Pt. 966) 205; Egbuna Vs. Egbuna (1989) 2 NWLR (Pt. 106) 773.**

Similarly, where there are averments in a counter affidavit asserting a particular state of affairs which are not challenged by a further affidavit, such averments will be deemed admitted.

In the instant case, the 1st respondent, who was the plaintiff at the trial court failed to contradict the very serious allegations in the appellants counter affidavit of malpractice and irregularity in the conduct of the primary election particularity as it relates to the conduct of the returning officer, BARRY OGBAKA. The 1st respondent's case was further compounded by Exhibits 6 and 6A, reports of independent observers (INEC & the Police) which supported the averments in the appellant's counter affidavit.

Contrary to the majority opinion of the lower court, the failure to controvert crucial averments in the appellant's counter affidavit was a fundamental omission that was fatal to the 1st respondent's case. The only way the trial court could determine whose name ought to have been forwarded to the 2nd respondent was by first determining who won the primary election. In order to do so the court was bound to consider the entirety of the evidence before it." *(Pp 94 – 95 paras F – E)*

4. *Courts are enjoined to do substantial justice*

It has been said time and again by this court that courts must always strive to do substantial justice and avoid reliance on technicalities to truncate a party's case.

In the instant case, there was uncontroverted evidence of the tactics employed by BARRY OGBAKA, the Returning Officer in trying to frustrate the appellant's victory by refusing to sign the result sheet (Exhibit 9) knowing fully well that by the 2nd appellant's electoral Guidelines for Primary Election (Exhibit R), particularly Part VI Section 43(d) thereof, a result sheet not signed by the Returning Officer shall be invalid unless otherwise approved by the National Executive Committee on the recommendation of the National Working Committee of the party. To allow the inaction of the Returning Officer in the circumstances of this case to stand would encourage others to simply withhold their signatures from the primary election result sheets as a ploy to thwart the will of the people as expressed by the outcome of the election exercise and impose a candidate on them.

Weighing the evidence proffered by the appellants against the evidence of the 1st respondent, the scale preponderates in the appellant's favour in the absence of any specific response to the incriminating averments in the appellants' counter affidavit and the documentary evidence annexed thereto. Exhibit E relied upon by the 1st respondent was clearly discredited by the averments in the

counter affidavit and the corroborative evidence contained in Exhibits 6 and 6A. The court below erred in disregarding them.
(Pp 95 – 96 paras E – C)

Per Augie (JSC)

"This appeal must be allowed because to hold to the contrary would actually encourage and perpetuate malfeasance by electoral officers, whose duties involve the conduct of elections.

He said all there is to say in the lead judgment and it is clear from this sound reasoning in the lead judgment that the Court below lost the plot in its majority judgment when it affirmed the decision of the trial Court to adopt the Exhibit E as the basis for its judgment.

Apparently, the Court below, despite its earlier finding that the fire respondent's failure to respond to critical facts contained in the first appellant's Counter Affidavit was fatal to his case, proceeded to say that the uncontroverted depositions in the appellants' affidavit were beside the point. It is reason for saying so, and for affirming the decision of the trial Court in favour of the first respondent is that the issue before the Court was not to determine, who won the election, but whose name ought to be forwarded to the second respondent.

This is not like the metaphorical question of which came first Chicken or Egg? It is a clear case of putting the cart before the horse. How do you determine whose name ought to be forward to INEC without resolving the question of who actually won the election?

More so, in this case, where the two contenders each claimed they won the election. Bu the Court below in its majority judgment discountenanced Exhibits 6 & 6A. Reports of Independent observers, which corroborated the appellants' evidence that the first Appellant scored eleven votes, as against ten scored by the first respondent, and found in favour of the first respondent, which is unacceptable.

In my view, to allow the majority judgment of the Court below to stand would be to allow the Returning Officer, who refused to sign

the Result Sheet as directed by the second appellant's appeal panel, get away with malfeasance, and perpetuate a chain of such iniquity; as Politicians to scuttle elections because this Court had sanctioned same.*(Pp 96 – 97 paras F – E)*

5. *The import of S. 87 of the Electoral Act*
Section 87, Electoral Act, 2010, as amended, contains the rules for he disputed primary election. The salient portions of Section 87 of Act provide thus:

> ***"87 (1) A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants for all elective offices.***
>
> ***(2) The procedure for the nomination of candidates by political party for the various elective positions shall be by direct or indirect primaries.***
> ***(3) .....***
> ***(4) A political party that adopts the system of indirect primaries for the choice of its candidates shall adopt the procedure outlined below:***
> ***(a) ....***
> ***(b) ....***
> ***(c) in the case of nomination to the position of a candidate to the House of Assembly.***
> ***a political party shall, where it intends to sponsor candidates.***
> (i) ***Hold special congresses in the .....House of Assembly Constituency-,with delegates voting for each of the aspirant in the designated centre on specified dates; and***
> **(ii)** ***The aspirant with the highest number of***

> ***votes at the end of voting shall be declared the winner of the primaries of the party and the aspirants name shall be forwarded to the commission as the candidate of the party".***
>
> *(Pp 98 – 99 paras C – B)*

Per Eko (JSC)

"There is nothing ambiguous about these provisions. The lawyer, as it is presumed, knows the law. Even if the rogue Returning Officer, one BARRY OGBAKA, needed an interpreter in order to appreciate or understand the full import of Section 87 of the Electoral Act particularly sub-section (4)(c)(iii) thereof, certainly the ignorance of the law would not be an excuse for the learned counsel for the 1st respondent who, also an officer of the court in the Temple of Justice, should know better. I expect him to live above board like Caesar's wife.

I think I should remind the counsel to the 1st respondent that Rule 32(3) (j) & (k) of Professional Conduct for Legal Practitioners, 2007 provide thus:

> ***"32 (3) In appearing in his professional capacity before a Court or Tribunal, a Lawyer SHALL NOT***
>
> ***(j) promote a case which to his knowledge is false; or***
>
> ***(k) in any other way do or perform any act which may obviously amount to an abuse of the process of the Court or which is dishonourable and unworthy of all officer of the law charged as a lawyer with the duty of aiding in the administration of justice."***

I say no more. The Rule, above reproduced, speaks for itself."
(P 99 paras B – I)

Nigerian cases cited in this Judgment

Adigun Vs. AG. Oyo State (1987) 1 NWLR (Pt. 53 678;
African International Bank Ltd Vs. Akpan Udoedehe (2012) 43 WRN 26;
AIB Ltd Vs. IDS Ltd.
Ajomale Vs. Yaduat (MO2) (1999) 5 MWLR (Pt. 191) 266;
Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 227;
Dekit Construction Co. Ltd. Vs. Adebayo (2010) 200 WRN 153;
Egbuna Vs. Egbuna (1989) 2 NWLR (Pt. 106) 773;
Federal Ministry of Health & Anor Vs. Comet Shipping Agencies Ltd. (2009) 9 NWLR (Pt. 1145) 193;
Foda Vs. Sule (1994) 3 NWLR (Pt. 332) 257;
Garba Vs. Mohammed (2016) 16 NWLR (Pt. 1537) 114;
Gbilere Vs. Adingi (2014) 16 NWLR (Pt. 1433) 394;
Henry Stephens Engineering Ltd. Vs. Yakubu Nig. Ltd. (2009) 10 NWLR (Pt. 1149) 416;
Ifeanyichukwu (Osondu) Co. Ltd. Vs. Soleh Boneh Nig. Ltd (2000) 5 NWLR (Pt. 656) 322;
Inakoju Vs. Adeleke (2007) 4 NWLR (Pt. 1025) 423;
Magnusson Vs. Koiki (1993) 9 NWLR (Pt. 317) 287;
NBN Vs. Alakija (1978) 9-10 SC 59;
Neka B.B.B. Menu Vs. ACB Ltd (20004) 16 WRN 1;
Nwosu Vs. Isesa (1990) 2 NWLR (Pt. 136) 688;
Ogoejeofo Vs. Ogoejeofo (2006) 3 NWLR (Pt. 966) 205;
Oro Vs. Falade (1995) 5 NWLR (Pt. 396);
Owodunni Vs. Registered Trustees of Celestial Church of Christ & 3 Ors (2000) 10 NWLR (Pt. 675) 315;
R-Benkay Nig. Ltd Vs. Cadbury (2012) 39 WRN 1;
Sanusi Vs. Smith (2009) 18 NWLR (Pt. 1173) 330;
Tukur Vs. UBA (2013) 4 NWLR (Pt. 1343) 90; and

A *Ugo Vs. Obiekwe & Anor (1989) 1 NWLR (Pt. 99) 566.*

Nigerian statutes cited in this Judgment

The Evidence Act 2011 Section 116;

The Electoral Act, 2010 Section 31(3); and

B *The Electoral Act 2010 Section 87 (4) (c) (11).*

Representations

Dr. J. Y. Musa for appellant with him are **Messrs E. E. Eko; J. O. Musa**

C **and G. I. Didi**

Henry A. Iyanya (Esq.), for 1st respondent with him are **Messrs Desmond Yamah; C. Iloeje; K. Ozo-Enemmo; S. O. Obuo and M. Moses**

M. Adetunbi (Esq.), for 2nd respondent with **Barbara J. Onwubiko**

D

NKANU ONNOGHEN, CJN (Delivering the Lead Judgment): The appeal is against the judgment of the Court of Appeal holding at Makurdi in appeal No. CA/N/95/16 delivered on 15th day of December, 2015,

E dismissing the appeal of the appellants and upholding the judgment of the trial Federal High Court also sitting in Makurdi. The facts leading to this appeal are inter alia as follows:

F **By an originating summons filed on 25th March, 2015, the 1st respondent herein as plaintiff, presented two questions to the trial court for determination and sought the following reliefs against the defendants (now appellants**

G **and 2nd respondent:**

i. ***A declaration that the plaintiff is the validly nominated candidate of the 2nd defendant to contest the April 11th, 2016 House of Assembly Election in Oju***

H ***11 State Constituency.***

ii. ***A declaration that being the validly nominated candidate of the 2nd defendant to contest the April 11th,***

I ***2015 House of Assembly Election in Oju 11 name***

A ***ought to have been forwarded to the 3rd defendant as the 2nd defendant's candidate to contest the April 11th, 2015 Oju 11 State Constituency.***

B ***iii. A declaration that the 1st defendant was not qualified to have contested at the State House of Assembly Primary Election of the 2nd defendant for Oju 11 State Constituency held 29th day of November, 2014 and or***
C ***be returned as the winner of the said Primary Election.***

iv. An order directing the defendants to recognize and
D ***deem the Plaintiff as the candidate of the 2nd defendant to contest the April 11th, 2015 House of Assembly Election in Oju State Constituency.***

E ***v. An order restraining the 3rd defendant from issuing a Certificate of Return to the 1st defendant in the event that the State Assembly Election scheduled to hold on April 11th, 2015 is held and the 2nd defendant wins in***
F ***Oju 11 State Constituency before the determination of this suit.***

vi. An order directing the 3rd defendant to issue a
G ***Certificate of Return to the plaintiff in the event that the State House of Assembly election scheduled to hold on April 11th, 2015 holds before the determination of this suit and the 2nd defendant wins***
H ***in Oju 11 State Constituency."***

The appellants as 1st and 2nd defendants flied their counter affidavits comprising of the following:

I

A

a. Counter affidavit of Mr. Ire Matthew Owuru
b. Affidavit of Edo Samuel Adamu (the Electoral Officer) who conducted the Primary Election with
B **Mr. Barry Ogbaka.**
c. Affidavit of Okpenge Friday Ogor (a delegate who voted at the Primary Election).
d. Affidavit of Okpe Joseph Enyi (a delegate who voted
C **at the Primary Election).**
e. Affidavit of Alobo Ode, the agent of the 1st defendant

Parties also filed their respective addresses.

D The case then proceeded to trial at the conclusion of which the learned trial Judge, I a judgment delivered on the 8th day of July 2015, granted the 1st respondent's relief numbers 1, 2 and 6 above, but refused.

On 29th March, 2017, when this appeal was heard parties identified,
E adopted and relied on their respective briefs of argument. In the appellants' brief settled by All **WOMBO, ESQ** and **DR. J. Y MUSA** which was filed on 20th February 2017, three issues have been distilled for determination arising from the seven grounds of appeal filed. The three issues are as hereunder stated:

F

"1. Whether the court below was right in identifying only 2 (two) issues for determination out of the 10 (10) issues submitted by the appellants when the said two
G ***issues did not address all the complaints of the appellants and whether same did not amount to denial of fair hearing to the appellants.***

H ***2. Whether the court below having found that there was uncontroverted affidavit evidence that the 1st appellant won the Primary Election of the 2nd appellant could still rely on Exhibit E to declare the 1st***
I ***respondent the winner and whether such finding is not perverse.***

A
3. Whether having regard to Exhibits 6, 6A and 9 which all confirmed that the 1st appellant won the Primary Election, of the 2nd appellant, the court below was right in affirming the judgment of the trial court that
B
the 1st respondent was the winner of the 2nd appellant's Primary Election."

The first respondent has also formulated three similar issues for
C determination in the brief filed by **HENRY A IYANG ESQ.** leading others the issues are couched differently as follows:

"1. ***Whether the issues not considered by the lower court***
D
are material or crucial in the circumstance of this case, to the determination of the issue in contention between the parties.

E
2. Whether the uncontroverted deposition in the 1st appellant's affidavit before the trial court are material to the issues in contention between the parties before the trial court.

F

3. Whether Exhibit 6, 6A and 9 are valid and relevant to the determination of issue in contention between the parties before the trial court."

G

It was however, the view of **MUSA BAU ADE, ESQ,** of Counsel for the 2nd respondent that only two issues are germane for the determination of the appeal. The two issues as contained in the brief filed on 10/3/17 are really
H the same as those distilled by the appellants and 1st respondent. I do not therefore intend to reproduce them I shall determine this appeal based on the three issues submitted by the appellants and the 1st respondent. I intend to resolve issue they speak the same language.

I On the first issue, it is the submission of learned counsel for

appellants that although the two issues identified by the court below were part of the ten issues submitted by appellants they did not cover all the contentions and grievances which the appellants argued before the court below. It is his contention that an intermediate court not being the final court in the adjudicatory system, must consider all the issues presented before it except where one issue would determine the appeal, such as issue of jurisdiction. According to him, the two issues which the court below considered are not issues of jurisdiction and did not address the other contending issues raised by the appellants and thus, there was a denial of the right of fair hearing of the appellants, relying on **Oro Vs. Falade (1995) 5 NWLR (Pt. 396) at 402; Garba Vs. Mohammed (2016) 16 NWLR (Pt. 1537) 114 at 162; Foda Vs. Sule (1994) 3 NWLR (Pt. 332) 257 AT 282 Sanusi Vs. Smith (2009) 18 NWLR (Pt. 1173) 330 at 356.**

Learned Counsel concluded that the failure to consider all the issues led to miscarriage of justice against the appellant relying on the case of **Adigun Vs. AG. Oyo State (1987) 1 NWLR (Pt. 53 678 at 721.** Learned Counsel then urged the court to resolve the issue in favour of the appellants and allow the appeal.

On his part, learned Counsel for the 1st respondent referred the court to page 758 of the record where the lower court held that most of the issues formulated by the appellants are only suitable for academic exercise to which the courts are not favourably disposed and that the justice of the case would be met based only on issues one and two as formulated by the appellants. He thus submitted that the decision of the lower court cannot be faulted in view of the decision f this court in **African International Bank Ltd Vs. Akpan Udoedehe (2012) 43 WRN 26.**

It was a further submission of learned counsel that although the Court of Appeal, being an intermediate court ought to endavour to pronounce on all issues before it, there are exceptions, referring to **AIB Ltd Vs. IDS Ltd (supra).** According to learned counsel it is not the law, as argued by the learned counsel for the appellants, that it is only when issue of jurisdiction is involved that the lower court can ignore other issues. He further opined that appellants failed to show that the issues not so considered are material or substantial in the circumstance of the appeal. He

urged the court to resolve the issue in favour of the 1st respondent.

It seems to me most appropriate at this juncture, to identify the main complaint and real controversy between the parties both at the trial court and at the court below in order to be able to do justice to the issue at hand. At page 410 of the record, the learned trial judge identified the main dispute between the parties as follows:

> ***"While the plaintiff claims he scored 11 votes against the 10 scored by the 1st defendant, the 1st defendant claims he scored 11 votes against the 10 of the plaintiff."***

The court below agreed with the learned trial judge as to the subject matter of the case between the parties in the following words, contained at pages 676-768 of the record thus:

> ***"As rightly submitted by the learned counsel to the appellants in their reply brief, the kernel of the forgoing claims borders on who between the 1st appellant and the 1st respondent won or did not win the Primary Election conduct (sic) 29th November, 2014 ..... The bottom line of the instant claims is for the court to declare that it was he the 1st respondent as opposed to the 1st appellant that won the Primary Election in issue."***

There is no doubt that the learned trial Judge, in entering judgment for the plaintiff (now 1st respondent) relied heavily on Exhibit $ (Electoral Guidelines for Primary Election 2014) of the 2nd appellant and Exhibit E (the result sheet signed by the Returning Officer). It follows that any issue on appeal which centres and considers the above position would do justice to the case. All other issues would be to my mind, mere embellishment. It is interesting to role that the minority judgment of the court below which the appellants accept as the correct position in this matter, also determined the appeal based on the two issues adopted by the majority decision.

May I state here that the grouse of the appellants in this issue is that the court below did not consider all the ten issues submitted to it but only chose two which according to the learned counsel for the appellants, did not fully address their grievances? It has nothing to do with the court formulating issues outside those presented by the parties. This must be noted.

In selecting only two issues for the determination of the appeal, the court below at page 758 of the record, gave us reason the following:

> ***"Bearing in mind the nature of election matters wherein time and brevity is of the essence, there is little or no room for proliferation of issues as is evident in the issues as donated for determination by the appellant. Most of the issues are suitable are for academic exercise to which the courts are not favourably disposed to. I think and I so hold that the justice of this appeal can be met based only on issues one and two as fathomed by the appellants."***

Generally speaking, the Court of Appeal being an intermediate court has a duty to consider all issues placed before it by the parties for determination. The reason is to give the apex court the benefit of their view on all the issues should there be a further appeal to the Supreme Court. There is, however, an exception. In Federal Ministry of **Health & Anor Vs. Comet Shipping Agencies Ltd. (2009) 9 NWLR (Pt. 1145) 193 at 220** this court held as follows:

> ***"In respect of the second issue of the parties, generally, it is settled that except in this court, all issues, ought and must be considered or dealt with by the intermediate court. In other words, unless or except in the clearest of cases an intermediate court such as the Court of Appeal, should endeavour to resolve or pronounce on all issues put before it."***

See also **Ifeanyichukwu (Osondu) Co. Ltd. Vs. Soleh boneh Nig. Ltd (2000) 5 NWLR (Pt. 556) 322; Owodunmi Vs. Registered Trustees of Celestial Church of Christ & 3 Ors (2000) 10 NWLR (Pt. 675) 315 at 326.**

Now, is this case within the exception granted above i.e. "in the clearest of cases"? Looking at the real issue in contest between the parties right from the trial court to the court below, which I had earlier set out in this judgment, it is clear that the two issues adopted by the court below capture the main issue in controversy. As I aid earlier, the other issues were mere embellishments. It must be noted that in election matters, as observed by the court below, time is of the essence. Brevity is therefore the watch word. It does not leave room for multiplicity of issues. As observed by this court in **Ugo Vs. Obiekwe & Anor (1989) 1 NWLR (Pt. 99) 566,** multiplicity of issues tends to reduce most of hem to trifles. Most appeals are won on a few cogent and substantial issues, well framed researched and presented rather than on numerous trifling slips.

It is therefore my view that failure to consider all the ten issues did not occasion any miscarriage of justice neither have the appellants show how it adversely affected their case. Afterall, the minority judgment which is in their favour was based on the said two issues adopted in the majority judgment. There is nothing to show that appellants were denied fair hearing merely by not resolving all the ten issues. Where a judge or court fails to consider an issue adjudged not to be relevant or crucial to the determination of the case or appeal before the court the non-reference to it is not a denial of fair hearing and will not amount to miscarriage of justice. *See* **Federal Ministry of Health & Anor Vs. Cornet Shipping Agencies Ltd (supra) at P. 222 Paras C-E.**

The summary of all I have said above is that the court below did not err in deciding the appeal on issues one and two only as the two issues captured the main issue in controversy between the parties, the outcome of the appeal notwithstanding. Issue one is thus resolve against the appellants.

As I hinted earlier, I shall determine issues two and three together.

On issue two, learned counsel for the appellants referred to the judgment of the court below from page 772 of the record which he quoted in-extenso and made the following deductions:

A
1. ***That the court below admitted that the affidavit of Samuel Edo Adamu (The Electoral Officer at the Primary Election) was un-challenged.***

B
2. ***That the court below admitted in the majority judgment that the effect of an unchallenged affidavit is that it is deemed admitted.***

C
3. ***That paragraph 6 of the uncontroverted affidavit of Samuel Edo Adamu shows that the 1st appellant won the primaries.***

D
4. ***The court below admitted that the affidavit of Samuel Edo Adamu to the effect that Barry Ogbaka was intent on frustrating the outcome of the Primary Election was unchallenged and erroneously went on to say***
E ***that "....but that is beside the point."***

Accordingly, learned counsel submitted that the foregoing shows that appellants had rebutted the presumption of correctness and regularity of
F Exhibit E (Election Result) which the court below relied upon to affirm the judgment of the learned trial Judge that the 1st respondent was the winner of the Primary Election. He opined that it was therefore wrong for the court below to say that ".... but that is beside the point" because that is the main
G and cardinal point. It is his further submission that the finding of the lower court to the effect that the provision of Exhibit R are mandatory and went ahead to give effect to Exhibit E on the basis that Exhibit R permits only the Returning Officer to sign Primary Election result was in error contending
H that Exhibit R is subject to Section 87 (4) (c) (11) of the Electoral Act 2010 as amended relying on the case of **Gbilere Vs. Adingi (2014) 16 NWLR (Pt. 1433) 394 at 428 Paras B-E; Amaechi Vs. INEC (2008) 5 NWLR (Pt. 1080) 227 at 315-316 and 324 Paras B-C.**

I Finally on the issue, learned counsel submitted that the concurrent findings of the lower courts are perverse and ought to be upturned. He urged

A the court to uphold the minority judgment of **OMOLEYE, JCA** as it is more in accord with the demands of justice in the case.

On the third issue, learned counsel for appellant submitted that both the 2nd respondent and the Police, the authors of Exhibits 6 and 6A
B respectively, are disinterested parties whose report on the Primary Election of the 2nd appellant ought to be taken as correct. Furthermore that as there was documentary conflict between the case of the plaintiff (now 1st respondent and the appellants, it was erroneous for the court below to
C affirm the judgment of the learned trial Judge without any oral evidence to resolve the conflict, referring to **NBN Vs. Alakija (1978) 9-10 SC 59 at 71; Nwosu Vs. Isesa (1990) 2 NWLR (Pt. 136) 688** and section 116 of the Evidence Act 2011.

D Learned counsel urged that Exhibit E, which the learned trial judge relied upon to declare the 1st respondent the winner of the Primary Election and which was also relief upon by the court below in affirming the judgment of the trial court, is in conflict with Exhibit 6, 6A and Exhibit 9
E and therefore, the judgment ought to be set aside on this ground.

On his part, learned counsel the 1st respondent submitted that the correct position of the law is that an opposing party will be obligated to challenge depositions in an affidavit only if they are relevant to the issue in
F contention between the parties that the cause of action was whose name ought to be forwarded to INEC and not who won the Primary Election. It is the claim of the plaintiff that determines the issue in contention between the parties he opined relying on the case of **Dekit Construction Co. Ltd. Vs.**
G **Adebayo (2010) 200 WRN 153 at 159.**

It is the contention of learned counsel that a challenge to result declared by a Returning Officer is a cause of action of its own and that is a weapon of attack and not a weapon of defence. He submitted that the
H depositions of various deponents to the affidavit attached to the appellants' counter affidavit to the effect the 1st appellant won the Primary Election are therefore immaterial and that the 1st respondent was not expected to respond to them. He stressed that this means that the 1st respondent admitted
I those depositions but that they were ignored because they were not relevant

to the issue in contention, referring to the cases of **Neka B.B.B. Menu Vs. ACB Ltd (20004) 16 WRN 1 at 12 and R-Benkay Nig. Ltd Vs. Cadbury (2012) 39 WRN 1 at 8.**

Learned counsel then urged the court to hold that the lower cour was right when it held that the uncontroverted deposition in the appellants affidavit were **"beside the ports"** because the issue before the court was not to determine who won the election but whose name ought to be forwarded to the 2nd respondent as 2nd appellant's candidate based on the declaration contained in Exhibits E and F. He also urged the court to resolve this issue in favour of the 1st respondent.

On the 3rd issue, learned counsel submitted that the appellants Exhibit B (INEC report), 6A (Police report) and 9 (Result sheet issued to 1st appellant) are irrelevant to the determination of the issue before the trial court. He stated further that the report of the 2nd respondent (Exhibit 6) cannot be useful to the appellant since it is not the 2nd respondent that conducted the primary election. He urged the court to resolve this issue in favour of the 1st respondent.

In resolving these two issues, I think it is wise to further and in a more detailed manner, determine the real issue in controversy between the parties at the trial court which gave birth to this appeal. I agree that it is the claim of the plaintiff that determines the cause of action between the parties in the 1st respondents' affidavit in support of his originating summons (as plaintiff at the trial court) paragraphs eleven, seventeen and forty-two ae instructive here. I shall reproduce them as follows:

> ***"11. That I know as a fact that upon the case of votes at the Primary Election, I polled a total number of Eleven (11) votes while the 1st defendant and Hon. Jarius Erube polled Ten (10) and Six (6) votes respectively hence I (the Plaintiff) was declared the winner of the Primary Election. A copy of the Result Sheet issued by the Primary Election Ad-hoc committee of the 2nd defendant that conduct the Primary Election is***

A ***attached hereto and marked as Exhibit E.***

17. That to my notification and utter dismay, when the 3rd defendant, in accordance with the provisions of
B ***section 31(3) of the Electoral Act, 2010 published the personal particulars of the 2nd defendants candidate received by it for the Oju II State Constituency, I saw that it was the 1st defendant whose personal***
C ***particulars were published as the 2nd defendants' candidate for Oju II State Constituency at the State Houses of Assembly Elections scheduled to hold on April, 2015.***

D

42. That I expected that at the end of the day my name would be restored as the 2nd defendants' candidate for the Oju II State Constituency come the April 11, 2015
E ***State Assembly Elections but my expectation was dashed when I saw the 3rd defendants' publication of its final list of House of Assembly candidates in Benue State still reflecting the 1st defendant's name."***

F

From the above paragraphs, it is crystal clear that there was a dispute as to who won the said primary election. The learned counsel for the 1st respondent argued that there was no such dispute but that the dispute was to
G whose name ought to be submitted to INEC (the 2nd respondent). For me there is no difference at all if any, it is like a difference between six and half a dozen. Maybe a lesson in semantics. Paragraphs 13, 14, 15, 24 and 35 of the 1st appellant's counter affidavit add credence to the fact that the dispute
H was as to who won the primaries. The paragraphs state as follows:

"13. That the result of the primary election was publicly announced by Samuel Edo Adamu, the Electoral
I ***Officer and the scores of aspirants were as follows:-***

A

(a) Mr. Ire Matthew Owuru - 11 voted
(b) Agi Michael Adigwu - 10 votes
(c) Dr. Jarius Erube - 6 votes

B

14. That I know as a fact that Exhibit E to the supporting affidavit to the originating summons is one of the electoral materials that Barry Ogbaka ran away with after the announcement of the result of the primary election at Obusa in Oju.

C

15. That Exhibit E to the supporting affidavit of the originating summons is not a product of primary election of 29th November, 2014 that took place in Obusa, Oju which I also contested.

D

24. That some officials of the 3rd defendant and the police among others attended and monitored the conduct of the said primary election and wrote reports to the effect that came was free, fair and credible and I emerged the winner of the said primary election. A certified true copy of the report of 3rd defendant's officials who monitored the primaries and that of the police are hereby exhibited as Exhibits 6 and 6A.

E

F

G

35. That Samuel Edo Adamu, the Electoral Officer entered the said scores on the result sheet, signed same but Barry Ogbaka, the Returning Officer left the venue without signing the said result. Find attached said result as Exhibit 9."

H

I

Given the above scenario, it is my view that the 1st respondent shot himself in the foot when he failed to refute or challenge in a further affidavit in response to the 1st appellant's counter affidavit the weighty allegations

against his supposed victory at the primary election. It must be noted that an affidavit evidence constitutes evidence and must be so constituted. Therefore any deposition made in an affidavit which is not challenged or controverted is deemed admitted. *See* **Ajomale Vs. Yaduat (MO2) (1999) 5 MWLR (Pt. 191) 266; Magnusson Vs. Koiki (1993) 9 NWLR (Pt. 317) 287; Henry Stephens Engineering Ltd. Vs. Yakubu Nig. Ltd. (2009) 10 NWLR (Pt. 1149) and Tukur Vs. UBA (2013) 4 NWLR (Pt. 1343) 90.**

The court below found as a fact that the 1st respondent failed to respond to critical facts or evidence contained in the counter affidavit of the 1st appellant. The lower court also found as a fact that the said failure was fatal to the case of the 1st respondent. However, the Court of Appeal went on to say that the uncontroverted depositions in the appellants' affidavit were 'besides the point' Reason" Because the issue before the court was not to determine who won the election but whose name ought to be forwarded to the 2nd respondent as 2nd appellant candidate based on the declaration contained in Exhibits E and F.

In my respectful view, this is where the error was committed by the court below. How could the court determine the name of the person who ought to have been forwarded to the 2nd respondent without first and foremost deciding who won the primary election? This is much more demanding in view of the conflicting evidence adduced in the appellants' counter affidavit and the affidavit of the first respondent. Each contended that he won the primary election. It is my considered view that all the exhibits attached to both affidavits ought to, have been given due consideration before arriving at a decision and not to sheepishly follow the 2nd appellants' guidelines for the conduct of Primary Elections in 2014. This error made the court below to affirm the decision of the learned trial judge to adopt Exhibit E as the basis for entering judgment for the plaintiff (now 1st Respondent), without more.

There was nothing before the trial court to contradict the contents of the counter affidavit of the appellants that Exhibit E was conducted by **BARRY AGBAKA** who had earlier failed to sign the declaration of result

sheet (Exhibit 9). Exhibits 6 and 6A were reports of independent observers i.e. INEC and the Police respectively. These corroborated the evidence of the appellants that the 1st appellant scored eleven (votes) against ten (10) votes scored by the 1st respondent. It is my view that the court below and indeed the trial court ought to have given these exhibits a dispassionate attention. Their failure to accord these exhibit due attention made their findings and conclusions perverse which indeed let to serious miscarriage of justice.

The powers granted the courts in Section 6 of the Constitution of the Federal Republic of Nigeria 1999, (as amended) are meant to be used to do justice to all manner of persons. Therefore, at all times, the courts must be vigilant to make sure that every person who comes to the Temple of Justice receives his due share. If the majority judgment of the Court of Appeal on this matter is allowed to stand, it would mean that the 1st appellant, whom the court below admitted won the primary election, would be denied of his electoral victory just because the Returning Officer refused to sign the result sheet as directed by the appeal panel of the 2nd appellant when it forwarded the name of the 1st appellant to the 2nd respondent (INEC) there is nothing left to be decided in the cross appeal.

Accordingly, I see no merit in the cross appeal. It is a ploy to waste the time of this court. It deserves an order of dismissal. I hereby order accordingly. I make no order as to costs.

Appeal allowed. Cross appeal dismissed.

Walter Samuel Nkanu Onnoghen
Chief Justice Of Nigeria

The courts below ought not to have closed their eyes against Exhibit 6, 6A and 9 which clearly titled the case in favour of the appellants.

It is on this note that I resolve issues two and three in favour of the appellants.

In conclusion, it is my view that this appeal is meritorious and ought to be allowed based on issues 2 and 3 resolved in favour of the appellants, I therefore make the following orders:

A

1. ***The judgment of the Court of Appeal in appeal No. CA/M/95/2015 delivered on the 15th day of December, 2015 is hereby set aside.***

B

2. ***I hereby affirm that 1st appellant was the rightful winner of the 2nd appellants' primary election held on the 29th day of November, 2014 having scored the***

C ***highest number of cotes cast at the Primary Election, that the forwarding of the name of the 1st appellant to the 2nd respondent by the 2nd appellant as its candidate for the Benue State House of Assembly, Oju 11 State***

D ***constituency election held on the 11th April, 2015 was proper and valid.***

3. ***Cost of this action is assessed at N100,000= in favour***

E ***of the appellants against the 1st respondent in the lower court and N500,000 also against the 1st respondent but in favour of appellants in this court.***

F Appeal allowed.

CROSS APPEAL

The 1st respondent in the main appeal filed a cross appeal vide his notice of

G cross appeal deemed properly filed and served on 1st day of February, 2017. The facts upon which the cross appeal is anchored are the same as those in the main appeal. It becomes unnecessary to reproduce them here. Three issues are distilled for determination as follows:

H

"1. Was the appellant's issue two before the lower court competently raised?

I ***2. Whether the lower court was right to hold in essence***

A ***that the State Electoral Appeal Panel sat to hear any complaint from the 1st appellant in view of paragraphs 3, 4, 7 and 8 of the 1st respondents' reply affidavit and Exhibit R1 and R2 before the trial court.***

B

3. Was the issue as to who won the Primary Election before the trial court for determination?"

C I have just decided the main appeal and a look at the three issues raised for determination in this cross appeal will reveal that they have been either fully or partially discussed and decided upon in the main appeal. Also, haven held in the main appeal that the 1st appellant won the primary election
D of the 2nd appellant for the Oju II State Constituency of Benue State held on 29th November, 2014 and that the 2nd appellant was right.

KEKERE-EKUN, (JSC): I have had the benefit of reading in advance the
E judgment of my learned brother, **WALTER SAMUEL NKANU ONNOGHEN, CIN** just delivered. I agree with the reasoning and conclusion that there is merit in this appeal and it deserves to be allowed.

F The suit at the trial court was instituted by way of originating summons with affidavits in support and in opposition thereto. Documents were attached to the affidavits and marked as Exhibits. In actions commenced by originating summons, the affidavits evidence takes the
G place of pleadings. The averments are on oath and are of the same evidential value as a witness statement on oath frontloaded in a suit commenced by writ of summons in which pleadings are filed. The counter affidavit serves as a statement of defence. Thus, every material averment in
H any affidavit filed in respect of an originating summons must be specifically denied by the adverse party otherwise the averments will stand unchallenged and will be deemed admitted. *See* **Inakoju Vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427 @ 684-685 H-B; E-G; Ogoejeofo Vs.**
I **Ogoejeofo (2006) 3 NWLR (Pt. 966) 205; Egbuna Vs. Egbuna (1989) 2**

NWLR (Pt. 106) 773.

Similarly, where there are averments in a counter affidavit asserting a particular state of affairs which are not challenged by a further affidavit, such averments will be deemed admitted.

In the instant case, the 1st respondent, who was the plaintiff at the trial court failed to contradict the very serious allegations in the appellants counter affidavit of malpractice and irregularity in the conduct of the primary election particularity as it relates to the conduct of the returning officer, **BARRY OGBAKA**. The 1st respondent's case was further compounded by Exhibits 6 and 6A, reports of independent observers (INEC & the Police) which supported the averments in the appellant's counter affidavit.

Contrary to the majority opinion of the lower court, the failure to controvert crucial averments in the appellant's counter affidavit was a fundamental omission that was fatal to the 1st respondent's case. The only way the trial court could determine whose name ought to have been forwarded to the 2nd respondent was by first determining who won the primary election. In order to do so the court was bound to consider the entirety of the evidence before it.

It has been said time and again by this court that courts must always strive to do substantial justice and avoid reliance on technicalities to truncate a party's case.

In the instant case, there was uncontroverted evidence of the tactic employed by **BARRY OGBAKA,** the Returning Officer in trying to frustrate the appellant's victory by refusing to sign the result sheet (Exhibit 9) knowing fully well that by the 2nd Appellant's Electoral Guidelines for Primary Election (Exhibit R), particularly Part VI Section 43(d) thereof, a result sheet not signed by the Returning Officer shall be invalid unless otherwise approved by the National Executive Committee on the recommendation of the National Working Committee of the party. To allow the inaction of the Returning Officer in the circumstances of this case to stand would encourage others to simply withhold their signatures from the

primary election result sheets as a ploy to thwart the will of the people as expressed by the outcome of the election exercise and impose a candidate on them.

Weighing the evidence proffered by the appellants against the evidence of the 1st respondent, the scale preponderates in the appellant's favour in the absence of any specific response to the incriminating averments in the appellants' counter affidavit and the documentary evidence annexed thereto. Exhibit E relied upon by the 1st respondent was clearly discredited by the averments in the counter affidavit and the corroborative evidence contained in Exhibits 6 and 6A. The court below erred in disregarding them.

For these and the more elaborate reasons stated in the lead judgment, I find this appeal to be meritorious. It is accordingly allowed.

With the success of the appeal there is nothing left to determine in the cross appeal. It is hereby dismissed. I abide by the order made on costs.

Appeal allowed.

Cross Appeal dismissed.

Kudirat M. O. Kekere-ekun
Justice, Supreme Court

ADAMU AUGIE, (JSC): I had privilege of reading in draft the lead judgment delivered by my learned brother **WALTER SAMUEL NKANU ONNOGHEN, CJN** and I agree with him that this Appeal must be allowed because to hold to the contrary would actually encourage and perpetuate malfeasance by electoral officers, whose duties involve the conduct of elections.

He said all there is to say in the lead judgment and it is clear from this sound reasoning in the lead judgment that the Court below lost the plot in its majority judgment when it affirmed the decision of the trial Court to adopt the **Exhibit E** as the basis for its judgment.

Apparently, the Court below, despite its earlier finding that the fire respondent's failure to respond to critical facts contained in the first appellant's Counter Affidavit was fatal to his case, proceeded to say that the

uncontroverted depositions in the appellants' affidavit were beside the point. It is reason for saying so, and for affirming the decision of the trial Court in favour of the first respondent is that the issue before the Court was not to determine, who won the election, but whose name ought to be forwarded to the second respondent.

This is not like the metaphorical question of which came first Chicken or Egg? It is a clear case of putting the cart before the horse. How do you determine whose name ought to be forward to **INEC** without resolving the question of who actually won the election?

More so, in this case, where the two contenders each claimed they won the election. Bu the Court below in its majority judgment discountenanced **Exhibits 6 & 6A.** Reports of Independent observers, which corroborated the appellants' evidence that the first Appellant scored eleven votes, as against ten scored by the first respondent, and found in favour of the first respondent, which is unacceptable.

In my view, to allow the majority judgment of the Court below to stand would be to allow the Returning Officer, who refused to sign the Result Sheet as directed by the second appellant's appeal panel, get away with malfeasance, and perpetuate a chain of such iniquity; as Politicians to scuttle elections because this Court had sanctioned same.

In the circumstances, and for the eloquent and incisive reasons stated by my learned brother, the Hon. Chief Justice of Nigeria, in the lead Judgment, which I adopt wholly as mine, I also allow this Appeal and dismiss the Cross-Appeal. I also make no order as cost.

Amina Adamu Augie
Justice, Supreme Court

EJEMBI EKO, (JSC): I read in draft the judgment just delivered by my lord, **WALTER SAMUEL NKANU ONNOGHEN,** Honourable, the Chief Justice of Nigeria.

The judgment had addressed and resolved all the salient issues in the appeal.

It represents my views in the appeal and I hereby adopt it, including

A all the Orders made therein.

The learned counsel for the 1st respondent had submitted that there was no dispute as to who won the primary election and that the only dispute
B was as to whose name ought to be submitted to INEC (the 2nd respondent). The audaciously preposterous argument is the best evidence of the impunity that has become the bane of the counterfeit democracy being practiced in all the political parties. The class of unemployed elites wearing
C the toga of politicians have turned politics to a game played by jungle brutes in which the end justifies the means even in the face of laid down rules.

Section 87, Electoral Act, 2010, as amended, contains the rules for he disputed primary election. The salient portions of Section 87 of Act provide
D thus:

> ***"87 (1) A political party seeking to nominate candidates for elections under this Act shall hold primaries for***
> E ***aspirants for all elective offices.***
> ***(2) The procedure for the nomination of candidates by political party for the various elective positions shall be by direct or indirect primaries.***
> F ***(3) .....***
> ***(4) A political party that adopts the system of indirect primaries for the choice of its candidates shall adopt the procedure outlined below:***
> G ***(a) ....***
> ***(b) ....***
> ***(c) in the case of nomination to the position of a candidate to the House of Assembly***
> H ***a political party shall, where it intends to sponsor candidates.***
> **(iii)** ***Hold special congresses in the .... House of Assembly Constituency -, with***
> I ***delegates voting for each of the aspirant***

A

in the designated centre on specified dates; and

(iv) ***The aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirants name shall be forwarded to the commission as the candidate of the party".***

B

C

There is nothing ambiguous about these provisions. The lawyer, as it is presumed, knows the law. Even if the rogue Returning Officer, one **BARRY OGBAKA,** needed an interpreter in order t appreciate or understand the full import of Section 87 of the Electoral Act particularly sub-section (4)(c)(iii) thereof, certainly the ignorance of the law would not be an excuse for the learned counsel for the 1st respondent who, also an officer of the court in the Temple of Justice, should know better. I expect him to live above board like Caesar's wife.

D

E

I think I should remind the counsel to the 1st respondent that Rule 32(3) (j) & (k) of Professional Conduct for Legal Practitioners, 2007 provide thus:

F

"32 ***(3)*** *In appearing in his professional capacity before a Court or Tribunal, a* ***Lawyer*** *SHALL NOT*

(j) promote a case which to his knowledge is false; or

G

(k) in any other way do or perform any act which may obviously amount to an abuse of the process of the Court or which is dishonourable and unworthy of all officer of the law charged as a lawyer with the duty of aiding in the administration of justice."

H

I say no more. The Rule, above reproduced, speaks for itself.

I

I allow the appeal. The cross-appeal lacking in substance is hereby dismissed. All Orders made in the Lead Judgment are hereby adopted by

MRS. ROSEMARY NGIGE
(Suing through her Attorney,
Mr. Chike Ngige)
AND
1. OLADELE DISU
2. FLOUR MILLS NIGERIA PLC
AND
1. ZENITH INTERNATIONAL BANK LIMITED
2. NIGERIA INTERNATIONAL BANK LIMITED
(Carrying on business under the name and style of Citibank)

SC. 375/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

JUDGMENT AND ORDERS: Final and interlocutory orders – Determination thereof – Relevant principles

JUDGMENT AND ORDERS: Final and interlocutory orders – Distinction thereof – Where the court finally determined the issue – Whether what is relevant is whether the court has finally determined the right of the parties – Principles in Alor Vs. Ngene (2007) 17 NWLR (pt 1062) 163

JUDGMENT AND ORDERS: Final order – Nature thereof – Where a matter is struck out for lack of jurisdiction – Whether an order thereof is a final order – The principles in Akinsanya vs. UBA Ltd.

JUDGMENT AND ORDERS: Final order – Nature thereof – Whether it finally determines the rights of the parties as to the particular issue disputed – The principles in Igunbor vs Afolabi.(2000) 11 NWLR (Pt 723)148

Issues for Determination

1 Could the trial court's ruling of June 1, 2006 be a final decision, as held by the Court of Appeal, when the ruling was merely incidentally made in the course of a garnishee proceedings which thereby could not have definitively determined the rights of the parties, and especially in view of the Supreme Court's decision in UBN Vs. Boney Marcus Industries Ltd (2005) 13 NWLR (Pt. 943) 654 that proceedings in between a garnishee order nisi and the making of an order absolute are interlocutory?

2 Is the Court of Appeal not in error in holding that the appellant's preliminary objection was an independent action from the garnishee proceedings, and therefore investing the respondents with locus standi to pursue their appeal to that court over otherwise garnishee proceedings, when the preliminary objection was founded upon and targeted against that respondent's motion to set aside the garnishee order nisi made by the trial court?

Facts of the matter

This is an appeal against the decision of the Court of Appeal, Lagos Division, delivered on November 2007. The facts on which the appeal hinges are hereinunder stated.

Pursuant to the personal and financial injuries the appellant sustained in an accident involving 2nd respondent's Mercedez Benz trailer negligently driven by the 1st respondent, the former's servant, the appellant sued the two at the Lagos State High Court, the trial court, where she obtained judgment in her favour. As execution was being levied in July 2002, 2nd respondent's vice chairman, the late Chief Rotimi Williams SAN, intervened and prevailed on appellant's counsel, Chief Emeka Ngige SAN, to suspend the execution. Consequent upon the intervention, the 2nd respondent paid five million naira out of the judgment sum and undertook to pay the balance within six months thereafter. Without waiving her right that had accrued from the judgment, the appellant granted Chief Rotimi Williams SAN his request that Guinea Insurance Plc, with whom the 2nd respondent appeared to have insured the lorry responsible for appellant's injuries, be sued with the view to recovering the insured sum and settling the judgment debt due to the appellant. Chief Rotimi Williams however failed to revert to the appellant on the issue. The appellant eventually sought and obtained a garnishee order nisi from the trial court against the Garnishee respondents.

A counsel from the Chambers of late Chief Rotimi Williams representing the 2nd respondent applied that the garnishee order nisi be set-aside on the ground that the appellant had a pending claim in the High Court on the same subject matter against Guinea Insurance Plc. In a ruling delivered on 1st June 2006, the trial court, on striking out the judgment debtors/respondents' application dated 12th January 2004, further restrained the Chambers of Chief Rotimi Williams from acting as counsel in the matter. The judgment debtors/respondents' appealed to the Court of Appeal against the ruling vide a notice filed on 27th June 2006. Appellant's preliminary objection challenging the competence of the appeal on the grounds that same was against the trial court's interlocutory decision, filed out of time and that the respondents thereto, not being parties to the garnishee proceedings at the trial court, require leave of

court to appeal against the trial court's ruling. The Court of Appeal, on 12th November 2007 dismissed appellant's objection having found that respondent's appeal was against the trial court's final decision, filed within time and not in respect of the garnishee order nisi. Aggrieved, the appellant has appealed against the decision of the Court of Appeal to the Supreme Court.

Held *(Unanimously dismissing the appeal)*

1. *A final order is one which finally determines the rights of the parties*
I am unable to agree with the learned appellant's counsel that the lower court in its foregoing summation has misapplied the principles enunciated by this court in a plethora of its decisions on the issue to the facts of the present case. In Igunbor Vs. Afolabi (supra), a case the lower court copiously reproduced in its judgment and drew from, this court particularly held thus:

> **"…Where the order made finally determines the rights of the parties as to the particular issue disputed, it is a final order even if arising from an interlocutory application." (Underlining supplied for emphasis).**
> *(P. 118 paras A – C)*

2. *A matter struck out for lack of jurisdiction is a final order*
Again in Akinsanya Vs. UBA Ltd (supra) another decision that guided the lower court, this court at page 296 of the report inter-alia held as follows:

> **"…if the court of first instance orders that a matter before it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all the issues arising in the cause or matter and there is no longer any issue between the parties in that cause or matter that remains for determination in that court" (Underlining supplied for emphasis)**

In the case at hand, the trial court held that the defendants/judgment debtors application seeking for its order to set aside the garnishee order nisi in favour of the judgment creditor as constituted, being incompetent, be struck out. The court further restrained counsel from Chief Rotimi Williams Chambers from being defendants/judgment debtor's counsel in the matter. The lower court's finding that both orders have finally determined the rights of parties to the cause is, on the authorities, unassailable. Appellant's insistence that it is otherwise is accordingly misconceived. The judgment debtors/respondents' application at the trial court might be interlocutory but not so the orders made on same in the light of the preliminary objection of the judgment creditor/respondent thereto. Having determined the rights of parties on the basis of the preliminary objection raised by the plaintiff/judgment creditor/objector against the defendant/judgment debtors' application that the decree nisi be set-aside, the ruling of the trial court appealed against is, therefore, final. This resolves the two issues against the appellant. *(Pp 118 – 119 paras – B)*

3. *How to determine that a decision is final or interlocutory*
The guiding factor in determining whether a decision is final or interlocutory is whether the decision or order finally determines the rights of the parties. Thus, a decision arising from interlocutory proceedings may be final or interlocutory depending on the effect of the order on the rights of the parties. *(P 120 paras F – G...)*

Per Kekere Ekun (JSC)

The principle was well stated by this court in **Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 @ 175 F – 176 A; 177 E-F** and **179 – 180H-A** as follows*:*

Per Kalgo, JSC @ 175F-G:
"In plethora of decided case, this court decided that in this country, if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is final but if it does not it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore, the determining factor is not whether the court has finally determined an issue but it is whether or not it has finally determine the rights of the parties in the claim before the parties (sic: court)".

At page 177 E-F"
"But where the rights or claims of the parties in any action have not been looked into and determined by the court, they are still pending and the parties can still go back to any court or indeed the same court to examine and decide on those rights".

At page 179 H 190 per Tobi, JSC:
"A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case; to the extent that the court becomes functus officio… in the context of the Judge, it means that the duty or function that the Judge was legally empowered and charged to perform, has been wholly accomplished and that the Judge has no further authority or legal competence to revisit the matter."
(Pp 120 – 121 paras G – G)

4. *A final judgment brings an end to the rights of the parties*
See also: **Igunbor Vs. Afolabi (2001) 11 NWLR (Pt. 723) 148 @ 165 D-G** per Karibi Whyte, JSC:

"A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order See Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318. The instant case as rightly submitted by appellant's counsel, is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order. An appeal on the said order is as of right under section 220(1) of the Constitution 1979".
(Underlining mine for emphasis) *(Pp 121 – 122 paras G – F)*

Per Kekere Ekun (JSC)

The issues decided by the trial court were whether the application to set aside garnishee proceedings was competent and whether the firm of Chief Rotimi Williams, SAN should be restrained from representing the 2nd defendant/judgment debtor/respondent, having previously represented the judgment creditor in other related proceedings pending before a different Judge of the same court.

The trial court held in respect of the first issue that the proper procedure to adopt in the circumstances of the case was by way of Stakeholder's Interpleader summons as provided by Order 43 of the High Court of Lagos State (Civil Procedure) Rules 2004 and Section 34(1) – (3) of the Sheriffs and Civil Process Act. On the representation by the chambers of Chief Rotimi Williams, the court restrained counsel from the chambers from representing the 2nd defendant/judgment debtor/respondent. In effect the court had finally determined the issue as to the competence of the application to set aside the garnishee proceedings and had also issued a restraining order against the Chambers of Chief Rotimi Williams. The court had thus become functus officio, as there could be no further recourse to it on these issues.

His Lordship, Galinje, JCA (as he then was) put it succinctly as follows at pages 89 90 of the record:

> **"The court below upheld the preliminary objection and the motion on notice dated 12th January 2004 was subsequently struck out. Clearly, the question of competency of the motion aforesaid, which was at the centre of the conflict between the parties in the notice of …** *(Pp 122 – 123 paras G – E)*

Per Augie (JSC)

This court in Balogun & Ors Vs. Alhaji Shifawu Ode & Ors. (2007) 1-2 SC 230; (2004) 4 NWLR (Pt. 1023) 1 per Mukhtar, JSC (as he then was) had restated the law on what a final decision is, and it means "a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it". A decision that renders the court functus officio is a final decision. In Agbogunleri Vs. Depo (2008) 1 SC (Pt. II) 189; (2008) 3 NWLR (Pt. 1074) 217, Onnoghen, JSC (as he then was) affirming this definition stated

"A decision of a court is said to be final when it finally disposes of the rights of the parties. For instance, if the judgment/decision/Order given by the court is such that the matter in controversy between the parties would not be brought back to the court for further adjudication, in such a case, such a decision or order is said to be final (underlining supplied for emphasis).

The motion for an order setting aside the garnishee order nisi having been struck out in its entirety the rights and obligations of the parties in the said proceedings had been entirely disposed of.

The application of the 2nd garnishee bank/respondent had, on 1st June, 2006, been finally and conclusively determined by the court presided by Atilade, J. The learned trial Judge, having discharged his office as regards that matter, would no longer have jurisdiction o adjudicate on the two orders made in the said proceedings. The entire proceedings, subject to any possible appeal to the Court of Appeal, had been finally determined. *(Pp 125 – 126 paras C – A)*

Nigerian cases cited in this judgment18

Adegbenro Vs. Akintola (1962) All NLR 442,
Afuwape Vs. Shodipe (1957) 2 FSC 62,
Agbogunleri Vs. Depo (2008) 1 SC (Pt. II) 189, 8, 9,
Akinsanya Vs. UBA Ltd,

A *Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163,*
Balogun & Ors Vs. Alhaji Shifawu Ode & Ors. (2007) 1-2 SC 230,
Falola Vs. UBN Plc,
Igunbor Vs. Afolabi (2001) 11 NWLR (Pt. 723) 148,
B *Iwuche Vs. Imo Broadcasting Corporation (2005) All FWLR (Pt 288) 1025,*
Ogolo Vs. Ogolo (2006) 10 WRN 92,
Ototole Vs. Oderinde (2004) 12 NWLR (Pt. 888) 574,
C *Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318,*
UBN Vs. Boney Marcus Industries Ltd (2005) 13 NWLR (Pt. 943) 654

Foreign Cases Cited in the judgment
D *Bozson Vs. Altrincham U.D.C (1903) 1 KB 547,*
Salman Vs. Warner (1891) 1 QB 734,

Nigerian status cited in the judgment
E *Constitution of Federal Republic of Nigeria 1999 S. 241 (1) (a)*

Representation
Chijioke Ikoli (SAN), with **O. Onyeka (Esq.),** for the Appellant.
F **E.O. Maduagwuna** with **O. E. Osunbade** for the 1st and 2nd Respondents.
G. C. Ugochukwu (Esq.), for the 1st Garnishee/Respondent.
Toyin Bashoru MS with **J. A. Adamu** for the 2nd Garnishee/Respondent.

G **MUSA DATTIJO MUHAMMAD, (JSC) (Delivering the lead judgment):** This is an appeal against the decision of the Court of Appeal, Lagos Division, delivered on November 2007. The facts on which the appeal hinges are hereinunder stated.
H Pursuant to the personal and financial injuries the appellant sustained in an accident involving 2nd respondent's Mercedez Benz trailer negligently driven by the 1st respondent, the former's servant, the appellant sued the two at the Lagos State High Court, the trial court, where she
I obtained judgment in her favour. As execution was being levied in July

2002, 2nd respondent's vice chairman, the late Chief Rotimi Williams SAN, intervened and prevailed on appellant's counsel, Chief Emeka Ngige SAN, to suspend the execution. Consequent upon the intervention, the 2nd respondent paid five million naira out of the judgment sum and undertook to pay the balance within six months thereafter. Without waiving her right that had accrued from the judgment, the appellant granted Chief Rotimi Williams SAN his request that Guinea Insurance Plc, with whom the 2nd respondent appeared to have insured the lorry responsible for appellant's injuries, be sued with the view to recovering the insured sum and settling the judgment debt due to the appellant. Chief Rotimi Williams however failed to revert to the appellant on the issue. The appellant eventually sought and obtained a garnishee order nisi from the trial court against the Garnishee respondents.

A counsel from the Chambers of late Chief Rotimi Williams representing the 2nd respondent applied that the garnishee order nisi be set-aside on the ground that the appellant had a pending claim in the High Court on the same subject matter against Guinea Insurance Plc. In a ruling delivered on 1st June 2006, the trial court, on striking out the judgment debtors/respondents' application dated 12th January 2004, further restrained the Chambers of Chief Rotimi Williams from acting as counsel in the matter. The judgment debtors/respondents' appealed to the Court of Appeal against the ruling vide a notice filed on 27th June 2006. Appellant's preliminary objection challenging the competence of the appeal on the grounds that same was against the trial court's interlocutory decision, filed out of time and that the respondents thereto, not being parties to the garnishee proceedings at the trial court, require leave of court to appeal against the trial court's ruling. The Court of Appeal, on 12th November 2007 dismissed appellant's objection having found that respondent's appeal was against the trial court's final decision, filed within time and not in respect of the garnishee order nisi. Aggrieved, the appellant has appealed against the decision of the Court of Appeal to the Supreme Court.

At the hearing of the appeal, parties having identified their briefs adopted and relied on same as their respective arguments in the appeal.

In the appellant's brief, settled by F. Chijioke Okoli SAN, the following two issues are presented for the determination of the appeal:

> **"(i) Could the trial court's ruling of June 1, 2006 be a final decision, as held by the Court of Appeal, when the ruling was merely incidentally made in the course of a garnishee proceedings which thereby could not have definitively determined the rights of the parties, and especially in view of the Supreme Court's decision in UBN Vs. Boney Marcus Industries Ltd (2005) 13 NWLR (Pt. 943) 654 that proceedings in between a garnishee order nisi and the making of an order absolute are interlocutory?**
>
> **(ii) Is the Court of Appeal not in error in holding that the appellant's preliminary objection was an independent action from the garnishee proceedings, and therefore investing the respondents with locus standi to pursue their appeal to that court over otherwise garnishee proceedings, when the preliminary objection was founded upon and targeted against that respondent's motion to set aside the garnishee order nisi made by the trial court?"**

The two issues distilled in the 1st and 2nd respondents' brief as having arisen for the determination of the appeal read:

> **"(a) Whether the trial court's ruling of 1st June, 2006 was a final decision and in view of the Supreme Court's decision in UBN Plc Vs. Boney Marcus Ind. Ltd (2005) 13 NWLR (Pt. 943) 654, where the court held that the proceedings in between a garnishee nisi and the making of an order absolute are interlocutory;**

and if this case was a proceeding in between a garnishee order nisi and an order absolute.

(b) Whether the Court of Appeal was in error when it held that the appellant/respondent's preliminary objection was an independent action from the garnishee proceedings and therefore investing the respondents with locus standi to pursue their appeal to that court over what were otherwise garnishee proceedings, when the preliminary objection was founded upon and targeted against the 2nd respondent's motion to set the garnishee order nisi made by the trial court."

At page 6 of the 1st garnishee/respondent's brief, the following two issues have been formulated for the determination of the appeal"

"i Whether the lower court was right when it held that the ruling of the Honourable F. O. Atilade, judge, of the High Court of Lagos State, delivered on the 1st day of June, 2006 is a final and not an interlocutory decision (Ground 1).

ii. Whether ground two of the appellant's notice of appeal is not incompetent, having not arisen from the decision of the lower court, delivered on the 12th day of November, 2007, now challenged in the present appeal (Ground 2)."

The 2nd garnishee/respondent's distilled a sole issue for the determination of the appellant. The issue reads:

"Whether or not the order made by the trial court and appealed against by the 1st & 2nd respondent/judgment

Debtor is a final order (decision in line with the established principles set down by this honourable court in Igunbor Vs. Afolabi (2001) 9 MJSC 191. (Grounds 1 & 2 of the notice of appeal".

The two issues distilled by the appellant shall be considered in the determination of the appeal.

The arguments of parties for and against the appeal are a rehash of their respective submissions at the lower court. In applying the principles outlined inter-alia in **Igunbor Vs. Afolabi (2001) FWLR (Pt. 59) 1284, UBN Vs. Boney Marcus Industries Ltd (2005) 13 NWLR (Pt. 943) 654 at 667** and **Ototole Vs. Oderinde (2004) 12 NWLR (Pt. 888) 574** in the light of Section 24(2)(a) of the Court of Appeal Act, learned appellant's counsel insists, the lower court is wrong in its finding at page 90 of the record of appeal that the trial court's decision at page 56 of the record is a final decision such that leave of court is not required for an appeal against the said decision. The judgment debtors/respondents' application, it is argued, is only struck out following the preliminary objection against same by the judgment creditor/objector. Any decision given in between garnishee order nisi and garnishee order absolute, it is further submitted, is interlocutory rather than the final decision the lower court wrongly found the trial court's ruling to be. The lower court's entire decision, learned counsel concludes, being perverse should be set-aside.

In response, learned judgment debtors/respondents' counsel submits that appellant's contentions and reliance on the various decisions of this court on the issues are misconceived. The Supreme Court, it is argued, has been consistent in applying the "nature of the order test" rather than the "nature of the proceedings test" in determining the finality or otherwise of a decision. Once the order made by the court determines the rights of the parties in the proceedings in issue, without necessarily determining the rights of the parties in the substantive suit, it is further submitted, the decision and/or order in that regard is final. Learned counsel supports his contention with the decisions of this court, inter-alia in **Ogolo Vs. Ogolo (2006) 10 WRN 92 at 119; Igunbor Vs. Afolabi (supra) Falola Vs. UBN**

Plc (supra) and **Akinsanya Vs. UBA Ltd.**

Further arguing the appeal, learned counsel submits that the trial court's order made while determining appellant's preliminary objection has two limbs. The first limb dwells on the wrong procedure invoked by the judgment debtors/respondents rather than the interpleader summons appropriate to their circumstance. The second limb, on the other hand, places a bar on the judgment debtors/respondents' right to counsel. The ruling, on account of both limbs, it is argued, has finally determined the rights of the parties in respect of the issues it considered. The notice of appeal at the lower court, it is submitted, is against this ruling of the trial court delivered on 1st June 2006 and not against the earlier garnishee order nisi of 22nd December 2003. Having sustained judgment creditor/appellant's preliminary objection and struck out the judgment debtors/respondents' application, learned respondents' counsel argues, it is patently clear that the issue of the competence of the judgment debtors/respondents' application of 12th January 2004 has finally been determined by the trial court. The trial court's decision appealed against the lower court is right, submits learned counsel, is final decision. On the whole, it is urged that the two issues be resolved against the appellant and that the appeal be dismissed.

In the briefs of the 1st and 2nd Garnishee/respondents settled by Godson C. Ugochukwu Esq and Adeniyi Adegbomire respectively both counsel stand in fierce support of the lower court's judgment. Beyond the authorities relied upon by the learned counsel to the 1st and 2nd respondents', the two counsel further cited more decisions of this court to buttress the principle in relation to the fundamental issue the appeal raises in urging that the unmeritorious appeal be dismissed.

Counsel on both sides agree, and rightly too, that the lower court is bound by the decisions of this court on all issues it considers which same issues had earlier been determined by the apex court. That is what the doctrine of stare decisis, as essentially codified in Section 287(1) of the 1999 Constitution, denotes. The narrow issue that arises in this appeal is indeed whether the lower court's decision on the finality of the trial court's ruling of 1st June 2006 is in conformity with what the Supreme Court held a

final decision or order, in contradistinction to an interlocutory one, to be.

The trial court's ruling on the plaintiff/judgment creditor's preliminary objection to the competence of the defendants'/judgment debtors' application for an order to set-aside the garnishee order nisi in favour of the former, see pages 26-27 of the record of appeal, contain two crucial orders. Firstly, the court held thus:

> **"The main thrust of the defendant's application dated the 12th January 2004 appears to me to be founded on their intention to bring to the notice of the court, the judgment of the court of the Honourable Justice Alogba in Suit No. LD/1799/2002; Roseline Ngige Vs. Guinea Insurance Plc., wherein the judgment of the court was delivered in favour of the claimant against the defendant Company, and to prevent a situation whereby the judgment creditor is allowed to proceed against the judgment debtor's assets in the 2nd Garnishee bank, which might have the consequence of overreaching the defendant.**
>
> **Having due regard to the relevance of the foregoing, I find that the more appropriate procedure for the defendant would have been to proceed by way of a stake holder's interpleader summons as provided under Order 43 of the High Court of Lagos State (Civil Procedure) Rules, 2004, and Section 34(1-3) of the Sheriffs and Civil Process Act.**
>
> **To the extent of the defendant/judgment debtor/ respondent's application's inconsistency with the above finding, I find that the application necessarily fails and is hereby struck out accordingly. Defendant to bring the proper application before the court."**

And further held as follows:

"On the second principal issue of the pending application wherein he contends that, it is improper in law for the counsel for the defendant/judgment debtor to hold its brief in this cause while it subsists as counsel for the judgment Credit/Applicant in Suit No: LD 1799/2002 ,……

I find no hesitation in restraining counsel from Chief Rotimi Williams Chambers from holding the brief of the defendant/judgment debtor/respondent in this cause".

It is in respect of the foregoing orders of the trial court that the defendants/judgment debtors appealed on 27th June 2006 to the lower court by their notice containing two grounds. In dismissing the plaintiff/judgment creditor's motion against the competence of the appeal before it, the lower court Per Galinje JCA (as he then was) firstly enthused at page 87 of the record as follows:

"In order to determine whether a decision is final or interlocutory the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. The proper test is therefore the one that does not look at the nature of the proceedings resulting in the order in question. In other words it is immaterial that the order made resulted from an interlocutory application or proceeding. The nature of the order made will determine the rights of the parties in the proceedings in issue and not whether the rights of the parties in the substantive action have been fully disposed of see Bozson Vs. Altrincham U.D.C (1903) 1 KB 547; Salman Vs. Warner (1891) 1 QB 734; Iwuche Vs. Imo Broadcasting Corporation (2005) All FWLR (Pt 288) 1025; Igunbor Vs. Afolabi (2001) FWLR (Pt. 59) 1284; Adegbenro Vs. Akintola (1962) All NLR 442, Afuwape Vs. Shodipe (1957) 2 FSC 62."

Having set out the matter in controversy between the parties pursuant to the plaintiff/judgment creditor's preliminary objection, vis-à-vis the defendants/judgment debtors' application as well as the decision thereon by the trial court, the lower court proceeded to apply the principle on the issue as enunciated in the various decisions of this court to the facts of the appeal before it, see page 89 of the record of appeal, as follows:

> **"…Clearly the question of competency of the motion aforesaid which was at the centre of the conflict between the parties in the notice of preliminary objection was finally determined in the ruling of 1st June 2006 in such a way that a further reference could not be made to the lower court on the same issue after the ruling. The rights of the parties as far as the competency of the application of 12th January 2004, the locus standi to initiate the application and the conflict of interest of counsel have been brought to an end in the ruling on the preliminary objection as such I am satisfied that the ruling of 1st June 2006 against which the notice of the appeal dated 27th June 2006 is a final decision."**

The court concluded at page 90 of the record of appeal thus:

> **"By Section 241(1)(a) of the 1999 Constitution of the Federal Republic of Nigeria, an appeal shall lie as of right to the court of appeal in a final decision in any civil or criminal proceedings before the Federal High Court or a State High Court sitting at first instance. The period prescribed for such appeal is ninety days (See Court of Appeal Act 2004, Section 24 (2) (a)). The ruling against which the notice of appeal was filed on 27th June 2006 was delivered on 1st June 2006, a period of 26 days only. I therefore hold that the appeal was properly filed."**

A I am unable to agree with the learned appellant's counsel that the lower court in its foregoing summation has misapplied the principles enunciated by this court in a plethora of its decisions on the issue to the facts of the present case. In **Igunbor Vs. Afolabi** (supra), a case the lower court B copiously reproduced in its judgment and drew from, this court particularly held thus:

> **"…Where the order made finally determines the rights of**
> C **the parties as to the particular issue disputed, it is a final order even if arising from an interlocutory application." (Underlining supplied for emphasis)**

D Again in **Akinsanya Vs. UBA Ltd** (supra) another decision that guided the lower court, this court at page 296 of the report inter-alia held as follows:

> **"…if the court of first instance orders that a matter before**
> E **it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all the issues arising in the cause or matter and there is no longer any issue between the parties in that cause or matter that**
> F **remains for determination in that court"** (Underlining supplied for emphasis)

In the case at hand, the trial court held that the defendants/judgment debtors G application seeking for its order to set aside the garnishee order nisi in favour of the judgment creditor as constituted, being incompetent, be struck out. The court further restrained counsel from Chief Rotimi Williams Chambers from being defendants/judgment debtor's counsel in H the matter. The lower court's finding that both orders have finally determined the rights of parties to the cause is, on the authorities, unassailable. Appellant's insistence that it is otherwise is accordingly misconceived. The judgment debtors/respondents' application at the trial I court might be interlocutory but not so the orders made on same in the light of the preliminary objection of the judgment creditor/respondent thereto.

Having determined the rights of parties on the basis of the preliminary objection raised by the plaintiff/judgment creditor/objector against the defendant/judgment debtors' application that the decree nisi be set-aside, the ruling of the trial court appealed against is, therefore, final. This resolves the two issues against the appellant. Resultantly the appeal fails and is accordingly dismissed.

.....Parties should bear their respective costs.

Musa DattijoMuhammad,
Justice, Supreme Court.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC): This is an interlocutory appeal against the judgment of the Court of Appeal Lagos delivered on 12/11/2007 dismissing the appellant's motion filed on 7/3/2007 seeking an order striking out the notice of appeal filed by the 1st and 2nd respondents (Oladele Disu and Flour Mills Nig. Plc) on 27/6/2006 against the ruling of the High Court of Lagos State coram Atilade, J. delivered on 1/6/2006 for being incompetent.

The grounds for the application were:

(1) That being an interlocutory appeal the notice of appeal was filed out of time and without leave; and
(2) That the applicants, as judgment debtors, had no right to appeal against a garnishee order.

The lower court held that the decision appealed against was a final decision and that the notice of appeal was properly filed within 90 days as required by Section 24(2)(a) of the Court of Appeal Act. The court also held that the notice of appeal is not against the garnishee order made on 27/12/2003 but against the ruling of Atilade, J. delivered on 1/6/2006. The application was accordingly dismissed. The appellant is dissatisfied with the decision, hence the instant appeal.

I have had the benefit of reading before now in draft, the judgment of my learned brother, MUSA DATTIJO MUHAMMAD, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit. I

shall make some brief comments in support.

The first issue in contention is whether the ruling of the trial court delivered on 1/6/2006 was a final or interlocutory decision. It is contended on behalf of the appellant that the ruling was made in the course of garnishee proceedings between the order *nisi* and order absolute and therefore, on the authority of the decision of this court in **U.B.N. Vs. Boney Marcus Ind. Ltd. (2005) 13 NWLR (Pt. 943) 654,** the proceedings were interlocutory. In other words, the appellant contends that since the proceedings in respect of which the order was made were interlocutory, the order itself was interlocutory and in the circumstance, the notice of appeal challenging same ought to have been filed within 14 days as required by Section 24(2)(a) of the Court of Appeal Act, 1976 (which was then applicable).

The Section provides:

> **"(2) The periods for the giving of notice of appeal or notice of application for leave to appeal are:-**
> **(a) In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision."**

The guiding factor in determining whether a decision is final or interlocutory is whether the decision or order finally determines the rights of the parties. Thus, a decision arising from interlocutory proceedings may be final or interlocutory depending on the effect of the order on the rights of the parties.

The principle was well stated by this court in **Alor Vs. Ngene (2007) 17 NWLR (Pt. 1062) 163 @ 175 F – 176 A; 177 E-F** and **179 – 180H-A** as follows:

Per Kalgo, JSC @ 175F-G:

> **"In plethora of decided case, this court decided that in this country, if the order, decision or judgment of a court finally**

and completely determines the rights of the parties in the case, it is final but if it does not it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore, the determining factor is not whether the court has finally determined an issue but it is whether or not it has finally determine the rights of the parties in the claim before the parties (sic: court)".

At page 177 E-F"

"But where the rights or claims of the parties in any action have not been looked into and determined by the court, they are still pending and the parties can still go back to any court or indeed the same court to examine and decide on those rights".

At page 179 H 190 per Tobi, JSC:

"A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case; to the extent that the court becomes functus officio… in the context of the Judge, it means that the duty or function that the Judge was legally empowered and charged to perform, has been wholly accomplished and that the Judge has no further authority or legal competence to revisit the matter."

See also: **Igunbor Vs. Afolabi (2001) 11 NWLR (Pt. 723) 148 @ 165 D-G** per Karibi Whyte, JSC:

"A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand,

an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the action. However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order See Toun Adeyemi Vs. Theophilus Awobokun (1968) 2 All NLR 318. The instant case as rightly submitted by appellant's counsel, is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order. An appeal on the said order is as of right under section 220(1) of the Constitution 1979". (Underlining mine for emphasis)

The issues decided by the trial court were whether the application to set aside garnishee proceedings was competent and whether the firm of Chief Rotimi Williams, SAN should be restrained from representing the 2nd defendant/judgment debtor/respondent, having previously represented the judgment creditor in other related proceedings pending before a different Judge of the same court.

The trial court held in respect of the first issue that the proper procedure to adopt in the circumstances of the case was by way of Stakeholder's Interpleader summons as provided by Order 43 of the High

Court of Lagos State (Civil Procedure) Rules 2004 and Section 34(1) (3) of the Sheriffs and Civil Process Act. On the representation by the chambers of Chief Rotimi Williams, the court restrained counsel from the chambers from representing the 2nd defendant/judgment debtor/respondent. In effect the court had finally determined the issue as to the competence of the application to set aside the garnishee proceedings and had also issued a restraining order against the Chambers of Chief Rotimi Williams. The court had thus become *functus officio*, as there could be no further recourse to it on these issues.

His Lordship, Galinje, JCA (as he then was) put it succinctly as follows at pages 89 90 of the record:

> **"The court below upheld the preliminary objection and the motion on notice dated 12th January 2004 was subsequently struck out. Clearly, the question of competency of the motion aforesaid, which was at the centre of the conflict between the parties in the notice of …**

Kekere-Ekun, JSC
Justice, Supreme Court

AMINA ADAMU AUGIE, (JSC): I had a preview of the lead judgment just delivered by my learned brother M. D. Muhammad, JSC, and I agree with his reasoning and conclusion that this Appeal must be dismissed in the circumstances.

He said all there is to say in the lead judgment and it is clear from his sound reasoning in the lead judgment that the lower court's findings on the issues at stake in this matter cannot be faulted at all.

There is no question that the said Orders finally determined the rights of the parties, and having determined their rights on the basis of the preliminary objection raised by the judgment creditor against the application that the decree nisi be set aside, the trial court's ruling appealed against, is final. In the circumstances, I also dismiss the appeal and I also

order that parties should bear their own costs.

Amina Adamu Augie,
Justice, Supreme Court

EJEMBI EKO, (JSC): I had the privilege of reading in advance the judgment just delivered by my learned brother, MUSA DATTIJO MUHAMMAD, JSC. The judgment represents all that I need to say in the appeal. I hereby adopt it, including all orders made therein. I will add a few words of mine.

The appellant had got judgment against the 1st and 2nd respondents. She had partially executed the judgment when Chief F.R.A. Williams, SAN (of blessed memory) intervened. The appellant, through her counsel, Chief Emeka Ngige, SAN, agreed to stay further execution to enable Chief F.R.A. Williams & Co., proceed against the insurers of the 1st and 2nd judgment debtors/respondents. Chief F.R.A. Williams, SAN, had assured Chief Emeka Ngige, SAN, that the balance of the judgment debt would be paid in six (6) weeks. The balance was not paid as promised. On this reneging act, the appellant applied and got garnishee order nisi attaching the funds of the two garnishee banks/respondents. Thereafter the Chambers of Chief F.R.A. Williams, SAN, applied on behalf of the 2nd garnishee bank/respondent to set aside the garnishee order nisi. On application of the appellant, as the judgment creditor, Atilade, J., allowed the preliminary objection. The learned trial judge issued two orders namely: An order striking out the application of the 2nd garnishee bank/respondent praying for the setting aside of the garnishee order nisi, and an order restraining the Chambers of Chief F.R.A. Williams, SAN & Co., on ethical grounds, from further appearing against the appellant in the matter. Chief F.R.A. Williams, SAN, had acted as a mediator. The two order were made on 1st June, 2006. The notice of appeal to the Court of Appeal was filed more than 14 days thereafter.

Section 24(2)(a) of the Court of Appeal Act, 2004 provides:

> **"The periods for the giving of notice of appeal or notice of application for leave to appeal are:**

A **(a) In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision".**

B

The issue is whether the decision of Atilade, J., striking out the application of the 2nd garnishee bank/respondent seeking an Order setting aside the garnishee order nisi, which the appellant obtained earlier, was a final or an C interlocutory decision? There is no doubt that the entire proceedings initiated by Chief F.R.A. Williams, SAN & Co., at the instance of the 2nd garnishee bank/respondent was, on 1st June, 2006, struck out. This court in **Balogun & Ors Vs. Alhaji Shifawu Ode & Ors. (2007) 1-2 SC 230;** D **(2004) 4 NWLR (Pt. 1023) 1** per Mukhtar, JSC (as he then was) had restated the law on what a final decision is, and it means "a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the E court decided the issues before it". A decision that renders the court *functus officio is a final decision. In* ***Agbogunleri Vs. Depo (2008) 1 SC (Pt. II) 189; (2008) 3 NWLR (Pt. 1074) 217,*** Onnoghen, JSC (as he then was) affirming this definition stated

F

> **"A decision of a court is said to be final when it finally disposes of the rights of the parties. For instance, if the judgment/decision/Order given by the court is such that** G **the matter in controversy between the parties would not be brought back to the court for further adjudication, in such a case, such a decision or order is said to be final** (underlining supplied for emphasis).

H

The motion for an order setting aside the garnishee order nisi having been struck out in its entirety the rights and obligations of the parties in the said proceedings had been entirely disposed of.

I The application of the 2nd garnishee bank/respondent had, on 1st June, 2006, been finally and conclusively determined by the court presided by

A Atilade, J. The learned trial Judge, having discharged his office as regards that matter, would no longer have jurisdiction to adjudicate on the two orders made in the said proceedings. The entire proceedings, subject to any possible appeal to the Court of Appeal, had been finally determined.

B It is for the foregoing and the fuller reasons stated in the judgment earlier delivered by my learned brother that I also dismiss the appeal for lacking in substance.

I make no order as to costs.

C **Ejembi Eko**
Justice, Supreme Court

D **SIDI DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother M. D. Muhammad, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal lacks merit, and it is
E accordingly dismissed by me. I abide by all the orders contained in the lead Judgment.

Sidi Dauda Bage
Justice, Supreme Court

F

G

H

I

MTN NIGERIA COMMUNICATION LIMITED
AND
MR. ETUK HANSON

SC. 301/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where not shown to be perverse – Attitude of appellate court thereto.

APPEAL: Grounds of appeal – Classification – Whether it does not depend on the label given to them – Principles relevant to classification thereof.

APPEAL: Grounds of appeal – Mixed law and fact – Failure to obtain leave – Where grounds of appeal requiring leave are filed without same – Effect – Whether such grounds are incompetent.

APPEAL: Grounds of appeal – Where only one ground is a ground of law – Notice filed without leave – Whether the only one ground of appeal make the notice of appeal competent.

ARBITRATION: Arbitral award – Setting aside thereof – Power of High Court thereto – Whether limited in determining whether the arbitrators

complied with the law according to their understanding and perception – The principle in Baker Marine Vs Cheveron (2000) 12 NWLR (pt. 681) 393.

ARBITRATION: Arbitral award – Setting-aside thereof – Ss 29 and 30 of the Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria, 2004 – Scope and imperatives.

Constitutional law: Leave to appeal – S. 242 CFRN 1999 (as amended) – Requirements thereof – Scope and imperatives.

CONSTITUTIONAL LAW: The jurisdiction of the High Court – S. 272 (1) and (2) of CFRN 1999 (as amended) – Purport and significance.

COURT: Arbitral Award – Where a party applies to court to review an award made by a sole arbitrator – Whether court sits as a court of first instance.

COURT: Jurisdiction – Judicial review – Power thereof – Relevant Principles.

COURT: Jurisdiction – Power to interfere with arbitral award – Limited nature thereof – Whether extends only to, setting aside the award or remitting it back to the arbitrator for consideration – Whether does not include power to determine any matter subject of the arbitration.

COURT: Jurisdiction – Where a High Court sits to consider an arbitral award – Whether it does not sit in its appellate capacity – Relevant considerations thereof.

EVIDENCE: Contradiction – When fatal – Whether it is only material contradiction or discrepancy in evidence that is fatal.

WORDS AND PHRASES: Appeal – Meaning.

Issues for determination

1 **Whether the Court of Appeal was right to have struck out the appellant's amended notice of appeal filed on April 20, 2011 on the ground that leave of the High Court or the Court of Appeal was not sought and obtained in accordance with Section 241 (1) (a) of the Constitution before it was filed, the appeal having emanated from decision of the High Court of Akwa Ibom State sitting on appeal over the decision of sole Arbitrator published on February 20, 2010. (Ground 1 of the amended notice of appeal)**

2 **Whether the Court of Appeal was right when it upheld the finding of the sole Arbitrator and the Learned Judge of the High Court of Akwa Ibom State that the Witness Statement of the Respondent's first witness; Mr. Ukpedeme James Harry (CW1) was sworn before the Commissioner for Oaths in spite of the Witness' own admission that it was not. (Ground 2 of the amended notice of appeal).**

3 **Whether the Court of Appeal was right to have refused to set aside the decision of the Learned Judge of the Akwa Ibom State High Court which held that the sole Arbitrator, was right by relying on the indirect evidence and factual inconsistencies of the respondent's Witness (CW1) in reaching his decision in the Final Arbitral Award Published on February 20,2010. (Distilled from ground 3 of the amended notice of appeal)**

4 **Whether the Court of Appeal was right to have upheld the decision of High Court to the effect that the Arbitrator did not raise issues suo motu or reached**

conclusion on areas or points which require professional or technical knowledge and expertise. (Distilled from Grounds 4,5 and 6 of the amended notice of appeal)

Facts of the Matter

This appeal emanates from the Judgment of the Calabar Division of the Court of Appeal delivered on the 10th day of April 2013 which upheld the decision of the High Court of Justice, Akwa-Ibom State, which varied the arbitration award made by the sole arbitrator who arbitrated on the dispute between the parties to the arbitration namely, the appellant and one Mr. Etuk Hanson, the respondent herein.

The facts which gave rise to the present appeal are summerised hereunder. On or about the 18th day of October 2003 there was thunder storm which struck on the appellant's cell site installation at Plot 1A Ewet Housing Estate, Uyo which had earlier on been leased to the appellant by the respondent herein. The blast affected the installation on the respondent's property causing some damages to the said property. The respondent realizing the damages made to his property, decided to sue the appellant before the Akwa-Ibom State High Court. However, at the instance of the appellant herein, the suit was withdrawn from the trial High court for reference to a sole arbitral Panel with Mr. Emmanuel Ukala SAN as the sole arbitrator as jointly agreed by both parties. After the arbitral proceedings, the sole arbitrator found in favour of the respondent having decided that the appellant was negligent and therefore culpable and made its award accordingly. The appellant thereupon became aggrieved by the award made against it and it thereupon invoked the jurisdiction of the High Court of Akwa-Ibom State by applying to it, to set aside the arbitral award made against it by the sole arbitrator. In its decision, the trial court varied the arbitral award by merely varying the special damages of #85,000 award made in favour of the present respondent.

Still dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal. After the parties filed and exchanged their respective briefs of argument, the learned counsel for the parties adopted their respective briefs of argument and argued their appeal before the Court of

Appeal adjourned the appeal for delivery of Judgment. But before delivering its Judgment in the appeal, the Court of Appeal found it expedient to invite parties' learned counsel to address it on the competence of the appeal and on the question whether there was need to seek and obtain leave of the trial court or from it, before filing such appeal. The parties learned counsel were thereupon, ordered to present their written address/briefs of argument on the issue suo moto raised by the Court of Appeal and both learned counsel for the parties adequately complied with that order. The Court of Appeal, after listening to the submissions of learned counsel, ruled that there was really the need to seek and obtain prior leave of the trial court which was not so sought and obtained and it decided that failure to so obtain such leave, had rendered the appeal incompetent. The lower court however graciously decided to consider the appeal on its merit and it ultimately dismissed the appeal for want of merit, after of course, resolving all the issues raised in the appeal in favour of the respondent and against the appellant herein.

Dissatisfied with the Judgment of the Court of Appeal, the appellant still further appealed to the Supreme Court.

Held *(Unanimously dismissing the appeal)*

1. *A court that determines an arbitral award sits as a court of first instance*
   The bone of contention between the parties to this appeal is whether when the High Court of Akwa Ibom State took the motion filed before it to set aside the arbitral award made by the sole arbitrator, it sat as a court of first instance or as an appellate court and secondly if the correct status of the High Court was that it sat as an appellate court, then whether leave was required to file the amended notice of appeal. In this instant case the appellant filed its motion on notice at the High Court seeking its indulgence to set aside the arbitral award published on 20th February 2010. As could be gleaned from the grounds supporting the motion filed before the lower court, the appellant made a catalogue of accusation against the sole arbitrator who published the award sought to be set aside, bordering on misconduct on the conduct of the proceedings and reaching conclusion on points requiring professional or technical expertise,

plus other alleged lapses. By their nature therefore, the complaints raised in the motion certainly called for review of the arbitral proceedings with a view to correcting the lapses or setting aside the award. After the High Court ruled on the motion and partially found against the appellant the appellant filed his appeal at the lower court. From the look of the notice of appeal filed before the lower court, it clearly shows that the High Court had surely sat to determine the appellant's (the applicant's) motion as court of first instance. *(P150 paras A – F)*

2. *The nature and purport of S. 272 (1) 2(2) of the constitution of Federal Republic of Nigeria 1999*
The jurisdiction of a High Court is provided under Section 272 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 as amended which reads thus:

> **(1) Subject to the provisions of section 251 and other provision of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.**
>
> **(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the Court in the exercise of its appellant or supervisory jurisdiction.** *(Pp 150 – 151 paras F – C)*

Per Sanusi (JSC)

"From the wordings of subsection 2 of Section 272 of the 1999 Constitution, a State High Court has jurisdiction to deal with complaint against proceedings brought before it and in exercising such jurisdiction it can be said that it is sitting as a court of first instance and not, as an appellate court. This is moreso because the word "appeal" is defined to substantially mean a complaint against a decision of a trial court. See OREDOYIN VS. AROWOLO (1989) 4 NWLR (Pt. 114) 172; NGIGE VS. OBI (2006) 14 NWLR (Pt. 999) 1; THE MINISTER OF PETROLEUM AND MINERAL RESOURCES & AMR VS. EXPOSHIPPING LINE (2010) LPELR 3189 (SC). An appeal is generally regarded as a proceeding undertaken to have a decision reconsidered by a higher authority or the submission of a lower court's decision to a higher court for review and possible reversal. See Black's Law Dictionary Ninth Edition a page 112. See also CORPORAL LIVANUS UGWU VS. THE STATE (2013) LPELR – 20177 (SC) There is therefore no gainsaying that the High Court of Akwa-Ibom State when dealing with the motion sat as a court of first instance as rightly submitted by the learned counsel for the appellant. It is my considered view that when a High Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate court over the arbitral award of the arbitrator. This is so because it is empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law. What that court is expected to do in that circumstance, is simply to look at the award and determine whether on the state of the law as understood by the arbitrator and as reflected on the face of the award, the arbitrator complied with the law as he perceived it rightly or wrongly. It is therefore a subjective test, as the judge simply takes the position as the arbitrator and not above him and determines the issue in that perspective alone. See the case of Baker Marina Limited Vs. Danos & Curole Count Inc (2001) 7 NWLR (Pt. 712) 337 at 352; A Savoia

Ltd Vs. Sonubi (2000) 12 NWLR (Pt. 682) 539 at 551 para F.G Baker Marine (Nig) Ltd Vs. Chevron Nig. Ltd (2000) 12 NWLR (Pt. 681) 393 at 410. *(P.**p** 151 – 152 paras C – B)*

3. *Nature of the supervisory jurisdiction of High Court under S. 272 (2)*
Again, looking at the prayers contained in the motion the appellant approached the trial court seeking orders for review of the decision of the sole arbitrator with a view to setting aside the arbitral award for same being incorrectly arrived at by the arbitral panel. By those prayers, the appellant was definitely invoking the jurisdiction of the trial court as provided by Section 272 (2) of the 1999 Constitution, as amended. Under those provisions, the High Court when so approached, is simply saddled with the responsibility of considering the proceedings of the arbitral panel and thereby using its supervisory function or jurisdiction as a court of first instance, even though it has no business or required to call evidence. *(P. 152 paras C– E)*

Per Sanusi (JSC)

Having looked very closely at virtually all the grounds of appeal contained in the amended notice of appeal except Ground 1 filed by the appellant, especially grounds Nos. 2 and 3, are grounds of mixed law and fact. It is noted by me that in each of the two, the appellant stated or captioned them as follows "the lower court erred in law". But upon further examining or closely looking at the particulars of each of the grounds of appeal, the appellant's complaint was on the evidence adduced at the arbitral proceedings, or on evaluation of evidence by the trial High Court.

Now let us look at the provisions of Section 242 of the 1999 Constitution as amended. The Section reads thus:

> **(1) Subject to the provision of section 241 of this Constitution, an appeal shall lie from decision of the Federal High Court or a High Court to the**

Court of Appeal with the leave of the Federal High Court or that High Court or the Court of Appeal.

(2) The Court of Appeal may dispose of any application for leave to appeal from any decision of the Federal High Court or a High Court in respect of any civil or criminal proceedings in which an appeal has been brought to the Federal High Court or a High Court from any other court after consideration of the record of the proceedings, if the Court of Appeal is of the opinion that the interests of justice do not require an oral hearing of the application.

By the above Constitutional provisions, any party who is aggrieved with decision or ruling of the High Court such party so aggrieved, can only validly appeal with leave of either the High Court or that of the Court of Appeal provided that such intended appeal he complies with the conditions laid down under Section 241 of the 1999 Constitution as amended. The subject matter of the appeal lodged by the appellant before the lower court no doubt falls under the conditions laid down in Section 241 of the 1999 Constitution as amended, since the grounds of appeal contained in the amended notice of appeal, where grounds of mixed law and fact as they all raised issues of evaluation of evidence and issues of both law and of mixed law and facts at the same time. They are therefore grounds of mixed law and facts as opposed to the appellant's learned counsel contention that they were grounds of law alone. Even by mere looking at them, from all indications, there was no leave sought and obtained by the appellant from either the High Court (trial court) or the court below before filing such grounds of appeal. However, since I stated that Ground No. 1 is a ground of law alone, the appellant can appeal on it as of right because he did not require any leave. The ground alone, can therefore sustain his appeal. *(Pp 152 – 154 paras G – A)*

4. *A ground of law does not depend on the label it was given*

The learned counsel for the appellant as I said above, had tagged all the grounds of appeal in the amended notice of appeal as "grounds of law alone". In his submission the learned appellant's counsel also argued that all the grounds of appeal being grounds of law alone, he was not of necessity, required to obtain leave before filing them.

The law is settled that the question whether a ground of appeal is one of law alone or of mixed law and fact does not depend on the label it was given by the framer (appellant). The court is required to thoroughly examine the grounds of appeal under consideration and their particulars in order to ascertain whether such grounds of appeal reveal misunderstanding of the law or misapplication of the law to the facts already proved or in which case it would be question of law. But if it is one which requires questioning the evaluation of facts by the lower court before the application of the law, then it would amount to question of mixed law and fact. See THE MINISTER OF PETROLEUM & MINERAL RESOURCES & ANOR VS. EXPOSHIPPING LINE (NIGERIA) LTD (2010) 12 NWLR (Pt. 1208) 261; **TB OGBECHIE & ORS VS. GABRIEL ONOCHIE & ORS** (1986) NWLR (Pt. 23) 484; **G. N. NWAOLISAH VS PASCHAL NWABUFOH** (2011) LPELR – 2115 (SC).

(P 154 paras A – F)

5. *Grounds filed by the appellant in 2 and 3 are not grounds of law and failure to obtain leave rendered them in competent*

As I posited supra, upon examining the grounds of appeal filed by the appellant, I am inclined to agree with the submission of the learned counsel for the respondent that the said grounds of appeal Nos. 2 and 3 are grounds of mixed law and fact which Ground 1 is of law alone as I stated above. The High Court or the trial court, when it entertained the motion filed by the present applicant/appellant, was sitting as a court of first instance, in order to determine the propriety of arbitral award made by the sole arbitrator. The appellant therefore should have sought and obtained leave of the trial High

Court or the court below under Section 242 (1) of the 1999 Constitution only with regard to grounds No. 2 & 3 as rightly found by the lower court. But with regard to ground No. 1 which is a ground of law alone, he can appeal as right. Failure to first seek and obtain leave from the trial court or the lower court in respect of Grounds 2, 3 and 4 rendered his Grounds 2, 3 and 4 incompetent, for want of such leave. See AJA VS. OKORO (1991) 4 NWLR (Pt 203) 260 at 272; OPUDU VS. ONWNWARI (2077) All NWLR (Pt 370) 1093; IDIKE VS. ERISI (1987) 9-11 SC 170 AT 189/192. I am therefore in partial agreement with the finding of the lower court that Grounds Nos. 2, 3 and 4 filed before it by the appellant rendered them incompetent for reason or failure on the part of the appellant to seek and obtain leave. The appeal therefore has wrongly struck out by the lower court for being incompetent since Ground No 1 being of law alone can sustain the appeal. The first issue for determination is therefore partly resolved in favour of the appellant herein.
(Pp 154 – 155 paras F – C)

6. *Concurrent findings that witness singed statement before Commissioner for Oath*

The record of appeal clearly shows that when testifying before the arbitral panel, the witness, (i.e. CW1) stated that he was really taken to Commissioner for Oath. The witness also admitted signing the statement on oath even though; during cross examination he said he signed his witness statement at the same time while sitting with another witness, one Mr. James. On the findings of both the sole arbitrator and the trial court, it was decided that the witness's statement on oath was signed by the witness and that such was done before the Commissioner for Oaths. Also the High Courts had also endorsed the finding of the arbitral panel. On its part, the learned counsel for the respondent urged that there were concurrent findings of the arbitral panel, the High Court and the lower court.

In view of the concurrent findings of the two lower courts I feel that this court lacks the competence to interfere with or disturb

those current findings especially in the absence of any cogent and convincing reasons or explanation showing that those findings were perverse or that there were misconception of law by the two lower courts. Also there was no any explanation advanced by the appellant to warrant or justify any interference with such findings as they were not shown to be perverse, hence I cannot interfere with them. See EBBA VS OGODO (1984) 4 SC 84. *(P 156 paras C – G)*

7. *The nature of inconsistency or contradiction that is fatal*

The law is trite and indeed well settled that for any conflict or contradiction or inconsistency in the evidence of a witness to be fatal, such conflict or contradiction or inconsistency must be material, substantial and fundamental to the main issues in controversy between the parties before the court as would create some doubts in the mind of the trial judge. In fact, it must be shown to have amounted to substantial disparagement of the witness concerned making it dangerous or likely to result in miscarriage of justice to rely on the evidence of such witness. My understanding of the meaning of contradictory statement is that it is an affiliation of a contrary version of what was either stated or spoken, and even then, it must be on a factual point in issue in controversy or contention between the parties or must be material to the fact in issue. In the present case all the alleged contradictions in the statement of Oath of CW1 and his testimony were not on material facts at the arbitral panel proceedings or factual issue in contention or controversy which were germaine to the determination of the case before the arbitral panel. It is noted by me, that the learned trial Judge had adequately considered all the alleged contradictory statements on Oath of the CW1 as well as his testimony in the proceedings before arriving at the conclusion upholding the arbitrator's findings and holding that the evidence of CW1 was admissible as there were no material contradictions. I am also convinced that the lower court was right in upholding such finding of the trial court without any hesitation. I therefore resolve this issue against the appellant and in

favour of the respondent herein. *(Pp 157 – 158 paras I – F)*

8. *Court did not suo motu raise Exhibit R²*

On examining the record of proceedings by me, I note there is no dispute that what the parties approached the arbitral panel for resolution did not actually relate to the said exhibit. It is worthy of note, that in the first place, it was the appellant who raised or introduced Exhibit R2 because it was the party that tendered it in evidence and its admission in evidence brought it to bear or feature in the proceedings, same being admitted in evidence during the proceedings.

Having been tendered in evidence through its witness and so admitted, the witness through whom it was tendered ought to be cross examined on its contents and had indeed been subjected to rigorous cross examination by the adverse party since it was put in issue which somehow led to its being disparaged during cross examination. In that regard, I think it will be wrong to say that the issue relating to Exhibit R2 was suo motu raised by the arbitral panel as rightly held by the two lower courts.

The law is trite that once an issue is raised or canvassed by learned counsel in the course of the proceedings, it is incumbent upon the trial court to consider it and form its opinion on it. Of course after evaluating the evidence brought in focus at the proceedings. In doing so, the trial court or arbitral panel had to form its own opinion on the exhibit or issue raised before it, and as such it cannot be accused that it raised it suo motu. The complaint by the learned appellant's counsel on Exhibit R2 that the same had been raised suo motu by the arbitral panel, has no substance and cannot stand on any substratum. It is therefore of no moment and is in fact a ruse. *(Pp 159 – 160 paras G – D)*

9. *The natural and purport of sections 29 and 30 of the Arbitration and Conciliation Act*

Sections 29 and 30 of the Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria, 2004 make provisions for the setting aside of an arbitral award as follows:

> **"29. (1) A party who is aggrieved by an arbitral award may within three months**
>
> **(a) From the date of the award; or**
>
> **(b) In a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal,**
>
> **by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.**
>
> **(2) The Court may set aside an arbitral award, if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside".**

(P 162 paras D – I)

10. *Power of the court when called upon to set aside an arbitral award*

In order to determine whether the jurisdiction of the court is appellate or original, it is necessary to consider what the court has power to do when called upon to set aside an arbitral award. The jurisdiction of the court in this regard is very narrow. It was held by

this court in A. Savoia Ltd. Vs. Sonubi (2000) 12 NWLR (Pt. 682) 538 @ 551 F-G that the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside the award or remitting it to the arbitrator for reconsideration. It was further held that the court has no jurisdiction to determine any matter which is the subject of the arbitration proceedings. *(P 163 paras A – C)*

11. *The power of court is to determine whether arbitrators complied with law according to their perception*

In Baker Marine Vs. Chevron (2000) 12 NWLR (Pt. 681) 393, His Lordship Oguntade, JCA (as he then was) stated *inter alia:*

> **"The lower court was not sitting as an appellate court over the award of the arbitrators. The lower court was not therefore empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. What the lower court had to do was to look at the award and determine whether on the state of the law as understood by them and as stated on the face of the award, the arbitrators complied with the law as they themselves rightly or wrongly perceived it. The approach here is subjective. <u>The court places itself in the position of the arbitrators, not above them</u>, and then determines on that hypothesis whether the arbitrators followed the law as they understood and expressed it" (Emphasis mine)**

See also: Aye-Fenus Ent. Ltd. Vs. Saipem (Nig.) Ltd. (2009) 2 NWLR (Pt. 1126) 483 @ 513H 514H. It is evident from the above that the role of the High Court with regard to an application to set aside an arbitral award is not appellate as the court cannot go into the merit of the award. It can either set it aside, uphold it or remit it to the arbitrator to reconsider a particular aspect. ***(Pp 163 – 164 paras D – A)***

12. *Power of court in judicial review*

It is akin to the jurisdiction exercised by the High Court in respect of an application for judicial review. It was held in Gov. of Oyo State Vs. Folayan (1995) 8 NWLR (Pt. 413) 292 @ 322-323 H-B that:

> **"(a) a judicial review is not an appeal;**
> **(b) the court must not substitute its judgment for that of the public body whose decision is being reviewed;**
> **(c) the correct focus is not upon the decision but the manner in which it was reached;**
> **(d) what matters is the legality and not the correctness of the decision and**
> **(e) the reviewing court is not concerned with the merits of a target activity".**

See also: Military Governor of Imo State & Anor. Vs. Nwauwa (1997) LPELR – 1876 (SC) @ 23 – 24 E – A.

In effect, when a High Court is exercising its powers under the Arbitration and Conciliation Act to set aside an arbitral award it is exercising its original jurisdiction in a supervisory capacity. A decision whether or not to set aside an award is a final decision from which an aggrieved party is entitled to appeal as of right by virtue of Section 241(1)(a) of the 1999 Constitution, as amended. The appellant therefore did not require leave to appeal. In the circumstances, I resolve this issue in the appellant's favour.
(P 164 paras A – G)

Nigerian cases cited in this judgment

A Savoia Ltd Vs. Sonubi (2000) 12 NWLR (Pt. 682) 539,
Aja vs. Okoro (1991) 4 NWLR (Pt 203) 260 at 272,
Aye-Fenus Ent. Ltd. Vs. Saipem (Nig.) Ltd. (2009) 2 NWLR (Pt. 1126) 483
Baker Marina (Nig) Ltd Vs. Chevron Nig. Ltd (2001) 12 NWLR (Pt. 681) 393,
City Engineering Nig. Ltd Vs. Federal Housing Authority (1997) 9 NWLR

(Pt 520) 224,
Corporal Livanus Ugwu Vs. The State (2013) LPELR 20177 (SC),
Ebba Vs Ogodo (1984) 4 SC 84,
G. N. Nwaolisah Vs Paschal Nwabufoh (2011) LPELR 2115 (SC),
Gov. of Oyo State Vs. Folayan (1995) 8 NWLR (Pt. 413) 292,
Idike Vs. Erisi (1987) 9-11 SC 170 AT 189/192,
Military Governor of Imo State & Anor. Vs. Nwauwa (1997) LPELR 1876 (SC),
Minister Vs. Expo-Shipping (2014) 4 SCNJ 115,
Ngige Vs. Obi (2006) 14 NWLR (Pt. 999)
Opudu Vs. Onwnwari (2077) All NWLR (Pt 370) 1093,
Oredoyin Vs. Arowolo (1989) 4 NWLR (Pt. 114) 172
Taylor Woodrod (Nigeria) Limited Vs. S. F. GMBH (1993) 4 NWLR (Pt. 286) 127,
Tb Ogbechie & Ors Vs. Gabriel Onochie & Ors (1986) NWLR (Pt. 23) 484,
The Minister Of Petroleum & Mineral Resources & Anor Vs. Exposhipping Line (Nigeria) Ltd (2010) 12 NWLR (Pt. 1208) 261,
The Minister Of Petroleum and Mineral Resources & Amr Vs. Exposhipping Line (2010) LPELR 3189 (SC)

Nigerian Statute cite in the judgment
Arbitration and Conciliation Act Section 29 (1)
Constitution of the Federal Republic of Nigeria 1999 as amended Section 272 (1) and (2), Section 241 (1) (a) and (b)

Representation
JUSTICE, SUPREME COURT APPEARANCES:
T. J. KRUKRUBO for the Appellant with **MESS C. EGBUNONU.**
USUNG URUA BASSEY for the Respondent with **EKPO PHILIP EKPO, R. C. OJIAKU** and **A. I. ETUK**

AMIRU SANUSI, JSC (Delivering the lead judgment): This appeal emanates from the Judgment of the Calabar Division of the Court of Appeal delivered on the 10th day of April 2013 which upheld the decision of the

A High Court of Justice, Akwa-Ibom State, which varied the arbitration award made by the sole arbitrator who arbitrated on the dispute between the parties to the arbitration namely, the appellant and one Mr. Etuk Hanson, the respondent herein.

B The facts which gave rise to the present appeal are summerised hereunder. On or about the 18th day of October 2003 there was thunder storm which struck on the appellant's cell site installation at Plot 1A Ewet Housing Estate, Uyo which had earlier on been leased to the appellant by C the respondent herein. The blast affected the installation on the respondent's property causing some damages to the said property. The respondent realizing the damages made to his property, decided to sue the appellant before the Akwa-Ibom State High Court. However, at the D instance of the appellant herein, the suit was withdrawn from the trial High court for reference to a sole arbitral Panel with Mr. Emmanuel Ukala SAN as the sole arbitrator as jointly agreed by both parties. After the arbitral proceedings, the sole arbitrator found in favour of the respondent having E decided that the appellant was negligent and therefore culpable and made its award accordingly. The appellant thereupon became aggrieved by the award made against it and it thereupon invoked the jurisdiction of the High Court of Akwa-Ibom State by applying to it, to set aside the arbitral award F made against it by the sole arbitrator. In its decision, the trial court varied the arbitral award by merely varying the special damages of #85,000 award made in favour of the present respondent.

Still dissatisfied with the decision of the trial court, the appellant G appealed to the Court of Appeal. After the parties filed and exchanged their respective briefs of argument, the learned counsel for the parties adopted their respective briefs of argument and argued their appeal before the Court of Appeal adjourned the appeal for delivery of Judgment. But before H delivering its Judgment in the appeal, the Court of Appeal found it expedient to invite parties' learned counsel to address it on the competence of the appeal and on the question whether there was need to seek and obtain leave of the trial court or from it, before filing such appeal. The parties I learned counsel were thereupon, ordered to present their written address/briefs of argument on the issue suo moto raised by the Court of

Appeal and both learned counsel for the parties adequately complied with that order. The Court of Appeal, after listening to the submissions of learned counsel, ruled that there was really the need to seek and obtain prior leave of the trial court which was not so sought and obtained and it decided that failure to so obtain such leave, had rendered the appeal incompetent. The lower court however graciously decided to consider the appeal on its merit and it ultimately dismissed the appeal for want of merit, after of course, resolving all the issues raised in the appeal in favour of the respondent and against the appellant herein.

Dissatisfied with the Judgment of the Court of Appeal, the appellant still further appealed to the Supreme Court vide its amended notice of appeal dated 5th February 2015 containing six grounds of appeal. As it is the practice in this apex court and in keeping with the rules of this court, parties to this appeal filed and exchanged their briefs of argument through their learned counsel. The appellant on 29th January 2016 filed its brief of argument settled by one Tonye Krukrubo Esq. wherein four issues for determination were distilled from the six grounds of appeal. The learned counsel for the respondent also filed brief of argument on behalf of the respondent on 14th April 2016 in which he also raised four issues for determination. The said brief was settled by Mr. Usunguma Bassey. It is pertinent to state here, that the appellant also filed appellant's reply brief on 19/5/2016 which was deemed filed on 13/3/2017. He also, in addition, filed 'applicant's reply brief on Point of Law' on 13/2/2015 which was deemed filed on 15/6/2015.

The four issues for determination raised in the appellant's brief of argument read as follows:

1 Whether the Court of Appeal was right to have struck out the appellant's amended notice of appeal filed on April 20, 2011 on the ground that leave of the High Court or the Court of Appeal was not sought and obtained in accordance with Section 241 (1) (a) of the Constitution before it was filed, the appeal having emanated from decision of the High Court of

Akwa Ibom State sitting on appeal over the decision of sole Arbitrator published on February 20, 2010. (Ground 1 of the amended notice of appeal)

2 Whether the Court of Appeal was right when it upheld the finding of the sole Arbitrator and the Learned Judge of the High Court of Akwa Ibom State that the Witness Statement of the Respondent's first witness; Mr. Ukpedeme James Harry (CW1) was sworn before the Commissioner for Oaths in spite of the Witness' own admission that it was not. (Ground 2 of the amended notice of appeal).

3 Whether the Court of Appeal was right to have refused to set aside the decision of the Learned Judge of the Akwa Ibom State High Court which held that the sole Arbitrator, was right by relying on the indirect evidence and factual inconsistencies of the respondent's Witness (CW1) in reaching his decision in the Final Arbitral Award Published on February 20,2010. (Distilled from ground 3 of the amended notice of appeal)

4 Whether the Court of Appeal was right to have upheld the decision of High Court to the effect that the Arbitrator did not raise issues suo motu or reached conclusion on areas or points which require professional or technical knowledge and expertise. (Distilled from Grounds 4,5 and 6 of the amended notice of appeal)

On his part, the respondent also formulated four issues for the determination of this appeal as set out hereunder:

A

1. **Whether the Court of Appeal was right to have struck out the appellant's amended notice of appeal filed on 20,2011 on the ground that leave of the High Court or the Court of Appeal was not sought and**

B

obtained in accordance with Section 241 (1) (a) of the Constitution before it was filed, the appeal having emanated from decision of the High Court of Akwa Ibom State sitting on appeal over the decision of E.C.

C

Ukala, SAN published on February 20, 2010. (Ground 1 of the amended notice of appeal).

2. **Whether the Court of Appeal was right when it upheld the finding of the Arbitrator; E.C Ukala,**

D

SAN and the Learned Judge of the High Court of Akwa Ibom State that the Witness Statement of the respondent's first witness; Mr. Ukpedeme James Harry (CW1) was sworn before the Commissioner

E

for Oaths in spite of the Witness' own admission that it was not (Ground 2 of the amended notice of appeal).

F

3. **Whether the Court of Appeal was right to have refused to set aside the decision of the Learned Judge of Akwa Ibom State High Court which held that the sole Arbitrator, E.C Ukala, SAN was right**

G

by relying on the indirect evidence and factual inconsistencies of the respondent's witness (CW1) in reaching his decision in Final Arbitral Award published on February 20, 2010, (Ground 3 of the amended notice of appeal).

H

4. **Whether the Court of Appeal was right to have upheld the decision of High Court to the effect that the Arbitrator did not raise issues suo moto or reached conclusions on areas or points which**

I

require professional or technical knowledge and

expertise. (Ground 4, 5 and 6 of the amended notice of appeal).

It would appear to me that the four issues raised in respondent's brief of argument tally with the four issues raised in the appellant's brief of argument, albeit, they differ in the manner they were couched. They are therefore substantially the same in context. I will therefore be guided by the issues raised in the appellant's brief of argument in treating this appeal and will consider them serially.

Issue No. 1

This issue queries whether the lower court was right to have struck out the appellant's amended notice of appeal filed on 20/4/2011 for failure to obtain leave. The learned counsel for the appellant argued that the appellant's grievances were against the ruling of High Court which partially upheld the arbitral award and that the High Court did not sit to set aside the arbitral award which was subject matter of the appeal, as a court of first instance. He contended that there is no provision in the Arbitration and Conceliation Act to the effect that a party aggrieved by the decision of a High Court in an arbitral proceeding, should appeal as of right neither is there any provisions for issues that will guide the Court of Appeal in determining such appeal. He referred to Section 241 (1) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 as amended, adding that, the provisions are mutually exclusive and the operative words in those provisions are "final decision" "sitting at first instance" and "question of law alone"

Learned appellant's counsel contended that the decision of the High Court of Akwa Ibom State delivered on 20th October 2010 is a final decision which is appealable as of right. He submitted further, that the High Court of Akwa Ibom State sat to decide the appellant's motion filed on 8th March 2010 as a court of first instance. He argued that the right to commence proceeding in the High Court to set aside an arbitral award under Section 29 (1) of the Arbitration and Conciliation Act is neither a continuation of arbitration proceeding nor an appeal against the award but a fresh right of

action which accrues when the arbitral award is delivered. He cited and referred to the case of **CITY ENGINEERING NIG. LTD VS. FEDERAL HOUSING AUTHORITY (1997) 9 NWLR (Pt 520) 224 at 229; BAKER MARINA LIMITED VS. DANOS OF CUROLE CONT INC (2001) 7 NWLR (Pt. 712) 337 at 352/353.**

Learned counsel also argued that the appellant's amended notice and grounds of appeal raised question of law alone and that by Section 241 (1) (a) and (b) of the 1999 Constitution, the appeal does not require the leave of court even if the appeal emanates from an interlocutory decision. See **ABUBAKAR VS. YAR'ADUA** (2008) 4 NWLR (Pt. 1028) 655 at 495. Learned counsel argued that even if there was any ground that requires leave, it probably would have been Ground No. 2 which may, at best, be question of mixed law and fact. He then submitted that the lower court was wrong to have struck out the appellant's entire appellant's amended notice of appeal.

Responding to the appellant's submissions on this issue, the learned counsel for the respondent submitted that the High Court of Akwa Ibom State sat in its supervisory/appellate jurisdiction when it considered the application of the appellant to set aside the arbitral award. He argued that the sitting of the High Court does not imply that the High Court sat as Court of first instance. He submitted also that none of the cases cited and relied on by the appellant is to the effect that the High court sat to consider the application to set aside arbitral award, as court of first instance over such application.

On the issue of failure to obtain leave, he argued that the grounds of appeal from the High Court to Court of Appeal were grounds of mixed law and facts and not those of law simpliciter. Learned counsel for the respondent further argued that the fact that the appellant stated that **"the lower court erred in law"** is not a determining factor that such grounds are grounds of law alone. He cited the case of **MINISTER VS. EXPO-SHIPPING (2014) 4 SCNJ 115 at 157** where it was held that mere labeling of a ground of appeal as one 'of law alone', does not necessarily mean or make it a ground of law alone or of mixed law and fact. He submitted that the High Court sat as an appellate court over the application to set aside the

arbitral award and that the ground of appeal are not grounds of law. He finally submitted that the lower court was right in striking out the appeal and urged this court to so hold.

The bone of contention between the parties to this appeal is whether when the High Court of Akwa Ibom State took the motion filed before it to set aside the arbitral award made by the sole arbitrator, it sat as a court of first instance or as an appellate court and secondly if the correct status of the High Court was that it sat as an appellate court, then whether leave was required to file the amended notice of appeal. In this instant case the appellant filed its motion on notice at the High Court seeking its indulgence to set aside the arbitral award published on 20th February 2010. As could be gleaned from the grounds supporting the motion filed before the lower court, the appellant made a catalogue of accusation against the sole arbitrator who published the award sought to be set aside, bordering on misconduct on the conduct of the proceedings and reaching conclusion on points requiring professional or technical expertise, plus other alleged lapses. By their nature therefore, the complaints raised in the motion certainly called for review of the arbitral proceedings with a view to correcting the lapses or setting aside the award. After the High Court ruled on the motion and partially found against the appellant the appellant filed his appeal at the lower court. From the look of the notice of appeal filed before the lower court, it clearly shows that the High Court had surely sat to determine the appellant's (the applicant's) motion as court of first instance.

The jurisdiction of a High Court is provided under Section 272 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 as amended which reads thus:

> **1. Subject to the provisions of section 251 and other provision of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceeding in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or**

relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

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

From the wordings of subsection 2 of Section 272 of the 1999 Constitution, a State High Court has jurisdiction to deal with complaint against proceedings brought before it and in the exercising such jurisdiction it can be said that it is sitting as a court of first instance and not, as an appellate court. This is moreso because the word "appeal" is defined to substantially mean a complaint against a decision of a trial court. See **OREDOYIN VS. AROWOLO** (1989) 4 NWLR (Pt. 114) 172; **NGIGE VS. OBI** (2006) 14 NWLR (Pt. 999) 1; **THE MINISTER OF PETROLEUM AND MINERAL RESOURCES & AMR VS. EXPOSHIPPING LINE** (2010) LPELR – 3189 (SC). An appeal is generally regarded as a proceeding undertaken to have a decision reconsidered by a higher authority or the submission of a lower court's decision to a higher court for review and possible reversal. See Black's Law Dictionary Ninth Edition a page 112. See also **CORPORAL LIVANUS UGWU VS. THE STATE** (2013) LPELR 20177 (SC) There is therefore no gainsaying that the High Court of Akwa-Ibom State when dealing with the motion sat as a court of first instance as rightly submitted by the learned counsel for the appellant. It is my considered view that when a High Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate court over the arbitral award of the arbitrator. This is so because it is empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law. What that court is expected to do in that circumstance, is simply to look at the award and determine whether on the

state of the law as understood by the arbitrator and as reflected on the face of the award, the arbitrator complied with the law as he perceived it rightly or wrongly. It is therefore a subjective test, as the judge simply takes the position as the arbitrator and not above him and determines the issue in that perspective alone. See the case of **Baker Marina Limited Vs. Danos & Curole Count Inc (2001) 7 NWLR (Pt. 712) 337** at 352; **A Savoia Ltd Vs. Sonubi (2000) 12 NWLR (Pt. 682) 539** at 551 para F.G Baker Marine (Nig) Ltd Vs. Chevron Nig. Ltd (2000) 12 NWLR (Pt. 681) 393 at 410. Again, looking at the prayers contained in the motion the appellant approached the trial court seeking orders for review of the decision of the sole arbitrator with a view to setting aside the arbitral award for same being incorrectly arrived at by the arbitral panel. By those prayers, the appellant was definitely invoking the jurisdiction of the trial court as provided by Section 272 (2) of the 1999 Constitution, as amended. Under those provisions, the High Court when so approached, is simply saddled with the responsibility of considering the proceedings of the arbitral panel and thereby using its supervisory function or jurisdiction as a court of first instance, even though it has no business or required to call evidence. The learned counsel for the appellant cited and relied on some decided authorities to support his stance on that point which said authorities are in my view germaine and relevant and duly supported.

This brings me to the question "whether leave must be sought and obtained on all the grounds of appeal filed before the lower court in order to have a valid and competent appeal". The appellant submitted that all his grounds of appeal were grounds of law alone and as such he was not required to seek and obtain the leave of the trial High Court or of the Court of Appeal before filing them. Having looked very closely at virtually all the grounds of appeal contained in the amended notice of appeal except Ground 1 filed by the appellant, especially grounds Nos. 2 and 3, are grounds of mixed law and fact. It is noted by me that in each of the two, the appellant stated or captioned them as follows "the lower court erred in law". But upon further examining or closely looking at the particulars of each of the grounds of appeal, the appellant's complaint was on the evidence adduced at the arbitral proceedings, or on evaluation of evidence

by the trial High Court.

Now let us look at the provisions of Section 242 of the 1999 Constitution as amended. The Section reads thus:

> **(3) Subject to the provisions of section 241 of this Constitution, an appeal shall lie from decision of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that High Court or the Court of Appeal.**
>
> **(4) The Court of Appeal may dispose of any application for leave to appeal from any decision of the Federal High Court or a High Court in respect of any civil or criminal proceedings in which an appeal has been brought to the Federal High Court or a High Court from any other court after consideration of the record of the proceedings, if the Court of Appeal is of the opinion that the interests of justice do not require an oral hearing of the application.**

By the above Constitutional provisions, any party who is aggrieved with decision or ruling of the High Court such party so aggrieved, can only validly appeal with leave of either the High Court or that of the Court of Appeal provided that such intended appeal he complies with the conditions laid down under Section 241 of the 1999 Constitution as amended. The subject matter of the appeal lodged by the appellant before the lower court no doubt falls under the conditions laid down in Section 241 of the 1999 Constitution as amended, since the grounds of appeal contained in the amended notice of appeal, where grounds of mixed law and fact as they all raised issues of evaluation of evidence and issues of both law and of mixed law and facts at the same time. They are therefore grounds of mixed law and facts as opposed to the appellant's learned counsel contention that they were grounds of law alone. Even by mere looking at them, from all indications, there was no leave sought and obtained by the appellant from either the High Court (trial court) or the court below before filing such

grounds of appeal. However, since I stated that Ground No. 1 is a ground of law alone, the appellant can appeal on it as of right because he did not require any leave. The ground alone, can therefore sustain his appeal.

The learned counsel for the appellant as I said above, had tagged all the grounds of appeal in the amended notice of appeal as "grounds of law alone". In his submission the learned appellant's counsel also argued that all the grounds of appeal being grounds of law alone, he was not of necessity, required to obtain leave before filing them.

The law is settled that the question whether a ground of appeal is one of law alone or of mixed law and fact does not depend on the label it was given by the framer (appellant). The court is required to thoroughly examine the grounds of appeal under consideration and their particulars in order to ascertain whether such grounds of appeal reveal misunderstanding of the law or misapplication of the law to the facts already proved or in which case it would be question of law. But if it is one which requires questioning the evaluation of facts by the lower court before the application of the law, then it would amount to question of mixed law and fact. See **THE MINISTER OF PETROLEUM & MINERAL RESOURCES & ANOR VS. EXPOSHIPPING LINE (NIGERIA) LTD** (2010) 12 NWLR (Pt. 1208) 261; **TB OGBECHIE & ORS VS. GABRIEL ONOCHIE & ORS** (1986) NWLR (Pt. 23) 484; **G. N. NWAOLISAH VS PASCHAL NWABUFOH** (2011) LPELR – 2115 (SC). As I posited supra, upon examining the grounds of appeal filed by the appellant, I am inclined to agree with the submission of the learned counsel for the respondent that the said grounds of appeal Nos. 2 and 3 are grounds of mixed law and fact which Ground 1 is of law alone as I stated above. The High Court or the trial court, when it entertained the motion filed by the present applicant/appellant, was sitting as a court of first instance, in order to determine the propriety of arbitral award made by the sole arbitrator. The appellant therefore should have sought and obtained leave of the trial High Court or the court below under Section 242 (1) of the 1999 Constitution only with regard to grounds No. 2 & 3 as rightly found by the lower court. But with regard to ground No. 1 which is a ground of law alone, he can appeal as right. Failure to first seek and obtain leave from the trial court or

the lower court in respect of Grounds 2, 3 and 4 rendered his Grounds 2, 3 and 4 incompetent, for want of such leave. See **AJA VS. OKORO** (1991) 4 NWLR (Pt 203) 260 at 272; **OPUDU VS. ONWNWARI** (2077) All NWLR (Pt 370) 1093; **IDIKE VS. ERISI** (1987) 9-11 SC 170 AT 189/192. I am therefore in partial agreement with the finding of the lower court that Grounds Nos. 2, 3 and 4 filed before it by the appellant rendered their incompetent for reason or failure on the part of the appellant to seek and obtain leave. The appeal therefore was wrongly struck out by the lower court for being incompetent since Ground No 1 being of law alone can sustain the appeal. The first issue for determination is therefore partly resolved in favour of the appellant herein.

Issue No. 2

This issue questions whether the lower court was right in upholding the findings of the sole arbitrator and that of the trial court that the witness statement on Oath of one Mr. Ekpedeme James Harry (CW1) was sworn before the Commissioner for Oaths despite witness's own admission that it was not. On this issue, the learned counsel for the appellant submitted that the fact that a witness's statement was adopted without an objection does not bar an opponent from raising an objection regarding its validity in his address. Learned appellant's counsel referred to the testimony of the said witness during cross examination where he stated that when he signed the statement the Commissioner for Oath was not with him. He contended that the lower court was wrong to have agreed with the reasoning of the trial High Court that the said witness duly swore to the statement on Oath before the Commissioner for Oath. He again argued that the lower court was wrong to have held that CW1 was entitled to retract his evidence adding that the interesting thing to note about the defect in the witness statement of CW1 is that it is not curable same not being a defect in form but in substance. He urged this court to resolve this issue in the appellant's favour.

In his reply to the above submission of appellant's counsel on this issue, the learned counsel for the respondent argued that the question whether the statement of the witness was not sworn to before a duly authorized Commissioner for Oath had already been proved. He argued

A that there was no categorical statement to the effect that the witness's deposition was not made before a Commissioner for Oaths. Learned respondent's counsel further submitted that even if there was any admission initially, such admission could not operate as estoppel and not conclusive
B against a party who made such admission in error. He argued that the party has the right to explain the circumstances to show that the admission were made due to misconception of real facts. He urged this court to resolve this issue in his favour and against the appellant.

C I think the resolution of this issue does not require any dissipation of energy. The record of appeal clearly shows that when testifying before the arbitral panel, the witness, (i.e. CW1) stated that he was really taken to Commissioner for Oath. The witness also admitted signing the statement
D on oath even though; during cross examination he said he signed his witness statement at the same time while sitting with another witness, one Mr. James. On the findings of both the sole arbitrator and the trial court, it was decided that the witness's statement on oath was signed by the witness
E and that such was done before the Commissioner for Oaths. Also the High Courts had also endorsed the finding of the arbitral panel. On its part, the learned counsel for the responded urged that there were concurrent findings of the arbitral panel, the High Court and the lower court.

F In view of the concurrent findings of the two lower courts I feel that this court lacks the competence to interfere with or disturb those current findings especially in the absence of any cogent and convincing reasons or explanation showing that those findings were perverse or that there were
G misconception of law by the two lower courts. Also there was no any explanation advanced by the appellant to warrant or justify any interference with such findings as they were not shown to be perverse, hence I cannot interfere with them. See **EBBA VS OGODO** (1984) 4 SC 84. I therefore
H resolve this issue against the appellant in favour of the respondent.

Issue No. 3

The third issue relates to whether the lower court was right to have refused
I to set aside the decision of the trial court which held that the sole arbitrator was right by relying on inadmissible evidence.

A On this issue, it was argued by the learned counsel for the appellant, that the refusal by the Court of Appeal to agree with the appellant that there were inconsistencies in the evidence of CW1 warranting the setting aside of the arbitral award had occasioned a miscarriage of Justice to the appellant.
B Learned counsel thereupon referred to alleged inconsistencies in the statement of CW1 to the effect that he said the lightening had struck on the windows, while in another breath he stated that he ran out of the security counter to uncompleted building immediately the first lightening struck.
C The learned counsel submitted that the inconsistencies portrayed him as one who ought not to be believed by the trial court. He urged this court to hold that the lower court's affirmation of the testimony of the witness was based on speculation or hearsay as he ought not be believed by the court.
D He prayed this court to hold that the lower court was wrong to have held that the arbitrator was right in relying on the evidence of CW1. He finally urged this court to resolve this issue in the appellant's favour and to set aside the arbitral award.
E Replying to the above submission of appellant's learned counsel on this issue, the counsel for the respondent submitted that there was nowhere in the Judgment of the trial High Court or the Court of Appeal (lower court) where it was decided that the evidence of CW1 was inadmissible. He
F submitted that there was absolutely no conflict between the sworn deposition and the evidence extracted under cross examination of the respondent at the arbitration proceedings. He urged this court to resolve this issue against the appellant but in favour of the respondent.
G The learned counsel for the appellant's grouse was that there were some inconsistencies in the evidence led by the respondent during the arbitral proceedings. Some of the alleged inconsistencies he cited are what he termed to be the inconsistencies between the contents of the statement on
H oath and CW1's testimony during cross examination at the arbitral panel proceedings.

I have considered various alleged or supposed contradictions or inconsistencies in the testimony of the sole witness i.e. CW1 referred to in
I the appellant's brief of argument. The law is trite and indeed well settled that for any conflict or contradiction or inconsistency in the evidence of a

witness to be fatal, such conflict or contradiction or inconsistency must be material, substantial and fundamental to the main issues in controversy between the parties before the court as would create some doubts in the mind of the trial judge. In fact, it must be shown to have amounted to substantial disparagement of the witness concerned making it dangerous or likely to result in miscarriage of justice to rely on the evidence of such witness. My understanding of the meaning of contradictory statement is that it is an affiliation of a contrary version of what was either stated or spoken, and even then, it must be on a factual point in issue in controversy or contention between the parties or must be material to the fact in issue. In the present case all the alleged contradictions in the statement of Oath CW1 and his testimony were not on material facts at the arbitral panel proceedings or factual issue in contention or controversy which were germaine to the determination of the case before the arbitral panel. It is noted by me, that the learned trial Judge had adequately considered all the alleged contradictory statements on Oath of the CW1 as well as his testimony in the proceedings before arriving at the conclusion upholding the arbitrator's findings and holding that the evidence of CW1 was admissible as there were no material contradictions. I am also convinced that the lower court was right in upholding such finding of the trial court without any hesitation. I therefore resolve this issue against the appellant and in favour of the respondent herein.

Issue No. 4

This issue relates to whether the Court of Appeal i.e. the lower court was right to have upheld the finding of the High Court that the sole arbitrator did not suo motu raise issue as to how Exhibit R2 was produced and reaching conclusion on areas which were beyond the scope of the submission made by learned counsel at the arbitration proceedings. The learned counsel for the appellant submitted that the sole arbitrator decided the case before him on point not argued or canvassed or put before him for determination by the arbitrator and as such that action amounted to misconduct for which the trial court ought to have set aside the arbitral award. He cited and relied on the case of **Taylor Woodrod (Nigeria) Limited** Vs. S. F. GMBH (1993) 4

NWLR (Pt. 286) 127. While referring to the ruling of the High Court at page 184 of the record, the learned appellant's counsel argued that the issue of how Exhibit R2 was produced was never raised by any of the parties not even the respondent's counsel in his cross examination of the appellant's witness. He again submitted that issue was not about the admissibility but one that deals with the weight to be attached and that the bottom line was that both admissibility and weight are indirectly imputed by the manner in which the exhibit was produced. He contended that the opinion of the expert is indispensable if the Justice of a technical matter such as the instant one, will be allowed. He then urged this court to resolve this issue in his favour, allow the appeal and set aside the decisions of both the court below as well as the arbitral award.

Responding to the above submission by appellant's counsel on this issue, the learned counsel for the respondent argued that the record of appeal did not show the issue or points argued and submitted to the arbitrator for resolution and that Exhibit R2 was tendered by the appellant to support its case and therefore was the one who brought the said exhibit into focus as an issue in the proceedings. He urged the court to hold that the source of Exhibit R2 was not suo motu brought by the sole arbitrator and that was also not an issue submitted to the arbitrator. He urged this court to resolve the issue against the appellant.

Now on this issue, the appellant is complaining that it was the sole arbitrator who suo motu raised or introduced the issue as to how Exhibit R2 was produced which according to him, the arbitrator reached a conclusion on scope of submission by the parties learned counsel. On examining the record of proceedings by me, I note there is no dispute that what the parties approached the arbitral panel for resolution did not actually relate to the said exhibit. It is worthy of note, that in the first place, it was the appellant who raised or introduced Exhibit R2 because it was the party that tendered it in evidence and its admission in evidence brought it to bear or feature in the proceedings, same being admitted in evidence during the proceedings.

Having been tendered in evidence through its witness and so admitted, the witness through whom it was tendered ought to be cross examined on its contents and had indeed been subjected to rigorous cross

examination by the adverse party since it was put in issue which somehow led to its being disparaged during cross examination. In that regard, I think it will be wrong to say that the issue relating to Exhibit R2 was suo motu raised by the arbitral panel as rightly held by the two lower courts.

The law is trite that once an issue is raised or canvassed by learned counsel in the course of the proceedings, it is incumbent upon the trial court to consider it and form its opinion on it. Of course after evaluating the evidence brought in focus at the proceedings. In doing so, the trial court or arbitral panel had to form its own opinion on the exhibit or issue raised before it, and as such it cannot be accused that it raised it suo motu. The complaint by the learned appellant's counsel on Exhibit R2 that the same had been raised suo motu by the arbitral panel, has no substance and cannot stand on any substratum. It is therefore of no moment and is in fact a ruse. This issue is also resolved in favour of the appellant herein.

Thus, having resolved all the four issues raised by the appellant in his brief of argument against him, my ultimate conclusion that I reached is that this appeal is lacking in merit. It therefore fails and is accordingly dismissed. Costs follow events. I award a cost of #200,000= against the appellant in favour of the respondent. Appeal dismissed.

Amiru Sanusi
Justice, Supreme Court

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC): I have had a preview of the judgment of my learned brother, AMIRU SANUSI, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

The genesis of this appeal was an arbitration proceeding conducted by Mr. Emmanuel Ukala, SAN in respect of a dispute between the parties herein regarding damage to the respondent's house as a result of lighting striking the appellant's mast during a thunderstorm. The arbitration took place in Port Harcourt, Rivers State. The arbitrator published his award on 20/2/2010. It was in the respondent's favour. Various sums were awarded to the respondent as special and general damages and costs.

A The appellant was dissatisfied with the award and applied to the High Court of Akwa Ibom State (the trial court) to set aside the award on grounds of misconduct. The High Court in the main upheld the award but set aside the award of N85,000 as special damages. All the other grounds of
B misconduct were rejected.

The appellant was still dissatisfied and filed an appeal before the Court of Appeal, Calabar Division. The parties were invited to address the court on whether the appeal was competent having been filed without
C leave. The court held that in exercising its jurisdiction to determine whether or not to set aside the arbitral award, the trial court was exercising appellate jurisdiction and that having regard to Section 242(1) of the 1999 Constitution, the appellant could only appeal with leave of either the High
D Court or the Court of Appeal. Consequently, it declared the amended notice of appeal filed on 20/4/2011 incompetent and struck it out. However not being the final court, it determined the appeal on its merit in the event that its decision in respect of the competence of the amended notice of
E appeal was overruled.

In its Issue 1 before us the appellant queries whether the lower court was right when it struck out the amended notice of appeal for failure to obtain leave to appeal.

F This issue highlights the misconception commonly held regarding the status of the High Court when hearing an application to set aside an arbitral award.

Section 272(1) & (2) of the 1999 Constitution, as amended provides:

G

"272 (1) Subject to the provision of Section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear
H **and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any**
I **criminal proceedings involving or relating to any penalty, forfeiture, punishment or other**

liability in respect of an offence committed by any person.

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

Thus the jurisdiction of the High Court may be original, appellate or supervisory.

Sections 29 and 30 of the Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria, 2004 make provisions for the setting aside of an arbitral award as follows:

"29. (1) A party who is aggrieved by an arbitral award may within three months

(c) From the date of the award; or

(d) In a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal,

by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

(2) The Court may set aside an arbitral award, if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside".

Section 57 of the Act provides that "court" means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.

In order to determine whether the jurisdiction of the court is appellate or original, it is necessary to consider what the court has power to do when called upon to set aside an arbitral award. The jurisdiction of the court in this regard is very narrow. It was held by this court in **A. Savoia Ltd. Vs. Sonubi (2000) 12 NWLR (Pt. 682) 538 @ 551 F-G** that the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside the award or remitting it to the arbitrator for reconsideration. It was further held that the court has no jurisdiction to determine any matter which is the subject of the arbitration proceedings.

In **Baker Marine Vs. Chevron (2000) 12 NWLR (Pt. 681) 393,** His Lordship Oguntade, JCA (as he then was) stated *inter alia:*

> **"The lower court was not sitting as an appellate court over the award of the arbitrators. The lower court was not therefore empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. What the lower court had to do was to look at the award and determine whether on the state of the law as understood by them and as stated on the face of the award, the arbitrators complied with the law as they themselves rightly or wrongly perceived it. The approach here is subjective. <u>The court places itself in the position of the arbitrators, not above them</u>**, and then determines on that hypothesis whether the arbitrators followed the law as they understood and expressed it" (Emphasis mine)

See also: **Aye-Fenus Ent. Ltd. Vs. Saipem (Nig.) Ltd. (2009) 2 NWLR (Pt. 1126) 483 @ 513H – 514H.** It is evident from the above that the role of the High Court with regard to an application to set aside an arbitral award is not appellate as the court cannot go into the merit of the award. It can either set it aside, uphold it or remit it to the arbitrator to reconsider a particular

aspect. It is akin to the jurisdiction exercised by the High Court in respect of an application for judicial review. It was held in **Gov. of Oyo State Vs. Folayan (1995) 8 NWLR (Pt. 413) 292 @ 322-323 H-B** that:

> **"(a) a judicial review is not an appeal;**
> **(b) the court must not substitute its judgment for that of the public body whose decision is being reviewed;**
> **(c) the correct focus is not upon the decision but the manner in which it was reached;**
> **(d) what matters is the legality and not the correctness of the decision and**
> **(e) the reviewing court is not concerned with the merits of a target activity".**

See also: **Military Governor of Imo State & Anor. Vs. Nwauwa (1997) LPELR – 1876 (SC) @ 23 – 24 E – A.**

In effect, when a High Court is exercising its powers under the Arbitration and Conciliation Act to set aside an arbitral award it is exercising its original jurisdiction in a supervisory capacity. A decision whether or not to set aside an award is a final decision from which an aggrieved party is entitled to appeal as of right by virtue of Section 241(1)(a) of the 1999 Constitution, as amended. The appellant therefore did not require leave to appeal. In the circumstances, I resolve this issue in the appellant's favour.

On the merit of the appeal, I am in full agreement with the reasoning and conclusion of my learned brother, AMIRU SANUSI, JSC in respect of issues 2, 3 and 4. I also resolve them against the appellant.

Thus, notwithstanding the resolution of issue 1 in the appellant's favour, the appeal fails and is accordingly dismissed.

I abide by the consequential orders made in the lead judgment including the order for costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

A **SIDI DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead Judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal lacks merit, and it is accordingly
B dismissed by me. I abide by all the orders contained in the lead judgment.

Sidi Dauda Bage
Justice, Supreme Court

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OLABISI OLAKUNLE
AND
THE STATE

SC. 210/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 9TH JUNE, 2017

BEFORE THEIR LORDSHIPS

MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Onus on appellant thereon – How discharged.

COURT Jurisdiction – Supreme Court – S. 233 (1) CFRN 1999 (as amended) – Whether does no have jurisdiction to take appeals from the High Count.

CRIMINAL LAW AND PROCEDURE: Confessional Statement – Retraction therefrom – Whether where an accused retracts from his earlier statement, he owes it as a duty to impeach earlier statement.

CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Where there is no direct evidence of agreement – Whether can be inferred from the acts of the accused – The principle in Onyenye vs The State (2012) 15 NWLR (Pt 1324) 586.

CRIMINAL LAW AND PROCEDURE: Conviction – Evidence of a single witness – Whether can secure conviction.

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

CRIMINAL LAW AND PROCEDURE: Identification – Evidence thereof – Whether cannot be tendered from the Bar.

CRIMINAL LAW AND PROCEDURE: Identification – Identification parade – Necessity thereof – Whether necessary only where the evidence on identification is poor.

CRIMINAL LAW AND PROCEDURE: Identification – Identification parade – Where evidence of identification is expressly or implied admitted by the accused – Whether identification parade unnecessary.

CRIMINAL LAW AND PROCEDURE: Proof of guilt – Where prosecution has led evidence which implicates the accused – Whether accused has evidential burden under S. 135 (3) to cast doubt on the evidence of prosecution.

CRIMINAL LAW: Defence – Alibi – How raised – Whether accused to raise it within reasonable time and earliest opportunity to enable police investigate it.

EVIDENCE: Confessional statement – Where free; voluntary, direct, positive and properly proved – Whether sufficient to sustain conviction.

EVIDENCE: Proof – Facts not disputed – Whether shall be taken as admitted.

PRACTICE AND PROCEDURE: Conflicting statements – Where a witness explains the circumstance or reason for his conflicting statements – Whether the court can act on it.

STATUTE: Rule of Professional – Conduct for Legal Practitioners 2007 – Rule 31 (1) thereof – Import and imperatives.

WORDS AND PHRASES: Confession – Meaning – S. 28 (1) of the Evidence Act 2011.

WORDS AND PHRASES: Robbery – Meaning

Facts of the Matter

The appellant was arraigned and charged for conspiracy to commit armed robbery and the commission of armed robbery on 13th October, 2011. He was jointly tried on 4 count charge with one Ibrahim Adeyeye. They each pleaded not guilty to the 4 count charge.

Three witnesses testified for the prosecution at the trial High Court. The PW.1, a Police exhibit keeper, testified only as to the roles he played as the exhibit keeper. The other police officer who testified was the PW.3. He was the Investigating Police Officer (IPO). He recorded extra judicial statement from the appellant, as the 2nd accused. The statement was admitted in evidence as Exhibit AA2 through the PW. 3 after trial-within-trial. Thereafter, the appellant testified in his defence as DW.2. He called no other witness.

On 13th October, 2011 Pw2 drove out in a Toyota Camry Car with registration No. EM 737 FST, Exhibit 2, to pick her daughter who was returning home from Kano. She drove to the motor-park and picked the daughter. They drove to their gate at No. 6, Afolabi Oyinloye Street, Off Pipeline, Ilorin. She blared the car horn for the people inside the compound to open the gate for her to drive in. The noise of the generator apparently did not allow the people to hear the horn blaring from her car. The daughter came out of the car to knock at the gate. As the daughter came down from the car and just before she got to the gate the PW. 2 noticed that a car had pulled up behind her car. Somebody came out from that car and ordered the PW. 2 to come out of her car. It was the appellant. He pulled PW. 2's ears to remove the earrings. He collected necklace and wrist watch and wedding ring from the PW.2. The appellant, according to the PW. 2, brought out a gun threatening to shoot as he was

ordering the PW.2 to surrender the car, and at the same time collecting earrings, necklace and wedding ring from her. Appellant's co-accused had taken on the PW.2's daughter. He collected her hand bag and earring. The two threatened that if PW.2 and her daughter shouted they would shoot them. They then drove off in PW. 2's car. There were two others in the other car. The two cars were driven away from the PW. 2's gate. It was then the PW.2 and her daughter were able to alert the people in the compound. A report was promptly made to the police.

The following day the police in Ibadan recovered the car and informed the PW.2's husband. The appellant and others were apprehended by the police in Ibadan with the car snatched from the PW.2.

The trial High Court in its judgment convicted the appellant and the co-accused for conspiracy to commit armed robbery and armed robbery. After the pleas of their counsel for leniency, they were each sentenced to death by hanging. The appellant appealed against his conviction and sentence. The appeal was dismissed on 4th March, 2014 and his conviction and sentence were affirmed. This further appeal is against that judgment of the Court of Appeal.

Held *(Unanimously dismissing the appeal)*

1. *Misconception of PW3's evidence*

Under cross-examination the PW. 3 had answered thus, at page 77 of the record, to the question put: "The only job I know they (the accused) do is robbery". In other words, the only vocation the appellant and the co-accused engaged themselves in is robbery. I cannot therefore comprehend the learned counsel's submission to the effect that since the PW. 3's evidence is categorical that the appellant's only known work is robbery, there is therefore no justification for his conviction and sentence, in the first place, for the offence of armed robbery. I do not think the learned counsel is right in dismissing this empirical statement of fact as mere speculation or mere imaginative guess. In any case, this evidence, very adverse to the case of the appellant, was elicited from the PW.3 under cross-examination. This is what makes it preposterous for the appellant's counsel to submit that it is not the function of the trial judge to supply the adverse evidence. *(Pp 190 – 191 paras G – A)*

2. *Attack on the trial judge improper by virtue of rules of professional conduct for legal practitioners*

This attack on the integrity of the learned trial judge is, to say the least, very irresponsible and reprehensible. Rule 31(1) of the Rules of Professional Conduct for Legal Practitioners, 2007 enjoins the appellant's counsel to "always treat the court with respect, dignity and honour". It is unethical for a lawyer, an officer of the court, to be disrespectful to the court and thereby bring it to disrepute by very reckless and ill-conceived submissions. *(P 191 paras B – C)*

3. *Supreme Court has no jurisdiction to take appeals from the High Court*

The offensive submission unfortunately attacks the learned trial judge. This court by dint of Section 233(1) of the 1999 Constitution, as altered, has no jurisdiction to take appeals as complaints against the decision of any High Court, including the trial High Court. Issue 1, though unmeritorious, is also incompetent. *(P 191 paras C – D)*

4. *Misconception in PW3's answer which the trail court did not base his conviction*

Issue 2, as formulated, has veered off the complaint of breach of the appellant's guaranteed right to fair trial to a mere question, whether the lower court was right when it affirmed the trial court's holding that apart from the PW. 3's answer, there is evidence from the PW.3 and other witnesses which the trial court rightly received and considered in convicting the appellant.

The PW.3's answer to a question under cross-examination that robbery is the only work or job he knew that the appellant and his co-accused engaged themselves in is again the subject of Issue 2. Appellant's counsel at the lower court made so much fuss of this answer given in response to a question at the Lower Court. He had misconceived the answer in the first place. Secondly, the trial court did not base the conviction or sentence on the fact that the only known work the appellant engaged himself was robbery, as a vocation or trade. Appellant's counsel seems to erroneously think

that by this answer the PW. 3 had judgmentally averred that the appellant committed mere ordinary robbery, and not armed robbery which is the aggravated robbery. It is for this obvious misconception that the learned counsel has consistently harped on PW. 3's answer to the question at page 77 of the record.

The Lower Court, in my firm view, was right in holding that apart from the singular answer to a specific question there were other evidence, including PW. 3's evidence as the IPO, on which the trial court relied to convict the appellant.

In the evaluation the learned trial judge had considered the evidence of PW. 1, PW. 2, PW. 3 and other material pieces of evidence including Exhibit AA2, the confessional statement of the appellant, and the appellant's testimony in his own defence.
(Pp 191 – 192 paras F – E)

5. *The lower court was right in affirming the appeallant's conviction based on empirical evidence*

The Lower Court, from the record, had further embarked on the re-evaluation of the available evidence at the trial in order to satisfy itself that the findings of fact, culminating in the conviction of the appellant, were not perverse and a miscarriage of justice. The conviction of the appellant affirmed by the Lower Court was not an exercise in speculation or mere imaginative guess to fill the gap. In the circumstance, the contention of the appellant that the trial court based his conviction on mere imaginative guess work and speculation and that the lower court was in error to have affirmed his conviction and sentence cannot be sustained.

Much as I agree, on authority of George Vs. FRN (2010) 11 NWLR (Pt. 1206) 531 at 552, that a court is not to speculate on matters not before it; I do not agree with the appellant that his conviction was predicated on mere speculation. I should say that the conviction of the appellant was based on empirical evidence before the trial court. The lower court, was therefore right to have affirmed the appellant's conviction and sentence on the empirical

evidence contained in the record. *(P. 192 paras E – I)*

6. *Elements which the prosecution must prove to establish the offence of murder armed robbery*

The three elements the prosecution must prove in order to establish the offence of armed robbery are:

"i. that there was a robbery;
ii. that the robbery was an armed robbery;
iii. and that the accused person was either the armed robber or that he was among the armed robbers".

The appellant and the respondent are *ad idem* on these elements the prosecution must prove in order to prove the charge of armed robbery. I agree, from the authorities, that the prosecution must prove these elements in order to establish that armed robbery had been committed. See Okudo Vs. The State (2011) 3 NWLR (Pt. 1234) 209 at 233; Osetola Vs. The State (2012) 17 NWLR (Pt. 1329) 25 at 27; The State Vs. Salawu (2012) All FWLR (Pt. 614), at 54.
(P 193 paras A – D)

7. *The definition of robbery*

Robbery, itself, is an aggravated theft. It is the illegal taking of property from the person of another by violence, threats of violence or intimidation. It is armed robbery when the theft or robber is committed by a person carrying a dangerous weapon or when thief is accompanied by another person carrying a dangerous weapon. See Black's Law Dictionary 9th Ed., page 1443. *(P 193 paras D – E)*

Per Eko (JSC)

Both the learned counsel for the appellant and respondent submitted that the evidence of the PW. 2, the victim, was material. The testimony of PW. 2 was not discredited and it was believed by the trial court. I had earlier summarized the evidence of PW. 2.

The trial court found as a fact from the PW. 2's evidence that the appellant was armed with a gun when he violently removed from the PW. 2 her earrings, necklace, wedding ring and wrist watch; and that he threatened to shoot her or her daughter if anyone of them shouted. They submitted to his command. The PW. 2 then surrendered the car key to the appellant. The car snatched at gun point was then driven off.

The PW. 3, corroborating the evidence of the PW. 2, testified that on 14th October, 2011, a day after the robbery, the police patrol team intercepted the Toyota Camry Car No. LAGOS EM 737 FST within Ibadan and arrested the two occupants. The PW. 2 later identified the car and the other items stolen from her the previous day in Ilorin. The trial court believed both PW. 2 and PW. 3. The findings of fact were subsequently affirmed by the Lower Court. On these concurrent findings of fact, the appellant's counsel submits that the trial court wrongly believed the prosecution witnesses, even when the prosecution failed to prove the case against the accused beyond reasonable doubt. I repeat; this appeal is not against the decision of the trial court. Rather it is against the decision of the Court of Appeal affirming the conviction and sentence of the appellant. The question is whether, from the state of available evidence the Lower Court was right in affirming the decision of the trial court. The appellant has not shown any concrete or plausible reason that would persuade a reasonable appellate tribunal to disturb the concurrent findings of fact by the two courts. I am the least persuaded that the Lower Court wrongly affirmed the conviction and sentence of the appellant for armed robbery. *(Pp 193 – 194 paras F – D)*

8. *Accused has evidential burden under S. 135 (3) of Evidence Act.*

It is not the law that the accused has no evidential burden to adduce evidence that casts reasonable doubt on the prosecution's evidence which tends to implicate the accused. Section 135(3) of the Evidence Act, 2011 is clear; if the prosecution proves the commission of a

crime by the accused beyond reasonable doubt, the burden of casting reasonable doubt on the prosecution's case is shifted to the accused person or defendant.

The evidence of PW. 2 and PW. 3 establish that on 13th October, 2011 the appellant and one other violently stole from or robbed the PW. 2 and her daughter valuable items including earrings, necklace, wedding rings and wrist-watch and also that the appellant and one other at a gun point snatched from the PW. 2 a Toyota Camry Car No. LAGOS EM 757 FST. *(P 194 paras D – G)*

9. *There is no material contradictions*

What the appellant's counsel considers to be material contradiction is a non-issue, that is completely irrelevant. He is just making so much fuss about the dates the report was made to the police, as opposed to the date the alleged offence was committed. The armed robbery was committed in the night of 13th October, 2011. On the charge sheet that was the date the offence was allegedly committed. PW. 2's evidence accords with this date. She is the only eye witness. The PW. 3 stated, in one breath, that on 18th October, 2011, the police at the SARS office received information about the two cars snatched at gun points on the said 18th October, 2011. In another breath, still in his evidence-in-Chief, PW. 3 stated that on 14th October, 2011 the police had received report from Oyo State Police Station that the Toyota Camry Car No. LAGOS EM 757 FST, snatched at gun-point from the PW. 2 had been intercepted by the Patrol Team and the two occupants were arrested as they could not explain how they came about the car. These facts are not material nor do they go to the substratum of the offence of armed robbery the appellant was defending. Even if the facts were material, the PW. 3, under cross-examination, subsequently explained why and how he had mixed up the facts as to these dates. ***(P 195 Paras D – H)***

Section 135(3) of the evidence Act, 2011 places evidential burden on the accused person to call evidence that casts reasonable

doubt on the case of the prosecution, when the latter had proved that the accused committed the alleged offence. In exercise of that right, howbeit duty, the appellant in his defence at the trial court raised for the first time his *alibi*. This defence presupposes that the accused was elsewhere at the material time the offence was allegedly committed at the *locus criminis*.

The accused person is by law enjoined to raise the defence of *alibi* at the earliest opportunity and within a reasonable time to enable the prosecution to investigate it with the view of confirming or disproving it. See Lateef Sadiku Vs. The State (2013) LPELR – 20588 (sc); Udobre Vs. The State (2001) FWLR (Pt. 59) 1244 at 1258 1259.

A successful plea of *alibi* not only casts reasonable doubt on the case of the prosecution against the accused person, it is a complete defence to the charge. In the instant case, the appellant raised the *alibi* for the first time in the trial court after the prosecution had closed their case against him. The undiscredited evidence of the PW. 2 had fixed him to the *locus criminis* and the alleged armed robbery. His confession in Exhibit AA2 had also established that he committed the alleged armed robbery. Exhibit AA2 also corroborates the PW. 3 that on 14th October 2011, after the robbery in Ilorin in the night of 13th October, 2011, the Police Patrol Team intercepted the stolen car while it was being driven by the appellant and/or the control of himself and the 1st accused. The appellant raised the *alibi* for the first time while he was being cross-examined. This piece of evidence is inconsistent with the appellant's previous statement, Exhibit AA2, which disproved the *alibi*. The *alibi* is clearly unreliable. *(Pp 200 – 201 paras F – C)*

10. *Where a witness explains his conflicting statements the court can act on it*

Once the witness explains satisfactorily why or the circumstances he gave the conflicting evidence the court can act on his evidence. See Boy Muka Vs. The State (1976) 10 SC 305; Onubogu Vs. The State (1974) 4 U.I.L.R. 538; (1974) 9 SC. 1

The Lower Court found that there was no contradiction or inconsistency in the evidence of PW. 2 and PW. 3 " that is substantial enough to affect the case of prosecution and the eventual decision of the trial judge". I cannot fault this finding of fact, and I completely endorse it. *(Pp 195 – 196 paras 1 – B)*

Per Eko (JSC)

The Lower Court, relying on this court's decision in Onyenye Vs. The State (2012) Vol. 5 MJSC (Pt. ii) 121; (2012) 15 NWLR (Pt. 1324) 586 at 617; (2013) All FWLR (Pt. 643) 1810 at 1832, held correctly in my view, that in law, conspiracy can be inferred from the acts of the accused where there is no direct evidence of an agreement between the accused. The law, from a long line of cases, is settle that from the acts of the accused where there is no direct evidence of an agreement between the accused and another criminal conspiracy can be inferred. It is the law, from a number of cases, that from the acts or manner the accused persons were doing things towards actualizing a common end it can be inferred or deduced that they did so in furtherance of their conspiratorial agreement to commit the alleged offence. See also Obiakor Vs. The State (2002) 10 NWLR (Pt. 776) 612; Daboh Vs. The State (1977) 5 SC 197; Muonwem Vs. Queen (1963) 2 SCNLR 172; Ubierho Vs. The State (2005) 1 NWLR (Pt. 919) 644.

The facts of this case, as can be seen from the undiscredited evidence of the PW. 2, shows that the appellant and his co-accused were in the car that trailed the PW. 2's car to her gate; that at the gate while the PW. 2 waited for her daughter to ensure that the gate was opened the appellant the accused, with a gun pointed at the PW. 2 ordered her to surrender the car key and come out of the car, that at the same time the appellant violently pulled PW. 2's ears to remove her earrings, broke her necklace and took it away together with her wedding ring and wrist-watch, and that the gun wielding 1st accused ordered the PW. 2's daughter to lie down as he collected earrings and

hand-bag. Thereafter the two entered the PW. 2's car and drove but not before warning the PW. 2 and her daughter that if they shouted to raise alarm they would be shot. These facts are all corroborated by Exhibit AA2, the extra judicial statement of the appellant admitted in evidence after trial-within-trial.

In the instant case, Exhibit AA2, the confession establishes the criminal conspiracy between the 1st accused, the appellant and the other two persons at large who were in the waiting car behind the PW. 2's car. From the PW. 2's evidence it is not difficult to deduce the conspiracy between these 4 characters to rob the PW. 2. The Lower Court in the circumstance had correctly applied the principle laid down in Onyenye's case (supra) by this court. *(Pp 196 – 197 paras B – B)*

11. *Facts not disputed are taken as admitted*

In both law and common sense facts not disputed are taken as admitted and/or established. They need no further proof as they are regarded as the strongest proof of the point or issue the facts refer. See Din vs. African Newspapers Ltd. (1990) 3 NWLR (Pt. 139) 392 at 405, (1990) 21 NSCC (Pt. 2) 313 at 320; Igwe Vs. ACB PLC (1999) 6 NWLR (Pt. 605) 1 at 11.

The identification of the appellant by the PW. 2 was not an issue at the trial court. It was an admitted fact, no issue having been joined on it by appellant with the PW. 2. Exhibit AA2, appellant's extra judicial statement expressly admits the fact as well. Moreover, as rightly submitted by the respondent's counsel relying on pages 61 and 62 of the record the appellant, upon arrival of the PW. 2 at Eleyele Police Station, had cried and begged the PW. 2 for forgiveness. *(Pp 197 – 198 paras H – B)*

12. *Identification parade is not a sine qua non*

Identification parade is not a *sine qua non* to conviction. It is only necessary when the evidence on it is poor. See Archibong Vs. The State (2004) 1 NWLR (Pt. 855) 488 at 509. It is unnecessary where the evidence on it is either expressly or impliedly admitted as in this

case. See Adamu Vs. The State (1991) LPELR – 73 (SC); Adeyemi Vs. The State (1991) LPELR – 188 (SC), wherein this court restated the law pointedly that when the witness who gave visual identification was not cross-examined nor shaken under cross-examination, nothing stops the trial court from accepting his evidence on it. *(P. 198 paras C – E)*

13. *Counsel cannot give evidence from the Bar*

The learned appellant's counsel, not being himself a witness, cannot in law testify from the Bar, as he did in the appellant's brief. Without any empirical evidence in the printed record the appellant's counsel cannot be heard submitting that "the identification of the appellant is blurred and fuzzy". This is a bare statement from the Bar that has no force of evidence. See Onu Obekpa Vs. Commissioner of Police (1981) 1 NCR 113.

It is untenable, as submitted by the appellant's counsel, that the identification of the appellant was blurred and fuzzy. It is not in dispute the PW. 2 knew and recognized the appellant as the armed robber who snatched the car from her at gun point. From the conduct of the appellant, as can be seen from the PW. 2's evidence at pages 61 and 62 of the record there is no doubt that the appellant knew and recognized his victim. He cried and begged the PW. 2 for forgiveness on sighting her at the Eleyele Police Station.
(P 198 paras E – H)

14. *The conviction of the appellant can be sustained without his confessional statement*

With or without the appellant's confession contained in Exhibit AA2 the conviction and sentence could be sustained. On the PW. 2's evidence alone the conviction could be sustained, even if Exhibit AA2 was successfully retracted. It is clear from the portion of the judgment of the learned trial judge, at pages 102 103 of the record, that it was not only on Exhibit AA2 that the trial court relied to convict the appellant for armed robbery. The learned trial judge

made the point at page 103 of the record where he held that "there is no doubt that the ingredient of the offence of armed robbery is complete in the narration of the PW. 2", and that the narration of the appellant in Exhibit AA2, either separately or in addition, also proved the ingredients of the said offence. In the appellant's brief of argument, it is not shown or demonstrated how the affirmation of the conviction and sentence of the appellant by the Lower Court has in any way occasioned miscarriage of justice. *(Pp 198 – 199 paras H – C)*

15. *An appellant court which does not observe witness cannot contradict the finding of fact of a trial court*

This court, being a second tier appellate court, is not in a position to contradict the findings of fact of the trial court based on available evidence because the appellate court does not have the advantage and the opportunity of observing the demeanor of witnesses as they testified. See Woluchem Vs. Gudi (1981) 5 SC 291 at 295 296; Okuoja Vs. Ishola (1980) 7 SC 314. It becomes worse for the appellate court when the finding of facts turns on the question of credibility of the witnesses. *(P 199 paras F – H)*

Per Eko (JSC)

As regards Exhibit AA2 the trial court followed the correct procedure in the conduct of the trial within trial before admitting it in evidence. The appellant had attempted retracting the statement. His evidence intended to impugn the voluntariness of the confession did not impress the trial court. At that state the decision to admit and not admit Exhibti AA2 in evidence rested largely on the credibility of the witnesses, and it was oath to oath. Neither the Lower Court nor this court was therefore in a position to contradict the trial court's finding on fact that culminated in its admitting Exhibit AA2 in evidence. Even at that, I agree with the respondent that the appellant performed poorly at the trial court in his bid to convince the said court that he was tortured in the bid of the police officers to force him to make Exhibit AA2. His allegation that he

was shot on the leg was not established. There was no sign of any injury on the leg to sustain the allegation. I shall, accordingly, not disturb the finding of fact by the trial court, duly affirmed by the court below, or at Exhibit AA2 was voluntarily made.

Where does all these fuss about Exhibit AA2 lead to? With or without Exhibit AA2 there was enough evidential material on which to sustain the finding of fact that the prosecution had proved beyond reasonable doubt that the appellant committed the offence of armed robbery alleged. The evidence of PW. 2 and PW. 3 are enough to sustain the conviction and sentence. In the circumstance the further pursuit of Issue 7 in this appeal is a mere academic exercise. It will have no utilitarian purpose. *(Pp 199 – 200 paras H – E)*

16. *Where an accused resiles from his earlier statement he owes it as a duty to impeach his earlier statement*

The current state of the law on when an accused retracts or resiles from his previous confession or statement in writing is that, where an accused person during trial retracts, resiles from or denies the earlier statement he made in writing to the police immediately after the event, giving rise to the charge and arraignment, he owes it a duty to the court to impeach his said earlier statement: See Hassan Vs. The State (2001) 15 NWLR (Pt. 735) 184; Nwachukwu Vs. The State (2007) 17 NWLR (Pt. 1062) 31 at 69; Tirimisiyu Adebayo Vs. The State (2014) LPELR 22988 (SC). The integrity of Exhibit AA2, reinforced by the decision of the trial court upon which the confession was admitted in evidence has not been impeached by the appellant. His belated *alibi*, a product of sheer prevarication, cannot in the circumstances be given any serious credibility. The trial court dismissed it as unavailing. The lower court, relying on Njovens Vs. The State (1973) 5 SC. 17; Attah Vs. The State (2010) Vol. 3 (Pt. iv) MJSC 139; Afolalu Vs. The State (2010) All FWLR (Pt. 538) 812, held correctly in my view, that where the prosecution's evidence has fixed the accused to the scene of crime and the commission of the alleged offence the *alibi* pleaded has been

effectively demolished or destroyed. The prosecution had before the appellant opened his defence through the evidence of the PW. 2, PW. 3 and Exhibit AA2, fixed the appellant to the scene of the armed robbery and the commission of the said armed robbery. The burden of casting reasonable doubt on those pieces of evidence had shifted to the appellant to discharge by virtue of Section 135(3) of the Evidence Act, 2011. The appellant never successfully discharged that evidential burden.

The appellant has not successfully shown good cause why I should disturb the decision of the lower court affirming his conviction and sentence of the appellant for conspiracy to commit armed robbery and the commission of the offence of armed robbery, which offences respectively are punishable under Sections 6(B) and 1(2) of the Robbery and Firearms Act Cap R11, LFN 2004. The appeal lacking in substance is hereby dismissed in its entirety.
(Pp 201 – 202 paras D – C)

17. *Onus on appellant in respect of concurrent findings*

The onus is on the appellant to show and convince this court that the lower courts were perverse in their findings of fact. The reasons must be strong enough and thus compelling interference. See Victor Vs. The State (2013) 12 NWLR (Pt. 1369) P. 465 at 485; also Abirifon Vs. State (2013) 13 NWLR (Pt. 1372) 587 at 598.

Exhibit AA2 was admitted after a trial within trial and it was held as confessional and is defined by Section 28(1) of the Evidence Act 2011 which states same as:

I agree with the reasoning and conclusion that the appeal is unmeritorious and deserves to be dismissed. *(Pp 202 – 203 Paras G – S)*

This appeal is against concurrent findings of fact made by the two Lower Courts. In order to succeed, the appellant must satisfy this court that there are exceptional circumstances to warrant interference. He must show that the findings are perverse, not supported by credible evidence on record or that there has been a miscarriage of justice arising from an error in law or procedure, which is apparent on the record. See: Omotola & Ors. Vs. The State

(2009) 7 NWLR (Pt. 1139) 148; Iyaro Vs. The State (1988) 1 NWLR (Pt. 69) 256; Maiyaki Vs. The State (2008) 15 NWLR (Pt. 1109) 173; Oduneye Vs. The State (2001) 2 NWLR (Pt. 697) 311.

This position of the law is premised on the fact that an appellate court would not lightly interfere with findings of fact made by a trial court, which had the singular opportunity of seeing and hearing the witnesses testify, observing their demeanour and ascribing probative value to their testimony. *(P 205 paras A – E)*

18. *Meaning of confession under S. 28 (1) Evidence Act*
"An admission made by an accused person at any time the person is charged with an offence suggesting the inference that he committed the offence". *(P 203 paras A – B)*

19. *Confession made by an accused may be given in evidence*
Section 29(1) also of the Act goes further to state that in any proceeding, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue, in the proceedings and is not excluded by the court in pursuance of this section. A confessional statement as long as it is free, voluntary, direct, positive and properly proved, is enough to sustain a conviction. See the case of Bature Vs. State (1994) 1 NWLR (Pt. 320) page 267. Same rationale was applied also in the case of Odua Vs. Federal Republic of Nigeria (2002) 5 NWLR (Pt. 761) page 615 at 637. *(P. 203 paras B – D)*

Per Ogunbiyi (JSC)

I seek to add further that the evidence of PW. 2 has provided an additional corroboration to Exhibit AA2. With the clear identification of PW. 2, it is no longer necessary that an identification parade should be conducted. See the case of Fabian Nwaturuocha Vs. State SC. 197/2010. See also Hassan Vs. State (2001) 6 NWLR (Pt. 709) 286 at 304 where it was held that:

> **"It is only when the identity of an accused person is in doubt that an identification parade will be necessary and in determining the type of identification that is necessary in a case, it is the entire circumstance of the case that will be considered."**

The appellant who was not caught at the scene of crime was however arrested in possession of the PW. 2's car not long after the robbery was committed. In addition to the recognition of the appellant at the scene, the PW 2 was able to recognize and identify him also in the midst of other suspects at the police state in Ibadan. The testimony of the witness PW 2 relating the recognition and identification of the appellant was not shaken during cross-examination.

On the confessional statement of the appellant Exhibit AA2, the law is trite that it is the primary duty of the trial court to evaluate the testimony adduced at the trial and ascribe probative value thereto. This is because it was that court that was privileged to see and hear the witnesses and it was in a position to pronounce on their credibility.

Where therefore, a trial court has satisfactorily carried out this duty, the appellate court has no reason to interfere with the findings of the trial court. Where however, the trial judge has abdicated the primary duty, or has failed to properly utilize the advantage of seeing and hearing the witnesses testify, the appellate court is in a good position to evaluate the evidence, provided it does not involve credibility of witnesses. See Fagbenro Vs. Arobadi (2006) All FWLR (Pt. 310) 1575; Saleh Vs. Bank of the North Ltd (2006) All FWLR (Pt. 310) 1600. See also Abiodun Vs. State (2013) Vol. 3 4 MJ S.C (Pt. 1) 163.

I agree with the Lower Court in endorsing the trial court that the confessional statement of the appellant was free and voluntary and that it was a positive admission of guilt. It is therefore, safe for the court to convict thereon. See Aremu Vs. State (1984) 6 SC. 85; Ejinima Vs. State (1991) 6 NWLR (Pt. 200) 62; Effiong Vs. State

(1998) 8 NWLR (Pt. 562) 362 and Alarape Vs. The State (2001) 14 WRN 1.

I also agree with Lower Court that the evidence of PW 2 sufficiently provided the evidence outside the appellant's confession in Exhibit AA2 to warrant the conviction by the learned judge.

My learned brother has resolved all the issues raised in this appeal comprehensively. *(Pp 203 – 204 paras D – G)*

20. *A conviction may be secured on the evidence of a single witness*
The law is settled that in criminal proceedings, a conviction may be secured on the evidence of a single witness if such evidence is credible and the evidence points irresistibly to the guilt of the accused person. See: Abokokuyanro Vs. The State (2016) 2-3 SC (Pt. II) 156; Akalezi Vs. The State (1993) 2 NWLR (Pt. 273) 1; Adisa Vs. The State (2014) LPELR – 24221 (SC) @ 28-29 F-A.
(P 205 paras E – F)

Per Kekere Ekun (JSC)

Moreover, the evidence of PW2 in particular as well as Exhibit AA2 fixed the appellant at the scene of the armed robbery. Where an accused person relies on the defence of *alibi,* that is to say, where he contends that he was elsewhere at the time the offence was committed, he must raise it at the earliest opportunity so that it may be investigated and either confirmed or rebutted. It serves no purpose for the defence to be raised after the prosecution has closed its case. See: Abubakar Mohammed Vs. The State (2015) LPELR 24397 (SC) @ 46 – 47 C A; Ikemson Vs. The State (1989) 3 NWLR (Pt. 110) 455 @ 466 – 467H – A & 473 E – F.

In the instant case where there was direct and credible evidence of the appellant's participation in the crime, the defence of *alibi* did not avail him. The findings of the Lower Courts in this regard cannot be faulted. I am also satisfied that no material inconsistencies have been shown in the evidence of the prosecution

to warrant the conviction and sentence of the appellant being set aside. The prosecution established its case against the appellant beyond reasonable doubt. There is no basis on which this court can interfere with the sound reasoning of the court below.

It is for these and the more elaborate reasons stated in the lead judgment that I find no merit in this appeal. *(Pp 206 – 207 paras G – C)*

21. *Defence of Alibi not properly raised*

The law is that it is not enough for an accused to raise the defence of Alibi at the stage of trial. He must give adequate particulars of his whereabouts at the time of the commission of the offence to assist the police to make a meaningful investigation of the Alibi. If the appellant said he was in a particular place, he must give a lead as to the specific place, names and/or addresses of who to contact and the relevant period he was away from the scene of crime.

Therefore, where an accused person raises an Alibi, the defence must be unequivocal and must be given during investigation and not during the hearing of the defence. The mere allegation that he was not at the scene is not enough, the accused person must give some explanation of where he was, and who could know of his presence at that other place at the material time of the commission of the offence in question. See:- Yanor Vs. The State (1965) 1 All NLR 193, and Obiode Vs. The State (1970) 1 All NLR 35. *(Pp 207 – 208 paras F – A)*

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A *The State Vs. Salawu (2012) All FWLR (Pt. 614),*
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B *Victor Vs. The State (2013) 12 NWLR (Pt. 1369) P. 465,*
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C **Nigerian Statutes cited**
Robbery and Firearms (Special Provisions) Act LFN 2004 S 6 (B), (2)
Constitution of Federal Republic of Nigeria 1999 S. 36 (1)
Evidence Act 2011 S. 13 S (3), 29 (1)

D
Representation
Taiye Oniyide, (Esq.), with
Theophilus Okwute, (Esq.), for the appellant.
E **Chief J.A. Akinola**, for the Respondent

EJEMBI EKO, (JSC) (Delivering the lead judgment): The appellant was arraigned and charged for conspiracy to commit armed robbery and the
F commission of armed robbery on 13th October, 2011. He was jointly tried on 4 count charge with one Ibrahim Adeyeye. They each pleaded not guilty to the 4 count charge. The charges read thus:

G **COUNT ONE:**
That you Ibrahim Adeyemi and Olabisi Olakunle with Olaniyi and Taiye (at large) on or about the 13/10/2011 at Ojomo Estate Offa Garage, Ilorin, Kwara State within the
H **jurisdiction of this honourable court conspired to commit an illegal act to wit; while armed with guns robbed one Adegbenle Olawale and you thereby committed an offence punishable under Section 6(B) of the Robbery and**
I **Firearms (Special Provision) Act, Law of the Federation of Nigeria, 2004.**

COUNT TWO:
That you Ibrahim Adeyemi and Olabisi Olakunle together with Olaniyi and Taiye (at large) on or about the 13/10/2011 at Ojomo Estate Offa Garage Ilorin, Kwara State within the jurisdiction of this honourable court while armed with guns robbed one Adegbenle Olawale and you thereby committed an offence punishable under Section 1(2) of the Robbery and Firearms (Special Provision) Act Cap. R11 Laws of the Federation of Nigeria 2004.

COUNT THREE:
That you Ibrahim Adeyemi and Olabisi Olakunle together with Olaniyi and Taiye (at large) on or about the 13/10/2011 at Pipeline road Ilorin, Kwara State within the jurisdiction of this honourable court conspired to commit an illegal act to wit; while armed with guns robbed one Mrs. Bunmi Afolayan and you thereby committed an offence punishable under Section 6(B) of the Robbery and Firearms (Special Provision) Act, Law of the Federation of Nigeria 2004.

COUNT FOUR:
That you Ibrahim Adeyemi and Olabisi Olakunle together with Olaniyi and Taiye (at large) on or about the 13/10/2011 at Pipeline road Ilorin, Kwara State within the jurisdiction of this honourable court while armed with guns robbed one Mrs. Bunmi Afolayan and you thereby committed an offence punishable under Section 1(2) of the Robbery and Firearms (Special Provision) Act,
Cap. R11 Laws of the Federation of Nigeria 2004".

Three witnesses testified for the prosecution at the trial High Court. The PW.1, a Police exhibit keeper, testified only as to the roles he played as the exhibit keeper. The other police officer who testified was the PW.3. He was the Investigating Police Officer (IPO). He recorded extra judicial statement from the appellant, as the 2nd accused. The statement was admitted in evidence as Exhibit AA2 through the PW. 3 after trial-within-trial. Thereafter, the appellant testified in his defence as DW.2. He called no other witness.

The PW. 2 was one of the victims of the alleged robbery. Her evidence is relevant only in regards to the allegations in counts 3 and 4 earlier reproduced. On 13th October, 2011 she drove out in a Toyota Camry Car with registration No. EM 737 FST, Exhibit 2, to pick her daughter who was returning home from Kano. She drove to the motor-park and picked the daughter. They drove to their gate at No. 6, Afolabi Oyinloye Street, Off Pipeline, Ilorin. She blared the car horn for the people inside the compound to open the gate for her to drive in. The noise of the generator apparently did not allow the people to hear the horn blaring from her car. The daughter came out of the car to knock at the gate. As the daughter came down from the car and just before she got to the gate the PW. 2 noticed that a car had pulled up behind her car. Somebody came out from that car and ordered the PW. 2 to come out of her car. It was the appellant. He pulled PW. 2's ears to remove the earrings. He collected necklace and wrist watch and wedding ring from the PW.2. The appellant, according to the PW. 2, brought out a gun threatening to shoot as he was ordering the PW.2 to surrender the car, and at the same time collecting earrings, necklace and wedding ring from her. Appellant's co-accused had taken on the PW.2's daughter. He collected her hand bag and earring. The two threatened that if PW.2 and her daughter shouted they would shoot them. They then drove off in PW. 2's car. There were two others in the other car. The two cars were driven away from the PW. 2's gate. It was then the PW.2 and her daughter were able to alert the people in the compound. A report was promptly made to the police.

The following day the police in Ibadan recovered the car and informed the PW.2's husband. The appellant and others were apprehended

by the police in Ibadan with the car snatched from the PW.2.

The trial High Court in its judgment convicted the appellant and the co-accused for conspiracy to commit armed robbery and armed robbery. After the pleas of their counsel for leniency, they were each sentenced to death by hanging. The appellant appealed against his conviction and sentence. The appeal was dismissed on 4th March, 2014 and his conviction and sentenced were affirmed. This further appeal is against that judgment of the Court of Appeal (hereinafter called the "Lower Court"). The notice of appeal filed on 19th March, 2014 has 9 grounds of appeal. Eight issues for the determination of this appeal have been formulated and argued by the parties. The issues are largely issues of law and facts. In the resolution of the issues, I shall proceed as the parties argued them.

The evidence of the PW.3 is the subject of issue 1. It raised the question: whether the Lower Court was right to have affirmed the trial court's conviction and sentence of the appellant to death on the charge of criminal conspiracy and armed robbery when the evidence of PW.3 (Sgt. Monday Ogidiagba) the only Investigative Police Officer (IPO) is that the appellant is a robber and not an armed robber.

In the appellant's brief, Mr. Sheni Ibiwoye, of counsel, submits that in the final analysis of court (whatever he means by this) what the court considers is the evidence adduced and not the charge(s) in the charge sheet. Counsel submits further that the clear evidence of Sgt. Monday Ogidiagba, PW. 3, which the court cannot deviate from, is that the appellant is a robber and not armed robber. The submission is misleading. That was not the evidence of PW. 3.

Under cross-examination the PW. 3 had answered thus, at page 77 of the record, to the question put: **"The only job I know they (the accused) do is robbery".** In other words, the only vocation the appellant and the co-accused engaged themselves in is robbery. I cannot therefore comprehend the learned counsel's submission to the effect that since the PW. 3's evidence is categorical that the appellant's only known work is robbery, there is therefore no justification for his conviction and sentence, in the first place, for the offence of armed robbery. I do not think the learned counsel is right in dismissing this empirical statement of fact as mere speculation or

mere imaginative guess. In any case, this evidence, very adverse to the case of the appellant, was elicited from the PW.3 under cross-examination. This is what makes it preposterous for the appellant's counsel to submit that it is not the function of the trial judge to supply the adverse evidence.

This attack on the integrity of the learned trial judge is, to say the least, very irresponsible and reprehensible. Rule 31(1) of the Rules of Professional Conduct for Legal Practitioners, 2007 enjoins the appellant's counsel to "always treat the court with respect, dignity and honour". It is unethical for a lawyer, an officer of the court, to be disrespectful to the court and thereby bring it to disrepute by very reckless and ill-conceived submissions.

The offensive submission unfortunately attacks the learned trial judge. This court by dint of Section 233(1) of the 1999 Constitution, as altered, has no jurisdiction to take appeals as complaints against the decision of any High Court, including the trial High Court. Issue 1, though unmeritorious, is also incompetent.

The complaint in ground 2 of the grounds of appeal is that the lower court breached the appellant's right to fair hearing or fair trial guaranteed by Section 36(1) of the 1999 Constitution, as altered, when it held that apart from the PW. 3's answer there is evidence from the PW.3 and other witnesses which the trial court considered in convicting the appellant. Issue 2, as formulated, has veered off the complaint of breach of the appellant's guaranteed right to fair trial to a mere question, whether the lower court was right when it affirmed the trial court's holding that apart from the PW. 3's answer, there is evidence from the PW.3 and other witnesses which the trial court rightly received and considered in convicting the appellant.

The PW.3's answer to a question under cross-examination that robbery is the only work or job he knew that the appellant and his co-accused engaged themselves in is again the subject of Issue 2. Appellant's counsel at the lower court made so much fuss of this answer given in response to a question at the Lower Court. He had misconceived the answer in the first place. Secondly, the trial court did not base the conviction or sentence on the fact that the only known work the appellant

engaged himself was robbery, as a vocation or trade. Appellant's counsel seems to erroneously think that by this answer the PW. 3 had judgmentally averred that the appellant committed mere ordinary robbery, and not armed robbery which is the aggravated robbery. It is for this obvious misconception that the learned counsel has consistently harped on PW. 3's answer to the question at page 77 of the record.

The Lower Court, in my firm view, was right in holding that apart from the singular answer to a specific question there were other evidence, including PW. 3's evidence as the IPO, on which the trial court relied to convict the appellant.

The trial court commenced its evaluation of the available evidence at page 99 of the record. The evaluation culminated in the conviction of the appellant at page 106 of the record. The totality of the evidence at the trial was evaluated before the trial court came to the decision to convict the appellant. In the evaluation the learned trial judge had considered the evidence of PW. 1, PW. 2, PW. 3 and other material pieces of evidence including Exhibit AA2, the confessional statement of the appellant, and the appellant's testimony in his own defence.

The Lower Court, from the record, had further embarked on the re-evaluation of the available evidence at the trial in order to satisfy itself that the findings of fact, culminating in the conviction of the appellant, were not perverse and a miscarriage of justice. The conviction of the appellant affirmed by the Lower Court was not an exercise in speculation or mere imaginative guess to fill the gap. In the circumstance, the contention of the appellant that the trial court based his conviction on mere imaginative guess work and speculation and that the lower court was in error to have affirmed his conviction and sentence cannot be sustained.

Much as I agree, on authority of **George Vs. FRN (2010) 11 NWLR (Pt. 1206) 351 at 552,** that a court is not to speculate on matters not before it; I do not agree with the appellant that his conviction was predicated on mere speculation. I should say that the conviction of the appellant was based on empirical evidence before the trial court. The lower court, was therefore right to have affirmed the appellant's conviction and sentence on the empirical evidence contained in the record.

The three elements the prosecution must prove in order to establish the offence of armed robbery are:

> **"i. that there was a robbery;**
> **ii. that the robbery was an armed robbery;**
> **iii. and that the accused person was either the armed robber or that he was among the armed robbers".**

The appellant and the respondent are *ad idem* on these elements the prosecution must prove in order to prove the charge of armed robbery. I agree, from the authorities, that the prosecution must prove these elements in order to establish that armed robbery had been committed. See **Okubo Vs. The State (2011) 3 NWLR (Pt. 1234) 209 at 233; Osetola Vs. The State (2012) 17 NWLR (Pt. 1329) 25 at 27; The State Vs. Salawu (2012) All FWLR (Pt. 614), at 54.** Robbery, itself, is an aggravated theft. It is the illegal taking of property from the person of another by violence, threats of violence or intimidation. It is armed robbery when the theft or robber is committed by a person carrying a dangerous weapon or when thief is accompanied by another person carrying a dangerous weapon. See **Black's Law Dictionary 9th Ed.,** page 1443.

The learned counsel for the respondent submitted, that they were able to prove at the trial court that the appellant committed armed robbery. Both the learned counsel for the appellant and respondent submitted that the evidence of the PW. 2, the victim, was material. The testimony of PW. 2 was not discredited and it was believed by the trial court. I had earlier summarized the evidence of PW. 2. The trial court found as a fact from the PW. 2's evidence that the appellant was armed with a gun when he violently removed from the PW. 2 her earrings, necklace, wedding ring and wrist watch; and that he threatened to shoot her or her daughter if anyone of them shouted. They submitted to his command. The PW. 2 then surrendered the car key to the appellant. The car snatched at gun point was then driven off.

The PW. 3, corroborating the evidence of the PW. 2, testified that on 14th October, 2011, a day after the robbery, the police patrol team intercepted the Toyota Camry Car No. LAGOS EM 737 FST within Ibadan

A and arrested the two occupants. The PW. 2 later identified the car and the other items stolen from her the previous day in Ilorin. The trial court believed both PW. 2 and PW. 3. The findings of fact were subsequently affirmed by the Lower Court. On these concurrent findings of fact, the
B appellant's counsel submits that the trial court wrongly believed the prosecution witnesses, even when the prosecution failed to prove the case against the accused beyond reasonable doubt. I repeat; this appeal is not against the decision of the trial court. Rather it is against the decision of the
C Court of Appeal affirming the conviction and sentence of the appellant. The question is whether, from the state of available evidence the Lower Court was right in affirming the decision of the trial court. The appellant has not shown any concrete or plausible reason that would persuade a
D reasonable appellate tribunal to disturb the concurrent findings of fact by the two courts. I am the least persuaded that the Lower Court wrongly affirmed the conviction and sentence of the appellant for armed robbery.

It is not the law that the accused has no evidential burden to adduce
E evidence that casts reasonable doubt on the prosecution's evidence which tends to implicate the accused. Section 135(3) of the Evidence Act, 2011 is clear; if the prosecution proves the commission of a crime by the accused beyond reasonable doubt, the burden of casting reasonable doubt on the
F prosecution's case is shifted to the accused person or defendant.

The evidence of PW. 2 and PW. 3 establish that on 13th October, 2011 the appellant and one other violently stole from or robbed the PW. 2 and her daughter valuable items including earrings, necklace, wedding rings and
G wrist-watch and also that the appellant and one other at a gun point snatched from the PW. 2 a Toyota Camry Car No. LAGOS EM 757 FST.

Was there any material contradiction between the evidence of PW. 2 and PW. 3? The appellant's counsel, under Issue 4, submits that between
H the PW. 2 and PW. 3 as to the date the PW. 2 reported the armed robbery there were material contradiction. Counsel submits further that while the PW. 2 testified that she, her husband and daughter reported the armed robbery on 13th October, 2011 at the Police Station the PW. 3 testified that
I the report of the armed robbery was made on 18th October, 2011. Issue 4 as formulated herein is *ipssima verba* with Issue 3 argued at the Lower Court.

The Issue as dismissed and resolved against the appellant. The Lower Court, correctly in my view, re-stated the law on this issue thus at page 199 of the record.

> **"It has been settled that for an alleged contradiction or inconsistency in evidence to affect the decision of the trial court, or warrant its being set aside, such contradiction or inconsistency must relate to material ingredients of the charge before the court and must go to the substance of the case. See Onubogu Vs. Queen (Sic) (1974) 9 SC 1; Buba Vs. State (1994) 7 NWLR (Pt. 355) 195; Archibong Vs. State (2006) ALL FWLR (Pt. 323) 174 and Agbo Vs. State (2006) All FWLR (Pt. 309) 1380".**

What the appellant's counsel considers to be material contradiction is a non-issue, that is completely irrelevant. He is just making so much fuss about the dates the report was made to the police, as opposed to the date the alleged offence was committed. The armed robbery was committed in the night of 13th October, 2011. On the charge sheet that was the date the offence was allegedly committed. PW. 2's evidence accords with this date. She is the only eye witness. The PW. 3 stated, in one breath, that on 18th October, 2011, the police at the SARS office received information about the two cars snatched at gun points on the said 18th October, 2011. In another breath, still in his evidence-in-Chief, PW. 3 stated that on 14th October, 2011 the police had received report from Oyo State Police Station that the Toyota Camry Car No. LAGOS EM 757 FST, snatched at gun-point from the PW. 2 had been intercepted by the Patrol Team and the two occupants were arrested as they could not explain how they came about the car. These facts are not material nor do they go to the substratum of the offence of armed robbery the appellant was defending. Even if the facts were material, the PW. 3, under cross-examination, subsequently explained why and how he had mixed up the facts as to these dates. Once the witness explains satisfactorily why or the circumstances he gave the conflicting evidence the court can act on his evidence. See **Boy Muka Vs. The State (1976) 10 SC**

305; Onubogu Vs. The State (1974) 4 U.I.L.R. 538; (1974) 9 SC. 1

The Lower Court found that there was no contradiction or inconsistency in the evidence of PW. 2 and PW. 3 " that is substantial enough to affect the case of prosecution and the eventual decision of the trial judge". I cannot fault this finding of fact, and I completely endorse it.

Issue 5 argued before us was the Issue 4 the Lower Court resolved against the appellant. The Lower Court, relying on this court's decision in **Onyenye Vs. The State (2012) Vol. 5 MJSC (Pt. ii) 121; (2012) 15 NWLR (Pt. 1324) 586 at 617; (2013) All FWLR (Pt. 643) 1810 at 1832,** held correctly in my view, that in law, conspiracy can be inferred from the acts of the accused where there is no direct evidence of an agreement between the accused. The law, from a long line of cases, is settled that from the acts of the accused where there is no direct evidence of an agreement between the accused and another criminal conspiracy can be inferred. It is the law, from a number of cases, that from the acts or manner the accused persons were doing things towards actualizing a common end it can be inferred or deduced that they did so in furtherance of their conspiratorial agreement to commit the alleged offence. See also **Obiakor Vs. The State (2002) 10 NWLR (Pt. 776) 612; Daboh Vs. The State (1977) 5 SC 197; Muonwem Vs. Queen (1963) 2 SCNLR 172; Ubierho Vs. The State (2005) 1 NWLR (Pt. 919) 644.**

The facts of this case, as can be seen from the undiscredited evidence of the PW. 2, shows that the appellant and his co-accused were in the car that trailed the PW. 2's car to her gate; that at the gate while the PW. 2 waited for her daughter to ensure that the gate was opened the appellant the accused, with a gun pointed at the PW. 2 ordered her to surrender the car key and come out of the car, that at the same time the appellant violently pulled PW. 2's ears to remove her earrings, broke her necklace and took it away together with her wedding ring and wrist-watch, and that the gun wielding 1st accused ordered the PW. 2's daughter to lie down as he collected earrings and hand-bag. Thereafter the two entered the PW. 2's car and drove but not before warning the PW. 2 and her daughter that if they shouted to raise alarm they would be shot. These facts are all corroborated by Exhibit AA2, the extra judicial statement of the appellant admitted in evidence after trial-

within-trial.

In the instant case, Exhibit AA2, the confession establishes the criminal conspiracy between the 1st accused, the appellant and the other two persons at large who were in the waiting car behind the PW. 2's car. From the PW. 2's evidence it is not difficult to deduce the conspiracy between these 4 characters to rob the PW. 2. The Lower Court in the circumstance had correctly applied the principle laid down in Onyenye's case (supra) by this court.

The testimony of the PW. 2 at the trial is reproduced at page 60 and 61 of the record. Her evidence that she knew the appellant, as the 2nd accused, and her evidence at page 60, *inter alia:*

> **"Suddenly somebody by my side ordered me to come down. He said I should show him the security of the car. I told him there was no security, he then brought the gun pointing it at me (sic) threaten to shoot me if I insisted there was no security on the car; he said I should come out. I came out of the car, the 2nd accused person pull (sic) my ears to remove my earrings. I helped him to remove it. He cut my necklace and collected my wrist-watch and the wedding ring".**

In the very brisk or short cross examination of the PW. 2 by the appellant's counsel at page 61 of the Record no issue was joined with the PW. 2, nor was the PW. 2 discredited, on the identity of the appellant as the person who pointed the gun at the PW. 2, ordered her out of the car, pulled her ears to remove her earrings and collected her wrist-watch and wedding ring. On these specific acts of the appellant, as the PW. 2's evidence revealed, there was no effort, howbeit feeble, to challenge and discredit her.

.....In both law and common sense facts not disputed are taken as admitted and/or established. They need no further proof as they are regarded as the strongest proof of the point or issue the facts refer. See **Din Vs. African Newspapers Ltd. (1990) NWLR (Pt. 139) 392 at 405, (1990) 21 NSCC (Pt. 2) 313 at 320; Igwe Vs. ACB PLC (1999) 6 NWLR (Pt.**

605) 1 at 11.

The identification of the appellant by the PW. 2 was not an issue at the trial court. It was an admitted fact, no issue having been joined on it by appellant with the PW. 2. Exhibit AA2, appellant's extra judicial statement expressly admits the fact as well. Moreover, as rightly submitted by the respondent's counsel relying on pages 61 and 62 of the record the appellant, upon arrival of the PW. 2 at Eleyele Police Station, had cried and begged the PW. 2 for forgiveness.

Identification parade is not a *sine qua non* to conviction. It is only necessary when the evidence on it is poor. See **Archibong Vs. The State (2004) 1 NWLR (Pt. 855) 488 at 509.** It is unnecessary where the evidence on it is either expressly or impliedly admitted as in this case. See **Adamu Vs. The State (1991) LPELR – 73 (SC); Adeyemi Vs. The State (1991) LPELR – 188 (SC),** wherein this court restated the law pointedly that when the witness who gave visual identification was not cross-examined nor shaken under cross-examination, nothing stops the trial court from accepting his evidence on it.

The learned appellant's counsel, not being himself a witness, cannot in law testify from the Bar, as he did in the appellant's brief. Without any empirical evidence in the printed record the appellant's counsel cannot be heard submitting that "the identification of the appellant is blurred and fuzzy". This is a bare statement from the Bar that has no force of evidence. See **Onu Obekpa Vs. Commissioner of Police (1981) 1 NCR 113.**

It is untenable, as submitted by the appellant's counsel, that the identification of the appellant was blurred and fuzzy. It is not in dispute the PW. 2 knew and recognized the appellant as the armed robber who snatched the car from her at gun point. From the conduct of the appellant, as can be seen from the PW. 2's evidence at pages 61 and 62 of the record there is no doubt that the appellant knew and recognized his victim. He cried and begged the PW. 2 for forgiveness on sighting her at the Eleyele Police Station.

With or without the appellant's confession contained in Exhibit AA2 the conviction and sentence could be sustained. On the PW. 2's evidence alone the conviction could be sustained, even if Exhibit AA2 was successfully retracted. It is clear from the portion of the judgment of the

learned trial judge, at pages 102 103 of the record, that it was not only on Exhibit AA2 that the trial court relied to convict the appellant for armed robbery. The learned trial judge made the point at page 103 of the record where he held that "there is no doubt that the ingredient of the offence of armed robbery is complete in the narration of the PW. 2", and that the narration of the appellant in Exhibit AA2, either separately or in addition, also proved the ingredients of the said offence. In the appellant's brief of argument, it is not shown or demonstrated how the affirmation of the conviction and sentence of the appellant by the Lower Court has in any way occasioned miscarriage of justice.

The complaint in the appellant's ground 7 of the grounds of appeal, from whence Issue 7 is formulated, is that the lower court erred in law when it held that the learned trial judge properly evaluated the evidence of witnesses at the trial-within-trial before it admitted in evidence Exhibit AA2 and that the evidence of the PW. 2, outside Exhibit AA2, warranted the conviction and sentence of the appellant based on Exhibit Aa2.

The contention of the appellant, under Issue 7, is that Exhibit AA2 was in the first place wrongly admitted in evidence, the confession having been obtained upon the appellant beaten, tortured and shot on the leg by the police in their bid to ensure that the appellant made Exhibit AA2. Secondly, that the lower court ought not to have affirmed both the admission in evidence of Exhibit AA2 and the trial court's reliance on it to affirm the conviction and sentence of the appellant.

This court, being a second tier appellate court, is not in a position to contradict the findings of fact of the trial court based on available evidence because the appellate court does not have the advantage and the opportunity of observing the demeanor of witnesses as they testified. See **Woluchem Vs. Gudi (1981) 5 SC 291 at 295 – 296; Okuoja Vs. Ishola (1980) 7 SC 314**. It becomes worse for the appellate court when the finding of facts turns on the question of credibility of the witnesses.

As regards Exhibit AA2 the trial court followed the correct procedure in the conduct of the trial within trial before admitting it in evidence. The appellant had attempted retracting the statement. His evidence intended to impugn the voluntariness of the confession did not

impress the trial court. At that stage the decision to admit and not admit Exhibti AA2 in evidence rested largely on the credibility of the witnesses, and it was oath to oath. Neither the Lower Court nor this court was therefore in a position to contradict the trial court's finding on fact that culminated in its admitting Exhibit AA2 in evidence. Even at that, I agree with the respondent that the appellant performed poorly at the trial court in his bid to convince the said court that he was tortured in the bid of the police officers to force him to make Exhibit AA2. His allegation that he was shot on the leg was not established. There was no sign of any injury on the leg to sustain the allegation. I shall, accordingly, not disturb the finding of fact by the trial court, duly affirmed by the court below, that Exhibit AA2 was voluntarily made.

Where does all these fuss about Exhibit AA2 lead to? With or without Exhibit AA2 there was enough evidential material on which to sustain the finding of fact that the prosecution had proved beyond reasonable doubt that the appellant committed the offence of armed robbery alleged. The evidence of PW. 2 and PW. 3 are enough to sustain the conviction and sentence. In the circumstance the further pursuit of Issue 7 in this appeal is a mere academic exercise. It will have no utilitarian purpose.

Section 135(3) of the evidence Act, 2011 places evidential burden on the accused person to call evidence that casts reasonable doubt on the case of the prosecution, when the latter had proved that the accused committed the alleged offence. In exercise of that right, howbeit duty, the appellant in his defence at the trial court raised for the first time his *alibi*. This defence presupposes that the accused was elsewhere at the material time the offence was allegedly committed at the *locus criminis.*

The accused person is by law enjoined to raise the defence of *alibi* at the earliest opportunity and within a reasonable time to enable the prosecution to investigate it with the view of confirming or disproving it. See **Lateef Sadiku Vs. The State (2013) LPELR – 20588 (sc); Udobre Vs. The State (2001) FWLR (Pt. 59) 1244 at 1258 – 1259.**

A successful plea of *alibi* not only casts reasonable doubt on the case of the prosecution against the accused person, it is a complete defence to the

charge. In the instant case, the appellant raised the *alibi* for the first time in the trial court after the prosecution had closed their case against him. The undiscredited evidence of the PW. 2 had fixed him to the *locus criminis* and the alleged armed robbery. His confession in Exhibit AA2 had also established that he committed the alleged armed robbery. Exhibit AA2 also corroborates the PW. 3 that on 14th October 2011, after the robbery in Ilorin in the night of 13th October, 2011, the Police Patrol Team intercepted the stolen car while it was being driven by the appellant and/or the control of himself and the 1st accused. The appellant raised the *alibi* for the first time while he was being cross-examined. This piece of evidence is inconsistent with the appellant's previous statement, Exhibit AA2, which disproved the *alibi*. The *alibi* is clearly unreliable.

The current state of the law on when an accused retracts or resiles from his previous confession or statement in writing is that, where an accused person during trial retracts, resiles from or denies the earlier statement he made in writing to the police immediately after the event, giving rise to the charge and arraignment, he owes it a duty to the court to impeach his said earlier statement: See **Hassan Vs. The State (2001) 15 NWLR (Pt. 735) 184; Nwachukwu Vs. The State (2007) 17 NWLR (Pt. 1062) 31 at 69; Tirimisiyu Adebayo Vs. The State (2014) LPELR – 22988 (SC).** The integrity of Exhibit AA2, reinforced by the decision of the trial court upon which the confession was admitted in evidence has not been impeached by the appellant. His belated *alibi*, a product of sheer prevarication, cannot in the circumstances be given any serious credibility. The trial court dismissed it as unavailing. The lower court, relying on **Njovens Vs. The State (1973) 5 SC. 17; Attah Vs. The State (2010) Vol. 3 (Pt. iv) MJSC 139; Afolalu Vs. The State (2010) All FWLR (Pt. 538) 812,** held correctly in my view, that where the prosecution's evidence has fixed the accused to the scene of crime and the commission of the alleged offence the *alibi* pleaded has been effectively demolished or destroyed. The prosecution had before the appellant opened his defence through the evidence of the PW. 2, PW. 3 and Exhibit AA2, fixed the appellant to the scene of the armed robbery and the commission of the said armed robbery. The burden of casting reasonable doubt on those pieces of evidence had

shifted to the appellant to discharge by virtue of Section 135(3) of the Evidence Act, 2011. The appellant never successfully discharged that evidential burden.

The appellant has not successfully shown good cause why I should disturb the decision of the lower court affirming his conviction and sentence of the appellant for conspiracy to commit armed robbery and the commission of the offence of armed robbery, which offences respectively are punishable under Sections 6(B) and 1(2) of the Robbery and Firearms Act Cap R11, LFN 2004. The appeal lacking in substance is hereby dismissed in its entirety.

The conviction and sentence of the appellant for the offences charged in the charge No. KWS/13^{C}/12, affirmed by the Lower Court in its judgment delivered on 4th March, 2014 in the appeal No. CA/IL/C.76/2013 are hereby further affirmed. Appeal dismissed.

Ejembi Eko
Justice, Supreme Court

MUSA DATTIJO MUHAMMAD, (JSC): My learned brother EJEMBI EKO JSC has obliged me in draft his lead judgment just delivered. I adopt same as mine in dismissing the appeal. I abide by the consequential orders made in the lead judgment.

Musa Dattijo Muhammad
Justice, Supreme Court

CLARA BATA OGUNBIYI, (JSC): I concur with the judgment of my learned brother Ejembi Eko, JSC that the appeal is devoid of any merit and should be dismissed.

The conviction and sentence of the appellant were concurrent by the two lower courts. The onus is on the appellant to show and convince this court that the lower courts were perverse in their findings of fact. The reasons must be strong enough and thus compelling interference. See **Victor Vs. The State (2013) 12 NWLR (Pt. 1369) P. 465 at 485; also Abirifon Vs. State (2013) 13 NWLR (Pt. 1372) 587 at 598.**

Exhibit AA2 was admitted after a trial within trial and it was held as confessional and is defined by Section 28(1) of the Evidence Act 2011

which states same as:

> **"an admission made by an accused person at any time the person is charged with an offence suggesting the inference that he committed the offence".**

Section 29(1) also of the Act goes further to state that in any proceeding, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue, in the proceedings and is not excluded by the court in pursuance of this section. A confessional statement as long as it is free, voluntary, direct, positive and properly proved, is enough to sustain a conviction. See the case of **Bature Vs. State (1994) 1 NWLR (Pt. 320) page 267.** Same rationale was applied also in the case of **Odua Vs. Federal Republic of Nigeria (2007) 5 NWLR (Pt. 761) page 615 at 637.**

I seek to add further that the evidence of PW. 2 has provided an additional corroboration to Exhibit AA2. With the clear identification of PW. 2, it is no longer necessary that an identification parade should be conducted. See the case of **Fabian Nwaturuocha Vs. State SC. 197/2010.** See also **Hassan Vs. State (2001) 6 NWLR (Pt. 709) 286 at 304** where it was held that:

> **"It is only when the identity of the accused person is in doubt that an identification parade will be necessary and in determining the type of identification that is necessary in a case, it is the entire circumstance of the case that will be considered."**

The appellant who was not caught at the scene of crime was however arrested in possession of the PW. 2's car not long after the robbery was committed. In addition to the recognition of the appellant at the scene, the PW 2 was able to recognize and identify him also in the midst of other suspects at the police state in Ibadan. The testimony of the witness PW 2

relating the recognition and identification of the appellant was not shaken during cross-examination.

On the confessional statement of the appellant Exhibit AA2, the law is trite that it is the primary duty of the trial court to evaluate the testimony adduced at the trial and ascribe probative value thereto. This is because it was that court that was privileged to see and hear the witnesses and it was in a position to pronounce on their credibility.

Where therefore, a trial court has satisfactorily carried out this duty, the appellate court has no reason to interfere with the findings of the trial court. Where however, the trial judge has abdicated the primary duty, or has failed to properly utilize the advantage of seeing and hearing the witnesses testify, the appellate court is in a good position to evaluate the evidence, provided it does not involve credibility of witnesses. See **Fagbenro Vs. Arobadi (2006) All FWLR (Pt. 310) 1575; Saleh Vs. Bank of the North Ltd (2006) All FWLR (Pt. 310) 1600.** See also **Abiodun Vs. State (2013) Vol. 3 4 MJ S.C (Pt. 1) 163.**

I agree with the Lower Court in endorsing the trial court that the confessional statement of the appellant was free and voluntary and that it was a positive admission of guilt. It is therefore, safe for the court to convict thereon. See **Aremu Vs. State (1984) 6 SC. 85; Ejinima Vs. State (1991) 6 NWLR (Pt. 200) 62; Effiong Vs. State (1998) 8 NWLR (Pt. 562) 362 and Alarape Vs. The State (2001) 14 WRN 1.**

I also agree with Lower Court that the evidence of PW 2 sufficiently provided the evidence outside the appellant's confession in Exhibit AA2 to warrant the conviction by the learned judge.

My learned brother has resolved all the issues raised in this appeal comprehensively.

With the few words of mine therefore and also relying on the reasoning and conclusion arrived at in the lead judgment, I also dismiss the appeal as lacking in merit.

Clara Bata Ogunbiyi
Justice, Supreme Court

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN (JSC): I have had the benefit of reading in draft the judgment of my learned brother, EJEMBI EKO, JSC just delivered. I agree with the reasoning and conclusion that the appeal is unmeritorious and deserves to be dismissed.

This appeal is against concurrent findings of fact made by the two Lower Courts. In order to succeed, the appellant must satisfy this court that there are exceptional circumstances to warrant interference. He must show that the findings are perverse, not supported by credible evidence on record or that there has been a miscarriage of justice arising from an error in law or procedure, which is apparent on the record. See: **Omotola & Ors. Vs. The State (2009) 7 NWLR (Pt. 1139) 148; Iyaro Vs. The State (1988) 1 NWLR (Pt. 69) 256; Maiyaki Vs. The State (2008) 15 NWLR (Pt. 1109) 173; Oduneye Vs. The State (2001) 2 NWLR (Pt. 697) 311.**

This position of the law is premised on the fact that an appellate court would not lightly interfere with findings of fact made by a trial court, which had the singular opportunity of seeing and hearing the witnesses testify, observing their demeanour and ascribing probative value to their testimony.

The law is settled that in criminal proceedings, a conviction may be secured on the evidence of a single witness if such evidence is credible and the evidence points irresistibly to the guilt of the accused person. See: **Abokokuyanro Vs. The State (2016) 2-3 SC (Pt. II) 156; Akalezi Vs. The State (1993) 2 NWLR (Pt. 273) 1; Adisa Vs. The State (2014) LPELR – 24221 (SC) @ 28-29 F-A.**

In the instant case, the learned trial judge considered the eye witness testimony of PW 2, the victim of the armed robbery as to how she and her daughter were accosted while waiting for the gate of their house to be opened on the fateful night, how the appellant threatened her with a gun demanding to be shown the security of the car and threatened to shoot if her daughter shouted; how he dispossessed her of her earrings, handbag and other valuables; how she identified the appellant and his co-accused when her stolen car was recovered by the Police the following day and how she identified the items stolen from her.

The court found her evidence credible and held at page 105 of the

record:

> **"PW2 clearly identified the 2 accused persons and stated the role each of them played towards the commission of the armed robbery. The vehicle was recovered from them soon after the robbery and exhibits recovered from the car. She further stated at Ibadan immediately she alighted from the vehicle, 2nd accused [appellant herein] started begging her and crying. This shows that she identified the 2nd accused persons and there is no necessity for identification parade."**

I am of the view that the credible evidence led by PW2, which was unshaken under cross examination, was sufficient to ground the conviction in this case.

The prosecution however did not rest its case on the evidence of PW2 alone. PW3, one of the Investigating Police Officer, narrated how he received a signal that two vehicles had been recovered (there were two robbery incidents involving 2 victims and 2 vehicles) and how he obtained the appellant's extra-judicial statement (Exhibit AA2) which was confessional. The statement was admitted after a trial within trial after objection was taken to its admissibility on grounds of voluntariness. The trial court was satisfied that it was voluntarily made. The confessional statement buttressed the evidence of the prosecution as to the appellant's involvement in the crime.

Moreover, the evidence of PW2 in particular as well as Exhibit AA2 fixed the appellant at the scene of the armed robbery. Where an accused person relies on the defence of *alibi,* that is to say, where he contends that he was elsewhere at the time the offence was committed, he must raise it at the earliest opportunity so that it may be investigated and either confirmed or rebutted. It serves no purpose for the defence to be raised after the prosecution has closed its case. See: **Abubakar Mohammed Vs. The State (2015) LPELR – 24397 (SC) @ 46 47 C – A; Ikemson Vs. The State (1989) 3 NWLR (Pt. 110) 455 @ 466 – 467H – A & 473 E – F.**

In the instant case where there was direct and credible evidence of the appellant's participation in the crime, the defence of *alibi* did not avail him. The findings of the Lower Courts in this regard cannot be faulted. I am also satisfied that no material inconsistencies have been shown in the evidence of the prosecution to warrant the conviction and sentence of the appellant being set aside. The prosecution established its case against the appellant beyond reasonable doubt. There is no basis on which this court can interfere with the sound reasoning of the court below.

It is for these and the more elaborate reasons stated in the lead judgment that I find no merit in this appeal. It is hereby dismissed.

The judgment of the Court of Appeal, Abuja Division delivered on 4th March 2014, affirming the conviction and sentence of the appellant by the High Court of Kwara State on 18th July 2013 for conspiracy and armed robbery is hereby affirmed.

Kudirat M. O. Kekere-Ekun
Justice, Supreme Court

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Ejembi Eko, JSC, just delivered. I agree with his reason and conclusion that the appeal is devoid of merit and should be dismissed. I will add a few words of my own.

The law is that it is not enough for an accused to raise the defence of Alibi at the stage of trial. He must give adequate particulars of his whereabouts at the time of the commission of the offence to assist the police to make a meaningful investigation of the Alibi. If the appellant said he was in a particular place, he must give a lead as to the specific place, names and/or addresses of who to contact and the relevant period he was away from the scene of crime.

Therefore, where an accused person raises an Alibi, the defence must be unequivocal and must be given during investigation and not during the hearing of the defence. The mere allegation that he was not at the scene is not enough, the accused person must give some explanation of where he was, and who could know of his presence at that other place at the material time of the commission of the offence in question. See:- **Yanor Vs. The**

State (1965) 1 All NLR 193, and **Obiode Vs. The State (1970) 1 All NLR 35.**

It is for the above reasons that I adopt all the reasoning by my learned brother in the lead judgment as mine and consequently dismiss the appeal for lack of merit.

Appeal dismissed.

Sidi Dauda Bage
Justice, Supreme Court