

PICTURE

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**ALHASSAN AUWALU
AND
FEDERAL REPUBLIC OF NIGERIA**

SC. 448/2016

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

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

**OLABODE RHODES-VIVOUR
MARY UKAEGO PETER-ODILI
CLARA BATA OGUNBIYI
AMIRU SANUSI
SIDIDAUDA BAGE**

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

APPEAL: Issues for determination – Whether appellate court has discretion thereto..

APPEAL: Raising of issues for determination – Circumstance where an appellate court may raise issue for determination.

CRIMINAL LAW AND PROCEDURE: Trial of accused person – Commencement thereof – Whether trial of an accused person starts. – When charge is read, explained and his plea taken.

PRACTICE AND PROCEDURE: Conflict – When the provisions of a practice direction is in conflict with provision of the substantive rules – Whether the provision of the Practice Direction cannot override the provision of the substantive rule.

PRACTICE AND PROCEDURE: Raising issue on appeal – Where issue now raised at the Supreme Court was not contained in the judgment appealed from – Implication – Whether issue ought to be discontinued.

STATUTE: Corrupt Practices And Other Related Offences Act 2000 Revalidated by decision of the Federal High Court in FHC/ABJ/CS/93/2003 – Whether a valid and subsisting legislation.

STATUTE: Corrupt Practices And Other Related Offences Act 2000 and 2004 Validity thereof – Whether Corrupt Practice And Other Related Offences Act 2000 was not repealed by the 2004 Act.

STATUTE: Corrupt Practices and other Related Offences Act 2004 – Whether not in existence.

Issues for Determination

- 1** *Whether the court below was right in failing to resolve the issue of the competence of in (sic) in the respondent's brief of Argument that was early (sic) filed outside the 10 days statutory period prescribed by Order 9(b) of the Court of Appeal Practice Direction of 2013, without any extended time to do so raised by the appellant and its Brief of argument. (Ground 3 of the notice of appeal)*
- 2** *Whether the learned Justices of the Court of Appeal were not in error in entirely adopting the issues for determination as framed by the Respondent in resolving the Appellant's appeal when those issues were vague, abstract and without reference to the relevant facts touching the real questions in controversies upon which the Notice of Appeal was anchored and whether the error has not occasioned a miscarriage of justice” (Grounds 1,*

5, 11 and 12 of the Notice of Appeal).

- 3 Whether the learned Justices of the Court of Appeal were right in affirming the trial court (sic) on the repealed Corrupt Practices and Other Related Offences Act, Cap C 31, Laws of the Federation of Nigeria 2004 which does not provide for the offences as that under which the Appellant is standing charged, on the ground that its previous decisions upholding the constitutionality of the 2000 Act, have not been overruled by the Supreme Court and whether in all the circumstances, the decision has not prejudiced the Appellant (Ground 5, 8, 9 and 10 of the Notice of Appeal).***

- 4 Whether the Court below (sic) was fair and not in error in the manner it approached and resolved the Appellant's complaint on the abuse of court proceedings arising from the mode and manner the Respondent commenced this instant proceedings at the trial court having regard to the totality of the uncontradicted evidence on the record in that direction? (Grounds 2, 4, 6, 7 and 8 of the Notice of Appeal.)***

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 19th of May, 2016 which affirmed the Ruling of the High Court of Federal Capital Territory, Abuja delivered by M.B. Idris J. on 20th April, 2015.

The facts which gave rise to this appeal are summarized hereunder. On 12th March 2015, the appellant and one other accused person were arraigned before the trial High Court by the respondent/prosecution on five count charge filed on 13th February, 2015, of course, after the latter obtained leave from the trial court. The five count charges were contrary to Section 25 (1) (a) and

Section 26 (1) (c) of the Corrupt Practices and Other Related Offences Act 2000. Both the appellant and his co-accused pleaded not guilty to the charges when same were read to them and the trial court thereafter admitted them to bail.

Then on the 16th March 2015, the appellant filed a motion before the trial court, praying it to quash the instant charge on three grounds listed below:

- (1) *That the charge was incompetent, unconstitutional and void as same violated the provisions of Section 36(6) and (12) of the Constitution of the Federal Republic of Nigeria 1999, as amended. Section 201 of the Criminal Procedure Code and had amounted to grave abuse of process of the court.*
- (2) *That the charge framed against the accused/appellant was groundless, vexatious and frivolous as it disclosed no prima facie case against the appellant; and*
- (3) *That the said charge “Exhibit A was filed before the trial court granted leave to the prosecution/respondent to so frame it and same was therefore defective and void, as such the proceedings held on 9/3/2015 and the accused appellant's purported arraignment on 10/3/2015 on Exhibit A (the charge) are null and void ab initio.*

On 10th March 2015, the motion was heard by the trial court and was adjourned to 20th April, 2015 for ruling. On 20/4/2015, the trial court delivered its considered ruling dismissing the application and adjourned the matter for continuation of the proceedings in the matter. Miffed by the Ruling of the trial court, the appellant promptly appealed to the Court of Appeal. The Court of Appeal after hearing the appeal, dismissed same, vide its judgment delivered on 19/3/2015.

Piqued by the judgment of the Court of Appeal, the appellant has now appealed to the Supreme Court.

(Held) *(Unanimously dismissing the appeal)*

1. *The purport of Or. 18 Rule 4(1) of Court of Appeal Rules*
Now, looking at the provisions of the Court of Appeal Rules 2007 particularly Order 18 Rule 4(1), it is clearly provided thus:

Order 18

4(1) The Respondent shall also within thirty days of service of the brief for the appellant on him, file the respondent's brief which shall be duly endorsed with an address or addresses for service”

(P 20 paras C – E)

2. *The provision of the Practice Direction cannot override the provisions of the substance rules*

It is instructive to note that Rule 1 of Order 18 categorically stated that the Order (i.e Order 18 of the Rules) shall apply to all appeals coming from any court or from which an appeal lies to this court (i.e the lower court herein). Apparently, the provisions of Order 9(b) of the Practice Direction 2013 which prescribed 10days period within which a respondent should serve his brief of argument from the date he received the appellant's brief of argument, is in conflict with the provisions of Order 18 Rule 4(1) of Court of Appeal Rules. The correct proposition of the law is that the provisions of the Practice Direction cannot override the provisions of the substantive rules of court from which the authority to promulgate the Practice Direction was derived. (P 20 paras E – H)

3. *The question of competence of brief was not raised at the lower court*
The important thing to note however, is that the attempt made by the learned counsel for the appellant to challenge the competence of the respondent's brief of argument is of no moment, as it was not canvassed anywhere. Similarly, the lower court was never and was nowhere called upon to make any pronouncement on it. Hence it

was never raised in the judgment of the lower court now being appealed against. See OSHODI v EYIFUNMI (2000)7 SC P. 145. Without much ado therefore, this first issue deserves to be and is accordingly resolved against the appellant. (Pp 20–21 paras H–A)

4. *Situations where an appellate court may raise issues for determination*
Here, I must reiterate that although an appellate court should be wary of raising or introducing new issues for determination in an appeal before it, however, where the issues raised by the parties before it, appear to it to be inappropriate or inadequate having regard to the grounds of appeal, the appellate court may, after having referred to the circumstances of the case, identify the relevant issues. In doing so however, it must be extra ordinarily careful and cautious so as not to go outside the grounds of appeal filed or issues not canvassed by the parties in their respective briefs of argument.

Although generally speaking, an appellate court will rely on the issues for determination formulated by an appellant in determining his appeal, however, it is my view, that failure by an appellate court to be so bound or guided by issues formulated by the parties, does not amount to any injustice or denial of fair hearing especially, in a situation, where the appellate court regards the issues so formulated by the parties as inappropriate having regard to the grounds of appeal filed. See PETERSIDE v FUBARA (2012) 12 SC (Pt. VI) 40; UNION BANK PLC & ANOR vs BOUARI (2008) 2-3c (pt. 11) 1; ASALU vs DAKAN (2016) 5 SC (pt. III) 120. In this instant appeal therefore, I hold the view that the lower court is entitled to determine the appeal based on the respondent's proposed issues as none of those issues appeared to have been outside the precinct of the grounds of appeal or were inappropriate to those grounds of appeal. (P 22 paras A–G)

Per Sanusi (JSC)

“I agree with the learned counsel for the appellant that the case of AG. Ondo State vs AG of the Federation & Ors (supra) is not relevant to the instant situation. That case dealt with the constitutionality of the 2000 Act and the case was even decided before the alleged promulgation of 2004 Act. All that the appellant is saying here is that with the promulgation of the 2004 Act, the 2000 Act became otiose and remain repealed.

Now coming to the controversy on the validity and continue existence of the 2000 Act and of the controversy on the validity of the 2004 Act given supra and submission of the learned respondent's counsel on whether that Act was validly promulgated which the appellant's counsel did not controvert in his Reply Brief, if such controversy is something to go by, one will be hesitant in holding that the purported 2004 Act had repealed the 2000 Act.

I am not aware of any case where this court dealt with the validity of 2000 Act however, I must therefore rely on the unreported case decided by the Court of Appeal, namely FRN v WABARA (2014) 2 ICPCLR where the issue in controversy was dealt with, in which the Court of Appeal per Mary Odili JCA (as she then was) held thus:

“The appellant's counsel not being able to convince one to depart from the finding of the learned trial judge, I go along with that finding without hesitation and also held that the 2000 Act is the valid law and the charge under it cannot be impugned on a point of invalidity of the law of arraignment”. (P 25 paras A–G)

5. *The trial of an accused starts when plea is taken*

It is noted by me, that on page 95 of the record it is shown that the accused/appellant himself admitted that on 12/3/2015, the

prosecution moved its Exparte motion for leave to prepare charge against them, shortly before they were arraigned before the court. It is my considered view that before an accused person is tried, a charge must be framed against him (See Section 185 (B) of Criminal Procedure Code. A trial of an accused person starts when he is arraigned in court, charge read and explained to him in the language he understands and when his plea is taken. See KAJUBO v THE STATE (1988) 3 SC 109; MRS E.A. LUFADJEU Vs EVANGELIST BAYO JOHNSON (2007) LPELR SC 43; In the instant case, it is clear from the record of appeal, that the accused persons including the appellant were in the court when the respondent moved its Exparte motion to seek leave to frame the charge against them with which they were promptly served. Their pleas were not taken at that stage, as it was premature to do so. I therefore do not agree with the appellant's counsel submission when he stated that that amounted to breach of the appellant's right to fair hearing. Had it been that they were arraigned before the trial court and their pleas taken before leave was sought and obtained, then it may be said to be a breach of his constitution right procedurally. In any case, it is my candid opinion, what had happened in this instant case when the application for leave was sought and obtained was moved in the presence of the appellant in court is trivial. The appellant's complaint is therefore lacking in substance and is of no moment. This appellant also did not show in which way he was prejudiced by that act of the prosecution or how miscarriage of justice was occasioned to him. (P 28 paras A – G)

6. *Court has discretion on the question of issue for determination*
The appeal in the Court of Appeal was heard on the issues formulated by the respondent. It has been long settled since appeals were heard on briefs that judges of appeal courts have discretion to adopt issues formulated by appellant or the respondent, or reformulate them.

This is geared towards serving the interest of justice and bringing to the fore the real grievance in an appeal. Issues are also reformulated by judges for clarity and to do away with prolixity, thereby enabling the appeal court properly determine the appeal. See *Abiola & Sons Bottling C. Ltd Vs 7Up Bottling Co. Ltd (2012) 7SC (Pt. ii) p. 83, Okere Vs. State (2016) LPEIR-26057, Unity Bank & anor Vs. E. Bouari (2008) 2-2SC (Pt. ii) p. 1, P.S.H.S.M.B & anor Vs. Goshwe (2012) 12SC (pt. vii) p. 90.*

I have examined the issues formulated by the respondent in the Court of Appeal and adopted by that court for the hearing of the appeal, and I am satisfied that the issues are better framed than those of the appellant, and clearly serve the interest of justice as they are concise and not contrary to Order 6 Rule 3 and 4 of the Court of Appeal Rules.

The burden lies on learned counsel for the appellant to show how adopting the issues formulated by the respondent has led to miscarriage of justice. This he has failed to show and so his complaint is finally put to rest. (P 29 paras D–I)

Per Peter Odili (JSC)

“The long and short of the grouse of the appellant is that the court below should have discountenanced the brief of the respondent which was filed outside the 10 days prescribed by the practice direction. The respondent tackled that posture by stating that the appellant had not raised the issue at the hearing of the appeal at the court below and so it is too late in the day now to raise it. Also that the court below was not obligated to assist the appellant argue his brief.

This matter of the incompetence of the respondent's brief at the court below having not cropped up and taking cognizance of the fact that the Court of Appeal Rules precisely Order 18 Rules 4 provides for 30 days period for the respondent to file its brief and so

with the superior standing of the rules of court to a practice direction, the matter of incompetence based on the limited 10 day period of the practice direction would take a second step below the rules of court especially in this case where the perceived irregularity was not raised by the appellant at the right time. See *Jev & Anor. Vs. Iyortyom & Ors.* (2012) LPELR-9291, (CA); *Akinbami Vs. Oando Plc & Ors.* (2013) LPELR-21843 (CA).

The appellant also would want the court to accept that the court below erred in not utilizing for the determination of the appeal before it, the issues as crafted by the appellant. That angle put forward by the appellant does not in my humble view represent the law as a court is not obligated to adopt the issues set down for determination by an appellant as a court is free to adopt the issues as crafted by either of the parties so long as the issues arise from the grounds of appeal. Again to be said is that a court is at liberty to reformulate issue or issues from that of any of the parties in order to give it precision and clarity, the condition being that the issue so identified by the court flow from the grounds of appeal as the court has to do that which is convenient within the bounds of the law in getting at the answer to the question or questions raised and in so doing, deliver justice. See *Unity Bank Vs. Bouari* (2008) 7 NWLR (Pt. 1086) 383 at 401; *Dada Vs. Dosunmu* (2006) 9 SCNJ 71.

It is clear from the foregoing that the appellant had not effectively impugned the proceedings at the court below and has not shown that the lower court used an incompetent process that is the respondent's brief in that court to consider the case and reach a decision. (Pp 34–35 paras C–D)

7. *The Corrupt Practices And Other Related Offences Act 2000 is valid*
Indeed an attempt was made in 2003 to pass into law Corrupt Practices And Other Related Offences Act 2004. The National Assembly passed the bill and the then president declined his assent. In a challenge as to its validity, the Federal High Court, Abuja Per

Egbo-Egbo J. declared the bill unconstitutional and illegal and went on to declare it null and void and had the said Act struck down and further reiterated the validity of the corrupt practices and other related offences Act 2000. That judgment was in the case of Hon. Bala Kaoje & 4 Ors Vs. The National Assembly of the Federal Republic of Nigeria & 13 Ors in Suit No. FHC/ABJ/CS/93/2003 delivered on 21st May, 2003.

That position of the Federal High Court has remained the extant situation and followed by the Court of Appeal in FRN Vs. Wabara (2014) 2 ICPCLR 1; Ayuba Bitrus Bakkat Vs. FRN (2014) 2 ICPCLR 2 page 455 (CA).

It is clear that the appellant was charged within the valid, extant law, the 2000 Act. (Pp 38–39 paras E–A)

8. *Appellant was substantially arraigned in compliance with the rules*
On the matter of the timing of the leave sought and obtained by the trial court, the appellant certainly is taking the court into the realm of the academic and technical rules as the substantiality of compliance with the rules were met. The appellant as accused person had not been docked or charged before the leave was sought for and obtained from the trial court. All that happened earlier was as respondent stated that the appellant was made aware of the coming event so he could be prepared and then the leave was sought and having been obtained the charge was initiated with the arraignment.

To refresh the memory, trial of a criminal case commences when the accused docked and the charge read over to him in open court and he takes his plea. See Mrs. E.A. Lufadeju Vs. Evangelist Bayo Johnson (2007) LPELR 43 per W.S.N. Onnoghen JSC (as he then was); Asakitipi Vs. State (1993) 5 NWLR (Pt. 296) 641; Effion Vs. State (1995) 1 NWLR (Pt. 373) 507 at 582–583; MFA Vs. Inongha (2014) 57 NSQR 24-25. (P 39 Paras A– D)

9. *Court has no duty to assist a party in presenting his case*

The pertinent question to ask is:- was the issue brought before the lower court by the appellant? I seek to say that the appellant in his reply brief at paragraph 1.1 said he was going to raise the issue of the competency of the respondent's brief, which he never did when the appeal came up for argument on April, 14. There was nowhere also that the lower court alluded to the question of competence. It is well settled that an appeal must be based on issue canvassed before the court and no more.

The law is again as decided in several authorities that there is no duty on the court to assist an appellant or any party at all to present his case before the court to the detriment of the other party. The practice direction cannot also be construed as superior to either statutes or rules of court.

As rightly submitted by the respondent's counsel therefore, the said issue should, without more, be resolved against the appellant. (P 40 paras B – E)

10. *Court not bound to adopt either of the parties' issues*

Long lines of authorities are settled that a court is not bound but is at liberty to adopt either of the parties issues as formulated or proceed to formulate its own for determination, provided however that the issues are arising from the grounds of appeal. The issue could be those by either of the parties also.

Furthermore, a court is not also under a regimental duty to take all issues canvassed by the parties in the appeal. An appellate court is at liberty to reformulate issues different from that formulated by parties/counsel in order to give it precision and clarity if it appears that the issues formulated by parties are not well framed. (Pp 40 – 41 paras G – A)

11. *The Corrupt Practices And Other Related Offences Act 2004 is not in existence*

It is pertinent to state that one of the principal aims of corrupt practices and other related offences Act 2000 was to check official corruption and abuse of office by political and public office holders.

Under the said Act, the Independent Corrupt Practices and other related offences commission was established and its function clearly set out in section 6. All move to repeal the Act did not yield positive; hence the 2004 Act contemplated by the appellant is not in existence but rather the 2000 Act, which is extant. (P 41 paras G–E)

Per Ogunbigi (JSC)

“I wish to say quickly that the filing and serving of the charge on the appellant before leave was sought and granted is constitutionally permitted. The appellant is also guaranteed constitutionally to be informed promptly in detail of the nature of the offence against him. See Section 26(6)(a)(b) of 1999 Constitution as Amended.

What the prosecution did in the case at hand was to pre-inform the appellant of the offences for which he is charged to court in order to enable him prepare adequately for his trial. The timely service of the charge on the appellate made his counsel to file an application for his bail before his arraignment.

I seek to restate further that by filing of a charge before seeking leave of court to prefer criminal charge against the appellant did not in any way offend the provisions of section 185(B) of CPC Act which states thus:

**“No person shall be tried by the High Court unless
b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court.”**

Again, the pertinent question to pose at this juncture is: was there any procedural defect on the face of the charge? It is intriguing that the appellant did not challenge/arrest this procedure which was adopted by the trial court at the time the trial began, but took his plea, and he proceeded to make an application for his bail through his counsel.

The appellant, as rightly submitted by the respondent's learned counsel, did not show any evidence of denial of fair hearing meted out to him by the court. The argument by his learned counsel, is purely academic.

This court cannot interfere with the findings of facts made by the two lower courts in the absence of any cogent reason to do so.
(Pp 41 – 42 paras G – F)

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UNION BANK PLC & ANOR vs BOUARI (2008) 2-3c (pt. 11)
Unity Bank Vs. Bouari (2008) 7 NWLR (Pt. 1086) 383,

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Constitution of the Federal Republic of Nigeria 1999 Section 26 (6) (a)(b)
36(6) and (12).
Corrupt Practices and Other Related Offences Act 2000
Corrupt Practices and Other Related Offences Act 2004 Section 25 (1) (a)
26 (1) (c).
Criminal Procedure Code Section 185, (b), S. 201.

Appearances:

Josiah Daniel-Ebune within him. Yakubu Idris and Charity Akiri for the Appellant.

A Osuobeni E. Akponimisigha with him. *Amba Blessing* for Respondent.

AMIRU SANUSI, (JSC) (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Abuja Division

B (hereinafter referred to as “the lower court”) delivered on 19th of May, 2016 which affirmed the Ruling of the High Court of Federal Capital Territory, Abuja (the trial court) delivered by M.B. Idris J. on 20th April, 2015.

.....The facts which gave rise to this appeal are summarized hereunder.

C On 12th March 2015, the appellant and one other accused person were arraigned before the trial High Court by the respondent/prosecution on five count charge filed on 13th February, 2015, of course, after the latter obtained leave from the trial court. The five count charges were contrary to Section

D 25 (1) (a) and Section 26 (1) (c) of the Corrupt Practices and Other Related Offences Act 2000. Both the appellant and his co-accused pleaded not guilty to the charges when same were read to them and the trial court thereafter admitted them to bail.

EThen on the 16th March 2015, the appellant filed a motion before the trial court, praying it to quash the instant charge on three grounds listed below:

F **(1) That the charge was incompetent, unconstitutional and void as same violated the provisions of Section 36(6) and (12) of the Constitution of the Federal Republic of Nigeria 1999, as amended. Section 201 of the Criminal Procedure Code and had amounted to grave abuse of process of the court.**

G

H **(2) That the charge framed against the accused/appellant was groundless, vexatious and frivolous as it disclosed no prima facie case against the appellant; and**

I **(3) That the said charge “Exhibit A was filed before the trial court granted leave to the prosecution/**

**A respondent to so frame it and same was therefore
defective and void, as such the proceedings held on
9/3/2015 and the accused appellant's purported
arraignment on 10/3/2015 on Exhibit A (the charge)
B are null and void ab initio.**

On 10th March 2015, the motion was heard by the trial court and was
adjourned to 20th April, 2015 for ruling. On 20/4/2015, the trial court
C delivered its considered ruling dismissing the application and adjourned
the matter for continuation of the proceedings in the matter. Miffed by the
Ruling of the trial court, the appellant promptly appealed to the Court of
Appeal. The Court of Appeal after hearing the appeal, dismissed same,
D vide its judgment delivered on 19/3/2015.

Piqued by the judgment of the Court of Appeal, the appellant has now
appealed to the Supreme Court. The appellant initially filed two notices of
appeal dated 24/5/2015 and 22/6/2016. He later chose to abandon the
E notice of appeal he filed on 24/5/2015 and relied on the notice of appeal he
filed on 22nd June 2016 as his extant notice of appeal. That extant notice of
appeal contains twelve grounds of appeal including the omnibus ground of
appeal.

F In keeping with the rules and practices obtained in this court, parties
filed and exchanged briefs of argument. The appellant's brief of argument
dated 1st July 2016 which was settled by Josiah Daniel Ebune Esq was filed
on the same 1st July 2016. Out of the twelve grounds of appeal, the appellant
G proposed four issues for the determination of the appeal which are set out
below:

**H 1. Whether the court below was right in failing to
I resolve the issue of the competence of in (sic) in the
respondent's brief of Argument that was early (sic)
filed outside the 10 days statutory period prescribed
by Order 9(b) of the Court of Appeal Practice
Direction of 2013, without any extended time to do**

- A** so raised by the appellant and its Brief of argument.
(Ground 3 of the notice of appeal).
- B** 2. **Whether the learned Justices of the Court of Appeal were not in error in entirely adopting the issues for determination as framed by the Respondent in resolving the Appellant's appeal when those issues were vague, abstract and without reference to the relevant facts touching the real questions in controversies upon which the Notice of Appeal was anchored and whether the error has not occasioned a miscarriage of justice” (Grounds 1, 5, 11 and 12 of the Notice of Appeal).**
- C**
- D** 3. **Whether the learned Justices of the Court of Appeal were right in affirming the trial court (sic) on the repealed Corrupt Practices and Other Related Offences Act, Cap C 31, Laws of the Federation of Nigeria 2004 which does not provide for the offences as that under which the Appellant is standing charged, on the ground that its previous decisions upholding the constitutionality of the 2000 Act, have not been overruled by the Supreme Court and whether in all the circumstances, the decision has not prejudiced the Appellant (Ground 5, 8, 9 and 10 of the Notice of Appeal).**
- E**
- F**
- G**
- H** 4. **Whether the Court below (sic) was fair and not in error in the manner it approached and resolved the Appellant's complaint on the abuse of court proceedings arising from the mode and manner the Respondent commenced this instant proceedings at the trial court having regard to the totality of the uncontradicted evidence on the record in that**
- I**

A direction? (Grounds 2, 4, 6, 7 and 8 of the Notice of Appeal.)

B The respondent on its part, filed its own Brief of Argument on 13/7/2016 wherein it also raised four issues for the determination of the appeal as follows:

C (i) Whether the court below is duty bound to resolve an issue which was not canvassed in a matter before it.

D (ii) Whether the Justices of the Court of Appeal are duty bound to rely on the issues formulated by parties to an appeal.

E (iii) Whether the Corrupt Practices and Other Related Offences Act 2000 has been repealed by Corrupt Practices and Other Related Offence Act 2003.

F (iv) Whether the Court below was right when it affirmed the mode of commencement of the criminal trial by the trial court.

Resolution of Issues for Determination

Issue No. 1

G On this issue, the learned counsel for the appellant submitted that the lower court was wrong to have entertained the respondent's brief of argument, which according to him, was filed outside the 10 days period prescribed by Order 9(6) of Practice Direction.

H He argued that whenever there is a requirement of law to exercise a certain power, such statutory power must be exercised within the limit or period prescribed by the statute. He stated that Practice Direction did not even make provisions for extension of time for the respondent to file his brief outside the prescribed period. He argued that by allowing the respondent to adopt his brief of argument which was filed outside the

A period of ten days prescribed by the Practice Direction (Order 9(b), his constitutional right of fair hearing was breached.

Then, learned counsel for the respondent while responding to the appellant's submissions on this issue, submitted that the appellant had

B never raised and argued the issue of the competence of the respondent's brief of argument, even though he had earlier said he was going to argue that issue. On the issue of Practice Direction raised by the appellant, the learned respondent's counsel argued that Practice Direction provisions do
C not override the provisions of the Court's substantive rules.

Now, looking at the provisions of the Court of Appeal Rules 2007 particularly Order 18 Rule 4(1), it is clearly provided thus:

D **Order 18**

4(1) The Respondent shall also within thirty days of service of the brief for the appellant on him, file the respondent's brief which shall be duly endorsed with an address or addresses for service"

E

It is instructive to note that Rule 1 of Order 18 categorically stated that the Order (i.e Order 18 of the Rules) *shall* apply to all appeals coming from any
F court or from which an appeal lies to this court (i.e the lower court herein).

Apparently, the provisions of Order 9(b) of the Practice Direction 2013 which prescribed 10days period within which a respondent should serve his brief of argument from the date he received the appellant's brief of

G argument, is in conflict with the provisions of Order 18 Rule 4(1) of Court of Appeal Rules. The correct proposition of the law is that the provisions of the Practice Direction cannot override the provisions of the substantive rules of court from which the authority to promulgate the Practice Direction
H was derived.

The important thing to note however, is that the attempt made by the learned counsel for the appellant to challenge the competence of the respondent's brief of argument is of no moment, as it was not canvassed
I anywhere. Similarly, the lower court was never and was nowhere called

A upon to make any pronouncement on it. Hence it was never raised in the judgment of the lower court now being appealed against. See *OSHODI v EYIFUNMI* (2000)7 SC P. 145. Without much ado therefore, this first issue deserves to be and is accordingly resolved against the appellant.

B

Issue No. 2

This issue deals with whether the lower court was wrong to have adopted the issue for determination proposed by the respondent in treating the appeal even when according to the appellant, those issues were vague and abstract without touching on the real question in controversy. Further, the learned counsel for the appellant submitted that the respondent's issues failed to capture the relevant facts and questions in controversy. He argued also, that the issue did not relate to or touch on the grounds of appeal. See *OLOWOSAGO VSADEBANJO* (1984) 4 NWLR (Pt. 88) 275.

D Learned appellant's counsel further submitted that the entire argument of the respondent failed to provide any answer to the crux of the appellant's complaint on the validity or otherwise of the existing Act, Cap C 31 2004 of the Laws of the Federation of Nigeria and that in spite of the foregoing the lower court adopted the respondent's issues for determination without modifying them in determining the appeal.

E He added that all the issues raised by the respondent which were adopted by the lower court, did not arise from the grounds of appeal because none of them was premised on what the trial court decided upon as captured by the appellant's notice of appeal. See *UDENGWU vs UZUEGBU* (2003) 13 NWLR (PT. 836) 136.

G Responding to the above appellant's learned counsel's argument on this issue, the respondent's counsel submitted that issues for determination raised by the appellant are not sacrosanct, hence the court is not obliged to adopt issues set down for determination by the appellant. He argued that a court is entitled to formulate, frame or reframe its issues in order to give it precision and clarity if it appears to it, that the issues so framed by a party or parties are not well framed.

H I have closely followed the argument raised on this point by the

- A** learned counsel for the appellant. His grouse is whether the lower court was correct in adopting the issues for determination raised in the respondent's brief of argument filed before it for the determination of the appeal filed before it. Here, I must reiterate that although an appellate court
- B** should be wary of raising or introducing new issues for determination in an appeal before it, however, where the issues raised by the parties before it, appear to it to be inappropriate or inadequate having regard to the grounds of appeal, the appellate court may, after having referred to the
- C** circumstances of the case, identify the relevant issues. In doing so however, it must be extra ordinarily careful and cautious so as not to go outside the grounds of appeal filed or issues not canvassed by the parties in their respective briefs of argument.
- D** Although generally speaking, an appellate court will rely on the issues for determination formulated by an appellant in determining his appeal, however, it is my view, that failure by an appellate court to be so bound or guided by issues formulated by the parties, does not amount to any
- E** injustice or denial of fair hearing especially, in a situation, where the appellate court regards the issues so formulated by the parties as inappropriate having regard to the grounds of appeal filed. See *PETERSIDE v FUBARA* (2012) 12 SC (Pt. VI) 40; *UNION BANK PLC &*
- F** *ANOR vs BOUARI* (2008) 2-3c (pt. 11) 1; *ASALU vs DAKAN* (2016) 5 SC (pt. III) 120. In this instant appeal therefore, I hold the view that the lower court is entitled to determine the appeal based on the respondent's proposed issues as none of those issues appeared to have been outside the
- G** precinct of the grounds of appeal or were inappropriate to those grounds of appeal.

This issue is therefore hereby resolved against the appellant.

H Issue No. 3

- This issue queries whether the court below was right when it affirmed the trial court's finding on the alleged repealed Corrupt Practices and Other Related Offences Act of 2000 and void the Act of 2004 which did not
- I** provide for the offences under which the appellant was charged.

- A** It was the contention of the learned counsel for the appellant that the appellant ought not to have been tried for the offences which were not contained in that statute. He argued that the Corrupt Practices and Other Related Offences Act, Cap C 31 Laws of the Federation of Nigeria 2004,
- B** has expressly repealed the Act of 2000 under which the appellant was charged. He added that the Respondent and the two lower court's avoided or refused to address the status of the 2004 Act placed before them for interpretation vis a vis, the repealed Act'. He referred to the lower court's
- C** judgment at page 443 of the record.

- In further submission, the learned appellant's counsel argued that the reasons given by the court below for dismissing this leg of the appellant's appeal before it were wrong because the 2004 Act is an existing Act that had
- D** not been made subject to any legislation in the circumstance and by Section 55 of the 2004 Act, the question whether the court below or the Supreme Court had invalidated the 2000 Act did not even arise. Learned appellant's counsel then submitted that an amendment of a law or statute is the function
- E** of the legislature and the court can not fill a gap which comes to light by altering the words of a statute to make it read in the way they think. He cited the case of OKUMAGBA Vs EGBE (1965) ALL NLR 62 at 65. He contended that the respondent and the two court below merely relied on and
- F** based their decisions on the transaction or charge framed before coming into operation of 2004 Act which said Act, was never subject of contention. He finally argued that the failure of the court below to resolve the constitutionality of 2004 Act had breached his right to fair hearing under
- G** Section 36 of the 1999 Constitution as amended. He urged that this issue be resolved in his favour.

In his reply, the learned counsel for the respondent in his brief of argument, gave extensive history of the two Acts of 2000 and 2004.

- H** The learned counsel to the respondent pointed out that the National Assembly in an attempt to gag the ICPC which they were not comfortable with hurriedly and without due process purportedly passed into law the Corrupt Practices and Other Related Offences Act of 2003 and in a letter
- I** dated March 17th 2003, with Ref. No. NASS/CAN/115/VOL. 4/257 sent the

A bill to the then President for assent.

In a swift reaction, certain members of the National Assembly challenged the constitutionality of the said 2003 Act in suit No. FHC/ABJ/93/2003, Hon. Bala Kaoje & Anors v N.A. & 13 others. Despite

B the order to maintain a status quo made by Hon. Justice Egbo-Egbo and the letter written to the National Assembly by the then President on the subject matter stating his inability to assent to bill because of pending suit before the court, yet the National Assembly went ahead to pass the bill into an Act
C on the 8th May, 2003.

And in a well considered judgment, the court declared the 2003 Act illegal and unconstitutional and consequently the Act of 2000 which came into effect on the 13th June, 2000 was sanctioned by the Supreme Court in

D AG ONDO STATE V AG FEDERATION in a judgment dated 7/6/2002 and where it was held that the 2000 Act shall be in force until amended or voided by a valid law made through due process of law by the National Assembly. He stated further, that the Abuja Division of the Court of Appeal
E reiterated the validity of the 2000 Act in another suit where Peter-Odili JCA (as she then was) held as below:-

F **“Now the bone of contention in this issue is whether or not the Corrupt Practices and Other Related Offences Act 2000 has been repealed? The answer to this poser is so simple and straight forward and it is that the Corrupt Practices and Other Related Offences Act 2000 is solidly in**
G **existence, it is yet to be repealed”.**

He therefore submitted that the position of the appellant is a misconception that the Act of 2000 is not in existence. He then urged this court to hold that
H that Act of 2000 is valid and subsisting.

It seems to me that the grouse of the appellant's learned counsel is that the trial court was wrong in trying the appellant under the 2000 Act which according to him, is non-existent in view the much later Act of 2004
I promulgated by the National Assembly. To the appellant's learned counsel,

- A** the 2004 Act did not make provisions of Offences on which the appellant stood tried on and therefore he was tried on an offence in which no known or existent law made provisions on. I agree with the learned counsel for the appellant that the case of AG. Ondo State vs AG of the Federation & Ors
- B** (supra) is not relevant to the instant situation. That case dealt with the constitutionality of the 2000 Act and the case was even decided before the alleged promulgation of 2004 Act. All that the appellant is saying here is that with the promulgation of the 2004 Act, the 2000 Act became otiose and
- C** remain repealed.

- Now coming to the controversy on the validity and continued existence of the 2000 Act and of the controversy on the validity of the 2004 Act given supra and submission of the learned respondent's counsel on
- D** whether that Act was validly promulgated which the appellant's counsel did not controvert in his Reply Brief, if such controversy is something to go by, one will be hesitant in holding that the purported 2004 Act had repealed the 2000 Act.

- E** I am not aware of any case where this court dealt with the validity of 2000 Act however, I must therefore rely on the unreported case decided by the Court of Appeal, namely FRN v WABARA (2014) 2 ICPLR where the issue in controversy was dealt with, in which the Court of Appeal per Mary
- F** Odili JCA (as she then was) held thus:-

- G** **“The appellant's counsel not being able to convince one to depart from the finding of the learned trial judge, I go along with that finding without hesitation and also held that the 2000 Act is the valid law and the charge under it cannot be impugned on a point of invalidity of the law of arraignment”.**

- H** It should be noted that both cases cited above were decided after the alleged purported promulgation of the controversial 2004 Act.

- I** In the light of what I stated supra, I tend to align myself with the finding of the lower court that the 2000 Act was a valid and applicable law

- A** under which the appellant should be and was rightly charged. This issue is therefore also resolved against the appellant.

Issue No. 4

- B** This issue pertains to the way and manner the respondent/prosecution commenced the instant case at the trial court. It is contention of the learned counsel for the appellant to prefer the charge was not done in accordance with the laid down procedure. See ABACHA vs STATE (2012) 11 NWLR
- C** (Pt 779) 437. The learned counsel complained that the respondent/prosecution did not comply with Section 185 (a) of the CPC and Rule 3 (2) (a) of CPC by filing a charge, serving it on the accused/appellant and arguing the Exparte Application for leave to prefer
- D** the charge against the appellant, while he was in dock standing. He cited the case of EFCC vs EKEOCHA (2008) 14 NWLR (pt. 1106) 161, 177 - 178. Learned counsel argued that the non-compliance with Section 185 of CPC by the respondent/prosecution is a fundamental defect which cannot
- E** be cured and the court below was wrong to have regarded it as mere irregularity.

- Responding, the learned counsel for the respondent submitted that filing and service of the charge on the appellant before leave was sought and obtained are constitutionality permitted if the accused is promptly informed in detail, of the nature of the offence and that what the prosecution did was to pre-inform the appellant of the offence which he was charged with to enable him to adequately prepare for his trial.
- F**

- G** It was also submitted on behalf of the respondent that the presence of the appellant in court before leave was sought and obtained, was allowed by Patrice Direction adopted by the court and could be therefore not be made a ground of appeal. He denied that the accused persons were docked when
- H** leave was being sought and obtained.

- The learned counsel for the respondent on the other hand emphasised that filing and service of the charge on the appellant before leave was sought and granted is constitutionality permitted and is also
- I** constitutionality guaranteed provided the accused is informed promptly in

A detail of the nature of the offence. He insisted that all that the prosecution did was simply to pre-inform the appellant of the offences for which he was charged with to enable him to adequately prepare for his trial.

He argued further that the presence of the appellant in court before the leave was sought and granted was approved by the Practice Direction adopted by the court and cannot therefore be invoked by the appellant as a ground of appeal. He pointed out that the accused persons were never docked when the leave was sought and granted as they sat in the open court like any other person and were merely asked to stand up for court to acknowledge their presence in court in compliance with Practice Direction of the High Court of the FCT which says “at the time of the prosecution seeking leave to prefer criminal charge, the accused must be present in court” (See the Practice Direction of 2014 duly signed by Hon. Justice Bukar 3(a) (b) & (c).) He argued that the appellant has not shown anywhere in the record, where he was docked before leave to prefer criminal charge was sought and obtained and that filing of charge before seeking leave does not offend the provisions of Section 185 (b) of CPC, but is simply a pre-requisite for seeking leave as prescribed by the said Act. He submitted further, that trial in criminal cases commences when the accused person is docked and the charge read over to him in the open court and the trial court it takes his plea. He cited the case of *MRS. E.A. LUFUDEJU vs EVANGELIST BAYO JOHNSON* (2007) LPELR (SC) where per Onnoghen JSC (as he then was) had this to say:-

G **“Trial in a criminal matter is said to commence with the arraignment which in turn consist of charging the accused or reading over the charge to the accused and taking his plea”.**

H He argued that there is no procedural defect on the face of the charge. He urged this court to resolve this last issue in favour of the respondent and to allow the appeal.

I The crux of the complaint by the appellant's borders on the filing of the charge by the respondent before leave was sought and obtained. His

- A** other complaints are the service of the charge and the alleged putting them (accused persons) in the dock (which was even denied by the respondent). It is noted by me, that on page 95 of the record it is shown that the accused/appellant himself admitted that on 12/3/2015, the prosecution
- B** moved its Exparte motion for leave to prepare charge against them, shortly before they were arraigned before the court.

- It is my considered view that before an accused person is tried, a charge must be framed against him (See Section 185 (B) of Criminal
- C** Procedure Code. A trial of an accused person starts when he is arraigned in court, charge read and explained to him in the language he understands and when his plea is taken. See *KAJUBO v THE STATE* (1988) 3 SC 109; *MRS E.A. LUFADAJU Vs EVANGELIST BAYO JOHNSON* (2007)
- D** LPELR SC 43; In the instant case, it is clear from the record of appeal, that the accused persons including the appellant were in the court when the respondent moved its Exparte motion to seek leave to frame the charge against them with which they were promptly served. Their pleas were not
- E** taken at that stage, as it was premature to do so. I therefore do not agree with the appellant's counsel submission when he stated that that amounted to breach of the appellant's right to fair hearing. Had it been that they were arraigned before the trial court and their pleas taken before leave was
- F** sought and obtained, then it may be said to be a breach of his constitution right procedurally. In any case, it is my candid opinion, what had happened in this instant case when the application for leave was sought and obtained was moved in the presence of the appellant in court is trivial. The
- G** appellant's complaint is therefore lacking in substance and is of no moment. This issue is as well resolved against the appellant. Therefore all the four issues are hereby resolved against the appellant.

- In the result, this appeal is adjudged to be unmeritorious and it
- H** deserves to be and is hereby accordingly dismissed. The judgment of the lower court which had earlier affirmed the Ruling of the trial High Court, is hereby also further affirmed.

Appeal is dismissed accordingly.

I

Amiru Sanusi
Justice, Supreme Court

A OLABODE RHODES-VIVOUR, (JSC): I have had the advantage of reading in draft the leading judgment of my learned brother **Sanusi, JSC**. I agree with his lordship that there is no merit in the appeal and it should be dismissed. I would comment on issue 2, it reads:

B

“Whether the learned justices of the Court of Appeal were not in error in entirety, adopting the issues for determination as framed by the respondents in resolving the appellant's appeal when those issues were vague, abstract and without reference to the relevant facts touching the real questions in controversy upon which the notice of appeal was anchored and whether the error has not occasioned a miscarriage of justice.”

D

The appeal in the Court of Appeal was heard on the issues formulated by the respondent. It has been long settled since appeals were heard on briefs that judges of appeal courts have discretion to adopt issues formulated by appellant or the respondent, or reformulate them.

E

This is geared towards serving the interest of justice and bringing to the fore the real grievance in an appeal. Issues are also reformulated by judges for clarity and to do away with prolixity, thereby enabling the appeal court properly determine the appeal. See *Abiola & Sons Bottling C. Ltd Vs 7Up Bottling Co. Ltd (2012) 7SC (Pt. ii) p. 83*, *Okere Vs. State (2016) LPEIR-26057*, *Unity Bank & anor Vs. E. Bouari (2008) 2-2SC (Pt. ii) p. 1*, *P.S.H.S.M.B & anor Vs. Goshwe (2012) 12SC (pt. vii) p. 90*.

F

G

I have examined the issues formulated by the respondent in the Court of Appeal and adopted by that court for the hearing of the appeal, and I am satisfied that the issues are better framed than those of the appellant, and clearly serve the interest of justice as they are concise and not contrary to Order 6 Rule 3 and 4 of the Court of Appeal Rules.

H

The burden lies on learned counsel for the appellant to show how adopting the issues formulated by the respondent has led to miscarriage of justice. This he has failed to show and so his complaint is finally put to rest.

I

A For this, and the detailed reasons given in the leading judgment I, too dismiss the appeal.

Olabode Rhodes-Vivour
Justice Supreme Court

B

MARY UKAEGO PETER-ODILI, (JSC): I am at one with my learned brother, Amiru Sansui JSC with the judgment that has just been delivered and in the reasoning from which the decision arose. In this support I shall

C record some remarks.

This appeal arose from the judgment of the Court of Appeal or court below or lower court, Abuja Division delivered on the 19th day of May, 2016 which dismissed the appellant's appeal and upheld the ruling of the trial court per M.B. Idris J of the FCT High Court, Abuja on the 20th April, 2015.

D

The backgrounds facts of this appeal are well set out in the lead judgment that I shall not repeat them except when it becomes necessary to make reference thereof.

E

On the 11th day of October, 2017 date of hearing, learned counsel for the appellant, Josiah Daniel-Ebune Eq. adopted the appellant's brief of argument filed on 1/7/16 and the reply brief filed on 20/7/16. In the brief of argument were raised four issues for determination which are thus:

F

1. Whether the court below was right in failing to resolve the issue of the competence of in the respondent's brief of argument that was clearly filed outside the 10 days statutory period prescribed by Order 9(b) of the Court of Appeal Practice Direction, 2013, without any extended time to do so raised by the appellant in its brief of argument? (Ground 3 of the notice of appeal.)

G

H

2. Whether the learned justices of the Court of Appeal were not in error in entirely adopting the issues for determination as framed by the respondent in resolving the appellant's appeal when those issues

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A were vague, abstract and without reference to the
B relevant facts touching the real questions in
controversy upon which the notice of appeal was
anchored and whether the error has not occasioned
a miscarriage of justice? (Grounds 1, 5, 11 and 12 of
the notice of appeal).

C 3. Whether the learned justices of the Court of Appeal
were right in affirming the trial court on the
repealed corrupt practices and other related
offences Act, 2000 avoiding the extant corrupt
practices and other related offences Act, Cap C31,
Laws of the Federation of Nigeria, 2004 which does
not provide for the offences as that under which the
appellant is standing charged, on the ground that its
previous decisions upholding the constitutionality
of the 2000 Act have not been overruled by the
Supreme Court, and whether in all the
circumstances the decision has not prejudiced the
appellant? (Grounds 8, 9 and 10 of the notice of
appeal).

D 4. Whether the court below was fair and not in error in
the manner it approached and resolved the
appellant's complaint on the abuse of criminal
proceedings arising from the mode and manner the
respondent commenced this instant proceedings at
the trial court having regard to the totality of the
uncontradicted evidence on the record in that
direction? (Grounds 2, 4, 6, 7 and 8 of the notice of
appeal).

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H For the respondent, Osuobeni Ekoi Akponiminisingha Esq, Deputy
Superintendent Legal of the ICPC adopted its brief of argument filed on the
13/7/16. He crafted four issues for determination so simply and easy to use
that I am persuaded to utilize them as drafted in the determination of this
appeal. They are thus.

I

- A** **1. Whether the court below is duty bound to resolve an issue which was not canvassed in a matter before it.**
- B** **2. Whether the justice of the Court of Appeal are duty bound to rely on the issues formulated for determination by parties to an appeal.**
- C** **3. Whether the corrupt practices and other related offences Act NO. 5, 2000 has been repealed by Corrupt practices and other related offences Act, 2003 Cap C.31 LFN 2004.**
- D** **4. Whether the court below was right when it affirmed the mode of commencement of the criminal trial by the trial court.**

E Issues 1 And 2

- 1. Whether the court below is duty bound to resolve an issue which was not canvassed in a matter before it.**
- F** **2. Whether the justices of the Court of Appeal are duty bound to rely on the issues formulated for determination by parties to an appeal.**

G Learned counsel for the appellant contended that a challenge to the jurisdiction of the court could be based on an averment that the period allowed by the court to entertain a process has expired. That a court is bound by the rules of court except where there is an alternative approach, the court cannot circumvent the strict application of the rules, for rules of court are made to be obeyed. Therefore where a court process should be brought within a stipulated time period and it is filed out of the time, the process would be incompetent unless time is extended by the court on an express application to do so by the party in default. That a court is not competent to

H

I

A entertain an incompetent court process and so by virtue of Order 9(b) and (f) (ii) the Court of Appeal Practice Directions, 2013 the respondent's brief was incompetent having been filed out of time. He cited **NIPOL Ltd Vs, Bioku Investment & Pro. Co. Ltd** (1992) 2 NWLR (Pt. 232) 727 at 730;

B **Okeke Vs. Obi-Okoye** (1994) 8 NWLR (Pt. 363) 610.

He stated for the appellant that where the exercise of power is statutory such power can only be exercised within the limits prescribed by the statute and so the respondent's brief filed outside the 10 days granted by the practice direction, 2013 the ensuing incompetence deprived the court of its jurisdiction to accord recognition to the respondent's brief and no provision was made for a remedy. That the court below erred in not considering the issue when it was raised and so rendered the proceedings without adherence to fair hearing and so the matter should be resolved in favour of the appellant.

E He cited **Sanusi Vs. Ayoola** (1992) 9 NWLR (Pt. 265) 275; **Akuinuli Vs. Ayo-Odugbesan** (1992) 8 NWLR (Pt. 258) 172 at 189; **Omoregie Vs. Emoron** (1982) 13 NSCC 145 at 146.

Learned counsel for the appellant contended that the court below erred when it adopted all the issues formulated by the respondent to resolve the appeal when those issues as formulated and promptly attacked as incompetent in the appellant's brief did not capture the relevant facts and questions in controversy as carefully delineated in the appellant's notice of appeal and respondent had not filed a cross-appeal. He cited **Azatse Vs. Zegeor** (1994) 5 NWLR (Pt. 342) 76 at 83; **Buraimoh Vs. Bamgbose** (1989) 3 NWLR (Pt. 109) 322 at 361; **Okwudili Vs. Obiekwe** (1989) 1 NWLR (Ppt. 99) 566.

Learned counsel for the respondent, contended that a court is not bound by law to resolve an issue where its attention is not drawn to it and so the appellant cannot now bring up the alleged infraction. He cited **Jev & Anor. Vs. Iyortyom & Ors.** (2012) LPELR-9291.

It was argued for the respondent that the practice direction of the Court of Appeal cannot be construed as a statute or rules of Court. That the Court of Appeal Rules provides for 30 day period for the respondent to file

A its brief upon service of the appellant's brief on him. He cited Order 18 Rule 4, Court of Appeal Rules, 2011. That the court cannot assist the appellant to argue his brief where he fails to present a point he intends to raise at the hearing of the appeal. He referred to **Akinbami Vs. Oando Plc & Ors** (2013) LPELR 21843 P. 21.

B That the court is not obligated to adopt the issues set down for determination by the appellant. Also that the court is at liberty to adopt either of the issues formulated by a party where the issues are arising from grounds of appeal and the court is entitled to reformulate issues as it seems fit. He cited **Unity Bank Vs. Bouari** (2008) 7 NWLR (Pt. 1086) 383; **Dada Vs. Dosumu** (2006) 9 SCNJ 71.

C The long and short of the grouse of the appellant is that the court below should have discountenanced the brief of the respondent which was filed outside the 10 days prescribed by the practice direction. The respondent tackled that posture by stating that the appellant had not raised the issue at the hearing of the appeal at the court below and so it is too late in the day now to raise it. Also that the court below was not obligated to assist the appellant argue his brief.

D This matter of the incompetence of the respondent's brief at the court below having not cropped up and taking cognizance of the fact that the Court of Appeal Rules precisely Order 18 Rules 4 provides for 30 days period for the respondent to file its brief and so with the superior standing of the rules of court to a practice direction, the matter of incompetence based on the limited 10 day period of the practice direction would take a second step below the rules of court especially in this case where the perceived irregularity was not raised by the appellant at the right time. See **Jev & Anor. Vs. Iyortyom & Ors.** (2012) LPELR-9291, (CA); **Akinbami Vs. Oando Plc & Ors.** (2013) LPELR-21843 (CA).

E The appellant also would want the court to accept that the court below erred in not utilizing for the determination of the appeal before it, the issues as crafted by the appellant. That angle put forward by the appellant does not in my humble view represent the law as a court is not obligated to adopt the issues set down for determination by an appellant, as a court is

- A** free to adopt the issues as crafted by either of the parties so long as the issues arise from the grounds of appeal. Again to be said is that a court is at liberty to reformulate issue or issues from that of any of the parties in order to give it precision and clarity, the condition being that the issue so identified by the
- B** court flow from the grounds of appeal as the court has to do that which is convenient within the bounds of the law in getting at the answer to the question or questions raised and in so doing, deliver justice. See **Unity Bank Vs. Bouari** (2008) 7 NWLR (Pt. 1086) 383 at 401; **Dada Vs. Dosunmu** (2006) 9 SCNJ 71.

- C** It is clear from the foregoing that the appellant had not effectively impugned the proceedings at the court below and has not shown that the lower court used an incompetent process, that is, the respondent's brief in
- D** that court to consider the case and reach a decision. The issues 1 & 2 are resolved against the appellant.

Issue 3 & 4

- E** **Whether the corrupt practices and other related offences Act No. 5, 2000 has been repealed by corrupt practices and other related offences Act, 2003 Cap C. 31 LFN 2004.**

- F** **Whether the court below was right when it affirmed the mode of commencement of the criminal trial by the trial court.**

- G** Learned counsel for the appellant contended that with the mix up as to the exact legislation under which appellant was charged whether section the 2004 or 2000 and so his right to fair hearing was compromised. That the
- H** two courts below utilizing the extinct 2000 Act erred seriously and the issue should be resolved in favour of the appellant. He cited **Okumagba Vs. Egbe** (1965) ALL NLR 62 at 65; **Ovunwo Vs. Dieli** (1990) 5 NWLR (Pt. 149) 126 at 134 – 135.

- I** In response, learned counsel for respondent submitted that the 2003

A Act is not in existence at all and that the Act of 2000 is valid and subsisting and so the appellant was validity tried thereby. He cited **A.G. Ondo State Vs. A.G Federation** (2002) 9 NWLR (Pt. 772) 222; **FRN Vs. WABARA** (2014) ICPCLR 1; **Ayuba Bitrus Bakkat Vs. FRN** (2014) ICPCLR 2 at
B 455.

The leg in the issues herein is the challenge of the appellant that the corrupt practices and other related offences Act, 2000 which has dovetailed into the 2004 Act is not the extant law but rather it is the 2003 Act and so the
C charge which appellant faced was under a no longer existent law should be quashed. When this was raised in the court below that court emphatically dispatched the argument by stating as follows:

“This issue is straight forward, and requires no rigmarole; this court
D earlier held in **Ayuba Bitrus Bakkat Vs. FRN** (2014) ICPCLR 2 page 455 that:

**“Now the bone of contention in this issue is whether or not
E the corrupt practices and other offences Act, 2000 has been repealed? The answer to this poser is so very simply and straight forward and it is that the corrupt practices and other related offences Act 2000 is solidly in existence,
F it is yet to be repealed...”** It is equally important to bear in mind that this decision was delivered on the 3rd of December, 2013; again this court also held on the 23rd of February 2015 in the unreported case of Temple
G Nwankwoala (DSP) Vs. FRN CA/B/106C/12 per Barka JSC. It is my candid view therefore that the 2000 Act solidly stands, and the appellant was duly and rightly tried under the 2000 Act, which was the law in force.” There
H does not appear to be any decision of the Supreme Court invalidating the 2000 Act or setting aside any of these decisions referred to here. It would be foolhardy therefore for anyone to assume, least of all this court, that
I the 2000 Act is not in force or invalidated, far from it.

- A The trial court was therefore correct in the circumstances to hold that the 2000 Act was not repealed in the absence of any decision of the Court or Supreme Court setting aside those decisions; accordingly this issue too is resolved in favour of the 1st respondent, against the appellant.”**
- B**

It is necessary to go back in time as to the year 2000 when the corrupt practices and other related offences Act was promulgated into law and section 6 thereof provides as follows:

- “It shall be the duty of the commission-**
- D (a) Where reasonable grounds exist for suspecting that any person has conspired to commit or has attempted to commit or has committed an offence under this Act or any other law prohibiting corruption, to receive and investigate any report of the conspiracy to commit, attempt to commit or the commission of such offence and, in appropriate cases, to prosecute the offenders;**
- E**
- F (b) To examine the practices, systems and procedures of public bodies and where, in the opinion of the commission, such practices, systems or procedures aid or facilitate fraud or corruption, to direct and supervise or review of them;**
- G**
- (c) To instruct, advise and assist any officer, agency or parastatals on ways by which fraud or corruption may be eliminated or minimized by such officer, agency or parastatal;**
- H**
- (d) To advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the commission thinks fit to reduce the**
- I**

A **likelihood or incidence of bribery, corruption and related offences;**

B **(e) To educate the public on and against bribery, corruption and related offences; and**

(f) To enlist and foster public support in combating corruption”

C Section 27(3) of the ICPC Act 2000 stipulates thus:

D **“Where an office of the commission has reasons to suspect the commission of an offence under this Act following a report made under sub-section (1) or information otherwise received by him, he shall cause investigation to be made and for such purpose may exercise all the powers of investigation provided for under this Act or any other law.”**

F Indeed an attempt was made in 2003 to pass into law corrupt practices and other related offences Act 2003. The National Assembly passed the bill and the then president declined his assent. In a challenge as to its validity, the Federal High Court, Abuja Per Egbo-Egbo J. declared the bill unconstitutional and illegal and went on to declare it null and void and had the said Act struck down and further reiterated the validity of the corrupt practices and other related offences Act 2000. That judgment was in the case of **Hon. Bala Kajoje & 4 Ors Vs. The National Assembly of the Federal Republic of Nigeria & 13 Ors** in Suit No. FHC/ABJ/CS/93/2003 delivered on 21st May, 2003.

H That position of the Federal High Court has remained the extant situation and followed by the Court of Appeal in **FRN Vs. Wabara** (2014) 2 ICPCLR 1; **Ayuba Bitrus Bakkat Vs. FRN** (2014) 2 ICPCLR 2 page 455 (CA).

I It is clear that the appellant was charged within the valid, extant law,

A the 2000 Act.

On the matter of the timing of the leave sought and obtained by the trial court, the appellant certainly is taking the court into the realm of the academic and technical rules as the substantiality of compliance with the

B rules were met. The appellant as accused person had not been docked or charged before the leave was sought for and obtained from the trial court. All that happened earlier was as respondent stated that the appellant was made aware of the coming event so he could be prepared and then the leave
C was sought and having been obtained the charge was initiated with the arraignment.

To refresh the memory, trial of a criminal case commences when the accused docked and the charge read over to him in open court and he takes

D his plea. See **Mrs. E.A. Lufadeju Vs. Evangelist Bayo Johnson** (2007) LPELR 43 per W.S.N. Onnoghen JSC (as he then was); **Asakitipi Vs. State** (1993) 5 NWLR (Pt. 296) 641; **Effion Vs. State** (1995) 1 NWLR (Pt. 373) 507 at 582 583; **MFA Vs. Inongha** (2014) 57 NSQR 24-25.

E In the main the issues here raised are resolved against the appellant as they have no leg on which a finding in favour of the appellant can stand.

From the foregoing and the better articulated lead judgment I too see no merit in this appeal. I dismiss the appeal as I abide by the consequential

F orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

G CLARA BATA OGUNBIYI, (JSC): I read in draft the lead judgment of my learned brother Sanusi, JSC and I agree that the appeal herein has no merit and ought to be dismissed.

The facts and background of this appeal are well spelt out in the lead

H judgment of my learned brother. I will not repeat same.

For the purpose of re-stating the view held by my brother on the lead judgment, I will seek to contribute based on the four issues formulated by the learned respondent's counsel, which have been reproduced in the lead

I judgment.

A Issue One

Whether the court below was duty bound to resolve an issue which was not canvassed in a matter before it?

B

The pertinent question to ask is:- was the issue brought before the lower court by the appellant? I seek to say that the appellant in his reply brief at paragraph 1.1 said he was going to raise the issue of the competency of the respondent's brief, which he never did when the appeal came up for argument on April, 14. There was nowhere also that the lower court alluded to the question of competence. It is well settled that an appeal must be based on issue canvassed before the court and no more.

C

The law is again as decided in several authorities that there is no duty on the court to assist an appellant or any party at all to present his case before the court to the detriment of the other party. The practice direction cannot also be construed as superior to either statutes or rules of court.

D

E

As rightly submitted by the respondent's counsel therefore, the said issue should, without more, be resolved against the appellant.

Issue Two

F

Whether the justices of the lower court are duty bound to rely on the issues formulated for determination by parties to an appeal.

G

Long lines of authorities are settled that a court is not bound but is at liberty to adopt either of the parties issues as formulated or proceed to formulate its own for determination, provided however that the issues are arising from the grounds of appeal. The issue could be those by either of the parties also.

H

Furthermore, a court is not also under a regimental duty to take all issues canvassed by the parties in the appeal. An appellate court is at liberty to reformulate issues different from that formulated by parties/counsel in order to give it precision and clarity if it appears that the issues formulated

I

A by parties are not well framed.

The said issue two is also resolved against the appellant.

Issue Three

B

Whether the corrupt practice and other related offences Act No. 5, 2000 has been repealed by corrupt practices and other related offences Act 2003 Cap C.31 LFN 2004.

C

It is pertinent to state that one of the principal aims of corrupt practices and other related offences Act 2000 was to check official corruption and abuse of office by political and public office holders.

D Under the said Act, the Independent Corrupt Practices and other related offences commission was established and its function clearly set out in section 6. All move to repeal the Act did not yield positive; hence the 2004 Act contemplated by the appellant is not in existence but rather the 2000 Act, which is extant.

E

The issue like the other two issues supra are resolved also against the appellant.

Issue Four

Whether the Court of Appeal was right when it affirmed the mode of commencement of the criminal trial by the trial court.

G

I wish to say quickly that the filing and serving of the charge on the appellant before leave was sought and granted is constitutionally permitted. The appellant is also guaranteed constitutionally to be informed promptly in detail of the nature of the offence against him. See **Section 26(6)(a)(b) of 1999 Constitution as Amended.**

H

I What the prosecution did in the case at hand was to pre-inform the appellant of the offences for which he is charged to court in order to enable

A him prepare adequately for his trial. The timely service of the charge on the appellant made his counsel to file an application for his bail before his arraignment.

I seek to restate further that by filing of a charge before seeking leave of court to prefer criminal charge against the appellant did not in any way offend the provisions of **section 185(B) of CPC Act which states thus:**

“No person shall be tried by the High Court unless:
C **b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court.”**

D Again, the pertinent question to pose at this juncture is: was there any procedural defect on the face of the charge? It is intriguing that the appellant did not challenge/arrest this procedure which was adopted by the trial court at the time the trial began, but took his plea, and he proceeded to make an application for his bail through his counsel.

The appellant, as rightly submitted by the respondent's learned counsel, did not show any evidence of denial of fair hearing meted out to him by the court. The argument by his learned counsel, is purely academic.

E This court cannot interfere with the findings of facts made by the two lower courts in the absence of any cogent reason to do so.

The said issue is resolved also against the appellant and the concurrent findings are held as sacrosanct and also affirmed by me.

G With my few words of contribution above, and while relying on the comprehensive judgment of my learned brother Sanusi JSC, I hereby endorse the lead judgment as mine. I do not find any merit in this appeal.

H Same is dismissed also by me.

Clara Bata Ogunbiyi
Justice, Supreme Court

I **SIDI DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the

A 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 to add. The appeal lacks merit, and it is accordingly dismissed by me. Judgment of the Court of Appeal Abuja Division is hereby affirmed.

B **Sidi Dauda Bage,**
Justice, Supreme Court

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**C.N. OKPALA & SONS LTD
AND
NIGERIAN BREWERIES PLC**

SC. 36/2007

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

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

**MUSADATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
JOHNINYANG OKORO
CHIMA CENTUS NWEZE
EJEMBI EKO**

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

COURT: Lower Court – Determination of issues – Whether as a general rule lower courts are bound to pronounce on all issues properly placed before them – Rationale.

COURT: Pleadings – Where a court in his judgment departs from the pleadings – Impropriety thereof – Whether it is not proper for a trial court to depart from the case as pleaded by the parties.

EQUITY: Estoppel by Conduct – Extent and application – S. 150 Evidence Act 2011 – Relevant considerations thereof.

EVIDENCE: Admissibility – Facts not pleaded – Evidence thereof – Whether go to no issue and inadmissible.

PRACTICE AND PROCEDURE: Pleadings – A party is not allowed to go

outside his pleadings to make a case than he pleaded.

PRACTICE AND PROCEDURE: Pleadings – Abandoned – Where no evidence is led on pleaded facts – Whether deemed abandoned.

PRACTICE AND PROCEDURE: Pleadings – Admission thereof – Where a party pleads a fact which the opposing party did not join issue therewith – Whether under the rules of pleadings it is deemed admitted.

PRACTICE AND PROCEDURE: Pleadings – Indices thereof – Whether must be sufficient, comprehensive and accurate.

PRACTICE AND PROCEDURE: Pleadings – Meaning and essence

PRACTICE AND PROCEDURE: Pleadings – Nature thereof – Principles in Obmiami Brick and Stones Nig Ltd vs A.C.B. (1992) 3 SCNJ 1

Issues for Determination

- 1. Whether from the totality of pleadings and evidence at the trial, the court below was right in its holding that the trial court made a case for the parties different from what they pleaded and equated abandonment of material facts pleaded and evidence at variance with such pleadings to mere technicality instead of simply holding that the appellant did not prove his case.**
- 2. Whether the court below was correct to hold that the trial court did not at anytime consider the case put forward by the respondent and thereby occasioned a miscarriage of justice.**

Facts of the Matter

This appeal is against the judgment of the Court of Appeal, Benin Division delivered on 8th September, 2005 wherein the lower court set aside the judgment of the learned trial judge which was in favour of the present appellant as plaintiff. Not being satisfied with the setting aside of the judgment it won at the trial court by the court below, the appellant has appealed to this court. A brief statement of the facts will suffice.

The appellant which was a customer of the respondent obtained the leave of the High Court of Edo State, sitting in Benin to institute an action against the respondent, wherein it claimed as follows in paragraph 10 of its statement of claim:

- a. A declaration that the plaintiff is entitled to the immediate supply to the plaintiff 1,400 cartons of star beer (sic) and 2,100 cartons of Gulder beer by the defendant.
- b. An order of Court compelling the defendant to supply to the plaintiff 1,400 cartons of star beer and 2,100 cartons of Gulder beer.
- c. Alternatively, the payment of the sum of N10M. (Ten Million Naira) being special and general damages made up as follows:-

Special Damages

i.	Amount deposited	N523,495.50
ii.	Anticipated profitN104,000.00
iii.	Solicitors feesN50,000.00
	TOTAL	N678,495.00
iv.	General Damages for Breach of Contract for supply of Beer	N9,321,504.00
	GRAND TOTAL	N10,000,000.00

The defendant, the respondent herein, denied the above averment in paragraph 14 of its statement of defence and further contended that:

- a. The plaintiff has utilized the value of his cheque covering Invoice No. 014650.
- b. The plaintiff collected products to the value of his cheque covering

Invoice No. 014650.

- c. The plaintiff is not entitled as claimed because:
- (i) He has utilized his deposit of N523,469.00
 - (ii) He has earned the profit on the products purchased, and
 - (iii) He embarked on a speculative suit and is not entitled to any sum.

At the trial, one witness each testified for the parties, and in his testimony the appellant's witness admitted, without an amendment to the statement of claim that after a demand letter from his solicitor, the respondent delivered to the appellant 1,272 cartons of Gulder beer leaving a balance of 822 cartons and 1,050 cartons of star beer, leaving a balance of 350 cartons. He further stated that:

“Up to now, the defendants have not delivered the balance to me. I want the court to ask the defendant to deliver the balance of 822 cartons of Gulder and 350 cartons of star”.

The respondent's witness however testified that there was a notice of increase in prices to its customers stating that all orders made up to 27th October, 1993 would be on the old price and from 28th October, 1993, on the new price, and when they were trying to serve the order, they discovered that the date on the appellant's invoice had been altered from 28 to 27 “apparently to beat the price increase”. He further testified as follows:

“We refused to supply the plaintiff because the products were underpaid for, having concluded that the date was deliberately tampered with. The plaintiff has been given the products and he has accepted the products based on the new prices. The defendant is no longer owing the plaintiff any sum of money on that order. The defendant is not owing any carton of beer because the waybill shows clearly the quantity order CNo 8. The defendant is not liable to the plaintiff.”

At the close of trial, counsel addressed the court, and in his judgment, delivered

on the 31st of January, 1995, the learned trial Judge held as follows:

“In sum, I rule that the plaintiff has proved a claim on this evidence tendered and do hereby give the plaintiff judgment as claimed in his evidence, not as in the pleadings”.

Dissatisfied with the decision, the respondent herein appealed to the Court of Appeal, which set aside the said decision of the trial High Court in a judgment delivered on 8th of September, 2005.

(Held) *(Unanimously dismissing the appeal)*

1. *The meaning and essence of pleadings*

In Black's Law Dictionary, 8th Edition, pleading is defined as a formal document in which a party to a legal proceeding, (especially in a civil lawsuit), sets forth or responds to allegations, claims, denials or defence. In summary, it consists of the plaintiff's complaint and the defendant's answer. The essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case is to be contested to avoid element of surprise by either party. It is also essential that parties are not allowed to adduce evidence which goes outside the facts pleaded. See Omouka & Anor V. Omogui (1992) LPELR -2719 (SC), (1992) 3 NWLR (pt. 230) 393, Adenuga V. Odumeru (2001) LPELR-130 (SC), (2001) 2 NWLR (pt 696) 184.

One other essence of pleading is that it must be precise and accurate on the issues to be decided by the court such that no party or court is left in doubt as to what each party requests from the court. In the circumstance, parties are usually confined to their pleadings. Put differently, parties are bound by their pleadings.

(P 67 paras C – G)

2. *Parties are not allowed to go outside their pleadings to make a case than they pleaded*

The law is trite that litigation is fought on pleadings of the parties and no party will be allowed to go outside the pleadings to make a case different from that which he had pleaded. At the hearing, no litigant would be permitted to set up a case which is different from that set forth in his pleadings. See Onuoha Nwokorobia V. Desmond Uchechi Nwogu & Ors (209) LPELR-2127 (SC), (2009) 10 NWLR (pt. 1150) 553, Clifford Osuji V. Nkemjika Ekeocha (2009) LPELR-2816 (SC), (2009) 16 NWLR (pt. 1166) 81.

In the instant case, there is no doubt that the appellant's evidence led at the trial court was at variance with the pleaded facts in his statement of claim. This much was stated by the court below. (Pp 67–68 paras G–A)

3. *It is not proper form trial court to give judgment based on unpleaded facts*

Even the learned trial Judge in his judgment agreed that the appellant herein abandoned his pleadings and led evidence on unpleaded facts. Because of this, the learned trial Judge said thus on page 26 of the record:

“It is my firm belief that it is undesirable to give effect to the rules of pleadings which will enable one party to score a victory not on the merits of the case.”

Then on page 28 of the record, which is the conclusion of the judgment, the learned trial Judge said:

“In sum I rule that the plaintiff has proved the claim on this evidence tendered and do hereby give the plaintiff judgment as claimed in his evidence; not as in the pleadings.” (italics mine for emphasis),”

It can be clearly seen as was rightly held by the Court of Appeal that the moment the learned trial Judge expressed the undesirability of the rules of pleadings in civil cases, he had derailed. I would rather state that rules of pleadings in civil proceedings are desirable. This is so because, litigation is fought on the pleadings. They are the pillars upon which a party's case is founded. It cannot be otherwise. The law is trite that it is not open to a party to depart from his pleadings and to put up a different case not contemplated by the other party. It is equally not open to the court as was done by the learned trial judge in this case, to depart from the case pleaded by the parties and to found its judgment on matters which are neither pleaded nor constitute issues as settled in the pleadings. I agree with the court below that the trial court was wrong when it held that it gave judgment to the plaintiff "as claimed in his evidence, not as in the pleadings". If this is allowed to stand, it will breed confusion and anarchy in civil proceedings. Rules of pleadings not only give the other party notion of the case he is to meet at the trial, they also define the parameters of the case. As I said earlier, parties are bound by their pleadings. It is trite that any evidence led on facts not pleaded goes to no issue while any pleadings in respect of which no evidence is led are deemed abandoned. See *Chukwuemeka Anyafulu & Ors V. Maduegbuna Meka & Ors* (2014) LPELR-22336 (SC); (2014) 7 NWLR (pt. 1406) 396; *Adesanya V. Otuewu & Ors* (1993) LPELR-146 (SC), (1993) 1NWLR (Pt. 270) 414, *Asani Sogunro & Ors. V. Aremu Yeku & Ors* (2017) LPELR-41905 (SC). (Pp 68–69 paras D–E)

4. *Evidence on facts not pleaded are inadmissible and go to no issue*
I quite agree with the court below when it held on page 103 of the record of appeal that:

"In civil action tried on pleadings the parties and the court are bound by their pleadings filed in the case; they are certainly not allowed to set up cases different from

their pleadings. The pleadings in an action determine and control the way and manner the trail of an action will succeed or fail, and to that end, parties must limit themselves severally to the issues raised in their pleadings, as evidence of facts not pleaded or contrary to facts pleaded is inadmissible and goes to no issue.”

(P 69 paras E–H)

Per Okoro (JSC)

“What baffles me in this case is that the appellant, at the time it filed the case at the trial court knew very well that the respondent had supplied it with 1,272 cartons of Gulder beer and 1,050 cartons of star beer and yet it demanded to be supplied with 1,400 cartons of star beer and 2,100 cartons of Gulder beer. Moreso, even when the respondent herein filed its statement of defence denying liability and stating clearly that it had supplied the appellant with the products as stated above, the appellant made no attempt to amend its statement of claim but merely admitted in evidence that he had been supplied as stated by the respondent and as held by the court below, it strengthened the case of the respondent. It was wrong for the trial court to shove aside the pleadings of the parties to give judgment on the evidence only. That evidence was based on nothing. You cannot put something on nothing and expect it to stand, it will crumble. See *Macfoy V. UAC (1962) AC, 152.*

On the whole, I accept the position taken by the court below which was largely to restate and apply the time honoured principle of law that parties are bound by their pleadings. No party is allowed to abandon his pleadings and thereafter lead evidence at large. This is unacceptable.” *(Pp 69–70 paras I–D)*

5. *Lower Courts to pronounce on all issues placed before them*
In several decisions of this court, it has been repeatedly held that all lower courts, as a general rule, must pronounce on all issues

properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues not pronounced upon are crucial, failure to pronounce on them will certainly lead to a miscarriage of justice. There is therefore need for every court or tribunal to make findings and pronounce on material and fundamental issues canvassed before it by the parties because failure to do so, as I said earlier, may result in a miscarriage of justice. See *Brawal Shipping (Nig) Ltd V. F.I. Onwadike Co. Ltd* (2000) 6 SCNJ 508 at 522, *Ojogbue V. Nnubia* (1972) 6 SC 227, *Kato V. CBN* (1991) 9 NWLR (pt. 214) 126, *Yakassai V. Incar Motors Ltd.* (1975) 5 Sc 107; *Citec International Estate Limited & Ors V. Josiah Oluwole Francis & Ors* (2014) LPELR-22314(SC).

In the instance case, the main issue for determination before the trial court was whether there was alteration of date from 28/10/93 to 27/10/93 by the appellant. It behoved the learned trial judge in the circumstance to consider all the pleadings and evidence of both parties in order to assist him in reaching a fair and acceptable decision. The court below faulted the learned trial judge on this aspect and held that the learned trial judge failed to consider the evidence of the respondent before reaching a decision and thus occasioned a serious miscarried of justice.

As was pointed out by the learned counsel for the respondent in their brief of argument, the respondent's witness tendered the order forms of UTC Stores which preceded that of the appellant on 28/10/93 as exhibits "CN0 9" and "CN0 10". It was the case of the respondent that the letter of appointment of the appellant, which was tendered as Exhibit "CN0 5" and Conditions of Sale-Exhibit"CN0 6", regulated the relationship between the respondent and the appellant. The respondent stated in both its statement of defence and evidence in court (trial court) that the date on Exhibit "CN0 1" was tampered with and that it becomes more obvious when one considers it along with Exhibits "CN- 9" and "CN0 10" which were orders from UTC Stores which placed its orders just before the

appellant's "CN0 1". (Pp 71 – 72 paras E – E)

Per Okoro (JSC)

“My Lords, the UTC invoice was Invoice No. 014649 and receipt No, 539399 both dated 28/10/93. The next order Invoice No. 014650 was that of the appellant. According to the respondent, the date was altered from 28/10/93 to 27/10/93 ostensibly to accord with the respondent's decision to supply its goods to its customers based on the old price for those who had ordered before 28/10/93. It was this alleged alteration which was the bone of contention between the parties. In fact it was the alteration which gave birth to this case. It was therefore the duty of the trial court to painstakingly consider the case of both parties in order to reach a just and fair decision.

Unfortunately, the learned trial judge, as was rightly held by the court below missed the point and failed to consider the defence put up by the respondent which was vital to its case. The trial court simply said of the respondent's exhibits “CN0 9” and “CN0 10” on page 28 of the record that:

“I have not seen the relevance in this suit of exhibits “CN0 9” and “CN0 10”, I have therefore, rejected same.”

With due respect to the learned trial judge, exhibits “CN0 10” were more than relevant to the case of the respondent. In deed the two exhibits ought to have played a pivotal role in the determination of the case, for whereas exhibits “CN0 9” and “CN0 10” of the respondent were first in time to exhibit “CN0 1” of the appellant, one wonders how the order paper of UTC Stores bore the date of 28/10/93 but the subsequent order by the appellant carried a date of 27/10/93. For me, I agree with the court below that, had the learned trial judge considered exhibits “CN0 9” and “CN0 10”, rather than rejecting them without any tangible reasons, he would have arrived

at a different conclusion to the effect that the appellant actually altered the date on the document.

On the whole, the failure of the learned trial judge to consider the evidence of the respondent led to a serious injustice and/or miscarriage of justice against the respondent. It was therefore proper for the court below to intervene by setting aside that judgment.” (Pp 72–73 paras E–D)

6. *Nature of pleadings*

In Obiami Brick & Stones Nig. Ltd. Vs ACB (1992) 3 SCNJ 1 @ 35 it was held:

“Pleadings constitute notice of the case a party intends to canvas at the trial. For that reason, all material facts to be canvassed at the trial are to be pleaded and proved.”

Clearly the essence of pleadings is to give the adverse party notice of the case he is to meet at the trial. The claimant must plead sufficient facts to afford the defendant an opportunity to prepare his defence and properly address the issues in contention. The defendant must also plead sufficient facts to enable the claimant know what defences he is relying on, including any special defences available to him by law. It affords each party an opportunity to meet his opponent's claim/defence, point by point and sets the parameters of the dispute. No dispute is at large. (P 74 paras B–E)

7. *Characteristics of pleadings*

The pleadings must be sufficient, comprehensive and accurate. See: James Vs Mid-Motors Nig. Co. Ltd. (1978) 11-12 SC (Rprint) 25; Ifeanyi-chukwu Co. Ltd. Vs Akhigbe (1999) 11 NWLR (Pt. 625) 1; Akaninwo Vs Nsirim (2008) 9 NWLR (Pt. 1093) 439. Indeed pleadings have been described as “the guiding light by which all concerned trace the path to justice of a case”. See: Ifeanyi-Chukwu

Co. Ltd. Vs Akhigbe (supra).

The corollary to the principle stated above is that any evidence led on facts not pleaded will go to no issue and where no evidence is led to support a pleaded fact, pleading in that respect is deemed abandoned: See: UBN Ltd. Vs Ogboh (1995) 2 NWLR (Pt. 380) 647; Fawehinmi Vs N.B.A. (No. 1) (1989) 2 NWLR (Pt. 105) 494, Ajide Vs Kelani (1985) 3 NWLR (Pt. 12) 248. (P 74 paras E–H)

Per Kekere-Eken (JSC)

“The court, on its part is bound by the pleadings of the parties before it. It has no competence to go outside the case as pleaded by each party. If it does so, it will amount to leaving its exalted position as impartial arbiter and descending into the arena of conflict by making a case for one of the parties.

It must however be noted that where evidence has been led in respect of facts not pleaded, a party is entitled to apply to the court for leave to amend his pleadings to bring them in line with the evidence led. Amendment generally is to prevent the justice of the case from being defeated or delayed by formal slips which may arise from the inadvertence of counsel. See: Ehidimhem Vs Musa (2000) 4 SC (pt. II) 186 @ 187; ACB Ltd Vs Ewarmi (1978) ALL NLR 257. An amendment of pleadings will be granted so long as it does not entail injustice to the other side.

In the instant case, by his pleading, the appellant claimed 2,100 cartons of Gulder beer and 1,400 cartons of Star beer, being the quantity of beer he alleged he was entitled to be supplied by the respondent at the old rate, which was applicable to customers who had paid for their goods on or before 27/10/1993. The respondent had issued and circulated a notice to the effect that a new price regime for its products would take effect from 28/10/1993. It was the appellant's case that it had paid for its products on 27/10/1993 and was therefore entitled to pay the old rate. The respondent however alleged that there was an alteration on the date on the appellant's

invoice changing the date from 28/10/1993 to 27/10/1993 to enable the appellant take advantage of the old price. The respondent, also pleaded that it had supplied the appellant the quantity of beer covered by the amount paid at the new rate. The appellant subsequently admitted through its witness at the trial that it had in fact been supplied with 1,272 cartons of Gulder beer and 1,050 cartons of Star beer as pleaded by the respondent and in oral testimony sought to claim the balance of 922 cartons of Gulder beer and 350 cartons of Star beer.

In the course of its judgment, the trial court observed that there was no pleading in the appellant's statement of claim to support the oral claim made during its testimony in court. It made a specific finding that the evidence led by the appellant was at variance with its pleading and that there was no application by the appellant to amend its pleadings to bring same in line with the evidence on record (see pages 25-26 of the record). Nevertheless in granting judgment in favour of the appellant, the learned trial Judge stated that he anchored same "as claimed in his evidence; not as in the pleadings" notwithstanding the fact that he also made a specific finding that what the appellant pleaded and asked for was the immediate supply of 2100 cartons of Gulder beer and 1400 cartons of Star beer not supplied and not the balance of 822 cartons of Gulder beer and 350 cartons of Star beer as claimed in his oral testimony." (Pp 4 – 75 paras H – B)

Per Kekere-Ekun (JSC)

I am in full agreement with the court below that the approach adopted by the learned trial Judge goes beyond avoiding reliance on technicality. It is a clear departure from the claim of the appellant as framed by his pleadings. This is also not a case of being entitled to less than what was claimed. The entire premise upon which the case was fought was failure to supply the quantity of products claimed and a request for an order of immediate delivery of same. From the evidence established at the trial, the appellant was clearly trying to be

clever by half to beat the respondent's price increase.

The appellant failed to avail itself of the opportunity to amend its pleadings to bring them in line with the evidence led. It was not for the court to fill in any lacuna in its case. That would amount to making a case for a party which it has not made for itself i.e descending into the arena of conflict. The trial court also failed to take into account the defence of the respondent which was in essence admitted by the appellant.

I agree with the court below that having regard to the state of the pleadings and the evidence before the Court, the finding of the learned trial Judge was perverse and cannot be allowed to stand. Indeed I am of the view that the resolution of this issue disposes of the appeal. (P 76 paras B–G)

Per C.C. Nweze (JSC)

“The learned trial Judge, at page 26 of the record, expressed his scandalous belief in the rule of pleadings. According to His Lordship:

It is my firm belief that it is undesirable to give effect to the rule of pleadings which will enable one party to score a victory not on the merits of the case.

[Italics supplied for emphasis]

Expectedly, the lower court was unimpressed with this approach. Like the lower court, I am not only unimpressed, I am, indeed, shocked by that approach of the trial court. This court has, in several decisions, eloquently explained the status of pleadings in civil matters. For example, in *Sogunro and Ors v Yeku and Ors*(2017) LPELR 41901 (SC) 5-6, this court [per Nweze, JSC] explained that:

Once pleadings are ordered, filed and exchanged, the parties, and indeed the Courts, are bound by them. The implication,

therefore, is that evidence must be led in accordance with the averments therein. That explains the impregnable prescription that evidence which is not in conformity with the pleadings go to no issue, **Okoro v. Dakoko (2006) LPELR -2461 (SC) 19-20.**

This ubiquitous principle in the vocabulary of pleadings applies with equal force whether the pleadings and evidence are those of the plaintiff or the defendants, **Akinloye v. Eyinyola (1968) NMLR 92, 95; Alli v. Alesinloye [2000] FWLR (pt.15) 2610, 2653, D-H; [2000] 6 NWLR (pt. 660) 177; Obulor v. Obiora [2001] 4 SC (pt. 1) 77, 79 – 80; [2000] 8 NWLR (Pt. 714) 25.**

As this Court had once, explained, the rationale behind this principle of law is that by our adversary system of civil procedure in the High Court, facts are first erected on the pleadings before the trial of the case. This is to foreclose the likelihood of springing surprises at the trial and to circumscribe the compass or breadth of divergences. This inviolable or sacrosanct rule is only subject to the fairly liberal rules appertaining to the amendment of pleadings.

Thus, if and when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts, **Okoro v. Dakolo (supra) 42-43, paragraphs D-A; Eze and Ors v. Atasi and Ors [2000] FWLR (pt 13) 2180, 2189; [2000] 10 NWLR (pt 676) 470; Emegokwe v. Okadigbo [1973] 4 SC 113; Obimiami Brick and Stone (nig.) v. A.C.B. Ltd. [1992] 3 NWLR (Pt. 229) 260; Akinterinwa and Anor v. Oladunjoye (2000) LPELR 358 (SC) 18; Aminu and Ors v. Hassan and Ors (2014) LPELR-22008 (SC) 24, A-C; Idahosa v. Orosaye (1959) 4 FSC 166; [1959] SCNLR 40.**

Others include, **NIPC Ltd c. Thompson Organization Ltd (1969) NMLR 99; 104, (1969) 1 All NLR 138; Ogbodo v. Adelugba (1971) 1 All NLR 68; Ipinlaiye II v. Olukotun [1996] 6 510; Ajoke v. Oba (1962) 1 SCNLR 137; George v. UBA Ltd 1972) 8 9 SC 284; Njoku v. Eme (1973) 5 SC 293; Oke-Bola v. Molake (1975) 12 SC 61.**

The lower court was, therefore, right in setting aside that erroneous view of the trial court. (Pp 77–78 paras A–D)

8. *Failure to join issue on pleaded four means admission*

The Respondent had raised in paragraph 13 of the Statement of Defence the defence of estoppels by conduct, which defence availed him under Section 150 of the Evidence Act, 1990. The Appellant, as the plaintiff, failed to join issues on this defence. By the rules of pleading, the Appellant is deemed to have admitted this defence. At the trial the Appellant's witness also did not deny that he was informed of the alteration; and that he was going to be supplied on the basis of the new prices and further that he had agreed to be so supplied. The trial court completely failed to advert to and consider the defence put forward by the Respondent. By this, the trial court had not been fair to the Respondent in its judgment. This also makes the decision perverse. (Pp 79–80 paras H–B)

9. *The application of the principle of estoppel by conduct*

The Appellant, having been informed of his fraudulent alteration of the invoice Exhibit CNO.1 (in order to beat the new price regime) and told that he would only be supplied on the new price regime which suggestion he accepted and subsequently took supplies on the basis of the new price regime, was stopped from insisting to the contrary of this his conduct. Section 150 of the Evidence Act 1990 provided that when a person has, by his act or omission, intentionally caused another person to believe a thing to be true and to act upon it, neither such person nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing. This court applying this estoppel by conduct in JOE IGA & ORS V. EZEKIELAMAKIRI & ORS (1976) 11 SC 1 at 11–13 held inter alia: if a man whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true

representation, and that the latter was intended to act upon it -, and he with such belief, does act on in that way to his damage, the first is estopped from denying the facts as represented. See also ROWRAFIC & FAR EASTERN LTD v. JOHN CHIEF AVBENEKE & ORS (1958) WRNLR 92.

The Court of Appeal was right in reversing the judgment of the trial court that was clearly perverse. There is no substance in this appeal. Joining my learned brother in the lead judgment, I also dismiss this appeal and affirm the decision of the Court of Appeal.

(P 80 paras B–H)

Nigerian cases cited in this judgment

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Adenuga V. Odumeru (2001) LPELR-130 (SC), (2001) 2 NWLR (pt 696) 184,
Adesanya V. Otuewu & Ors (1993) LPELR-146 (SC), (1993) 1NWLR (Pt. 270) 414,
Agbi V. Ogbe (2005) 25 WRN 23,
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Akinloye v. Eyinyola (1968) NMLR 92, 95,
Akinterinwa and Anor v. Oladunjoye (2000) LPELR 358 (SC) 18,
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Citec International Estate Limited & Ors V. Josiah Oluwole Francis & Ors (2014) LPELR-22314 (SC),
Clifford Osuji V. Nkemjika Ekeocha (2009) LPELR-2816 (SC), (2009) 16 NWLR (pt. 1166) 81,
Ehidimhem Vs Musa (2000) 4 SC (pt. II) 186,

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Emegokwe v. Okadigbo [1973] 4 SC 113,
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Ipinlaiye II v. Olukotun [1996] 6 510,
James Vs Mid-Motors Nig. Co. Ltd. (1978) 11-12 SC (Rprint) 25,
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Kato V. CBN (1991) 9 NWLR (pt. 214) 126,
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Ngige V. Obi (2006) 14 NWLR (pt. 999) 1,
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Obimiami Brick and Stone (nig.) v. A.C.B. Ltd. [1992] 3 NWLR (Pt. 229)
260,
Obulor v. Obiora [2001] 4 SC (pt. 1) 77, 79 80,
Ochonma V. Unosi (1965) NMLR 321, 18
Odulaju V. Haddad (1973) 11 SC 357, 18
Ogbodo v. Adelugba (1971) 1 All NLR 68, 13, 27
Ojogbue V. Nnubia (1972) 1 ALL NLR (Pt. 2) 226, 22
Oke-Bola v. Molake (1975) 12 SC 61, 13, 28
Okon V. Morecab Finance Ltd (2007) 14 NWLR (Pt. 1053) 37, 18
Okoro v. Dakoko (2006) LPELR -2461 (SC) 19-20, 12, 27
Omoboriowo V. Ajasin (1984) 1 SCNLR 152, 18
Omouka & Anor V. Omogui (1992) LPELR -2719 (SC), (1992) 3 NWLR (pt.
230) 393, 4, 19
Oniah V. Onyia (1989) 1 NWLR (pt. 99) 514, 18
Onuoha Nwokorobia V. Desmond Uchechi Nwogu & Ors (209) LPELR-2127
(SC), (2009) 10 NWLR (pt. 1150) 553, 5, 19
Orie V. Uba (1976)) 9 10 SC 123, 18
Rowrafic & Far Eastern Ltd V. John Chief Avbeneke & Ors (1958) WRNLR

- A** 92, 14, 30
S.T.B. V. Anumnu (2007) 29 WRN 75, 18
Sogunro and Ors v Yeku, 12, 27
Thompson Organization Ltd (1969) NMLR 99, 13, 27
- B** *UBN Ltd. Vs Ogboh* (1995) 2 NWLR (Pt. 380) 647, 9, 25
Yakassai V. Incar Motors Ltd. (1975) 5 Sc 107,

Nigerian statutes cited in this judgment

- C** *Evidence Act, 1990 Section 150*

APPEARANCES:

- G.C. Igbokwe, Esq., with Makua Igbokwe Esq., for the appellant.**
- D Ogaga Ovwrah Esq., with Edmund Osunde, Esq., for the respondent.**

- JOHN INYANG OKORO, (JSC) (Delivering the lead judgment):** This appeal is against the judgment of the Court of Appeal, Benin Division delivered on 8th September, 2005 wherein the lower court set aside the judgment of the learned trial judge which was in favour of the present appellant as plaintiff. Not being satisfied with the setting aside of the judgment it won at the trial court by the court below, the appellant has appealed to this court. A brief statement of the facts will suffice.

- The appellant which was a customer of the respondent obtained the leave of the High Court of Edo State, sitting in Benin to institute an action against the respondent, wherein it claimed as follows in paragraph 10 of its statement of claim:

- G** d. .A declaration that the plaintiff is entitled to the immediate supply to the plaintiff 1,400 cartons of star beer (sic) and 2,100 cartons of Gulder beer by the defendant.
- H** e. An order of Court compelling the defendant to supply to the plaintiff 1,400 cartons of star beer and 2,100 cartons of Gulder beer.
- f. Alternatively, the payment of the sum of N10M. (Ten Million Naira) being special and general damages made up as follows:

I

A Special damages:

v.	Amount depositedN523,495.50
vi.	Anticipated profit	N104,000.00
vii.	Solicitors fees	N50,000.00
B	TOTAL	N678,495.00

viii.	General Damages for Breach of Contract for supply of Beer	N9,321,504.00
C	GRAND TOTAL	N10,000,000.00

The defendant, the respondent herein, denied the above averment in paragraph 14 of its statement of defence and further contended that:

- D** d. The plaintiff has utilized the value of his cheque covering Invoice No. 014650.
- e. The plaintiff collected products to the value of his cheque covering Invoice No. 014650.
- E** f. The plaintiff is not entitled as claimed because:
 - (iv) He has utilized his deposit of N523,469.00
 - (v) He has earned the profit on the products purchased, and
 - (vi) He embarked on a speculative suit and is not entitled to any sum.

F At the trial, one witness each testified for the parties, and in his testimony the appellant's witness admitted, without an amendment to the statement of claim that after a demand letter from his solicitor, the respondent delivered to the appellant 1,272 cartons of Gulder beer leaving a balance of 822 cartons and 1,050 cartons of star beer, leaving a balance of 350 cartons. He further stated that:-

H **“Up to now, the defendants have not delivered the balance to me. I want the court to ask the defendant to deliver the balance of 822 cartons of Gulder and 350 cartons of star”.**

I The respondent's witness however testified that there was a notice of increase in prices to its customers stating that all orders make up to 27th

A October, 1993 would be on the old price and from 28th October, 1993, on the new price, and when they were trying to serve the order, they discovered that the date on the appellant's invoice had been altered from 28 to 27 “apparently to beat the price increase”. He further testified as follows:

B

“We refused to supply the plaintiff because the products were underpaid for, having concluded that the date was deliberately tampered with. The plaintiff has been given the products and he has accepted the products based on the new prices. The defendant is no longer owing the plaintiff any sum of money on that order. The defendant is not owing any carton of beer because the waybill shows clearly the quantity order CNo 8. The defendant is not liable to the plaintiff.”

C

D

E At the close of trial, counsel addressed the court, and in his judgment, delivered on the 31st of January,1995, the learned trial Judge held as follows:

F

“In sum, I rule that the plaintiff has proved a claim on this evidence tendered and do hereby give the plaintiff judgment as claimed in his evidence, not as in the pleadings”.

G Dissatisfied with the decision, the respondent herein appealed to the Court of Appeal, which set aside the said decision of the trial High Court in a judgment delivered on 8th of September, 2005. Four grounds of appeal are contained in the Notice of Appeal which can be found on pages 108-110 of the record of appeal.

H

I On 10th October, 2017 when this appeal was heard, the learned counsel for the appellant G.C Igbokwe, Esq., identified and adopted their brief of argument filed on 14th January, 2008 wherein two issues have been formulated from the four grounds of appeal for the determination of this appeal. The two issues are as follows:

A statement of defence, the learned trial judge was right to accept that the appellant herein paid for the drinks on 27/10/93. He argued that pleadings are not evidence and facts averred in pleadings can only be proved by evidence. According to him, it is upon evidence or testimony in court that

B the court will decide whether or not facts pleaded or contained in pleadings have been proved and upon which judgment can be given, relying on **Odulaju V. Haddad (1973) 11 SC 357, Okon V. Morecab Finance Ltd (2007) 14 NWLR (Pt. 1053) 37.**

C Learned counsel further submitted that the decision of the court below that the appellant admitted in evidence that it had been supplied with 1,272 cartons of Gulder beer and 1,050 cartons of star beer is perverse as the appellant never made such admission. On the effect of a perverse findings,

D he cited the cases of **S.T.B. V. Anumnu (2007) 29 WRN 75, Nnajofofor V. Ukaonu (1986) 4 NWLR (pt 36) 16.** Learned counsel urged the court to resolve this issue in favour of the appellant.

E In response, the learned counsel for the respondent referred to some paragraphs in the judgment of the learned trial judge and submitted that the court below was right to hold that the appellant had abandoned its pleadings for which judgment ought not to have been entered in its favour. He submitted further that the lower court said the obvious when it held on page

F 104 lines 15 – 20 of the record that the appellant admitted that it had been supplied 1,272 cartons of Gulder beer and 1,050 cartons of star beer as against its claim that it was entitled to 1,400 cartons of star beer and 2,100 cartons of Gulder beer. According to learned counsel, there was no basis

G for the criticism of the judgment of the lower court when even the trial court said that the evidence tendered before it was at variance with the pleadings. He opined that the appellant was claiming the immediate supply of 1,400 cartons of star beer and 2,100 cartons of Gulder beer and not the difference

H between what it collected and what it claimed it was entitled to.

Learned counsel further submitted that pleadings form the frame work on which a party to a suit found his case, citing **Ihezukwu V. University of Jos (1990) 4 NWLR (pt. 146) 598 at 607, Oniah V. Onyia (1989) 1 NWLR (pt. 99) 514 at 531. Ochonma V. Unosi (1965) NMLR 321.** Learned counsel submitted that from its pleadings the appellant

A notified the respondent that it was claiming the number of cartons of beer set out therein but when it testified, it led evidence in support of the respondent's case.

It was the further submission of counsel for the respondents that in spite of the evidence led at the trial, the appellant failed to amend its pleadings and so its evidence that it was supplied to the tune of N523,000.00 at the new price supports the respondent's pleadings, particularly paragraph 14 at page 10 lines 31-41 of the records. He argued that as the learned trial judge did not base his judgment on the pleadings, then there was no evidence before him to base his judgment. He urged the court to resolve this issue against the appellant.

In Black's Law Dictionary, 8th Edition, pleading is defined as a formal document in which a party to a legal proceeding, (especially in a civil lawsuit), sets forth or responds to allegations, claims, denials or defence. In summary, it consists of the plaintiff's complaint and the defendant's answer. The essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case is to be contested to avoid element of surprise by either party. It is also essential that parties are not allowed to adduce evidence which goes outside the facts pleaded. See **Omouka & Anor V. Omogui (1992) LPELR -2719 (SC), (1992) 3 NWLR (pt. 230) 393, Adenuga V. Odumeru (2001) LPELR-130 (SC), (2001) 2 NWLR (pt 696) 184.**

One other essence of pleading is that it must be precise and accurate on the issues to be decided by the court such that no party or court is left in doubt as to what each party requests from the court. In the circumstance, parties are usually confined to their pleadings. Put differently, parties are bound by their pleadings. The law is trite that litigation is fought on pleadings of the parties and no party will be allowed to go outside the pleadings to make a case different from that which he had pleaded. At the hearing, no litigant would be permitted to set up a case which is different from that set forth in his pleadings. See **Onuoha Nwkorobia V. Desmond Uchechi Nwogu & Ors (209) LPELR-2127 (SC), (2009) 10 NWLR (pt. 1150) 553, Clifford Osuji V. Nkemjika Ekeocha (2009) LPELR-2816 (SC), (2009) 16 NWLR (pt. 1166) 81.**

A In the instant case, there is no doubt that the appellant's evidence led at the trial court was at variance with the pleaded facts in his statement of claim. This much was stated by the court below. On page 103 of the record of appeal, the lower court said as follows:

B

“As I said, parties are bound by their pleadings, and the respondent in this case pleaded in its statement of claim that it is entitled to 1,400 cartons of star beer and 2,100 cartons of Gulder beer by the appellant, and it prayed the lower court to compel the appellant to supply said number of cartons of beer to it, even as it very well knew that the appellant had already supplied it with 1,272 cartons of Gulder beer and 1,050 cartons of star beer.”

C

D

E Even the learned trial Judge in his judgment agreed that the appellant herein abandoned his pleadings and led evidence on unpleaded facts. Because of this, the learned trial Judge said thus on page 26 of the record:

F

“It is my firm belief that it is undesirable to give effect to the rules of pleadings which will enable one party to score a victory not on the merits of the case.”

Then on page 28 of the record, which is the conclusion of the judgment, the learned trial Judge said:

G

“In sum I rule that the plaintiff has proved the claim on this evidence tendered and do hereby give the plaintiff judgment as claimed in his evidence; not as in the pleadings.” (italics mine for emphasis),”

H

I It can be clearly seen as was rightly held by the Court of Appeal that the moment the learned trial Judge expressed the undesirability of the rules of pleadings in civil cases, he had derailed. I would rather state that rules of pleadings in civil proceedings are desirable. This is so because, litigation is

- A** fought on the pleadings. They are the pillars upon which a party's case is founded. It cannot be otherwise. The law is trite that it is not open to a party to depart from his pleadings and to put up a different case not contemplated by the other party. It is equally not open to the court as was done by the
- B** learned trial judge in this case, to depart from the case pleaded by the parties and to found its judgment on matters which are neither pleaded nor constitute issues as settled in the pleadings. I agree with the court below that the trial court was wrong when it held that it gave judgment to the
- C** plaintiff **“as claimed in his evidence, not as in the pleadings”**. If this is allowed to stand, it will breed confusion and anarchy in civil proceedings. Rules of pleadings not only give the other party notion of the case he is to meet at the trial, they also define the parameters of the case. As I said
- D** earlier, parties are bound by their pleadings. It is trite that any evidence led on facts not pleaded goes to no issue while any pleadings in respect of which no evidence is led are deemed abandoned. See **Chukwuemeka Anyafulu & Ors V. Maduegbuna Meka & Ors (2014) LPELR-22336**
- E** **(SC); (2014) 7 NWLR (pt. 1406) 396; Adesanya V. Otuewu & Ors (1993) LPELR-146 (SC), (1993) 1NWLR (Pt. 270) 414, Asani Sogunro & Ors. V. Aremu Yeku & Ors (2017) LPELR-41905 (SC).**

- F** I quite agree with the court below when it held on page 103 of the record of appeal that:

- G** **“In civil action tried on pleadings the parties and the court are bound by their pleadings filed in the case; they are certainly not allowed to set up cases different from their pleadings. The pleadings in an action determine and control the way and manner the trail of an action will succeed or fail, and to that end, parties must limit themselves severally to the issues raised in their pleadings,**
- H** **as evidence of facts not pleaded or contrary to facts pleaded is inadmissible and goes to no issue.”**

- I** What baffles me in this case is that the appellant, at the time it filed the case at the trial court knew very well that the respondent had supplied it with

A 1,272 cartons of Gulder beer and 1,050 cartons of star beer and yet it demanded to be supplied with 1,400 cartons of star beer and 2,100 cartons of Gulder beer. Moreso, even when the respondent herein filed its statement of defence denying liability and stating clearly that it had

B supplied the appellant with the products as stated above, the appellant made no attempt to amend its statement of claim but merely admitted in evidence that he had been supplied as stated by the respondent and as held by the court below, it strengthened the case of the respondent. It was wrong for the

C trial court to shove aside the pleadings of the parties to give judgment on the evidence only. That evidence was based on nothing. You cannot put something on nothing and expect it to stand, it will crumble. See **Macfoy V. UAC (1962) AC, 152.**

D On the whole, I accept the position taken by the court below which was largely to restate and apply the time honoured principle of law that parties are bound by their pleadings. No party is allowed to abandon his pleadings and thereafter lead evidence at large. This is unacceptable. I

E resolve this issue against the appellant.

The second issue is whether the court below was correct to hold that the trial court did not at any time consider the case put forward by the respondent and thereby occasioned a miscarriage of justice.

F On this, the learned counsel for the appellant submitted that the learned trial judge adequately considered all the defences put forward by the respondent before coming to its decision to give judgment to the appellant. Referring to some portions of the judgment to the learned trial

G judge, learned counsel urged this court to hold that the court below was wrong to hold that the trial court failed to consider the case of the respondent.

In response, the learned counsel for the respondent submitted that

H the judgment of the learned trial judge only concerned the transaction of the 27th October, 1993 as presented by the appellant, based on the documents tendered by the appellant to wit: Exhibits “CN0 1: - the order, “CN0 2” the receipt for N523,496.50, “CN0 3” Letter from the respondent announcing price review and “CN0 4” Letter from appellant's counsel to the

I respondent. That the only other document mentioned by the learned trial

A judge were exhibits “CN0 9” and “CN0 10” UTC orders tendered through the respondent's witness but which the learned trial judge held that:

B “I have not seen the relevance in this suit of exhibits “CN0 9” and CN0 10”, I have therefore rejected same.”

C It is his further submission that the trial court failed to consider Exhibits “CNO 7” and “CNO 8” which appellant admitted signing and which shows that the appellant signed that it had collected the products it ordered at the new price and that the respondent owed it nothing. Relying on the case of **Ojogbue V. Nnubia (1972) 1 ALLNLR (Pt. 2) 226 at 232**, learned counsel submitted that it is the duty of the trial judge to consider all the issues properly raised in the pleadings and the evidence supporting them.

D In conclusion, learned counsel for the respondent submitted that the failure of the learned trial judge to consider the case put forward by the respondent made the judgment perverse and occasioned a miscarriage of justice. He urged this court to resolve this issue against the appellant.

E In several decisions of this court, it has been repeatedly held that all lower courts, as a general rule, must pronounce on all issues properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues not pronounced upon are crucial, failure to pronounce on them will certainly lead to a miscarriage of justice. There is therefore need for every court or tribunal to make findings and pronounce on material and fundamental issues canvassed before it by the parties because failure to do so, as I said earlier, may result in a miscarriage of justice. See **Brawal Shipping (Nig) Ltd V. F.I. Onwadike Co. Ltd (2000) 6 SCNJ 508 at 522, Ojogbue V. Nnubia (1972) 6 SC 227, Kato V. CBN (1991) 9 NWLR (pt. 214) 126, Yakassai V. Incar Motors Ltd. (1975) 5 Sc 107; Citec International Estate Limited & Ors V. Josiah Oluwole Francis & Ors (2014) LPELR-22314 (SC).**

I In the instance case, the main issue for determination before the trial court was whether there was alteration of date from 28/10/93 to 27/10/93 by the appellant. It behoved the learned trial judge in the circumstance to

- A** consider all the pleadings and evidence of both parties in order to assist him in reaching a fair and acceptable decision. The court below faulted the learned trial judge on this aspect and held that the learned trial judge failed to consider the evidence of the respondent before reaching a decision and
- B** thus occasioned a serious miscarried of justice.

- As was pointed out by the learned counsel for the respondent in their brief of argument, the respondent's witness tendered the order forms of UTC Stores which preceded that of the appellant on 28/10/93 as exhibits
- C** "CN0 9" and "CN0 10". It was the case of the respondent that the letter of appointment of the appellant, which was tendered as Exhibit "CN0 5" and Conditions of Sale- Exhibit "CN0 6", regulated the relationship between the respondent and the appellant. The respondent stated in both its
- D** statement of defence and evidence in court (trial court) that the date on Exhibit "CN0 1" was tampered with and that it becomes more obvious when one considers it along with Exhibits "CN- 9" and "CN0 10" which were orders from UTC Stores which placed its orders just before the
- E** aepellant's "CN0 1".

- My Lords, the UTC invoice was Invoice No. 014649 and receipt No, 539399 both dated 28/10/93. The next order Invoice No. 014650 was that of the appellant. According to the respondent, the date was altered from
- F** 28/10/93 to 27/10/93 ostensibly to accord with the respondent's decision to supply its goods to its customers based on the old price for those who had ordered before 28/10/93. It was this alleged alteration which was the bone of contention between the parties. In fact it was the alteration which gave
- G** birth to this case. It was therefore the duty of the trial court to painstakingly consider the case of both parties in order to reach a just and fair decision.

- Unfortunately, the learned trial judge, as was rightly held by the court below missed the point and failed to consider the defence put up by
- H** the respondent which was vital to its case. The trial court simply said of the respondent's exhibits "CN0 9" and "CN0 10" on page 28 of the record that:

- I** **"I have not seen the relevance in this suit of exhibits "CN0 9" and "CN0 10", I have therefore, rejected same."**

- A** With due respect to the learned trial judge, exhibits “CN0 10” were more than relevant to the case of the respondent. In deed the two exhibits ought to have played a pivotal role in the determination of the case, for whereas exhibits “CN0 9” and “CN0 10” of the respondent were first in time to exhibit “CN0 1” of the appellant, one wonders how the order paper of UTC Stores bore the date of 28/10/93 but the subsequent order by the appellant carried a date of 27/10/93. For me, I agree with the court below that, had the learned trial judge considered exhibits “CN0 9” and “CN0 10”, rather than rejecting them without any tangible reasons, he would have arrived at a different conclusion to the effect that the appellant actually altered the date on the document.

- D** On the whole, the failure of the learned trial judge to consider the evidence of the respondent led to a serious injustice and/or miscarriage of justice against the respondent. It was therefore proper for the court below to intervene by setting aside that judgment. This issue, as it stands, does not avail the appellant. I resolve same against the appellant.

- E** Having resolved the two issues against the appellant, I hold that this appeal is devoid of merit and is hereby dismissed. The judgment of the Court of Appeal is hereby affirmed. I shall however make no order as to costs.

- F** **John Inyang Okoro**
Justice, Supreme Court

- G** **MUSADATTIJO MUHAMMAD, (JSC):** I read in draft the lead judgment of my learned brother **JOHN INYANG OKORO JSC** just delivered. I agree with the reasoning and conclusion therein, which I hereby adopt as mine, that the unmeritorious appeal be and stands dismissed. I abide by the consequential orders made in the lead judgment including the order on costs.

- H** **Musa Dattijo Muhammad**
Justice, Supreme Court

- I** **KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC):** I have had a preview of the judgment of my learned brother, Okoro,

- A** JSC. I agree with his reasoning and conclusion that the appeal is devoid of merit and deserves to be dismissed. The facts of the case have been adequately summarized in the lead judgment. In support, I wish to make some comments on Issue 1 and the importance of pleadings in civil proceedings. In **Obiami Brick & Stones Nig. Ltd. Vs ACB (1992) 3 SCNJ 1 @ 35** it was held:

- C** **“Pleadings constitute notice of the case a party intends to canvas at the trial. For that reason, all material facts to be canvassed at the trial are to be pleaded and proved.”**

- D** Clearly the essence of pleadings is to give the adverse party notice of the case he is to meet at the trial. The claimant must plead sufficient facts to afford the defendant an opportunity to prepare his defence and properly address the issues in contention. The defendant must also plead sufficient facts to enable the claimant know what defences he is relying on, including
- E** any special defences available to him by law. It affords each party an opportunity to meet his opponent's claim/defence, point by point and sets the parameters of the dispute. No dispute is at large. The pleadings must be sufficient, comprehensive and accurate. See: **James Vs Mid-Motors Nig. Co. Ltd. (1978) 11-12 SC (Rprint) 25; Ifeanyi-chukwu Co. Ltd. Vs Akhigbe (1999) 11 NWLR (Pt. 625) 1; Akaninwo Vs Nsirim (2008) 9 NWLR (Pt. 1093) 439.** Indeed pleadings have been described as “the guiding light by which all concerned trace the path to justice of a case”. See:
- G** **Ifeanyi-Chukwu Co. Ltd. Vs Akhigbe (supra).**

- The corollary to the principle stated above is that any evidence led on facts not pleaded will go to no issue and where no evidence is led to support a pleaded fact, pleading in that respect is deemed abandoned: See: **UBN Ltd. Vs Ogbob (1995) 2 NWLR (Pt. 380) 647; Fawehinmi Vs N.B.A. (No. 1) (1989) 2 NWLR (Pt. 105) 494, Ajide Vs Kelani (1985) 3 NWLR (Pt. 12) 248.**

- I** The court, on its part is bound by the pleadings of the parties before it. It has no competence to go outside the case as pleaded by each party. If it does so, it will amount to leaving its exalted position as impartial arbiter

A and descending into the arena of conflict by making a case for one of the parties.

It must however be noted that where evidence has been led in respect of facts not pleaded, a party is entitled to apply to the court for leave to
B amend his pleadings to bring them in line with the evidence led. Amendment generally is to prevent the justice of the case from being defeated or delayed by formal slips which may arise from the inadvertence of counsel. See: **Ehidimhem Vs Musa (2000) 4 SC (pt. II) 186 @ 187;**
C **ACB Ltd Vs Ewarmi (1978) ALL NLR 257.** An amendment of pleadings will be granted so long as it does not entail injustice to the other side.

In the instant case, by his pleading, the appellant claimed 2,100 cartons of Gulder beer and 1,400 cartons of Star beer, being the quantity of
D beer he alleged he was entitled to be supplied by the respondent at the old rate, which was applicable to customers who had paid for their goods on or before 27/10/1993. The respondent had issued and circulated a notice to the effect that a new price regime for its products would take effect from
E 28/10/1993. It was the appellant's case that it had paid for its products on 27/10/1993 and was therefore entitled to pay the old rate. The respondent however alleged that there was an alteration on the date on the appellant's invoice changing the date from 28/10/1993 to 27/10/1993 to enable the
F appellant take advantage of the old price. The respondent, also pleaded that it had supplied the appellant the quantity of beer covered by the amount paid at the new rate. The appellant subsequently admitted through its witness at the trial that it had in fact been supplied with 1,272 cartons of
G Gulder beer and 1,050 cartons of Star beer as pleaded by the respondent and in oral testimony sought to claim the balance of 922 cartons of Gulder beer and 350 cartons of Star beer.

In the course of its judgment, the trial court observed that there was
H no pleading in the appellant's statement of claim to support the oral claim made during its testimony in court. It made a specific finding that the evidence led by the appellant was at variance with its pleading and that there was no application by the appellant to amend its pleadings to bring
I same in line with the evidence on record (see pages 25-26 of the record). Nevertheless in granting judgment in favour of the appellant, the learned

- A** trial Judge stated that he anchored same “as claimed in his evidence; not as in the pleadings” notwithstanding the fact that he also made a specific finding that what the appellant pleaded and asked for was the immediate supply of 2100 cartons of Gulder beer and 1400 cartons of Star beer not
- B** supplied and not the balance of 822 cartons of Gulder beer and 350 cartons of Star beer as claimed in his oral testimony.

- I am in full agreement with the court below that the approach adopted by the learned trial Judge goes beyond avoiding reliance on
- C** technicality. It is a clear departure from the claim of the appellant as framed by his pleadings. This is also not a case of being entitled to less than what was claimed. The entire premise upon which the case was fought was
- D** failure to supply the quantity of products claimed and a request for an order of immediate delivery of same. From the evidence established at the trial, the appellant was clearly trying to be clever by half to beat the respondent's price increase.

- The appellant failed to avail itself of the opportunity to amend its
- E** pleadings to bring them in line with the evidence led. It was not for the court to fill in any lacuna in its case. That would amount to making a case for a party which it has not made for itself i.e descending into the arena of conflict. The trial court also failed to take into account the defence of the
- F** respondent which was in essence admitted by the appellant.

- I agree with the court below that having regard to the state of the pleadings and the evidence before the Court, the finding of the learned trial Judge was perverse and cannot be allowed to stand. Indeed I am of the view
- G** that the resolution of this issue disposes of the appeal.

- For these and the more detailed reasons advanced in the lead judgment, I find the appeal to be unmeritorious. It is hereby dismissed. The judgment of the court below is affirmed. I abide by the order on costs.

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

- I** **CHIMA CENTUS NWEZE, (JSC):** I had the advantage of reading, before now, the draft of the leading judgment which my Lord, Okoro, JSC, just delivered now. I agree with the reasoning and conclusion.

A The learned trial Judge, at page 26 of the record, expressed his scandalous belief in the rule of pleadings. According to His Lordship:

It is my firm belief that it is undesirable to give effect to the rule of pleadings which will enable one party to score a victory not on the merits of the case>

B Expectedly, the lower court was unimpressed with this approach. Like the lower court, I am not only unimpressed, I am, indeed, shocked by that approach of the trial court. This court has, in several decisions, eloquently explained the status of pleadings in civil matters. For example, in *Sogunro and Ors v Yeku and Ors*(2017) LPELR 41901 (SC) 5-6, this court [per Nweze, JSC] explained that:

C Once pleadings are ordered, filed and exchanged, the parties, and indeed the Courts, are bound by them. The implication, therefore, is that evidence must be led in accordance with the averments therein. That explains the impregnable prescription that evidence which is not in conformity with the pleadings go to no issue, *Okoro v. Dakoko* (2006) LPELR -2461 (SC) 19-20.

D This ubiquitous principle in the vocabulary of pleadings applies with equal force whether the pleadings and evidence are those of the plaintiff or the defendants, *Akinloye v. Eyinyola* (1968) NMLR 92, 95; *Alli v. Alesinloye* [2000] FWLR (pt.15) 2610, 2653, D-H; [2000] 6 NWLR (pt. 660) 177; *Obulor v. Obiora* [2001] 4 SC (pt. 1) 77, 79 80; [2000] 8 NWLR (Pt. 714) 25.

E As this Court had once, explained, the rationale behind this principle of law is that by our adversary system of civil procedure in the High Court, facts are first erected on the pleadings before the trial of the case. This is to foreclose the likelihood of springing surprises at the trial and to circumscribe the compass or breadth of divergences. This inviolable or sacrosanct rule is only subject to the fairly liberal rules appertaining to the amendment of pleadings.

F Thus, if and when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts, *Okoro v. Dakolo* (supra) 42-43, paragraphs

- A** D-A; Eze and Ors v. Atasié and Ors [2000] FWLR (pt 13) 2180, 2189; [2000] 10 NWLR (pt 676) 470; Emegokwe v. Okadigbo [1973] 4 SC 113; Obimiami Brick and Stone (nig.) v. A.C.B. Ltd. [1992] 3 NWLR (Pt. 229) 260; Akinterinwa and Anor v. Oladunjoye (2000) LPELR 358 (SC) 18;
- B** Aminu and Ors v. Hassan and Ors (2014) LPELR-22008 (SC) 24, A-C; Idahosa v. orosaye (1959) 4 FSC 166; [1959] SCNLR 40.

- Others include, NIPC Ltd c. Thompson Organization Ltd (1969) NMLR 99; 104, (1969) 1 All NLR 138; Ogbodo v. Adelugba (1971) 1 All NLR 68; Ipinlaiye II v. Olukotun [1996] 6 510; Ajoke v. Oba (1962) 1 SCNLR 137; George v. UBA Ltd 1972) 8 9 SC 284; Njoku v. Eme (1973) 5 SC 293; Oke-Bola v. Molake (1975) 12 SC 61.

- D** The lower court was, therefore, right in setting aside that erroneous view of the trial court. It is for these, and the more elaborate, reasons in the leading judgment that I, too, shall dismiss this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

- E** **EJEMBI EKO, (JSC):** The facts of this case have been succinctly set out in the judgment just delivered by my learned brother, HON. JOHN I. OKORO, JSC. I hereby adopt the facts as summarised in the lead judgment.

- F** The Appellant, as the plaintiff at the trial court, had ignobly sought against the Respondent a declaration that he was entitled to be supplied 1,400 cartons of Star lager beer and 2,100 cartons of Gulder lager beer.
- G** That was his main relief against the Respondent. He had also an alternative claim for N10,000,000.00 damages made up of a total of N678,495.00 as special damages and the sum of N9,321,504.00 as general damages.

- H** The Appellant's cause of action, as falsely pleaded in the Statement of Claim, was that on 27th October, 1993 he had paid to the Respondent the sum of N523,495.00 for supply of the 1,400 Cartons of Star beer and 2,100 cartons of Gulder beer. The basis of this claim was Exhibits CNO. 1 and CNO. 2, respectively the invoice No. 014650 and receipt No. 539400, which he had altered to carry the date of 27th October, 1993 instead of the date of 28th October, 1993 they were actually issued. The said documents,
- I**

- A** as the evidence would later establish, were altered ostensibly to beat the Respondent's new price regime in Exhibit CNO. 3, that took effect from 29th October, 1993. The effect of Exhibit CNO. 3 was that the sum of N523,495.00 paid by the Appellant entitled him only to 1,050 cartons of
- B** Star beer and 1,272 cartons of Gulder beer as per the new price regime commencing on 28th October, 1993.

- While *ex facie* his Statement of Claim the Appellant averred that he had not been supplied all the cartons of the beer he had paid for and ordered
- C** from the Respondent, the Appellant's witness admitted in the open court that after the Appellant's solicitor's demand letter, Exhibit CNO. 4 of 20th December, 1993, and long before the filing of the suit at the trial court the Respondent had supplied the Appellant 1,050 cartons of Star beer and
- D** 1,272 cartons of Gulder beer. The Appellant was now constrained to asking the trial court to direct the Respondent "to deliver the balance of 822 cartons of Gulder and 350 cartons of the star" to him.

- The entire conduct of the Appellant smacks of attempt to obtain by
- E** false pretences. That is what makes the filing of the suit not only frivolous but also very dubious.

- The Respondent was able to establish that the Appellant's Exhibit CNO. 1, a serialized invoice, was unilaterally altered to bear the date of 27th
- F** October, 1993. The invoices immediately after Exhibit CNO. 1, that is Exhibit CNO. 0 and CNO. 10, bear the date: 28th October 1993. The evidence of the defence witness, to the effect that when the Appellant's alter ego, the PW.1, came in person to the office of the Respondent he was
- G** informed of the alteration and was told that his supply would be on the basis of the new price as per Exhibit CNO. 6, was not challenged nor discredited. The Appellant also admitted signing Exhibit CNO. 7 & CNO. 8 as evidence that he took delivery of the goods. And this was clearly in furtherance of his
- H** agreement with the Respondent.

- The Respondent had raised in paragraph 13 of the Statement of Defence the defence of estoppels by conduct, which defence availed him under Section 150 of the Evidence Act, 1990. The Appellant, as the
- I** plaintiff, failed to join issues on this defence. By the rules of pleading, the

- A** Appellant is deemed to have admitted this defence. At the trial the Appellant's witness also did not deny that he was informed of the alteration; and that he was going to be supplied on the basis of the new prices and further that he had agreed to be so supplied. The trial court completely
- B** failed to advert to and consider the defence put forward by the Respondent. By this, the trial court had not been fair to the Respondent in its judgment. This also makes the decision perverse.

- C** The Appellant, having been informed of his fraudulent alteration of the invoice Exhibit CNO.1 (in order to beat the new price regime) and told that he would only be supplied on the new price regime which suggestion he accepted and subsequently took supplies on the basis of the new price regime, was stopped from insisting to the contrary of this his conduct.
- D** Section 150 of the Evidence Act 1990 provided that when a person has, by his act or omission, intentionally caused another person to believe a thing to be true and to act upon it, neither such person nor his representative in interest shall be allowed, in any proceedings between himself and such
- E** person or such person's representative in interest, to deny the truth of that thing. This court applying this estoppel by conduct in *JOE IGA & ORS V. EZEKIEL AMAKIRI & ORS* (1976) 11 SC 1 at 11-13 held inter alia: if a man whatever his real meaning may be, so conducts himself that a
- F** reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the latter was intended to act upon it -, and he with such belief, does act on in that way to his damage, the first is estopped from denying the facts as represented. See also
- G** *ROWRAFIC & FAR EASTERN LTD v. JOHN CHIEF AVBENEKE & ORS* (1958) WRNLR 92.

The Court of Appeal was right in reversing the judgment of the trial court that was clearly perverse. There is no substance in this appeal.

- H** Joining my learned brother in the lead judgment, I also dismiss this appeal and affirm the decision of the Court of Appeal.

Ejembi Eko.
Justice, Supreme Court

I

1. **CHIEF GABRIEL IGBINEDION
(The Proprietor/Investor of Igbinedion
Hospital and Medical Research**
 2. **The Board of Trustees of Igbinedion
Hospital and Medical Research Centre**
 3. **Igbinedion Hospital and
Medical Research Centre**
- AND**
UMOH ASUQUO ANTIA

SC. 96/2006

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

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

**MARY UKAEGO PETER-ODILI
OLUKAYODE ARIWOOLA
JOHN INYANG OKORO
AMINA ADAMU AUGIE
EJEMBI EKO
PAUL ADAMU GALINJE
SIDIDAUDABAGE**

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

ACTION: Commencement of appeal – Notice of appeal – Foundational process – Defective thereof – Whether can be likened in a virus which vitiates the entire process – The principle in FRN Vs Dairo (2015 6 NWLR (Pt. 1454) 141

ACTION: Commencement of appeal – Originating process – Notice of appeal – Defective thereon – Where a notice of appeal to the court of Appeal is defective – Whether the court does not have jurisdiction thereto –

Principles in Shelim vs Gobang.

ACTION: Commencement thereof – Where a process is signed in the name of a legal firm without indicating the name of a particular legal practitioner who signed the process – Whether not competent – Effect thereof.

APPEAL: Commencement thereof – Notice of appeal – Originating process – Where signed by Chief P.C. Ajayi – Implication – Whether process incompetent and liable to be struck out.

COURT: Competency – What determines – The principles In Madukolu vs Nkemdilim (1962) 2 SCNLR 341.

COURT: Court of Appeal – Jurisdiction thereof – Where an appellant failed to comply with statutory provisions and rules conferring jurisdiction on the court – Whether Court of Appeal will lack jurisdiction.

COURT: Jurisdiction – Absence thereof – Where a law firm signs on originating process – Whether robs court of jurisdiction – Principle in SLB Consortium vs NNPC.

LEGAL PRACTITIONERS: Where an originating process was signed by a person known under the Legal Practitioners Act – Implication – Whether process incompetent.

PRACTICE AND PROCEDURE: Jurisdiction – Issues thereof – Whether have to be resolved first and quickly – Principle in Oni vs Cadbury.

STATUTE: Legal Practitioners Act – SS. 2 (1) and 24 thereof – Purport and imperatives.

Issues for Determination

- (a) Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a fundamentally defective notice of appeal issued and signed by Chief P.C. Ajayi-Obe (SAN) & Co., which is not a legal practitioner recognized by law to practice law in Nigeria?**
- (b) Whether the learned Justices of the Court of Appeal were right when they relied solely on Exhibit F in coming to the conclusion that a recommendation of \$5,000.00 was made by the appellants and accepted by the respondent as the latter's monthly salary as employee of the 3rd appellant?**
- (c) Whether the lower court was right in holding that the evidence of the respondent with respect to his conversation with the 1st appellant on the amount of monthly salary payable was uncontroverted and liable to be accepted and acted upon by the court.**
- (d) Whether the lower Court was right in reaching a conclusion that the doctrine of waiver could not avail the appellants on the facts submitted before it?**

Facts of the Matter

The Respondent is the son of Professor Asuquo Antia (deceased), who was the Plaintiff at the Edo State High Court, and appellant at the Court of Appeal, Benin. He was substituted for his deceased father by the Court of Appeal. The late Professor Asuquo Antia, who was Chief Paediatrician Consultant with the third appellant, had instituted an action at the High Court, Benin (trial Court).

The late Professor's case at the trial court is that he took on the employment with third appellant on a salary of five thousand United States

Dollars monthly, which was to be paid to him partly in Dollars and partly in Naira. He claimed that although he worked as agreed; he was not paid as agreed in that the Dollars component of his salary was not paid at all and the Naira component was not paid for October, **1994**. He, therefore, claimed the following:

1. The sum of N66,000.00 being the unpaid salary due to the Plaintiff from the Defendants for the month of October, **1994** which sum represents that part of the Plaintiff's remuneration payable in Naira under the contract of employment with the defendants.
2. The sum of N2,210,000.00 equivalent of U.S \$26,000.00 being the unpaid salary due to the Plaintiff from the defendants for the month of October **1993** to October, **1994**. 13 months at the rate of U.S \$2,000.00 per month which sum represents that part of the Plaintiff's remuneration payable to his London Account in U.S Dollars under his contract with the defendants.
3. 10% interest from Judgment till the total sum is fully paid.

The appellants, who were the defendants, claimed inter alia that there was no portion of the salary payable in United States Dollars; and no salary was payable for the month of October, **1994**, as his employment had been terminated at the end of September, 1994.

The learned trial Judge, Idahosa, J., believed the appellants. He concluded as follows in his Judgment delivered on **6/6/1997**-

Held: *(Unanimously dismissing the appeal)*

1. *Jurisdictional issue should be addressed quickly*

The respondent made no reference to the complaint in Ground 1 of the said grounds of appeal and formulated no issue there-from.

However, the appellant's Issue 1 raises a jurisdictional issue, which must be resolved quickly because "there is nothing as useless as doing efficiently that which should not have been done at all"- Oni V. Cadbury (2016) LPELR-26061 (SC) per Rhodes Vivour, JSC.

In other words, the issue touching on jurisdiction has to be resolved first because jurisdiction is the life wire or lifeblood of any

litigation before a Court of law, and if the Court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity see Ocholi Enojo James, SAN Vs. INEC (2015) LPELR-24494 (SC). (P 104 Paras E–H)

2. *It is fatal to sign a process in the name of a firm without indicating the name of the particular legal practitioner who issued the process*

The respondent did not say anything about this issue at all. But it is clear from the authorities cited by the appellant that the issue before this full court is whether this court can depart from or find any extenuating circumstances in this particular case to make this court deviate from its earlier pronouncements that any court process that is signed in the name of a law firm without indicating the name of the particular legal practitioner, who had issued and signed the process, is incompetent and is liable to be struck out.

To start with, the appellants are right that a notice of appeal is the originating process that sets the ball rolling for the valid and lawful commencement of an appeal Shelim V. Gobang (supra), therefore, any defect in the notice of appeal goes to the root of the appeal and robs this court of jurisdiction to hear the appeal see Iwunze V. FRN (supra), where Rhodes-Vivour, JSC, observed - The Constitution confers on the Court of Appeal Jurisdiction to hear and determine appeals. The Jurisdiction is Statutory and also controlled by the rules of court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fail to comply with Statutory Provisions or the relevant rules of court. The originating process in all appeals is the notice of appeal. Once it is found to be defective the Court of Appeal ceases to have jurisdiction to entertain an appeal in whatever form. (Pp 106–107 Paras D–A)

3. *A defective notice can be likened in a virus which vitiates the process*
See also FRN Vs. Dairo (supra), (2015) 6 NWLR (Pt. 1454) 141 166/177, wherein Nweze, JSC, likened a defective notice to a virus,

thus:

As it is well-known, it is a notice of appeal that initiates an appeal from a High Court to the lower court. Put differently, the notice (actually a competent notice of appeal) is the foundational process that triggers off an appeal from a High Court to the lower Court. As such, any virus in this process would, invariably, corrode or taint the entire appeal thereby rendering it incompetent. The effect of such a viral corrosion is, usually, far-reaching as it nibbles at the jurisdiction of the appeal Court which must, as of necessity, strike out such a process. In effect, the absence of a competent notice of appeal, simply, translates to the non-existence of an appeal. This must be so for it is condition precedent to any valid exercise of appellate jurisdiction. (P 107 Paras B–E)

Per Augie (JSC)

“In other words, the importance of a notice of appeal in the process of an appeal is tremendous as it is the substratum of the appeal. Thus, if it is defective, it must be struck out on the ground that it is incompetent see First Bank Vs. T.S.A. Industries Ltd. (supra).

In this case, the appellants' contention is that the amended notice of appeal on which the court below based its Judgment is defective since it was signed by a law firm; not a legal practitioner.

Now, Section 2(1) of the Legal Practitioners Act, stipulated that Subject to the provisions of this Act, a person shall be entitled to practice as barrister and solicitor if, and only if, his name is on the roll.

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

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

As the appellants rightly submitted, this court has considered these provisions of the Legal Practitioners Act in numerous cases. For instance, in the well-known case of Okafor Vs. Nweke (supra), where a motion on notice was signed by “J.H.C. Okolo, SAN & Co”, this court per Onnoghen, JSC (as he then was), categorically said:

The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise, he cannot engage in any form of legal practice in Nigeria. The law does not say that what should be in the roll should be the signature of the legal practitioner but his name. That apart, it is very clear that by looking at the documents, the signature which learned counsel claimed to be his really belongs to J.H.C. OKOLO, SAN & CO or was appended on its behalf since it was signed on top of that name. Since both counsel agree that J.H.C. OKOLO, SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. OKOLO, SAN & CO cannot legally sign and/or file any process in the Courts and as such the motion on notice. Notice of Cross-Appeal and brief of argument all signed and issued by the firm known and called J.H.C. OKOLO, SAN & CO are incompetent in law particularly as the said firm of J.H.C. OKOLO, SAN & CO is not a registered legal

practitioner. (*Pp 107–108 Paras F–B*)

4. *A law firm cannot legally file or sign any process in the courts*
This court maintained the same position and reiterated its point that a law firm “cannot legally sign and/or file any process in the courts”; and any such process signed by a law firm is “incompetent in law” in FBN Vs. Maiwade (supra) and SLB Consortium Vs. NNPC (supra).
In SLB Consortum V. NNPC (supra), the originating summons was signed by a law firm. This court per Fabiyi, JSC, held that:

It is not in doubt that the signature of “Adewale Adesokan & Co” on the originating summons robs the process of competence ab initio as the said firm is not a registered legal practitioner enrolled to practice law as Barrister and Solicitor in this court. In the prevailing circumstance, all the proceedings, which rested on the inchoate originating summons, are deemed not to have taken place in law. One cannot put something on nothing and expect it to stand. This is as stated in UAC Vs. Macfoy (supra). It has been established that the originating summons signed by a Law Firm of “Adewale Adesokan & Co was not initiated by due process. As same is incompetent, this Appeal rests on nothing. (P 109 Paras A–E)

5. *The principles in Okafor vs Nweke has come to stay since it is aimed at protecting legal practice.*
The same Fabiyi, JSC, stated as follows in FBN Vs. Maiwada (supra):

We are interpreting a law, which seeks to make legal practitioners responsible and accountable in modern

times. I see nothing technical in insisting that a legal practitioner should abide by dictates of the law in signing court processes. It is my view that if the decision in Okafor Vs. Nweke is revisited as urged, more confusion will be created. The decision in Okafor Vs. Nweke is not in any respect wrong in law. The convenience of counsel should have no pre-eminence over the dictates of the law. The law as enacted should be followed. I do not for one moment see any valid reason why the decision in Okafor Vs. Nweke should be revisited. It has come to stay and legal practitioners should reframe their minds to live by it for due accountability and responsibility on their part and for due protection of our profession. (Pp 109–110 Paras F–B)

6. *Where statement of claim was signed by a law firm it was struck out*
The decision in Okafor Vs. Nweke (supra) has come to stay; that is the message entrenched in the decisions of this court thereafter see Hamzat & Anor V. Sanni & Ors (2015) 5 NWLR (Pt. 1453) 486, wherein this court per Galadima, JSC, very aptly stated as follows:

**This Court was faced with a similar situation in Okafor Vs. Nweke. In SLB Consortium Vs. NNPC this Court citing the case of Okafor Vs. Nweke struck out the plaintiff's originating summons and statement of claim, both having been signed by a person not known to law. In view of our clear position in Okafor Vs. Nweke and other similar cases, I hold that the appellant's statement of claim on which evidence was led, were a nullity, same having been signed in the name of a law firm.
(P 110 Paras B–F)**

Per Augie (JSC)

In this case, it is clear that the amended notice of appeal filed at the court below was signed by “Chief P. C. Ajayi-Obe (SAN) & Co”, who is not a legal practitioner that is known to law; it was not filed according to the dictates of law, and it is, therefore incompetent, and must be struck out. Thus, the appeal itself rested on nothing.

This is a full court with seven Justice of the Supreme Court. The respondent has not placed anything before the court that will sway this court to depart from its previous decisions in the cases of Okafor Vs. Nweke (supra), SLB Consortium Ltd. Vs. NNPC (supra), FBN Vs. Maiwada (supra) and that of Hamzat Vs. Sanni (supra).

In the circumstances, the appeal filed at the Court of Appeal by the late Professor is incompetent and it is, therefore, struck out. (Pp 110–111 Paras F–A)

7. *The court of appeal will lack jurisdiction where an appellant fails comply with statutory provisions and rules of the court*

A notice of appeal is the originating process in an appeal and so when it turns out defective, the appeal would be considered incompetent. This court per Rhodes-Vivour JSC in Nonye Iwunze Vs. FRN (2015) 6 NWLR (Pt. 1404) 580 at 596 stated thus:

“The constitution confers on the Court of Appeal jurisdiction to hear and determine appeals. The jurisdiction is statutory and also controlled by the rules of the court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fails to comply with statutory provisions or the relevant rules of court. The originating process in all appeals is the notice of appeal. Once it is found to be defective the Court of Appeal ceases to have jurisdiction to entertain an appeal in whatever form”. (P 116 Paras A–D)

Per Peter Odili (JSC)

“It is a safe conclusion therefore that a notice of appeal is the spinal cord of an appeal, the foundation upon which an appeal is based. Therefore once it is found defective, the Court of Appeal ceases to have jurisdiction to entertain an appeal as an ineffectual notice of appeal is incapable of activating an appellant's right of appeal. See *Uwazurike & Ors Vs. A.G. Federation* (2007) LPELR 3448; *Kweki Vs. Ebele* (2005) 11 NWLR (Pt. 936) 397; *Akpan Vs. Bob* (2010) 17 NWLR (Pt. 1224) 421; *Agu Vs. Odofin* (1992) 3 SCNJ 161; *Olowokere Vs. African Newspapers* (1993) 5 NWLR (Pt. 295) 583.

The clear picture of the effect of a defective notice of appeal is well captured in its raw form by my learned brother Nweze JSC in the case of *FRN Vs. Dairo & Ors* (2015) LPELR-24303 thus:

“As such, any virus in this process would, invariably, corrode or taint the entire appeal thereby rendering it incompetent. *First Bank of Nigeria Plc Vs. T.S.A. Ind Ltd* (2010) LPEL-1283 (SC) 49, paragraphs A-D; *Okeke Amadi Vs. Okeke Okoli* (1977) 7 (SC) 57; 58; *Adelekan Vs. ECU-Line NV* (2006) 12 NWLR (Pt. 993) 33; *Okolo Vs. UBN Ltd.* (2004) 3 NWLR (Pt. 859) 87; *Ikweki Vs. Ebele* (2005) 11 NWLR (Pt. 936) 397...

The effect of such a viral corrosion is, usually, far-reaching as it nibbles at the jurisdiction of the appeal court which must, as of necessity, strike out such a process, *A.G Fed Vs. Guardian Newspapers Ltd* (1999) (Pt. 618) 187; *Odunze Vs. Nwosu* (2007) 13 NWLR (Pt. 1050) 1; *Agu Vs. Odofin* (1992) 3 SCNJ 161, 172-173; *Ibeto Vs. Aminu* (2007) 5 NWLR (Pt. 1028) 446; *Danmusa Vs. Inuwa* (2007) 17 NWLR (Pt. 1063) 391; *Clev Josh Ltd Vs. Tokimi* (2008) 13 NWLR (Pt. 11-4) 422.

**In effect, the absence of a competent Notice of Appeal, simply, translates to the non-existence of an appeal, Anadi Vs. Okoti (1972) 7 SC 57; CBN Vs. Okojie (2004) 10 NWLR (Pt. 882) 488; Olanrwaju Vs. BON Ltd (1994) 8 NWLR (Pt. 364) 622; Olowokere Vs. African Newspapers Ltd (1993) 5 NWLR (Pt. 295) 583; Erisi Vs. Idika (1987) 4 NWLR (Pt. 66) 503; Josiah Cornelius Ltd Vs. Ezenwa (1996) 37 LRCN 618; Tukur Vs. Government of Gongola State (1988) 1 NWLR (Pt.68) 391; First Bank of Nigeria Plc Vs. Maiwada (2012) LPELR-9713 (SC) 187. This must be so for it is a condition precedent to any valid exercise of appellate jurisdiction, Okeke Amadi Vs. Okeke Okoli (supra); Okotie Vs. Olughor (supra)”.
(Pp 116–117 Paras E–G)**

8. *Amended notice of appeal was signed by a law firm*
To bring the principles of the law to the facts of the case, it is not in dispute that the notice of appeal filed by the respondent an appellant in the court below was signed in this way:

“FOR CHIEF P.C. AJAYI-OBE (SAN) & CO, THE APPELLANT'S SOLICITORS, ANCE BUILDING (2ND FLOOR) MAGAZINE ROAD, JERICHO, IBADAN”.

The same respondent sought leave of the lower court to amend the aforesaid notice of appeal and upon the grant of the application, filed an amended notice of appeal dated 7th September, 2000 and once again the same mode of signing which read as follows:

**“Chief P.C. Ajayi-Obe (SAN) & CO
 The appellant's Solicitors,
 Ance building (2nd Floor)
 Magazine Road, Jericho, Ibadan”. (Pp 117–118 Paras H–C)**

9. *The implication of SS 2 (1) and 24 of the Legal Practitioners Act*
The situation has brought into operation Section 2 (1) and 24 of the legal practitioners' Act. Section 2 (1) of the said Act provides that a person is authorized to practice as a Barrister and solicitor in Nigeria if and only if his name is contained on the roll of legal practitioners. Then Section 24 of the same Act defines a legal practitioner to mean a person entitled to practice as a Barrister or solicitor either generally or for the purpose of any particular office proceedings.
- A community reading of Sections 2 (1) and 24 of the Legal Practitioner Act leads to the conclusion that only a person whose name appears on the Roll of Legal Practitioners that can practice Law in this country. The implication is that it is a natural human person and not a firm that the person whose name appears in the Roll of Legal Practitioners that can sign Legal documents. That interpretation is what no less than Supreme Court had placed its stamp of definition or interpretation. That is the current State of the law and nothing has happened for a reversal of the position or for this court departing from its earlier decisions on the point. See N. N. N Plc Vs. Denclag Ltd (2005) 4 NWLR (Pt. 916) 549 at 583; Okafor Vs. Nweke (2007) AU FWLR (Pt. 368) 1016 at 1018; FBN Vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444. (P 118 Paras C–H)**
10. *What determines the competence of a court*
It cannot never be overstated, the matter concerning the three conditions that must exist before a court can competently assume jurisdiction and these are:
- a) **The court must be properly constituted as regards number and qualification of members of the bench.**
 - b) **The subject matter of the case must be within the jurisdiction of the court.**
 - c) **The case must come before the court initiated by due process of law and upon fulfillment of all conditions precedent to the exercise of the jurisdiction. See Madukolu Vs. Nkemdilim**

(1962) 2 SCNLR 341; Skenconsult (Nig) Ltd Vs. Ukey (1981) 1 SC 6.

In the case at hand while the two conditions for jurisdiction of the court exist, the third condition is absent, the initiating process having been validly or competently commenced, thereby robbing the court of its vires to entertain the appeal.

While we have been busy scouring whether a legroom could be found to validate the appeal process, it has been thrown up that even the writ of summons is visited by the defeating vice. It was also signed by the legal firm of Ajayi-Obe & Co in this way:

**“CHIEF P.C. AJAYI-OBE (SAN) & CO.
ANCE BUILDING (2nd FLOOR) MAGAZINE ROAD,
JERICHO, IBADAN”.**

Indeed the situation is even more grave than earlier thought. This is because “AJAYI-OBE SAN & CO” is not a legal practitioner as known to law and so the writ of summons, the initiating process was not commenced by due process of ... (Pp 118–119 Paras H–H)

Per Okoro (JSC)

“The sole question which this court is to determine in this appeal is whether “Chief P.C. Ajayi-Obe (SAN) & Co” is a legal practitioner recognized by the law. From all the submissions of both counsel in this appeal, and the decided authorities cited in support, the answer is simply in the negative. Both the original notice of appeal and the amended version of same which was used to hear and determine the appeal at the lower court was signed by “Chief P.C. Ajayi-Obe (SAN) & Co”. This court has made it very clear that such a notice of appeal is incompetent and cannot sustain an appeal. See Okafor Vs. Nweke (2007) 10 NWLR (Pt 1043) 521, FBN PLC Vs. Maiwada (2013) 5 NWLR (Pt 1348) 444, SLB Consortium Ltd Vs. NNPC

(2016) 9 NWLR (Pt 1252) 317 etc, etc.

In view of the provision of Sections 2 (1) and 24 of the Legal Practitioners Act, Cap 207, laws of the Federation of Nigeria, “Chief P.C. Ajayi-Obe (SAN) & Co”, not being a person whose name is on the sign both the original and amended notices of appeal before the lower court. The two notices alluded to above, to say the least, are null and void and of no legal consequence whatsoever, same having been signed by the said “Chief P.C. Ajayi-Obe (SAN) & Co”. The legal consequence is that there was no competent appeal before the lower court and as such no proper judgment could have been predicated on such incompetent notice of appeal. To take this matter further, it can be said that the court below lacked the jurisdiction to entertain the appeal since the originating process (the notice of appeal) was not before the court. Since it is the notice of appeal which ignites the appellate jurisdiction of the court below, an incompetent notice of appeal cannot ignite its jurisdiction.

My Lords, as was decided by my Lord, Amina Augie, JSC in the lead judgment, I agree that the only reasonable thing to do at this stage is to strike out the incompetent notice of appeal before the lower court, the fact that it generated a judgment from it, notwithstanding. The said notice of appeal is accordingly struck out. (Pp 120–121 Paras C–B)

Per Gabinje (JSC)

“In Okeke Anadi Vs. Okeke Okoli (1977) 11 NSCC. 117, this Court, per Idigbe JSC held:

“The notice of appeal is a very important document because it is the foundation of the appeal and if it is defective, the Court of Appeal has inherent power to strike it out on the ground that it is incompetent.”

The amended Notice of appeal before the Court of Appeal in the instant case is signed by “Chief P.C. Ajayi-Obe (SAN) & Co.” who is not a person entitled to practice as a barrister and solicitor, as it is a firm that is incapable of being enrolled as such. This court has held in a number of cases that a notice of appeal signed by a firm is incompetent and ought to be struck out. See Okafor Vs. Nweke (2007) 10 NWLR (Pt. 1043) 521 FBN Vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444, SLB Consortium Ltd. Vs. NNPC (2016) 9 NWLR (Pt. 1252) 317.

This court, has been called upon to depart from its previous decisions by Ebun-Olu Adegboruwa, learned counsel for the Respondent. Learned counsel argued that section 2(1) and 24 of the Legal Practitioners Act, upon which the previous decisions of this court are based are sections of an Act that was promulgated to regulate legal profession, and that the Act has nothing to do with practice and procedure in courts. In a further argument, learned counsel submitted that in certain jurisdiction, lay men are permitted to file writ of summons, and by the decision in Fawehinmi Vs. NBA (No. 2) (1989) 2 NWLR (Pt. 105) 558, this Court defined jural units as having legal personality to include human beings, companies incorporated under the various companies Act, corporation sole with perpetual succession, Trade Unions, Partnership and Friendly Societies. It is learned counsel's submission that the decisions in Okafor Vs. Nweke (Supra) and FBN Vs. Maiwade were based on technicalities as such this court should adopt the attitude of doing substantial justice instead of relying on legal technicality. Learned counsel made extensive submission and finally urge this court to revisit and depart from the decision in Nweke Vs. Okafor (Sic) (Supra) and a host of others on similar subject matter in the interest of justice and public policy.

Now, the issue of whether this court should or should not depart from its previous decisions is entirely a new issue. For the respondent to argue a new issue, he ought to have sought for leave to

raise it as a ground in his cross appeal. Having failed to cross appeal, all the argument canvassed by his counsel go to no issue. A respondent who has not filed a cross appeal, cannot formulate and argue issues that do not arise from the grounds of appeal filed by the appellant.

Be that as it may, learned counsel has failed to convince me that this court should revisit its decision in *Okafor Vs. Nweke (Supra)*. (Pp 121–122 Paras C–F)

Per Eko (JSC)

“The notice of appeal to the Court of Appeal was issued and signed by an unknown proxy “for P.C. Ajayi (SAN) & Co.”. By this fact, that case is almost on all fours with the situation in *BOSSOM VENTURES LTD. Vs. F.C.D.A. & ANOR. (2012) NO. CA/A/29/2009* of 14th June, 2012 in which an amended statement of claim, signed by unknown proxy “for R.O. Atabo” of counsel, was held by the Court of Appeal to be incompetent. The rationale for the decision, correct and logical, is that the Legal Practitioners Act that statutorily enabled a Legal Practitioner to act as an agent or proxy of the litigant does not envisage that the Legal Practitioner would further delegate his powers or authority under the Law to an unknown proxy. *Delegatus non potest delegare* is the basic principle in the law of agency.

In the instant case the unknown proxy of “Chief P.C. Ajayi (SAN) & Co” cannot validly in law settle an originating court process as the notice of appeal. The notice of appeal is consequently void ab initio. In purporting to amend the void process more fundamental errors, going to the root or vires of the originating process, were further committed. Amended Notice of appeal was, this time, signed by “Chief P.C. Ajayi (SAN) & Co.”. This is the same blunder committed in *OKAFOR Vs. NWEKE (2007) 10 NWLR (pt. 1043) 521* and this court stated categorically that the blunder, rendering the originating process defective, goes

to the roots. It renders the process invalid.

The law is now settled, if not fossilized, that a court of law lacks the jurisdiction to entertain an incompetent process which renders the proceedings incompetent. A court cannot give judgment upon an incompetent action. MADUKOLU Vs. NKEDMILIM (1962) 2 SCNLR 341; AJUWA Vs. SPDC (NIG.) LTD. (2008) 10 NWLR (Pt. 1094) 64 at 96. The Court of Appeal, lacking the necessary competence to entertain the respondent's appeal that was invalid and void ab initio, could not in law give judgment in the incompetent appeal. It was simply that the court erected and rested its judgment upon nothing, and expected it to stand. It cannot stand. MACFOY Vs. U.A.C. LTD. (1952) A.C. 154.

The appeal at the Court of Appeal ought to have been struck out for being incompetent. (Pp 122–123 Paras H–H)

Nigerian cases cited in this judgment

Adelekan Vs. ECU-Line NV [2006] 12 NWLR (Pt. 993) 33,
Aderibigbe V. Abidoye (2009) 4 SC 123,
Agu Vs. Odofin (1992) 3 SCNJ 162,
Akpan Vs. Bob (2010) 17 NWLR (Pt. 1224) 421,
Ebokan Vs. Ekwenibe and Sons Trading Coy Ltd. [1977] 7 SCNJ 77,
FBN Plc Vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444,
First Bank Plc. Vs. T.S.A. Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247 SC,
FRN Vs. Dairo,
General Electric Co. Vs. Akande [2010] 18 NWLR (Pt. 1225) 596,
Hamzat & Anor Vs. Sanni & Ors (2015) LPELR-24302 (SC).,
Ikweki Vs. Ebele ([2005] 11 NWLR (Pt. 936) 397,
Iwunze V. FRN,
Joel Okunrinboye Export Co. Ltd & Anor Vs. Skye Bank,
N.N.B. Plc. Vs. Denclag Ltd. (2005) 4 NWLR (Pt. 915) 549,
Nigerian Army Vs. Samuel (2013) LPELR-SC 75/2008,
Nonye Iwunze Vs. FRN (2015) 6 NWLR (Pt. 1404) 580,
Nwaigwe Vs. Okere (2008) 12 NWLR (Pt. 1105) 445,

- A** *Ocholi Enojo James, SAN Vs. INEC (2015) LPELR-24494 (SC), Okafor Vs. Nweke (2007) 10 NWLR (Pt. 1043) 521, Okeke Amadi Vs. Okeke Okoli [1977] 7 SC 57, 58, Oketade Vs. Adewunmi (2010) 2-3 SC (Pt. 1) 140,*
- B** *Okolo Vs. UBN Ltd. [2004] 3 NWLR (Pt. 859) 87, Olanrewaju Vs. BON Ltd. (1994) 8 NWLR (Pt. 364) 622, Olowokere Vs. African Newspapers (1993) 5 NWLR (Pt. 295) 583, Oni V. Cadbury (2016) LPELR-26061 (SC),*
- C** *Shelim Vs. Gobang (2009) 12 N.W.L.R (Part. 1156) 435, SLB Consortium Ltd. Vs. NNPC (2016) 9 NWLR (Pt. 1252) 317 Thor Vs. FCMB Ltd [2002] 2 SCNJ 85, UAC Vs. Macfoy,*
- D** *Uwazurike and Ors Vs. AG, Federation (2007) LPELR-3448 (SC),*

Nigerian statutes cited in this judgment

Legal Practitioners Act Section 2 (1) and 24

- E** *Constitution of the Federal Republic of Nigeria 1999 Section 4 (9)*

Representation

Afolabi Kuti, (Esq.) **with**

- F** Ikechukwu Nwakanma, (Esq.)

For the **Appellants**

Ebun-Olu Adegboruwa, (Esq.), **with**

Eniola Aiyenuberu, **and**

- G** Gbadebo Ikuesan, (Esq.)

For the **Respondent**

AMINA ADAMU AUGIE, (JSC) (Delivering the lead judgment): The

- H** Respondent is the son of Professor Asuquo Antia (deceased), who was the Plaintiff at the Edo State High Court, and appellant at the Court of Appeal, Benin. He was substituted for his deceased father by the Court of Appeal. The late Professor Asuquo Antia, who was Chief Paediatrician Consultant
- I** with the third appellant, had instituted an action at the High Court, Benin (trial Court).

- A** The late Professor's case at the trial court is that he took on the employment with third appellant on a salary of five thousand United States Dollars monthly, which was to be paid to him partly in Dollars and partly in Naira. He claimed that although he worked as agreed; he was not paid as
- B** agreed in that the Dollars component of his salary was not paid at all and the Naira component was not paid for October, **1994**. He, therefore, claimed the following:
- C** 4. The sum of N66,000.00 being the unpaid salary due to the Plaintiff from the Defendants for the month of October, **1994** which sum represents that part of the Plaintiff's remuneration payable in Naira under the contract of employment with the defendants.
- D** 5. The sum of N2,210,000.00 equivalent of U.S \$26,000.00 being the unpaid salary due to the Plaintiff from the defendants for the month of October **1993** to October, **1994**. 13 months at the rate of U.S \$2,000.00 per month which sum represents that part of the Plaintiff's remuneration payable to his London Account in U.S Dollars under his contract with the defendants.
- E** 6. 10% interest from Judgment till the total sum is fully paid.

The appellants, who were the defendants, claimed inter alia that there was no portion of the salary payable in United States Dollars; and no salary was

F payable for the month of October, **1994**, as his employment had been terminated at the end of September, 1994.

The learned trial Judge, Idahosa, J., believed the appellants. He concluded as follows in his Judgment delivered on **6/6/1997**:

G

H

I

The inference one can draw from this state of facts is that Plaintiff did not complain or protest because he knew he was not entitled to any payment in Dollars. It is natural to expect a worker, who is not paid his full wages as agreed to protest at the earliest opportunity. It is also natural and in the normal course of events that a worker, who has been paid all his entitlements will continue to perform his duties without any protest about unpaid salaries or salaries not completely paid.

A The Plaintiff is a renowned Paediatrician and a retired Professor emeritus, according to the pleadings and evidence. It cannot be successfully argued that a man of such learning and experience, who worked for over 31 years as at **1993**, could be enticed into a contract of service, which was not
B written, and thus has no firm and easily identifiable conditions of service. It cannot be successfully argued that such a man, as the Plaintiff, did not find it necessary to check that the payment of that part of his salary
C “payable in Dollars” was being made regularly as and when due, especially as he had cause to complain that the Naira “part of the salary” was not being paid regularly. Thus, it is in consideration of the evidence before me in this Suit that I have come to the following conclusions and I make the following findings of fact:

- D** 1. That the Plaintiff was actually engaged to work in the 3rd defendant Hospital as its Chief Consultant Paediatrician.
2. That he actually worked in that capacity from 5th October, **1993** till 30th September, **1994**.
E 3. That his salary or remuneration was the sum of \$3,000.00 United States Dollars payable in the Naira equivalent.
4. That the Plaintiff was paid all his remuneration as above for the period he worked.
5. I do not accept the contention of the Plaintiff when he said that his
F salary was 5000 U.S. Dollars payable as follows:- 3000 U.S. Dollars equivalent in Naira and 2000 U.S. Dollars payable into his London account in Dollars, for the reasons already outlined above.
6. I do not accept the contention of the Plaintiff that he worked till
G October, **1994** and as such he was entitled to be paid for the month of October, **1994**, for reasons already outlined above.

H **In the light of the above findings, I am satisfied that the action of the Plaintiff has no merit and it ought to be dismissed. It is hereby dismissed with costs of N1,000 to all the defendants jointly.**

I Dissatisfied with the decision of the trial Court, the late Professor appealed to the Court of Appeal with an original notice of appeal that was issued and

A signed “for Chief P. C. Ajayi-Obe (SAN) & Co”.

He later sought and was granted leave by the Court of Appeal to amend his notice of appeal. The amended notice of appeal, however, was also signed by “Chief P. C. Ajayi-Obe (SAN) & Co”.

B In its Judgment of 19/1/2005, the Court of Appeal held that “with regard to the caliber of the person and institution he was dealing it, it would have been uncalled for the appellant to doubt the \$2,000 was paid as he got the Naira equivalent as at when due”. At the end of the day, the Court of
C Appeal concluded as follows:

The appeal succeeds in part. Appellant is entitled to be paid \$2,000 per month from October 1993 till September 1994. He failed to prove his claim for salary up to the end of October 1994. Though, he pleaded interest on the sum he claimed, he offered no evidence relating to his claim for interest, and pleading is not evidence. His claim for Naira equivalent of U.S. \$3,000 for October was not proved and is dismissed. appeal allowed in part. Respondents to pay costs at N3,000.

F Dissatisfied with part of the Judgment “in which the lower Court held that Professor Asuquo Antia, the respondent be paid the sum of US \$2,000.00 per month from October 1993 to September 1994”, the appellants appealed to this court with a notice of appeal that had six grounds of appeal. The
G notice of appeal was amended, and the amended notice of appeal has seven grounds of appeal.

Ground 1 complains that “the lower Court erred in relying on the amended notice of appeal dated 7/9/2000 in determining the appeal filed by
H the Respondent”, The **Particulars of Error** are:

1. **The respondent filed his notice of appeal and a subsequent amended notice of Appeal dated 30/7/1997 and 7/9/2000 respectively against the decision of the trial court.**

- A 2. **Both the notice of appeal and the amended notice of appeal was issued and signed in the name of “CHIEF P. C. AJAYI-OBE (SAN) & CO”, the law Firm representing the respondent at the lower court.**
- B
- C 3. **“CHIEF P.C. AJAYI-OBE (SAN) & CO”, is not a legal practitioner under the Nigerian Law that can competently sign a process upon which the appeal could have been commenced.**

The appellant formulated the following Issues for Determination:

- D (a) **Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a fundamentally defective notice of appeal issued and signed by Chief P.C. Ajayi-Obe (SAN) & Co., which is not a legal practitioner recognized by law to practice law in Nigeria?**
- E
- F (b) **Whether the learned Justices of the Court of Appeal were right when they relied solely on Exhibit F in coming to the conclusion that a recommendation of \$5,000.00 was made by the appellants and accepted by the respondent as the latter's monthly salary as employee of the 3rd appellant?**
- G
- H (c) **Whether the lower court was right in holding that the evidence of the respondent with respect to his conversation with the 1st appellant on the amount of monthly salary payable was uncontroverted and liable to be accepted and acted upon by the court.**
- I (d) **Whether the lower Court was right in reaching a conclusion that the doctrine of waiver could not avail the appellants on the facts submitted before it?**

- A The respondent also formulated four Issues for Determination i.e.
- B a. **Whether the learned justices of the Court of Appeal were right in holding that the monthly salary payable to the respondent was \$5,000 out of which US \$3,000 was payable in Naira equivalent?**
- C b. **Whether the learned justices of the Court of Appeal gave Exhibit F the legal factual interpretation supported by evidence?**
- D c. **Whether the learned justices of the Court of Appeal adequately evaluated the evidence before them and if they did, whether they applied the evidence to the judgment?**
- E d. **Whether the learned justices of the Court of Appeal were right in failing to award the respondent the sum of N66,000.00 being his salary for October 1994?**

The respondent made no reference to the complaint in **Ground 1** of the said grounds of appeal and formulated no issue there-from.

F However, the appellant's **Issue 1** raises a jurisdictional issue, which must be resolved quickly because “there is nothing as useless as doing efficiently that which should not have been done at all”- **Oni V. Cadbury** (2016) LPELR-26061 (SC) per Rhodes Vivour, JSC.

G In other words, the issue touching on jurisdiction has to be resolved first because jurisdiction is the life wire or lifeblood of any litigation before a Court of law, and if the Court has no jurisdiction, the proceedings, however ably and well conducted, will be a nullity see **Ocholi Enojo James, SAN Vs. INEC** (2015) LPELR-24494 (SC).

H In this case, the appellants contend that the judgment of the court below is predicated upon an incompetent notice of appeal, and so, as held in **Macfoy v UAC** (1962) AC 152, “there was nothing upon which the Judgment of the lower court could be predicated and every judgment founded on such notice of appeal is a nullity”.

I

- A** They cited the following cases on the nature of a notice of appeal:
- **Shelim Vs. Gobang** (2009) 12 N.W.L.R (Part. 1156) 435
 - **Nonye Iwunze Vs. FRN** (2015) 6 NWLR (Pt. 1404) 580
 - **Thor Vs. FCMB Ltd** [2002] 2 SCNJ 85
- B**
- **Ebokan Vs. Ekwenibe and Sons Trading Coy Ltd.** [1977] 7 SCNJ 77
 - **Uwazurike and Ors Vs. AG, Federation** (2007) LPELR-3448 (SC) 14
 - **Ikweki Vs. Ebele** ([2005] 11 NWLR (Pt. 936) 397
- C**
- **Akpan Vs. Bob** (2010) 17 NWLR (Pt. 1224) 421
 - **General Electric Co. Vs. Akande** [2010] 18 NWLR (Pt. 1225) 596
 - **Okeke Amadi Vs. Okeke Okoli** [1977] 7 SC 57, 58
 - **Adelekan Vs. ECU-Line NV** [2006] 12 NWLR (Pt. 993) 33
- D**
- **Okolo Vs. UBN Ltd.** [2004] 3 NWLR (Pt. 859) 87
 - **Agu Vs. Odofin** (1992) 3 SCNJ 162; **Aderibigbe V. Abidoye** (2009) 4 SC 123

- E** They submitted that a defective notice of appeal is non-existent in the eyes of the law, therefore, the appeal is incompetent, citing:
- **Olowokere Vs. African Newspapers** (1993) 5 NWLR (Pt. 295) 583,
- F**
- **Joel Okunrinboye Export Co. Ltd & Anor Vs. Skye Bank** [no citation]
 - **First Bank Plc. Vs. T.S.A. Ind. Ltd.** (2010) 15 NWLR (Pt. 1216) 247 SC
 - **Olanrewaju Vs. BON Ltd.** (1994) 8 NWLR (Pt. 364) 622
- G**
- **Nwaigwe Vs. Okere** (2008) 12 NWLR (Pt. 1105) 445
 - **Nigerian Army Vs. Samuel** (2013) LPELR-SC 75/2008

- H** They further submitted that there is a veritable body of authorities of this court to the effect that by virtue of Section 2 (1) and 24 of the Legal Practitioners Act, only a person, whose name appears on the Roll of Legal Practitioners can practice law in this Country, and this includes signing of legal documents. So, any legal document signed by any other person is incompetent and must be struck out. They referred this Court to the
- I** following authorities on this point:

- A - **N.N.B. Plc. Vs. Denclag Ltd.** (2005) 4 NWLR (Pt. 915) 549
 - **Okafor Vs. Nweke** (2007) 10 NWLR (Pt. 1043) 521
 - **Oketade Vs. Adewunmi** (2010) 2-3 SC (Pt. 1) 140
 - **FBN Plc Vs. Maiwada** (2013) 5 NWLR (Pt. 1348) 444
 B - **SLB Consortium Ltd. Vs. NNPC** (2016) 9 NWLR (Pt. 1252) 317

C Relying on these authorities, they argued that the notice of appeal having been signed by a law firm instead of a legal practitioner is incompetent, which is in tandem with another pronouncement of this Court in **Hamzat & Anor Vs. Sanni & Ors** (2015) LPELR-24302 (SC). They contend that the respondent's notice of appeal before the Court of Appeal is competent, and same is liable to be struck out.

D The respondent did not say anything about this issue at all. But it is clear from the authorities cited by the appellant that the issue before this full court is whether this court can depart from or find any extenuating circumstances in this particular case to make this court deviate from its earlier pronouncements that any court process that is signed in the name of
 E a law firm without indicating the name of the particular legal practitioner, who had issued and signed the process, is incompetent and is liable to be struck out.

F To start with, the appellants are right that a notice of appeal is the originating process that sets the ball rolling for the valid and lawful commencement of an appeal **Shelim V. Gobang** (supra), therefore, any defect in the notice of appeal goes to the root of the appeal and robs this court of jurisdiction to hear the appeal see **Iwunze V. FRN** (supra), where
 G Rhodes-Vivour, JSC, observed:

H **The Constitution confers on the Court of Appeal Jurisdiction to hear and determine appeals. The Jurisdiction is Statutory and also controlled by the rules of court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fail to comply with Statutory Provisions or the relevant rules of court. The**
 I **originating process in all appeals is the notice of appeal.**

- A** **Once it is found to be defective the Court of Appeal ceases to have jurisdiction to entertain an appeal in whatever form.**
- B** See also **FRN Vs. Dairo** (supra), (2015) 6 NWLR (Pt. 1454) 141 166/177, wherein Nweze, JSC, likened a defective notice to a virus, thus:

- C** **As it is well-known, it is a notice of appeal that initiates an appeal from a High Court to the lower court. Put differently, the notice (actually a competent notice of appeal) is the foundational process that triggers off an appeal from a High Court to the lower Court As such, any virus in this process would, invariably, corrode or taint the entire appeal thereby rendering it incompetent. The effect of such a viral corrosion is, usually, far-reaching as it nibbles at the jurisdiction of the appeal Court which must, as of necessity, strike out such a process. In effect, the absence of a competent notice of appeal, simply, translates to the non-existence of an appeal. This must be so for it is condition precedent to any valid exercise of appellate jurisdiction.**
- D**
- E**
- F**

- In other words, the importance of a notice of appeal in the process of an appeal is tremendous as it is the substratum of the appeal. Thus, if it is defective, it must be struck out on the ground that it is incompetent see
- G** **First Bank Vs. T.S.A. Industries Ltd.** (supra).

- In this case, the appellants' contention is that the amended notice of appeal on which the court below based its Judgment is defective since it
- H** was signed by a law firm; not a legal practitioner.

Now, Section 2(1) of the **Legal Practitioners Act**, stipulated that:

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

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

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

C As the appellants rightly submitted, this court has considered these provisions of the **Legal Practitioners Act** in numerous cases. For instance, in the well-known case of **Okafor Vs. Nweke** (supra), where a motion on notice was signed by “J.H.C. Okolo, SAN & Co”, this court per Onnoghen, JSC (as he then was), categorically said:

The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise, he cannot engage in any form of legal practice in Nigeria. The law does not say that what should be in the roll should be the signature of the legal practitioner but his name. That apart, it is very clear that by looking at the documents, the signature which learned counsel claimed to be his really belongs to J.H.C. OKOLO, SAN & CO or was appended on its behalf since it was signed on top of that name. Since both counsel agree that J.H.C. OKOLO, SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. OKOLO, SAN & CO cannot legally sign and/or file any process in the Courts and as such the motion on notice. Notice of Cross-Appeal and brief of argument all signed and issued by the firm known and called J.H.C. OKOLO, SAN & CO are incompetent in law particularly as the said firm of J.H.C. OKOLO, SAN & CO is not a registered legal practitioner.

A This court maintained the same position and reiterated its point that a law firm “cannot legally sign and/or file any process in the courts”; and any such process signed by a law firm is “incompetent in law” in **FBN Vs. Maiwade** (supra) and **SLB Consortium Vs. NNPC** (supra).

B In **SLB Consortium V. NNPC** (supra), the originating summons was signed by a law firm. This court per Fabiyi, JSC, held that:

C **It is not in doubt that the signature of “Adewale Adesokan & Co” on the originating summons robs the process of competence ab initio as the said firm is not a registered legal practitioner enrolled to practice law as Barrister and Solicitor in this court. In the prevailing circumstance, all the proceedings, which rested on the inchoate originating summons, are deemed not to have taken place in law. One cannot put something on nothing and expect it to stand. This is as stated in UAC Vs. Macfoy (supra). It has been established that the originating summons signed by a Law Firm of “Adewale Adesokan & Co was not initiated by due process. As same is incompetent, this Appeal rests on nothing.**

F The same Fabiyi, JSC, stated as follows in **FBN Vs. Maiwada** (supra):

G **We are interpreting a law, which seeks to make legal practitioners responsible and accountable in modern times. I see nothing technical in insisting that a legal practitioner should abide by dictates of the law in signing court processes. It is my view that if the decision in Okafor Vs. Nweke is revisited as urged, more confusion will be created. The decision in Okafor Vs. Nweke is not in any respect wrong in law. The convenience of counsel should have no pre-eminence over the dictates of the law.**

H

I **The law as enacted should be followed. I do not for one**

A moment see any valid reason why the decision in **Okafor Vs. Nweke** should be revisited. It has come to stay and legal practitioners should reframe their minds to live by it for due accountability and responsibility on their part and for due protection of our profession.

B

The decision in **Okafor Vs. Nweke** (supra) has come to stay; that is the message entrenched in the decisions of this court thereafter see **Hamzat & Anor V. Sanni & Ors** (2015) 5 NWLR (Pt. 1453) 486, wherein this court per Galadima, JSC, very aptly stated as follows:

C

D This Court was faced with a similar situation in **Okafor Vs. Nweke**. In **SLB Consortium Vs. NNPC** this Court citing the case of **Okafor Vs. Nweke** struck out the plaintiff's originating summons and statement of claim, both having been signed by "Adewale Adesokan & Co", who was held not to be a legal practitioner known to law. In view of our clear position in **Okafor Vs. Nweke** and other similar cases, I hold that the appellant's statement of claim on which evidence was led, were a nullity, same having been signed in the name of a law firm.

E

F

In this case, it is clear that the amended notice of appeal filed at the court below was signed by "**Chief P. C. Ajayi-Obe (SAN) & Co**", who is not a legal practitioner that is known to law; it was not filed according to the dictates of law, and it is, therefore incompetent, and must be struck out. Thus, the appeal itself rested on nothing.

G

This is a full court with seven Justice of the Supreme Court. The respondent has not placed anything before the court that will sway this court to depart from its previous decisions in the cases of **Okafor Vs. Nweke** (supra), **SLB Consortium Ltd. Vs. NNPC** (supra), **FBN Vs. Maiwada** (supra) and that of **Hamzat Vs. Sanni** (supra).

H

I In the circumstances, the appeal filed at the Court of Appeal by the

A late Professor is incompetent and it is, therefore, struck out.

Amina Adamu Augie,
Justice, Supreme Court

B MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amina Adamu Augie JSC and to register that support. I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on the 19th day of January, 2005 in which the Court of Appeal or Court below set aside the decision of the Edo State High Court, Benin Division per C.O. Idahosa J (as he then was).

The Plaintiff's claim are as stated briefly hereunder thus:

D

i. **The sum of N66,000.00 (sixty six thousand naira) being the unpaid salary due to the plaintiff from the defendants for the month of October, 1994 which sum represents that part of the plaintiff's remuneration payable in Naira under the contract of employment with the defendants.**

E

F

ii. **The sum of N2,210,000.00 equivalent of U.S \$26,000.00 (twenty six thousand U.S Dollars) being the unpaid salary due to Plaintiff from the defendant for the month of October 1993 to October, 1994. 13 months at the rate of U.S \$2,000.00 (Two thousand U.S Dollars) per month which sum represents that part of the plaintiff's remuneration payable to his London Account in United States Dollars under his contract with the defendants.**

G

H

iii. **10% Interest from the judgment sum till the total sum is fully paid.**

I

The Respondent filed a statement of claim dated the 10th day of November 1995 and led evidence in support. The appellants filed a joint statement of

A defence and Mr. Ivowe Executive Director (Medical Services) of the 3rd appellant proffered evidence in support of the statement of defence. At the conclusion of the case the learned trial judge found for the defendant holding, as its judgment, the following conclusions.

B

i. That the Plaintiff was actually engaged to work in the 3rd defendants Hospital as its chief consultant paediatrician.

C

ii. The respondent worked in that capacity from 5th October, 1993 till 30th September, 1994.

iii. That the respondent's salary or remuneration was the sum of \$3,000.00 payable in Naira equivalent.

D

iv. That the respondent was paid all his remuneration throughout the period of employment.

Aggrieved with the decision of the trial court, the appellant (now respondent herein) filed a notice of appeal at the Court of Appeal vide a notice and grounds of appeal dated 30th July 1997.

E

By judgment of the Court of Appeal dated 19th of January 2005, the judgment of the lower court was upturned and the appeal was allowed in part. The lower court held the respondent herein was entitled to be paid the sum of \$2,000.00 per month from October 1993 till September 2004.

F

The appellant being dissatisfied with the judgment of the lower court appealed against the judgment by initiating appeal to this honourable court via notice of appeal dated 12th, 2005.

G

At the hearing on 26th September, 2017 Afolabi Kuti Esq. learned counsel for the appellants adopted the amended appellants' brief of argument filed on 15th July, 2016 and deemed filed on 26th September, 2017 and reply brief filed on 21st September, 2017 and deemed filed on 26th

H

September, 2017 learned counsel identified four issues for determination which are as follows:

I

A Issues

- B**
- C**
- D**
- E**
- F**
- G**
- a. **Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a fundamentally defective notice of appeal issued and signed by Chief P.C. Ajayi-Obe (SAN) & CO. which is not a legal practitioner recognized by law to practice law in Nigeria? (Groud 1 of the Notice of Appeal).**
 - b. **Whether the learned Justices of the Court of Appeal were right when they relied solely on EXHIBIT F in coming to the conclusion that a recommendation of \$5,000.00 was made by the appellants and accepted by the respondent as the latter's monthly salary as employee of the 3rd appellant? (Ground 2, 4 and 5 of the Notice of Appeal).**
 - c. **Whether the lower court was right in holding that the evidence of the respondent with respect to his conversation with 1st appellant on the amount of monthly salary payable was uncontroverted and liable to be accepted and acted upon by the court.**
 - d. **Whether the lower court was right in reaching a conclusion that the doctrine of waiver could not avail the appellants on the facts submitted before it? Ground 3 of the Notice of Appeal).**

H Ebun-Olu Adegboruwa Esq. of counsel for the respondent adopted his brief of argument filed on 3rd May, 2017 and deemed filed on 26th September, 2017. He crafted five issues for determination, viz:

- I**
- a. **Whether the learned Justices of the Court of Appeal acted within jurisdiction in relying on the notice of appeal of the respondent filed in the lower court?**

- A (Ground 1 of the Notice of Appeal).**
- B b. Whether the learned Justices of the Court of Appeal were right in holding that the monthly salary payable to respondent was \$5,000.00 out of which U.S \$3,000.00 was payable in Naira equivalent.**
- C c. Whether the learned Justices of the Court of Appeal gave EXHIBIT F the legal factual interpretation supported by evidence.**
- D d. Whether the learned Justices of the Court of Appeal adequately evaluated the evidence before them and if they did, whether they applied the evidence to the judgment.**
- E e. Whether the learned Justices of the Court of Appeal were right in failing to award the respondent the sum of N66,000.00 being his salary for October 1994?**

I shall confine my comments to issue no 1 of the appellant which is substantially the same as issue one of the respondent.

F *Issue No 1*

- G Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a fundamentally defective notice of appeal issued and signed by Chief P.C. Ajayi-Obe (SAN) & CO., which is not a legal practitioner recognized by law to practice law in Nigeria?**

- H** Learned counsel for the appellant, Afolabi Kuti Esq. submitted that a notice of appeal has been held to be most important step in the initiation of an appeal and consequently where the notice of appeal turns out to be defective, the appeal would be considered incompetent. The follow up to
- I** such a defect is that the Court of Appeal ceased to have jurisdiction to

A entertain appeal in whatever form. The cases of **Thor v FCMB** (2002) 2 SCNJ 85; **Ebokan Vs. Ekweibe and Sons Trading Co Ltd** (1977) 7 SCNJ 77; **Uwazurike & Ors Vs. A.G. Federation** (2007) LPELR-3448 14; **Ikweki Vs. Ebele** (2005) 11 NWLR (Pt. 938) 397; **J.A. Aderigbe Vs. B Tihamiyu Abidoeye** (2009) 4 SCNJ 259-281.

Learned counsel for the appellant further contended that the effect of signing a process in the name of a law firm as happened in this instance breached the provisions of Sections 2(1) and 24 of the Legal Practitioners Act Cap. L 11 Laws of the Federation of Nigeria (LFN) 2004. He relied also on the cases of **N.N.N Plc Vs. Denclag Ltd** (2005) 4 NWLR (Pt. 915) 549 at 582; **Okafor Vs. Nweke** (2007) ALL FWLR (Pt. 368) 1016 at 1018; **FBN Plc Vs. Maiwada** (2013) 5 NWLR (Pt. 1348) 444.

D For the respondent, learned counsel, Mr. Adegboruwa submitted that this court should depart from its earlier decisions in **Okafor Vs. Nweke (Supra)** and **NNB Plc Vs. Denclag Ltd (Supra)**, that this court should hold, that judgments of this court should not take retrospective effect over cases that are already concluded wherein, some agreements that are settled, payments already made, judgments already executed prior to the principle of the court on subject matter. That by Section 4 (9) of the 1999 Constitution of the Federal Republic of Nigeria forbids the National Assembly from enacting a law that has a retrospective effect. He cited **Ojokolobo & Ors Vs. Alamu & Anor** (1987) LPELR 2392.

G It was stated for the respondent that in the spirit of substantial justice, there is a cry for the departure from the earlier decisions which go against the justice that should prevail in this case. He cited **Uwazurike & Ors Vs. A.G. of the Federation** (2013) LPELR-20392; **Erisi Vs. Idika** (No 1) (1987) 4 NWLR (Pt. 66) 503 etc.

H The crux of the appellant's contention on this issue 1 is that the notice of appeal before the court below being incompetent is liable to be struck out. This is because it was not signed by a legal practitioner as known to law.

I The stand of the respondent is an invitation to the Supreme Court to depart from its earlier decisions along that line of position of the appellant.

A A notice of appeal is the originating process in an appeal and so when it turns out defective, the appeal would be considered incompetent. This court per **Rhodes-Vivour JSC in Nonye Iwunze Vs. FRN (2015) 6 NWLR (Pt. 1404) 580 at 596** stated thus:

B

The constitution confers on the Court of Appeal jurisdiction to hear and determine appeals. The jurisdiction is statutory and also controlled by the rules of the court. The Court of Appeal would lack jurisdiction to hear an appeal if an appellant fails to comply with statutory provisions or the relevant rules of court. The originating process in all appeals is the notice of appeal. Once it is found to be defective the Court of Appeal ceases to have jurisdiction to entertain an appeal in whatever form”.

D

E It is a safe conclusion therefore that a notice of appeal is the spinal cord of an appeal, the foundation upon which an appeal is based. Therefore once it is found defective, the Court of Appeal ceases to have jurisdiction to entertain an appeal as an ineffectual notice of appeal is incapable of activating an appellant's right of appeal. **See Uwazurike & Ors Vs. A.G. Federation (2007) LPELR 3448; Kweki Vs. Ebele (2005) 11 NWLR (Pt. 936) 397; Akpan Vs. Bob (2010) 17 NWLR (Pt. 1224) 421; Agu Vs. Odofin (1992) 3 SCNJ 161; Olowokere Vs. African Newspapers (1993) 5 NWLR (Pt. 295) 583.**

F

G The clear picture of the effect of a defective notice of appeal is well captured in its raw form by my learned brother Nweze JSC in the case of **FRN Vs. Dairo & Ors (2015) LPELR-24303** thus:

H

“As such, any virus in this process would, invariably, corrode or taint the entire appeal thereby rendering it incompetent. First Bank of Nigeria Plc Vs. T.S.A. Ind Ltd (2010) LPEL-1283 (SC) 49, paragraphs A-D; Okeke Amadi Vs. Okeke Okoli (1977) 7 (SC) 57; 58; Adelekan Vs. ECU-Line NV (2006) 12 NWLR (Pt. 993) 33; Okolo Vs.

I

A UBN Ltd. (2004) 3 NWLR (Pt. 859) 87; Ikweki Vs. Ebele (2005) 11 NWLR (Pt. 936) 397...

B The effect of such a viral corrosion is, usually, far-reaching as it nibbles at the jurisdiction of the appeal court which must, as of necessity, strike out such a process, A.G Fed Vs. Guardian Newspapers Ltd (1999) (Pt. 618) 187; Odunze Vs. Nwosu (2007) 13 NWLR (Pt. 1050) 1; Agu Vs. Odofin (1992) 3 SCNJ 161, 172-173; Ibeto Vs. Aminu (2007) 5 NWLR (Pt. 1028) 446; Danmusa Vs. Inuwa (2007) 17 NWLR (Pt. 1063) 391; Clev Josh Ltd Vs. Tokimi (2008) 13 NWLR (Pt. 11-4) 422.

**D In effect, the absence of a competent Notice of Appeal, simply, translates to the non-existence of an appeal, Anadi Vs. Okoti (1972) 7 SC 57; CBN Vs. Okojie (2004) 10 NWLR (Pt. 882) 488; Olanrwaju Vs. BON Ltd (1994) 8 NWLR (Pt. 364) 622; Olowokere Vs. African Newspapers Ltd (1993) 5 NWLR (Pt. 295) 583; Erisi Vs. Idika (1987) 4 NWLR (Pt. 66) 503; Josiah Cornelius Ltd Vs. Ezenwa (1996) 37 LRCN 618; Tukur Vs. Government of Gongola State (1988) 1 NWLR (Pt.68) 391; First Bank of Nigeria Plc Vs. Maiwada (2012) LPELR-9713 (SC) 187. This must be so for it is a condition precedent to any valid exercise of appellate jurisdiction, Okeke Amadi Vs. Okeke Okoli (supra); Okotie Vs. Olughor (supra)”.
**E
 F
 G****

H To bring the principles of the law to the facts of the case, it is not in dispute that the notice of appeal filed by the respondent an appellant in the court below was signed in this way:

I “FOR CHIEF P.C. AJAYI-OBE (SAN) & CO, THE APPELLANT'S SOLICITORS, ANCE BUILDING (2ND FLOOR) MAGAZINE ROAD, JERICHO, IBADAN”.

A The same respondent sought leave of the lower court to amend the aforesaid notice of appeal and upon the grant of the application, filed an amended notice of appeal dated 7th September, 2000 and once again the same mode of signing which read as follows:

B

“Chief P.C. Ajayi-Obe (SAN) & CO

The appellant's Solicitors,

Ance building (2nd Floor)

C

Magazine Road, Jericho, Ibadan”.

The situation has brought into operation Section 2 (1) and 24 of the legal practitioners' Act. Section 2 (1) of the said Act provides that a person is authorized to practice as a Barrister and solicitor in Nigeria if and only if his name is contained on the roll of legal practitioners. Then Section 24 of the same Act defines a legal practitioner to mean a person entitled to practice as a Barrister or solicitor either generally or for the purpose of any particular office proceedings.

D A community reading of Sections 2 (1) and 24 of the Legal Practitioner Act leads to the conclusion that only a person whose name appears on the Roll of Legal Practitioners that can practice Law in this country. The implication is that it is a natural human person and not a firm that the person whose name appears in the Roll of Legal Practitioners that can sign Legal documents. That interpretation is what no less than Supreme Court had placed its stamp of definition or interpretation. That is the current State of the law and nothing has happened for a reversal of the position or for this court departing from its earlier decisions on the point. See **N. N. N Plc Vs. Denclag Ltd** (2005) 4 NWLR (Pt. 916) 549 at 583; **Okafor Vs. Nweke** (2007) AU FWLR (Pt. 368) 1016 at 1018; **FBN Vs. Maiwada** (2013) 5 NWLR (Pt. 1348) 444.

E It cannot never be overstated, the matter concerning the three conditions that must exist before a court can competently assume jurisdiction and these are:

I

- A** **d) The court must be properly constituted as regards number and qualification of members of the bench.**
- B** **e) The subject matter of the case must be within the jurisdiction of the court.**
- C** **f) The case must come before the court initiated by due process of law and upon fulfillment of all conditions precedent to the exercise of the jurisdiction. See Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341; Skenconsult (Nig) Ltd Vs. Ukey (1981) 1 SC 6.**

D In the case at hand while the two conditions for jurisdiction of the court exist, the third condition is absent, the initiating process having been validly or competently commenced, thereby robbing the court of its vires to entertain the appeal.

E While we have been busy scouring whether a legroom could be found to validate the appeal process, it has been thrown up that even the writ of summons is visited by the defeating vice. It was also signed by the legal firm of Ajayi-Obe & Co in this way:

F

**“CHIEF P.C. AJAYI-OBE (SAN) & CO.
ANCE BUILDING (2nd FLOOR) MAGAZINE ROAD,
JERICHO, IBADAN”.**

G Indeed the situation is even more grave than earlier thought. This is because **“AJAYI-OBE SAN & CO”** is not a legal practitioner as known to law and so the writ of summons, the initiating process was not commenced by due process of

H From the foregoing and in line with the well articulated lead judgment, I too strike out the suit at the trial High Court. I abide by the consequential orders as made.

I

Mary Ukaego Peter-Odili
Justice, Supreme Court

- A OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Amina Augie, JSC** just delivered. I agreed entirely with the reasoning and conclusion that the appeal is unmeritorious and should be struck out. I too will strike out the appeal, not having been commenced or initiated in accordance with the law.
- B** Appeal struck out.

Olu Ariwoola
Justice, Supreme Court

- C JOHN INYANG OKORO, (JSC):** The sole question which this court is to determine in this appeal is whether “Chief P.C. Ajayi-Obe (SAN) & Co” is a legal practitioner recognized by the law. From all the submissions of both
- D** counsel in this appeal, and the decided authorities cited in support, the answer is simply in the negative. Both the original notice of appeal and the amended version of same which was used to hear and determine the appeal at the lower court was signed by “Chief P.C. Ajayi-Obe (SAN) & Co”. This
- E** court has made it very clear that such a notice of appeal is incompetent and cannot sustain an appeal. See **Okafor Vs. Nweke (2007) 10 NWLR (Pt 1043) 521, FBN PLC Vs. Maiwada (2013) 5 NWLR (Pt 1348) 444, SLB Consortium Ltd Vs. NNPC (2016) 9 NWLR (Pt 1252) 317** etc, etc.
- F** In view of the provision of Sections 2 (1) and 24 of the Legal Practitioners Act, Cap 207, laws of the Federation of Nigeria, “Chief P.C. Ajayi-Obe (SAN) & Co”, not being a person whose name is on the sign both the original and amended notices of appeal before the lower court. The two
- G** notices alluded to above, to say the least, are null and void and of no legal consequence whatsoever, same having been signed by the said “Chief P.C. Ajayi-Obe (SAN) & Co”. The legal consequence is that there was no competent appeal before the lower court and as such no proper judgment
- H** could have been predicated on such incompetent notice of appeal. To take this matter further, it can be said that the court below lacked the jurisdiction to entertain the appeal since the originating process (the notice of appeal) was not before the court. Since it is the notice of appeal which ignites the appellate jurisdiction of the court below, an incompetent notice of appeal
- I** cannot ignite its jurisdiction.

A My Lords, as was decided by my Lord, **Amina Augie**, JSC in the lead judgment, I agree that the only reasonable thing to do at this stage is to strike out the incompetent notice of appeal before the lower court, the fact that it generated a judgment from it, notwithstanding. The said notice of
B appeal is accordingly struck out.

John Inyang Okoro
Justice, Supreme Court

C PAULADAMU GALINJE, (JSC): I have had the advantage of reading in draft the judgment just delivered by my Learned brother Augie JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. In **Okeke Anadi Vs. Okeke Okoli (1977) 11 NSCC. 117**, this
D Court, per Idigbe JSC held:

“The notice of appeal is a very important document because it is the foundation of the appeal and if it is defective, the Court of Appeal has inherent power to strike it out on the ground that it is incompetent.”

E

The amended Notice of appeal before the Court of Appeal in the instant
F case is signed by **“Chief P.C. Ajayi-Obe (SAN) & Co.”** who is not a person entitled to practice as a barrister and solicitor, as it is a firm that is incapable of being enrolled as such. This court has held in a number of cases that a notice of appeal signed by a firm is incompetent and ought to be
G struck out. See **Okafor Vs. Nweke (2007) 10 NWLR (Pt. 1043) 521 FBN Vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444, SLB Consortium Ltd. Vs. NNPC (2016) 9 NWLR (Pt. 1252) 317.**

This court, has been called upon to depart from its previous decisions
H by Ebun-Olu Adegboruwa, learned counsel for the Respondent. Learned counsel argued that section 2(1) and 24 of the Legal Practitioners Act, upon which the previous decisions of this court are based are sections of an Act that was promulgated to regulate legal profession, and that the Act has
I nothing to do with practice and procedure in courts. In a further argument, learned counsel submitted that in certain jurisdiction, lay men are permitted

- A** to file writ of summons, and by the decision in **Fawehinmi Vs. NBA (No. 2) (1989) 2 NWLR (Pt. 105) 558**, this Court defined jural units as having legal personality to include human beings, companies incorporated under the various companies Act, corporation sole with perpetual succession, Trade Unions, Partnership and Friendly Societies. It is learned counsel's submission that the decisions in **Okafor Vs. Nweke (Supra) and FBN Vs. Maiwade** were based on technicalities as such this court should adopt the attitude of doing substantial justice instead of relying on legal technicality.
- C** Learned counsel made extensive submission and finally urge this court to revisit and depart from the decision in **Nweke Vs. Okafor (Sic) (Supra)** and a host of others on similar subject matter in the interest of justice and public policy.

- D** Now, the issue of whether this court should or should not depart from its previous decisions is entirely a new issue. For the respondent to argue a new issue, he ought to have sought for leave to raise it as a ground in his cross appeal. Having failed to cross appeal, all the argument canvassed by his counsel go to no issue. A respondent who has not filed a cross appeal, cannot formulate and argue issues that do not arise from the grounds of appeal filed by the appellant.

- F** Be that as it may, learned counsel has failed to convince me that this court should revisit its decision in **Okafor Vs. Nweke (Supra)**.

For these few words and the more detailed reasoning in the lead judgment, I find merit in this appeal which I allow. The respondent's appeal at the lower court is accordingly struck out for being incompetent.

- G** **Paul Adamu Galinje**
Justice, Supreme Court

- EJEMBI EKO, (JSC):** The respondent, aggrieved by the decision of the High Court of Edo State which dismissed his Suit against the appellants, caused Chief P.C. Ajayi (SAN) & Co. a firm of Legal Practitioners to appeal the decision. The notice of appeal to the Court of Appeal was issued and signed by an unknown proxy "for P.C. Ajayi (SAN) & Co.". By this fact, that case is almost on all fours with the situation in **BOSSOM**

A VENTURES LTD. Vs. F.C.D.A. & ANOR. (2012) NO. CA/A/29/2009 of 14th June, 2012 in which an amended statement of claim, signed by unknown proxy “for R.O. Atabo” of counsel, was held by the Court of Appeal to be incompetent. The rationale for the decision, correct and logical, is that the Legal Practitioners Act that statutorily enabled a Legal Practitioner to act as an agent or proxy of the litigant does not envisage that the Legal Practitioner would further delegate his powers or authority under the Law to an unknown proxy. Delegatus non potest delegare is the basic principle in the law of agency.

In the instant case the unknown proxy of “Chief P.C. Ajayi (SAN) & Co” cannot validly in law settle an originating court process as the notice of appeal. The notice of appeal is consequently void ab initio. In purporting to amend the void process more fundamental errors, going to the root or vires of the originating process, were further committed. Amended Notice of appeal was, this time, signed by “Chief P.C. Ajayi (SAN) & Co.”. This is the same blunder committed in **OKAFOR Vs. NWEKE (2007) 10 NWLR (pt. 1043) 521** and this court stated categorically that the blunder, rendering the originating process defective, goes to the roots. It renders the process invalid.

The law is now settled, if not fossilized, that a court of law lacks the jurisdiction to entertain an incompetent process which renders the proceedings incompetent. A court cannot give judgment upon an incompetent action. **MADUKOLU Vs. NKEDMILIM (1962) 2 SCNLR 341; AJUWA Vs. SPDC (NIG.) LTD. (2008) 10 NWLR (Pt. 1094) 64 at 96.** The Court of Appeal, lacking the necessary competence to entertain the respondent's appeal that was invalid and void ab initio, could not in law give judgment in the incompetent appeal. It was simply that the court erected and rested its judgment upon nothing, and expected it to stand. It cannot stand. **MACFOY Vs. U.A.C. LTD. (1952) A.C. 154.**

The appeal at the Court of Appeal ought to have been struck out for being incompetent. On the basis of the foregoing and the fuller reasons contained in the lead judgment of my learned brother, AMINA ADAMU AUGIE, JSC, which I endorse and concur, I allow the appeal and consequently strike out the respondent's appeal at the Court of Appeal

A between the parties herein.

Ejembi Eko
Justice, Supreme Court

B SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amina Adamu Augie, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is hereby struck out
C by me.

Sidi Dauda Bage,
Justice, Supreme Court

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**CHIFOANI OKORIE
AND
THE STATE**

SC. 640/2014

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

FRIDAY 8TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

**MUSADATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
JOHN INYANG OKORO
AMIRU SANUSI
EJEMBI EKO**

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

APPEAL: Appellate Court – Findings of fact – Interference therewith – Whether an appellate Court will interfere with findings of fact made by a trial court which is perverse.

APPEAL: Appellate Court – Interference with findings – Whether slow in disturbing findings of fact made by a trial court – Rationale thereof.

APPEAL: Concurrent findings – Attitude of Supreme Court thereto.

APPEAL: Reply brief – Nature thereof.

APPEAL: Respondent's reply – Failure thereto – Where a respondent fails to reply to an issue by appellant – Whether does not mean that respondent conceded appeal on that issue.

CONSTITUTIONAL LAW: Fair hearing – Need for counsel to present his

client's case without fear.

CONSTITUTIONAL LAW: Fair hearing – S. 36 of CFRN 1999 – Purport and import.

CONSTITUTIONAL LAW: Presumption of innocence – A person charged has a constitutional right of presumption of innocence – Whether a trial court should not over indulge the prosecution.

COURT: Appellate Court – Duty thereof.

COURT: Decision – Perversity thereof – What amounts – The principle in Atolagbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360.

COURT: Evaluation of evidence – Duty thereof – When an appellate court will interfere – Relevant principles.

COURT: Evaluation of evidence – Duty thereof – Whether the duty of court is to assess witness, form impression about them and then evaluate their evidence – The principle in Dakat vs. Dashe (1997) 12 NWLR (Pt. 531) 46

COURT: Evaluation of evidence – Where court believes the prosecution evidence which was credible that it was the accused that committed the offence – Effect.

COURT: Expert evidence – Where there is conflict in the opinion of the experts – Attitude of Court thereto – Whether should incline to that which is based on proven facts.

CRIMINAL LAW AND PROCEDURE: Alibi – Proof thereof – Onus on defence – Whether does not have onus to prove alibi beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Calling of witness – Whether accused cannot dictate to the prosecution witnesses to be called to prosecute him.

CRIMINAL LAW AND PROCEDURE: Cause of death – Proof thereof – Whether medical evidence is not a sine quo non.

CRIMINAL LAW AND PROCEDURE: Defences – Alibi – Purport – How raised – Whether should be raised at the earliest opportunity – Rationale

CRIMINAL LAW AND PROCEDURE: Evidence – Solitary witness – Whether a solitary witness if believed can establish a criminal case including the offence of murder.

CRIMINAL LAW AND PROCEDURE: Material witness – Obligation to call – Where evidence will settle a vital point one way or the other.

CRIMINAL LAW AND PROCEDURE: Medical evidence – Where there is an eye witness account of cause of death – Whether medical evidence not indispensable.

EVIDENCE: Evaluation – Meaning

Evidence: Expert testimony – S. 68 of Evidence Act 2011 – Nature and significance.

EVIDENCE: Expert witness – Attitude of Court thereto – Whether has discretion therewith.

PRACTICE AND PROCEDURE: Expert evidence – Admissibility thereof – Whether subject to their being no good reason to reject it.

WORDS AND PHRASES: Pathologist – Meaning.

WORDS AND PHRASES: Fair hearing – Meaning.

Issues for Determination

- 1. Was the Court of Appeal right in upholding the decision of the trial court to rely on the evidence of Dr. Gogo Abite, PW4 in arriving at the conclusion that the conviction of the appellant by the trial court was right and sustainable?**
- 2. Was the Court of Appeal right when it upheld the decision of the learned trial judge which rejected the evidence of Dr. Egejuru (PW7) and refused to rely on the autopsy report (Exhibit 4) issued by Dr. Egejuru regarding the cause of death of the deceased?**
- 3. Was the Court of Appeal right when it came to the conclusion that medical evidence was not *sine qua non* for establishing the guilt of the appellant in the circumstance of this case?**
- 4. Whether sustaining the conviction of the appellant for the offence of murder, did not, in the circumstance constitute a denial of the appellant's constitutional right to fair hearing?**
- 5. Was the Court of Appeal right when it proceeded to sustain the conviction of the appellant by the trial court in the circumstance of this case?**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Owerri Division, delivered on 17th July, 2014 wherein the court below affirmed the conviction and sentence to death of the appellant by the High Court of Imo State, holden at

Owerri for the offence of murder. The appellant was one of nine accused persons charged with murder contrary to Section 319 (1) of the Criminal Code, Cap 30 Vol. 11 Laws of Eastern Nigeria 1963 as applicable to Imo State of Nigeria.

The prosecution's case as accepted by the trial court is that on 3rd March, 2005, three of the accused persons, i.e. the 1st accused **James Ugwuoha Duru**, the 6th accused **Sussana Duru** and the 8th accused **Matthias Ohazuruike**, went to the house of the deceased **Nze Dominic Duru** at Amaudara Izombe in Oguta Local Government Area of Imo State to remind him of their previously scheduled arrangement to go to their farmland to, amongst other things, remove the beehive that infested trees.

Upon their arrival at the deceased house, they met his wife and son as the deceased was not at home. They then left for the farmland, instructing the wife and son to tell the deceased to meet them in the farm as earlier agreed. The deceased later came home and when he was told about the visitors and their mission, he left for the farmland on his own bicycle, to meet them.

Later, in the afternoon when the deceased was yet to return, his family became apprehensive and his wife, Mrs. Felicia Duru prepared his lunch and directed his son to take the food to his father in the farm. PW1 thereafter left for the farm on his mother's directives on a bicycle.

On getting nearer the farmland, he heard the muffled cry of his father. Circumspectly, he parked his bicycle at a spot and tip toed closer to the scene, only to see the accused persons, **Mr. Alexander Nnadi, Evans Egbufor, Matthias Ohazuruike, Festa Nuforo, Friday Nuforo, Chifoani Okorie** (appellant herein) attacking his father with dangerous weapons.

When they spotted the son of the deceased, they rushed after him in hot pursuit with their weapons, but he managed to escape and ran for his life. He hid in the bush and after some time elapsed, when he convinced himself that they must have left, he went back to the scene and found his father dead as his dead body was lying between two trees.

Weeping profusely, he went home and reported all that transpired to his brother, warning him not to inform their mother, who was hypertensive about the death of the deceased, until they have made necessary reports to the police.

Later that evening, PW1 went to the house of 1st accused to enquire of his

father's whereabouts but he feigned ignorance of all that transpired and rather dissuaded him from going to the police. He then proceeded to Izombe Police Station to lodge a report that evening but the police were not willing to go to the bush that night as it was already dark. The next morning, the police accompanied the PW1 to the farmland where they recovered the corpse of the deceased and deposited it in the Aladinma hospital mortuary.

Upon investigation by the police, the nine accused persons were arraigned in court for the murder of the deceased. At the conclusion of the trial, eight of the accused persons, except the 6th accused (Sussana Duru) were convicted and sentenced to death.

Dissatisfied with the decision of the learned trial Judge, the appellant appealed to the Court of Appeal. On 17th July, 2014, the lower court delivered its judgment and dismissed the appeal of the appellant.

Further dissatisfied with the judgment of the Court of Appeal, the appellant has appealed to the Supreme Court via a notice of appeal filed on 15th August, 2014.

Held: *(Unanimously dismissing the appeal, Ejembi Eko (JSC) dissenting)*

1. *The nature of a reply brief*

**This further deliberation on the issue in the reply brief is not what a reply brief is supposed to contain. A reply brief is normally filed in answer to substantial points of law or fact raised in the respondent's brief and not an opportunity for the appellant to re-argue his appeal. The content of the reply brief in respect of issue one spanning pages 1 to 6 of the reply brief are in my opinion a re-argue of issues which are already, adequately done in the appellant's brief. That is not what a reply brief should do. See *Yadis Nig. Ltd vs. Great Nigeria Insurance Coy. Ltd* (2007) 14 NWLR (Pt. 1055) P. 584, *Chief P. D. C. Okenwa vs. Military Governor of Imo State & ors.* (1996) 6 NWLR (Pt.455) P. 394, *Dogo vs. The State* (2013) 10 NWLR (Pt. 1361) P. 160.
*(P 165 Paras F–H)***

2. *The significance of Expert witness (S. 68 of Evidence Act 2011).*

There is no doubt that in some matters pending before the courts, there is need for experts or persons specially trained or qualified in

the particular discipline to assist the court by testifying on causation arising from certain phenomena studied only by them. Thus by Section 68 (1) of the Evidence Act, 2011, it is provided as follows:

“68 (1) When the court has to form an opinion upon a point of foreign law, customary law or custom, or of science or art, or as to identity of handwriting or finger impression, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible”.

Such evidence as alluded to above is usually described as “expert evidence”. It is the opinion of the expert that is required on areas that are considered technical for the court's ordinary understanding. Such an expert witness is not to usurp the duty of the court to draw inference from the evidence before the court. All that is expected of the expert is to explain the facts, and based on the proven facts, give his opinion. See *Seismograph Services Nig. Ltd. vs. Robinson Kwavbe Ogbeni* (1979) LPELR 3029 (SC), or 3 SC (Reprint) P. 18 or (1976) ANLR P. 163. (*P 166 Paras A–F*)

3. *When expert evidence is admissible*
Elf Nig. Ltd vs. Sillo & Anor (1994) LPELR 1115 (SC), this court held that if the evidence of an expert is not shaken under cross examination and is uncontradicted, it should be admitted. See *Oyakhire vs. Obaseki* (1986) 1 NWLR (Pt. 19) 735 at 742. I need to emphasize that the admission of such evidence is subject to there being no good reason to reject it, and, in the process of scrutinizing it, could be rejected if there is a reason to do so. See *AG Oyo State vs. Fairlakes Hotels (No.2)* (1989) 5 NWLR (Pt. 121) 255. (*P 166 Paras F–H*)

4. *Attitude of court where there are conflict in the opinion of two experts*
Let me further state clearly that where there are conflict of opinions of two or more experts in their evidence, the court is expected to accept the expert advice which is based on proven facts that is demonstrated to the satisfaction of good reasoning. The court will reject opinion that files against positive facts before it. See Nweke vs. The State (2001) FWLR (Pt. 40) 1595 at 1610 Paragraphs D H. In Joyce vs. Yeoman (1981) 2 All ER 21 at 24, the English Court of Appeal held that where two opposing experts' opinions are conflicting, the trial court is free to accept the opinion of the expert that demonstrates to the satisfaction of the court the likely position of the fact. It must be noted that expert opinion is an advise to the court. The court still has the discretion to accept or reject such opinion depending on the prevailing facts and circumstances of the case. (Pp 166–167 Paras H–C)

Per Okoro (JSC)

“In the instant case the opinions of PW4 Dr. Gogo Abite and that of DW7 Dr. Egejuru were placed before the learned trial judge who, after a careful appraisal of the facts, preferred that of PW4 and rejected that of DW7. The court below affirmed the decision of the learned trial judge. It has to be noted that DW7 was the first Pathologist to be engaged to perform post mortem examination on the body of the deceased. A long line of events transpired which led to the invitation of PW4 to conduct an independent autopsy on the body of the deceased.

First, it was stated in court unequivocally by PW7 the first son of the deceased that DW7 Dr. Egejuru demanded for the sum of N65,000.00 from him before he could conduct the autopsy, thus, PW7 refused to oblige insisting that he would only pay the amount officially charged by government. Secondly, PW7 maintained that Dr. Egejuru was paid the money by one Dr. Onyejiaka who he described as one of the sponsors of the killers of his father and that

Dr. Egejuru's autopsy report was thus, falsified.

Thirdly, that notwithstanding the objections of the family of the deceased, the police at State CID Owerri were insistent on DW7 conducting the post mortem examination. This resulted in the family instituting a case at the Federal High Court, Owerri where they sought and obtained leave to conduct an independent autopsy. This order of court brought Dr. Gogo-Abite on board.

There is also evidence that the family of the deceased felt so strong against the activities of Dr. Egejuru that they petitioned the Medical and Dental Council of Nigeria which constituted a panel to investigate the allegation against Dr. Egejuru.

Clearly, the above and even more viruses were found to have afflicted the autopsy report generated by Dr. Egejuru. In contrast, there is nothing on record which tainted the autopsy report produced by the PW4 Dr. Gogo-Abite except that the learned counsel for the appellant had submitted that a period of one year was too long for PW4 to have been able to still produce an acceptable report on the body of the deceased". (Pp 167–168 Paras C–B)

5. *Duty of trial court is to evaluate evidence*

It is trite that one of the duties of a trial court is to adequately evaluate the evidence adduced in the case and make appropriate findings of facts in respect of all issues arising in the case and material to the determination of the case. It is a well settled principle of law that where a trial court has carried out its assignment satisfactorily, an appellate court shall be loathsome in disturbing those findings. The duty of an appellate court is to see to the following:

1. **Whether there was evidence to support the findings and/or the decision of the trial court.**
2. **Whether the trial court has made correct assessment of the evidence before it.**

3. **Whether the trial court has wrongly accepted or rejected any evidence tendered at the trial and/or**
4. **Whether there has been an erroneous appraisal of facts leading to erroneous conclusions in the case. See Mogaji Lasisi Atanda & ors. vs. Salami Ajani & ors. (1989) LPELR 589 (SC), (1989) 3 NWLR (Pt. 111) P. 511, A. Anyaoke vs. Dr. F. Adi (1986) 3 NWLR (Pt 31) 731 at 742, Odofine & ors. vs. Mogaji & ors (1978) 4 SC 91.**

All I have said above is that an appellate court will not interfere with the findings of a trial court unless it is obvious that the court has not made good use of the unique advantage which it has of seeing, hearing and watching the demeanor of witnesses before it. See Fashanu vs. Adekoya (1974) 1 All NLR 32 and Woluchem vs. S. Dudi (1981) 5 SC 319. (P 168 Paras B–I)

Per Okoro (JSC)

“Based on the findings of the learned trial judge that the evidence of Dr. Egejuru was highly compromised and an attendant rejection of same which was upheld by the court below, is there any reason why this court should disturb the concurrent findings of the two lower courts in the circumstance of this case? I do not think so. I am satisfied with the decision of the Court of Appeal to uphold the judgment of the trial court which rejected the discredited evidence of DW7 Dr. Egejuru and accepted that of Dr. Gogo Abite. It is my view that no court or tribunal worth its salt would accept and/or rely on the autopsy report conducted by Dr. Egejuru having regard to the circumstances surrounding the making of the said report. In fact that report had no evidential value. The trial court was perfectly in order when it decided not to rely on it. That is as much as the issue of preference on the two medical reports is concerned. The above answers issues 1 & 2 of the appellant which are resolved against him”. (P 169 Paras A–D)

6. *The relevance of medical evidence where there is an eye witness account of cause of death.*

Now as regards issue 3, I do not understand this brouhaha about medical report, whereas there is direct evidence of an eye witness who saw the appellant taking part in the beating of the deceased who died on the spot and at the scene. Right from when James Ugwuoha Duru, Sussana Duru and Matthias Ohazuruike who were 1st, 6th and 8th accused persons respectively went to the deceased's house to invite him to the farm to when PW1 took food to the deceased in the farm where he saw the appellant beating up the deceased, up to other evidence thrown up in the process, is clear indication that the appellant took part in the killing of the deceased. The findings of the two courts below are that evidence of PW1 was never shaken on any material particular. It is trite that the court can act on the evidence of a single witness if that witness can be believed given all the surrounding circumstances. That is to say, evidence of one credible witness can establish a case beyond reasonable doubt. See Basil Akalezi vs. The State (1993) LPELR 313 (SC), (1993) 2 NWLR (Pt. 273) P.1. Eke vs. The State (2011) LPELR 1133 (SC), (2011) 3 NWLR (Pt. 1235) P. 589; Onafowokan vs. The State (1987) LPELR 2666 (SC), (1987) 3 NWLR (Pt. 61) Page 538. (P 169 Paras D–H)

7. *Medical evidence is not a sine qua non improving cause of death in a murder charge*

Having said that, the law is well settled that although medical evidence is desirable, a medical report is not a *sine qua non* in determining the cause of death in a murder trial where there are other evidence upon which the cause of death can be inferred to the satisfaction of the court. Thus, the energy and resources spent by the parties to this appeal on the issue of autopsy report flies in the face of the raw facts before the trial court as to the participation of the appellant in the killing of the deceased. I agreed with the Court of Appeal which upheld the decision of the trial court that medical evidence was not really of any moment in the determination of the cause of death of the deceased. See Olusanya Onitayo vs. The State (2017) LPELR 42756 (SC), Ramond Ozo vs. The State (1971) LPELR 289 (SC), (1971) ANLR P. 112, Adekunle vs. The State (1989) 5 NWLR (Pt. 123) 505, Alarape vs The State (2001) 5 NWLR

(Pt. 705) 79.

In sum of all I have said above, I hold the view that the Court of Appeal was right when it held that medical evidence was not a *sine qua non* for establishing the guilt of the appellant having regard to the circumstances of this case. (Pp 169 – 170 Paras H – C)

8. *Failure of respondent to reply to an issue does not mean conceding the appeal on that issue.*

Unfortunately, the court does not have the benefit of the opinion of the learned counsel for the respondent on this issue as she did not formulate any issue with regard to fair hearing nor respond to the argument of learned senior counsel for the appellant on the said issue. In a situation where the respondent fails to respond to argument of the appellant in an issue, does that translate to the respondent conceding the appeal on the issue? I do not think so. This is so because an appellant will succeed on the strength of his case. However, the respondent will be deemed to have admitted the truth of everything stated in the appellants' brief in so far as such is borne out by the records. In other words, an appellant must succeed or fail on his own brief. It is not automatic that where a respondent fails to put in a reply, the appellant has succeeded. The court still has the duty to resolve the issue based on the argument of the appellant vis-a-vis the judgment appealed against, the facts of the case and the applicable law in the circumstance. See *Unity Bank Plc & anor. vs. Mr. Edward Bouari* (2008) LPELR 3411 (SC) (2008) 7 NWLR (Pt. 1086) P. 372. *Mathew Echeré & Son vs. Christopher Ezirike & ors.* (2006) LPELR 1000 (SC), (2006) 12 NWLR (Pt. 994) 386. (P 171 Paras A – E)

9. *The purport of S. 36 of CFRN 1999*

I shall resolve this issue based on the argument of the appellant as presented in his brief.

Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

“36 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality”. (P 171 Paras E – G)

10. *The meaning of fair hearing*
The Blacks' Law Dictionary (Ninth Edition) at page 789 defines the phrase fair hearing as *“A judicial or administrative hearing conducted in accordance with due process.”* In essence, fair hearing means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principle. See INEC vs. Musa (2003) LPELR 24927 (SC) (2003) 3 NWLR (Pt. 806) P. 72, UBN Ltd vs. Nwaokolo (1995) LPELR 3385 (SC). (Pp 171 – 172 Paras H – A)
11. *A counsel should present his client's case without fear or favour*
I entirely agree with the learned senior counsel for the appellant that a person charged with a criminal offence before a court of law is entitled to defend himself and to avail himself of all facilities provided by the law. I am also guided here by the dictum and ever green words of Nnaemeka-Agu, JSC in the case of Okoduwa vs. The State (1988) 2 NWLR (Pt. 76), 333 at 354 wherein the erudite Jurist stated as follows:

“I cannot over-emphasize the fact that in our adversary system of administration of justice, the freedom of counsel to put across his client's case without fear or favour, is a most important ingredient.....

There are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the

inquisitorial system. In that adversary system, parties, with their counsel, and the judge have their respective roles to play.

Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides.....

under no circumstance must a Judge under the system do anything which can give the impression that he has descended into the arena, as obviously, his sense of justice will be obscured.”

With the above admonition in mind, I wish to state clearly that every case is authority for what it decides and that each case is decided based on its peculiar facts and circumstances. What constitutes fair hearing or lack of it in one case may not necessarily apply to another case except the facts and circumstances are the same. See Adamu Suleman vs. COP (2008) LPELR 3126 (SC), (2008) 8 NWLR (Pt. 1089) P. 298. (P 172 Paras A–H)

Per Okoro (JSC)

“There is no doubt that after the DW7 i.e. Dr. Egejuru had tendered Exhibit D4 his autopsy report, the learned trial judge stopped him from giving explanation on the exhibit and stated that Exhibit D4 “Speaks for itself”. It must be noted that before the said Dr. Egejuru gave evidence, the prosecution witnesses had testified chronicling the activities of Dr. Egejuru which include the demand for bribe before he could conduct the autopsy, the payment of money to him by one Dr. Onyejiaka, the alleged sponsor of the killing of the deceased, the filing of case in court for an independent post mortem examination, the intervention of the Inspector General of Police etc etc. This, to my mind weighed heavily on the mind of the learned trial judge and he seems to have taken a position to attach no weight to his report. Moreso, the prosecution had given other evidence to prove the cause of death. In fact, to the court, medical evidence

which the parties were splitting hair was irrelevant. My view is that the circumstances of this case made the trial judge, who had the duty to control the proceedings, to tell him that his report “speaks for itself”. This, to my mind, did not constitute lack of fair hearing at all.

Again, the court below considered the evidence of DW4, DW5 and DW8 at pages 665 667 of the record and held that the learned trial judge was right not to believe their evidence. I do not intend to review the evidence of the three defence witnesses here as there is no reason for the exercise. But let me state clearly that where a court has carefully evaluated evidence placed before it and decides to believe one and disbelieve the other, that exercise of discretion does not, by any stretch of imagination amount to denial of fair hearing. Having been given opportunity to state their case, the learned trial judge did not breach their right to fair hearing”.(Pp 172 – 173 Paras I–F)

12. *The purport of the defence of alibi and how raised*

Lastly, on this issue, the trial court rejected the evidence of DW4 Lady Gladdys Anozie which was only mentioned at the trial of the case based on the fact that in a criminal trial, a party raising a defence of *alibi* must do so at the earliest opportunity so as to enable the police to investigate same. The expression, *alibi*, simply means, “*elsewhere*”. If the defence of an accused person is that he was elsewhere other than the scene of crime at the time the offence was committed, it behoves him to say so at the earliest opportunity and given particulars to enable investigators to see whether it is so. It is in the interest of the accused to give particulars as a confirmation that he was elsewhere may absolve him of complicity in the commission of the offence. See Aliyu vs. The State (2013) LPELR 20748 (SC), (2013) 12 NWLR (Pt. 1368) 403, Ajayi vs. The State (2013) LPELR 19941 (SC), (2013) 9 NWLR (Pt. 1360) 589, Idemudia vs. The State (2015) LPELR 24835 (SC). Since the evidence in support of *alibi* was given only years after the commission of the crime, and for the first time in court, the two courts below were right to have rejected such defence. This also, did not amount to denial of fair, hearing. As it stands, this issue does not avail the appellant. It is thus resolved against him.
(Pp 173 – 174 Paras F--A)

Per Okoro (JSC)

“May I state clearly that, having held earlier in this judgment that the court below was right to affirm the decision of the trial court that medical evidence is not a *sine qua non* in a charge of murder, though desirable, especially where there is direct and uncontrovertible evidence linking the accused with the offence, and having also accepted the decision of the two courts below that the learned trial judge was right to have rejected the autopsy report by DW7 Dr. Egejuru, I do not think I need to say more in this issue as it may amount to beating a dead horse. Be that as it may, a word on the evidence of DW8 will suffice. He is said to be a Neurologist, not a Pathologist. He was invited by the appellant to witness the autopsy by PW4 Dr. Gogo Abite. I cannot fathom how the trial court could have abandoned the evidence of a qualified Pathologist versed in the science of post-mortem examination to rely on the evidence of DW8 who was, as rightly described by the learned trial judge as “a mere observer”. And, in any case, the evidence of PW1, an eye witness to the committing of the offence is so overwhelming such that the splitting of hairs on medical report becomes puerile”.
(P175 Paras F–H)

13. *A solitary witness if believed can establish a criminal case including murder*

The above is the evidence of PW1 in this case. As was observed by the learned counsel for the respondent, the above narration by the PW1 of what he witnessed puts the matter clearly beyond dispute that he identified the appellant as one of the attackers of the deceased on the fateful day. I said it before, may be I will say it again at the risk of repetition that a solitary witness if believed can establish a criminal case, including a charge of murder. See *Mumuni Adisa vs. The State* (2014) LPELR 24221 (SC), *Basil Akpa vs. The State* (2008) LPELR 368 (SC), (2008) 14 NWLR (Pt. 1106) 72, *Basil Akalezi vs. The State* (1993) LPELR 313 (SC), (1993) 2 NWLR (Pt. 273) P.1. An eye witness account of an incident is usually the best evidence in criminal trials. *(Pp 176–177 Paras G–A)*

14. *Evidence of DW5 not relievable*
On the evidence of DW5 who was the Financial Secretary of the village at that time, learned senior counsel for the appellant argued that the trial court ought to have accorded it probative value. The issue is this, he was in the village when the deceased was reported killed in the bush by some of his fellow villagers and yet he kept mute as to what he knew was the cause of death. He did not speak out that it was bees that killed the deceased. As one of the leaders in the community, he ought to have gone to the police when investigations were going on to say that it was bees that killed the deceased and not to wait until years, after for him to appear at the defence stage in court to make such a statement. The question may be asked: Was he part of the team that went to the farmland to cut down the trees infested with bees? Was he present when the deceased died. The truth is that his evidence was an afterthought. The two courts below rejected his evidence and I agree with them totally. (P 177 Paras A–D)
15. *Evidence of DW6 was in accord with evidence of PW1.*
On the evidence of DW6, the mortuary attendant, who testified that he did not see any wound on the body of the deceased when it was brought to the mortuary, I do not know what type of open wound he expected when it is alleged that iron rod and sticks were used to hit the deceased. In view of the evidence of PW1 who saw how his father was killed, the courts below were right to reject the evidence of DW6. (P 177 Paras D–E)
16. *Accused cannot dictate to the prosecution witnesses to be called*
On the argument that the failure to call material and vital witnesses by the prosecution, especially police investigation and Dr. Onejiaka, I agree with the court below that no issue was made against the report at the trial court. Moreso, since the said report was not tendered before the court, it would be speculative to comment on it and/or its contents. Again, PW7 in his testimony in court asserted that Dr. Onyejiaka bribed Dr. Egejuru to falsify the Autopsy Report. Since, as contended by the appellant, the evidence of Dr. Onyejiaka would have been favourable to him, he ought to have invited him to testify for him and not to blame the prosecution for not calling him.

It is trite that although the prosecution is not bound to call a particular witness in order to discharge the burden of proof placed on him by the law before securing conviction, yet the law is very emphatic that where there exists a vital point in issue and there are witnesses whose evidence would settle that issue one way or the other, these witnesses ought to be called. See *State vs. Nnolim* (1994) 5 NWLR (Pt. 345) 394 at 406 C – D, *The State vs. Fatai Azeez & ors.* (2008) LPELR 3215 (SC) (2008) 14 NWLR (Pt. 1108) 439. In the circumstance of this case, I do not think Dr. Onyejiaka would have even agreed to testify for the prosecution that he gave bribe to Dr. Egejuru to falsify the Autopsy Report. It is the defence that ought to have called him.

The above notwithstanding, the prosecution has a discretion to call witnesses of its choice. The prosecution is under no constitutional or statutory duty to call a particular witness or particular witnesses.

An accused person cannot dictate to the prosecution witnesses it should call to prosecute him. See *Ime David Idiok vs. The State* (2008) LPELR 1423 (SC) (2008) 13 NWLR (Pt. 1104) 225, *Adebite vs. The State* (2017) LPELR 42585 (SC), *Emmanuel Okpolor vs. The State* (1990) LPELR 2523 (SC). (*Pp 177–178 Paras F–C*)

17. *Trial court has benefit of observing witnesses*

Before I conclude this issue, may I state that it was the trial court that saw the witnesses during trial and heard their testimonies. This afforded that court the opportunity of observing the demeanour and idiosyncracies of the witnesses. In evaluating the evidence of the witnesses, the trial court is expected to make full use of the opportunity it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusion a reasonable tribunal or court will make.

Once a trial court is satisfied beyond reasonable doubt that on the evidence offered by the prosecution, the accused and no one else committed the offence charged, the court is entitled to enter a finding of guilt against the accused person. This is especially so where the prosecution's evidence emanates from eye witnesses as in this case, whose evidence was believed and whose credibility was not

impugned successfully. See *Ndike vs. The State* (1994) 8 NWLR (Pt. 360) 33. (P 178 Paras – G)

18. *Attitude of Supreme Court to concurrent findings*
Moreso, where there are concurrent findings of fact by two lower courts, this court would not interfere unless the appellant can show that the findings are perverse, not supported by the evidence, that there is a wrongful application of the law or that there has been a miscarriage of justice. In my considered opinion, there is nothing to show that the judgment and/or findings of fact of the two lower courts were perverse or *et all*. See *Sobakin vs. The State* (1981) LPELR 3077 (SC) (1981) 5 SC P. 75, *Nwobodo Ezeudu & ors. vs. Isaac Obiagwu* (1986) LPELR 1213 (SC) (1986) 2 NWLR (Pt. 21) P. 208. (P 178 Paras G–I)
19. *Conviction may be based on the evidence of a single witness*
I wish to observe here that PW1 was the only eye witness to the events that took place on 3/3/2005. His evidence would therefore be of immense value to the court if found to be positive and credible. It is the law that a conviction may be founded upon the evidence of a single witness if accepted and believed by the court. See: *Effiong vs. The State* (1998) 8 NWLR (Pt. 562) 362; *Onafowokan vs. The State* (1987) 3 NWLR (Pt. 61) 538 @ 552; *Sule vs. State* (2009) 17 NWLR (Pt. 1169) 33. (P 182 Paras A–C)
20. *Appellate court is slow in disturbing findings made by a trial court*
It is also important to note that an appellate court is usually reluctant to disturb findings of fact made by the trial court having regard to the fact that the trial court has the exclusive privilege of seeing and hearing the witnesses testify, and ascribing probative value to their evidence in contrast to an appellate court which relies solely on the printed record. See *Ekpa vs. Utong* (1991) 6 NWLR (Pt. 197) 358; *Nwokorobia vs. Nwogu* (2009) 10 NWLR (Pt. 1150) 553; *Makinde vs. Akinwale* (2000) 2 NWLR (Pt. 645) 435. An

appellate court will only interfere where such findings are perverse. The Supreme Court is even more reluctant to interfere where there are concurrent findings of fact made by both the trial and intermediate courts. The learned trial judge who had the singular opportunity of hearing all the witnesses testify and of observing their demeanour found PW1 to be a credible witness. He observed that PW1 was unshaken in his testimony under cross-examination. His Lordship painstakingly evaluated the evidence of this witness alongside other evidence led by the prosecution and found that the prosecution had established its case beyond reasonable doubt. He considered all the issues raised by the defence and was not persuaded that any doubt had been created as to the appellant's part in the commission of the offence. (P182 Paras C – G)

21. *Meaning of a pathologist*

A pathologist is a medical doctor who studies pathology and examines dead bodies to ascertain the cause of death. By Section 68 of the Evidence Act, 2011 that are deemed to be experts. The court has a discretion based on the qualification of the expert and other surrounding facts as to which of the experts to believe. It also has the discretion not to rely on the evidence of either one. See: A.G. Oyo State vs. Fairlakes Hotel (No.2) (1989) 5 NWLR (Pt. 121) 255 @ 291 292 H – A, 292 F – G; Nweke vs. The State (2001) FWLR (Pt. 40) 1595 @ 1610 D – H; Joyce vs. Yeoman (1981) 2 ALL ER 21 @ 24. Having regard to the surrounding circumstances of this case, the learned trial judge was entitled to prefer the testimony of PW4 to that of DW7. I am of the considered view that even without the evidence of PW4 and DW7 the cause of death was established by the eyewitness evidence of PW1. I must also state that having placed the appellant at the scene of the crime, her defence of *alibi* could not stand. The trial court rightly observed that in her statement, Exhibit P20, she did not state that she arrived at school at 7am on the fateful day and left 1.15pm. She also did not mention the headmistress, DW4, or the scenario described during their

testimony. Furthermore, in her testimony, PW1 stated that she left school at 1.15pm on 3/3/2005. PW1 testified that it was when his father had not returned home around 2pm that he was sent to take his lunch to him and this was when he saw him being attacked. If the offence took place around 2pm or thereafter, the appellant's evidence that she left school at 1.15pm does not account for her whereabouts around 2pm.

The evidence of DW5, the village chairman who testified that the deceased was stung by bees is not worthy of any credibility. (Pp 182–183 Paras I–F)

22. *Trial Court properly utilized opportunity of seeing witnesses*
Indeed, even DW7, the witness whose testimony the appellant wanted the court to rely on, did not state that the deceased was stung by bees.

I am of the view that the learned trial judge properly utilised the opportunity of seeing and hearing the witnesses testify to evaluate the evidence and to decide which evidence to believe and which to disbelieve. I agree with the court below that the appellant was unable to show that the findings of the trial court were perverse. I am also not persuaded to interfere with those findings. (P184 Paras A–B)

23. *Appellate court will not “readily interfere with findings made by a trial court.*

I agree with the lower court that the appeal court, on the authority of Irene Nguma (alias Irene Okoli) vs. A.G. Imo State (2014) 7 NWLR (Pt. 1405) 119 at 140, will not readily disturb the findings of fact made by the trial court. The reason for this policy is that:

It was the trial court that saw the witnesses during trial and heard their testimonies. This afforded the trial court the opportunity of observing the demeanor and idiosyncrasies of the witnesses. In evaluating the

evidence of the witnesses, the trial court is expected to make full use of the opportunity it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusions a reasonable tribunal in that circumstance will arrive at. (P189 Paras D – G)

24. *When an appeal court will interfere with findings of a trial court*
The appeal court will, however, interfere with the findings of fact if the findings are clearly perverse and if from the printed record it is clear that the trial court failed to use the opportunity afforded it to properly evaluate the evidence at the trial court. The appellate court, in the circumstance, is competent to re-evaluate the evidence on the record in order to obviate any miscarriage of justice. See *Iwuoha vs. NIPOST (2003) 8 NWLR (Pt. 822) 308 at 343 – 344; Adeye vs. Adesanya (2001) 6 NWLR (Pt. 708) 1 and Iragunima vs. R.S.H.P.D.A. (2003) 12 NWLR (Pt. 834) 427. (Pp 189–190 Paras G–A)*

Ejembi Eko JSC (Dissenting)

1. *The defence does not have the onus to prove Alibi beyond reasonable doubt*
The law does not impose on the defence to prove defence of *alibi* beyond reasonable doubt. The prosecution has the burden of proving the guilt of the accused beyond reasonable doubt, on the contrary. That duty enjoins the prosecution to undertake thorough investigation. In the circumstance is it not reasonable, in their duty to undertake thorough investigation, that the prosecution should have done proper background checks on the DW3, including finding out what she did for a living and finding out if, on the material date, she was at her place of work? The existence and address of the school the DW3 was teaching was not in dispute. Nothing stopped the investigators from going to do the background checks on her, particularly in view of Exhibit P20. (P191 Paras E – G)

2. *A person charged is presumed innocence*

The court, as the adjudicator, should not over indulge the prosecution in their laziness or *laiser faire* attitude to investigation. A person charged for a criminal offence has a constitutional right to be presumed innocent until his guilt is proved beyond reasonable doubt. Accordingly, it is not expected by the Constitution that the onus is on him to prove his innocence to investigators.

The DW5, Samuel Amaechi Nwoke, the Chairman of the village, was not an accused person. He testified as an independent witness. (Pp 191 – 192 Paras G – A)

3. *There is serious doubt on the evidence of PW1*

The DW5's evidence had cast serious doubt on PW1's evidence. If the PW1 knew who killed his father, and he was very emphatic about this at pages 126 and 133 of the record, the why would the same PW1 suggest that oracle be consulted to help them know who killed his father. That is the same PW1 who, allegedly, saw his father being killed, ran home told only his younger brother about it and cajoled him to keep quiet! That is the same PW1 who, throughout the night did nothing to assist the search party find and recover the corpse. He did not tell anybody the location of his father's corpse. The weird behaviour of PW1 should have put the lower courts on guard.

The PW1's evidence is the only evidence the trial court relied on to hold that the appellant was fixed to the scene of crime! The Pw1, himself, from the overwhelming evidence on this issue of consulting oracle to help them identify the cause and killer of his father, was clearly uncertain about how and who killed his father. The DW1, DW2 and DW5 all testified, uncontradicted on this issue of oracle respectively at pages 222, 232, 234 – 237 and 243 – 250 of the record. DW1 and DW2 were emphatic that the oracle indicted the PW1. Thereafter the PW1 proposed that another oracle be consulted. The trial court just glibly and in a terse manner at page 418 of the record dismissed the DW5's evidence as unbelievable without any evaluation. (Pp 192 – 193 Paras D – A)

4. *Duty of court to assess witnesses form impression and evaluate their evidence*

The duty of the trial court to assess the totality of the evidence before it before ascribing probative value to them is undoubted. This court, per Ogwuegbu, JSC, in *Dakat vs. Dashe* (1997) 2 NWLR (Pt. 531) 46, put it thus:

it is without doubt the duty of a trial court to assess witnesses, form impression about them and evaluate their evidence having regard to the impression it formed of the witnesses. (P 193 Paras A – C)

5. *Meaning of evaluation*

Evaluation simply means the assessment of the evidence so as to give value or quality to it. *Onwuka vs. Ediala* (1989) 1 NWLR (Pt. 76) 182 at 208; *Niyi Akintola vs. Buraimoh L. Balogun* (2000) NWLR (Pt. 532) at 549. From the statement of law re-stated in *Odojin & Ors. vs. Mogaji & Ors* (1978) 6 SC 91 at 93, it is imperative that trial court, before coming to decision as to which set of evidence given by a party before it is preferable to another set of facts given in evidence by the other party, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide between the two sets of evidence which one it accepts in preference to the other. It must give its account of this preference. The trial court clearly failed to undertake this preliminarily imperative duty before, from the blues, it dismissed the evidence of DW5 and added that DW5 did not make “statement at Izombe Police Station, State C.I.D. and Zone 9 Umuahia”. The DW5 owes the police no such duty as a busy-body in their affairs. He honourably discharged his civic when he was summoned to tell the truth of what he knew. The trial court had placed on the DW5, and of course on the defence in criminal proceeding, an unnecessary and undeserving responsibility to offer, gratuitously, their defence to the police investigators, who apparently had failed in their statutory duty. (P 193 Paras C – H)

6. *Conviction of appellant was perverse*
There was not even an iota or scintilla of comment made by the trial court on the evidence of DW1 and DW2 affirming the evidence of DW5 that the PW1, uncertain about or not knowing, who or what killed his father suggested that the oracle be consulted to help them know who did it. The failure of the trial court, and the lower court as well, to consider this vital aspect of the defence available as a matter of fact before it has clearly rendered its judgment or the conviction of the appellant very perverse. (Pp 193 – 194 Paras H – A)

7. *When a decision of court is perverse*
In Atolagbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360, this court made it very clear that a decision of a court of law is perverse, among other things, where the court took into consideration matters which it ought not to take into account or deliberately shuts its eyes to the obvious. See also Hamza vs. Kure (2010) 10 NWLR (Pt. 1203) 630 SC; Edoho vs. The State (2004) 5 NWLR (Pt. 865) 17 CA Fatai vs. The State (2013) LPELR 21180 (CA). (P 194 Paras A – C)

8. *Trial Court decision perverse*
Notwithstanding that the DW6 was not challenged or undiscredited in this piece of evidence, the trial court held that the DW6 was one of the witnesses bought by the defence. There is no evidence warranting this uncharitable and perverse holding. The trial court further held at page 419 of the record, that:

under cross-examination he (DW6) could not identify the photographs of the corpse the deceased to have received at Aladinma. (Pp 194 – 195 Paras I – B)

9. *Evidence was not properly evaluated*
The trial court, without attempting any proper evaluation of the evidence of PW4 viz-viz the DW6 and DW7 was merely content and eager to prefer “the evidence of PW4 to that of DW8 which actually

accounted for nothing”. The conclusion is perverse and most preposterous. The evidence of PW4, even on his own showing or admission, was clearly preposterous. The trial court admitted that DW8 “was a mere observer”. So also were the DW6 and DW5.

Surely, and certainly too, had the courts below, particularly the trial court, been guided by Section 126(a) of the Evidence Act, 2011 (formerly Section 76(a) the miscarriage of justice to the appellant would have been averted. By the provisions of the Evidence Act, oral evidence in all cases, if it refers a fact which can be seen shall be the direct evidence of the witness who says he saw or observed that fact. The evidence of the DW5, DW6, DW7 and DW8 refer to the existence or condition of the corpse at the time they each observed them. Even if the evidence of DW8 is not regarded as the expert evidence, as the trial court seemed to suggest at page 420 of the record, it certainly, like the evidence of DW6 and to some extent of DW7, would qualify as “testimonial evidence”, as T. Akinola Aguda would put in paragraph 12 06, page 152 of his book: Law & Practice Relation to Evidence in Nigeria (1980) (Pp 196–197 Paras E–A)

Per Eko (JSC)

“These pieces of evidence supporting the case of the defence are not only material, they are relevant to the facts in issue. The trial court, in my firm view, was seriously in error in holding as it did, at page 420 of the record, that the evidence, particularly of DW8, “has nothing to do with the proceedings in this case”. This wrong appreciation or appraisal of the defence evidence, has in consequence led to the wrong decision upon the totality of the evidence before it. It had clearly abdicated its duty, just also the lower court did, to evaluate the totality of the evidence available before it before determining whether the prosecution had proved their case against the defendant, the appellant herein, beyond reasonable doubt. Boy Muka vs. The State (1976) 10 SC 305. Once the defence has cast serious doubt on the evidence of the prosecution

and the court is reasonably left in a state of doubt, the prosecution would have failed to discharge the onus of proof beyond reasonable doubt, and the prisoner is entitled to be discharged and acquitted in the circumstance. James Ikhane vs. C.O.P (1977) 6 SC 119.

The sum total of all I have been labouring to say is that there was no proper evaluation of the evidential materials before the trial court. The conviction in the circumstance was perverse. The lower court was therefore wrong to have endorsed or affirmed it.

The prosecution procured the evidence of the PW4 and PW7 for some purposes, including the intent to discredit the autopsy report of the DW7, Dr. Egejuru. According to PW7 the accused persons were released on bail on the strength of DW7's autopsy report, and they had to approach the Federal High Court for orders quashing the report and directing a fresh autopsy to be done on the corpse. The prosecution did not call Dr. Egejuru (DW7) as their witness. The defence did. When the DW7 was giving his testimony, without any objection from the prosecutor, the learned trial judge, *suo motu*, intervened and stopped the witness from giving evidence to explain and or throw light on his medical report, Exhibit D4.

(P197 Paras A–H)

10. *Appellant was denied fair hearing*

The appellant, in Issue 4 argued in the appellant's brief, is seriously aggrieved and holds the strong view that the conduct of learned trial judge is tantamount to the denial to the appellant her right to fair hearing guaranteed by the Constitution. In the minutes of the proceedings, at page 256 it is recorded:

when Mr. Nworka wanted to ask question of the things that happened regarding the mortuary the court ruled that Exhibit D4 speaks for itself and refused him doing so.

The allegation, *ex facie* the record, is *res ipsa Loquitur*.

Learned Senior Counsel for the appellant regards this as not only an unwarranted interference of cutting short the defence evidence, but also that the learned trial judge denied the appellant equal procedural equality to present her case. I agree entirely. In the case of Okoduwa vs. The State (1988) 2 NWLR (Pt. 76) 333 at 354, Nnaemeka-Agu, JSC, stated thus:

I cannot over-emphasize the fact that in our adversary system of administration of justice the freedom of counsel to put across his client's case without fear or favour, is most important ingredient

There are certain fundamental norms in the system of administration of justice we operate. The system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system parties, with their counsel, and the judge have their respective roles to play. Basically, the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both parties. Under no circumstance must a judge under the system do anything which can give the impression that he has descended into the arena, as, obviously, his sense of justice be obscured.

The constitution in several provisions, including Sections 17(2)(e) and 36(1) thereof, enjoins every court, including the instant trial court, in the conduct of proceedings for the determination of the civil rights and obligation of every person to always remain independent and impartial.

The intrusion of the learned trial judge to cut short the evidence of the DW7, and throw him to the prosecution for cross-examination at page 257 of the record clearly reflect the mind of a partial judge impatient or eager to deal quickly with a party before

him. (Pp 197–199 Paras H–B)

11. *The purport of fair trial*

In my firm view, reasonable persons sitting in court and watching the proceedings, in the circumstances will infer irresistibly that there is a real likelihood of bias against the DW7 and the eagerness to march the 7th accused (DW3), who is now the appellant, to the gallows. This test of reasonable man was adopted by this court in Deduwa & Ors. vs. Okorodudu (1976) 1 NMLR 236; (1976) 9 – 10 SC 499. Alexander, CJN, delivering the opinion of the court cited with approval the earlier decision of Ademola, CJN in Mohammed vs. Kano N. A. (1968) 1 ALL NLR 424 where at page 426 His Lordship stated that:

a fair hearing must involve a fair trial, and a fair trial consists of the whole hearing. The test of fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation, (whether) justice has been done in the case.

I feel obliged to agree with the Senior Counsel for the appellant that the learned trial judge clearly abdicated his responsibility and duty to conduct this proceeding in question fairly, impartially and independently. I also agree, on authority of Idrisu vs. The State (1967) ALL NLR 12 at 16, that a person charged for a criminal offence before a court of law is entitled to defend himself and to be availed of all facilities provided by law, including the candour and calm comportment of the Judge.

Fair hearing or fair trial means a hearing or trial conducted in accordance with the due process of law or the legal rules formulated to ensure that justice is done to all parties on equal footing Olumesan vs. A.G. Ogundepo (1996) 2 NWLR (Pt. 433) 628 at 644 – 645. It means, also, that the proceedings are conducted in accordance with the relevant laws and rules in contradiction of the whims and

caprices of the Judge. State vs. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 at 56; Bamaiyi vs. The State (2001) 8 NWLR (Pt. 715) 270 at 284; Mohammed vs. Olawunmi (1990) 2 NWLR (Pt. 133) 458.

The trial court, no doubt, had breached the appellant's right to fair hearing or trial guaranteed by Section 36(1) of the 1999 Constitution. The effect of this infraction of the fundamental rights provision of the Constitution is that entire proceeding the judgment or conviction and sentence imposed by the trial court are all a nullity. Mohammed vs. Kano N. A. (supra); KIM vs. The state (1992) NWLR (Pt. 233) 17; Ogboh vs. FRN (2002) 10 NWLR (Pt. 774) 21 at 39.

The consequential effect of the lower court affirming the decision of the trial court that clearly was violative of the fundamental rights provision, as it pertains to the appellant, is that the affirming decision, tainted with fundamental illegality committed by the trial court, like the decision it affirmed, is liable to be set aside. (Pp 199 – 200 Paras D – G)

Nigerian cases cited

A.G. Oyo State vs. Fairlakes Hotel (No.2) (1989) 5 NWLR (Pt. 121) 255
Adamu Suleman vs. COP (2008) LPELR 3126 (SC), (2008) 8 NWLR (Pt. 1089) P. 298.
Adegbite vs. The State (2017) LPELR 42585 (SC),
Adekunle vs. The State (1989) 5 NWLR (Pt. 123) 505,
Adeye vs. Adesanya (2001) 6 NWLR (Pt. 708) 1
AG Oyo State vs. Fairlakes Hotels (No.2) (1989) 5 NWLR (Pt. 121) 255.
Ajayi vs. The State (2013) LPELR 19941 (SC), (2013) 9 NWLR (Pt. 1360) 589,
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Aliyu vs. The State (2013) LPELR 20748 (SC), (2013) 12 NWLR (Pt. 1368) 403,
A. Anyaoke vs. Dr. F. Adi (No 2) (1986) 3 NWLR (Pt. 31) 731,;
Atolagbe vs. Shorun (1985) 1 NWLR (Pt. 2) 360
Bamaiyi vs. The State (2001) 8 NWLR (Pt. 715) 270;
Basil Akalezi vs. The State (1993) LPELR 313 (SC), (1993) 2 NWLR (Pt. 273)

P.1.

Basil Akpa vs. The State (2008) LPELR 368 (SC), (2008) 14 NWLR (Pt. 1106) 72,

Boy Muka vs. The State (1976) 10 SC 305.

Chief P. D. C. Okenwa vs. Military Governor of Imo State & ors. (1996) 6 NWLR (Pt.455) P. 394,

Deduwa & Ors. vs. Okorodudu (1976) 1 NMLR 236; (1976) 9 10 SC 499

Dogo vs. The State (2013) 10 NWLR (Pt. 1361) P. 160.

Edoho vs. The State (2004) 5 NWLR (Pt. 865) 17 CA

Effiong vs. The State (1998) 8 NWLR (Pt. 562) 362;

Eke vs. The State (2011) LPELR 1133 (SC), (2011) 3 NWLR (Pt. 1235) P. 589;

Ekpa vs. Utong (1991) 6 NWLR (Pt. 197) 358;

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Emmanuel Okpolor vs. The State (1990) LPELR 2523 (SC).

Fatai vs. The State (2013) LPELR 21180 (CA).

Fashanu vs. Adekoya (1974) 1 All NLR 32

Hamza vs. Kure (2010) 10 NWLR (Pt. 1203) 630 SC;

Idemudia vs. The State (2015) LPELR 24835 (SC).

Idrisu vs. The State (1967) ALL NLR 12

Ime David Idiok vs. The State (2008) LPELR 1423 (SC) (2008) 13 NWLR (Pt. 1104) 225,

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Irene Nguma (alias Irene Okoli) vs. A.G. Imo State (2014) 7 NWLR (Pt. 1405) 119 at 140,

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Mogaji & ors. vs. Odofine & ors. (1978) 4 SC 91.

Mogaji Lasisi Atanda & ors. vs. Salami Ajani & ors. (1989) LPELR 589 (SC), (1989) 3 NWLR (Pt. 111) P. 511,

Mohammed vs. Kano N. A. (1968) 1 ALL NLR 424
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Ndike vs. The State (1994) 8 NWLR (Pt. 360) 33.
Niyi Akintola vs. Buraimoh L. Balogun (2000) NWLR (Pt. 532) at 549.
Nweke vs. The State (2001) FWLR (Pt. 40) 1595
Nwobodo Ezeudu & ors. vs. Isaac Obiagwu (1986) LPELR 1213 (SC) (1986) 2 NWLR (Pt. 21) P. 208.
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Olafowokan vs. The State (1987) 3 NWLR (Pt. 61) 538;
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Olusanya Onitayo vs. The State (2017) LPELR 42756 (SC),
Onafowokan vs. The State (1987) LPELR 2666 (SC), (1987) 3 NWLR (Pt. 61) Page 538.
Onwuka vs. Ediala (1989) 1 NWLR (Pt. 76) 182;
Oyakhire vs. Obaseki (1986) 1 NWLR (Pt. 19) 735.
Ramond Ozo vs. The State (1971) LPELR 289 (SC), (1971) ANLR P. 112,
Seismograph Services Nig. Ltd. vs. Robinson Kwavbe Ogbeni (1979) LPELR 3029 (SC), or 3SC (Reprint) P. 18 or (1976) ANLR P. 163.
Sobakin vs. The State (1981) LPELR 3077 (SC) (1981) 5 SC P. 75,
State vs. Nnolim (1994) 5 NWLR (Pt. 345) 394;
State vs. Onagoruwa (1992) 2 NWLR (Pt. 221) 33;
The State vs. Fatai Azeez & ors. (2008) LPELR 3215 (SC) (2008) 14 NWLR (Pt. 1108) 439.
Sule vs. The State vs. Sule (2009) 17 NWLR (Pt. 1169) 33.
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A Foreign case cited

Joyce vs. Yeoman (1981) 2 All ER 21 at 24,

Nigerian statutes cited

- B** 1999 Constitution of the Federal Republic of Nigeria S36.
Evidence Act, 2011 S. 68(1).

Representation

- C** D. C. Denwigwe, (SAN), J. E. Ezeuko, (SAN), Emeka Etiaba (SAN), with J. O. Asoluka (Esq.) and Ugochi Nnadika (Esq.) for the appellant.

- D** A. N. Eluwa (Mrs) Solicitor General of Imo State with K. A. Leweanya (Mrs) Asst. Chief State Counsel for the respondent.

E **INYANG OKORO, (JSC) (Delivering the Lead Judgment):** This is an appeal against the judgment of the Court of Appeal, Owerri Division, delivered on 17th July, 2014 wherein the court below affirmed the conviction and sentence to death of the appellant by the High Court of Imo State, holden at Owerri for the offence of murder. The appellant was one of nine accused persons charged with murder contrary to Section 319 (1) of the Criminal Code, Cap 30 Vol. 11 Laws of Eastern Nigeria 1963 as applicable to Imo State of Nigeria. A brief facts leading to this appeal will suffice.

F The prosecution's case as accepted by the trial court is that on 3rd March, 2005, three of the accused persons, i.e. the 1st accused **James Ugwuoha Duru**, the 6th accused **Sussana Duru** and the 8th accused **Matthias Ohazuruike**, went to the house of the deceased **Nze Dominic Duru** at Amaudara Izombe in Oguta Local Government Area of Imo State to remind him of their previously scheduled arrangement to go to their farmland to, amongst other things, remove the beehive that infested trees.

G Upon their arrival at the deceased house, they met his wife and son as the deceased was not at home. They then left for the farmland, instructing the wife and son to tell the deceased to meet them in the farm as earlier agreed. The deceased later came home and when he was told about the

A visitors and their mission, he left for the farmland on his own bicycle, to meet them.

Later, in the afternoon when the deceased was yet to return, his family became apprehensive and his wife, Mrs. Felicia Duru prepared his lunch and directed his son to take the food to his father in the farm. PW1 thereafter left for the farm on his mother's directives on a bicycle.

On getting nearer the farmland, he heard the muffled cry of his father. Circumspectly, he parked his bicycle at a spot and tip toed closer to the scene, only to see the accused persons, **Mr. Alexander Nnadi, Evans Egbufor, Matthias Ohazuruike, Festa Nuforo, Friday Nuforo, Chifoani Okorie** (appellant herein) attacking his father with dangerous weapons.

D When they spotted the son of the deceased, they rushed after him in hot pursuit with their weapons, but he managed to escape and ran for his life. He hid in the bush and after some time elapsed, when he convinced himself that they must have left, he went back to the scene and found his father dead as his dead body was lying between two trees.

E Weeping profusely, he went home and reported all that transpired to his brother, warning him not to inform their mother, who was hypertensive about the death of the deceased, until they have made necessary reports to the police.

F Later that evening, PW1 went to the house of 1st accused to enquire of his father's whereabouts but he feigned ignorance of all that transpired and rather dissuaded him from going to the police. He then proceeded to **G** Izombe Police Station to lodge a report that evening but the police were not willing to go to the bush that night as it was already dark. The next morning, the police accompanied the PW1 to the farmland where they recovered the corpse of the deceased and deposited it in the Aladinma **H** hospital mortuary.

Upon investigation by the police, the nine accused persons were arraigned in court for the murder of the deceased. At the conclusion of the trial, eight of the accused persons, except the 6th accused (Sussana Duru) **I** were convicted and sentenced to death.

A Dissatisfied with the decision of the learned trial Judge, the appellant appealed to the Court of Appeal. On 17th July, 2014, the lower court delivered its judgment and dismissed the appeal of the appellant.

B Further dissatisfied with the judgment of the lower court, the appellant has appealed to this court via a notice of appeal filed on 15th August, 2014. The notice of appeal contains twelve (12) grounds of appeal out of which the appellant has distilled five issues for determination.

C At the hearing of this appeal on 21st September, 2017, the learned senior counsel for the appellant D. C. Denwigwe SAN, leading others, identified, adopted and relied on their brief of argument filed on 10/2/15. The five issues formulated are contained on page 2 of the said brief which state as follows:

D

6. Was the Court of Appeal right in upholding the decision of the trial court to rely on the evidence of Dr. Gogo Abite, PW4 in arriving at the conclusion that the conviction of the appellant by the trial court was right and sustainable?

E

7. Was the Court of Appeal right when it upheld the decision of the learned trial judge which rejected the evidence of Dr. Egejuru (PW7) and refused to rely on the autopsy report (Exhibit 4) issued by Dr. Egejuru regarding the cause of death of the deceased?

F

G

8. Was the Court of Appeal right when it came to the conclusion that medical evidence was not *sine qua non* for establishing the guilt of the appellant in the circumstance of this case?

H

9. Whether sustaining the conviction of the appellant for the offence of murder, did not, in the circumstance constitute a denial of the appellant's constitutional right to fair hearing?

I

A **10. Was the Court of Appeal right when it proceeded to sustain the conviction of the appellant by the trial court in the circumstance of this case?**

B Also, in the brief of the respondent settled by A. N. Eluwa (Mrs), learned Solicitor General of Imo State, leading other counsel, which was filed on 21st June, 2016 but deemed properly filed on 21st September, 2017, four issues are however distilled for the determination of this appeal.

C The issues are as stated hereunder:

D **1. Whether the Court of Appeal was right in upholding the decision of the trial court in accepting the medical evidence of PW4 Dr. Egejuru and DW8 Dr. Onoyona, regarding the cause of death of the deceased.**

E **2. Whether there were material contradictions in the evidence of prosecution witnesses that created doubts in the mind of the trial court capable of vitiating conviction.**

F **3. Whether the trial court considered the defence of *alibi* raised by the appellant and rightly held that same did not avail her, and whether the Court of Appeal was justified in upholding same.**

G **4. Whether the prosecution, on the totality of direct, credible and admissible evidence adduced at the trial, proved the offence of murder against the appellant beyond reasonable doubt warranting her conviction.**

H

I Now, a careful perusal of the grounds of appeal and the issues distilled therefrom, and in view of the fact that the appellant is the party aggrieved with the judgment of the lower court, I shall determine this appeal based on

- A** the five issues formulated by the learned senior counsel for the appellant. In the process, I shall take issues one, two and three together since they all relate to the issue of autopsy and medical evidence. Thereafter, I shall resolve the remaining two issues separately.
- B** On issue one, the learned senior counsel for the appellant picked holes with the evidence of PW4 Dr. Gogo - Abite, the pathologist who performed autopsy on the body of the deceased and generated Exhibit 7, the autopsy report. Apart from his grouse on the length of time between the
- C** death of the deceased and the time Exhibit 7 was generated, he submitted that the areas the PW4 described as wounds were in fact the same areas that had been cut open in the course of an earlier post mortem examination by Dr. Egejuru whom he faulted the respondent's refusal to call him as witness
- D** and also the refusal of the trial court to rely on his autopsy report.
- Learned senior counsel opined that although PW4 claimed to have observed what he referred to as **“brown reactive” or “brown slack reactive”** which enable him to distinguish between what he believed to be
- E** injuries before death and the cuts that were made after the death of the deceased for the purpose of carrying out the earlier post mortem examination, the witness admitted in his report that the body of the deceased he examined was **“that of a poorly preserved adult male**
- F** **consisting of dry skin and bones”**. Learned senior counsel then wondered how the pathologist was able to distinguish the wounds in the circumstance.
- On the evidence of Dr. Egejuru, who concluded that the cause of death was due to **“acute cardio-respiratory failure due to cerebral oedema**
- G** **with tonsilar herniation consequent upon wide spread intravascular blood clots”**, he submitted that there was no challenge whatsoever to the substance of Exhibit 4. It is his view that the learned trial Judge to have preferred that evidence which was not controverted by cross-examination,
- H** relying on the cases of **Waziri vs. The State (1997) 3 NWLR (Pt. 496) 689 at 727, Gaji vs. Paye (2003) 8 NWLR (Pt.823) 583 at 605, Oforlete vs. State (2000) 12 NWLR (Pt.681) 415 at 436, Okoro vs. State (2012) 4 NWLR (Pt.1290) 351 at 373.**
- I** Learned senior counsel submitted further that in the face of the conflict between the evidence of Dr. Gogo Abite (PW4) and Dr. Egejuru

- A** (DW7) both of whom were originally listed as prosecution witnesses, the least that could have been expected of the prosecution was to cross-examine Dr. Egejuru extensively on his evidence and report (Exhibit D4) especially on his claim that the cause of death was due to “*cerebral*
- B** *oedema*” which is totally different from the claims of Dr. Gogo Abite PW4 who attributed the cause of death to “*multiple homicidal injuries*” that in the absence of such extensive cross examination, Dr. Egejuru's evidence ought to have been preferred.
- C** It is his view that although the two courts below agree on their findings as to the cause of death, this court is urged to disturb such findings invoking the exceptions in **Balogun vs. Agboola (1974) 10 SC 111 at 118 119 and Kale vs. Coker (1982) 12 SC 252 at 272**. He concluded that, had
- D** the Court of Appeal correctly taken into consideration the exceptions, it would not have fallen into the error of abdicating its responsibility mainly on the ground that the learned trial judge was entitled to prefer the evidence of Dr. Gogo Abite to that of Dr. Onoyonam (DW8) and Dr. Egejuru (DW7).
- E** On issue 2, the learned senior counsel adopted and relied on their argument in respect of issue No. 1. In addition, he submitted that the evidence of PW7 was unreliable and ought not to have been relied upon by the learned trial judge. That the witness, in one breath said he paid
- F** N20,000.00 to Dr. Egejuru and in another, he said it was N21,000.00 that he paid. Again, that there was no evidence of demand for N100,000.00 and/or N65,000.00. It is his view that the alleged payment of some money by one Dr. Onyejiaka to Dr. Egejuru could not be proved. Learned senior counsel
- G** wondered why the evidence of Dr. Egejuru was rejected while reliance was placed on that of Dr. Gogo Abite.
- As regards issue 3, the learned senior counsel also adopts and relies on his earlier arguments in issues 1 & 2. He submitted further that in view
- H** of the existence of conflicts in the two medical reports produced in this case, it is insufficient to show that this is not one of the cases where the cause of death could be said to be obvious. That the Court of Appeal wrongly relied on the decision in **Emmanuel Ben vs. The State (2006) 16 NWLR (Pt. 1006) 582 at 594 C – G and Jeremiah vs. The State (2012) 14 NWLR (Pt. 1320) 248 at 275**. It is his contention that the evidence
- I**

A before the court was not such as to enable the court to correctly draw a conclusion without the medical evidence that the cause of death was obvious.

Learned senior counsel submitted further that it is clear from the case
B of the prosecution that this was a case it sought to prove through medical evidence including the nature of the wound found on the body of the deceased. That this is clear from the autopsy commissioned by the prosecution. It is his view that having adopted this option, it is no longer
C open to infer the cause of death from other circumstances, relying on **Gabriel vs. The State (1989) 5 NWLR (Pt. 122) 457 at 467 – 468 H – C.**

In the final analysis, the learned senior counsel urged this court to resolve the three issues in favour of the appellant.

D In response on the 1st issue, the learned Solicitor General for Imo State A. N. Eluwa (Mrs) submitted in general that a trial court considering the specialized evidence of experts can choose whom to believe depending on their qualifications, experience and other circumstances surrounding the
E case. According to her the trial court rightly rejected the evidence of DW7 Dr. Egejuru and accepted the evidence of PW4, Dr. Gogo Abite.

Learned Solicitor General narrated the events that transpired; leading to the invitation of Dr. Gogo-Abite to conduct an independent
F autopsy and submitted that the decision of the learned trial judge to reject the evidence of Dr. Egejuru and uphold that Dr. Gogo-Abite remains unassailable. She submitted that assessment of the credibility of witnesses is within the purview of a trial court. According to her, the credibility of Dr.
G Egejuru was severely dented and battered at the trial by the following evident facts:

H 1. **That he demanded for money before carrying out his duties for which he was paid which raises an inference of a dishonest public officer, with a tendency for financial inducement and aggrandizement.**

I

- A** 2. **That when PW7 could not pay the sum demanded, one Dr. Onyejiaka paid him and he conducted the autopsy.**
- B** 3. **That at the trial, Dr. Egejuru did not deny that he received money from Dr. Onyejiaka to falsify the Autopsy Report as alleged.**
- C** 4. **That despite the damning and damaging allegations, the same remained unchallenged throughout cross examination.**
- D** 5. **That in his own testimony, he did not refute the allegation.**

E Learned counsel then submitted that where the trial judge has unquestionably evaluated evidence and justifiably appraised the facts, it is not the business of the appellate court to interfere and/or to substitute its own views for the views of the trial court.

F On the submission of the learned senior counsel for the appellant on the state of the corpse of the deceased when Dr. Gogo-Abite conducted the autopsy, she submitted that medical research has shown that post-mortem examinations can be carried out on a corpse years after death with correct and verifiable results obtained. That the important consideration is the competence of the pathologist involved. It is her further submission that

G when a court has to form an opinion on a point of science or art as to the cause of death, then evidence of persons specially skilled in the area is relevant.

H On the arguments as to whether medical evidence is a *sine qua non* in establishing the cause of death, the learned Solicitor General submitted that it is settled that medical evidence is not a *sine qua non* in all cases to establish cause of death. She opined that where the cause of death is obvious, medical evidence ceases to be of practical necessity especially in

I this case where the deceased died within a short while of the beating by the accused persons, appellant inclusive. She submitted further that an

A accused person can be convicted of murder even if the body was not found, if there is enough compelling circumstantial evidence that the accused killed the deceased relying on **Ahpa vs. State (2008) 163 LRCN 186 at 208, Alarape vs. The State (2001) LRCN 600 at 634, Lori vs. The State (1990) 8 – 11 SC 81.**

B In conclusion, she urged this court to hold that the lower court was justified in upholding the decision of the trial court in accepting the medical evidence of the PW4 Dr. Gogo-Abite while rejecting the medical evidence of the DW7 Dr. Egejuru and DW8 Dr. Onoyona, regarding the cause of death of the deceased, and that the issue be resolved against the appellant.

C A close look at the summary of the submission of the learned Solicitor General in her issue one discloses that she has covered issues 1, 2 and 3 in the appellant's brief earlier summarized. This is so because the three issues are interwoven and ought to have been brought under one issue only. No wonder I decided to resolve them together. I shall thus proceed to resolve them accordingly. Before then, let me refer to a reply brief filed by the appellant on 20/9/17 but deemed properly filed on 21/9/17. With due respect to the learned senior counsel for the appellant, the issue as to why the learned trial judge rejected the evidence of Dr. Egejuru and preferred that of Dr. Gogo-Abite has been extensively argued and responded to in the appellant's and respondent's briefs respectively. This further deliberation on the issue in the reply brief is not what a reply brief is supposed to contain. A reply brief is normally filed in answer to substantial points of law or fact raised in the respondent's brief and not an opportunity for the appellant to re-argue his appeal. The content of the reply brief in respect of issue one spanning pages 1 – 6 of the reply brief are in my opinion a re-argue of issues which are already, adequately done in the appellant's brief. That is not what a reply brief should do. See **Yadis Nig. Ltd vs. Great Nigeria Insurance Coy. Ltd (2007) 14 NWLR (Pt. 1055) P. 584, Chief P. D. C. Okenwa vs. Military Governor of Imo State & ors. (1996) 6 NWLR (Pt.455) P. 394, Dogo vs. The State (2013) 10 NWLR (Pt. 1361) P. 160.**

D The main plank of appellant's grouse against the judgment of the lower court in this first issue relates to its refusal to set aside the decision of the learned trial judge which rejected the evidence of DW7 Dr. Egejuru and

A accepted that of PW4 Dr. Gogo-Abite regarding the cause of death of the deceased. There is no doubt that in some matters pending before the courts, there is need for experts or persons specially trained or qualified in the particular discipline to assist the court by testifying on causation arising from certain phenomena studied only by them. Thus by Section 68 (1) of the Evidence Act, 2011, it is provided as follows:

C **“68 (1) When the court has to form an opinion upon a point of foreign law, customary law or custom, or of science or art, or as to identify of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible”.**

E Such evidence as alluded to above is usually described as **“expert evidence”**. It is the opinion of the expert that is required on areas that are considered technical for the court's ordinary understanding. Such an expert witness is not to usurp the duty of the court to draw inference from the evidence before the court. All that is expected of the expert is to explain the facts, and based on the proven facts, give his opinion. See **Seismograph Services Nig. Ltd. vs. Robinson Kwavbe Ogbeni (1979) LPELR 3029 (SC), or 3SC (Reprint) P. 18 or (1976) ANLR P. 163.**

G In **Elf Nig. Ltd vs. Sillo & anor (1994) LPELR 1115 (SC)**, This court held that if the evidence of an expert is not shaken under cross examination and is uncontradicted, it should be admitted. See **Oyakhire vs. Obaseki (1986) 1 NWLR (Pt. 19) 735 at 742.** I need to emphasize that the admission of such evidence is subject to there being no good reason to reject it, and, in the process of scrutinizing it, could be rejected if there is a reason to do so. See **AG Oyo State vs. Fairlakes Hotels (No.2) (1989) 5 NWLR (Pt. 121) 255.**

I Let me further state clearly that where there are conflict of opinions of two or more experts in their evidence, the court is expected to accept the expert advice which is based on proven facts that is demonstrated to the

- A** satisfaction of good reasoning. The court will reject opinion that files against positive facts before it. See **Nweke vs. The State (2001) FWLR (Pt. 40) 1595 at 1610 Paragraphs D – H**. In **Joyce vs. Yeoman (1981) 2 All ER 21 at 24**, the English Court of Appeal held that where two opposing
- B** experts' opinions are conflicting, the trial court is free to accept the opinion of the expert that demonstrates to the satisfaction of the court the likely position of the fact. It must be noted that expert opinion is an advise to the court. The court still has the discretion to accept or reject such opinion
- C** depending on the prevailing facts and circumstances of the case.

- In the instant case the opinions of PW4 Dr. Gogo Abite and that of DW7 Dr. Egejuru were placed before the learned trial judge who, after a careful appraisal of the facts, preferred that of PW4 and rejected that of
- D** DW7. The court below affirmed the decision of the learned trial judge. It has to be noted that DW7 was the first Pathologist to be engaged to perform post mortem examination on the body of the deceased. A long line of events transpired which led to the invitation of PW4 to conduct an
- E** independent autopsy on the body of the deceased.

- First, it was stated in court unequivocally by PW7 the first son of the deceased that DW7 Dr. Egejuru demanded for the sum of N65,000.00 from him before he could conduct the autopsy, thus, PW7 refused to oblige
- F** insisting that he would only pay the amount officially charged by government. Secondly, PW7 maintained that Dr. Egejuru was paid the money by one Dr. Onyejiaka who he described as one of the sponsors of the killers of his father and that Dr. Egejuru's autopsy report was thus, falsified.

- G** Thirdly, that notwithstanding the objections of the family of the deceased, the police at State CID Owerri were insistent on DW7 conducting the post mortem examination. This resulted in the family instituting a case at the Federal High Court, Owerri where they sought and
- H** obtained leave to conduct an independent autopsy. This order of court brought Dr. Gogo-Abite on board.

- There is also evidence that the family of the deceased felt so strong against the activities of Dr. Egejuru that they petitioned the Medical and
- I** Dental Council of Nigeria which constituted a panel to investigate the allegation against Dr. Egejuru.

A Clearly, the above and even more viruses were found to have afflicted the autopsy report generated by Dr. Egejuru. In contrast, there is nothing on record which tainted the autopsy report produced by the PW4 Dr. Gogo-Abite except that the learned counsel for the appellant had

B submitted that a period of one year was too long for PW4 to have been able to still produce an acceptable report on the body of the deceased.

It is trite that one of the duties of a trial court is to adequately evaluate the evidence adduced in the case and make appropriate findings of facts in

C respect of all issues arising in the case and material to the determination of the case. It is a well settled principle of law that where a trial court has carried out its assignment satisfactorily, an appellate court shall be loathsome in disturbing those findings. The duty of an appellate court is to

D see to the following:

- 5. Whether there was evidence to support the findings and/or the decision of the trial court.**
- E**
- 6. Whether the trial court has made correct assessment of the evidence before it.**
- F**
- 7. Whether the trial court has wrongly accepted or rejected any evidence tendered at the trial and/or**
- G**
- 8. Whether there has been an erroneous appraisal of facts leading to erroneous conclusions in the case. See Mogaji Lasisi Atanda & ors. vs. Salami Ajani & ors. (1989) LPELR 589 (SC), (1989) 3 NWLR (Pt. 111) P. 511, A. Anyaoke vs. Dr. F. Adi (1986) 3 NWLR 731 at 742, Mogaji & ors. vs. Odofine & ors. (1978) 4 SC 91.**
- H**

All I have said above is that an appellate court will not interfere with the findings of a trial court unless it is obvious that the court has not made good use of the unique advantage which it has of seeing, hearing and watching the demeanor of witnesses before it. See **Fashanu vs. Adekoya (1974) 1 All NLR 35 and Woluchem vs. S. Gudi (1981) 5 SC 319.**

I

- A** Based on the findings of the learned trial judge that the evidence of Dr. Egejuru was highly compromised and an attendant rejection of same which was upheld by the court below, is there any reason why this court should disturb the concurrent findings of the two lower courts in the circumstance of this case? I do not think so. I am satisfied with the decision of the Court of Appeal to uphold the judgment of the trial court which rejected the discredited evidence of DW7 Dr. Egejuru and accepted that of Dr. Gogo Abite. It is my view that no court or tribunal worth its salt would accept and/or rely on the autopsy report conducted by Dr. Egejuru having regard to the circumstances surrounding the making of the said report. In fact that report had no evidential value. The trial court was perfectly in order when it decided not to rely on it. That is as much as the issue of preference on the two medical reports is concerned. The above answers issues 1 & 2 of the appellant which are resolved against him.
- B**
- C**
- D** Now as regards issue 3, I do not understand this brouhaha about medical report, whereas there is direct evidence of an eye witness who saw the appellant taking part in the beating of the deceased who died on the spot and at the scene. Right from when James Ugwuoha Duru, Sussana Duru and Matthias Ohazuruike who were 1st, 6th and 8th accused persons respectively went to the deceased's house to invite him to the farm to when PW1 took food to the deceased in the farm where he saw the appellant beating up the deceased, up to other evidence thrown up in the process, is clear indication that the appellant took part in the killing of the deceased.
- E**
- F** The findings of the two courts below are that evidence of PW1 was never shaken on any material particular. It is trite that the court can act on the evidence of a single witness if that witness can be believed given all the surrounding circumstances. That is to say, evidence of one credible witness can establish a case beyond reasonable doubt. See **Basil Akalezi vs. The State (1993) LPELR 313 (SC), (1993) 2 NWLR (Pt. 273) P.1. Eke vs. The State (2011) LPELR 1133 (SC), (2011) 3 NWLR (Pt. 1235) P. 589; Onafowokan vs. The State (1987) LPELR 2666 (SC), (1987) 3 NWLR (Pt. 61) Page 538.**
- G**
- H** Having said that, the law is well settled that although medical evidence is desirable, a medical report is not a *sine qua non* in determining the cause of death in a murder trial where there are other evidence upon which the cause of death can be inferred to the satisfaction of the court.
- I** Thus, the energy and resources spent by the parties to this appeal on the issue of autopsy report flies in the face of the raw facts before the trial court

A as to the participation of the appellant in the killing of the deceased. I
agreed with the Court of Appeal which upheld the decision of the trial court
that medical evidence was not really of any moment in the determination of
the cause of death of the deceased. See **Olusanya Onitayo vs. The State**
B **(2017) LPELR 42756 (SC)**, **Raymond Ozo vs. The State (1971) LPELR**
289 (SC), **(1971) ANLR P. 112**, **Adekunle vs. The State (1989) 5 NWLR**
(Pt. 123) 505, **Alarape vs The State (2001) 5 NWLR (Pt. 705) 79**.

In sum of all I have said above, I hold the view that the Court of
Appeal was right when it held that medical evidence was not a *sine qua non*
C for establishing the guilt of the appellant having regard to the
circumstances of this case. The third issue, as it turns out, is also resolved
against the appellant.

The fourth issue which I intend to treat separately is whether
D sustaining the conviction of the appellant for the offence of murder, did not,
in the circumstances constitute a denial of the appellant's constitutional
right to fair hearing. The learned senior counsel for the appellant argued
that the learned trial judge refused to allow the DW7 Dr. Egejuru to give
evidence to explain or throw light on his medical report Exhibit 4 as the
E court ruled that "Exhibit D4 speaks for itself". Learned senior counsel
wondered why Dr. Gogo Abite was given ample time to explain the
contents of his autopsy report Exhibit P7. Learned counsel also picked
hole with the learned trial judge's refusal to allow the DW7 to conclude his
F evidence in chief. It is his view that the learned trial judge was in error and
that the Court of Appeal ought to have appreciated that the conduct of the
trial judge constituted a denial of the appellant's right to fair hearing,
relying on the case of **Okoduwa vs. The State (1988) 2 NWLR (Pt. 76)**
333 at 354.

G Learned senior counsel also submitted that the learned trial judge
denied the appellant the benefit of the evidence of DW4, DW5 and DW8 by
disbelieving them and this constituted denial of fair hearing. According to
learned counsel, fair hearing lies in the procedure followed by the court,
H citing the case of **State vs. Onagorowa (1982) 2 NWLR (Pt. 221) 33 at 56**,
Bamaiyi vs. State (2001) 8 NWLR (Pt. 715) 270 at 280, **Olumesan vs.**
AG Ogundepo (1996) 2 NWLR (Pt. 443) 628 at 644 – 645.

I According to learned senior counsel, the effect of breach of fair
hearing renders the entire proceedings, including the judgment a nullity.
Learned Silk cited the cases of **Salu vs. Egeighon (1994) 6 NWLR (Pt.**
348) 23 at 44, **Ogbon vs. FRN (2002) 10 NWLR (Pt. 774) 21 at 39**

A amongst others, in support. He urged the court to resolve this issue in favour of the appellant.

B Unfortunately, the court does not have the benefit of the opinion of the learned counsel for the respondent on this issue as she did not formulate any issue with regard to fair hearing nor respond to the argument of learned senior counsel for the appellant on the said issue. In a situation where the respondent fails to respond to argument of the appellant in an issue, does that translate to the respondent conceding the appeal on the issue? I do not think so. This is so because an appellant will succeed on the strength of his case. However, the respondent will be deemed to have admitted the truth of everything stated in the appellants' brief in so far as such is borne out by the records. In other words, an appellant must succeed or fail on his own brief. It is not automatic that where a respondent fails to put in a reply, the appellant has succeeded. The court still has the duty to resolve the issue based on the argument of the appellant vis-a-vis the judgment appealed against, the facts of the case and the applicable law in the circumstance. See **Unity Bank Plc & anor. vs. Mr. Edward Bouari (2008) LPELR 3411 (SC) (2008) 7 NWLR (Pt. 1086) P. 372. Mathew Echere & Son vs. Christopher Ezinke & ors. (2006) LPELR 1000 (SC), (2006) 12 NWLR (Pt. 994) 386.** I shall resolve this issue based on the argument of the appellant as presented in his brief.

F Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

G **“36 (1) In the determination of his civil rights and obligations, including any question of determination by or against any government of authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality”.**

H The Blacks' Law Dictionary (Ninth Edition) at page 789 defines the phrase fair hearing as **“A judicial or administrative hearing conducted in accordance with due process.”** In essence, fair hearing means giving equal opportunity to the parties to be heard in the litigation before the court. I Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principle. See **INEC vs. Musa (2003) LPELR**

A 24927 (SC) (2003) 3 NWLR (Pt. 806) P. 72, UBN Ltd vs. Nwaokolo (1995) LPELR 3385 (SC).

B I entirely agree with the learned senior counsel for the appellant that a person charged with a criminal offence before a court of law is entitled to defend himself and to avail himself of all facilities provided by the law. I am also guided here by the dictum and ever green words of **Nnaemeka-Agu, JSC** in the case of **Okoduwa vs. The State (1988) 2 NWLR (Pt. 76), 333 at 354** wherein the erudite Jurist stated as follows:

C “I cannot over-emphasize the fact that in our adversary system of administration of justice, the freedom of counsel to put across his client's case without fear or favour, is a most important ingredient.....

D There are certain fundamental norms in the system of administration of justice we operate. The system is the adversary system, in contradistinction to the inquisitional system. In that adversary system, parties, with their counsel, and the judge have their respective roles to play.

E Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides.....

F under no circumstance must a Judge under the system do anything which can give the impression that he has descended into the arena, as obviously, his sense of justice will be obscured.”

G

H With the above admonition in mind, I wish to state clearly that every case is authority for what it decides and that each case is decided based on its peculiar facts and circumstances. What constitutes fair hearing or lack of it in one case may not necessarily apply to another case except the facts and circumstances are the same. See **Adamu Suleman Vs. COP (2008) LPELR 3126 (SC), (2008) 8 NWLR (Pt. 1089) P. 298.**

I There is no doubt that after the DW7 i.e. Dr. Egejuru had tendered Exhibit D4 his autopsy report, the learned trial judge stopped him from

- A** giving explanation on the exhibit and stated that Exhibit D4 “**Speaks for itself**”. It must be noted that before the said Dr. Egejuru gave evidence, the prosecution witnesses had testified chronicling the activities of Dr. Egejuru which include the demand for bribe before he could conduct the autopsy,
- B** the payment of money to him by one Dr. Onyejiaka, the alleged sponsor of the killing of the deceased, the filing of case in court for an independent post mortem examination, the intervention of the Inspector General of Police etc etc. This, to my mind weighed heavily on the mind of the learned trial judge and he seems to have taken a position to attach no weight to his report.
- C** Moreso, the prosecution had given other evidence to prove the cause of death. In fact, to the court, medical evidence which the parties were splitting hair was irrelevant. My view is that the circumstances of this case made the trial judge, who had the duty to control the proceedings, to tell him that his report “**speaks for itself**”. This, to my mind, did not constitute lack of fair hearing at all.

- Again, the court below considered the evidence of DW4, DW5 and DW8 at pages 665 667 of the record and held that the learned trial judge was right not to believe their evidence. I do not intend to review the evidence of the three defence witnesses here as there is no reason for the exercise. But let me state clearly that where a court has carefully evaluated evidence placed before it and decides to believe one and disbelieve the other, that exercise of discretion does not, by any stretch of imagination amount to denial of fair hearing. Having been given opportunity to state their case, the learned trial judge did not breach their right to fair hearing.

- Lastly, on this issue, the trial court rejected the evidence of DW4 Lady Gladdys Anozie which was only mentioned at the trial of the case based on the fact that in a criminal trial, a party raising a defence of *alibi* must do so at the earliest opportunity so as to enable the police to investigate same. The expression, *alibi*, simply means, “*elsewhere*”. If the defence of an accused person is that he was elsewhere other than the scene of crime at the time the offence was committed, it behoves him to say so at the earliest opportunity and given particulars to enable investigators to see whether it is so. It is in the interest of the accused to give particulars as a confirmation that he was elsewhere may absolve him of complicity in the commission of the offence. See *Aliyu vs. The State (2013) LPELR 20748 (SC)*, (2013) 12 NWLR (Pt. 1368) 403, *Ajayi vs. The State (2013) LPELR 19941 (SC)*, (2013) 9 NWLR (Pt. 1300) 589, *Idemudia vs. The State (2015) LPELR 24835 (SC)*. Since the evidence in support of *alibi*

A was given only years after the commission of the crime, and for the first time in court, the two courts below were right to have rejected such defence. This also, did not amount to denial of fair, hearing. As it stands, this issue does not avail the appellant. It is thus resolved against him.

B I am now left with issue 5. This is issue 4 in the respondent's brief of argument. The learned senior counsel for the appellant, apart from adopting his earlier arguments in issues 1, 2, 3 and 4, submitted that the evidence of DW8 who was described as a mere observer by the learned trial judge is a person whose evidence qualifies as direct evidence under the law.

C That his testimony related to what he saw with his eyes with regard to the state of the physical body of the deceased at the time the PW4 performed his post-mortem examination. Learned counsel argued that a Neurologist i.e. DW8 is a specialist in the area of pathology. He submitted that if the court below had taken this into consideration, it would not have sustained the refusal of the learned trial judge to rely on the evidence of DW8.

D Furthermore, the learned senior counsel also referred to the evidence of DW5 which the two courts below refused to believe. It is his view that a careful appraisal of his evidence will reveal that he is a witness of truth and ought to have been believed. Learned Silk also referred to the evidence of DW6 one Emeh Ugwu who described himself as a mortician and who also said that when the corpse was brought to the mortuary, there was no wound on the body of the deceased.

E The learned senior counsel appraised the evidence of prosecution witnesses and submitted that their evidence was weak and was not strong enough to convict the appellant. That the appellant ought to have been accorded the benefit of reasonable doubt relying on the cases of **Bubuga vs. The State (1995) 5 NWLR (Pt. 395) 328 at 347**, **Adelu vs. The State (2014) 13 NWLR (Pt. 1425) 465 at 524**.

F Learned counsel also submitted that material and vital witnesses were not called by the prosecution especially on police investigation. It is his view that the failure is fatal to the prosecution's case, relying on the case of **Oshodin vs. The State (2001) 12 NWLR (Pt. 726) 217 at 234**. He then urged the court to hold that the court below was wrong to uphold the decision of the trial court as the case of the prosecution was not proved beyond reasonable doubt.

G In response, the learned Solicitor General for Imo State submitted that the prosecution, through admissible evidence led at the trial, established that the death of the deceased resulted from the act of the

A accused/appellant. Referring to the evidence of PW1, she submitted that there was incontrovertible and positive evidence linking the acts of the appellant with the death of the deceased. According to her, an eye witness testimony is usually the best evidence in criminal trials, citing the case of **B Oyekhire vs. The State (2005) 15 NWLR (Pt. 47) P. 169 at 180**. It is her submission that evidence of one credible witness can ground a conviction, relying of **Oluwatoba vs. The State (1985) 28 CR 357 at 362, Ekpenyong vs. The State (1994) 6 NWLR (Pt. 200) P. 583**.

C On the rejection of the evidence of DW4, DW5 and DW8, learned counsel submitted that there were ample justifiable reasons discernible from the evidence on record, upon which the trial court based its decision in rejecting the evidence proffered by those witnesses. It is her view that it is within the judicial role of a trial judge to hear and evaluate evidence, with a view to either believing or disbelieving the witnesses called at the trial.

D The learned Solicitor General finally submitted that where the concurrent findings, of fact and resultant judgments of the two lower courts are neither perverse nor manifestly wrong, the Supreme Court does not interfere, relying on **Babarinde vs. The State (2014) 10 NCC 567 at 606** **E 607**. She then urged the court to resolve this issue against the appellant.

F May I state clearly that, having held earlier in this judgment that the court below was right to affirm the decision of the trial court that medical evidence is not a *sine qua non* in a charge of murder, though desirable, especially where there is direct and incontrovertible evidence linking the accused with the offence, and having also accepted the decision of the two courts below that the learned trial judge was right to have rejected the autopsy report by DW7 Dr. Egejuru, I do not think I need to say more in this issue as it may amount to beating a dead horse. Be that as it may, a word on the evidence of DW8 will suffice. He is said to be a Neurologist, not a Pathologist. He was invited by the appellant to witness the autopsy by PW4 Dr. Gogo Abite. I cannot fathom how the trial court could have abandoned the evidence of a qualified Pathologist versed in the science of post-mortem examination to rely on the evidence of DW8 who was, as rightly described by the learned trial judge as “a mere observer”. And, in any case, the evidence of PW1, an eye witness to the committing of the offence is so overwhelming such that the splitting of hairs on medical report becomes puerile.

I For the avoidance of doubt, let me reproduce part of the evidence of PW1 in this judgment for ease of reference:- **See PP 123 – 129 of the**

A record.

B *“On 3rd March, 2005, in accordance with their arrangement with my father, Mathias Ohazuruike 8th accused, James Ugwuoha Duru 1st accused and Sussana Duru 6th accused came to our house to inform us to tell my father who was not in the house that he should meet them in the bush as they planned. The bush was “Okporo” farmland the venue of the murder..... when my father came back around after*

C *10am, my mother and I delivered the message to him. He quickly ate his breakfast and left to meet them in the farmland..... up to 2pm my father did not come back. My mother prepared lunch and put in his lunch bag and gave me to send to him. There is a track foot that leads to the farmland. That is where I alighted. I overheard the muffled cry of my father as if he was in great pain. I tip toed to close inside the bush. I saw Mathias Ohazuruike Hitter 8th accused, both of them were with iron rods. Also saw Mr. Alexander Nnadi 10th accused with a knife and harmer. Chifoani Okorie 7th accused and Friday Nuforo 4th accused when they held my father on the ground and Festa Nuforo 2nd accused was hitting my father with a stick. I rushed to rescue him but 10th and 8th accused came after me with their weapons. I ran back and dodged into the bush. They lost torch of me. When they could not get me, they went back. When they had all left the scene, I went back to the scene. When I got to the scene, I discovered that they had killed him and hid the body in between two trees. I wept.....*

D

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H The above is the evidence of PW1 in this case. As was observed by the learned counsel for the respondent, the above narration by the PW1 of what he witnessed puts the matter clearly beyond dispute that he identified the appellant as one of the attackers of the deceased on the fateful day. I said it before, may be I will say it again at the risk of repetition that a solitary witness if believed can establish a criminal case, including a charge of murder. See **Mumuni Adisa vs. The State (2014) LPELR 24221 (SC)**, **Basil Alypa vs. The State (2008) LPELR 368 (SC)**, **(2008) 14 NWLR (Pt. 1106) 72**, **Basil Akalezi vs. The State (1993) LPELR 313 (SC)**,

I

A (1993) 2 NWLR (Pt. 273) P.1. An eye witness account of an incident is usually the best evidence in criminal trials.

B On the evidence of DW5 who was the Financial Secretary of the village at that time, learned senior counsel for the appellant argued that the trial court ought to have accorded it probative value. The issue is this, he was in the village when the deceased was reported killed in the bush by some of his fellow villagers and yet he kept mute as to what he knew was the cause of death. He did not speak out that it was bees that killed the deceased. As one of the leaders in the community, he ought to have gone to the police when investigations were going on to say that it was bees that killed the deceased and not to wait until years, after for him to appear at the defence stage in court to make such a statement. The question may be asked: Was he part of the team that went to the farmland to cut down the trees infested with bees? Was he present when the deceased died. The truth is that his evidence was an afterthought. The two courts below rejected his evidence and I agree with them totally.

C On the evidence of DW6, the mortuary attendant, who testified that he did not see any wound on the body of the deceased when it was brought to the mortuary, I do not know what type of open wound he expected when it is alleged that iron rod and sticks were used to hit the deceased. In view of the evidence of PW1 who saw how his father was killed, the courts below were right to reject the evidence of DW6.

D On the argument that the failure to call material and vital witnesses by the prosecution, especially police investigation and Dr. Onejiaka, I agree with the court below that no issue was made against the report at the trial court. Moreso, since the said report was not tendered before the court, it would be speculative to comment on it and/or its contents. Again, PW7 in his testimony in court asserted that Dr. Onyejiaka bribed Dr. Egejuru to falsify the Autopsy Report. Since, as contended by the appellant, the evidence of Dr. Onyejiaka would have been favourable to him, he ought to have invited him to testify for him and not to blame the prosecution for not calling him.

E It is trite that although the prosecution is not bound to call a particular witness in order to discharge the burden of proof placed on him by the law before securing conviction, yet the law is very emphatic that where there exists a vital point in issue and there are witnesses whose evidence would settle that issue one way or the other, these witnesses ought to be called. See **State vs. Nnolim (1994) 5 NWLR (Pt. 345) 394 at 406 C – D, The**

- A State vs. Fatai Azeez & ors. (2008) LPELR 3215 (SC) (2008) 14 NWLR (Pt. 1108) 439.** In the circumstance of this case, I do not think Dr. Onyejiaka would have even agreed to testify for the prosecution that he gave bribe to Dr. Egejuru to falsify the Autopsy Report. It is the defence that ought to have called him.
- B** The above notwithstanding, the prosecution has a discretion to call witnesses of its choice. The prosecution is under no constitutional or statutory duty to call a particular witness or particular witnesses.
- C** An accused person cannot dictate to the prosecution witnesses it should call to prosecute him. See **Ime David Idiok vs. The State (2008) LPELR 1423 (SC) (2008) 13 NWLR (Pt. 1104) 226, Adegbite vs. The State (2017) LPELR 42585 (SC), Emmanuel Okpolor vs. The State (1990) LPELR 2523 (SC).**
- D** Before I conclude this issue, may I state that it was the trial court that saw the witnesses during trial and heard their testimonies. This afforded that court the opportunity of observing the demeanour and idiosyncracies of the witnesses. In evaluating the evidence of the witnesses, the trial court is expected to make full use of the opportunity it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusion a reasonable tribunal or court will make.
- E** Once a trial court is satisfied beyond reasonable doubt that on the evidence offered by the prosecution, the accused and no one else committed the offence charged, the court is entitled to enter a finding of guilt against the accused person. This is especially so where the prosecution's evidence emanates from eye witnesses as in this case, whose evidence was believed and whose credibility was not impugned successfully. See **Ndike vs. The State (1994) 8 NWLR (Pt. 336) 33.**
- F** Moreso, where there are concurrent findings of fact by two lower courts, this court would not interfere unless the appellant can show that the findings are perverse, not supported by the evidence, that there is a wrongful application of the law or that there has been a miscarriage of justice. In my considered opinion, there is nothing to show that the judgment and/or findings of fact of the two lower courts were perverse or *et all*. See **Sobakin vs. The State (1981) LPELR 3077 (SC) (1981) 5 SC P. 75, Nwobodo Ezendu & ors. vs. Isaac Obiagwu (1986) LPELR 1213 (SC) (1986) 2 NWLR (Pt. 21) P. 208.** What remains now to be said is that issue five does not also avail the appellant.
- G**
- H**
- I**

A Having resolved the five issues nominated by the learned silk for the determination of this appeal against the appellant, this appeal is adjudged devoid of any scintilla of merit. It is accordingly dismissed by me. The judgment of the Court of Appeal which upheld the conviction and sentence of the appellant is further affirmed by this court.

B Appeal is hereby dismissed.

John Inyang Okoro
Justice, Supreme Court

C **KEKERE-EKUN, (JSC):** I have had the benefit of reading in draft the judgment of my learned brother, John Inyang Okoro, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed. My learned brother has adequately addressed the issues in contention in the appeal. I shall add some words of my own in support.

E This is a case in which a lot of energy has been expended in challenging the evidence surrounding the autopsy reports that emanated from different experts as to the cause of death of the deceased. The law is quite well settled that though medical evidence is desirable, where there is other evidence upon which the cause of death could be inferred, it is not essential for the court to have recourse to a medical report. The court may also infer the cause of death from the facts and circumstances of the case. Where the cause of death is obvious, medical evidence ceases to be of practical necessity, as in a situation where the deceased died immediately from the voluntary act of the accused person. See: **Ogbu & Anor vs. The State (2007) 5 NWLR (Pt. 1028) 635; Ahmed vs. The State (2001) 18 NWLR (Pt. 746) 622; Adekunle vs. The State (1989) 5 NWLR (Pt. 123) 505; Haruna vs. A.G. Federation (2012) LPELR 7821 (SC).**

H PW1, the son of the deceased testified that some of the accused persons, namely the 1st, 6th and 8th accused came to their house on the fateful day, 3/3/2005, to remind his father of their earlier agreement to go to the farm and cut down a palm tree with a beehive in order to remove the beehive. His father was not at home but he delivered the message when he returned, whereupon he proceeded to the farm to join the others. His

A mother gave him some lunch to take to his father at the farm when he had not returned by 2pm. He narrated how he heard his father's cries of distress as he approached the farm on his bicycle. He stated that on moving closer, he saw the 8th accused, Mathias Ohazuruike, 9th accused, Evans Egbufor
B with iron rods, while the 2nd accused Alexander Nnadi had a knife and hammer. He also saw the appellant (7th accused) and 4th accused Friday Nufuro holding his father on the ground while the 3rd accused, Festus Nufuro was beating him with a stick. He testified that he tried to rescue his
C father but was chased away by the 3rd and 4th accused persons. He ran away and was able to escape from them. He later discovered his father's lifeless body lying between two trees. He testified as to how he reported the incident to his brother, Walter Chibuike Duru (PW3) who advised that his
D mother should not be informed at that time due to her state of health. The matter was eventually reported to the police in the evening although they did not go to the scene until the following morning.

PW2, the wife of the deceased confirmed the fact that the 1st, 6th and
E 8th accused persons came to her house on the day of the incident and left a message for the deceased to meet them at the farm. She corroborated the evidence of PW1 that she sent him to take food to the deceased in the afternoon when he failed to return and that neither her son, PW1 nor the
F deceased returned home. She also stated that she was curious when the 1st accused who was one of those who came to invite her husband to the farm later showed up enquiring after him.

PW3 and PW5 were brothers of PW1 to whom he reported what had
G transpired and what he witnessed.

PW1 also testified as to how when he reported the matter to his uncle, the 1st accused, and that when he threatened to report the matter to the police, the 1st accused tried to discourage him and referred him to the 3rd
H accused. It was his testimony that it was during discussions at the residence of the 3rd accused that he realised that the 1st accused was used to lure his father to the bush.

PW4 was one of the pathologists who conducted a post mortem
I examination on the body of the deceased. He testified that he found marks

- A** of violence on the body and observed a fracture on the skull. He observed other features that led him to conclude that the fracture occurred before his death. There was also what he described as a penetrating injury on the left side of the neck and a laceration on the left groin. He attributed the cause of
- B** death to multiple injuries on the body. He performed the autopsy more than a year after the deceased's death.

PW7, the first son of the deceased testified as to all that transpired regarding the procurement of a pathologist to conduct a post mortem on the

C body of the deceased. My learned brother has adequately summarised the facts relating to this issue in the lead judgment. Suffice it to say that PW7 testified that the two pathologist contacted by the Investigating Police

D Officer through the Federal Medical Centre, Owerri, charged astronomical amounts, way beyond the official rate, which he refused to pay. he testified that during the period of discussion, DW7 (Dr. Egejuru) who was one of the pathologists whose service he had rejected on account of exorbitant fees,

E was engaged by one Dr. Onyejiaka and that he performed the autopsy in spite of his objections. He subsequently briefed a counsel who applied to the Federal High Court for a fresh autopsy to be conducted and this was the autopsy eventually conducted by PW4. PW8 testified as to his investigation into the matter.

- F** The appellant in her defence testified that as a teacher, she was in her school on 3/3/2005 from 7am till 1.15pm. That it was the following day, on 4/3/2005, that she received news of the death of the deceased while at school and that her weeping attracted the headmistress of the school (PW4)
- G** and her pupils. DW4 testified that the appellant was at school on the day in question and stated that on 4/3/2005 pupils rushed to inform her that the appellant was crying. That the appellant was in school from 7am till 1pm.

Other witnesses who testified for the defence were DW5, Chairman

H of the village, who stated that the deceased was stung to death by bees. DW6 was a mortician who stated that he received the corpse of the deceased in the mortuary but did not notice any wound on the body. Dr. Egejuru (DW7) the first pathologist also stated that he did not observe any

I fracture or injury on the deceased. DW8 a neurologist who testified that he was retained by the defence counsel to observe the autopsy conducted by

A PW4 stated that he did not observe any ante-mortem wound on the deceased.

I wish to observe here that PW1 was the only eye witness to the events that took place on 3/3/2005. His evidence would therefore be of

B immense value to the court if found to be positive and credible. It is the law that a conviction may be founded upon the evidence of a single witness if accepted and believed by the court. See: **Effiong vs. The State (1998) 8 NWLR (Pt. 562) 362; Olafowokan vs. The State (1987) 3 NWLR (Pt. 61) 538 @ 552; The State vs. Sule (2009) 17 NWLR (Pt. 1169) 33.**

C It is also important to note that an appellate court is usually reluctant to disturb findings of fact made by the trial court having regard to the fact that the trial court has the exclusive privilege of seeing and hearing the

D witnesses testify, and ascribing probative value to their evidence in contrast to an appellate court which relies solely on the printed record. See **Ekpa vs. Utong (1991) 6 NWLR (Pt. 197) 258; Nwokorobia vs. Nwogu (2009) 10 NWLR (Pt. 1150) 553; Makinde vs. Akinwale (2000) NWLR (Pt. 645) 435.** An appellate court will only interfere where such findings are perverse. The Supreme Court is even more reluctant to interfere where there are concurrent findings of fact made by both the trial and intermediate

E courts. The learned trial judge who had the singular opportunity of hearing all the witnesses testify and of observing their demeanour found PW1 to be

F a credible witness. He observed that PW1 was unshaken in his testimony under cross-examination. His Lordship painstakingly evaluated the evidence of this witness alongside other evidence led by the prosecution

G and found that the prosecution had established its case beyond reasonable doubt. He considered all the issues raised by the defence and was not persuaded that any doubt had been created as to the appellant's part in the commission of the offence.

H A lot of time has been expended in this appeal on the cause of death of the deceased. Learned counsel for the appellant contended that the trial court erred when, having regard to all the facts of the case, it preferred the evidence of PW4 to that of DW7.

I PW4 and DW7 are both pathologists. A pathologist is a medical doctor who studies pathology and examines dead bodies to ascertain the

A cause of death. By Section 68 of the Evidence Act, 2011 that are deemed to be experts. The court has a discretion based on the qualification of the expert and other surrounding facts as to which of the experts to believe. It also has the discretion not to rely on the evidence of either one. See: **A.G. B Oyo State vs. Fairlakes Hotel (No.2) (1989) 5 NWLR (Pt. 121) 255 @ 291 – 292 H – A, 292 F – G; Nweke vs. The State (2001) FWLR (Pt. 40) 1595 @ 1610 D – H; Joyce vs. Yeoman (1981) 2 ALL ER 21 @ 24.**

C Having regard to the surrounding circumstances of this case, the learned trial judge was entitled to prefer the testimony of PW4 to that of DW7. I am of the considered view that even without the evidence of PW4 and DW7 the cause of death was established by the eyewitness evidence of PW1. I must also state that having placed the appellant at the scene of the crime, her

D defence of *alibi* could not stand. The trial court rightly observed that in her statement, Exhibit P20, she did not state that she arrived at school at 7am on the fateful day and left 1.15pm. She also did not mention the headmistress, DW4, or the scenario described during their testimony. Furthermore, in her

E testimony, PW1 stated that she left school at 1.15pm on 3/3/2005. PW1 testified that it was when his father had not returned home around 2pm that he was sent to take his lunch to him and this was when he saw him being attacked. If the offence took place around 2pm or thereafter, the appellant's

F evidence that she left school at 1.15pm does not account for her whereabouts around 2pm.

G The evidence of DW5, the village chairman who testified that the deceased was stung by bees is not worthy of any credibility. The learned trial judge at page 418 of the record observed thus:

H ***“DW5 who gave evidence like DW4 was brought in during the hearing of the defence. He made no statement to the police. it is unbelievable that DW5 did all he said he did and yet made no statement at Izombe Police Station, State C.I.D. and Zone 9 Umuahia. DW5 said that the deceased was stung to death by the bees. He did not tell that to the***

I ***police. He appeared to be a hired witness to try to confuse the court”.***

A Indeed, even DW7, the witness whose testimony the appellant wanted the court to rely on, did not state that the deceased was stung by bees.

I am of the view that the learned trial judge properly utilised the opportunity of seeing and hearing the witnesses testify to evaluate the evidence and to decide which evidence to believe and which to disbelieve. I agree with the court below that the appellant was unable to show that the findings of the trial court were perverse. I am also not persuaded to interfere with those findings.

C For these and the more detailed reasons stated in the lead judgment of my learned brother, John Inyang Okoro, JSC, I find no merit in this appeal. I accordingly dismiss it and affirm the judgment of the court below.

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

D

AMIRU SANUSI, (JSC): His lordship Hon. Justice J. I. Okoro JSC has graciously obliged me with a copy of the lead judgment he prepared on this appeal before now. Having perused same, I must say that His lordship has ably and painstakingly treated all the salient issues in contention by the parties' learned counsel before arriving at his conclusion that this appeal lacks merit and deserved to be dismissed.

F While adopting his reasoning and conclusion as mine, it is also my judgment that the appeal is meritless and I accordingly dismiss same without any hesitation. I affirm the judgment of the court below which has also earlier on affirmed the decision of the trial High Court. Appeal is accordingly dismissed by me.

Amiru Sanusi
Justice, Supreme Court

H **EJEMBIEKO, (JSC):** The appellant, CHIFOANI OKORIE, a primary school teacher, was the 7th accused person at the trial court. She testified as DW3 at the trial. Her defence was not believed and she was convicted and sentenced to death by the trial court. The conviction and sentence were affirmed by the Court of Appeal (Coram: R. C. Agbo, P. O. Ige and F. O. Oho, JJCA) in the judgment delivered on 17th July, 2014.

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A The relevant portion of the judgment of the trial court on which the appellant, as DW3, was convicted runs from pages 418 420 of the record. The portion is herein below reproduced, viz:

B *“D.W.3 raised the defence of alibi. She wrote her statement to the police Exhibit P20.*

C *In it she did not state that she arrived school at 7a.m. and left at 1.15p.m. She did not mention Lady Gladys Anozie (DW4) as her school headmistress. She did not state that anybody saw her within the school premises. She did not therefore give particulars of alibi and therefore the defence failed.*

D *The evidence of PW1 fixed DW1, DW2 and DW3 at the scene of crime. Their defence of alibi is therefore demolished.*

E *The evidence of DW4 did not improve the fortune of DW3. It was in the witness box during the hearing of defence that the name of Lady Gladys Anozie was mentioned.*

F *DW5 who gave evidence like DW4 was brought in during the hearing of the defence. He made no statement to the police. It is unbelievable that DW5 did all he said and yet made not statement at Igombe Police Station, State C.I.D. and Zone 9 Umuahia. DW5 said that the deceased was stung to death by the bees. He did not tell that to the police.*

G *He appeared to be a hired witnesses to try to confuse the court.*

H *In all I do not believe the evidence of DW1, DW2 and DW3. Their respective defence of alibi failed. I hold that the*

A *prosecution proved their case against each of them beyond reasonable doubt.*

The defence bought other witnesses.

B

DW6 Ernest Ugwu a mortician did not help the case with his evidence. he claimed that he received the corpse of the deceased in the mortuary. Under cross-examination he could not identify the photographs of the corpse the deceased he claimed to have received at Aladinma.

C

D *DW7 was Dr. Egejuru. Emma Duru PW7 said in his statement to the police and in evidence in court that Dr. Egejuru demanded N65,000.00 before he would conduct the autopsy. PW7 did not produce the money. PW7 when he could not pay the money one Dr. Oneyjiaka paid him before he performed the autopsy. Dr. Egejuru as DW7 did not deny that he received bribe from Dr. Onyejiaka for the purpose of falsifying the autopsy report in favour of the accused persons who paid the money. What I stated earlier about even the attempt by the commissioner of police to block the 2nd autopsy examination tells the whole story.*

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The court preferred and accepted the evidence of PW4 and Exhibit P7 which was based on the eye-witness account Pw1.

H

In Bosah vs. The State (1980) 1 NLR 204 Pate 229 FCA the court said:

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“In all post mortem examinations it is not enough for the doctor to mention his opinion as the cause of death above and then proceed to tell the court stories of

A *various maladies laced with medical jargons. The findings on the corpse and how those findings led to the conclusion as to the cause of death must be explained to the court”.*

B *It is based on the above authority that I reject the evidence of Dr. Egejuru (DW7) and his report Exhibit D4.*

C *The last defence witness was one Dr. Onoyone (DW8). He was hired by the defence to observe the 2nd autopsy examination. He was not invited to the 2nd autopsy examination. He was on his own. He had big qualifications but he was not a Pathologist. He was a mere observer and his report went to the defence and has nothing to do with the proceedings in this case. His view cannot compare with let alone override the authority of Pw4.*

E *I prefer the evidence of PW4 to that of DW8 which actually accounted for nothing.*

F The lower court, in the lead judgment of the Hon. Justice Ige, JCA, unanimously concurred by the two other honourable Justices of the court, it is stated *inter alia* at pages 650 651 that the learned trial judge believed the evidence of PW1 and “also preferred the evidence of PW4 to that of DW8
G which the trial judge described as “which actually accounted for nothing”. For emphasis, the germane portion of the decision of the lower court at pages 650 and 651 of the record is reproduced, as follows:

H *I have no doubt in my mind that the prosecution proved and established the ingredients of the offences including conspiracy to murder the deceased against the appellant. The evidence of the prosecution witnesses especially PW1
I and PW4 established the fact of death of the deceased. Contrary to the submission of the appellant that there was*

A *contradiction between PW1's evidence and PW4 Dr. Gogo Abite there, was/is no such contradiction. See Exhibit P7 tendered by PW4 and his evidence.*

B *PW1 also gave eye witness account of seeing the appellant participating in the murder of his father. The learned trial judge believed the evidence. The appellant's brief stated that 1st and 6th accused came to the deceased house and invited him to the farm/bush as the only evidence against them. The learned trial judge also preferred the evidence of PW4 to that of DW8 which the trial judge described as "which actually accounted for nothing".*

D *The learned trial judge considered the defence put forward by the appellant 7th accused who testified as DW3 and held that the defence failed. The Learned Senior Counsel also submitted that the Police Investigation Report tells (sic) against the prosecution.*

F *I am of the view that the said Investigation Report was not tendered by the prosecution and same was not relied upon by the appellant. The said Investigation Report of the Police is (not) of the evidential value. A court cannot speculate contents of document that was not tendered and made exhibit before it. The court can only decide on issues and facts established before it. see Alam Oparaji & ors. vs. Nwosu Ohawu & Ors. (1999) 9 NWLR (Pt. 618) 290 at 307 E F, per Iguh, JSC.*

H *"the second issue that arises from this non production of the said written decisions of the arbitrators concerns the basic principle of law not tendered as Exhibit before it except of course, where its contents have been rendered admissible in law, such as where*

I

A *after sufficient foundation has been laid, secondary evidence therefore is admitted in evidence”.*

B *On the whole, the appellant has not been able to show that the findings of the lower court is perverse having regard to the evidence. The lower court did not misuse the opportunity he had of hearing and seeing the witnesses testified before him. The lower court did a proper evaluation of oral and documentary evidence before it in arriving at a decision to convict the appellant. This court will not disturb the findings of the learned trial judge.*

D I agree with the lower court that the appeal court, on the authority of **Irene Nguma (alias Irene Okoli) vs. A.G. Imo State (2014) 7 NWLR (Pt. 1405) 119 at 140**, will not readily disturb the findings of fact made by the trial court. The reason for this policy is that:

E *It was the trial court that saw the witnesses during trial and heard their testimonies. This afforded the trial court the opportunity of observing the demeanor and idiosyncrasies of the witnesses. In evaluating the evidence of the witnesses, the trial court is expected to make full use of the opportunity it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusions a reasonable tribunal in that circumstance will arrive at.*

H The appeal court will, however, interfere with the findings of fact if the findings are clearly perverse and if from the printed record it is clear that the trial court failed to use the opportunity afforded it to properly evaluate the evidence at the trial court. The appellate court, in the circumstance, is competent to re-evaluate the evidence on the record in order to obviate any miscarriage of justice. See **Iwuoha vs. NIPOST (2003) 8 NWLR (Pt. 822) 308 at 343 – 344; Adeye vs. Adesanya (2001) 6 NWLR (Pt. 708) 1**

A and Iragunima vs. R.S.H.P.D.A. (2003) 12 NWLR (Pt. 834) 427.

I intend to re-evaluate some evidence, as they pertain to the appellant who testified as DW3 at the trial court, to demonstrate that the findings of fact by trial court which were affirmed by the lower court were, perverse,

B unwarranted and unreasonable.

The DW3 raised her *alibi* that she was, at all material times, at her place of work, as a teacher, on 3rd & 4th days of March, 2005. She maintained that she was in her school, Aladinma Housing Estate Primary

C School from 7.00a.m until about 1.15p.m on 3rd March, 2005. She further testified that she left for her home from the school and she never left her house on the said date until 4th March, 2005 when she came to school as usual. The DW4 confirmed that the DW3 was at her place of work before

D 7.30a.m on 3rd March, 2005 and remained there until after 1.00p.m. The DW4 is the Headmistress of the school. The DW3 was a teacher. DW3 and DW4 were all cross-examined. The *alibi* of DW3 was not dislodged by cross-examination.

E The PW1 testified, though, that on 3rd March, 2005 at the scene of crime he saw:

F **Chifoani 7th accused and Friday Nuforo 4th accused when they held my father on the ground and Festa Nuforo 2nd accused was hitting my father with stick.**

The PW1 seems to have embellished his evidence to rope in the 7th accused (DW3), the appellant. The appellant, as the 7th accused was not one of those persons he listed in his statement of 7th March, 2005, Exhibit P. In the said statement he made mention of only “Alexander Nnadi, Evans Egbujor, Marthias Ohazuruike, Fester and her husband Chifoani all armed”.

H The DW3's *alibi* was disbelieved and was said to have been demolished by the trial court, at page 418 of the record ostensibly because in Exhibit P.20, the previous statement she made to the police, as the trial court inferred:

I

- A** She did not state that she arrived school at 7a.m and left at 1.15p.m. She did not mention Lady Gladys Anozie (DW4) as her school Head Mistress. She did not state that anybody saw her within the school premises. She did not
- B** give particulars of *alibi* and therefore the defence of *alibi* failed.
- C** The evidence of PW1 fixed DW1, DW2 and DW3 at the scene of crime. Their defence of *alibi* is therefore demolished.
- D** The evidence of DW4 did not improve the fortune of DW3. It was in the witness box during hearing of defence that the name of Lady Gladys Anozie was mentioned. He made no statement to the Police.
- E** The law does not impose on the defence to prove defence of *alibi* beyond reasonable doubt. The prosecution has the burden of proving the guilt of the accused beyond reasonable doubt, on the contrary. That duty enjoins the prosecution to undertake thorough investigation. In the circumstance is it not reasonable, in their duty to undertake thorough investigation, that the
- F** prosecution should have done proper background checks on the DW3, including finding out what she did for a living and finding out if, on the material date, she was at her place of work? The existence and address of
- G** the school the DW3 was teaching was not in dispute. Nothing stopped the investigators from going to do the background checks on her, particularly in view of Exhibit P20.
- H** The court, as the adjudicator, should not over indulge the prosecution in their laziness or *laiser faire* attitude to investigation. A person charged for a criminal offence has a constitutional right to be presumed innocent until his guilt is proved beyond reasonable doubt. Accordingly, it is not expected by the Constitution that the onus is on him to
- I** prove his innocence to investigators.

- A** The DW5, Samuel Amaechi Nwoke, the Chairman of the village, was not an accused person. He testified as an independent witness. His evidence that, after he accompanied the PW1 to report the death of the deceased at the police station and thereafter deposited the corpse at the
- B** Aladinma Mortuary, the PW1 engaged “the town crier to summon the community; “that when the community assembled the PW1 suggested that the oracle be consulted “to help them find out the circumstance surrounding the death of their father”; and that the community agreed with the PW1 that
- C** the oracle be consulted “to find out the cause of his father's death”. The PW1 accompanied the selected committee of the community that went to consult the oracle. The DW5, cross-examined, was not in anyway discredited on this. The only questions put to him on this issue were
- D** whether he, as a Christian, and “the community as a whole believed in juju”. His answer emphatic: “we believe in Juju”. His evidence is at pages 243 – 252 of the record.

- The DW5's evidence had cast serious doubt on PW1's evidence. If
- E** the PW1 knew who killed his father, and he was very emphatic about this at pages 126 and 133 of the record, the why would the same PW1 suggest that oracle be consulted to help them know who killed his father. That is the same PW1 who, allegedly, saw his father being killed, ran home told only
- F** his younger brother about it and cajoled him to keep quiet! That is the same PW1 who, throughout the night did nothing to assist the search party find and recover the corpse. He did not tell anybody the location of his father's corpse. The weird behaviour of PW1 should have put the lower courts on
- G** guard.

- The PW1's evidence is the only evidence the trial court relied on to hold that the appellant was fixed to the scene of crime! The Pw1, himself, from the overwhelming evidence on this issue of consulting oracle to help
- H** them identify the cause and killer of his father, was clearly uncertain about how and who killed his father. The DW1, DW2 and DW5 all testified, uncontradicted on this issue of oracle respectively at pages 222, 232, 234 237 and 243 – 250 of the record. DW1 and DW2 were emphatic that the
- I** oracle indicted the PW1. Thereafter the PW1 proposed that another oracle be consulted. The trial court just glibly and in a terse manner at page 418 of

A the record dismissed the DW5's evidence as unbelievable without any evaluation.

The duty of the trial court to assess the totality of the evidence before it before ascribing probative value to them is undoubted. This court, per

B **Ogwuegbu, JSC, in *Dakat vs. Dashe* (1997) 2 NWLR (Pt. 531) 46, put it thus:**

C *it is without doubt the duty of a trial court to assess witnesses, form impression about them and evaluate their evidence having regard to the impression it formed of the witnesses.*

D Evaluation simply means the assessment of the evidence so as to give value or quality to it. **Onwuka vs. Ediala** (1989) 1 NWLR (Pt. 76) 182 at 208; **Niyi Akintola vs. Buraimoh L. Balogun** (2000) NWLR (Pt. 532) at 549.

From the statement of law re-stated in **Mogaji & Ors. vs. Odofin & Ors.** (1978) 6 SC 91 at 93, it is imperative that trial court, before coming to

E decision as to which set of evidence given by a party before it is preferable to another set of facts given in evidence by the other party, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide

between the two sets of evidence which one it accepts in preference to the

F other. It must give its account of this preference. The trial court clearly failed to undertake this preliminarily imperative duty before, from the

blues, it dismissed the evidence of DW5 and added that DW5 did not make “statement at Izombe Police Station, State C.I.D. and Zone 9 Umuahia”.

G The DW5 owes the police no such duty as a busy-body in their affairs. He honourably discharged his civic when he was summoned to tell the truth of what he knew. The trial court had placed on the DW5, and of course on the

defence in criminal proceeding, an unnecessary and undeserving

H responsibility to offer, gratuitously, their defence to the police investigators, who apparently had failed in their statutory duty.

There was not even an iota or scintilla of comment made by the trial court on the evidence of DW1 and DW2 affirming the evidence of DW5

I that the PW1, uncertain about or not knowing, who or what killed his father suggested that the oracle be consulted to help them know who did it. The

- A** failure of the trial court, and the lower court as well, to consider this vital aspect of the defence available as a matter of fact before it has clearly rendered its judgment or the conviction of the appellant very perverse. In **Atolagbe vs. Shorun (1985) NWLR (Pt. 2) 360**, this court made it very
- B** clear that a decision of a court of law is perverse, among other things, where the court took into consideration matters which it ought not to take into account or deliberately shuts its eyes to the obvious. See also **Hamza vs. Kure (2010) 10 NWLR (Pt. 1203) 630 SC; Edoho vs. The State (2004) 5**
- C** **NWLR (Pt. 865) 17 CA Fabiyi vs. The State (2013) LPELR – 21180 (CA).**

- At the trial there was serious dispute as to what the cause of death of the deceased was. The defence maintained that PW1's father was killed by
- D** bees. The PW1 posing as eye witness, maintained that some persons he specifically named caused the death of his father. He claimed, quite unreasonably too, that he did not participate in the “search for his father because (he) was an eye witness of what happened”. PW1 claimed further
- E** that he “saw wounds on (his) father's face because blood was gushing out from his face”. The mortician, DW6, who in the presence of DW5 and PW1 took in the corpse of PW1's father to his mortuary did not see any of such injury. The DW6, unchallenged and undiscredited, testified at page
- F** 253, thus:

- G** **when we recovered the corpse we open up the corpse to see if there was open wound on the corpse in the front of the owner of the deceased. We open up the corpse in front of the owners so (that) if there was open wound they would see it themselves. In the instant case there was no open wound.**

- H** **By opening up the corpse I mean that we undress the corpse by removing all wrappers.**

- I** Notwithstanding that the DW6 was not challenged or undiscredited in this piece of evidence, the trial court held that the DW6 was one of the witnesses

- A** bought by the defence. There is no evidence warranting this uncharitable and perverse holding. The trial court further held at page 419 of the record, that:
- B** *under cross-examination he (DW6) could not identify the photographs of the corpse the deceased to have received at Aladinma.*
- C** This finding of fact is spurious and perverse in view of the DW6's evidence at page 255 of the record where the DW6 identified the photograph of the corpse, thus:
- D** *Exhibit P3 is the photograph of the corpse of the man. That was the condition under which the man was brought to us. They covered his body with wrapper.*
- E** The evidence of DW6 makes the PW4 a liar. The DW6, who first (before the PW4) saw the corpse, was not contradicted in his evidence that there was no open wound found on the corpse of the deceased. The DW8, at pages 260 - 268 of the record, testified emphatically that from his physical observation of the body of the deceased, there was no injury on the neck ante mortem (at P.265), and that there were no "blood clots on the wounds on the neck and groin where blood vessels traverse which would have been there are if the corpse was ante-mortem" (at page 262). DW8 was physically present at the time the autopsy was conducted on 25th May, 2006.
- F** The evidence of DW8 and DW6 corroborate the evidence of DW7, Dr. Raphael Egejuru. These pieces of evidence, on the physical observation of the corpse, seriously contradict the stance of PW4, Dr. Gogo-Abite at pages
- G** 167 and 168 of the record.
- H** DW6, the mortician, observed the corpse physically on 4th March 2005 ante-mortem. The deceased died on the 3rd march, 2005. The DW6 performed his autopsy on 23rd May, 2006 15 months after DW6's observation. The DW6, physically examining the corpse in the presence of
- I** PW1 (and also DW5), did not see any open wound on the body of decease

- A** ante-mortem. DW6 testified virtually without much challenge, and undiscredited. The evidence of DW6, taken together with DW8 and DW7, not only cast serious doubt on PW4's evidence, they sharply contradict the PW4's evidence. PW4 claimed, at pages 167 and 168 of the record, that he
- B** saw some 3 marks of violence on the body; namely; on the skull that was fractured on the left side of the frontal part; a penetrating injury on the left side of the neck and a third laceration on the groin. The PW4, corroborating the DW6, DW7 and DW8, and contradicting the PW1, did not, upon seeing
- C** the scalp of the deceased. In an apparent self-contradiction PW4 admitted under cross-examination, at page 171 of the record, that he “did not find any wound on the collar bone”, and further that:

D **Naturally a bleeding human being stabbed on the neck would bleed. Same applies to a stab would puncture the cloth. There was not blood in that area.**

- E** The trial court, without attempting any proper evaluation of the evidence of PW4 viz-viz the DW6 and DW7 was merely content and eager to prefer “the evidence of PW4 to that of DW8 which actually accounted for nothing”. The conclusion is perverse and most preposterous. The
- F** evidence of PW4, even on his own showing or admission, was clearly preposterous. The trial court admitted that DW8 “was a mere observer”. So also were the DW6 and DW5.

- Surely, and certainly too, had the courts below, particularly the trial
- G** court, been guided by Section 126(a) of the Evidence Act, 2011 (formerly Section 76(a) the miscarriage of justice to the appellant would have been averted. By the provisions of the Evidence Act, oral evidence in all cases, if it refers a fact which can be seen shall be the direct evidence of the witness
- H** who says he saw or observed that fact. The evidence of the DW5, DW6, DW7 and DW8 refer to the existence or condition of the corpse at the time they each observed them. Even if the evidence of DW8 is not regarded as the expert evidence, as the trial court seemed to suggest at page 420 of the
- I** record, it certainly, like the evidence of DW6 and to some extent of DW7, would qualify as “testimonial evidence”, as T. Akinola Aguda would put in

A paragraph 12 – 06, page 152 of his book: Law & Practice Relation to Evidence in Nigeria (1980)

These pieces of evidence supporting the case of the defence are not only material, they are relevant to the facts in issue. The trial court, in my
B firm view, was seriously in error in holding as it did, at page 420 of the record, that the evidence, particularly of DW8, “has nothing to do with the proceedings in this case”. This wrong appreciation or appraisal of the defence evidence, has in consequence led to the wrong decision upon the
C totality of the evidence before it. It had clearly abdicated its duty, just also the lower court did, to evaluate the totality of the evidence available before it before determining whether the prosecution had proved their case against the defendant, the appellant herein, beyond reasonable doubt. **Boy Muka**
D vs. The State (1976) 10 SC 305. Once the defence has cast serious doubt on the evidence of the prosecution and the court is reasonably left in a state of doubt, the prosecution would have failed to discharge the onus of proof beyond reasonable doubt, and the prisoner is entitled to be discharged and
E acquitted in the circumstance. **James Ikhane vs. C.O.P (1977) 6 SC 119.**

The sum total of all I have been labouring to say is that there was no proper evaluation of the evidential materials before the trial court. The conviction in the circumstance was perverse. The lower court was
F therefore wrong to have endorsed or affirmed it.

The prosecution procured the evidence of the PW4 and PW7 for some purposes, including the intent to discredit the autopsy report of the DW7, Dr. Egejuru. According to PW7 the accused persons were released
G on bail on the strength of DW7's autopsy report, and they had to approach the Federal High Court for orders quashing the report and directing a fresh autopsy to be done on the corpse. The prosecution did not call Dr. Egejuru (DW7) as their witness. The defence did. When the DW7 was giving his
H testimony, without any objection from the prosecutor, the learned trial judge, *suo motu*, intervened and stopped the witness from giving evidence to explain and or throw light on his medical report, Exhibit D4. The appellant, in Issue 4 argued in the appellant's brief, is seriously aggrieved
I and holds the strong view that the conduct of learned trial judge is tantamount to the denial to the appellant her right to fair hearing guaranteed

A by the Constitution. In the minutes of the proceedings, at page 256 it is recorded:

B *when Mr. Nworka wanted to ask question of the things that happened regarding the mortuary the court ruled that Exhibit D4 speaks for itself and refused him doing so.*

The allegation, *ex facie* the record, is *res ipsa Loquitur*.

C Learned Senior Counsel for the appellant regards this as not only an unwarranted interference of cutting short the defence evidence, but also that the learned trial judge denied the appellant equal procedural equality to present her case. I agree entirely. In the case of **Okoduwa vs. The State (1988) 2 NWLR (Pt. 76) 333 at 354**, Nnaemeka-Agu, JSC, stated thus:

E *I cannot over-emphasize the fact that in our adversary system of administration of justice the freedom of counsel to put across his client's case without fear or favour, is most important ingredient*

F *There are certain fundamental norms in the system of administration of justice we operate. The system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system parties, with their counsel, and the judge have their respective roles to play.*

G *Basically, the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both parties. Under no circumstance must a judge under the system do anything which can give the impression that he has descended into the arena, as, obviously, his sense of justice be obscured.*

I The constitution in several provisions, including Sections 17(2)(e) and 36(1) thereof, enjoins every court, including the instant trial court, in the

A conduct of proceedings for the determination of the civil rights and obligation of every person to always remain independent and impartial.

The intrusion of the learned trial judge to cut short the evidence of the DW7, and throw him to the prosecution for cross-examination at page 257
B of the record clearly reflect the mind of a partial judge impatient or eager to deal quickly with a party before him. Defence counsel had applied at page 257 of the record for adjournment to enable him decide on the next line of action. The request was refused with more threats. Counsel was directed
C to conclude the evidence-in-Chief of the DW7 “or I will stop you”. DW7 was led to answer a question and the answer not going down well with the learned trial judge, His Lordship, Judge Egole, cut in sharply to ordain:

D **I hereby stop Mr. Nworka and call on the Deputy Director of Public Prosecutions to cross examine (the DW7).**

In my firm view, reasonable persons sitting in court and watching the proceedings, in the circumstances will infer irresistibly that there is a real
E likelihood of bias against the DW7 and the eagerness to march the 7th accused (DW3), who is now the appellant, to the gallows. This test of reasonable man was adopted by this court in **Deduwa & Ors. vs. Okorodudu (1976) 1 NMLR 236; (1976) 9 10 SC 329**. Alexander, CJN, delivering the opinion of the court cited with approval the earlier decision of Ademola, CJN in **Mohammed vs. Kano N. A. (1968) 1 ALL NLR 424** where at page 426 His Lordship stated that:

G *a fair hearing must involve a fair trial, and a fair trial consists of the whole hearing. The test of fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation, (whether) justice has been done in the case.*

H

I feel obliged to agree with the Senior Counsel for the appellant that the
I learned trial judge clearly abdicated his responsibility and duty to conduct this proceeding in question fairly, impartially and independently. I also

A agree, on authority of **Idrisu vs. The State (1967) ALL NLR 12 at 16**, that a person charged for a criminal offence before a court of law is entitled to defend himself and to be availed of all facilities provided by law, including the candour and calm comportment of the Judge.

B Fair hearing or fair trial means a hearing or trial conducted in accordance with the due process of law or the legal rules formulated to ensure that justice is done to all parties on equal footing **Olumesan vs. A.G. Ogundepo (1996) 2 NWLR (Pt. 443) 628 at 644 – 645**. It means, also, that the proceedings are conducted in accordance with the relevant laws and rules in contradiction of the whims and caprices of the Judge. **State vs. Onagoruwa (1982) 2 NWLR (Pt. 221) 33 at 56; Bamaiyi vs. The State (2001) 8 NWLR (Pt. 715) 270 at 284; Mohammed vs. Olawumi (1990) 2 NWLR (Pt. 133) 485.**

D The trial court, no doubt, had breached the appellant's right to fair hearing or trial guaranteed by Section 36(1) of the 1999 Constitution. The effect of this infraction of the fundamental rights provision of the Constitution is that entire proceeding the judgment or conviction and sentence imposed by the trial court are all a nullity. **Mohammed vs. Kano N. A. (supra); KIM vs. The state (1992) NWLR (Pt. 233) 17; Ogbon vs. FRN (2002) 10 NWLR (Pt. 774) 21 at 39.**

E The consequential effect of the lower court affirming the decision of the trial court that clearly was violative of the fundamental rights provision, as it pertains to the appellant, is that the affirming decision, tainted with fundamental illegality committed by the trial court, like the decision it affirmed, is liable to be set aside.

G I allow the appeal. The decision of the lower court in the appeal **No. CA/DW/307/2013** delivered on 17th July, 2014 affirming the conviction and sentence of the appellant imposed on 13th May, 2013 by the High Court of Imo State in the case **No. HOG/4C/2007**, is hereby set aside.

H The appellant, CHIFOANI OKORIE, is entitled to the order of discharge and acquittal, I hereby so make.

I **Ejembi Eko,**
Justice, Supreme Court

1. **CHROME AIR SERVICES LIMITED**
 2. **CHROME OIL SERVICES LIMITED**
 3. **SIREMEKA OFFOR**
- AND**
FIDELITY BANK

SC. 817/2014

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

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

**MUSA DATTIJO MUHAMMAD
KUDIRAT M. O. KEKERE-EKUN
JOHNINYANG OKORO
CHIMA CENTUS NWEZE
EJEMBI EKO**

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

APPEAL: Classification – Ground of fact – Where the ground questions the evaluation of fact by the lower tribunal before the tribunal would come to us finding of fact – Whether a ground of fact.

APPEAL: Classification of ground of appeal – Error of law – Whether the mere labelling of a ground of appeal as a ground of law or error in law does not ipso facto make the complaint in the ground of appeal to one of law.

APPEAL: Classification of ground of appeal – Ground of fact – A ground which raises question of improper evaluation of evidence – Whether is a ground of fact.

APPEAL: Classification of grounds of appeal – Ground of mixed law and facts

– Where disputed facts have to be determined before applying the law – Whether it is a ground of mixed law and fact.

APPEAL: Ground of appeal – Ground of mixed law and facts or facts – Where filed without leave – S 233(3) of CFRN 1999 (as amended) – Whether renders the ground of appeal incompetent.

APPEAL: Originating process – Notice of appeal – Determines – Whether an appeal is competently initiated under S. 233 (3) of the 1999 constitution – Relevant considerations thereof.

APPEAL: Right of appeal – Requirement of leave to appeal – S. 233 (3) of CFRN 1999 (as amended) – Relevant considerations thereof.

CONSTITUTIONAL LAW: S 233 (2) and (3) of CFRN 1999 (as amended) – Leave to appeal on grounds other than law alone – Necessity for leave to be obtained.

COURT: Classification of grounds of appeal – How determined – What court should do.

EVIDENCE: Admitted facts – S. 123 of Evidence Act 2011 – Whether facts no in dispute or admitted needs no further proof.

PRACTICE AND PROCEDURE: Leave to appeal – Where required to file a ground of appeal – Whether failure to obtain leave renders the ground of appeal incompetent.

Issues for Determination

**The issue raised by the Preliminary Objection is simply:
whether the appellant's appeal is competent?**

Facts of the Matters

The appellants were the plaintiffs at the trial court. They were also the appellants at the lower court. The respondent was the defendant and respondent respectively at those courts.

By a Writ of Summons and Statement of Claim filed on the 24th day of November, 2009 the plaintiffs (now appellants) claimed against the defendant (now respondent) as follows:

- i. A declaration that the plaintiffs are not indebted to the defendant in any sum of money whatsoever whether in local or foreign currency.**
- ii. The sum of N100,000,000.00 (One hundred million naira) in favour of the 1st plaintiff being general damages for detinue.**
- iii. An order of court mandating the defendant to return to the 1st plaintiff Certificate of Occupancy Nos. FCT/ABU/CR.296 in respect of Plot No. 756 Maitama A5 District, measuring approximately 2189.30 square meters and FCT/ABU/NG488 in respect of Plot No. 71A3, Garki II District, measuring approximately 1195.06 square meters which the 1st plaintiff deposited with the defendant in respect of overdraft which has been fully liquidated.**
- iv. An order of court mandating the defendant to return to the 1st plaintiff Recertification Acknowledgement letters it received from the Abuja Geographical Information System in respect of recertification of the title documents prayed in (3) above.**
- v. Interest at the rate of 10% per annum on judgment sum from the date of judgment until judgment sum is fully liquidated by the defendant.**

Upon being served with the plaintiffs' claim, the defendant filed their Statement of Defence and also counter claimed against the plaintiffs and Sir Emeka Offor KSM (who was joined by leave of court) as follows:

- a. The sum of N17,099,169.99 (Seventeen million and ninety nine thousand, one hundred and sixty nine naira ninety nine kobo only) being the outstanding due to the defendant/counter claimant from the 1st and 3rd defendants.**
- b. Interest at the rate of 38% per annum from the 17th June, 1999 till date of judgment and 10% thereafter until full payment.**
- c. An order of specific performance by the payment of the sum of \$1,000,000 (One million US dollars) by the 2nd and 3rd defendants to defendant/counter claimant.**
- d. Interest at the rate of 38% per annum from the 17th June, 1999 till date of judgment and 10% thereafter until full payment.**
- e. An order of foreclosure and sale of all that property located at Plot 755 Maitama A5, District measuring about 2189.30 square meters covered by Certificate of Occupancy No. FCT/ABU/CR.296 in liquidation of the debts owed by the 1st, 2nd and 3rd defendants.**
- f. An order foreclosure and sale of all that property located at Plot 71 A3, Garki II District measuring about 1195.06 square meters covered by Certificate of Occupancy No. FCT/ABU/NG488 in liquidation of the debts owed by the 1st, 2nd and 3rd defendants.**
- g. An order of foreclosure and sale of all that property located at Plot No. 505 Cadastral Zone A0 in Abuja**

measuring about 3940.85 square meters covered by Certificate of Occupancy No. FCT/ABU/MISC-5178 in liquidation of the debts owed by 1st, 2nd and 3rd defendants.

h. Cost of this action.

Both sides called oral evidence, one witness each, at the trial court. At the close of their respective cases and final addresses the trial court delivered a reserved judgment. In the judgment the trial court held as a fact that the appellants, as plaintiffs, were no longer indebted to the defendant/respondent in any sum in Naira denomination, and that in US Dollar denomination, however, the 2nd and 3rd plaintiffs/appellants were still liable in the sum of \$1,000,000.00 USD to the defendant/respondent. The appellants unsuccessfully appealed that finding. This further appeal is against the decision of the Court of Appeal, Abuja Division (the lower court), that affirmed the decision of the trial court and dismissed the appeal of the appellants before it.

Aggrieved by the decision of the lower court in the appeal No. CA/A/203/2012 the appellants herein have further appealed to this court.

1. **Whether the court below was right when it held that the respondent discharged the onus of proof of the counter-claim and that the appellants failed to show that they paid or are not indebted to the respondent. (Ground 1)**
2. **Whether the court below was right in its position that the failure of the 3rd appellant to testify at the High Court left the evidence of DW1 uncontradicted as it pertains to the counter-claim (Ground 2)**

Held: *(Unanimously allowing the appeal)*

1. *The more labelling of a ground of appeal as error of law does not move it so*

It is true, as submitted by the respondent on the authority of *Tilbury Construction Co. Ltd. Vs. Sunday Ogunniyi (1988) 2 NWLR (pt. 74) 64*, that the mere labeling of a ground of appeal as a ground of law, or

error in law, does not *ipso facto* make or transform the complaint in the ground of appeal to one of complaint of error of law. The ground of appeal, to be one of error of law must, in actuality or substance, be a complaint that the court below had committed error of law in its judgment, the subject of the appeal. The ground of appeal read together with the particulars of error must unequivocally point at error in law. (Pp 219–220 Paras G–A)

2. *The notice of appeal determines whether an appeal is properly initiated*
The notice of appeal is an originating process. To determine whether or not it has properly initiated an appeal before this court under Section 233 (3) of the 1999 Constitution, the notice of appeal shall be submitted to scrutiny in order to determine whether or not it has strictly complied with the relevant enabling provisions of the law. See Abbas Vs. Terra (2013) 3 NWLR (pt. 1334) 284 at 286. (P 220 Paras A–C)

3. *The nature and purport of S 233 (2) and (3) of CFRN 1999*
The enabling provisions of Section 233 (2) & (3) of the Constitution are clear:
 - (2) **An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in following cases-**
 - (a) **where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;**
 - (b)
 - (c)
 - (d)
 - (e)
 - (f)
 - (3) **Subject to the provision of subsection (2) of this section, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.**

In other words, a ground of appeal other than one complaining or raising issue of law alone is not filed as of right. The appellant shall, for a ground involving question of mixed law and fact or of fact alone, seek and obtain leave of court before filing or bringing appeal on that ground.

The appellants posit that their appeal comes under Section 233(2) of the Constitution, and therefore as of right, since the two grounds of appeal “involve questions of law alone”. The respondent, on the contrary, maintains that the two grounds of appeal are grounds of mixed law and fact, or of fact, and therefore the appeal on them could not be brought as of right. The respondent on this stance submits that the appellants needed to have first sought and obtained leave of court under Section 233 (3) of the Constitution before filing the notice of appeal, and having brought their appeal without satisfying the pre-condition, the appeal therefore is incompetent. (Pp 220–221 Paras C–B)

Per Eko (JSC)

“My lords, I had earlier set out the grounds of appeal and the issues formulated therefrom by the appellants for the determination of their appeal. The perusal of the grounds of appeal together with their particulars of error, when read together with the issues for the determination, leaves no doubt that the two grounds of appeal are purely on facts. Dr. Ameh, SAN for the respondent puts it succinctly thus: “the issues framed from the grounds (of appeal) have put the argument to rest that the grounds are grounds of facts only”.

The complaint in ground one is merely that the lower court did not properly evaluate the facts before it. The totality of the ground and its particulars comes down to this: that the lower court did not appreciate or apprehend the facts on which it held that the evidence of the DW1 viz-a-viz Exhibits O and Q as found by the trial court, are clear admissions of their indebtedness to the respondent. Indebtedness of one party to other is one facts. It calls for the

estimation or valuation of one set of facts against the other in order that the judge would appreciate, realize or see that one party is or is not indebted to the other. Where the ground of appeal is couched in a way, as the instant ground one, that reveals or questions the evaluation of facts by the lower tribunal before the tribunal would come to its finding of fact such a ground is one of facts, or at best one of mixed law and facts. As Onu, JSC, stated in *Medical and Dental Practitioners Disciplinary Tribunal Vs. Dr. John Emewulu Nichola Okonkwo* (2001) 3 SC 76; (2001) 6 NWLR (pt. 710).” (P 221 Paras B–H)

5. *A ground of mixed law and fact calls for determination of facts before applying the law*

Where the error complained of is one predicated on disputed facts calling into question the correctness of the facts determined, it is invariably a question of mixed law and facts. *A.C.B. Plc Vs. Obiami Brick & Stone* (1993) 6 SCNJ 98; (1993) 5 NWLR (pt. 274) 399. (Pp 221–222 Paras H–A)

6. *A ground that raised question on improper evaluation of evidence is a ground of fact*

I have read the opinion of Adekeye, JSC in *B.A.S.F (Nig) Ltd. Vs. Faith Enterprises Ltd* (2010) 4 NWLR (pt, 1183) 104 at 132 cited by the appellant's counsel. It also accords with the earlier dicta of this court in *M.D.P.D.T. Vs. Okonkwo* (supra) and *A.C.B. Plc Vs. Obiami* (supra) that where admissible evidence has been led, the assessment of that evidence is entirely for the court. If the complaint, as in the instant case, is about the assessment of the admissible evidence, the ground is that of fact. Adekeye JSC also stated in *B.A.S.F. (Nig) Ltd Vs. Faith Ent. Ltd* (supra) that where the ground questions the evaluation of the facts before the application of the law, it is ground of mixed law and facts.

The complaint in ground two of the grounds of appeal is that the lower court was in error in its findings as of the fact that the 3rd defendant had abandoned his case at the trial court, having failed to

adduce evidence or elicit evidence from the opponent's witness (DW1) to support his case as pleaded. The issue formulated from this ground of appeal is: whether the lower court was right that the failure of the 3rd appellant to testify at the trial court left the evidence of DW1 uncontradicted as it pertains to the counter-claim?

(P 222 Paras A – E)

7. *Facts which are admitted need to further proof*

The verb contradict, in its ordinary grammatical meaning, also means to assail, controvert, deny, dispute or traverse. One fact or set of facts is required to contradict, controvert, or traverse another fact or set of facts. That is why in Section 123 of the Evidence Act, 2011 it is provided that facts not disputed or which are taken as admitted need no further proof. See also DIN Vs. African Newspapers of Nigeria Ltd (1990) 21 NSCC (pt. 2) 313 at 320. (P 222 Paras E – G)

8. *The two grounds of appeal are ground of mixed law an facts or facts and requires leave*

Clearly from the earlier templates set by this court in M.D.P.D.T. Vs. Dr. Okonkwo (supra), A.C.B. Plc Vs. Obiami Bricks & Stone (supra) and B.A.S.F (Nig) Vs. Faith Enterprises Ltd (supra); it becomes very hard for me to agree with the appellant's counsel that the two grounds of appeal on which the appellants' appeal is predicated “involve questions of law”. I agree with the senior counsel for the respondent that the two grounds of appeal are grounds of mixed law and facts, or of facts. They accordingly require leave of the Court of Appeal or of this court first sought and obtained before this appeal on them could be brought in accordance with Section 233 (3) of the Constitution. The failure of the appellant to first seek and obtain the leave before bringing this appeal has rendered this appeal incompetent.

The preliminary objection is on *terra firma* and it is accordingly sustained. Consequently, the appeal being incompetent is hereby struck out.

The respondent is entitled to costs, which I assess at N500,000. The said amount shall be paid to the respondent by the appellants, jointly and or severally as costs.

I agree with him that an appeal founded on grounds of mixed law and fact and in respect of which the leave of court has not been sought and obtained is incompetent. In the instant case with all the grounds of appeal being of mixed law and fact and leave of neither the lower court nor this court not having been sought and obtained the respondent/objector is right to insist that we decline jurisdiction. Section 233(3) of the 1999 Constitution as amended supports their contention. *See also Ugboaja Vs. Akintoye-Sowemimo (2008) 16 NWLR (Pt. 1113) 278 and Jimoh Vs. Akande (2009) 5 NWLR (Pt. 1135) 549. (Pp 222 – 223 Paras G – F)*

10. *Effect of failure in obtain leave where required before filing a ground of appeal*

It is learned senior counsel's contention that the appeal is incompetent for failure of the appellants to obtain leave to appeal either from this court or from the court below. It is settled law that failure to obtain leave to appeal where leave is required is fatal to the appeal. The leave of court is a condition precedent to the jurisdiction of the appellate court to entertain the appeal. Failure to obtain leave, where necessary, renders the grounds of appeal requiring such leave and any issues formulated therefrom incompetent. *See Oshatoba Vs. Olujitan (2000) 5 NWLR (Pt. 655) 159; Metal Construction...Vs. Migliore (1990) 1 NWLR (Pt. 126) 99; Ikweki Vs. Ebele (2005) 11 NWLR (Pt. 936) 397; Tilbury Construction Ltd. Vs. Ogunniyi (1988) 2 NWLR (Pt. 74) 64.*

By virtue of Section 233(2)(a) of the 1999 Constitution, an appellant can appeal as of right from the Court of Appeal to the Supreme Court where the ground of appeal is a ground of law alone in respect of decisions in any civil or criminal proceedings before the Court of Appeal. By virtue of Section 233 (3) of the 1999 Constitution, on the other hand, an appeal to this court on facts

alone or on mixed law and facts can only be by leave of this court or the court below. See *KTP Ltd. Vs. G & H (Nig.) Ltd.* (2005) 13 NWLR (Pt. 943) 680; *Maigoro Vs. Garba* (1999) 10 NWLR (Pt. 624) 555 @ 568; *CBN Vs. Okojie* (2002) 8 NWLR (Pt. 768) 48; *Abubakar Vs. Dankwambo* (2015) 18 NWLR (Pt. 1491) 213 @ 234-235. It has been held that the mere description of a ground of appeal as an error of law is not sufficient to make it so. See *Yaro Vs. Arewa Construction Ltd.* (2007) 6 SC (Pt. II) 149; *Ojemen & Ors. Vs. Momodu II* (1983) SC 173. (*Pp 226–227 Paras G–D*)

Per Kekere Ekun (JSC)

It is recognized that it is often difficult to distinguish between a ground of law and a ground which is of mixed law and facts. Over time, a general rule of thumb employed by courts to determine the nature of a ground of appeal has evolved. Where the complaint is that the trial or appellate court misunderstood the law or misapplied the law to the proved or admitted facts, it is a ground of law. Where the ground of appeal questions the evaluation of evidence before the application of the law, it is a ground of mixed law and fact. There is generally no difficulty in determining whether a ground of appeal is a question of fact. See *Odunukwe Vs. Ofomata* (2010) 18 NWLR (Pt. 1225) 404; *Metal Construction (W.A.) Ltd. Vs. Migliore* (1990) 1 NWLR (Pt. 126) 299; *Ogbechie Vs. Onochie* (1986) 2 NWLR (Pt. 23) 484; *Anukam Vs. Anukam* (2008) 5 NWLR (Pt. 1081) 455.

I have carefully examined the two grounds of appeal reproduced above. I agree with learned senior counsel for the respondent that the two grounds raise issues of fact or at best mixed law and facts. There is no evidence in the record before us that leave to appeal was sought and obtained either from the court below or from this court. The two grounds of appeal are therefore incompetent. In the absence of any ground of law to sustain the appeal, the failure to obtain leave before filing this appeal is fatal. I agree with my learned brother in the lead judgment that the appeal

is incompetent. It is accordingly struck out. I abide by the order for costs as contained in the lead judgment. (Pp 227–228 Paras E–B)

11. *How courts determine the nature of grounds of appeal*

“Admittedly, the difficulty in recognizing and/or distinguishing a ground of law from a ground of fact or mixed law and fact has always been recognized by the courts. The position as enunciated by this court in several authorities on this issue is for the court to examine the grounds of appeal involved to see whether the grounds reveal a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or not in dispute in which case the question in the ground is one of law. Where the grounds would require questioning the evaluation of facts by the lower court before the application of the law, then the question in the involved grounds would be of mixed law and fact. *See Ogbechi Vs. Onochie (1986) 2 NWLR (pt. 23) 484; Orakosin Vs. Menkiti (2001) 5. SC (Pt. 1) 72; Osasona Vs. Ajayi (2004) 5 SC, (pt. 1) 88; Global West Vessel Specialist Nig. Ltd. Vs. Nigeria LNG Ltd & Anor. (2017) LPELR-41987 (SC).*

The two grounds of appeal in the instant appeal have been set out in the lead judgment and I find it unnecessary repeating the exercise here. A close look at the two grounds as was evaluated by my learned brother, Eko, JSC, they are of mixed law and facts. There is no evidence that the leave of this court or the Court of Appeal was sought and obtained before filing the notice of appeal. This is as provided for under Section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). By this provision, only grounds complaining of or raising issue of law alone can be filed as of right. Any ground of appeal raising or complaining about issue of mixed law and fact or facts alone cannot be raised in this court except leave of this court or the Court of Appeal has previously been sought and obtained. Failure to seek and obtain the requisite leave renders the said ground of appeal incompetent and deserves to be struck out.

As it stands in this appeal, the only two grounds of appeal contained in the notice of appeal are adjudged incompetent. What this means is that the preliminary objection of the learned senior counsel for the respondent Dr. S. Ameh, SAN, is hereby sustained. In consequence, as there is no competent ground to sustain the appeal, it is hereby struck out. I abide by the order as to costs.”
(Pp 228–229 Paras D–D)

Per CC Nweze (JSC)

I agree with His Lordship's view that the ground of appeal is incompetent, being a ground of mixed law and fact, which cannot be raised without leave of either the court below or this court, Section 233 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

When the facts are disputed as between the parties, the conclusions which follow from the application of the law to such disputed facts are characterized as those of mixed law and facts. Hence grounds of appeal challenging such conclusions are grounds of mixed law and fact, Ajayi and Anor Vs. Omoroghe (1993) LPELR- 290 (SC) 23; F-G; MDPDT Vs. Okonkwo (2001) 3 SC 76; ACB Plc Vs. Obmiami Brick and Stone Nigeria Ltd (1993) 6 SCNJ 98.

As this court held in ACB Plc Vs. Obmiami Brick and Stone Nigeria Ltd (1993) LPELR-206 (SC) 27; E-F:

It is now generally accepted that where the ground of appeal is based on an allegation of error deduced from conclusion on undisputed facts, it is a ground of law. Where on the other hand, the error of law is founded on disputed facts calling into question the correctness of the facts determined, it is invariably a question of mixed law and fact. This is because in this latter case, it is a conclusion of law coupled with the exercise of discretion. *(Pp 229–230 Paras E–B)*

Nigeria Cases cited in the Judgment

- A.C.B. Plc Vs. Obiami (supra)*, 6
A.C.B. Plc Vs. Obiami Brick & Stone (1993) 6 SCNJ 98, 6
A.C.B. Plc Vs. Obiami Bricks & Stone (supra), 7
Abbas Vs. Terra (2013) 3 NWLR (pt. 1334) 284 at 286, 5
Abubakar Vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 213 @ 234-235, 8
ACB Plc Vs. Obiami Brick and Stone Nigeria Ltd (1993) 6 SCNJ 98, 10
Ajayi and Anor Vs. Omoroghe (1993) LPELR- 290 (SC) 23, 10
Anukam Vs. Anukam (2008) 5 NWLR (Pt. 1081) 455, 9
B.A.S.F (Nig) Vs. Faith Enterprises Ltd (supra)
CBN Vs. Okojie (2002) 8 NWLR (Pt. 768) 48
DIN Vs. African Newspapers of Nigeria Ltd (1990) 21 NSCC (pt. 2) 313 at 320
Global West Vessel Specialist Nig. Ltd. Vs. Nigeria LNG Ltd & Anor. (2017) LPELR-41987 (SC).
Ikweki Vs. Ebele (2005) 11 NWLR (Pt. 936) 397
Jimoh Vs. Akande (2009) 5 NWLR (Pt. 1135) 549
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M.D.P.D.T. Vs. Dr. Okonkwo (supra), 7
Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555 @ 568
Medical and Dental Practitioners Disciplinary Tribunal Vs. Dr. John Emewulu Nichola Okonkwo (2001) 3 SC 76
Metal Construction (W.A.) Ltd. Vs. Migliore (1990) 1 NWLR (Pt. 126) 299
Odunukwe Vs. Ofomata (2010) 18 NWLR (Pt. 1225) 404
Ogbechi Vs. Onochie (1986) 2 NWLR (pt. 23) 484
Ojemen & Ors. Vs. Momodu II (1983) SC 173
Orakosin Vs. Menkiti (2001) 5. SC (Pt. 1) 72
Osasona Vs. Ajayi (2004) 5 SC, (pt. 1) 88
Oshatoba Vs. Olujitan (2000) 5 NWLR (Pt. 655) 159
Tilbury Construction Co. Ltd. Vs. Sunday Ogunniyi (1988) 2 NWLR (pt. 74) 64
Ugboaja Vs. Akintoye-Sowemimo (2008) 16 NWLR (Pt. 1113) 278
Yaro Vs. Arewa Construction Ltd. (2007) 6 SC (Pt. II) 149

Nigeria Statutes cited in this Judgment

- Evidence Act, 201 Section 123*
1999 Constitution Section 233 (3)

A Representation

**J.C. Njikonye with I.A. Arotiowa, (Esq.), Isaac Ita, (Esq.), Wilfred Okoli, (Esq.), and Blessing Yusuf, (Esq.)
Dr. S.S. Ameh, (SAN) with Jane Obi, (Esq.)**

B

EJEMBI EKO, (JSC) (Delivering the lead judgment): The appellants were the plaintiffs at the trial court. They were also the appellants at the lower court. The respondent was the defendant and respondent respectively at those courts.

C

By a Writ of Summons and Statement of Claim filed on the 24th day of November, 2009 the plaintiffs (now appellants) claimed against the defendant (now respondent) as follows:

D

vi. A declaration that the plaintiffs are not indebted to the defendant in any sum of money whatsoever whether in local or foreign currency.

E

vii. The sum of N100,000,000.00 (One hundred million naira) in favour of the 1st plaintiff being general damages for detinue.

F

viii. An order of court mandating the defendant to return to the 1st plaintiff Certificate of Occupancy Nos. FCT/ABU/CR.296 in respect of Plot No. 756 Maitama A5 District, measuring approximately 2189.30 square meters and FCT/ABU/NG488 in respect of Plot No. 71A3, Garki II District, measuring approximately 1195.06 square meters which the 1st plaintiff deposited with the defendant in respect of overdraft which has been fully liquidated.

G

H

ix. An order of court mandating the defendant to return to the 1st plaintiff Recertification Acknowledgement letters it received from the Abuja Geographical Information System in

I

A **respect of recertification of the title documents prayed in (3) above.**

B **x. Interest at the rate of 10% per annum on judgment sum from the date of judgment until judgment sum is fully liquidated by the defendant.**

C Upon been served with the plaintiffs' claim, the defendant filed their Statement of Defence and also counter claimed against the plaintiffs and Sir Emeka Offor KSM (who was joined by leave of court) as follows:

D **i. The sum of N17,099,169.99 (Seventeen million and ninety nine thousand, one hundred and sixty nine naira ninety nine kobo only) being the outstanding due to the defendant/counter claimant from the 1st and 3rd defendants.**

E **j. Interest at the rate of 38% per annum from the 17th June, 1999 till date of judgment and 10% thereafter until full payment.**

F **k. An order of specific performance by the payment of the sum of \$1,000,000 (One million US dollars) by the 2nd and 3rd defendants to defendant/counter claimant.**

G **l. Interest at the rate of 38% per annum from the 17th June, 1999 till date of judgment and 10% thereafter until full payment.**

H **m. An order of foreclosure and sale of all that property located at Plot 755 Maitama A5, District measuring about 2189.30 square meters covered by Certificate of Occupancy No. FCT/ABU/CR.296 in liquidation of the debts owed by the 1st, 2nd and 3rd defendants.**

I

- A n. An order foreclosure and sale of all that property located at Plot 71 A3, Garki II District measuring about 1195.06 square meters covered by Certificate of Occupancy No. FCT/ABU/NG488 in liquidation of the debts owed by the 1st, 2nd and 3rd defendants.**
- B o. An order of foreclosure and sale of all that property located at Plot No. 505 Cadastral Zone A0 in Abuja measuring about 3940.85 square meters covered by Certificate of Occupancy No. FCT/ABU/MISC-5178 in liquidation of the debts owed by 1st, 2nd and 3rd defendants.**
- C**
- D p. Cost of this action.**

E Both sides called oral evidence, one witness each, at the trial court. At the close of their respective cases and final addresses the trial court delivered a reserved judgment. In the judgment the trial court held as a fact that the appellants, as plaintiffs, were no longer indebted to the defendant/respondent in any sum in Naira denomination, and that in US Dollar denomination, however, the 2nd and 3rd plaintiffs/appellants were still

F liable in the sum of \$1,000,000.00 USD to the defendant/respondent. The appellants unsuccessfully appealed that finding. This further appeal is against the decision of the Court of Appeal, Abuja Division (the lower court), that affirmed the decision of the trial court and dismissed the appeal of the appellants before it.

G Aggrieved by the decision of the lower court in the appeal No. CA/A/203/2012 the appellants herein have further appealed to this court. They filed their notice of appeal on 27th November, 2014. It has two

H grounds, to wit-

GROUND ONE: ERROR IN LAW

The honourable lower court erred in law when it held as follows:

I Exhibits O and Q as found by the trial court are clear

- A** admissions of indebtedness to the respondent by the 2nd and 3rd appellants, in addition to the Oruruo Eloka, DW1, at page 111 of the record, especially paragraphs 10-15.
- B** Contrary to the contention of learned counsel to the appellants, this court holds the view that the respondent have discharged the onus of proof of a counter claimant, by the evidence of DW1 and Exhibits O and Q; and thus
- C** having acknowledged their liability the onus is on the 2nd and 3rd defendants to the counter claim, herein appellants to show that they paid, or are not indebted; this is more so especially in view of the appellants' eagerness, portrayed particularly in Exhibit O to pay.
- D**

GROUND TWO: ERROR IN LAW

The honourable lower court erred in law when it held as follows:

- E**
- F** The abandonment of the 3rd defendant/appellant's case is total, by reason of the fact that no sufficient evidence was elicited in contradiction from the testimony of DW1, contrary to the contention of learned counsel to the appellant; it is just not enough in circumstances to refuse or fail to lead evidence in support of your pleadings, only to cross examine the witness for the counter claimant, and assume that mere cross examination is enough. The evidence elicited from such cross examination must not only be pleaded, relevant but also substantially support the claim of the appellant. I did not see such thing in this case. The circumstances of this case are clearly in contradistinction to the position of the law in *Ofem & Anor Vs. Ewa & Anor (2012) LPELR-7852-CA*.
- G**
- H**
- I** The appellants also formulated two (2) issues from the two (2) grounds of appeal, viz:

A **3. Whether the court below was right when it held that the respondent discharged the onus of proof of the counter-claim and that the appellants failed to show that they paid or are not indebted to the respondent. (Ground 1)**

B

C **4. Whether the court below was right in its position that the failure of the 3rd appellant to testify at the High Court left the evince of DW1 uncontradicted as it pertains to the counter-claim (Ground 2)**

D In the respondent's brief, filed on 30th January, 2015, the respondent raised preliminary objection to the competence of the appeal on the grounds that:

E **a. The grounds of appeal herein are grounds of fact and or mixed law and fact.**

F **b. No leave was obtained before the filing of the appeal.**

F **c. The mere labeling of a ground of appeal as “error in law” does not translate the ground into a ground of law.**

G **d. This honourable court lacks the jurisdiction to entertain an appeal based on facts or mixed law and fact without leave.**

H The issue raised by the Preliminary Objection is simply: whether the appellant's appeal is competent? It is true, as submitted by the respondent on the authority of **Tilbury Construction Co. Ltd. Vs. Sunday Ogunniyi (1988) 2 NWLR (pt. 74) 64**, that the mere labeling of a ground of appeal as a ground of law, or error in law, does not *ipso facto* make or transform the complaint in the ground of appeal to one of complaint of error of law. The

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A ground of appeal, to be one of error or law must, in actuality or substance, be a complaint that the court below had committed error of law in its judgment, the subject of the appeal. The ground of appeal read together with the particulars of error must unequivocally point at error in law.

B The notice of appeal is an originating process. To determine whether or not it has properly initiated an appeal before this court under Section 233 (3) of the 1999 Constitution, the notice of appeal shall be submitted to scrutiny in order to determine whether or not it has strictly complied with the relevant enabling provisions of the law. *See Abbas Vs. Terra (2013) 3 NWLR (pt. 1334) 284 at 286.* The enabling provisions of Section 233 (2) & (3) of the Constitution are clear:

D **(2) An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in following cases:**

E **(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;**

F **(b)**

F **(c)**

F **(d)**

F **(e)**

F **(f)**

G **(3) Subject to the provision of subsection (2) of this section, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.**

H In other words, a ground of appeal other than one complaining or raising issue of law alone is not file as of right. The appellant shall, for a ground involving question of mixed law and fact or of fact alone, seek and obtain leave of court before filing or bringing appeal on that ground.

I The appellants posit that their appeal comes under Section 233(2) of the Constitution, and therefore as of right, since the two grounds of appeal

- A** “involve questions of law alone”. The respondent, on the contrary, maintains that the two grounds of appeal are grounds of mixed law and fact, or of fact, and therefore the appeal on them could not been brought as of right. The respondent on this stance submits that the appellants needed to
- B** have first sought and obtained leave of court under Section 233 (3) of the Constitution before filing the notice of appeal, and having brought their appeal without satisfying the pre-condition, the appeal therefore is incompetent.
- C** My lords, I had earlier set out the grounds of appeal and the issues formulated therefrom by the appellants for the determination of their appeal. The perusal of the grounds of appeal together with their particulars of error, when read together with the issues for the determination, leaves no
- D** doubt that the two grounds of appeal are purely on facts. Dr. Ameh, SAN for the respondent puts it succinctly thus: “the issues framed from the grounds (of appeal) have put the argument to rest that the grounds are grounds of facts only”.
- E** The complaint in ground one is merely that the lower court did not properly evaluate the facts before it. The totality of the ground and its particulars comes down to this: that the lower court did not appreciate or apprehend the facts on which it held that the evidence of the DW1 viz-a-viz
- F** Exhibits O and Q as found by the trial court, are clear admissions of their indebtedness to the respondent. Indebtedness of one party to other is one facts. It calls for the estimation or valuation of one set of facts against the other in order that the judge would appreciate, realize or see that one party is
- G** or is not indebted to the other. Where the ground of appeal is couched in a way, as the instant ground one, that reveals or questions the evaluation of facts by the lower tribunal before the tribunal would come to its finding of fact such a ground is one of facts, or at best one of mixed law and facts. As
- H** Onu, JSC, stated in **Medical and Dental Practitioners Disciplinary Tribunal Vs. Dr. John Emewulu Nichola Okonkwo (2001) 3 SC 76; (2001) 6 NWLR (pt. 710)**- where the error complained of is one predicated on disputed facts calling into question the correctness of the facts
- I** determined, it is invariably a question of mixed law and facts. **A.C.B. Plc**

A Vs. Obiami Brick & Stone (1993) 6 SCNJ 98; (1993) 5 NWLR (pt. 274) 399.

I have read the opinion of Adekeye, JSC in **B.A.S.F (Nig) Ltd. Vs. Faith Enterprises Ltd (2010) 4 NWLR (pt, 1183) 104 at 132** cited by the appellant's counsel. It also accords with the earlier dicta of this court in **M.D.P.D.T. Vs. Okonkwo (supra)** and **A.C.B. Plc Vs. Obiami (supra)** that where admissible evidence has been led, the assessment of that evidence is entirely for the court. If the complaint, as in the instant case, is about the assessment of the admissible evidence, the ground is that of fact. Adekeye JSC also stated in **B.A.S.F. (Nig) Ltd Vs. Faith Ent. Ltd (supra)** that where the ground questions the evaluation of the facts before the application of the law, it is ground of mixed law and facts.

D The complaint in ground two of the grounds of appeal is that the lower court was in error in its findings as of the fact that the 3rd defendant had abandoned his case at the trial court, having failed to adduce evidence or elicit evidence from the opponent's witness (DW1) to support his case as pleaded. The issue formulated from this ground of appeal is: whether the lower court was right that the failure of the 3rd appellant to testify at the trial court left the evidence of DW1 uncontradicted as it pertains to the counter-claim?

F The verb contradict, in its ordinary grammatical meaning, also means to assail, controvert, deny, dispute or traverse. One fact or set of facts is required to contradict, controvert, or traverse another fact or set of facts. That is why in Section 123 of the Evidence Act, 2011 it is provided that facts not disputed or which are taken as admitted need no further proof. *See also* **DIN Vs. African Newspapers of Nigeria Ltd (1990) 21 NSCC (pt. 2) 313 at 320.**

H Clearly from the earlier templates set by this court in **M.D.P.D.T. Vs. Dr. Okonkwo (supra)**, **A.C.B. Plc Vs. Obiami Bricks & Stone (supra)** and **B.A.S.F (Nig) Vs. Faith Enterprises Ltd (supra)**; it becomes very hard for me to agree with the appellant's counsel that the two grounds of appeal on which the appellants' appeal is predicated “involve questions of law”. I agree with the senior counsel for the respondent that the two grounds of appeal are grounds of mixed law and facts, or of facts. They

A accordingly require leave of the Court of Appeal or of this court first sought and obtained before this appeal on them could be brought in accordance with Section 233 (3) of the Constitution. The failure of the appellant to first seek and obtain the leave before bringing this appeal has rendered this
B appeal incompetent.

The preliminary objection is on *terra firma* and it is accordingly sustained. Consequently, the appeal being incompetent is hereby struck out.

C The respondent is entitled to costs, which I assess at N500,000. The said amount shall be paid to the respondent by the appellants, jointly and or severally as costs.

D **Ejembi Eko**
Justice, Supreme Court

MUSADATTIJO MUHAMMAD, (JSC): My learned brother Ejembi Eko JSC did oblige me the draft of his lead judgment just delivered. I agree
E with him that an appeal founded on grounds of mixed law and fact and in respect of which the leave of court has not been sought and obtained is incompetent. In the instant case with all the grounds of appeal being of
F mixed law and fact and leave of neither the lower court nor this court not having been sought and obtained the respondent/objector is right to insist that we decline jurisdiction. Section 233(3) of the 1999 Constitution as amended supports their contention. *See also Ugboaja Vs. Akintoye-Sowemimo (2008) 16 NWLR (Pt. 1113) 278 and Jimoh Vs. Akande (2009) 5 NWLR (Pt. 1135) 549.*
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It is for the foregoing and more so for the fuller reasons contained in the lead judgment that I also strike out the incompetent appeal and abide by the consequential orders made in the lead judgment.

H **Musa Dattijo Muhammad**
Justice, Supreme Court

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, (JSC): My learned brother, Ejembi Eko, JSC obliged me with a draft of the
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A judgment just delivered. I agree with him that there is merit in the preliminary objection raised by the respondent.

The appellants' appeal against the judgment of the lower court is on two grounds. They are reproduced hereunder:

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GROUND 1

The honourable lower court erred in law when it held as follows:-

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Exhibits O and Q as found by the trial court are clear admissions of indebtedness to the respondent by the 2nd and 3rd appellants, in addition to the Oruruo Eloka, DW1, at page 111 of the record, especially paragraphs 10-15.

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Contrary to the contention of learned counsel to the appellants, this court holds the view that the respondent have discharged the onus of proof of a counter claimant, by the evidence of DW1 and Exhibits O and Q; and thus

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having acknowledged their liability the onus is on the 2nd and 3rd defendants to the counter claim, herein appellants to show that they paid, or are not indebted; this is more so especially in view of the appellants' eagerness, portrayed

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particularly in Exhibit O to pay.

PARTICULARS

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1. Exhibit O was clear on its surface that the one million US Dollars was to substantially reduce an already outstanding indebtedness with the bank .

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2. Evidence on records shows that the appellants totally liquidated their outstanding indebtedness with the bank.

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3. The respondents DW1 admitted on record that there is no contract between the appellants and the respondent wherein the respondent paid the

A **appellants N99 million naira in exchange for \$1 million dollars.**

GROUND 2

B The honourable lower court erred in law when it held as follows:-

C **The abandonment of the 3rd defendant/appellant's case is total, by reason of the fact that no sufficient evidence was elicited in contradiction from the testimony of DW1, contrary to the contention of learned counsel to the appellant; it is just not enough in circumstances to refuse or fail to lead evidence in support of your pleadings, only**

D **to cross examine the witness for the counter claimant, and assume that mere cross examination is enough. The evidence elicited from such cross examination must not only be pleaded, relevant but also substantially support**

E **the claim of the appellant. I did not see such thing in this case. The circumstances of this case are clearly in contradistinction to the position of the law in Ofem & Anor Vs. Ewa & Anor (2012) LPELR-7852-CA.**

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PARTICULARS:

G **1. A counter claim is an independent action that must succeed on the strength of the counter claim and not on the weakness of defence to the counter claim.**

H **2. The decision of the trial High Court that the respondent did not prove the claim of \$1 million dollars apart from reliance on Exhibits O and Q was not appealed and stands.**

I **3. Exhibits O and Q do not constitute admission of indebtedness of \$1 million dollars by the appellants.**

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4. In the 1st and 2nd appellants defence to counter claim dated 22nd January, 2010 and filed on 2nd February, 2010 the 1st and 2nd appellants adopted paragraphs 1-19 of the Statement of Claim in answer to the counter claim.

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C

5. PW1 led evidence in support of paragraphs 1-19 of the Statement of Claim, thereby defending the counter claim.

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6. The admission of DW1 under cross examination supports the pleadings in paragraphs 1-19 of the Statement of Claim and substantially destroyed the counter claim.

E The objection of Dr. S.S. Ameh, SAN, learned counsel for the respondent is on the following grounds:

1. The grounds of appeal herein are grounds of fact or of mixed law and fact.
2. No leave was obtained before filing this appeal.
- F** 3. The mere labeling of a ground of appeal as “error in law” does not translate the ground into a ground of law.
4. This honourable court lacks the jurisdiction to entertain an appeal based on facts or on mixed law and fact without leave.

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It is learned senior counsel's contention that the appeal is incompetent for failure of the appellants to obtain leave to appeal either from this court or from the court below. It is settled law that failure to obtain leave to appeal

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where leave is required is fatal to the appeal. The leave of court is a condition precedent to the jurisdiction of the appellate court to entertain the appeal. Failure to obtain leave, where necessary, renders the grounds of appeal requiring such leave and any issues formulated therefrom

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incompetent. *See Oshatoba Vs. Olujitan (2000) 5 NWLR (Pt. 655) 159; Metal Construction....Vs. Migliore (1990) 1 NWLR (Pt. 126) 99;*

A Ikweki Vs. Ebele (2005) 11 NWLR (Pt. 936) 397; Tilbury Construction Ltd. Vs. Ogunniyi (1988) 2 NWLR (Pt. 74) 64.

By virtue of Section 233(2)(a) of the 1999 Constitution, an appellant can appeal as of right from the Court of Appeal to the Supreme Court where
B the ground of appeal is a ground of law alone in respect of decisions in any civil or criminal proceedings before the Court of Appeal. By virtue of Section 233 (3) of the 1999 Constitution, on the other hand, an appeal to this court on facts alone or on mixed law and facts can only be by leave of this
C court or the court below. *See* **KTP Ltd. Vs. G & H (Nig.) Ltd. (2005) 13 NWLR (Pt. 943) 680; Maigoro Vs. Garba (1999) 10 NWLR (Pt. 624) 555 @ 568; CBN Vs. Okojie (2002) 8 NWLR (Pt. 768) 48; Abubakar Vs. Dankwambo (2015) 18 NWLR (Pt. 1491) 213 @ 234-235.** It has been
D held that the mere description of a ground of appeal as an error of law is not sufficient to make it so. *See* **Yaro Vs. Arewa Construction Ltd. (2007) 6 SC (Pt. II) 149; Ojemen & Ors. Vs. Momodu II (1983) SC 173.**

However, a single ground of appeal in law alone is capable of
E sustaining an appeal.

It is recognized that it is often difficult to distinguish between a ground of law and a ground which is of mixed law and facts. Over time, a general rule of thumb employed by courts to determine the nature of a
F ground of appeal has evolved. Where the complaint is that the trial or appellate court misunderstood the law or misapplied the law to be proved or admitted facts, it is a ground of law. Where the ground of appeal questions the evaluation of evidence before the application of the law, it is a ground of
G mixed law and fact. There is generally no difficulty in determining whether a ground of appeal is a question of fact. *See* **Odunukwe Vs. Ofomata (2010) 18 NWLR (Pt. 1225) 404; Metal Construction (W.A.) Ltd. Vs. Migliore (1990) 1 NWLR (Pt. 126) 299; Ogbechie Vs. Onochie (1986) 2**
H **NWLR (Pt. 23) 484; Anukam Vs. Anukam (2008) 5 NWLR (Pt. 1081) 455.**

I have carefully examined the two grounds of appeal reproduced above. I agree with learned senior counsel for the respondent that the two
I grounds raise issues of fact or at best mixed law and facts. There is no evidence in the record before us that leave to appeal was sought and

- A** obtained either from the court below or from this court. The two grounds of appeal are therefore incompetent. In the absence of any ground of law to sustain the appeal, the failure to obtain leave before filing this appeal is fatal. I agree with my learned brother in the lead judgment that the appeal is
- B** incompetent. It is accordingly struck out. I abide by the order for costs as contained in the lead judgment.

Kudirat M. O. Kekere-Ekun, JSC
Justice, Supreme Court

- C**
- JOHN INYANG OKORO, (JSC):** My learned brother Ejembi Eko, JSC obliged me in draft form a copy of the judgment he has just delivered which I read in advance. I agree with him that the five grounds of appeal in the
- D** notice of appeal are of mixed law and facts and the leave of this court not having been sought and obtained before filing same, makes the said grounds incompetent and cannot sustain this appeal.

- Admittedly, the difficulty in recognizing and/or distinguishing a
- E** ground of law from a ground of fact or mixed law and fact has always been recognized by the courts. The position as enunciated by this court in several authorities on this issue is for the court to examine the grounds of appeal involved to see whether the grounds reveal a misunderstanding by the
- F** lower court of the law or a misapplication of the law to the facts already proved or not in dispute in which case the question in the ground is one of law. Where the grounds would require questioning the evaluation of facts by the lower court before the application of the law, then the question in the
- G** involved grounds would be of mixed law and fact. *See Ogbечи Vs. Onochie (1986) 2 NWLR (pt. 23) 484; Orakosin Vs. Menkiti (2001) 5. SC (Pt. 1) 72; Osasona Vs. Ajayi (2004) 5 SC, (pt. 1) 88; Global West Vessel Specialist Nig. Ltd. Vs. Nigeria LNG Ltd & Anor. (2017)*
- H** *LPELR-41987 (SC).*

- The two grounds of appeal in the instant appeal have been set out in the lead judgment and I find it unnecessary repeating the exercise here. A close look at the two grounds as was evaluated by my learned brother,
- I** Eko, JSC, they are of mixed law and facts. There is no evidence that the leave of this court or the Court of Appeal was sought and obtained before

- A** filing the notice of appeal. This is as provided for under Section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). By this provision, only grounds complaining of or raising issue of law alone can be filed as of right. Any ground of appeal raising or
- B** complaining about issue of mixed law and fact or facts alone cannot be raised in this court except leave of this court or the Court of Appeal has previously been sought and obtained. Failure to seek and obtain the requisite leave renders the said ground of appeal incompetent and deserves
- C** to be struck out.

As it stands in this appeal, the only two grounds of appeal contained in the notice of appeal are adjudged incompetent. What this means is that the preliminary objection of the learned senior counsel for the respondent

- D** Dr. S. Ameh, SAN, is hereby sustained. In consequence, as there is no competent ground to sustain the appeal, it is hereby struck out. I abide by the order as to costs.

John Inyang Okoro
Justice, Supreme Court

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- CHIMACENTUS NWEZE, (JSC):** I had the advantage of reading, before now, the draft judgment which my lord, Ejembi Eko, JSC, just delivered now. I agree with His Lordship's view that the ground of appeal is incompetent, being a ground of mixed law and fact, which cannot be raised without leave of either the court below or this court, Section 233 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

- G** When the facts are disputed as between the parties, the conclusions which follow from the application of the law to such disputed facts are characterized as those of mixed law and facts. Hence grounds of appeal challenging such conclusions are grounds of mixed law and fact, **Ajayi and**
- H Anor Vs. Omoroghe (1993) LPELR- 290 (SC) 23; F-G; MDPDT Vs. Okonkwo (2001) 3 SC 76; ACB Plc Vs. Obmiami Brick and Stone Nigeria Ltd (1993) 6 SCNJ 98.**

- I** As this court held in **ACB Plc Vs. Obmiami Brick and Stone Nigeria Ltd (1993) LPELR-206 (SC) 27; E-F:**

A It is now generally accepted that where the ground of appeal is based on an allegation of error deduced from conclusion on undisputed facts, it is a ground of law. Where on the other hand, the error of law is founded on

B disputed facts calling into question the correctness of the facts determined, it is invariably a question of mixed law and fact. This is because in this latter case, it is a conclusion of law coupled with the exercise of discretion.

C It is for these, and the more elaborate, reasons in the lead judgment that I, too, shall dismiss this appeal. Appeal dismissed.

D **Chima Centus Nweze**
Justice, Supreme Court

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