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Ogbodu vs. The State (1987) 2 NWLR (Pt. 54) 20;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Ogbonna vs. A.G. Imo State (1992) 1 NWLR (Pt. 220) p. 647;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Ogbu vs. The State (2007) 2 SCNJ 319;
Setraco Nigeria Limited vs. Joseph Kpaji (2017) JSCNLR (Vol. 2). 131 S.C.

Ogembe vs. Usman (2011) 17 NWLR (pt. 1277) 638;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Ogoala vs. The State (1991) 2 NWLR (Pt. 175) 509;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Ogonzee vs. The State (1998) 5 NWLR (Pt. 551) 521;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Ogudo vs. The State (2011) 18 NWLR (pt. 1278) at 45;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Ogundoyin vs. Adeyemi (2001) 33 WRN 1,;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Okafor vs. AG, Anambra State and Ors (1991) LPELR-SC.264/1998, 27-28;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Okafor vs. Nweke (2007) 10 NWLR (pt. 1043) 521;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Oke Utuyorume vs. The State (2010) 43 WRN 162;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Okelade vs. Adewunmi (2010) 2 -3 SC (Pt. 1) 140;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Okesuji vs. Lawal (1991) 1 NWLR (Pt.) 661;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Okike vs. Legal Practitioners Disciplinary Committee (2005) 15 NWLR (Pt.949) 471, or (2005) 7 SC (Pt.111) 75;

Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Okonkwo vs. C. C. B. (2003) FWLR (Pt. 154) 457;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Okonkwo vs. Okonkwo (1998) 10 NWLR (Pt. 571) 554;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Okoro vs. The State (1953) 14 WACA 370;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Okoro vs. The State (1988) 5 NWLR (Pt. 94) 255;
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Okoroji vs. The State (2001) FWLR (Pt. 77) 871;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Okotha vs. Herwa Ltd (2000) 15 NWLR (Pt.690) 249, 258;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Okotha vs. Herwa Ltd. (2000) 15 NWLR (Pt. 690) 249,;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Okoya vs. Santili (1994) 4 NWLR (Pt.338) 256;
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) JSCNLR (Vol. 2), 85 S.C.

Okoye vs. N. C. and F.C. Ltd (1991) 6 NWLR (Pt.199) 501;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Okoye vs. Nig Construction (1991) 7 SCNJ (Pt. 2) 365;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Oladejo vs. he State (1987) 3 NWLR (Pt. 61) 364;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Olayinka vs. The State (2002).
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Oloba vs. Akereja (1988) 3 NWLR (Pt.84) 508;
Setraco Nigeria Limited vs. Joseph Kpaji (2017) JSCNLR (Vol. 2), 131 S.C.

Olofu vs. Idodo (2010) 18 NWLR (Pt. 1225) 545;
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

Oloriode vs. Oyebi (1984) 5 SC 1;
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

Olumesan vs. Ogundepo (1996) 2 SCNJ 172 ;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Omo vs. JSC, Delta State (2000) 12 NWLR (Pt. 682) 444;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Onafowokan vs. The State (1987) 3 NWLR (Pt. 61) 538;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

ONU OBEKPA vs. COMMISSIONER OF POLICE (1981) 2 NCLR 420.
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Onungwa vs. The State (1976) 1 sc (reprint) 74;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Onwuka & Anor vs. Omogwi (1992) 3 NWLR (Pt. 230) 393;

Sunday Oroja vs. Ilo Adeniyi (2017) 1 JSCNLR (Vol. 2), 56 S.C.

Onwuka vs. Owolewa (2001) 28 WRN 89; (2001) 7 NWLR (Pt.713) 695.
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Onyenye vs. The State (2012) 15 NWLR (pt. 1324) 586;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Ordia vs. Piedmant (Nig.) Ltd (1995) 2 NWLR (Pt. 378) 516;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Oredoyin vs. Arowolo (1989) 4 NWLR (pt. 114) 72;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Oriawe vs. Okere (2002) FWLR (Pt. 14) 427;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Osakwe vs. Nigerian Paper Mill Ltd. (1998) 1 NWLR (Pt. 568) 1;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Oshodim vs. The State (2002) FWLR (Pt. 90) 1336;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Osolu vs. Osolu (2003) FWLR (Pt. 172);
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Owena Bank (Nig.) Plc vs. Mohammed (1998) 1 NWLR (Pt. 533) 301;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Owodunni vs. Reg Trustees of CCC (2000) 6 SC (Pt III) 60;
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

Oyagbola vs. Esso West African Ltd (1966) 1 ALL NLR p. 170;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Oyedeji vs. Akinyele (2002) 3 NWLR (Pt. 755) 586, 613;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt. 50) 356;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt.50 356;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Oyibo Iriri & Ors. vs. Eseroraye Erhuarhobara & Anor. (1991) 3 SC. 1;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Ozigbo vs. Commissioner of Police (1976) 1 ALL NLR 133;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Plateau State of Nigeria and Anor vs. A.G, Federation (2006) LPELR 2921 (SC);
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

PMB vs. MIB (2000) 6 WRN 30;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Prime Merchant Bank vs. Man-Mountain Company (2000) 6 WRN 130,;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Professor Bolaji Idowu vs. Reverend G. A. Bamgbose (1986) 4 NWLR (Pt 37) 632;
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

R. vs. Walter Skyes (1913) 8 car 233;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Ras Pal Gazi Construction Co. Ltd. vs. F.C.D.A. (2001) 10 NWLR (Pt.722) 559;
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) JSCNLR (Vol. 2), 85 S.C.

Registered Trustees of the Apostolic Church, Lagos Area vs. Akindele (1967) ALL NLR 110;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Sanmabo vs. The State (1967) NMLR 3IX ;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Savannah Bank of Nigeria Limited vs. S. I. O. Corporation (2001) 1 NWLR (Pt.693) 194;
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) 1 JSCNLR (Vol. 2), 85 S.C.

Scott Emukpor vs. Ukaube (1979) 1 SC 6;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Scott Emukpor vs. Ukaube (1979) 1 SC 6;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Senator Abraham Adesanya vs. President of Nigeria and Anor (1981) 1 ALL N.L.R 1;
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

Shell Petroleum Development Co. Nig. Ltd vs. Sam Royalhotel. Nig. Ltd. (2016) LPELR SC. 120/2006;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Shittu vs. State (1970) 1 All NLR 228;
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Shittu vs. The State (1970) 1 ALL NLR 233;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Shonekan vs. Smith (1964) NMLR 59;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Silas Sule vs. State (2009) 8 SCM 177;
Chukwuemeka Agugua vs. The State (2017) 1 JSCNLR (Vol. 2), 387 S.C.

Sken Consult Nig. Ltd vs. Ukey (1981) 1 SC 6;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

SLB Consortium Ltd. vs. NNPC (2011) 9 NWLR (Pt. 1252) 317;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Solanke vs. Ajibola (1968) SCNLR 92;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Solola vs. The State (2005) 11 NWLR (Pt. 937) 460;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Solomon Thomas Akpan vs. The State (1992) LPELR 351 (SC);
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Songhai Ltd. vs. UBA (2003) 14 WRN 121,;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Stephen vs. State (1986) 5 NWLR (pt. 46) p. 78;
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Sule vs. The State (2009) 17 NWLR (Pt. 1169) 33;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Taylor Wooodrow (Nig) Ltd. vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127;
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) JSCNLR (Vol. 2), 85 S.C.

THE NIGERIAN AIR FORCE vs. KAMALDEEN (2007) 2 SC. 113;
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

The Salawu vs. State (2011) LPELR 8252 (SC) (2011) 10 SCM 76;
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

The State vs. Gwonto (1983) ALL NLR 109 (1983) 3 SC. 62;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

The Young Shall Grow Motors Ltd.vs Okonkwo (2010) 15 NWLR (Pt.1217) 524;
Setraco Nigeria Limited vs. Joseph Kpaji (2017) JSCNLR (Vol. 2), 131 S.C.

Thomas Edison Ltd. vs. Bullock (1912) 1 SCLR 679;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Timitimi vs. Amabebe & Ors 14 WACA 374.
The Attorney-General of the Federation vs. The Attorney-General of Lagos State (2017) JSCNLR (Vol. 2), 170 S.C.

Torri vs. National Park Service of Nigeria (2011) 6-7 SC (Pt. III) 171;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

U.T.C. (Nig.) Ltd vs. Pamotei (1989) 2 NWLR (Pt.103) 244;
Setraco Nigeria Limited vs. Joseph Kpaji (2017) JSCNLR (Vol. 2), 131 S.C.

Ubierho vs. The State (2005) 5 NWLR (Pt. 919) 644;
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439.
Joel Adamu vs. The State (2017) JSCNLR (Vol. 2), 1 S.C.

Ukpe Ibodo vs. Iguisi Enorafia (1980) 5-7 SC. 42.
Christopher Dibia vs. The State (2017) JSCNLR (Vol. 2), 335 S.C.

Umeojiako vs. Ezeanamuo (1990) 1 NWLR (Pt. 126) 253;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

*Union Bank of Nigeria Plc vs. Sparkling Breweries Limited (*1997) 5 NWLR (Pt.505) 344;
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) JSCNLR (Vol. 2), 85 S.C.

University of Lagos vs. Aigoro (1985) NWLR (Pt. 1) 145;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Uwagbo vs. State (2007) 6 NWLR (Pt. 103) 1;
Chukwuemeka Agugua vs. The State (2017) JSCNLR (Vol. 2), 387 S.C.

Uwazuruike vs. A.G. Federation (2007) 8 NWLR (pt. 1035) 1;
Prof. Nnamdi Okwuosa vs. Professor N.E. Gomwalk (2017) JSCNLR (Vol. 2), 445 S.C.

Vinz International (Nig.) Ltd vs. Morohundiya (2009) 11 NWLR (Pt.1153) 562.
Nigerian Telecommunication Ltd. vs. Engr. Emmanuel C. Okeke (2017) JSCNLR (Vol. 2), 85 S.C.

Walter vs. Skyll Nig Ltd (2000) 13 WRN 60, 98;
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

Wolunchem vs. Wokoma (1974) 1 All NLR (Pt. 1) 605;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Yisi (Nig.) Ltd vs. Trade Bank Plc (1999) 1 NWLR (Pt. 588) 464;
The Registered Trustees of the Presbyterian Church of Nigeria vs. John Asuquo Etim (2017) JSCNLR (Vol. 2), 218 S.C.

Young Shall Grow Motors Ltd vs. Ambrose O. Okonkwo & Anor (2010), 2 SCNJ 396.
Setraco Nigeria Limited vs. Joseph Kpaji (2017) JSCNLR (Vol. 2), 131 S.C.

Yusuf vs. State (2011) 6-7 SC (Pt.v) p.180;
Auwalu Darma vs. Eco Bank Nigeria Limited (2017) JSCNLR (Vol. 2), 292 S.C.

Zaccheus Faleye & Ors vs. Alhaji Lasisi Otapo & Ors (1995) 3 NWLR (Pt. 381) 1.
Sunday Oroja vs. Ilo Adeniyi (2017) JSCNLR (Vol. 2), 56 S.C.

JOEL ADAMU
AND
THE STATE

SC. 125/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 13TH JANUARY 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower courts – Attitude of the Supreme Court thereto.

CONSTITUTIONAL LAW: Fair hearing – Improper arraignment of accused – Breach of his right to fair hearing – ***Section 36(1) of the Constitution of Federal Republic of Nigeria 1999 (as commended)*** *– Consideration thereof.*

COURT: Identification of accused – Where case against the accused substantially depended on his proper identification – Accused alleged mistaken identity – What should be proper attitude of court thereto.

CRIMINAL LAW AND PROCEDURE: Arraignment – Improper arraignment – Effect

CRIMINAL LAW AND PROCEDURE: Accused not properly arraigned on the charge of conspiracy – Implication.

CRIMINAL LAW AND PROCEDURE: Arraignment of accused person – Requirements of valid arraignment – Sections 187 of the Criminal Procedure Code and 215 of the Criminal Procedure Act.

CRIMINAL LAW AND PROCEDURE: Identification of accused – Evidence of identification of a single witness – Whether sufficient to identity the accused in a charge of murder.

CRIMINAL LAW AND PROCEDURE: Identification of accused Identification parade, – Whether necessary – A question of fact to be decided by the trial court.

CRIMINAL LAW AND PROCEDURE: Proof – Offence of armed robbery – Burden of persecution proof on – How discharged.

CRIMINAL LAW AND PROCEDURE: Proof – Whether a certain number of witnesses is required to successfully prove a charge against the accused.

CRIMINAL LAW AND PROCEDURE: Proof – Failure of prosecution to tender items recovered from accused –

Whether diminished the standard of proof.

CRIMINAL LAW AND PROCEDURE: The circumstances where an identification parade is imperative.

CRIMINAL LAW: Charge of conspiracy – Distinct from the substantive offence – Implication.

EVIDENCE: The test for determining the credibility of a Confessional statement – Consideration thereof.

Issues for Determination

i. Whether the trial, conviction and sentence passed on the appellant are not a nullity in view of the failure of the trial court to comply with the mandatory provisions of Section 187(1) of the Criminal Procedure Code (Ground 5).

ii. Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the appellant was not fatal to its case (Ground 2).

iii. Whether there was proper identification of the Appellant consequently linking him to the commission of the offences charged (Ground 3).

Facts of the Matter

The appellant and two others were charged before the High Court of the Federal Capital Territory (FCT) on a two-count charge of conspiracy and armed robbery contrary to Section 5 and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990 respectively. They were alleged to have committed the offences

on 8/9/2005 at Anglican Church Guest House, Dauda Street, Wuse Zone 5 Abuja. In the course of the armed robbery they were alleged to have robbed 5 victims of various sums of money and other valuable items such as jewelry, handsets and wristwatches. The appellant and his co-accused pleaded not guilty to each of the counts. At the trial the prosecution called 3 witnesses: PW1, Inspector Akeem Lamboye, a police officer attached to Wuse Division of the Nigerian Police, FCT Command, PW2, Inspector Obeh Azuka attached to the Special Anti Robbery Squad (SARS), FCT Command who took over the investigation and PW3, Julius Nomshem, a security guard and staff of the Guest House.

In their defence the accused persons testified on their own behalf and called no other witnesses. Five sets of exhibits were tendered. Exhibits C and A1 were statements of the appellant made at Wuse FCT and SARS respectively.

At the end of trial, the court convicted the accused persons as charged. The appellant's appeal to the Court of Appeal was dismissed hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal in part)*

1. *The requirements of valid arraignment of an accused person*

Section 187 (1) of the Criminal Procedure Code (applicable in Northern Nigeria) and Section 215 of the Criminal Procedure Act (applicable in Southern Nigeria) contain similar provisions relating to the procedure for the arraignment of an accused person. The requirements are as follows:

1. The accused person shall be brought before the court unfettered (unless the trial Judge otherwise directs).

2. The charge shall be read and explained to the accused person to the satisfaction of the court in the language he understands.

3. The accused person shall then be called upon to plead thereto instantly. *(Pp 18-19 paras F-A)*

2. *The implication of improper arraignment of accused person.*

The requirements are mandatory, as they ensure that the accused person's right to fair hearing, as enshrined in Section 36 (6) of the 1999 Constitution, is protected. Failure to comply with these requirements would render the trial a nullity for lack of fair hearing. Kajubo vs. The State (1988) 1 NWLR (Pt. 73) 721 @ 732 E-F; Eyorokoromo vs. The State (1979) 6-9 SC 3; Josiah vs. The State (1985) 1 SC 406 @ 416; Torri vs. National Park Service of Nigeria (2011) 6-7 SC (Pt. III) 171 @ 200 lines 4-31).
(P 19 paras A-C)

3. *Conspiracy is distinct from the substantive offence*

The offence of conspiracy is a separate and distinct offence from the offence of armed robbery. The act of conspiracy may be based on the same facts or set of facts as the main offence of armed robbery but not in all cases. On the distinction between the two offences, it was held in Balogun vs. A.G. Ogun State (2002) 2 SC (Reprint) (Pt. 11) 89 @ 96 per Uwaifo, (JSC) as follows:

"Conviction for conspiracy does not become inappropriate simply because the substantive offence has not been proved. It is a known principle of law that conspiracy to commit an offence is a separate and distinct offence and is independent of the actual commission of the offence to which the conspiracy is related. The offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted, or may have become impossible to commit."
(Pp 21-22 paras D-A.)

Per Kekere Ekun (JSC):

In Balogun's case (supra), it was found that the appellant and others had a common purpose, namely to rob with violence, as they were together in the premises of PW1 from whom they made a demand of money under threat. However, as a result of lack of evidence that money or property was actually stolen by the appellant and others on the day in question, the offence of armed robbery was not established. However, the appellant's conviction for conspiracy to commit armed robbery was upheld.

(Awosika vs The State (2010) 9 NWLR (Pt. 1198) 49 @ 70 D; (Kayode vs The State (2012) 11 NWLR (Pt. 1312) 523)". *(P 22 paras A-D)*

4. Where the accused did not plead to the charge of conspiracy

In the instant case, the appellant was properly arraigned in respect of the charge of armed robbery. Being separate and distinct offences, I am of the considered view that the counts could be severed from one another. As the appellant's plea was not taken in respect of the count for conspiracy, his conviction and sentence on that count amounts to a nullity. However, as he was properly arraigned on the count for armed robbery, the trial in respect of that offence remains valid. This issue succeeds in part in respect of the conviction and sentence of the appellant on the charge for conspiracy.
(P 22 paras D-G)

5. How to discharge the burden of proof in a case of armed robbery

It is settled law that in order to discharge the burden of establishing the guilt of an accused person beyond reasonable doubt in a charge of armed robbery, the prosecution must prove the following:

1. **That there was a robbery or series of robberies.**
2. **That each of the robberies was an armed robbery.**
3. **That the appellant was the robber or one of those who participated in the armed robbery.**

[Bozin vs The State (1985) 2 NWLR (Pt. 8) 465
Suberu vs The State (2010) 8 NWLR (Pt. 1197) 586
Ani vs The State (2003) 11 NWLR (Pt. 830) 142

Attah vs The State (2010) 10 NWLR (Pt. 1201) 190 @ 244 B-D Olayinka Vs The State (2007) 9 NWLR (Pt. 1040) 561]. *(P 25 paras A-D)*

6. *There is no specified number of witnesses required to successfully prove a charge*

As rightly submitted by learned counsel for the respondent, the prosecution has the discretion to call whatever number of witnesses it deems necessary to discharge the burden of proof.

(Ochiba vs The State (2011) 17 NWLR (Pt. 1277) 663 @ 687 B-E; 691 B-D

Akpan vs The State (1991) 3 NWLR (Pt. 182) 646].

Indeed, the evidence of a single witness, if credible and cogent, is sufficient to ground a conviction. See: Babarinde vs. The State (2013) 12 SCNJ 316; Sule vs The State (2009) 17 NWLR (Pt. 1169) 33 @ 57-58 H-B; Ogoala vs The State (1991) 2 NWLR (Pt. 175) 509 @ 523; Ibrahim Musa vs The State; SC 31/2013 delivered on 16/12/2016 (unreported)].
(P 25 paras E-H)

7. *The attitude of the Supreme Court to the findings of fact by two lower courts*

Per Kekere Ekun, (JSC):

> **"In the course of its judgment, the court below, at pages 239 – 240 of the record, endorsed the findings of the trial court**

> **reproduced above. The trial court has the singular opportunity of seeing and hearing the witnesses testify and of observing their demeanour. Notwithstanding the fact that the stolen items recovered from the appellant were not tendered in evidence, he found the witnesses to be credible and their evidence cogent and compelling. The lower court found no reason to disturb the findings.**
>
> **Unless the appellant is able to show that the said findings are perverse, this court will not interfere with the concurrent findings of facts by the two lower courts. The appellant has failed to advance any special or compelling reasons to warrant interference by this court.**
>
> **In the circumstances, I hold that the failure of the prosecution to call all the witnesses named in the proof of evidence or to tender in evidence the items recovered from the appellant is not fatal to the prosecution's case, as there was sufficient evidence before the court upon which it based its decision. This issue is accordingly resolved against the appellant".**
> *(P 30 paras D-H)*

8. *Proper Identification is a question of fact*

The law is settled that the question whether an accused person is properly identified as one of those who participated in the commission of the criminal

act is a question of fact to be considered by the trial court on the evidence adduced for that purpose. [Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439].

It is also trite that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely examine the evidence and in acting on it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. See: Ukpabi vs. The State (supra); R vs. Turnbull (1976) 3 All ER 549; Abudu vs. The State (1985) 1 NWLR (Pt. 1) 55 @ 61-62; Mbenu vs. The State (1988) 3 NWLR (Pt. 84) 615 @ 628; Ikpo vs. The State (2016) 2-3 SC (Pt. III) 88 @ 111 6-21.
(P 35 paras B-F)

9. *Evidence of Identification of a single witness.*
However, if the evidence of a lone witness is believed, his identification of an accused person can sustain a conviction, even on a charge of murder. See: Ochiba vs. The State (2011) 12 SC (Pt. IV) 79.

In the instant case, there was no serious doubt as to the identity of the appellant as one of the robbers. Although PW3 did not specifically mention him, PW1 in his evidence testified as to how the appellant was apprehended after the 1st accused was caught in the bushes behind the Guest House shortly after the offence was committed. The 1st accused led the investigating team to where the appellant and the 3rd accused were arrested. The appellant confessed to

his part in the crime in his statement, Exhibit A1.
(Pp 35-36 paras F-A)

Per Kekere-Ekun (JSC):

> **"I am of the considered view that there was no uncertainty whatsoever regarding the identity of the appellant as one of those who committed the offence. He confessed to his part in the crime and thereby fixed himself at the scene. There was also no doubt as to where the offence was committed. The observation of learned counsel for the appellant regarding the mention of hotel as opposed to guest house in the appellant's statement is of no moment, particularly as PW1 and PW2 testified that they personally interviewed the victims of the crime at the Anglican Guest House. Furthermore, even though the appellant retracted his confessional statements at the trial, the learned trial judge was correct in the manner in which he treated the statements by considering their weight in relation to the other evidence adduced and proved by the prosecution".** *(Pp 36-37 paras H-C)*

10. *The six way test for assessing the credibility of a confessional statement*

1. **Whether there is anything outside the confession which shows that it may be true;**
2. **Whether the confessional statement is in fact**

corroborated;

3. **Whether the relevant statement of fact made in it are most likely true as far as they can be tested;**
4. **Whether the accused had the opportunity of committing the offence;**
5. **Whether the confession is possible and;**
6. **Whether the alleged confession is consistent with other facts that have been ascertained and established.** *(Pp 31-32 paras H-C)*

Nigerian Cases cited in this Judgment

Abdullahi vs. The State (2005) ALL FWLR (Pt. 263) 69;
Abudu vs. The State (1985) 1 NWLR (Pt. 1) 55;
Adaje vs. The State (1979) 6-9 SC 18;
Akalezi vs. The State (1993) 2 NWLR (Pt. 273);
Akpan vs. The State (1991) 3 NWLR (Pt. 182) 646;
Alabi vs. The State (1993) 7 NWLR (Pt. 307) 511
Alor vs. State (1997) 4 NWLR (Pt. 505) 511;
Ani vs. The State (2003) 11 NWLR (Pt. 830) 142;
Archibong vs. The State (2004) 1 NWLR (Pt. 853) 488;
Attah vs. The State (2010) 10 NWLR (Pt. 1201) 190;
Awosika vs. The State (2010) 9 NWLR (Pt. 1198) 49;
Babarinde vs. The State (2013) 12 SCNJ 316;
Balogun vs. A.G. Ogun State (2002) FWLR (Pt. 100) 1287;
Balogun vs. A.G. Ogun State (2002) 2 SC (Reprint) (Pt. 11) 89;
Bozin vs. The State (1985) 2 NWLR (Pt. 8) 465;
Dapere Gona vs. The State (1996) 4 NWLR (Pt. 443) 375;
Edamine vs. The State (1996) 3 NWLR (438) 530;
Effiong vs. The State (1998) 8 NWLR (Pt. 562) 362 SC;
Ewe vs. The State (1992) 6 NWLR (Pt. 246) 147;
Eyorokoromo vs. The State (1979) 6-9 SC 3;
FRN vs. Mohammed Usman (Alias Yaro Yaro) and Anor. (2012)

8 NWLR (Pt. 1301) 141;
Gabriel vs. State (2010) 6 NWLR (Pt. 1190) 280;
Gira vs. The State (1996) 4 NWLR (Pt. 443) 375;
Ibrahim Musa vs. The State (unreported) SC 31/2013;
Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455;
Ikpo vs. The State (2016) 2-3 SC (Pt. III) 88;
Isah vs. The State (2010) 16 NWLR (Pt. 1218) 132;
Isiaka Rufai vs. The State (2001) 13 NWLR 718;
Josiah vs. The State (1985) 1 SC 406;
Kajubo vs. The State (1988) 1 NWLR (Pt. 73) 721;
Kayode vs. The State (2012) 11 NWLR (Pt. 1312) 523;
Mbenu vs. The State (1988) 3 NWLR (Pt. 84) 615;
Millar vs. The State (2005) 8 NWLR (Pt. 927) 236;
Nkwuda Edamince vs. State (1996) 3 NWLR (Pt. 438) 530;
Nwomukoro & Ors. vs. The State (1995) 1 NWLR (Pt. 372) 432;
Ochiba vs. The State (2011) 17 NWLR (Pt. 1277) 663;
Ofoke Nwambe vs. The State (1995) 3 NWLR (Pt. 384) 385;
Ogbodu vs. The State (1987) 2 NWLR (Pt. 54) 20;
Ogoala vs. The State (1991) 2 NWLR (Pt. 175) 509;
Ogonzee vs. The State (1998) 5 NWLR (Pt. 551) 521;
Okoro vs. The State (1953) 14 WACA 370;
Okoroji vs. The State (2001) FWLR (Pt. 77) 871;
Oladejo vs. The State (1987) 3 NWLR (Pt. 61) 364;
Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561;
Onafowokan vs. The State (1987) 3 NWLR (Pt. 61) 538;
Oshodim vs. The State (2002) FWLR (Pt. 90) 1336;
Solola vs. The State (2005) 11 NWLR (Pt. 937) 460;
Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586;
Sule vs. The State (2009) 17 NWLR (Pt. 1169) 33;
Torri vs. National Park Service of Nigeria (2011) 6-7 SC (Pt. III) 171;
Ubierho vs. The State (2005) 5 NWLR (Pt. 919) 644; and

Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439.

Foreign Cases cited in this Judgment

Miller vs. Minister of Pension (1947) 2 All ER 372

R vs. Sykes (1913) 8 Cr. App. Reports 233; and

R vs. Turnbull (1976) 3 All ER 549;

Nigerian Statutes cited in this Judgment

Criminal Procedure Code

The 1999 Constitution of the Federal Republic of Nigeria S. 36(1) (6);

The Criminal Procedure Act S. 215;

The Evidence Act 2011 S. 167(d);

The Robbery and Firearms (Special Provisions) Act, Cap 398;

Laws of the Federation of Nigeria, 1990 S. 5 and 1(2)(g)

Representations

Aliyu Saiki (Esq.), *for the Appellant with* **W.E. Ivara (Esq.), Afolabi Omotoso, Ibrahim T. Hassan** *and* **Amal Abdulwahab (Miss)**.

AISHA EGELE (MISS) *for the Respondent.*

KEKERE-EKUN, (JSC) (Delivering the Lead Judgment): The appellant and two others were charged before the High Court of the Federal Capital Territory (FCT) on a two-count charge of conspiracy and armed robbery contrary to **Section 5 and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990** respectively. They were alleged to have committed the offences on 8/9/2005 at Anglican

Church Guest House, Dauda Street, Wuse Zone 5 Abuja. In the course of the armed robbery they were alleged to have robbed 5 victims of various sums of money and other valuable items such as jewelry, handsets and wristwatches. The appellant and his co-accused pleaded not guilty to each of the counts. At the trial the prosecution called 3 witnesses: PW1, Inspector Akeem Lamboye a police officer attached to Wuse Division of the Nigeria Police, FCT Command, PW2, Inspector Obeh Azuka attached to the Special Anti Robbery Squad (SARS), FCT Command who took over the investigation and PW3, Julius Nomshem, a security guard and staff of the Guest House.

In their defence the accused persons testified on their own behalf and called no other witnesses. Five sets of exhibits were tendered. Exhibit C and A1 were statements of the appellant made at Wuse FCT and SARS respectively.

The facts of the case, as presented by the prosecution, are as follows: Upon receipt of a distress call on 8/9/2005 relayed from the FCT Command control room that some armed robbers had invaded the Anglican Church Guest House, PW1 and his team went to the scene to investigate. They met the manager of the hotel as well as PW3, the security guard. They also met some victims of the attacks who narrated how they were relieved of their valuables by the bandits. On being informed that the robbers escaped through the bush, PW1 and his team proceeded to the canal at the back of the Guest House and blocked possible exits. The 1st accused, James Simon, was arrested and searched. The following items were found on him: N4,940 in cash, one necklace, two wrist watches, and a belt. The 1st accused led the police team to Jabi Motor Park where the appellant and the 3rd accused were arrested. They were searched and the

police recovered cash, two handsets and jewellery from them. They were taken to the police station where they volunteered statements. The case was transferred to SARS (SCID) and handed over to PW2 who invited some of the victims. They made statements. The appellant also made a statement.

PW3, the security guard, testified as to how in the course of his patrol around 3.40 a.m., he saw someone near the generator house. As he walked towards him several other men emerged with weapons such as cutlass, machetes, sticks and a locally made pistol. They took him to the security post and tied him down. They left one person to guard him. According to him, the 1st and 3rd accused persons were the ones who tied him up. He could see their faces because there was light in the compound. They removed his handset, the sum of N1,505.00 and his security torch light. He was gagged and threatened with death if he raised an alarm. He identified the accused person at the police station.

In his defence the appellant denied committing the offence and also denied making Exhibits C and A1. At the conclusion of the trial in a well considered judgment delivered on 31/1/2012 the learned trial judge found him guilty on each count of the charge and sentenced him to death by hanging. Dissatisfied with the decision, he appealed to Court of Appeal Abuja Division (the court below), which on 23/1/2013, dismissed the appeal and affirmed the judgment of the trial court. Still dissatisfied he has further appealed to this court vide a Notice of Appeal dated 18/2/2013 containing four grounds of appeal. With leave of this court granted on 15/7/2013, he filed an additional ground of appeal, which was incorporated in his amended Notice of Appeal deemed filed the same day, making a total of five

grounds of appeal.

At the hearing of the appeal on 20/10/2016, ALIYU SAIKI ESQ., leading other learned counsel, adopted and relied on the appellant's brief, which was deemed properly filed on 15/7/2013 and urged the court to allow the appeal. AISHA EGELE (MISS) adopted and relied on the respondent's brief deemed properly filed on the same day, 20/10/2016, and urged the court to dismiss the appeal and affirm the concurrent findings of the two lower courts.

In his brief of argument, ALIYU SAIKI ESQ., identified 4 issues for determination as follows:

i. Whether the trial, conviction and sentence passed on the appellant are not a nullity in view of the failure of the trial court to comply with the mandatory provisions of **Section 187(1) of the Criminal Procedure Code** (Ground 5).

ii. Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the appellant was not fatal to its case (Ground 2).

iii. Whether there was proper identification of the appellant consequently linking him to the commission of the offences charged (Ground 3).

iv. Whether the learned justices of the Court of Appeal were right in affirming the conviction of the appellant having regard to the evidence before the court (Ground 1 and 4), as submitted by learned counsel for the appellant. She also conceded that the learned trial judge failed to take the appellant's plea in respect of count 1, the charge for conspiracy. In her view, the effect of this omission is that the trial and conviction of the appellant on the count for conspiracy amounts

to a nullity. She however argued that, as the appellant's plea was properly taken on the count for armed robbery, the failure to take his plea on the count for conspiracy could not nullify the entire trial. She submitted that conspiracy is a separate and distinct offence and independent of the substantive offence of armed robbery. She referred to the case of **Balogun vs A.G. Ogun State (2002) FWLR (Pt. 100) 1287 @ 1306.** She noted that an accused person could be convicted of the offence of conspiracy even where the substantive offence has not been proved and that an acquittal in respect of the offence of conspiracy does not i.e. armed robbery in the instant case. She argued further that a charge for the substantive offence could stand on its own without a charge for conspiracy. She maintained that the appellant's trial and conviction on the substantive offence of armed robbery is sustainable notwithstanding the court's failure to take his plea on the charge of conspiracy. She urged the court to resolve this issue in the respondent's favour.

Section 187 (1) of the Criminal Procedure Code (applicable in Northern Nigeria) and **Section 215 of the Criminal Procedure Act** (applicable in Southern Nigeria) contain similar provisions relating to the procedure for the arraignment of an accused person. The requirements are as follows:

1. The accused person shall be brought before the court unfettered (unless the trial jdge otherwise directs).
2. The charge shall be read and explained to the accused person to the satisfaction of the court in the language he understands.

3. The accused person shall then be called upon to plead thereto instantly.

The requirements are mandatory, as they ensure that the accused person's right to fair hearing, as enshrined in **Section 36 (6) of the 1999 Constitution**, is protected. Failure to comply with these requirements would render the trial a nullity for lack of fair hearing. See**: Kajubo vs. The State (1988) 1 NWLR (Pt. 73) 721 @ 732 E-F; Eyorokoromo vs. The State (1979) 6-9 SC 3; Josiah vs. The State (1985) 1 SC 406 @ 416; Torri vs. National Park Service of Nigeria (2011) 6-7 SC (Pt. III) 171 @ 200 lines 4-31.**

The appellant and his co-accused were arraigned before the trial High Court on 1/12/2005. The record of proceedings in respect of their arraignment is at pages 102-103 of the record. It reads thus:

"Pros. Counsel: We pray the court to take the plea of the accused persons.

Court: Count 1 is read and explained to the 1st accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.

1st accused: I am not guilty.

Court: Count 2 is read and explained to the 1st accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.

1st accused: I am not guilty.

Court: Count 2 is read and explained to the 2nd accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.

2nd accused: I am not guilty.

Court: Count 1 is read and explained to the 3rd accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make this plea.

3rd accused: I am not guilty.

Court: Count 2 is read and explained to the 3rd accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plead.

3rd accused: I am not guilty.
Pros. Counsel: We apply for a date for hearing. The accused persons have all pleaded not guilty.

Court: The case is adjourned to 19/1/2006 for hearing.
Signed: Hon. Justice A.M. Talba Presiding Judge
1/12/2005"

It is glaring from the record reproduced above that the plea of the appellant, who was the 2nd accused, was not taken in respect of count 1 of the charge. However at the conclusion of the trial all three accused persons were found guilty and convicted on each count of the charge and were sentenced to death by hanging accordingly. Learned counsel for the respondent concedes that the appellant was not arraigned in respect of the count of conspiracy and that his trial and conviction for that offence amount to a nullity. The point of divergence is that while it is contended on behalf of the appellant that the entire trial is a nullity, learned counsel for the respondent argues that the trial and conviction on the count of armed robbery is sustainable, as the appellant was properly arraigned in respect of that count.

The offence of conspiracy is a separate and distinct offence from the offence of armed robbery. The act of conspiracy may be based on the same facts or set of facts as the main offence of armed robbery but not in all cases. On the distinction between the two offences, it was held in **Balogun vs A.G. Ogun State (2002) 2 SC (Reprint) (Pt. 11) 89 @ 96** per **Uwaifo, JSC** as follows:

"Conviction for conspiracy does not become inappropriate simply because the substantive offence has not been proved. It is a known principle of law that conspiracy to commit an offence is a separate and distinct offence and is independent of the actual commission of the offence to which the conspiracy is related. The offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted, or may have become

impossible to commit."

In **Balogun's case (supra),** it was found that the appellant and others had a common purpose, namely to rob with violence, as they were together in the premises of PW1 from whom they made a demand of money under threat. However, as a result of lack of evidence that money or property was actually stolen by the appellant and others on the day in question, the offence of armed robbery was not established. However, the appellant's conviction for conspiracy to commit armed robbery was upheld.

See also: **Awosika vs. The State (2010) 9 NWLR (Pt. 1198) 49 @ 70 D; Kayode vs The State (2012) 11 NWLR (Pt. 1312) 523.**

In the instant case, the appellant was properly arraigned in respect of the charge of armed robbery. Being separate and distinct offences, I am of the considered view that the counts could be severed from one another. As the appellant's plea was not taken in respect of the count for conspiracy, his conviction and sentence on that count amounts to a nullity. However, as he was properly arraigned on the count for armed robbery, the trial in respect of that offence remains valid. This issue succeeds in part in respect of the conviction and sentence of the appellant on the charge for conspiracy.

ISSUE TWO

This issue challenges the failure of the prosecution to tender the items recovered from the appellant and its failure to call the victims of the armed robbery as witnesses. Learned counsel for the appellant noted that the prosecution called only three out of eight witnesses listed in the proof of

evidence, in spite of the fact that PW2, in his evidence, stated that two of the victims made statements to the police. He submitted they were material witnesses and that failure to call them to testify was fatal to the prosecution's case. While conceding that the prosecution is not bound to call every available witness, he maintained that the failure to call vital witnesses was fatal. He relied on: **Millar vs The State (2005) 8 NWLR (Pt. 927) 236 @ 277 A-B; Ogonzee vs. The State (1998) 5 NWLR (Pt. 551) 521; Archibong vs. The State (2004) 1 NWLR (Pt. 853) 488.** He submitted that their evidence would have resolved vital issues such as the items stolen and the identity of the robbers. He submitted that before there can be a robbery, something must have been stolen. He referred to: **F.RN. vs. Usman & Anor. (2012) 8 NWLR (Pt. 1301) 141 @ 156.** He submitted further that even where witnesses listed on the proof of evidence are not called by the prosecution, they must be presented for cross examination and that where the evidence of a material witness would be conclusive one way or another and he is not called to testify, the conviction would be liable to be quashed. He relied on: **Okoroji vs. The State (2001) FWLR (Pt. 77) 871 @ 888 and Oshodin vs. The State (2002) FWLR (Pt. 90) 1336 @ 1347.** On the failure of the prosecution to tender the items allegedly recovered from the appellant, he cited the case of: **Nwomukoro & Ors. vs. The State (1995) 1 NWLR (Pt. 372) 432 @ 444.**

In reply, learned counsel for the respondent submitted that the prosecution's burden of proving its case beyond reasonable doubt is not discharged on the basis of the number of witnesses called by the prosecution but on the cogency of the evidence led. She referred to: **Akalezi vs. The State (1993) 2 NWLR (Pt. 273) 1.** She submitted that the

A obligation to call vital or material witnesses does not extend to calling every available witness, as it is trite that a court can convict on the evidence of a single witness, if the witness is not an accomplice in the commission of the offence and his B evidence is sufficiently probative of the offence with which the accused is charged. She relied on: **Ofoke Nwambe vs. The State (1995) 3 NWLR (Pt. 384) 385 @ 408 C-H; Onafowokan vs. The State (1987) 3 NWLR (Pt. 61) 538.** C She submitted further that the number of witnesses called to establish its case is within the discretion of the prosecution. She relied on: **Ogbodu vs. The State (1987) 2 NWLR (Pt. 54) 20; Adaje vs. The State (1979) 6-9 SC 18.**

D Learned counsel submitted that PW3 who was an eye witness and victim of the offence gave a positive and cogent account of how he was tied up by the appellant and other members of his gang, how he was able to identify the 1st E accused because he was one of those who tied him up and the fact that he was able to see the robbers' faces because there was light in the compound. She submitted that his evidence is credible and sufficient to establish the charge against the F appellant. She submitted further that there is nothing in the record to show that the appellant applied for the production in court of any of the witnesses listed in the proof of evidence but not called to testify for the purpose of cross examination G and submitted that in the absence of such an application the prosecution had no obligation to produce them.

On the failure to tender the weapon used in the commission of the offence or the items recovered, learned H counsel submitted that there is no duty imposed on the prosecution by law to tender them. She submitted that the presumption of withholding evidence as provided in **Section 167 (d) of the Evidence Act**, does not apply to the non-

A calling of certain witnesses, as in the instant case. She urged the court to resolve this issue against the appellant.

It is settled law that in order to discharge the burden of establishing the guilty of an accused person beyond B reasonable doubt in a charge of armed robbery, the prosecution must prove the following:

1. That there was a robbery or series of robberies.
2. That each of the robberies was an armed robbery.

C 3. That the appellant was the robber or one of those who participated in the armed robbery.

See: **Bozin vs. The State (1985) 2 NWLR (Pt. 8) 465; D Suberu vs. The State (2010) 8 NWLR (Pt. 1197) 586; Ani vs. The State (2003) 11 NWLR (Pt. 830) 142; Attah vs. The State (2010) 10 NWLR (Pt. 1201) 190 @ 244 B-D; Olayinka vs. The State (2007) 9 NWLR (Pt. 1040) 561.**

E As rightly submitted by learned counsel for the respondent, the prosecution has the discretion to call whatever number of witnesses it deems necessary to discharge the burden of proof.

F *See*: **Ochiba vs The State (2011) 17 NWLR (Pt. 1277) 663 @ 687 B-E; 691 B-D; Akpan vs. The State (1991) 3 NWLR (Pt. 182) 646.** Indeed, the evidence of a single witness, if credible and cogent, is sufficient to ground G a conviction. *See:* **Babarinde vs. The State (2013) 12 SCNJ 316; Sule vs. The State (2009) 17 NWLR (Pt. 1169) 33 @ 57-58 H-B; Ogoala vs. The State (1991) 2 NWLR (Pt. 175) 509 @ 523; Ibrahim Musa vs. The State; SC H 31/2013 delivered on 16/12/2016 (unreported).**

PW3, the security guard on duty at the Guest House on the fateful day gave a first hand account of what he witnessed as follows:

"… My name is Julius Nomshen. I live at Mararaba. I am a staff of Church Guest House at Zone 5 Anglican Communion. I am a security man. I know the three accused persons. On 8/9/2005 at about 3.40am when I was patrolling round the premises of the Guest House I came back to the security post. After three minutes I came outside and sighted one man standing by the General inhouse. Then I walked towards him. Then reaching where he was standing many of them came up with weapons such as cutlass, matchete, sticks and locally made pistol. Then they held me and took me to the security post. They tied me down, they started their operation and they left one of them to guard me. When they came there was light in the compound. They removed one handset from me (sergem), the sum of N1,505.00 and a security torch light. The first and the third accused persons were the ones that tied me. I saw their faces in the light. They put a rag in my mouth so that I will not shout. They said if I shout they will finish me. After the incidence (sic) the police arrested them. I went to the police station. I saw them. The sagem handset, the security torch light and the money were recovered from the accused persons. It was the first accused person who was left to guard me. And he was the one who raised the alarm to the others when they ran away. There was security light in the security room. The security torchlight is a rechargeable one. It is for the Guest House. Immediately the

police arrested them we were invited to the station and we identified them at the crime branch office."

Under cross-examination he stated that he saw the three accused persons at the police station and that they all confessed to participating in the crime.

PW1, one of the Investigation Police Officers, stated how upon receiving a distress call that armed bandits had raided the Anglican Church Guest House at Wuse, Zone 5, went to the scene with a team of policemen. He stated that he met the manager of the Guest House and PW3, the security guard, who narrated what happened. He also met the victims of the robbery who were guests at the Guest House. The said victims enumerated the various items stolen from them, which included various types of handsets, sums of money, wristwatches, a necklace and some clothes. Having been informed that the robbers escaped into the bush, he stated that he and his team spread out among the three canal exits behind the Guest House to ambush the robbers and in the process apprehended the 1st accused. He stated that upon searching him the sum of N4,930.00, a necklace, two wristwatches and a belt were found on him. He stated that the items found on him tallied with some of the items the victims mentioned had been stolen from them. It was the statement volunteered by the 1st accused that led to the arrest of the appellant and the 3rd accused. He stated that a search of their persons also produced more of the stolen items, namely two handsets, some jewellery and the sum of N11,000.00 in cash. Statements were obtained from the two accused, which were dully endorsed by a superior police officer. The appellant's statement, Exhibit C, was tendered and admitted in evidence

without objection.

Under cross-examination, PW1 stated that he and his team arrived at the scene not more than five minutes after they received the distress call.

PW2, a police officer attached to the Special Anti Robbery Squad, State C.I.D. FCT Command, took over the investigation from PW1. He also conducted an investigation into the case, interviewed the victims of the robbery and obtained statements from the accused persons. The statement of the appellant was admitted in evidence without objection and marked Exhibit A1.

The appellant, in his defence stated that he was arrested at Jabi Motor Park while waiting to board a vehicle and that he was the victim of random arrests by the police. That he remained in detention because he had no money to bail himself out. He also stated that the statement obtained from him at Wuse Police Station was written by PW1, who had asked him a few preliminary questions such as his name, Local Government Area and educational background and that he was forced to sign it.

The learned trial judge carefully considered the evidence led by the prosecution and the appellant's defence. He also painstakingly considered his confessional statements, Exhibits C and A1. He found as follows at page 166 lines 18-30 of the record:

> **"PW1 who responded to the distress call was the one who arrested the 1st accused and took him to Wuse Police Station. I accept the evidence of PW3 who is an eye witness and a victim of the robbery incident. His evidence was not challenged, it is credible and is**

> **supported by the evidence of PW3[1].**
>
> **I therefore believe his evidence. It is settled law that the evidence of a single witness, if believed by the court can establish a criminal case, even if it is a murder charge.** See **Effiong Vs The State (1998) 8 NWLR (Pt. 562) 362 SC. And from the evidence of PW3 and PW1, I am satisfied with the truth of the confessional statements made by the three accused persons i.e Exhibits A, B, C and A1, B1 and C1."**

On the failure of the prosecution to call all the witnesses listed in the proof of evidence, the learned trial Judge held at page 170 lines 14 to 34:

> **"… a confessional statement is the best evidence on the issue of calling either the exhibit keeper or other victims of the robbery as witnesses. The law imposed no obligation on the prosecution to [call a host of witnesses to prove its case. All it needs to do is to call enough material witnesses to prove its case, and in so doing it has a discretion in the matter. It does not lie in the mouth of the defence to urge the prosecution to call a particular witness. See Olayinka vs The State (2007) 9 NWLR (Pt. 1040) 561. And for the sake of emphasis the evidence of a single witness, if believered by the court can establish a criminal case. See Efiong vs The State (supra).**
>
> **There is no law which imposes an obligation on the prosecution to tender as**

evidence the weapons used to commit an offence. Most often at times the culprits do discard the weapons after committing the offence. Similarly stolen items are rarely recovered. And where they are recovered, it is not absolutely necessary that they must be tendered in evidence in other to secure a conviction. It suffices once there is evidence to establish the fact that there was a robbery as in the instant case. Consequently the issues raised by the learned defence counsel lacks merit."

In the course of its judgment, the court below, at pages 239 240 of the record, endorsed the finding of the trial court reproduced above. The trial court has the singular opportunity of seeing and hearing the witnesses testify and of observing their demeanour. Notwithstanding the fact that the stolen items recovered from the appellant were not tendered in evidence, he found the witnesses to be credible and their evidence cogent and compelling. The lower court found no reason to disturb the findings. Unless the appellant is able to show that the said findings are perverse, this court will not interfere with the concurrent findings of fact by the two lower courts. The appellant has failed to advance any special or compelling reasons to warrant interference by this court.

In the circumstances, I hold that the failure of the prosecution to call all the witnesses named in the proof of evidence or to tender in evidence the items recovered from the appellant is not fatal to the prosecution's case, as there was sufficient evidence before the court upon which it based its decision. This issue is accordingly resolved against the appellant.

ISSUES THREE AND FOUR

In respect of Issue Three, it is contended by learned counsel for the appellant that an identification parade ought to be conducted where the identity of an accused person is in issue. He submitted that an identification parade is essential where the accused person was not arrested at the scene of the crime, where the victim was not acquainted with the accused before the commission of the crime or where the confrontation with the accused was very brief. He relied on: **Alabi vs The State (1993) 7 NWLR (Pt. 307) 511 @ 524 – 525 G-A and 532 – 533 H-A.; Archibong vs The State (supra) at 1762.**

He submitted that the appellant was not arrested at the scene of the crime and that PW3 did not mention him in the course of his testimony and did not identify him as one of the robbers. He contended that there is no nexus between the appellant and the offence with which he was charged. He submitted that the non-identification of the appellant requires the return of a verdict of not guilty unless there is other evidence to show the correctness of the identification. He referred to: **Abdullahi vs. The State (2005) ALL FWLR (Pt. 263) 698 @ 715.**

In respect of Issue Four, learned counsel referred to the ingredients of the offence of armed robbery as stated in the case of **Isah vs. The State (2010) 16 NWLR (Pt. 1218) 132 @ 161.** I have set them out earlier while resolving Issue Two above. He submitted that a conviction could be based solely on the confessional statement of an accused person but that the confessional statement can only be acted upon if subjected to the following guidelines to ascertain its truthfulness:

(i) Whether there is anything outside the confession which shows that it may be true;

(ii) Whether the confessional statement is in fact corroborated;
(iii) Whether the relevant statements of fact made in it are most likely true as far as they can be tested;
(iv) Whether the accused had the opportunity of committing the offence;
(v) Whether the confession is possible; and
(vi) Whether the alleged confession is consistent with other facts that have been ascertained and established.

He referred to: **Ubierho vs The State (2005) 5 NWLR (Pt. 919) 644 @ 655.** The above guidelines are also known as the test in **R vs. Sykes (1913) 8 Cr. App. Reports 233.** He submitted that although it is settled law that the court can act on a retracted confessional statement, such statement must be subjected to the guidelines enumerated above. He relied on: **Gira vs. The State (1996) 4 NWLR (Pt. 443) 375 @ 388 and Solola vs. The State (2005) 11 NWLR (Pt. 937) 460.** He identified certain statements made in Exhibits C and A1, which in his view, were inconsistent with the evidence led by the prosecution. He observed that while the charge states that the offence was committed at No. 23 Anglican Church Guest House Dauda Street, Wuse Zone 5, Abuja, in his confessional statements the appellant stated that the operation was carried out "in one hotel in Wuse". He contended that in the circumstances the appellant confessed to a crime that occurred at a different location from the one charged. He submitted that no evidence was led to explain the discrepancy. He submitted further that in the absence of corroborative evidence, Exhibits C and A1 neither related to the offence charged nor the scene of crime. He noted further that there was no evidence to corroborate the statement that

offensive weapons were used since PW1 admitted that no offensive weapons were recovered from the appellant. He submitted that the learned trial judge wrongly placed heavy reliance on the confessional statements and failed to dispassionately evaluate the evidence given by the appellant in his defence. He argued that once the appellant's oral testimony was rejected, his extra judicial statements were bound to be rejected also on grounds of inconsistency. He relied on: **Oladejo vs The State (1987) 3 NWLR (Pt. 61) 419.** He submitted that Exhibits C and A1 were wrongly relied upon to convict the appellant.

In reply, learned counsel for the respondent referred to the cases of **Bozin vs The State (supra) and Ikemson vs. The State (1989) 3 NWLR (Pt. 110) 455** for the ingredients of the offence of armed robbery, which must be established beyond reasonable doubt by the prosecution. She submitted that the identity of an accused person as one of those who participated in the commission of the crime is a crucial element in discharging this burden. She however submitted that it is not in all cases that an identification parade is necessary. She conceded that an identification parade might be necessary in the circumstances enumerated by learned counsel for the appellant but argued that the participation of an accused person in the commission of a crime may also be established through his confessional statement. On what constitutes a confession, she cited the case of: **Ikemson vs The State (supra) at 476 D.** She submitted that in proving its case, the respondent relied on the two confessional statements made by the appellant as well as circumstantial evidence. Relying on the case of: **Ubierho vs. The State (supra),** she submitted that an accused person can be convicted on the basis of his confessional statement alone.

She noted that before a confessional statement could be acted upon, the court must subject the statement to certain tests to determine its validity. She referred to **Ubierho vs. The State (supra).** She submitted that notwithstanding the appellant's retraction of his confessional statements, the court is entitled to rely and act on them, once it has considered the weight to be attached thereto in line with the guidelines for assessing their truthfulness. She referred to: **Edamine vs. The State (1996) 3 NWLR (438) 530; Gira vs. The State (supra).**

Learned counsel submitted that the contents of Exhibits C and A1, which were admitted without objection, are consistent with the evidence of PW3 whose evidence amounts to facts outside the confessional statements that make them probable. On the alleged inconsistency regarding the scene of the crime, she submitted that the evidence of the prosecution witnesses regarding the date and time of the offence and the fact that it took place in a guest house, which is similar to a hotel, show that there is no inconsistency. She contended further that the fact that the appellant retracted his confessional statements at the trial does not preclude the court from acting on them, as they are direct, positive and unequivocal as to the appellant's participation in the commission of the offence, and were tendered and admitted in evidence without objection. She submitted further that the evidence of the prosecution witnesses was cogent and credible. She also observed that in Exhibits C and A1, the appellant mentioned the names of the 1st and 3rd accused persons as members of his gang. She submitted that the court below was right in affirming the appellant's conviction and sentence and urged this court to resolve these issues against the appellant.

With regard to the issue of the identity of the appellant as one of those who took part in the armed robbery, both learned counsel have correctly stated the position of the law as regards the circumstances in which an identification parade is necessary. The law is settled that the question whether an accused person is properly identified as one of those who participated in the commission of the criminal act is a question of fact to be considered by the trial court on the evidence adduced for that purpose. *See* **Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439.** It is also trite that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely examine the evidence and in acting on it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. *See:* **Ukpabi vs. The State (supra); R vs. Turnbull (1976) 3 All ER 549; Abudu vs. The State (1985) 1 NWLR (Pt. 1) 55 @ 61-62; Mbenu vs. The State (1988) 3 NWLR (Pt. 84) 615 @ 628; Ikpo vs. The State (2016) 2-3 SC (Pt. III) 88 @ 111 6-21 per Kekere-Ekun, (JSC).** However, if the evidence of a lone witness is believed, his identification of an accused person can sustain a conviction, even on a charge of murder. *See:* **Ochiba vs. The State (2011) 12 SC (Pt. IV) 79.**

In the instant case, there was no serious doubt as to the identity of the appellant as one of the robbers. Although PW3 did not specifically mention him, PW1 in his evidence testified as to how the appellant was apprehended after the 1st accused was caught in the bushes behind the Guest House shortly after the offence was committed. The 1st accused led the investigating team to where the appellant and the 3rd

accused were arrested. The appellant confessed to his part in the crime in his statement, Exhibit A1. The statement, which was reproduced at page 153 of the record by the learned trial Judge, reads inter alia, as follows:

> **"The fourth operation was 7/9/2005. Omo came to me at Jabi Park and asked me and Ibrahim to follow okada. That was around 9:30 o'clock and we went behind Ibro Hotel where they parked (sic) sand, myself and Omo smoked Indian Hemp before we left for operation. We left for the operation around 2 a.m. It was Danlami who carried cutlass and it was the cutlass we used to cut stick we used for the operation. I got entrance to the guest house through the fence, it was Awalu who brought the work, when one sighted the security he came to us that the security was writing, he never sleep. From there all of us jumped into the house and tight (sic) the security down. We collected thirteen handsets and a lot of money. My share from the money was N8,000.00 and one hand set."**

The learned trial Judge considered the facts as stated above along with the evidence of the prosecution witnesses and found that their evidence corroborated the contents of the confessional statements. In other words he properly applied the settled guidelines in determining the truthfulness of the confession. I am of the considered view that there was no uncertainty whatsoever regarding the identity of the appellant as one of those who committed the offence. He

confessed to his part in the crime and thereby fixed himself at the scene. There was also no doubt as to where the offence was committed. The observation of learned counsel for the appellant regarding the mention of hotel as opposed to guest house in the appellant's statement is of no moment, particularly as PW1 and PW2 testified that they personally interviewed the victims of the crime at the Anglican Guest House. Furthermore, even though the appellant retracted his confessional statements at the trial, the learned trial Judge was correct in the manner in which he treated the statements by considering their weight in relation to the other evidence adduced and proved by the prosecution. The lower court at pages 228-230 of the record reviewed the findings of the learned trial Judge in respect of Exhibits A1 and C as follows:

> **"The learned trial Judge evaluated the evidence before him to determine the admissibility of the appellant's statements, Exhibits A1 and C. he observed at page 25 of the judgment as follows:**
>
> **"I therefore believe his evidence. The law is settled that the evidence of a single witness, if believed by the court can establish a criminal case, even if it is a murder charge. See Effiong vs. The State (1998) 8 NWLR (Pt. 562) 362 SC. And from the evidence of PW3 and PW1, I am satisfied with the truth of the confessional statements made by the three accused persons i.e. exhibits A, B, C and A1, B1 and C1. In fact, each of the accused persons did mention one Omo as the person who**

introduced them to the gang. The accused persons in their testimonies before the court mentioned where they were arrested in the morning hours. As for the 1st accused, he said he was arrested at Wuse. While the 2nd and 3rd accused said they were arrested at Jabi. In my view it could not have been a coincidence for each of them to mention the name Omo in their statements and names of other members of the gang. PW1 told the court that the 1st accused was arrested at Wuse, while the 2nd and 3rd accused persons were arrested at Jabi Motor Park. The three accused persons had confirmed what PW1 told the court. Again PW3 did inform the court that he was tied down by the 1st and 3rd accused persons before they started their operation. And in each of their statements the three accused persons mentioned that they tied down the security man (PW3). See Exhibits A1,B, B1 and C.

It is in view of the clear consistency in the statements of the three accused persons and the evidence of PW1 and PW3, that I am convinced and satisfied with the truth of the confessional statements. I am also convinced and satisfied that the prosecution has established beyond reasonable doubt that there was a robbery at the Anglican Church Guest House Wuse, Zone 5 on the 8/9/2005. And the robbery

was an armed robbery. And the three accused persons, namely James Simon, Joel Adamu and Ibrahim Musa participated in the robbery."

Moreover, the failure to object to the admissibility of the statements, Exhibits A1 and C has derailed the subsequent attempt by the appellant to disown those statements. I cannot fault the lower court in admitting the statements for it has no reason whatsoever to reject them. Once admitted the learned trial judge was entitled to rely on the said exhibits. The poser in issue one cannot but be answered in the affirmative and resolved against the appellant."

The concurrent findings of fact by the two lower courts have not been shown to be perverse. They are fully founded upon the evidence before the trial court. This court will not interfere. Issues Three and Four are accordingly resolved against the appellant.

In conclusion, the appeal succeeds in part. The conviction and sentence of the appellant to death for the offence of conspiracy to commit armed robbery by the trial court and affirmed by the lower court is hereby set aside. The judgment of the court below affirming the conviction and sentence of the appellant to death by hanging for the offence of armed robbery is hereby affirmed.

Appeal succeeds in part.

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

PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Kudirat Kekere-Ekun and to underscore my support I shall make

some comments.

This is an appeal against the judgment of the Court of Appeal, Abuja Division which affirmed the conviction of the trial court for the offences of conspiracy and armed robbery.

The appellant was charged along with two other persons for the offences of conspiracy and armed robbery contrary to **Section 5 and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria 1990** respectively.

The version presented by the prosecution/respondent is that the appellant with others conspired and robbed the guests in a guest house at Wuse Zone 5, Abuja and on their arrest certain of the stolen items belonging to the victims of the robbery were recovered from the robbers. Confessional statements were tendered and admitted in evidence as Exhibits A1 and C.

On the other part, the appellant in his defence denied committing the offences and asserted that the confessional statements were signed under duress.

At the conclusion of the trial, the appellant with the 2nd accused were convicted and sentenced to death by hanging which was affirmed b***nd sentence passed on the appellant are not a nullity in vie***y the Court of Appeal and being dissatisfied further, the appellant has appealed before this court.

On the 20th October, 2016 date of hearing, learned counsel for the appellant, Aliyu Saiki adopted his brief of argument in which he formulated four issues for determination which are as follows:

(i) Whether the trial, conviction aw of the failure of the trial court to comply with the

mandatory provisions of section 187(1) of the Criminal Procedure Code (Ground 5)

(ii) Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the appellant was not fatal to its case (Ground 2).

(iii) Whether there was proper identification of the appellant consequently linking him to the commission of the offences charged (Ground 3)

(iv) Whether the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant having regard to the evidence before the court (Ground 1, and 4).

Aisha Egele, counsel for the respondent adopted the brief of the respondent filed on 19/9/16 and deemed filed on 20/10/16 and in it distilled three issues for determination which are thus:

(i) Whether the failure of the trial court to take the plea of the appellant in respect of the 1st count out of the two count charge as required by Section 187(1) of the Criminal Procedure Code renders the entire trial a nullity. (Ground 5).

(ii) Whether the failure of the respondent to call those listed in the proof of evidence as witnesses and tender the recovered stolen items in evidence occasioned any miscarriage of justice in the conviction of appellant (Ground 2).

(iii) Whether from the evidence adduced the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant. (Grounds 1, 3 and 4)

I shall utilize the issues as crafted by the appellant and take Issues 1, 2 and 3 together and 4 which I see as sufficient to answer the nagging questions in this appeal.

Whether the trial, conviction and sentence passed on the appellant are not a nullity in view of the failure of the trial court to comply with the mandatory provisions of **Section 187(1) of the Criminal Procedure Code**. Also the matter of the failure to produce the absent witnesses and the identification of the appellant.

For the appellant, learned counsel stated that on arraignment on two counts of the charge, one of conspiracy and the other of armed robbery, the appellant was only put to the plea of the armed robbery and not conspiracy and so the taking of the plea in the second count alone was contrary to section 187(1) of the Criminal Procedure Code (CPO) and thereby created a nullification of the trial in its entirety. He cited **Kajubo vs. The State (1988) 1 NWLR (Pt. 73) 721; Ewe vs. The State (1992) 6 NWLR (Pt. 246) 147; Isiaka Rufai vs. The State (2001) 13 NWLR 719 at 729 — 733; Section 36 (6) of the 1999 Constitution of the Federal Republic of Nigeria** (as amended).

That aside from the above, that the proof of evidence specified eight witnesses which made them material and vital but only three witnesses testified and the failure to call the other witnesses is fatal. Learned counsel cited **Millar vs. The State (2005) 8 NWLR (Pt. 927) 236 at 277; FRN vs. Mohammed Usman (Alias Yaro Yaro) and Anor. (2012) 8**

NWLR (Pt. 1301) 141 at 156 etc.

Mr. Aliyu Saiki of counsel for the appellant contended that the respondent's failure to call the victims of the robbery brings about the presumption that the evidence would have been favourable to the accused. He relied on **Section 167 (d) of the Evidence Act 2011; Oshodim vs. The State (2002) FWLR (Pt. 90) 1336 at 1347**.

Also submitted for the appellant is that the failure of the respondent to tender in evidence the items allegedly recovered is fatal to the case of the respondent more so in the absence of any explanation of their absence. He referred to **Nwomukoro & Ors. vs. The State (1995) 1 NWLR (Pt. 372) 432 at 444 (CA).**

For the appellant, it was further submitted by counsel that in criminal trial, the identity of the accused is material and crucial and it must be established by credible evidence with the required standard which is beyond reasonable doubt as provided for in **Section 135(1)** of the **Evidence Act, 2011**.

That the identification in this instance was short of that standard expected. He cited **Balogun vs. AG. Ogun (2002) FWLR (Pt. 100) 1287, Alabi vs. State (1993) 7 NWLR (Pt. 307) 511 at 524 525**.

Respondent's learned counsel, Aisha Egele submitted that it is conceded that failure of the appellant to plead to the count on conspiracy vitiated the trial on only that count and did not affect the count of armed robbery to which appellant pleaded as each count stood alone and separately.

That the prosecution is not obligated to call all material and vital witness if there is a witness whose sole testimony would be sufficient in proof of the crime that is enough. She cited **Ogbodu vs. State (1987) 2 NWLR (Pt.**

54) 20 Adaje vs. State (1970) 6-9 SC 18.

In summary, the long and short of the stance of the appellant is that the trial, conviction and sentence of the appellant are a nullity for non-compliance with the mandatory provisions of **Section 187(1) CPC and section 36(6) of the 1999 Constitution** as amended.

Also there was no nexus between the appellant and the commission of the offences charged and respondent had failed to prove the case against the appellant beyond reasonable doubt.

The response from the other side is that the offence of conspiracy is a separate, distinct and independent of the substantive offence, hence an accused person could be convicted for conspiracy even where the substantive offence has not been proved. That an acquittal on an offence of conspiracy does not translate to acquittal on the substantive offence and that it is trite that a charge on the substantive offence could stand on its own without the charge on conspiracy. On the substantive charge the respondent contends the offence was proved beyond reasonable doubt and that the Court of Appeal was correct in affirming the conviction and sentence of the appellant for the offences charged.

It is stating the obvious that an arraignment of an accused without his taking his plea on the count in keeping with **Section 187(1) of the Criminal Procedure Code** renders the trial a nullity. The present scenario however is unique and has to be treated with the distinction it deserves.

The provisions of the said **Section 187(1) of the Criminal Procedure Code (CPC)** provides thus:

> **"When the High Court is ready to commence trial the accused shall appear or be brought before it and the charge shall be read out in court and explained to him and he shall be asked whether he is guilty or not of the offence or offences charged."**

That provision of the CPC is similar in content to **Section 36(6) (a) of the 1999 Constitution** and it stipulates as follows:

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

The two statutory provisions, **Section 187(1) CPC** and **Section 36(6) (a) of the Constitution** are mandatory. Curiously at the arraignment there were two counts of the charge, the count 1 being of conspiracy while count 2 was for armed robbery and it turned out that the record showed that the accused/appellant only took the plea for the count 2 and nothing said on the count 1. There was nothing on record explaining this anomaly.

The two statutory stipulations brook no options for failure to do the needful, that is that the count or charge being read and explained to the accused in English or language he understands in all details and essentials and his understanding of what he was standing trial for, after which he is asked to make his plea. As done in count 2, shown in the record there was compliance and nothing said on count 1.

The effect of what transpired is that only count 2 stood valid and its trial thereby in order. On the other hand the count 1 on conspiracy would remain invalid and the trial thereby a nullity. See **Kajubo vs. The State (1988) 1 NWLR (Pt. 73) 721; Ewe vs. The State (1992) 6 NWLR (Pt. 246) 147; Isiaka Rufai vs. The State (2001) 13 NWLR 718 at 729-733.**

The appellant's stand is that the two counts and the entire proceedings be declared a nullity. This would be taking technicality too far particularly where the offence of conspiracy is a separate, distinct and independent offence from the substantive. Since either of the two counts can fail or succeed standing alone, only count 1 of conspiracy which being visited with the fundamental vice would fail without dragging down count 2 which had no non-compliance defect. I rely on **Balogun vs. Ag. Ogun State (2002) FWLR (Pt. 100) 1287 at 1306.**

Therefore all references to the conspiracy and evidence laid thereby would be of no moment having died with the count 1.

On the valid count 2 of armed robbery the appellant is of the view that prosecution failed to meet the required standard of proof which is beyond reasonable doubt. That the prosecution called only three witnesses PW1 PW3 out of the eight listed in the proof of evidence.

It is to be said that proving the offence beyond reasonable doubt is not synonymous with the number of witnesses called by the prosecution. This court had restated what is required in meeting the standard of proof beyond reasonable doubt in the case of **Akalezi vs. State (1993) per Ogwuegbu JSC** at page 13 as follows:

> **"Proof beyond reasonable doubt is not attained by the number of witnesses fielded by the prosecution. It depends on the quality of evidence tendered by the prosecution. In the case of Miller vs. Minister of Pension (1947) 2 ALL ER 372, it was held that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and if the evidence is strong against a man, as to leave only a remote probability in his favour; of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt."**

The learned Supreme Court jurist further stated that:

> **"The court can act on the evidence of a single witness if that witness can be believed given all the surrounding circumstances. One single credible witness can establish a case beyond reasonable doubt."**

What is expected of the prosecution is to exercise discretion on who to call to testify and is not bound to utilize those named in the proof of evidence. This is so since the court can convict on the evidence of only one witness if that witness is of an compliance in the commission of the offence and his evidence sufficient probative of the offence charged. *See* **Ofoke Nwambe vs. State (1995) 3 NWLR (Pt. 384) 385 at 408; Onafowokan vs. State (1987) 3 NWLR (Pt. 61) 538; Ogbodu vs. State (1987) 2 NWLR (Pt. 54) 20; Adaje vs. State (1979) 6-9 SC 18**.

In this case at hand, the PW3 an eye witness and victim of the robbery gave a positive account of the incident, stating how he was tied up by the appellant and other members of the gang. PW3 said he had no difficulty identifying the appellant as there was light at the time of incident and he saw the faces of the assailants.

On the non tendering of the weapons used at the robbery and the recovered stolen items the learned trial judge said there was nothing reducing the probity and cogency of the evidence as there was enough evidence to establish the fact that there was a robbery. That is correct summation in the circumstances as it is not often that weapons used during such transactions are recovered or the stolen items retrieved and so such failure to tender recovered weapons or items stolen would not adversely affect the required proof once other parameters exist in the evidence. It is therefore farfetched to invoke the presumption of withholding evidence as provided in **Section 167(d) of the Evidence Act, 2011**, that is that the evidence withheld would have been unfavourable to the prosecution.

On the question whether the essential ingredients of the offence of armed robbery had been established beyond reasonable doubt. It is to be stated that the elements of the said offence are:

(a) That there was a robbery or a set of robberies;
(b) That the robbers were armed;
(c) That the accused participated in the robbery.

See Bozin vs. State (1985) 2 NWLR (Pt. 8) 465; Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455.

I am in agreement with learned counsel for the respondent that the linkage between the offence and the

appellant had been made as the identity of the appellant was established in a way that made an identification parade unnecessary. **See Alabi vs. State (1993) 7 NWLR (Pt.307) 511 at 524 525.**

The circumstances showcased in the evidence taken along with the confessional statements of the appellant Exhibits A1 and C made it easy for the culpability of the appellant to be established as happened in this case. The confessional statement met the guidelines for which their truthfulness were assessed and the later retraction went to no purpose. See **Nkwuda Edamince vs. State (1996) 3 NWLR (Pt. 438) 530** and **Dapere Gona vs. The State (1996) 4 NWLR (Pt. 443) 375 at 388.**

The confessional statements alone could sustain the conviction in this matter as there was corroboration and the statements met the six way test restated in the case of **Ubierho vs. The State (2002) 5 NWLR (Pt. 819) 644 at 655**. The six way test are:

7. **Whether there is anything outside the confession which shows that it may be true;**
8. **Whether the confessional statement is in fact corroborated;**
9. **Whether the relevant statement of fact made in it are most likely true as far as they can be tested;**
10. **Whether the accused had the opportunity of committing the offence;**
11. **Whether the confession is possible and;**
12. **Whether the alleged confession is consistent with other facts that have been ascertained and established.**

Indeed there is nothing on which I can go against the concurrent findings of the two courts below and their conclusion on the count 2 of armed robbery.

ISSUE 4

Whether the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant having regard to the evidence before the court.

Canvassing the position of the appellant, Mr. Saiki stated that to establish the offence of armed robbery the prosecution needed to prove that there was robbery which was armed robbery and the accused was part of the incident. He cited **Isah vs. The State (2010) 16 NWLR (Pt. 1218) 132 at 161.**

That the confessional statement of the accused/ appellant alone could ground a conviction if it met the guidelines established. That the retraction of such a statement does not change the use the court could make of it. He cited **Dapere Gona vs. The State (1996) 4 NWLR (Pt. 443) 375 at 388**. That in the case at hand the statements did not meet the expected guides as Exhibits A1 and C did not relate to the offences charged and there were no corroborative evidence. He relied on **Gabriel vs. State (2010) 6 NWLR (Pt. 1190) 280 at 324; Alor vs. State (1997) 4 NWLR (Pt. 505) 511.**

Also learned counsel for the appellant stated that since the oral testimony of the appellant was inconsistent with the statement Exhibits B and C1, the statements are bound to be rejected. He cited **Oladejo vs. State (1987) 3 NWLR (Pt. 61) 419 at 427.**

For the respondent it was submitted by Miss Aisha Egele that the respondent adopted two modes of establishing

the guilt of the appellant which are confessional statement and circumstantial evidence. That the confessional statement in his case was enough to sustain the conviction. She relied on **Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455 at 476; Ubierho vs. The State (2005) 5 NWLR (Pt.919) 644 at 655.**

Flowing from the answers in Issues 1, 2 and 3 this issue 4 seems to have its answer cut out for it as indeed the Court of Appeal was correct to affirm the conviction and sentence of count 2, the viable charge. There is no basis to deviate at this point there being no misapplication of law in that regard nor any miscarriage of justice in place.

From the foregoing and the better reasoning in the lead judgment I dismiss this appeal.

I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): I read in draft the very thorough judgment of my learned brother Kekere-Ekun JSC just delivered. I adopt the reasons therein stated to allow the appeal in part.

Appellant's conviction for conspiracy to commit armed robbery, an offence for which appellant had not been properly arraigned, is accordingly hereby set-aside. The appeal having however failed in respect of appellant's conviction and sentence for armed robbery as affirmed by the lower court is hereby dismissed.

Musa Dattijo Muhammad,
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment just delivered by my brother, **Kekere-Ekun, JSC.** I adopt same as mine and have nothing more useful to add. In other words I agree that the totality of the appeal herein should succeed in part. In other words while the conviction and sentence of the appellant to death for the offence of armed robbery is affirmed also by me, the other arm of the conviction and sentence of the appellant for the offence of conspiracy to commit armed robbery, is hereby set aside for the reasons and conclusions arrived thereat in the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

BAYANG AKAAHS (JSC): I was privileged to read before now the judgment of my learned brother, Kekere-Etun JSC wherein she nullified the conviction of the appellant for the offence of conspiracy to commit armed robbery and affirming the conviction for the substantive offence of armed robbery as laid under **Sections 5 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990**. I agree with the resolution of the issues raised in the appeal.

In the course of taking the pleas, the learned trial judge omitted to ask the appellant to take his plea on count 1 which dealt with the conspiracy charge. However when he came to deliver his judgment, the appellant was found guilty of conspiracy and sentenced to death along with the other two accused persons.

The Notice of Appeal to the Court of Appeal contained six grounds. Ground 4 from which issue No.(iii) was formulated complained that the offence of conspiracy

was not proved by the prosecution. It is only in this court that the appellant raised the issue of the absence of proper arraignment as prescribed by section 187(1) of the Criminal Procedure Code which mandates that after an accused person has been arraigned before the court, the charge shall be read and explained to him in the language he understands to the satisfaction of the court. After the charge has been read and explained, the accused is then called upon to plead to the charge. This ensures that the accused's right to fair hearing as enshrined in **Section 36(6) of the 1999 Constitution** (as amended) is not compromised. Usually where there is more than one count in the charge, all the counts are read and explained and each accused is then called upon to take his plea.

In paragraph 5.04 of the appellant's brief learned counsel stated that only one count out of the two counts charge was read and explained to the appellant and submitted that there was no proper arraignment as required by the Criminal Procedure Code which goes to the root of the criminal trial and affects the outcome of the trial and so urged this court to declare the trial conviction and sentence of the appellant as a nullity.

Learned counsel to the respondent conceded that the failure of the trial court to comply with the provision of **Section 187(1) of the Criminal Procedure Code and Section 36(6) of the Constitution** only relates to count one dealing with conspiracy.

At page 102 of the records the following minutes appear in relation to the 2nd accused (now appellant);

"Court: Count 2 is read and explained to the 2nd accused in English

language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.

2nd accused. I am not guilty".

The appellant was properly arraigned in count 2 of the charge and pleaded not guilty to it. He was not misled and the proceedings were properly conducted. The omission by the court to read and explain count 1 to him and thereafter ask him to take his plea cannot in any way vitiate the proceedings under count 2 as to render his trial conviction and sentence for the offence of robbery a nullity. The charge was not incurably defective as was the case in **Okoro vs. The State (1953) 14 WACA 370** nor is the arraignment completely null and void as was the case in **Kajubo vs. State (1988) 1 NWLR (Pt. 73) 721.** If the court had read and explained count 1 to the appellant and asked him to take his plea, the conviction and sentence on count 1 would have stood.

I agree with the reasoning and conclusions reached by my learned brother, Kekere-Ekun (JSC). Even though the charge for conspiracy is based on the same facts as the charge for armed robbery, nonetheless the two counts are separate and create distinct offences and the principle of severance can be invoked in respect of the convictions which were returned by the trial court. In this regard the conviction and sentence for the offence of armed robbery stands while the one for conspiracy to commit armed robbery is a nullity since he was not properly arraigned on that count.

On 16th December, 2016 the appeal by Ibrahim Musa in SC. 31/2013 was dismissed by this court. The remaining issues in this appeal which were based on the same facts as

SC. 31/2013 should suffer the same fate as the appellant in this appeal was tried along with Ibrahim Musa and James Simon and it was the arrest of James Simon that led to the arrest of the appellant and Ibrahim Musa.

The appeal succeeds on the 1st issue. The conviction and sentence of the appellant on the count of conspiracy to commit armed robbery is declared a nullity since he was not properly arraigned on that count but his conviction and sentence for armed robbery is affirmed because he was properly arraigned and took his plea on that count. Appeal therefore partially succeeds on the count of conspiracy to commit a felony to wit armed robbery.

K.B. AKA'AHS
Justice, Supreme Court

1. **MICHAEL SUNDAY OROJA**
2. **GANIYU OKE ODU-OROJA**
3. **TIMOTHY OLUFEMI ODU-OROJA**
4. **DAVID AYINDE ODU-OROJA**
5. **TIMOTHY KOKUMO ODU-OROJA**

(For themselves and on behalf of Odo-Oroja, Orisabiaje and Ogunwunmi Family of Meran in Agege).

AND

1. **EBENEZER ILO ADENIYI**
2. **JONATHAN ADENIYI**
3. **O. AKINDE OLANIRE**
4. **SAKIRUDEEN IBRAHIM**

(For themselves and on behalf of Eshilo Family).

SC. 113/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Counter-claim – Nature of.

ACTION: Counter-claim – Whether dependant on plaintiff's claim.

ACTION: Counter -claim – Distinct from the main claim.

ACTION: Counter -claim – What the counter – claimant must prove.

ACTION: Counter claim – Meaning .

*APPEAL: **Section 16 of Court of Appeal Act** – Whether applicable to correct the error of a trial Judge.*

COURT: Counter -claim – Court treating counter-claim and main claim as one – Propriety of.

JUDGMENT AND ORDERS: Retrial order – Whether appropriate where the trial judge failed to consider a counter-claim.

PRACTICE AND PROCEDURE: Onus of proof on a counter claimant – How discharged.

*STATUTE: **Section 16 of the Court of Appeal Act** – Whether can be applied to usurp the role of the trial court.*

Issues for Determination

1. Whether the Court of Appeal was right in holding that the respondents' counter-claim was not considered and the failure to make a specific/formal pronouncement thereon occasioned a miscarriage of justice thereby resulting in a violation of the respondents' fundamental

human right.

2. Whether the Court of Appeal could not have invoked its powers under Section 16 Court of Appeal Act to rectify the error?

Facts of the Matter

The plaintiffs sued the defendants for declaration of title to land at Meiran, Agege. The respondents filed a statement of defence and counter-claim in respect of the land at Meiran, Araromi Oke-Meiran and Akritan. The suit was heard by E. F. Longe J. of the Ikeja Judicial Divison of the Lagos High Court and the court gave judgment to the plaintiffs in the main claim and did not evaluate, consider and deliver judgment in respect of the defedants counter-claim. The defendants dissatisfied filed an appeal at the Court of Appeal Lagos Division, Coram: I. A. Salami, M. D. Muhammad; C. B. Ogunbiyi (JCA) with the lead judgment delivered by C. B. Ogunbiyi (JCA) (as she then was). The Court of Appeal allowed the appeal, set aside the judgment of the trial court and remitted the entire case to the chief judge for hearing de novo before another Judge. The plaintiffs being dissatisfied have now appealed to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. The meaning and purport of a counter-claim

There is a rich case law on the meaning and purport of a counter-claim and I shall have recourse to a few in aid at this point in time. [Effiom vs. Iron Bar (2000) 1 NWLR (Pt. 678) 344 where it was held thus:

> **"A counter-claim is an independent action and it needs not relate to or be in anyway**

> **connected with the plaintiffs' claim or arise out of the same transaction. It is not even analogous to the plaintiff's claim. It needs not be an action of the same nature as the original claim. A counter-claim is to be treated for all purposes for which justice requires it to be treated as an independent action".**

See also **the case of Okonkwo vs. C. C. B. (2003) FWLR (Pt. 154) 457 at 508.** *(Pp 73-74 paras F-B)*

2. What is the nature of a counter-claim?

The nature of a counter-claim had been clearly spelt out as follows:

> **"Counter-claim though related to the principal action is a separate and independent action and our adjectival law requires that it must be filed separately. The separate and independent nature of a counter-claim is borne out from the fact that it allows the defendant to maintain an action against the plaintiff as profitably as in a separate suit. It is a weapon of defence which enables the defendant to enforce a claim against the plaintiff as effectually as an independent action. As a matter of law a counter-claim is a cross action with its separate pleadings, judgments and costs".**

[Hasan vs. Regd. Trustees Baptist Convention (1993) 7 NWLR (Pt. 308) 679 at 690]
(P 74 paras B-G)

3. *The fate of a counter-claim as an independent action*
See also the case of **Okonkwo v. C. C. B. (2003) FWLR (Pt. 154) 457 at 508**
Wherein it was held that:

> **"The fate of a counter-claim being an independent action does not depend upon the outcome of the plaintiff's case. If the plaintiff's case is dismissed, stayed or discontinued, the counter-claim may nevertheless be proceeded with".**
> *(Pp 74-75 paras H-A)*

4. *The main claim and the counter-claim are not dependent in this case*
Having put across the definition of a counter-claim through case law and relating them to the plaintiffs' claim through their amended statement of claim and reply with the defence to the counter-claim, it is to be seen that while the defendants' counter claimed for a declaration of the right to customary right of occupancy to the large area of land which includes the land in dispute at Meran and that one Eshilo was the first settler of the disputed land. The plaintiffs' claim on the other hand is an entitlement to the right on the ground that their forefather Adeluola over 200 years before was the first to settle on a large parcel of land including the farmland which is the land in dispute. It is evident that these really are two major claims, each independent and could effectively stand alone. *(P 75 paras A-E)*

5. *The trial court was not right in treating the counter-claim as part of the main claim*
Therein lay the error of the trial court as the respondents' claim was not restricted to the same land as was claimed by the appellants. The sad aspect of the whole process at the trial court was that the trial judge considered the evidence proffered thereto and failed to make a pronouncement thereon, thereby treating what he found in that respect as part of the main suit. *(P 75 paras G-H)*

6. *Where a court erroneously treats a claim and a counter-claim as dependent on each other.*
The error is fundamental and not one to be brushed aside or treated lightly. This is because a counter claim is a different action from that on which the main claim is predicated which translates to two separate actions for which there must be two distinct judgments which can be in the same process or suit or another date and process. There is no running away from the distinction. See [Akinola vs. Unilorin (2004) NWLR (Pt. 885) 616; Obi vs. Biwater Shellevbear Nig. Ltd (1997) 1 NWLR (Pt. 484) 722].
(Pp 75-76 paras H-B)

7. *The distinctions between the counter-claim and the main claim*
The appellants seem to wish a persuasion that what is on ground is akin to a matter of judge's right to his particular style of judgment writing or that what he did in relation to the issues arising from the counter-claim were within his discretion so to do. That is not

the correct position of the law as it is a matter of substantive and procedural law that is now well settled in a long line of cases. Stated another way, a counter-claim is a different action from that which the main claim is predicated. Therefore there must be two separate judgments, one for the main claim and the other for the counter-claim though they have both been brought together in the same suit. [Kaduna Textile vs. Umar (1994) 1 NWLR (Pt. 319) 143; Emaphil vs. Odili (1987) 4 NWLR (Pt. 67) 915]
(Pp 78-79 paras F-A)

8. *The Court of Appeal was right in refusing to apply **S.16 of the Court of Appeal Act** to correct the error of the trial court*
The Court of Appeal was on good ground to have declined such an invitation of the use of its power under Section 16 of Court of Appeal Act to right the wrong. The reason is that the Court of Appeal if it had imagined such power would be arrogating to itself, power it did not have, that is to decide on an action which is what the counter-claim is when the evidence really was not considered. One would ask if it would not be jumping into the status of the trial court and make consideration of evidence not before it. Truly the error is not a light one that could be so casually and informally treated by the Court of Appeal or even this one inserting the words "counter-claim dismissed". I agree with the court below that the trial court having failed to consider the counter-claim separately, the Court of Appeal was not to speculate on what the judgment and orders of the

trial judge would have been had he considered the counter-claim. [Masade Esene Substituted by A. Masade vs. C. Isikhuemen (1978) 2 SC 87].
(P 80 paras B-G)

9. *The rationale for an order of retrial where the counter-claim was not considered*
Again, to be said is that the gravity of the error made by the trial judge being such that it cannot be easily rectified by no other way out but a retrial. Also, the retrial cannot be just for the counter-claim as the justice of the situation is such that a whole hog of the entire matter, main claim and the counter-claim must be effectively dealt with in the retrial so that all the issues between the parties are resolved, two judgments as part of the deal, one for the main claim and the other for the counter-claim. There cannot be a severance enabling the retrial to be just for the counter-claim. *(Pp 80-81 paras G-A)*

10. *The onus on the counter-claimant in civil proceedings*
The counter-claimant, like the plaintiff in the main action, has a duty to prove his counter-claim if he hopes to obtain judgment, [Jeric Nigeria Ltd vs. Union Bank of Nigeria Plc (2001) 7 WRN 1, 18; Prime Merchant Bank vs. Man-Mountain Company (2000) 6 WRN 130, 134; Walter vs. Skyll Nig Ltd (2000) 13 WRN 60, 98].

In effect, the burden of proving a counter-claim is on the counter-claimant as he is the party who would fail if no evidence is adduced to establish it, [N.B.N. vs. U.C. Holdings Ltd (2004) 13 NWLR

(Pt. 891) 436, 454; Umeojiako vs. Ezeanamuo (1990) 1 NWLR (Pt. 126) 253, 267]. *(Pp 83-84 paras G-B)*

Nigerian Cases cited in this Judgment

Abbas vs. Solomon (2001) FWLR (Pt. 167) 287;
Akinola vs. Unilorin (2004) NWLR (Pt. 885) 616;
Effiom vs. Iron Bar (2000) 1 NWLR (Pt. 678) 344;
Emaphil vs. Odili (1987) 4 NWLR (Pt. 67) 915;
Eze vs. A.G. Rivers State (2002) FWLR (Pt. 89) 1109;
Hasan vs. Regd. Trustees Baptist Convention (1993) 7 NWLR (Pt. 308) 679;
Igwe vs. Kalu (2002) FWLR (Pt. 122) P. 1;
Jeric Nigeria Ltd vs. Union Bank of Nigeria Plc (2001) 7 WRN 1,;
Kaduna Textile vs. Umar (1994) 1 NWLR (Pt. 319) 143;
Masade Esene Substituted by A. Masade vs. C. Isikhuemen (1978) 2 SC 87;
N.B.N. Ltd vs. U.C. Holdings Ltd (2004) 13 NWLR (Pt. 891) 436;
Narinde Trust Ltd vs. NIMB (2000) 10 NWLR (Pt. 721) 3212;
Nkuma vs. Odili (2006) 6 NWLR (Pt. 977) 587;
Obi vs. Biwater Shellevbear Nig. Ltd (1997) 1 NWLR (Pt. 484) 722;
Ogbonna vs. A.G. Imo State (1992) 1 NWLR (Pt. 220) p. 647;
Okonkwo vs. C. C. B. (2003) FWLR (Pt. 154) 457;
Onwuka & Anor vs. Omogwi (1992) 3 NWLR (Pt. 230) 393;
Ordia vs. Piedmant (Nig.) Ltd (1995) 2 NWLR (Pt. 378) 516;
Oriawe vs. Okere (2002) FWLR (Pt. 14) 427;
Osolu vs. Osolu (2003) FWLR (Pt. 172);
Oyagbola vs. Esso West African Ltd (1966) 1 ALL NLR p. 170;
PMB vs. MIB (2000) 6 WRN 30;
Prime Merchant Bank vs. Man-Mountain Company (2000) 6

WRN 130,;
Songhai Ltd. vs. UBA (2003) 14 WRN 121,;
Umeojiako vs. Ezeanamuo (1990) 1 NWLR (Pt. 126) 253;
University of Lagos vs. Aigoro (1985) NWLR (Pt. 1) 145;
Walter vs. Skyll Nig Ltd (2000) 13 WRN 60, 98; and
Zaccheus Faleye & Ors vs. Alhaji Lasisi Otapo & Ors (1995) 3 NWLR (Pt. 381) 1.

Nigerian Statute cited in this Judgment

Court of Appeal Act, 2004 – S. 16
High Court of Lagos State (Civil Procedure) Rules, 1994 – Or. L19 Rule 9

Representations

A. B. Kasumu Esq for the Appellant
M. A. Bashua Esq for the Respondent

PETER-ODILI, (JSC) (Delivering the Lead Judgment): The appellants as plaintiffs sued the respondents as defendants for declaration of title to land at Meiran, Agege. The respondents filed a statement of defence and counter-claim in respect of the land at Meiran, Araromi Oke-Meiran and Akritan. The suit was heard by E. F. Longe J. of the Ikeja Judicial Divison of the Lagos High Court and the court gave judgment to the appellants in the main claim and did not evaluate, consider and deliver judgment in respect of the respondents counter-claim. The respondents dissatisfied filed an appeal at the Court of Appeal Lagos Division, Coram: I. A. Salami, M. D. Muhammad; C. B. Ogunbiyi JCA with the lead judgment delivered by C. B. Ogunbiyi JCA (as she then was). The Court of Appeal or Court below allowed the appeal, set aside the judgment of the trial court and

remitted the entire case to the chief judge for hearing de novo before another Judge.

FACTS BRIEFLY STATED

The appellants' sought before the High Court a declaration to an entitlement to a customary right of occupancy in respect of farmland at Meran Village in Agege, Lagos and the total sum of N230,478.50 against the respondents being special and general damages suffered by the appellants as a result of the appellants' crops destroyed by the respondents. They also asked for an order of perpetual injunction restraining the respondents from further trespassing on the land in dispute.

The claim of the appellants is grounded on their claim that their forefather, A. Adeluola, over 200 years before had first settled on a large parcel of land which includes the farmland, the land now in dispute.

By the pleadings and the evidence proffered through 8 witnesses and the 23 exhibits tendered and admitted in evidence, the appellants linked their family to the land in dispute from Adeluola till the time of the commencement of the action at the High Court. The appellants asserted that they had uninterrupted and exclusive possession of the land, with a history of the descendants to the uninterrupted succession as Baale of Meran Village under which the land in dispute is located. They further asserted that respondents were strangers to the land and showed exhibit 13 as report prepared by the colonial district officer in 1935 which showed that there was no land called Eshilo land as claimed by the respondents.

The case further put up by the appellants is that sometime in 1976, the Federal Government acquired a portion of the said farmland for low cost housing scheme and

while negotiations were going on for compensation, the Federal Government, by a letter released a portion of the acquired land to the appellants and a survey was carried out in that respect and this dispute arose on the entering by the respondents into a portion of that land released.

The case of the respondents is that their ancestor, Obalanloye Eshilo, who died in 1704 and was the first to settle on the land they called "Orile Eshilo". From their pleadings and the evidence led by six witnesses and nine exhibits tendered and admitted into evidence before the court, Odu-Oroja, who was a child of Adeluola, who was their tenant and was only permitted to farm on and also oversee Eshilo land. That they claim to have exercised acts of possession on the land in dispute and thus counter-claimed for a declaration to an entitlement to a customary right of occupancy in respect of the land and farmland known as Orile Eshilo including Meiran, Araromi, Oke Meran and Akintan. They also claimed forteiture, injunction and N5,000.00 as damages for trespass.

The court of trial granted the appellants' claim preferring their traditional history but dismissed respondents' counter-claim without making a formal pronouncement. The court below allowed the respondents' appeal and remitted the case for retrial on the ground that the trial judge failed to make a pronouncement on the counter-claim thereby rendering the judgment incomplete.

The appellants aggrieved by the decision of the Court of Appeal, that propelled them to approach the Supreme Court.

On the 31st October, 2016 date of hearing, learned counsel for the appellants, A. B. Kasunmu Esq. adopted their Brief of Argument filed on 31/10/07 and deemed filed on the

30/1/2008 in which were drafted two issues for determination, viz:

ISSUE ONE:

Whether the Court of Appeal was right in holding that the respondents' counter-claim was not considered and the failure to make a specific/formal pronouncement thereon occasioned a miscarriage of justice thereby resulting in a violation of the respondents' fundamental human right.

ISSUE TWO:

Having regard to Section 16 of the Court of Appeal Act and the evidence already before the court, was the Court of Appeal right in holding that it could not exercise its powers by making a pronouncement upon the respondents' counter claim.

Learned counsel for the appellants also adopted their Reply Brief filed on the 14th April, 2016.

M. A. Bashua Esq. of counsel for the respondents adopted their Brief of Argument filed on the 21/3/2010 and deemed filed on 14/3/16 and they identified similar issues for determination though crafted differently and they are thus:

ISSUE ONE:

Whether the lower court was not right when they found that the respondents' counter-claim was not considered by the trial judge, and that the failure to consider it occasioned a miscarriage of justice and violation of their fundamental human rights to fair hearing.

ISSUE TWO:

Whether the lower court was not right when they refused to invoke Section 16 of the Court of Appeal Act.

I shall utilize the issues as framed by the appellants for ease of reference.

ISSUES 1 & 2:

Whether the Court of Appeal was right in holding that the respondents' counter-claim was not considered and the failure to make a specific/formal pronouncement thereon occasioned a miscarriage of justice thereby resulting in a violation of the respondents' fundamental human right.

And whether the Court of Appeal could not have invoked its powers under Section 16 Court of Appeal Act to rectify the error?

Pushing forward the stand of the appellants, learned counsel, A. B. Kasunmu Esq. contended that the issue as to the existence of a village called Orile Eshilo and founded by the respondents' ancestor, as canvassed in the counter-claim was considered by the trial judge and decided against them. That another issue raised by the respondents which was considered by the trial judge was in relation to the way the action was instituted which was in order in a representative capacity in the names of the three surviving families of Adeluola. That the trial judge had resolved all vital issues pertaining to the counter-claim and so the court below was wrong in holding that the respondents' counter-claim was not considered or evaluated at all. That the non formal and separate pronouncement on the counter-claim by the trial

court should not have the fatal effect as given it by the Court of Appeal. The case of **Nkuma vs. Odili (2006) 6 NWLR (Pt. 977) 587** was relied upon. Also, the case of **Onwuka & Anor vs. Omogwi (1992) 3 NWLR (Pt. 230) 393.**

Learned counsel for the respondents, M. A. Bashua Esq. contended that **Order 19 Rule 9** of the **High Court of Lagos (Civil Procedure) Rules 1994** applicable to the case in hand is explicit on the nature of a counter-claim. That is well settled that a main claim is totally different from a counter-claim and so a formal pronouncement on the counter-claim cannot be dispensed with. He cited **Oriawe vs. Okere (2002) FWLR (Pt. 14) 427; Narinde Trust Ltd vs. NIMB (2000) 10 NWLR (Pt. 721) 3212**; **Okonkwo vs. C. C. B. (2003) FWLR (Pt. 154) 457** etc.

That the lower court was right when it found that the learned trial judge did not advert his mind to the counter-claim and had not considered the counter-claim and what the trial judge had done has left room for speculation and conjecture.

It was submitted that what the court below did having been done without any arbitrariness or contrary to justice, this court should not interfere with that finding and conclusion.

They cited the case of **Eze vs. A.G. Rivers State (2002) FWLR (Pt. 89) 1109; University of Lagos vs. Aigoro (1985) NWLR (Pt. 1) 145.**

In summary, the position of the appellants is that this court should hold that the Court of Appeal was wrong in holding that the respondents' counter-claim was not considered and the failure to make a specific/formal pronouncement thereon occasioned a miscarriage of justice thereby resulting in a violation of their fundamental human

right.

The stance of the respondents is that a counter-claim is a separate suit not connected with the main suit and so the failure or success thereof is not dependent on the failure or success of the main suit.

For the appellants, Mr. Kasunmu of counsel submitted that the trial court considered the counter-claim and the failure to pronounce on it by the trial judge was not so grave as to lead to a miscarriage of justice or to imply that the respondents' right to be heard had been violated. That there was enough before the Court of Appeal for it to have exercised its powers under Section 16 of the Court of Appeal Act and done that which the trial court ought to have done but failed to do so. He relied on **Zaccheus Faleye & Ors vs. Alhaji Lasisi Otapo & Ors (1995) 3 NWLR (Pt. 381) 1 at 33; Ordia vs. Piedmant (Nig.) Ltd (1995) 2 NWLR (Pt. 378) 516 at 528.**

Mr. Bashua, learned counsel for the respondents stated that the lower court was right in refusing to invoke **Section 16 of the Court of Appeal Act** as the appellate court could not do what the trial court did not have the power to do. He cited **Abbas vs. Solomon (2001) FWLR (Pt. 167) 287.**

That the mistake committed by the trial judge was not such that could not be corrected on appeal.

I shall now refer to what the Court of Appeal said which is to be seen at pages 360 and 361 of the record per **Ogunbiyi JCA** (as she then was) thus:

> **"A failure to make a pronouncement on an adjudication is a substantial error so grave and fatal thereby vitiating the entire proceedings which can in no wise have the**

force of law, for being inconclusive. The court will for instance set aside a judgment where:

> **"It is either that the findings are perverse or there has been procedural errors committed by those courts which have led to miscarriage of justice".**

This proposition has been laid down in the case of Agu vs. Nmadi reference supra. Also in the authority of the case of Osolu vs. Osolu (2003) FWLR (Pt. 172) at 1974, it was held thus**:**

> **"An appellate court will only interfere with a Finding of fact by a trial judge when such Findings are perverse or wrong because of Violation of some principle Law or procedure".**

Relying therefore on the authority of Igwe vs. Kalu (2002) FWLR (Pt. 122) P. 1, the consequential effect of the failure is as if the appellants were never heard at all. As rightly submitted by the learned appellants' counsel, there is no doubt that the trial court had committed a substantial procedural error by its failure to consider and make a formal pronouncement on the appellants' case, and thereby rendering the entire judgment incomplete". See page 360 of the record.

The lower court being of the view that the error or mistake on ground is grave, fundamental and touching on the main stream of the judgment, it could not be overlooked. She went on at page 361 of the record thus:

> **"Further still, I would also wish to restate that even with the pronouncement having been made on the main claim it would not be easy to sever same from the counter-claim without one over crossing into the spheres of the other. In other words, the two claims for purpose of clear cut and distinct proof may not easily be put into two separate water tight compartments. Justice of the case therefore would best be served if both the claims be properly determined, with all evidence considered, evaluated and specifically pronounced thereon. It is not the duty of this court to do that because Section 16 of the Court of Appeal Act is not at large but operative within the context and extent of the provision. It is therefore safer and neater that the entire case at hand be sent back to the lower court for proper adjudication and determination. A retrial order is therefore made in the circumstance with the said issue No. 2 resolved in favour of the appellants".**

There is a rich case law on the meaning and purport of a counter-claim and I shall have recourse to a few in aid at this point in time. See **Effiom vs. Iron Bar (2000) 1 NWLR (Pt. 678) 344** where it was held thus:

> **"A counter-claim is an independent action and it needs not relate to or be in anyway connected with the plaintiffs' claim or raise out of the same transaction. It is not even analogous to**

the plaintiff's claim. It needs not be an action of the same nature as the original claim. A counter-claim is to be treated for all purposes for which justice requires it to be treated as an independent action".

See also the case of **Okonkwo vs. C. C. B. (2003) FWLR (Pt. 154) 457 at 508**, the nature of a counter-claim had been clearly spelt out as follows:

"Counter-claim though related to the principal action is a separate and independent action and our adjectival law requires that it must be filed separately. The separate and independent nature of a counter-claim is borne out from the fact that it allows the defendant to maintain an action against the plaintiff as profitably as in a separate suit. It is a weapon of defence which enables the defendant to enforce a claim against the plaintiff as effectually as an independent action. As a matter of law a counter-claim is a cross action with its separate pleadings, judgments and costs".

See also **Hasan vs. Regd. Trustees Baptist Convention (1993) 7 NWLR (Pt. 308) 679 at 690**, wherein it was held that:

"The fate of a counter-claim being an independent action does not depend upon the outcome of the plaintiff's case. If the plaintiff's case is dismissed, stayed or discontinued, the

counter-claim may nevertheless be proceeded with".

Having put across the definition of a counter-claim through case law and relating them to the plaintiffs' claim through their amended statement of claim and reply with the defence to the counter-claim, it is to be seen that while the defendant's counter claimed for a declaration of the right to statutory customary right of occupancy to the large area of land which includes the land in dispute at Meran and that one Eshilo was the first settler of the disputed land.

The plaintiffs' claim on the other hand is an entitlement to the right on the ground that their forefather Adeluola over 200 years before was the first to settle on a large parcel of land including the farmland which is the land in dispute.

It is evident that there really are two major claims, each independent and could effectively stand alone.

The learned trial judge admitted evidence in relation to the two divergent claims and stated as follows:

As the only crucial point in this case is between Adeluola and Eshilo who was the first to settle in Meran, the land in dispute".

Therein lay the error of the trial court as the respondents' claim was not restricted to the same land as was claimed by the appellants. The sad aspect of the whole process at the trial court was that the trial judge considered the evidence proffered thereto and failed to make a pronouncement thereon, thereby treating what he found in that respect as part of the main suit. The error is fundamental and not one to be

brushed aside or treated lightly. This is because a counter-claim is a different action from that on which the main claim is predicated which translates to two separate actions for which there must be two distinct judgments which can be in the same process or suit or another date and process. There is no running away from the distinction. *See* **Akinola vs. Unilorin (2004) NWLR (Pt. 885) 616**; **Obi vs. Biwater Shellevbear Nig. Ltd (1997) 1 NWLR (Pt. 484) 722.**

To further show the differences in the two claims, I shall quote the claims in the statement of claim and the counter-claim on the other part.

"WHEREFOR THE PLAINTIFFS CLAIM:

(a) DECLARATION that the plaintiffs are entitled to a Customary Right of Occupancy on the farmland lying and being at MERAN in Agege District of Lagos State as described on the Plan attached to this Statement of Claim.

(b) N150,000.00 being special damages for the plaintiffs' crops on the said farmland wrongfully destroyed by the defendants.

(c) N50,000.00 being special damages against the co-defendant for the plaintiffs' crops destroyed on the farmland.

CROPS DESTROYED BY CO-DEFENDANT

(i)	**15,000 Kola Nut trees**	**N25,000.00**
(ii)	**25,000 Cassava trees**	**N12,000.00**
(iii)	**15,000 Rafia Palm trees**	**N15,000.00**
		N50,000.00

The survey fees payable for the carving out of the portion of land trespassed upon as per Plan No. OY/05/FHA/LA/85 N26,478.50

(d) N2,000.00 against the defendant family being general damages for trespass to the said farmland.

(e) N2,000.00 general damages against the co-defendant for trespass to the farmland.

COUNTER-CLAIM:

(f) Defendants/counter-claimant (1st and 3rd defendants) repeat by way of counter-claim paragraphs PERPETUAL INJUNCTION restraining the defendants, their servants, agents and privies from further trespassing on the said farmland.

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 14A, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 32A, 33, 34, 35, 35A, 35B, 35C, 35D, 35E, 36, 37, 37A, 38, 39, and 40 and also claims:

(i) A declaration that they are entitled to the (statutory/customary right of occupancy in respect of the land and farmland known as Orile Eshilo including Meran, Araromo, Oke Meran and Akitun and more particularly described in Plan No. PSE/46/77 and APAT 327 AND 32A/90.

(ii) Forfeiture of the customary interest or rights of the plaintiffs/defendants in

respect of the claimed by them at Meran on the grounds of:

(a) Disputing the right/interest of their overlord (the defendants/ counter-claimant).

(b) By leasing, alienating, selling and otherwise disposing portions of the said land without the consent and approval of Eshilo Family contrary to the terms of their holding.

(iii) Perpetual Injunction restraining the plaintiffs/ defendants or their agents from committing further acts of trespass on the said land.

(iv) N500,000.00 damages for trespass already committed on the Eshilo family land at Moran.

The appellants seem to wish a persuasion that what is on ground is akin to a matter of judge's right to his particular style of judgment writing or that what he did in relation to the issues arising from the counter-claim were within his discretion so to do. That is not the correct position of the law as it is a matter of substantive and procedural law that is now well settled in a long line of cases. Stated another way, a counter claim is a different action from that which the main claim is predicated. Therefore there must be two separate judgments, one for the main claim and the other for the counter-claim though they have both been brought together in the same suit. See **Kaduna Textile vs. Umar (1994) 1 NWLR (Pt. 319) 143; Emaphil vs. Odili (1987) 4 NWLR**

(Pt. 67) 915.

The learned counsel for the appellants had raised the issue that of the Court of Appeal ought to have used its powers under **Section 16 of the Court of Appeal Act** to rectify the anomaly. The court below did not buy the argument holding as follows at pages 358 and 365:

> **"The learned respondents counsel argued that the Court of Appeal being vested by the Powers of the trial court under section 16 to evaluate evidence led at the lower court. The purpose of the provision in my humble opinion is not to take over the powers of the trial court as a court of evidence. For example, it is not within the powers of the court to hear witnesses in respect of the counter-claim before it. There is no indication on the record that the counter-claim was either considered or evaluated at all. The powers conferred on the Court of Appeal vide section 16 cannot be exercised in the circumstances at hand…….**

Per Salami page 365:

> **"The error is not as light as the learned counsel for respondents has created it by inviting us to invoke the powers of this court under Section 16 of the Court of Appeal Act, Cap. 75 of the Laws of the Federation 1990. It is not a matter that can be treated so casually by merely inserting the words "counter-claim dismissed"**

as suggested by learned counsel for respondent. The trial court having failed to consider the counter-claim separately, the Court of Appeal cannot speculate on what its judgment and orders would have been if he had duly considered said claim".

The Court of Appeal was on good ground to have declined such an invitation of the use of its power under **Section 16 of Court of Appeal Act** to right the wrong. The reason is that the Court of Appeal if it had imagined such power would be arrogating to itself, powers it did not have, that is to decide on an action which is what the counter-claim is when the evidence really was not considered. One would ask if it would not be jumping into the status of the trial court and make consideration of evidence not before it. Truly the error is not a light one that could be so casually and informally treated by the Court of Appeal or even this one inserting the words "counter-claim dismissed". I agree with the court below that the trial court having failed to consider the counter claim separately, the Court of Appeal was not to speculate on what the judgment and orders of the trial judge would have been had he considered the counter-claim. *See* **Masade Esene Substituted by A. Masade vs. C. Isikhuemen (1978) 2 SC 87.**

Again, to be said that the gravity of the error made by the trial judge being such that it cannot be easily rectified by no other way out but a retrial. Also, the retrial cannot be just for the counter claim as the justice of the situation is such that a whole hog of the entire matter, main claim and the counter-claim must be effectively dealt with in the retrial so that all the issues between the parties are resolved, two judgments as

part of the deal, one for the main claim and the other for the counter-claim. There cannot be a severance enabling the retrial to be just for the counter-claim.

The findings and conclusion of the Court of Appeal are well founded and I am all for what the Court below did and cannot deviate.

In the end, this appeal is without merit and I hereby dismiss it as I uphold the findings, conclusions and order of retrial before another judge other than E. F. Longe J.

Parties are to bear their respective costs.

Mary Ukaego Peter-Odili
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I read in draft the lead judgment delivered by my learned brother **Peter-Odili, (JSC).** I agree with the order that this suit be retried all over again by a judge of the Lagos State High Court.

The appellants' as plaintiffs' sued the respondents' as defendants' on a Writ of Summons and statement of claim for:

1. **Declaration that they are entitled to customary right of occupancy.**
2. **N150,000.00 as special and general damages for cash crops destroyed.**
3. **N50,000.00 against co-defendant.**
4. **Survey fees for carrying on the portion of land trespassed upon N26,478.50.**
5. **N2,000.00 against defendants family for trespass and the 2nd co-defendant.**
6. **Order of perpetual injunction.**

The defendants counter-claimed for:

1. Declaration that they are the one entitled to the customary right of occupancy of the land in dispute.
2. Forfeiture of the customary interests of right of the plaintiff.
3. Order of injunction against the plaintiffs.
4. N500,000.00 damages for trespass.

The learned trial judge failed to make any pronouncement on the counter-claim. The Court of Appeal observed that the justice of this case would best be served if both the claims, i.e. the main claim and the counter-claim are properly determined, with all evidence considered, evaluated and specifically pronounced upon, and proceeded to order a retrial of the case.

I agree with the Court of Appeal. A counter-claim is an independent action where the parties in the main action are in reverse rolls. The plaintiff becomes the defendant, while the defendant becomes the plaintiff. *See* **Oyagbola vs. Esso West African Ltd (1966) 1 ALL NLR p. 170; Ogbonna vs. A.G. Imo State (1992) 1 NWLR (Pt. 220) p. 647.**

A counter-claim does not depend on the outcome of the main claim. Once the main claim is concluded in whatever form, be it dismissed or discontinuance, the hearing of the counter-claim must commence.

It was a grave error for the learned trial judge not to have made pronouncement on the counter-claim. As it stands now, the counter-claim was left in the realm of speculation and that is bad for the streams of justice. The learned trial judge ought to have made a pronouncement on the counter-claim. It is for this reasons that I agree with my learned brother that this case should be sent back to the trial

court for a rehearing.

Rhodes Vivour
Justice, Supreme Court

ARIWOOLA, (JSC): I have been obliged before now with a copy of the lead judgment of my learned brother, **Peter-Odili, (JSC)** just delivered. I am in complete agreement with the reasoning and conclusion that this application has no merit and should not be allowed. I too will not allow the appeal.

Appeal is dismissed.

I abide by the consequential orders in the said lead judgment including the order on costs.

Olu Ariwoola
Justice, Supreme Court

CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the lead judgment which my Lord, Odili, (JSC), just delivered now. I agree that this suit should be remitted to the Chief Judge of Lagos State for re-assignment to another judge for hearing de novo.

I am ad idem with the lower court that a counter-claim is a separate, independent and distinct action, **N.B.N. Ltd vs. U.C. Holdings Ltd (2004) 13 NWLR (Pt. 891) 436; Ogbonna vs. AG, Imo State (1992) 1 NWLR (Pt. 220) 647**; **Oyagbola vs. Esso West Africa Ltd (1966) 1 All NLR 170;** the counter-claimant, like the plaintiff in the main action, has a duty to prove his counter-claim if he hopes to obtain judgment, **Jeric Nigeria Ltd vs. Union Bank of Nigeria Plc (2001) 7 WRN 1, 18; Prime Merchant Bank vs. Man-Mountain Company (2000) 6 WRN 130, 134; Walter vs.**

Skyll Nig Ltd (2000) 13 WRN 60, 98.

In effect, the burden of proving a counter-claim is on the counter claimant as he is the party who would fail if no evidence is adduced to establish it, **N.B.C. Holdings Ltd (2004) 13 NWLR (Pt. 891) 436, 454; Umeojiako vs. Ezeanamuo (1990) 1 NWLR (Pt. 126) 253, 267.**

That is, precisely, why the trial court ought to have made a pronouncement on the defendant's counter-claim. It failed to do so. The lower court was, therefore, right in its findings and conclusion in this regard. It is for these, and the more detailed, reasons in the leading judgment that I, also, allow this appeal. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

NIGERIAN TELECOMMUNICATION LTD.
AND
ENGR. EMMANUEL C. OKEKE

SC. 144/2006

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 27TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

WALTER S. NKANU ONNOGHEN	**AG. CHIEF JUSTICE OF NIGERIA**
MARY UKAEGU PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE EKUN	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Arbitration-Allegation of misconduct – Failure to prove same – Effect

ACTION: Arbitration – Nature of – Purpose

APPEAL: Concurrent findings of two lower courts – Whether Supreme Court can interfere – Conditions thereto

ARBITRATION: Issue of misconduct of the arbitrator – How established

ARBITRATION: Time within which to set aside an award – Article 2(2) Arbitration Rules – Consideration thereof

ARBITRATION: What amounts to a Misconduct – Circumstances thereto.

COURT: Jurisdiction – Jurisdiction to set aside arbitral awards – Consideration thereof.

COURT: Arbitration - Arbitral awards – How treated.

COURT: Duty to act on evidence – Whether a court can act on any evidence tendered at the trial.

COURT: Jurisdiction – Filing of application to set aside award – The requirement of three months to set aside an award in S. 29 of the Arbitration and Conciliation Act – When does time start to be recorded..

COURT: Limited powers to set aside arbitral awards – Consideration of Sections 29(2) and 30 of the Arbitration and Conciliatory Act, 2004.

*EVIDENCE: Burden of proof – Allegation of crime in a civil action – How burden is discharged – **Section 135(1), Evidence Act 2011** – Consideration thereof.*

PRACTICE AND PROCEDURE: Action to set aside arbitral awards – Whether in the form of appeal – How commenced.

PRACTICE AND PROCEDURE: Burden of proof – Proof in civil cases – Whether address of counsel can substitute for the requirement of proof.

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

PRACTICE AND PROCEDURE: Credibility of receipts admitted in evidence – How determined.

PRACTICE AND PROCEDURE: Proof in civil cases – Burden of proof – On whom lies.

PRACTICE PROCEDURE: Arbitration – Reimbursable expenses – When established – Guiding principles.

STATUTE: Interpretation – Section 26(4) of the Arbitration and Conciliation Act – Consideration thereof

Issues for Determination

1. Whether the lower court exceeded its jurisdiction in affirming **Longe J's** judgement and upholding the arbitral award; and

2. Whether the arbitrator misconducted himself.

Facts of the Matter

An Arbitral proceeding resulted from the termination of the respondent's appointment as appellant's consultant (Electrical/Mechanical Engineer) for the construction of appellant's Corporate Headquarter building in Abuja. Apart from the respondent, three other consultants were appointed by the appellant to oversee various aspects of the project namely.

Consultant Architect (Deenarc Consultants), Consultant Quantity Surveyors (El-Rufai & Partners) and Consultant Civil/Structural Engineer (Landscope Consultants) collectively

referred to along with the respondent as "the Consultants").

By a Notice of Arbitration dated 16/12/1996 the respondent commenced the arbitral proceeding seeking a declaration that the termination of the contract by the appellant was a breach of contract between the parties and asked for special and general damages for the wrongful termination. Pursuant to the direction given by the arbitrator for filling of pleadings, the respondent filed his points of claim dated 16/12/1996 and in response, the appellant filed its points of defence dated 4/4/1997 wherein joining issues with the respondent on his allegations of fact. The respondent subsequently filed a reply to the points of defence dated 9/4/1997 and the matter proceeded to trial.

According to the appellant, the respondent's collusion in the inclusion of N700,000,000.00 (seven hundred million naira) in the sub-contract tender documents was the underpinning issue contended by the parties in their pleadings but the arbitrator failed to determine this issue one way or the other in the award dated 15/9/1998. This prompted the appellant to file an application before the High Court, Lagos praying the court to set aside the Arbitral Award on grounds of misconduct amongst others. The High Court dismissed the application holding that there was no misconduct established against the arbitrator. The appeal to the Court of Appeal was dismissed on 23/7/2003 wherein the Court of Appeal held that the pleadings have no relevance in arbitral proceedings. This prompted a further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The burden of proof in civil cases*
The arbitrator stated the correct position of the law

that the burden of proof in civil proceedings lies on that person who would fail if no evidence at all is given. Thus it was the appellant who had alleged that the respondent colluded with the Quantity Surveyors to include the over N700,000,000.00 in the tender documents to provide evidence in proof of the allegations to justify the termination of the contract.

The address of counsel no matter its persuasiveness, can never take the place of credible evidence. (Vinz International (Nig.) Ltd vs. Morohundiya (2009) 11 NWLR (Pt.1153) 562.
(Pp 113; 114 paras E-G; A-B)

2. *A court or tribunal is not bound to act on any evidence produced at the trial*
It is not just any evidence produced in a proceeding that must be acted upon by a court or tribunal but how relevant it is to the proceeding. This includes arbitral proceedings. See K. S. U. D. B. vs. Fanz Ltd (1986) 5 NWLR (Pt.39) 74. *(P 114 paras B-C)*

3. *There was no proof of misconduct on the part of the arbitrator in this case*
Without any proof to substantiate the allegation, the arbitrator cannot be said to have shirked his responsibility in deciding all matters which were referred to him for which he would be said to have misconducted himself in order to set aside the arbitral award. [Tayor Woodrow (Nig) Ltd vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127].

If the respondent colluded with the Quantity Surveyors to include N700,000,000.00 in the tender documents so as to defraud the appellant, the burden of proof is heavier since a crime is being alleged. [Section 135(1) Evidence Act 2011].
(Pp 114-115 paras G-A)

4. *How to test the credibility of receipts tendered in evidence*
I agree with the submission of learned counsel for the respondent that since the respondent submitted receipts to back up the expenses he claimed to have made, the only way to test whether they are credible evidence is through cross-examination to ascertain their authenticity. Since appellant's counsel chose not to cross-examine on the receipts, there was uncontradicted evidence which the arbitrator could act upon to make the award for reimbursable expenses. *(P 115 paras E-G)*

5. *When the Supreme Court may interfere with the concurrent findings of two lower courts*
The above findings of the court below were along the line of findings and decision of the court of trial per Longe J. The question that would naturally flow is whether this court has any reason for departing from those findings or to interfere with them. Of course, I am mindful that this court or any appellate court for that matter is loath to upsetting or disturbing concurrent findings of a court below or courts below where there is nothing perverse leading to those findings or a miscarriage of justice having taken

place or an error or law which appears on the face of the Award and subsequent findings. None of those conditions having taken place, there is no foundation for a contrary finding. *(P 125 paras B-E)*

6. *The appellant did not establish the misconduct of the arbitrator in the instant case*
The appellant has not established the misconduct he alluded to and so his complaint has not gone beyond a murmur of dissatisfaction and that is not sufficient to impugn the award well considered and arrived at by the arbitrator. Therefore there is also no justification in setting aside of the Award. I rely on the cases of Kano State Urban Development Board vs. Fanz Limited (1986) 5 NWLR (Pt.39) 74; Okoya vs. Santili (1994) 4 NWLR (Pt.338) 256 at 302; Ige vs. Akoju (1994) 4 NWLR (Pt.340) 535 at 546. *(P 125 paras E-G)*

7. *The nature of an application to set aside an arbitral award*
Learned counsel for the respondent correctly stated the position of the law that arbitration proceedings are sui generis. An application to set aside an arbitral award is not in the nature of an appeal against the award. An arbitral award is regarded as a final and conclusive judgment on all matters referred and the courts are enjoined, as far as possible to uphold and enforce arbitral awards, having regard to the fact that it is a mode of dispute resolution voluntarily agreed upon by the parties. [Ras Pal Gazi Construction Co. Ltd. vs. F.C.D.A. (2001) 10 NWLR

(Pt.722) 559 @ 569 D E; Commerce Assurance Ltd. vs. Alli (1992) 1 NSCC 556; (1992) 3 NWLR (Pt.232) 710]. *(P 128 paras A-D)*

8. *What amounts to a misconduct of an arbitrator?*
In Taylor Woodrow (Nig) Ltd. vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127 @ 142-144 A-E this court set out comprehensively what amounts to misconduct by an arbitrator, *See also:* **A. Savoia Ltd. vs. Sonubi (2000) 12 NWLR (Pt.682) 539 @ 547 D-G. [A few of such acts which are relevant to the instant appeal, are: where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement; where the award contains decisions on matters beyond the scope of the reference; and where he fails to decide all the matters that were referred to him.** *(P 128 paras E-H)*

9. *The jurisdiction of court to set aside arbitral award*
To underscore the fact that the court does not sit on appeal over an arbitral award, it is to be noted that even where the court finds merit in an application to set aside an award, its jurisdiction is limited to setting aside the award and remitting it to the arbitrator for reconsideration. The court has no jurisdiction to determine the merits of the matter which is the subject of the arbitration proceedings. See A. Savoia Ltd. vs Sonubi (supra).
(Pp 128-129 paras H-B)

10. *The proof of reimbursable expenses in the instant case*
With regard to the award of reimbursable expenses, the respondent's claim was in the nature of special damages. He gave evidence and tendered receipts in respect of the expenses incurred. He was not cross-examined on his evidence. The learned arbitrator was entitled to rely on the evidence which he found credible and unrebutted.

On the whole, I agree with the court below that the appellant failed to establish misconduct on the part of the arbitrator to warrant the award being set aside by the Lagos State High Court.
(P 129 paras F-H)

Nigerian Cases cited in this Judgment

A. Savoia Ltd. vs. Sonubi (2000) 12 NWLR (Pt.682) 539;
Commerce Assurance Ltd. vs. Alli (1992) 1 NSCC 556; (1992) 3 NWLR (Pt.232) 710;
Ige v Akoju (1994) 4 NWLR (Pt.340) 535 ;
K. S. U. D. B. vs. Fanz Ltd (1986) 5 NWLR (Pt.39) 74;
Kano State Urban Development Board vs. Fanz Limited (1986) 5 NWLR (Pt.39) 74;
KSUDB vs. Fanz Construction Ltd (1990) 4 NWLR (Pt.142) 1;
Okoya vs. Santili (1994) 4 NWLR (Pt.338) 256;
Ras Pal Gazi Construction Co. Ltd. vs. F.C.D.A. (2001) 10 NWLR (Pt.722) 559;
Savannah Bank of Nigeria Limited vs. S. I. O. Corporation (2001) 1 NWLR (Pt.693) 194;
Taylor Woodrow (Nig) Ltd. vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127;
Union Bank of Nigeria Plc vs. Sparkling Breweries Limited (1997) 5 NWLR (Pt.505) 344; and

A *Vinz International (Nig.) Ltd vs. Morohundiya* (2009) 11 NWLR (Pt.1153) 562.

Nigerian Statutes cited in this Judgment

B *Arbitration and Conciliation Act, Cap 19 Laws of the Federation of Nigeria 1990 (now Cap 18 LFN 2004) Ss. 29 and 30*

Arbitration Rules Articles 18, 19 and 20

C *Evidence Act 2011 S. 135(1)*

Representations

M.O. Liadi (with I.B. Duru) *for appellant*

D **A.O. Agbola** for *Respondent*

BAYANG AKAAHS, (JSC) (Delivering the Lead Judgment): This is an appeal against the decision of the E Court of Appeal, Lagos delivered on 23/7/2003. The appeal to the Court of Appeal was against the ruling of Longe J. of the High Court of Lagos State delivered on 5/12/2000 dismissing the appellant's application to set aside an Arbitral F Award made by late Honourable Justice Olusola Thomas dated 15/9/1998 but delivered to the appellant on 3/5/1999.

The arbitral proceeding itself resulted from the termination of the respondent's appointment as appellant's G consultant (Electrical/Mechanical Engineer) for the construction of appellant's Corporate Headquarter building in Abuja (referred to as "the Project"). Apart from the respondent, three other consultants were appointed by the H appellant to oversee various aspects of the project namely: Consultant Architect (Deenarc Consultants), Consultant Quantity Surveyors (El-Rufai & Partners) and Consultant Civil/Structural Engineer (Landscope Consultants)

A collectively referred to along with the respondent as "the Consultants").

By a Notice of Arbitration dated 16/12/1996 the respondent commenced the arbitral proceeding seeking a B declaration that the termination of the contract by the appellant was a breach of contract between the parties and asked for special and general damages for the wrongful termination. Pursuant to the direction given by the arbitrator C for filling of pleadings, the respondent filed his points of claim dated 16/12/1996 and in response, the appellant filed its points of defence dated 4/4/1997 wherein joining issues with the respondent on his allegations of fact. The D respondent subsequently filed a reply to the points of defence dated 9/4/1997 and the matter proceeded to trial.

According to the appellant, the respondent's collusion in the inclusion of N700,000,000.00 (seven hundred million E naira) in the sub-contract tender documents was the underpinning issue contended by the parties in their pleadings but the Arbitrator failed to determine their issue one way or the other in the award dated 15/9/1998. This F prompted the appellant to file an application before the High Court, Lagos praying the court to set aside the Arbitral Award on grounds of misconduct amongst others. The High Court dismissed the application holding that there was no G misconduct established against the arbitrator. The appeal to the court of Appeal was dismissed on 23/7/2003 wherein the Court of Appeal held that the pleadings have no relevance in arbitral proceedings. This prompted a further appeal to this H court. There are 11 grounds of appeal in the amended Notice of Appeal from which appellant's counsel distilled three issues for determination as follows:

1. Was the Court of Appeal right in affirming the decision of the Lagos High Court that the arbitrator made a finding on the core issues submitted to him for determination despite his (Arbitrator's) admission that he did not go into the avalanche of evidence adduced by the parties on the issue of collusion? (Grounds 2, 3, 5, 9 and 11).
2. Was the Court of Appeal right in upholding the decision of the High Court that the appellant did not establish any misconduct against the Honourable arbitrator? (Grounds 4 and 10).
3. Was the Court of Appeal right in affirming the award of reimbursable expenses? (Grounds 6, 7 and 8).

The respondent also submitted three issues for determination as follows:

1. Was the lower court right in holding that the appellant did not prove any misconduct on the part of the Sole Administrator nor show any error of law on the face of the Arbitral Award to warrant the setting aside of the Arbitral Award?
2. Was the lower court right in holding that the conduct of arbitration is not subject to the same set of rigid rules of pleadings as obtained in a formal court trial and that the parties having elected arbitration are bound by the results?
3. Was the lower court right in upholding the damages awarded in favour of the respondent by the arbitrator and upheld at the Lagos High Court (Coram Longe J)?

Before considering the issues raised in the appeal, it is necessary to dispose of the issue of jurisdiction raised suo

motu by the court on 19/4/2016 regarding the filing of the application to set aside the award made on 15/9/1998.

There is no doubt that the award is dated 15/9/1998 but it was not communicated to the parties until 3/5/1999 and the appellant filed the application to set aside the award on 24/6/1999 which was a month after the award was communicated to the appellant. The 3 months period stipulated in **Section 29 of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria 2004** for filing the application to set aside the award started to run from the date the award was published. See **Section 26(4) of the Arbitration and Conciliation Act** and **Article 2(2) Arbitration Rules**. The lower court therefore had jurisdiction to hear the appeal against the order of Longe J. refusing to set aside the arbitral award.

ARGUMENTS OF COUNSEL

Learned counsel for the appellant maintains that the honourable arbitrator did not decide the core and central issue of collusion of the respondent in the inclusion of the provisional sums which issues were well set out in the parties' respective pleadings and supported by both oral and documentary evidence. He argued that the relevance of pleadings in judicial proceedings cannot be over-emphasized as arbitral proceedings are judicial in nature pointing to the **Arbitration and Conciliation Act, Cap 19 Laws of the Federation of Nigeria 1990** (now **Cap 18 LFN 2004**) ("**the Act**") itself and **Articles 18, 19 and 20 of the Arbitration Rules** which are similar to **Civil Procedure Rules**. He said that the issues that were submitted to arbitration as can be seen from Notice of Arbitration and the points of claim as filed by the respondent are:

(a) Legality of the termination and
(b) Damages.

He submitted that issues for determination can only be distilled after the consideration of processes filed by the parties since doing otherwise will be unfairly prejudicial to the other party. Learned counsel contended that if the Court of Appeal had despite its neglect of the appellant's statement of defence, considered the submission in the appellant's written address to which it referred, it would have discovered that the underpinning issue on the legality or otherwise of the termination is the collusion of the respondent and its effect as a ground for termination of the contract. He further submitted that the honourable arbitrator could not have validly determined and conclusively reached a decision thereon without first resolving the issue of collusion and complicity of the respondent in the inclusion of the provisional sums in the subcontractor tenders documents without the appellant's knowledge, consent and authorisation which were the core issues around which the parties built their respective cases before the Arbitral Tribunal. Also the misconduct of the arbitrator is situated in making an award without a determination of that issue of collusion between the parties; hence the error of the lower court. Learned counsel for the appellant is therefore inviting this court to consider the process documents of both parties before the Arbitral Tribunal and the lower court.

Learned counsel submitted that if the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference that such an award can be set aside. He relied on **KSUDB vs. Fanz Construction Ltd (1990) 4 NWLR (Pt.142) 1** and **Taylor Woodraw (Nig)**

Ltd vs. SGMBH (1993) 4 NWLR (Pt.286) 127. Learned counsel maintained that the appellant as respondent devoted the whole of paragraph 12 of the points of defence to the details of the breach that justified the termination of the claimant's appointment. He referred specifically to paragraphs 12 (f) and (g) of the points of defence where the relevant provisions of the consultancy agreement and the custom and trade practices that were breached by the claimant's alleged collusion in the inclusion of the provisional sums provision in the sub-contract tender documents and these were summed up in the respondent's address to the honourable arbitrator. He said the respondent issued clear instructions to the consultants in Exhibit S, directing that tender documents be prepared with the provisional sum ignored and the claimant admitted that up till the determination of his agreement on July 18, 1996, this direct instruction from the respondent was not complied with.

He continued that Exhibits "G" and "MM" show that the Quantity Surveyors were acting in concert with other consultants, including the claimant in the preparation of Exhibit OO and the claimant admitted under cross examination that he did not at any time prior to the termination of his service dissociate himself from the consultants' collective obstinacy over and insistence on the inclusion of the disputed and contentious provisions.

In the circumstances, the claimant was as liable for the breach of clause 9.5 of Exhibit A as the Quantity Surveyors and any of the other members of the gang-up. Learned counsel then submitted that to that extent, the respondent was legally justified in terminating his appointment under clause 18.1 of Exhibit A.

On the award for reimbursable expenses, learned counsel submitted that the Court of Appeal was misdirected in law and on the facts in holding that "clearly going by the observation of the arbitrator on page 36 of the printed record he had considered the evidence before him to support the award for reimbursable expenses and the arbitrator was right in believing the uncontradicted evidence before him". Learned counsel argued that the arbitrator accepted the evidence led on reimbursable claims based on the failure of the appellant to cross-examine the witness without regard to the position of the law on proof of special damage.

Learned counsel for the respondent submitted that the substratum of the appeal whilst ostensibly framed against the judgement of the Court of Appeal is in essence a direct challenge to the findings and award of the arbitrator which was made in 1999. He argued that two issues were submitted for arbitration namely:

(a) Legality of the termination; and
(b) Damages

It is learned counsel's contention that an application to set aside an arbitral award is not in the nature of an appeal but sui generis placing reliance on **Sections 29** and **30** of the **Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria 1990**. Learned counsel maintained that an arbitral award may only be set aside if the party making the application furnishes proof that the award contains decisions which are beyond the submission for arbitration or where the arbitrator has misconducted himself. Learned counsel conceded that the jurisdiction of the lower court to interfere with the decision of an arbitrator is limited to either setting aside the award or remitting it back for

reconsideration. He said the question for this court is whether the lower court exceeded its jurisdiction in affirming Honourable Justice Longe's judgement and holding the arbitral award as was done in **A. Savoia Ltd vs. Sonubi (2000) 12 NWLR (Pt.682) 539** and submitted that the jurisdiction was not exceeded. He contended that a careful consideration of the lower court's ruling will show that the court confined itself to determining whether Longe J. properly exercised his powers to review the award to come to the right conclusion that save for the issue of interest, the arbitrator did not exceed the scope of matters submitted to him and did not misconduct himself.

Section 29 and 30 of the Arbitration and Conciliation Act provides as follows:

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

(a) From the date of the award; or

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

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

(2) The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the

submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted may be set aside.

(1) The court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine, to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

30. 1 Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.

2 An arbitrator who has misconducted himself may, on the application of any party be removed by court".

The issues in this appeal are:

3. Whether the lower court exceed its jurisdiction in affirming Longe J's judgement and upholding the arbitral award; and

4. Whether the arbitrator misconducted himself.

See: **A. Savoia Ltd vs. Sonubi (2000) 12 NWLR (Pt.682) 539.**

The sole ground upon which the applicant (now appellant) applied to the Lagos High Court to set aside the award made by the arbitrator was for misconduct. In dealing with the issue about the collusion of the claimant with other consultants with regards to the provisional sums of over N700,000,000.00 and the appointment of a nominated sub-contractor by the consultant architect, Longe J. said at pages 346-347:

"I found two matters directly well treated with regard to those issues. The arbitrator touched on these two issues as from page K19 of the report. It would therefore be erroneous to say that the arbitrator never consider (sic) these issues. The arbitrator however, concluded that having arrived at these conclusions it would amount to fruitless exercise to go into the avalanche of evidence adduced by the parties at the hearing as to whether, the role if any pleaded by the claimant and the inclusion of the provisional sums in the Consultant Quantity Surveyors Tender Documents..... etc.

It may be said such finding is not comprehensive enough in the light of the evidence and arguments on those issues.

However, I believe one can take refuge in the address of the claimant's counsel at clause 3.38 of the record as follows:

> **"Thus although Exhibit B was written to the consultant/architect by the respondent directing that the "Tender Documents be prepared with the provisional decisions ignored", Architect Afolabi DW1 adduced under cross-examination, that this instruction was meant to be carried out by the Consultant Quantity Surveyor and not the Claimant. It is the Quantity Surveyors who expressly refuse (sic) to carry on this direct instruction Exhibit J5".**

I checked the cross-examination of DW1 Engineer Afolabi at page 43 and it confirms the above address. Thus even if the arbitrator has considered the whole issues and the address on this point, I believe it would go to no advantage to the applicant. The fact that the arbitrator did not consider it, is not such a misconduct but a slight misdirection on the part of the late arbitrator (may his soul rest in peace).

However, having admitted and said these, I believe the termination is still bad in itself because even if the client is right and that is has a suspicion or ground to termination, the client has moved too hastily to terminate in that without waiting (sic) for the 30 days to expire, it has re-award the contract to a third party".

In the court below the central or core issue submitted to the arbitrator for determination is as contained in the Notice of Arbitration dated 16th December, 1996 paragraph F which is the relief and remedy sought as follows:

> **"The claimant claim against the respondent the following reliefs and remedies.**
>
> **(a) A declaration that the respondent unilaterally breached the agreement between the parties by its letter of termination dated 18th July, 1996 as the claimant was not in default of its obligations under the agreement and the alleged acts relied upon by the respondent for the termination was not committed or aided by the claimants but was the act of a third party.**
>
> **(b) Damages for wrongful termination of the agreement between the parties".**

The arbitrator construed clause 18(1)(a) and (b) of the Agreement in considering the legality or otherwise of the termination wherein the agreement provided that:

> **"18.1 (a) This agreement may be terminated at any time by either party on the expiring of thirty (30) days notice in writing.....**
>
> **(b) This agreement may be terminated at any time when either**

party fails to carry out their responsibilities and duties as embodied in the Blue Book or found to be defaulting in clause in this agreement".

In its letter addressed to the respondent dated 14th July, 1996 which was admitted as Exhibit 'F' during the arbitration proceedings, the appellant write:

"TERMINATION OF CONSULTANCY AGREEMENT NITEL HEADQUARTERS BUILDING ABUJA.

This is to inform you that your services are no longer required as a consultant (Electro/Mechanical Engineers) for the construction of its Corporate Headquarters in Abuja. This letter consequently serves as the requisite 30 days notice under clause 18.8 of your agreement with effect from the date hereof, of the termination of your said Consultancy Services Agreement dated 14th July, 1995 in respect of the project.

NITEL decision is based, among others, on the understated reason. Recently the Consultant Quantity Surveyor prepared tenders documents for the services subcontract and made provisions for,

(a) Provisional sums worth over N700,000,000.00 and

(b) Nominated subcontractor to be appointed by the Architect

The provisions were not in the original Bill and were unnecessary because, *inter alia* there are drawings and specifications for all the services. Besides, these provisions were made without NITEL'S prior knowledge and consent. All the consultants, it turned out, knew of and approved the

inclusions, in order, according to them, to check alleged "wilful perversion of the (subcontract) procedures" by NITEL and the Main Contractor. The Consultants' attitude is objectionable and unacceptable to NITEL. NITEL considers the insistence of the consultants in including the provisional sums in the tender documents despite NITEL's objection, as a fundamental breach of their collective and individual duties and responsibilities to NITEL as their employer.

NITEL is currently working out your entitlement (and outstanding obligations if any) as at the effective date of the termination (i.e. 30 days from the date of this letter). Please note that NITEL intends to proceed against you before an arbitrator, in the event of any dispute *inter alia* on you terminal entitlements and/or obligations in accordance with clause 21.1 of your Consultancy Agreement.

S.O. Olabiyi
for: General Manager Legal & Secretarial"

The respondent received Exhibit "F" on 22/7/96 and reacted to the said termination in his letter Exhibit "H" on 25th July, 1996 as follows:

"The Managing Director
Nigerian Telecommunication Plc
3/5 Tafawa Belewa Square
Lagos.

Dear Sir,

Re: Termination of Consultancy Agreement Nitel Headquarters Building, Abuja

I have received with utter consternation your letter No.GMLS/A.I/T.5/Vol. III/4421/91 of 18th July, 1996 informing us of the termination of our appointment as Consulting Mechanical/electrical Engineers to NITEL Plc on the above project.

The reasons adduced are that we "knew of and approved the inclusion of certain provisions by the quantity surveyor in the tender documents prepared by him. We wish to inform you most respectfully that these deductions are totally false and that you could not have thus mistakenly sought to terminate our appointment if we had simply been invited and asked if we knew or endorsed those inclusions. Indeed the quantity surveyors themselves would have informed you that they acted purely solo, again the trouble had been taken to ask them if there had been collusion or even connivance by our firm.

The simple truth is that we did not know what the quantity surveyors provided in their documents; that we did not even see the documents prior to tendering as their letter forwarding it to the client was not copied to us; that we could not therefore have approved of what we were unaware of. It is also the truth that when we eventually saw the documents we condemned it and approached the authors for those inclusions.

We went further to advise the client that a way out was for tenders to neglect the provisional sums and quote for any item. It is further the truth that when the quantity surveyor rejected the

client's instructions stemming from our above advice and wrote his letter of 10th June, 1996 claiming copyright to his tender documents (among other correspondences), we were outraged and wrote a letter of reprimand and advice dated 17th June, 1996 which we copied the client. In order to obviate any doubts to the effect, we must make it clear immediately that these praise-worthy acts of this practice were done not because we have my responsibilities for the quantity surveyor's areas of duty and responsibility, but purely out of a sense of maturity, esprit de corps and interest in the overall success of the project implementation. A local proverb holds that the elderly does not sit by while goat delivers under burden of a noose.

Since you made reference to Clause 18.1 of our Agreement with NITEL as basis for the termination letter you would by now have seen that as the same clause provides, MEKON ASSOCIATES, has not and could not by merely the failures of others, be said to have themselves failed "to carry out their responsibilities and duties as embodied in the Blue Book or found to be defaulting in any clause in this agreement. In its long history, this practice has never been tabled for misconduct or mal-performance that would even contemplate determination of its appointment. Among others, its principal is an engineer of over thirty years practice, a Fellow of the Nigerian Society of Engineers and an officer and gentleman of high integrity (N 527 Capt. E.

C. Okeke Vol. Rtd NAEE 1971) who is beyond such reproach.

We therefore implore you primary in the interest of the success of the project, justice and fair play to withdraw the letter of termination which was obviously issued in error. You may then invite us to carefully explain and defend our position which is clearly, albeit only sketchily, stated therein. We would then be able to tender oral and voluminous documentary evidence which we are very sure will convince you of our vindication and innocence. May we take this opportunity to affirm our absolute loyalty to the client and our commitment and abiding faith in the successful attainment of this most important national project in which we are very proud to be servants.

Yours most faithfully,

for: MEKON ASSOCIATES
(Sgd) Engr. E. C. Okeke
Principal Partner"

Despite this exhaustive explanation in Exhibit "H" the appellant did not shift ground in terminating the appointment and stated this fact in its letter of 12th August, 1996 wherein it referred to the letter of 25th July, 1996 and went on to say:

"We wish to inform you that NITEL Management maintains its stand on the above. You should therefore, regard the matter as closed".

Exactly one week after Exhibit "J" was written, the appellant on 19th August, 1996 appointed Techno Consult as consultants.

The letter was received in evidence as Exhibit "KK". It reads:

"GMLS/C.9/T.5/Vol. III/465/143
19th August, 1996
The Principal Partner
Techno Consult
47, Aminu Kano Way
P. O. Box 6242
Kano.

Dear Sir,

Appointment as consultant mechanical/ electrical engineers for the construction of NITEL corporate headquarters building, Abuja.

Reference is made on the above project. I am pleased to convey to you the Honourable Minister of Communications' approval for the appointment of your Firm as Consultant Mechanical/Electrical Engineers for the Construction of NITEL Corporate Headquarters Building, Abuja. Your Consultancy fee will be based on the Federal Government Scale of Fee for Consultancy Service.

Please indicate your acceptance of this offer in writing and contact the undersigned for

the signing of the Consultancy Services Agreement. You are also advised to liaise with the Project Management Consultant for further details.

Yours faithfully,

NIGERIAN TELECOMMUNICATION PLC
(Sgd.) C. T. IYORKAR
for: GENERAL MANAGER
(LEGAL & SECRETARIAL)

The arbitrator noted that Exhibit "F" did not reach the respondent until 22nd July, 1996 because that was the date the claimant acknowledged receipt of the termination and held that the 30 days' notice under clause 18.1(a) of exhibit "A" should properly be calculated from 22/7/1996 when Exhibit "F" was delivered to the claimant. Since by Exhibit "KK" Techno Consult was appointed as Consultant Mechanical/ Electrical Engineers on 19th August, 1996 while the notice of termination of Exhibit "A" would have expired on 21st August, 1996 the contract was not determined in accordance with clause 18.1(a) of the agreement and proceeded to nullify the termination and declared it illegal.

The arbitrator then examined Clause 18.1(b) of the agreement and held that the burden lay on the respondent (Appellant) who sought to terminate Exhibit "A" on

The arbitrator then examined Clause 18.1(b) of the agreement and held that the burden lay on the respondent (Appellant) who sought to terminate Exhibit "A" on the ground that the claimant failed to carry out its responsibilities and duties embodied in the Blue Book or found to be defaulting in any clause in the agreement, that should plead

these facts in its points of defence and lead evidence to establish same. He said that it was in its reaction to paragraph 9 of the points of claim (wherein claimant averred that he exercised all due care and complied strictly with the agreement and professional ethics of the engineering profession), that the respondent alleged that the claimant breached his duty of care and responsibility to it, its employer (vide paragraph 10 of the points of defence). He said that respondent did not plead the Blue Book (or any part thereof) or any failure to carry out his responsibilities and duties therein. On that basis he held that the respondent did not strictly comply with the conditions laid down in clause 18.1 of exhibit 'A' for the termination of the contract therein. Learned counsel for the appellant relied heavily on this and argued that the arbitrator could not have validly determined and conclusively reached a decision without resolving the issue of collusion which is central to a determination of the legality or otherwise of the termination of the contract.

The arbitrator stated the correct position of the law that the burden of proof in civil proceedings lies on that person who would fail if no evidence at all is given. Thus it was the appellant who had alleged that the respondent colluded with the quantity surveyors to include the over N700,000,000.00 in the tender documents to provide evidence in proof of the allegations to justify the termination of the contract.

The respondent vehemently protested his innocence in Exhibit "H" on the issue of collusion and maintained that he did not even see the documents prior to tendering and so could not have approved of what he was not aware of. Despite this strong protest, the appellant still went ahead to terminate the contract without giving the respondent any

opportunity to refute the allegation in Exhibit "F". The address of counsel no matter its persuasiveness, can never take the place of credible evidence. *See* **Vinz International (Nig.) Ltd vs. Morohundiya (2009) 11 NWLR (Pt.1153) 562.** It is not just any evidence produced in a proceedings that must be acted upon by a court or tribunal but how relevant it is to the proceedings. This includes arbitral proceedings. *See* **K. S. U. D. B. vs. Fanz Ltd (1986) 5 NWLR (Pt.39) 74.** Heavy weather has been made of the statement by the arbitrator when he said, "it would be a futile exercise to go into the avalanche of evidence adduced by the parties at the hearing as to whether the role, if any, played by the claimant in the inclusion of the provisional sums in the consultant Quantity Surveyors' Tender Documents for the services of the subcontract tenders amounted to a collusion or whether any act of collusion or connivance on the part of the claimant, if established, was a breach on the part of the claimant to carry out his responsibilities and duties as embodied in the Blue Book or found to be defaulting in clause in the agreement". Longe J. found in his review of the arbitral award that the arbitrator considered the issue.

The appellant did not pinpoint any part in the avalanche of the evidence adduced" where he proved that the claimant colluded or connived with the quantity surveyors to include over N700,000,000.00 in the tender documents. Without any proof to substantiate the allegation, the arbitrator cannot be said to have shirked his responsibility in deciding all matters which were referred to him for which he would be said to have misconducted himself in order to set aside the arbitral award. *See*: **Tayor Woodrow (Nig) Ltd vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127.** If the respondent colluded with the quantity

surveyors to include N700,000,000.00 in the tender documents so as defraud the appellant, the burden of proof is heavier since a crime is being alleged. *See*: **Section 135(1) Evidence Act 2011.**

On the issue of reimbursable expenses, learned counsel contented that what is required in proof of special damages is the strength and quality of the evidence and not the weakness of cross-examination or lack of it citing **Union Bank of Nigeria Plc vs. Sparkling Breweries Limited (1997) 5 NWLR (Pt.505).** He argued that in discharging this duty the court or Arbitral Tribunal requires a proper and painstaking evaluation of the evidence so led and a specific finding on their cogency and credibility as a basis for their reliability.

Learned counsel for the respondent argued that the arbitrator, the High Court and the Court of Appeal considered the award for reimbursable expenses and submitted that this Court should not interfere with the concurrent findings of fact by three different tribunals.

I agree with the submission of learned counsel for the respondent that since the respondent submitted receipts to back up the expenses he claimed to have made, the only way to test whether they are credible evidence is through cross-examination to ascertain their authenticity. Since appellant's counsel chose not to cross-examination on the receipts, there was uncontradicted evidence which the arbitrator could act upon to make the award for reimbursable expenses.

The application to set aside the award made to the Lagos State High Court was refused save for the complaint that the arbitrator misdirected himself when he awarded interest at the rate of 21% on the sum awarded to the claimant. The court below affirmed the ruling of the Lagos

State High Court. I find that the further appeal to this court to set aside the arbitral award based on misconduct lacks merit and it is accordingly dismissed. The award for reimbursable expense is further affirmed by me. appeal is dismissed.

K.B. AKA'AHS
Justice, Supreme Court

NKANU ONNOGHEN, (AG. CJN): I have had the benefit of reading in draft the lead Judgment of my learned brother AKAAHS (J.S.C.) just delivered.

My learned brother has exhaustively dealt with the issues formulated and relevant for the determination of the appeal and I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

There is nothing on record to make it necessary for this court to disturb the concurrent findings of facts by the lower courts.

I abide by the consequential orders made in the lead Judgment including the order as to cost.

Appeal dismissed.

Walter Samuel Nkanu Onnoghen,
Acting Chief Justice of Nigeria.

PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs JSC and to register my support, I shall make some comments.

This is an appeal against the decision of the Court of Appeal, Lagos Division which dismissed the appeal against the Ruling of Longe J. of the High Court of Lagos State delivered on the 5th December 2000 which also dismissed appellant's application to set aside an Arbitral Award made by

Olusola Thomas J dated 15th September 1998 and delivered to appellant on 3rd May 1999.

The background of the facts leading to this appeal are well set out in the lead judgment and I will not repeat them save for any reference thereto in the course of this contribution.

The learned counsel for the appellant, M. O. Liadi Esq. on the 7th day of November, 2011 adopted the brief of appellant settled by Paul Usoro SAN and filed on the 14th March 2013 and a Reply Brief filed on 8/1/2014 and deemed filed on 5/2/2014. The appellant distilled three issues for determination which are as follows:

1. **Was the Court of Appeal right in affirming the decision of the Lagos High Court that the arbitrator made a finding on the core issues submitted to him for determination despite his (arbitrator's) admission that he did not "go into avalanche of evidence adduced by the parties on the issue of collusion? (Ground 2, 3, 5, 9 and 11).**
2. **Was the Court of Appeal right in upholding the decision of the High Court that the appellant did not establish any misconduct against the Honourable Arbitrator? (Grounds 4 and 10).**
3. **Was the Court of Appeal right in affirming the award of reimbursable expenses? (Grounds 6, 7 and 8)**

For the respondent, learned counsel, A. O. Agbola adopted the brief of argument of the respondent filed on the 18/4/2013. Also were formulated three issues for determination, viz:

1. **Was the lower court right in holding that the appellant did not prove any misconduct on the part of the Sole Arbitrator nor show any error of law on the face of the Arbitral Award to warrant the setting aside of the Arbitral Award.**
2. **Was the lower court right in holding that the conduct of arbitration is not subject to the same set of rigid rules of pleadings as obtained in a formal court trial and that the parties having elected arbitration are bound by the results?**
3. **Was the lower court right in upholding the damages awarded in favour of the respondent by the arbitrator and upheld at the Lagos State High Court Coram Alonge J?**

I shall utilise Issue 2 of the appellant which is similar to Issue 1 of the respondent as sufficient to resolve the question before the court in this appeal.

ISSUE 2

Was the Court of Appeal right in upholding the decision of the High Court that the appellant did not establish any misconduct against the honourable arbitrator?

Learned counsel for the appellant submitted that the Ruling of the trial High Court contains contradictions, factual inaccuracies and considerable errors of law and fact on the part of the trial judge. The ruling contradicts itself materially consequent upon a fundamental disconnection between the trial court's final conclusion the upholding of the Arbitral Award, and the main findings that led up to the conclusion. That the findings of the learned judge lead to the inescapable conclusion that there was a decision whatsoever

by the arbitrator on the central and core issues that were submitted by the parties to him for determination i.e. whether or not (a) respondent had colluded with the other consultants including provisional sums provisions in the subcontract tender documents; and (b) such collusion as alleged by the appellant was in breach of Consultancy Agreement and provided sufficient and legal justification for the termination of the respondent's appointment by the appellant.

For the appellant it was further contended that the Court of Appeal misdirected itself in law when it refused to consider the appellant's submissions on the issue of misconduct of the arbitrator. That there was a lot to show that the arbitrator veered off course not backed by pleadings and thereby exceeded the scope of the arbitral proceedings and his authority on the issues. He cited several judicial authorities such as **Taylor Woodrow (Nig) Limited vs. SE GMBH (1993) 4 NWLR (Pt.286) 127.**

Responding, learned counsel for the respondent stated that the Court of Appeal did not make a single addition to findings of fact made by the arbitrator and the trial High Court and the Court of Appeal essentially found that none of the allegation of misconduct against the arbitrator and of error against Longe J was established. That the appellant failed to show any error of law on the face of the award save for the award relating to damages which had been severed from the award by the High Court. that there is no basis on which this court can set aside the concurrent findings of fact of the Arbitral Tribunal, the State High Court and the Court of Appeal. He cited **Savannah Bank of Nigeria Limited vs. S. I. O. Corporation (2001) 1 NWLR (Pt.693) 194 at 212.**

In brief the stance of the appellant is that the failure of the arbitrator to consider the collusion of the respondent in

A the inclusion of the provisional sums in the subcontract tender documents and his refusal to go into the avalanche of evidence led by the parties on this issue is a serious misconduct on the part of the arbitrator on which the award
B should be set aside.

The respondent took the contrary view, stating that the arbitrator is not obliged to rule on every issue of law or fact canvassed before him. That he is only entitled to rule on
C matters that will assist him determining the core issue before him i.e. whether the termination of the consultancy service agreement was lawful and if not, the amount and measures of damages. That the appellant was unable to prove at the lower
D court any allegation of misconduct or error of law which appears on the face of the award and the only complaint of the appellant is that the award was not in his favour as there was no error on the face of the award to justify the setting aside of
E the award.

The award made by the arbitrator being the fulcrum of the dispute illuminating in this appeal will be quoted hereunder, viz:

F

"The award

This is the award by me, Justice Olusola Thomas (RTD) former Chief Justice of Lagos State and of No.22 Saka
G **Tinubu Street, Victoria Island, Lagos made this 15th day of September, 1998.**

Whereas:

H **1. By an Order of the High Court of Lagos State made at Ikeja on 23rd January 1997 by the Chief Judge of the State in the Ikeja High Court, suit No. ID/724M/96 wherein one Engr. Emmanuel**

A **Chukwuemeka Okeke (Trading under the name of Mekon Associates) was the plaintiff/claimant and the Nigerian Telecommunications Plc. was the defendant/respondent, it was ordered that the**
B **dispute between the parties be referred to me as the Sole arbitrator for hearing and determination. The enrolment of the order is published along with other particulars in this report.**

C **2. That both parties led oral evidence through three witnesses each (including the claimant) and tendered 40 documentary exhibits.**

3. That the solicitor for the either party thereafter
D **submitted written addresses on behalf of their clients.**

Now be it known that I the said Sole Arbitrator, Justice
E **Olusola Thomas (Rtd) hereby make and publish this my award for and concerning the matters so referred to me in the following manner, that is to say:**

1.1 Award and determine that the purported
F **termination letter Exhibit "F" from the respondent to the claimant was a jollity and ineffective to terminate the Consultancy Services Agreement exhibit "A" made between the parties**
G **on the 14th July, 1995.**

1.2 Award and determine that the respondent did not strictly comply with the conditions laid down in Clause 18 of the Consultancy Service Agreement
H **(Exhibit A) for the termination of the contract therein in exhibit "A" is invalid, unlawful and illegal.**

1.3 Assess and award in favour of the claimant the maximum allowable claim under Exhibit "A" of the sum of N1,263,750.00 as reimbursable expenses to be paid by the respondent.

4. That I assess and award the sum N134,760.00 in respect of the remuneration for Engr. S. O. Ajayi for 7 months only under the Resident Staff employed by the claimant in favour of the claimant to be paid by the respondent.

5. I assess and award the sum of N3,948,498.15 as damages for loss of profit in favour of the claimant to be paid by the respondent.

6. That the total sum of the damages award in favour of claimant against the respondent is N5,346,908.15 and I award interest on the said sum at 21% per annum from the date of the breach of contract 14th July, 1996 till the date hereon amounting N2,432,843.10 to be paid by the respondent.

7. That the claimant is entitled to the costs of his legal representation as the successful party and I assess and award the sum of N500,000.00 in favour of the claimant to be paid by the respondent.

8. That the claimant being the successful party is entitled to the costs of this Arbitration fixed at N25,000.00 to be paid by the respondent and I so award.

9. That the respondent shall reimburse the claimant being the successful party in the sum of and being the arbitrator's fee paid by the claimant and I so award.

10. that the total amount for which the claimant is entitled and which shall be paid by the respondent is N9,134,751.25 and interest at 6% per annum shall be paid as from the 15th September, 1998 till all the sums awarded are liquidated and I so award.

11. That the reasons for decision, findings and the award are contained at page hereafter.

Hon. Justice Olusola Thomas (Rtd)
Sole Arbitrator
15th September, 1988.

What is for review before this Apex Court are the concurrent findings of the two courts below that the arbitrator acted above board and the allegation put up by the appellant of misconduct on the part of the arbitrator remained not proven.

The salient part of the judgment of the Court of Appeal on the conduct of the arbitrator is shown at page 433 and I shall state it thus:

"The points of claim which was filed after the reference to the arbitrator and which counsel to the appellant regard as pleadings only give further particulars and cannot be equated to pleadings in the superior court of records. By its nature arbitration proceedings is sui generis and the important consideration in determining its procedure is that each party must be given adequate opportunity to canvass his case and rebut the evidence of the other party if he so desires. It is a very wrong

notion to equate arbitration proceedings as if it was formal proceedings at superior court of records. In arbitration proceedings the rules are more relaxed. There is no doubt the purpose of arbitration will be defeated if subjected to the same rules of court to which by necessary implication it is inferior. This court in Ebokan vs. Ekenibe & Sons Trading Co. (Supra) stated the benefits of submission to arbitration thus:

> **"Parties who make a submission to an arbitrator often do so in an order to adopt a quick, inexpensive and technicality free procedure to resolve their dispute. A court should not therefore upset the expectation of the parties except for the clearest evidence of wrong doing or manifest illegality on the part of the arbitrator".**

In view of the above therefore arbitration is a fast, cheap and efficient method of resolving conflict between parties without having to follow the rigid procedures of normal courts of law. Besides the recourse to arbitration was a conscious decision of the parties and they ought to be bound by the result save in situation of clearest evidence of wrong doing or manifest illegality on the party of the arbitrator. In the light of the fact that in arbitration proceedings pleadings have no

relevance and the fact that the arbitrator acted within the context of the Notice of Arbitration dated 16th December 1996 and the lower court so found in this regard I resolved Issue No.2 in favour of the respondent against the appellant".

The above finding of the court below was along the line of finding and decision of the court of trial per Longe J. The question that would naturally flow is whether this court has any reason for departing from those findings or to interfere with them. Of course, I am mindful that this court or any appellate court for that matter is loath to upsetting or disturbing concurrent finds of a court below or courts below where there is nothing perverse leading to those findings or a miscarriage of justice having taken place or an error or law which appears on the face of the award and subsequent findings. None of those conditions having taken place, there is no foundation for a contrary finding.

The appellant has not established the misconduct he alluded to and so his complaint has not gone beyond a murmur of dissatisfaction and that is not sufficient to impugn the award well considered and arrived at by the arbitrator. Therefore there is also no justification in setting aside of the Award. I rely on the cases of **Kano State Urban Development Board vs. Fanz Limited (1986) 5 NWLR (Pt.39) 74; Okoya vs. Santili (1994) 4 NWLR (Pt.338) 256 at 302; Ige vs. Akoju (1994) 4 NWLR (Pt.340) 535 at 546** referred to by the respondent.

From the above and the well reasoned lead judgment of my learned brother, Kumai Bayang Aka'ahs I too see no merit in his appeal and I dismiss it.

I abide by the consequential orders as made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

KEKERE-EKUN, (JSC): The genesis of this appeal is the appellant's dissatisfaction with the arbitral award made by Hon. Justice Olusola Thomas dated 15/9/1998 and delivered on 3/5/1999, which was upheld by the High Court of Lagos State via a ruling delivered on 5/12/2000 and affirmed by the Court of Appeal, Lagos Division on 23/7/2003.

The dispute between the parties arose from the termination of the respondent's appointment as the appellant's consultant (Electrical/Mechanical Engineer) for the construction of the appellant's Corporate Headquarters in Abuja. There were three other consultants appointed by the appellant to oversee various aspects of the project. After terminating the contract the appellant immediately re-awarded it to another consultant.

My learned brother, KUMAI BAYANG AKAAHS, (JSC) has set out in detail the facts that gave rise to this appeal. Suffice it to say that the reason given by the appellant for terminating the contract was the alleged collusion by the respondent with other consultants by including the sum of N700 million in the sub-contract tender documents without the appellants knowledge, consent or authorisation. Sequel to the termination of the contract, the respondent commenced arbitration proceedings against the appellant. The two issues submitted to arbitration were:

(a) The legality of the termination
(b) Damages

At the conclusion of the proceedings, an award was made in favour of the respondent. The sole arbitrator found the termination of the Consultancy Services Agreement between the parties was invalid for non compliance with clause 18 thereof which required either party to give 30 days notice in writing before terminating the contract. The arbitrator noted that the contract was not properly terminated before it was re-awarded to another consultant. He also found that the appellant failed to lead any evidence to prove that there was any default by the respondent in carrying out his responsibilities and duties as embedded in the Blue Book or in any other respect under the contract.

Having so held, he stated that he did not deem it necessary to consider the "avalanche of evidence" adduced by the parties on the issue of what role, if any, the respondent played in the inclusion of the provision terms in the Quantity Surveyor's Tender Documents and whether or not there was collusion. He also made an award in favour of the respondent for reimbursable expenses.

The appellant sought to have the award set aside by the Lagos State High Court on grounds of misconduct. His Lordship, Longe J. in his ruling delivered on 5/12/2000 affirmed the awards made by the sole arbitrator except the award for interest. The court below, affirmed the decision of the High Court. The appellant is still dissatisfied, hence the instant appeal.

The main complaints of the appellant are that it was wrong of the sole arbitrator not to have considered the evidence of collusion in determining whether the contract between the parties was validly terminated and that the claim for damages, which was in the nature of special damages was not strictly proved, and that the lower court erred in affirming

the decision of the Lagos State High Court.

At the outset, I must say that learned counsel for the respondent correctly stated the position of the law that arbitration proceedings are sui generis. An application to set aside an arbitral award is not in the nature of an appeal against the award. An arbitral award is regarded as a final and conclusive judgment on all matters referred and the courts are enjoined, as far as possible to uphold and enforce arbitral awards, having regard to the fact that it is a mode of dispute resolution voluntarily agreed upon by the parties. **See Ras Pal Gazi Construction Co. Ltd. vs F.C.D.A. (2001) 10 NWLR (Pt.722) 559 @ 569 D E; Commerce Assurance Ltd. vs. Alli (1992) 1 NSCC 556; (1992) 3 NWLR (Pt.232) 710.**

The rather limited circumstances in which a court can set aside an arbitral award are provided for in **Section 29(2) and 30 of the Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria 2004** as follows:

In **Taylor Wooodrow (Nig) Ltd. vs. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt.286) 127 @ 142-144 A-E** this court set out comprehensively what amounts to misconduct by an arbitrator, *See also***: A. Savoia Ltd. vs. Sonubi (2000) 12 NWLR (Pt.682) 539 @ 547 D-G.** A few of such acts which are relevant to the instant appeal, are: where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement; where the award contains decisions on matters beyond the scope of the reference; and where he fails to decide all the matters that were referred to him.

To underscore the fact that the court does not sit on appeal over an arbitral award, it is to be noted that even where the court finds merit in an application to set aside an award,

its jurisdiction is limited to setting aside the award and remitting it to the arbitrator for reconsideration. The court has no jurisdiction to determine the merits of the matter which is the subject of the arbitration proceedings. **See A. Savoia Ltd. vs. Sonubi (supra).**

In the instant appeal, I observe that a significant portion of the appellant's brief is devoted to challenging the award. This is not proper.

In the instant appeal, I agree with my learned brother, Aka'ahs, (JSC) that the appellant failed to show why the concurring decisions of the two lower courts should be interfered with. The sole arbitrator rightly held that the appellant failed to comply with the terms of the agreement between the parties regarding the required number of days' notice to be given on either side before the contract could be terminated. Thus, as rightly found by the sole arbitrator and upheld by the two lower courts, even if the appellant was able to establish collusion, he was still bound to comply with the terms of the agreement governing the termination of the contract.

With regard to the award of reimbursable expenses, the respondent's claim was in the nature of special damages. He gave evidence and tendered receipts in respect of the expenses incurred. He was not cross-examined on his evidence. The learned arbitrator was entitled to rely on the evidence which he found credible and unrebutted.

On the whole, I agree with the court below that the appellant failed to establish misconduct on the part of the arbitrator to warrant the award being set aside by the Lagos State High Court.

For these and the more detailed reasons ably articulated in the lead judgment of my learned brother,

A KUMAI BAYANG AKAAHS, (JSC), with which I entirely agree, I also dismiss the appeal and abide by the order on costs as contained therein.

Appeal dismissed.

B **Kudirat Motonmori Olatokunbo Kekere-Ekun**
Justice, Supreme Court

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SETRACO NIGERIA LIMITED
AND
JOSEPH KPAJI

SC.119/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 13TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

WALTER S. N. ONNOGHEN	**AG. CHIEF JUSITICE OF NIGERIA**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**

APPEAL: Notice of Appeal – Where Notice of Appeal was wrongly headed 'in Abuja', instead of 'in Jos – Whether Notice of Appeal can be amended to read 'in Jos'.

APPEAL: The purport and significance of Notice of Withdrawal of Appeal.

APPEAL: Where irregularities in Notice of Appeal do not affect the jurisdiction of appellate court – Whether irregularities can be amended

APPEAL: Where Notice of Appeal did not state the name of appellant "as a person interested" in the appeal – Whether Notice of Appeal can be so amended.

*APPEAL: Withdrawal of Appeal – **Order 11 of the Court of Appeal Rules 2011** – Consideration thereof.*

INTERPRETATION OF STATUTES: Principles guiding the courts in the interpretation of statutes.

PRACTICE AND PROCEDURE: Where applicant for extension of time within which to appeal, had previously withdrawn the appeal – Implication.

PRACTICE AND PROCEDURE: Where appellant filed Notice of Withdrawal of Appeal – Appellant subsequently seeks to obtain leave to file fresh Notice out of time and extension of time to appeal – Whether procedure regular.

Issue for Determination

Whether an appeal which has been withdrawn and struck out pursuant to Order II Rules (1) and (2) of the Court of Appeal Rules, 2011 can be relitigated.

Facts of the Matter

The plaintiff (now respondent in this appeal) instituted an action before the Nasarawa State High Court sitting in Keffi claiming the sum of Two Hundred and Fifty Million Naira (N250,000,000.00) only as special and general damages as a result of injuries he had suffered due to negligence of the defendant/appellant. The suit is number NSD/K 25/2006. On 28/11/2008 the Nasarawa State High Court presided over by Viko J. entered judgment in favour of the plaintiff/respondent in the sum of N89,640,000.00 (Eighty-Nine Million, Six Hundred and Forty Thousand Naira) only. The defendant was dissatisfied with the said judgment and appealed against it to the Court of

Appeal, Jos Division. The said Notice of Appeal was wrongly headed and instead of "IN THE COURT OF APPEAL HOLDEN AT JOS", the Notice was headed "IN THE COURT OF APPEAL HOLDEN AT ABUJA". On discovering this mistake, Mr. Akin Adewale of counsel filed another Notice of Appeal on 16/12/2008. The appeal was entered as CA/J/43/2009 and the appellant filed its brief of argument. On being served with the appellant's brief, the respondent raised a preliminary objection to the competency of the appeal on the grounds that:

1. There was no competent appeal before the court; and
2. There was no competent brief of argument filed by the appellant.

The preliminary objection was argued in the respondent's brief wherein objection was also taken regarding the formulation of more than one issue from a single ground of appeal.

The appellant did not respond to the preliminary objection but instead decided to change counsel.

On 24/2/2012, a Notice of Withdrawal of Appeal No.CA/J/43/2009 was filed by Omale Omale. The appeal was struck out on 24/4/2012 by virtue of **Order II Rules (1) and (2)** of the **Court of Appeal Rules 2010** (as amended).

The new counsel S. A. Ngavan Esq. filed a fresh Motion on Notice on 25/4/2012 which was given appeal No. CA/MK/51/M/2012 praying for the following reliefs:

1. Extension of time within which the applicant may apply for leave to appeal against the judgment of Hon. Justice John A. Viko of Keffi High Court, Nasarawa State in Suit No. NSD/K25/2006 delivered on the 28th day of November, 2008.
2. Leave for the applicant to appeal against the said

judgment of Hon. Justice John A. Viko in Suit No. NSD/K25/2006 delivered on the 28th day of November, 2008.

3. Extension of time within which the applicant may file its notice and grounds of appeal against the judgment stated in (1) and (2) above.

The Court of Appeal dismissed the application. It held that a Notice of Appeal wrongly headed could have been amended and the appeal heard on merit. It further held that failure to state the names of the applicants in the Notice of Appeal was an irregularity that also could have been amended. However, the court held that an appeal withdrawn cannot be relitigated. The applicant now appeals in the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. Where procedural irregularity in a Notice of Appeal does not affect the court's jurisdiction.
Learned Counsel must have labored under the mistaken belief that the Notice of Appeal was incompetent because of the preliminary objection which was subsisting at the time the Notice of withdrawal of the appeal was filed. The lower court effectively dealt with the mistaken belief when it held that the appeal was competent and all that learned counsel should have done was apply to amend the Notice of Appeal so as to add the name of and address of the appellant as the person affected by the appeal. Even the first notice which was wrongly headed 'IN THE COURT OF APPEAL HOLDEN AT ABUJA" could have been amended to read "Jos" because the

error did not affect the jurisdiction of the court to entertain the appeal. *(P 152 .paras A-D)*

2. It is wrong for an applicant to file a motion for leave to appeal and extension of time to appeal where he had previously filed a motion withdrawing the appeal.
The motion for leave and extension of time to appeal was rightly dismissed since the appellant had filed notice to discontinue with the appeal and it was struck out which is tantamount to a dismissal of the appeal under Order II Rule 5 Court of Appeal Rules, 2011. *(P 152 .paras D-E)*

3. The approach of the courts to interpretation of statutes.
The courts including the Apex Court have been well guided over the years in the interpretation of statutes with the clear boundary beyond which courts cannot enter. That is to say that while the courts have powers of interpretation of the law, it has no licence to veer into the legislative arena or constitute itself into the legislator however harsh or distasteful the piece of legislation may be, as once the words are plain and unambiguous, the court is duty bound to give effect to those words and not interpret the law as it ought to be. (F.B.N. Plc vs. Maiwada (2013) 5 NWLR (Pt.1348) 444 at 448 and 483) *(P 160 paras E-G)*

4. The withdrawal of an appeal amounts to a dismissal.
This court had in a similar scenario in the Young Shall Grow Motors Ltd vs. Ambrose O. Okonkwo & Anor (2010), 2 SCNJ 396 at 409-412 stated as follows:

"A case which has been withdrawn and subsequently struck out/dismissed when the point of litis contestio has been reached cannot be relisted for another bite at the cherry ……. In other words, after briefs of argument have been exchanged by the parties whereby issues between them became crystallized litis contestio can be deemed to have been reached. A withdrawal from that point in time must, as an inflexible rule lead to the dismissal of the appeal." *(P 161 paras A-E)*

5. *The interpretation of Order II Rule 5 of the Court of Appeal Rules 2011*

Per Peter Odili (JSC):

"What I am labouring to put across is that in interpreting Order 11 Rule 5 of the Court of Appeal Rules under which the withdrawal was made, the appellant had reached a point of no return and there is no turning back the hands of the clock. In similar circumstances Kalgo JSC in Kraus Thompson Organization vs. NIPSS (2004) 17 NWLR (Pt. 901) 44 at 64 described the situation thus:

> "**Once the Respondent applies under the said rule, the appeal must be dismissed and such dismissal is final…….Therefore the order**

> **striking out the appeal is in full compliance with the provisions of Order 6 Rule 10 of the Court of Appeal Rules and 'striking out" amounts to a "Dismissal" of the appeal. There is no relisting of such an appeal".** *(Pp 161-162 paras E-A)*

6. *The implication of notice of withdrawal*

In the case at hand, the wordings of the Notice of Discontinuance or withdrawal left no doubt that it was the intendment of the appellant to withdraw from further prosecution of the appeal. In fact, those were the exact words and slated under Order 11 Rules 1 and 2 of the Court of Appeal Rules underscored what was expected and the court obliging in carrying out those wishes cannot now be told that the resultant effect was not what was expected. A party cannot be allowed to play with the processes of the court as the mood propels him irrespective of the plain, clear and unambiguous provisions of the law he had set to utilize. The party must sink and swim with what he had by his own volition activated. I place reliance on Abalogu vs. Shell Petroleum Development Company Ltd (2003) 6 SCNJ 162 at 284 per Iguh JSC.
(P 162 .paras A-E)

7. *The implication of Notice of Withdrawal of appeal*

The case of Ezomo vs. A.G. Bendel State (1986) 4 NWLR (Pt.36) 448 at 362 could easily have had this case in mind and I quote Aniagolu JSC thus:

"Having held that the withdrawal notice filed by Mr. Obasiyi was validly filed. Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By sub-rule 5 of Rule 18:

> **An appeal which has been withdrawn under this Rule, whether with or without an Order of the Court shall be deemed to have been dismissed.**

This sub-rule 5 is in identical terms with Order 7 of Rule 17 (5) of the Supreme Court Rules 1977 and the current order 8 Rule 6 (5) Supreme Court Rules 1985. The effect of the withdrawal notice filed by Mr. Obasiyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an Order of Court".
(Pp 162-163 paras E-B)

Nigerian Cases cited in this Judgment
Abalogu vs. Shell P.D.C. Ltd (2003) 6 SCNJ 262;
Akaneziri vs. Okenwa & Ors (2000) 15 NWLR (Pt.691) 526;
Auto Import Export vs. Adeboye & 2 Ors (2002) 18 NWLR (Pt.799) 554;
Edozien vs. Edozien (1993) 1 NWLR (Pt.272) 678;
Ezomo vs. A.G Bendel State (1986) 4 NWLR (Pt. 36) 448;
F.B.N. Plc vs. Maiwada (2013) 5 NWLR (Pt.1348) 444;
Fagunwa & Anor vs. Adibi & 2 Ors (2004) 17 NWLR (Pt. 903) 544;.
First bank of Nigeria Plc vs. T.S.A. Industries Ltd (2010) 15 NWLR (Pt. 1216) 247;
Ihunwo vs. Ihunwo (2013) 3 NWLR (Pt. 1357) 550;

Inyang vs. Ebong (2002) 2 NWLR (Pt. 751) 284;
Kraus Thompson Organization vs. NIPSS (2004) 17 NWLR (Pt. 901) 44;
Lagos State Traffic Management Authority & Ors vs. Ezezoobo (2012) 3 NWLR (Pt. 1286) 49;
Odunukwe vs. Ofomata & Anor (2010) 18 NWLR (Pt.1225) 404;
Ogbu vs. The State (2007) 2 SCNJ 319;
Oloba vs. Akereja (1988) 3 NWLR (Pt.84) 508;
The Young Shall Grow Motors Ltd.vs Okonkwo (2010) 15 NWLR (Pt.1217) 524;
U.T.C. (Nig.) Ltd vs. Pamotei (1989) 2 NWLR (Pt.103) 244; and
Young Shall Grow Motors Ltd vs. Ambrose O. Okonkwo & Anor (2010), 2 SCNJ 396.

Nigerian Statutes sited in this Judgment
Court of Appeal Rules, 2011 0.11, R.1,2,5, 0.6 R. 2 & 6
The Constitution of Niogeria 1999 Ss. 36, 241, 242, 243
The Court of Appeal Rules 1981 0.3 R.18(5), 14
The Evidence Act S.169
The Supreme Court Rules 1985 0.7 R.17(5); 0.6(1) to (5); 0.8 R.6(5).

Representations
C.O. Toyin Pinheiro (SAN) (*with* **C.A. Chambang, I.Y. Mekah** *and* **J.A. Sambo** *for Appellant*.
A.O. Maduabuchi (*with* **Kenechukwu Maduka**, **Chijioke Dike** *and* **Chibueze Ndidigwe**) *for Respondent.*

BAYANG AKA'AHS (JSC) (Delivering the Lead Judgment): The plaintiff (now respondent in this appeal)

instituted an action before the Nasarawa State High Court sitting in Keffi, claiming the sum of Two Hundred and Fifty Million Naira (N250,000,000.00) only as special and general damages as a result of injuries he had suffered due to negligence of the defendant/appellant. The suit is number NSD/K 25/2006. On 28/11/2008 the Nasarawa State High Court presided over by Viko J. entered judgment in favour of the plaintiff/respondent in the sum of N89,640,000.00 (Eighty-Nine Million, Six Hundred and Forty Thousand Naira) only. The defendant was dissatisfied with the said judgment and appealed against it to the Court of Appeal, Jos Division. The said Notice of Appeal was wrongly headed and instead of "IN THE COURT OF APPEAL HOLDEN AT JOS", the Notice was headed "IN THE COURT OF APPEAL HOLDEN AT ABUJA". On discovering this mistake, Mr. Akin Adewale of counsel filed another Notice of Appeal on 16/12/2008. The appeal was entered as CA/J/43/2009 and the appellant filed its brief of argument. On being served with the appellant's brief, the respondent raised a preliminary objection to the competency of the appeal on the grounds that:

1. There was no competent appeal before the court; and
2. There was no competent brief of argument filed by the appellant.

The preliminary objection was argued in the respondent's brief wherein objection was also taken regarding the formulation of more than one issue from a single ground of appeal.

The appellant did not respond to the preliminary objection but instead decided to change counsel.

On 24/2/2012, a Notice of Withdrawal of Appeal

No.CA/J/43/2009 was filed by Omale Omale, (See page 239 of the Records). The appeal was struck out on 24/4/2012 by virtue of **Order II Rules (1) and (2) of the Court of Appeal Rules 2010** (as amended).

The new counsel S. A. Ngavan Esq. filed a fresh Motion on Notice on 25/4/2012 which was given appeal No. CA/MK/51/M/2012 praying for the following reliefs:

1. Extension of time within which the applicant may apply for leave to appeal against the judgment of Hon. Justice John A. Viko of Keffi High Court, Nasarawa State in Suit No. NSD/K25/2006 delivered on the 28th day of November, 2008.
2. Leave for the applicant to appeal against the said judgment of Hon. Justice John A. Viko in Suit No. NSD/K25/2006 delivered on the 28th day of November, 2008.
3. Extension of time within which the applicant may file its notice and grounds of appeal against the judgment stated in (1) and (2) above.

The grounds upon which the application was brought are as follows:

1. That following the delivery of the said judgment on 28/11/2008 the applicant immediately caused her counsel then, Akin Adewale Esq. to file an appeal against it and the said counsel actually filed a Notice of Appeal dated the 29th day of November 2008 and filed on 1st December, 2008 but was wrongly headed "in the Court of Appeal Holden at Abuja".
2. That another Notice of Appeal dated 16th December, 2008 was filed on 6th February, 2009 within the statutory period for appealing.

3. That the said appeal No. CA/J/43/2009 was struck out by this Honourable Court on the 24th day of April, 2012.
4. That the applicant is desirous of prosecuting the appeal to its logical conclusion.
5. That the lapses are caused by counsel.
6. Extension of time by this Honourable Court is required to file a competent Notice of Appeal.

In paragraph 3,4,5,6,7,8 and 10 of the affidavit in support of the motion, Ephriam Fater Sarwuan a legal Practitioner deposed to the following facts:

"3. That I know as of fact that on the 19th day of December, 2011, the Law Firm of Bernard Hom. & Co. received a brief from the legal Department of the Trust Insurance Company, on behalf of the applicant that a fresh Notice of Appeal be filed against the judgment of Hon. Justice A. Viko delivered on the 28th November, 2008. A copy of the said judgment is attached hereto and is marked Exhibit 1.

4. That I know as of fact from the records sent to our law office that the applicant's former counsel, Akin Adewale Esq. had filed two different Notices of Appeal, one dated 29th November, 2008 and filed on 1st December, 2008 and the other dated the 16th day of December, 2008 and filed on the 6th day of February, 2009.

5. That I also know as of fact that the appeal

had been entered as appeal No. CA/J/43/2009 and briefs of argument were settled, filed and exchanged based on the Notice of Appeal filed on 6th February, 2009 mentioned above.

6. The appeal No. CA/J/43/2009 being defective has been withdrawn and struck out by this Honourable Court and annexed hereto as Exhibits 2 is the ruling of this Honourable Court striking out the said appeal.

7. That the proposed fresh and competent Notice of Appeal has now been prepared on behalf of the applicant and is attached here and marked as exhibit 3.

8. That as a lawyer I believe that the proposed Notice of Appeal has arguable grounds of appeal and is likely to succeed.

10. That the defect discovered in the appeal filed by applicant's former counsel is that the names of all persons affected by the appeal were not stated in paragraph 5 of the said notice.

The respondent filed a counter-affidavit in opposition to the motion for extension of time to appeal and this is what Bello Lukman Ibrahim, a legal practitioner in the Chambers of Oba Maduabuchi Esq. averred in paragraphs 3,4,5,6,7,8,9 and10:

"3. That judgment was entered in favour of the respondent by the Nasarawa State High Court on the 28th day of November, 2008.

4. That the appellant filed an appeal against same and also filed a brief and the respondent also filed his brief.
5. That while the parties were waiting for a hearing date the appellant appealed to the Supreme Court on whether it should pay the judgment sum into court as it had undertaken to do in the Court of Appeal.
6. This lasted from 2009 until 2012 when the Supreme Court struck same out and then the appellant paid the judgment sum into Court in Jos instead of Makurdi. The ruling is exhibit JKI hereto.
7. That upon noticing that their case was weak in the appeal number CA/J/43/2009 the appellant voluntarily withdrew same pursuant to Order II of the Court of Appeal Rules.
8. That it is not true that the Notice of Appeal did not contain the names and addresses of the persons interested in the appeal.
9. That a copy of the said Notice of Appeal is exhibited thereto as Exhibit JK 2.
10. That the appeal No. CA/J/43/2009 having been withdrawn stands dismissed.
11. That the applicant has no right of appeal again against the judgment of the Nasarawa State High Court having exercised same in appeal number CA/J/43/2009".

A further and better affidavit was filed in support of the application to which were attached several exhibits. The

court below thereafter ordered counsel to file written addresses.

Learned counsel also made oral submissions. The court below considered the application and dismissed same as lacking in merit, but before reaching this conclusion the court held that the wrong heading of a Notice of Appeal and failure to state the name and address of one of the parties interested in the appeal are blunders that can be amended and they do not warrant the striking out of an appeal which otherwise should be heard on the merit. This prompted the appellant to file an appeal to this court on 11th February, 2013 containing 6 grounds of appeal from which the appellant distilled three issues for determination which are as follows:

1. Was the Court of Appeal right when it held that, the appellant, having withdrawn her appeal under Order II of the Court of Appeal Rules 2011, was barred from bringing an application for extension of time and for leave to appeal against the substantive judgment of Hon. Justice John A. Viko, notwithstanding her constitutional right of appeal and right to fair hearing. (This issues is distilled from Grounds 1,3,4 and 6).
2. Was the Court of Appeal right when in determining the application before it, it did not consider the appellant's further and better Affidavit and the Reply Address on points of law, which were properly before it. (This issues is formulated from Ground 2).
3. Was the Court of Appeal right to hold, as it did, that the defects leading to the withdrawal of the original Notice of Appeal could have been cured by amendment even at the stage when briefs had been filed and exchanged. (Formulated from Ground 5).

The respondent on his part felt there was only one issue for determination and it is:

> Whether an appeal which has been withdrawn and struck out pursuant to Order II Rules (1) and (2) of the Court of Appeal Rules, 2011 can be relitigated.

Granted that the respondent had filed Notice of Preliminary Objection to the Notice of Appeal which the appellant filed on 16/12/2008, it is the substantiality of that preliminary objection that will determine the fate of this appeal.

There is no dispute whatsoever that the appellant filed Notice of Withdrawal of the appeal. The process which is at page 239 of the record states:

> "NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER II RULE 1 OF THE COURT OF APPEAL RULES 2011.
>
> TAKE NOTICE that the appellant herein intends not to prosecute this appeal any further and hereby gives Notice of Withdrawal to the respondent in accordance with the rules of this court.
>
> Dated this 24th day of February, 2012.
>
> **Signed**
> **Omale Omale Esq".**

The proceeding of the 24th day of April, 2012, when the appeal was withdrawn is at page 157 of the records and it is reproduced in extensor as follows:

"APPEAL NO. CA/J/43/2009

BETWEEN:
SETRACO NIG. LTD *APPELLANT*
V.
JOSEPH KPAJI *RESPONDENT*

PARTIES ABSENT

S.A. Ngavan (with Omale Omale) for the Appellant.

Mr. Oba M. for the Respondent.

S.A. NGAVAN: We filed a Notice of Discontinuance of this appeal and urge this court to discontinue with this case. The notice was filed on 27/2/2012

Mr. Oba: No objection

Court: The Appeal No. CA/J/43/09 having been discontinued is hereby struck out by virtue of Order II (1)(e) of this Court Rules 2010 (as mended)

Mr. Ngavan: I wish to withdraw our motion filed on 3/2/2012.

Mr. Oba: No objection

Court: Application filed on 3/2/2012 for extension of time apply (sic) for leave to appeal, etc is struck out having been withdrawn.

Signed.

Hon. Justice M. l. TSAMIYA PJCA
24/4/2012
Signed.
I agreed Hon. Justice A. A. B. Gumel JCA

Signed.
I agreed Hon. Justice U. Onyemenam JCA".

It is on the basis of this ruling that the court below dismissed the motion in CA/MK/51/M/2012 when the panel (Coram: Mikailu, Mshelia and Oseji JJCA) unanimously held that the failure of appellant to state the name and address of one of the parties interested in the appeal amounts to a blunder which constitutes only an amendable irregularity and does not warrant the striking out of an appeal which otherwise should be heard on the merit. In his own contribution, Mshelia JCA dealing with the import of filing the Notice of Discontinuance of the appeal as it relates to the motion stated at page 288 of the record:

"It is clear from the proceedings of this court dated 24/4/2012 that appellant now applicant applied to discontinue the appeal filed on 27/2/2012 and same was struck out by this court pursuant **Order II Rules 1 and 2** of the **Court of Appeal Rules**, 2010 as amended. Once an appeal is withdrawn under Order II Rules 1 and 2, with or without consent of the parties, the appeal stands dismissed pursuant to **Order II Rule 5** of the said **Rules**".

Learned counsel for the appellant has argued that since

Appeal No. CA/J/43/2009 was not decided on the merits when the appeal was struck out on 24/4/2012, **Order II of** the **Court of Appeal Rules 2011** cannot be interpreted and applied to defeat the express constitutional provision relating to right to fair hearing and the right of appeal as guaranteed under **Sections 36,241,242,243** of the **Constitution of the Federal Republic of** Nigeria 1999. It was argued in the Reply Brief that before the Court of Appeal can have jurisdiction to dismiss the appeal, there must be a competent and valid Notice of Appeal.

In the lead ruling Oseji JCA examined **Order II** with a view to establishing its effect on the withdrawal and striking out of an appeal. The said **Order II** provides:

1. An appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the registrar, a notice to the effect that he does not intend to prosecute the appeal any further.
2. If all parties to the appeal consent to the withdrawal of the appeal without an order of the court, the appellant may file in the registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the registrar and in such event any sum deposited against costs shall be paid out to the appellant.
3. The withdrawal of an appeal with the consent of the parties under Rule 2 of this Order shall be a bar to further proceedings on application made by the respondent under Order 9.
4. If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list,

and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the respondent under Order 9, and for the making of an order as to the disposal of any sum deposited against cost.

5. An appeal which has been withdrawn under this Order, whether with or without an order of the court, shall be deemed to have been dismissed.

6. Where an appeal is withdrawn under this Order, any respondent who has not given a notice under Order 9, may give Notice of Appeal and proceed therewith in the manner prescribed by the foregoing rules, and in such case the time limited for giving Notice of Appeal, for depositing the sum estimated to cover the cost of the record and for making deposit against costs may, on application to the court, be extended so far as is reasonably necessary in all the circumstances of the case".

He continued thus:

"**Order II Rule 5**, in *pari materia* with Order 3 Rule 18(5) of the Court of Appeal Rules 1981, wherein the Supreme Court in **Ezomo vs. A-G Bendel (1986) 4 NWLR (pt. 36) 448 at 462** had course to consider the effect of the said provision on an appeal that was withdrawn.

Their lordships per **Aniagolu** (JSC) held *inter alia* as follows:

"Having held that the withdrawal notice filed by

Mr. Obasuyi was validly filed, Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By sub Rules 5 of Rules 18, "An appeal which has been withdrawn under this Rule, whether with or without an order of the court, shall be deemed to have been dismissed".

"This sub-rule 5 is in identical terms with Order 7 of Rule 17 (5) of the Supreme Court Rules 1985. The effect of the withdrawal notice filed by Mr. Obasuyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an order court".

"I do not consider it necessary to decide the question whether the respondents are stopped by their conduct in resiling from their Notice of Withdrawal. This is because the appeal having been dismissed by virtue of Order 3 Rule 18(5), it is only the respondent to such dismissed appeal who had given notice under Order 3 Rule 14 that the judgment should be affirmed or varied on other ground, and on fulfilling the conditions prescribed in that rule who can continue with the appeal. There is no provision enabling an appellant to relist the appeal so dismissed. I am therefore unable to conceive from the rules, how having validly withdrawn the appeal it would again be entered for hearing".

Learned counsel must have labored under the mistaken

belief that the Notice of Appeal was incompetent because of the preliminary objection which was subsisting at the time the Notice of Withdrawal of the appeal was filed. The lower court effectively dealt with the mistaken belief when it held that the appeal was competent and all that learned counsel should have done was apply to amend the Notice of Appeal so as to add the name of and address of the appellant as the person affected by the appeal. Even the first Notice which was wrongly headed 'IN THE COURT OF APPEAL HOLDEN AT ABUJA" could have been amended to read "Jos" because the error did not affect the jurisdiction of the court to entertain the appeal.

The motion for leave and extension of time to appeal was rightly dismissed since the appellant had filed notice to discontinue with the appeal and it was struck out which is tantamount to a dismissal of the appeal under **Order II Rule 5 Court of Appeal Rules, 2011.**

The appeal lacks merit and it is accordingly dismissed.

There shall be costs of N500,000.00 against the appellant in favour of the respondent.

K.B AKA'AHS
Justice, Supreme Court

NKANU ONNOGHEN, (AG. CJN): I have had the benefit of reading in draft the lead judgment of my learned brother, AKA'AHS (J.S.C.) just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

My learned brother has dealt exhaustively with all the issues calling for determination. I therefore have nothing to add.

I therefore abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

Walter Samuel Nkanu Onnoghen
Acting Chief Justice Of Nigeria

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs JSC and to place my support for the reasonings on record, I shall make some comments.

The respondent as plaintiff at the High Court of Nasarawa State sitting at Keffi Coram: Viko J claiming the sum of N250,000,000.00 for the negligence of the appellant as defendant which resulted in the amputation of his leg.

After full trial, judgment was entered for the plaintiff/respondent in the sum of N89,600,000.00 and dissatisfied, the defendant appealed to the Court of Appeal, Makurdi Division and also filed a motion for stay of execution.

At the Court of Appeal or lower court or court below, the appellant and respondent agreed that the judgment be stayed on terms being that appellant pay the sum of N29,600,000.00 to the present respondent and bring a bank guarantee for the balance sum of N60,000,000.00. The appellant appealed against the order to the Supreme Court inspite of the agreement. The appellant then paid the sum of N29,600,000.00 into the account of the chief registrar of the court below to abide the outcome of the main appeal. On the 13th day of February, 2012, the application for leave to appeal against the judgment was filed and on the 24th day of February, 2012, the present appellant withdrew the appeal and on 24th day of April 2012, the court below struck out the

appeal pursuant to **Order II, Rules 1** and **2** of the **Court of Appeal Rules 2011**.

The appellant on the 25th day of April, 2012 sought leave to appeal the same said judgment and the present respondent opposed it on the ground that the appeal having been withdrawn pursuant to Order 11, the appeal is deemed dismissed and it is against that refusal of the application for leave to appeal that the appellant has come before the Supreme Court.

Toyin Pinherio SAN of counsel on the day of hearing, adopted appellant's Brief of Argument settled by B.I. Hon SAN and filed on 30/4/2013.

In the brief were crafted 3 Issues for determination of the appeal and they are as follows:

(1) Was the Court of Appeal right when it held that the appellant, having withdrawn her appeal under Order 11 of the Court of Appeal Rules, 2011, was barred from bringing an application for extension of time and for leave to appeal against the substantive judgment of Hon. Justice John A. Viko, notwithstanding her constitutional right of appeal and right to fair hearing. (This issue is distilled from grounds 1,3,4 and 6).

(2) Was the Court of Appeal right when, in determining the application before it, it did not consider the appellant's Further and Better Affidavit and the Reply Address on Points of Law, which were properly before it. (This issue is formulated from ground 2).

(3) Was the Court of Appeal right to hold, as it did, that the defects leading to the withdrawal of the Original Notice of Appeal could have been cured by

amendment even at the stage when briefs had been filed and exchanged (formulated from ground 5).

Learned counsel for the appellant also adopted the Reply Brief filed on 14/3/16.

Oba Maduabuchi of counsel for the respondent adopted respondent's Brief filed on 4/3/15 and deemed filed on the 17/10/16. He raised a lone issue which is thus:

Whether an appeal which has been withdrawn and struck out pursuant to Order 11, Rules 1 and 2 of the Court of Appeal Rules, 2011 can be relitigated?

This sole issue so crafted by the respondent covers the grounds on which this appeal is based and has the appellant's 3 issues subsumed therein and so without beating about the bush, I shall make use of it in the determination of this appeal.

SOLE ISSUE:

This raises the question whether an appeal which has been withdrawn and struck out pursuant to Order 11, Rules 1 and 2 of the Court of Appeal Rules 2011 can be relitigated.

Learned counsel for the appellant submitted that the constitutional right of the appellant to appeal to the Court of Appeal is guaranteed under **Section 243 subject to Sections 241 and 242 of the Constitution of the Federal Republic of Nigeria, 1999** as amended. That where the determination of an appeal by a party is not on the merits but by withdrawal,

for some reasons, such party cannot be prevented from approaching the court once more and bring a proper appeal.

He cited **Akaneziri vs. Okenwa & Ors (2000) 15 NWLR (Pt.691) 526 at 539; Order 8, Rules 6(1) to 6(5) of the Supreme Court Rules, 1985** which counsel contends are in *pari materia* with the provisions of **Order 11, Rules 1-5 of the Court of Appeal Rules, 2011.**

He stated further that Rules of court are meant to be obeyed but the application of the rules are not to defeat or truncate justice as that is not the intention of the legislature.

He relied on **U.T.C. (Nig.) Ltd vs. Pamotei (1989) 2 NWLR (Pt.103) 244 at 296; Oloba vs. Akereja (1988) 3 NWLR (Pt.84) 508 at 528.**

That rules of court cannot override statutory or constitutional provisions. He referred to **Auto Import Export vs. Adeboye & 2 Ors (2002) 18 NWLR (Pt.799) 554 at 580.**

That an appeal withdrawn and struck out can be brought back either by relisting or by a fresh application for leave to appeal out of time. He cited **First bank of Nigeria Plc vs. T.S.A. Industries Ltd (2010) 15 NWLR (Pt. 1216) 247 at 287**; **Inyang vs. Ebong (2002) 2 NWLR (Pt. 751) 284 at 319-320; Young Shall Grow Motors Ltd vs. Okonkwo (2010) 15 NWLR (Pt. 1217) 524.**

Learned counsel for the appellant stated further that the lower court did not consider the further and better Affidavit filed by the appellant alongside the exhibits. He cited **Fagunwa & Anor vs. Adibi & 2 Ors (2004) 17 NWLR (Pt. 903) 544 at 567 etc.**

That the failure of the court below to consider the further and better Affidavit with the exhibits of the appellant led that court to a wrong conclusion leading to a denial of fair

hearing.

He referred to **Odunukwe vs. Ofomata & Anor (2010) 18 NWLR (Pt.1225) 404 at 435 (SC).**

It was stated for the appellant that once briefs have been filed and exchanged, no amendment will be allowed and the only way out is for the appellant to withdraw the appeal and come back properly. He relied on **Lagos State Traffic Management Authority & Ors vs. Ezezoobo (2012) 3 NWLR (Pt. 1286) 49 at 54-55.**

For the respondent, learned counsel contended that any appeal which is withdrawn pursuant to Order 11, Rules 5(1) and (2) cannot be brought back to life as the process is deemed dismissed. That the essence of a court is to interpret the law as it is and not as it is wished it was. He cited **F.B.N. Plc vs. Maiwada (2013) 5 NWLR (Pt.1348) 444 at 448; Kraus Thompson Org. vs. NIPSS (2004) 17 NWLR (Pt.901) 44 at 64.**

That the Notice of Withdrawal under Order 11, Rule 1 of the Court of Appeal Rules, 2011 was clear and did not give room for the alteration of the contents by any extraneous evidence. Learned counsel cited **Abalogu vs. Shell PDC Nig. Ltd (2003) 6 SCNJ 262 AT 282; Ihunwo vs. Ihunwo (2013) 3 NWLR (Pt. 1357) 550 at 583.**

That the appellant/applicant has not shown why the decision of the Court of Appeal is wrong. That the appellant had a duty to show how the exhibits were ignored and how what happened led to a perverse or wrong decision. He cited **Ogbu vs. The State (2007) 2 SCNJ 319 at 329.**

For the respondent, it was canvassed that appellant made the respondent believe that they had dropped all interests in the pursuit of the appeal only to turn around and seek to alter that position which is not allowed. Learned

counsel referred to **Abalogu vs. Shell P.D.C. Ltd (2003) 6 SCNJ 262 at 284; Section 169 of the Evidence Act; Ezomo vs. A.G Bendel State (1986) 4 NWLR (Pt. 36) 448 at 462.**

In brief, the stand of the appellant is that since the Notice of Appeal dated the 16th day of December, 2008 was defective the appellant was right to have withdrawn same and appellant was also right to bring a fresh application for extension of time and for leave to appeal as the earlier withdrawal did not constitute a bar for a new application.

That position, the respondent did not accept as respondent is of the view that the withdrawal or discontinuance pursuant to **Order 11, Rules 1** and **2** as the appellant had done and the attendant striking out was a dismissal for all time since the jurisdiction of the court is thereby permanently ousted.

For a clearer view of what is before court, I shall quote verbatim, the process at the base of this appeal which is the Notice of Withdrawal and it is captured at page 239 of the Record of Appeal and it is thus:

"NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER 11 RULES 1 OF THE COURT OF APPEAL RULES 2011"

TAKE NOTICE that the appellant intends not to prosecute this appeal any further and thereby gives Notice of Withdrawal to the respondent in accordance with the rules of this court.

Dated this 24th day of February, 2012.

Signed

Omale Omale Esq".

The court below was of the firm view that the appellant cannot come again with an application to have the matter relisted in the light of the provisions of **Order 11 Rules 1,2,3,4** and **5** of the **Court of Appeal Rules**.

I shall quote those rules hereunder so that the issue at stake is seen in a clearer light. Order 11 reads thus:

"(1) An appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the registrar, a notice to the effect that he does not intend to prosecute the appeal any further.

(2) If all parties to the appeal consent to the withdrawal of the appeal without an order of the court, the appellant may file in the registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the registrar and in such event any sum deposited against costs shall be paid out to the appellant.

(3) The withdrawal of an appeal with the consent of the parties under Rule 2 of this order shall be a bar to further proceeding on application made by the respondent under Order 9.

(4) If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the respondent under Order 9, and for the making of an order as to the disposal of any sum deposited against cost.

(5) An appeal which has been withdrawn under this order, whether with or without an order of the court, shall be deemed to have been dismissed".

The courts including the Apex Court have been well guided over the years in the interpretation of statutes with the clear boundary beyond which courts cannot enter. That is to say that while the courts have powers of interpretation of the law, it has no licence to veer into the legislative arena or constitute itself into the legislator however harsh or distasteful the piece of legislation may be, as once the words are plain and unambiguous, the court is duty bound to give effect to those words and not interpret the law as it ought to be.

See **F.B.N.Plc vs. Maiwada (2013) 5 NWLR (Pt.1348) 444 at 448 and 483.**

A point to be noted in this matter is that briefs had been filed by parties even though, that of the respondent had embedded in it a preliminary objection contesting the validity of the Notice of Appeal before the Notice of Withdrawal of the appeal was filed and moved by learned counsel for the appellant. This court had in a similar scenario

in the **Young Shall Grow Motors Ltd vs. Ambrose O. Okonkwo & Anor (2010), 2 SCNJ 396 at 409-412 stated as follows:**

"A case which has been withdrawn and subsequently struck out/dismissed when the point of litis contestio has been reached cannot be relisted for another bite at the cherry ……. In other words, after briefs of argument have been exchanged by the parties whereby issues between them became crystallized litis contestio can be deemed to have been reached. A withdrawal from that point in time must, as an inflexible rule lead to the dismissal of the appeal."

"What I am laboring to put across is that in interpreting **Order 11 Rule 5** of the **Court of Appeal Rules** under which the withdrawal was made, the appellant had reached a point of no return and there is no turning back the hands of the clock. In similar circumstances **Kalgo JSC in Kraus Thompson Organization vs. NIPSS (2004) 17 NWLR (Pt. 901) 44** at 64 described the situation thus:

"**Once the respondent applies under the said rule, the appeal must be dismissed and such dismissal is final ……. Therefore the order striking out the appeal is in full compliance with the provisions of Order 6 Rule 10 of the Court of Appeal Rules and 'striking out" amounts to a "Dismissal" of the appeal. There is no relisting of such an appeal".**

In the case at hand, the wordings of the Notice of Discontinuance or withdrawal left no doubt that it was the intendment of the appellant to withdraw from further prosecution of the appeal. In fact, those were the exact words and slated under **Order 11 Rules 1** and **2** of the **Court of Appeal Rules** underscored what was expected and the court obliging in carrying out those wishes cannot now be told that the resultant effect was not what was expected. A party cannot be allowed to play with the processes of the court as the mood propels him irrespective of the plain, clear and unambiguous provisions of the law he had set to utilize. The party must sink and swim with what he had by his own volition activated. I place reliance on **Abalogu vs. Shell Petroleum Development Company Ltd (2003) 6 SCNJ 162 at 284 per Iguh JSC.**

"The case of **Ezomo vs. A.G. Bendel State (1986) 4 NWLR (Pt.36) 448** could easily have had this case in mind and I quote **Aniagolu**, JSC thus:

> **"Having held that the withdrawal notice filed by Mr. Obasiyi was validly filed. Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By sub-rule 5 of Rule 18:**
>
> **An appeal which has been withdrawn under this rule, whether with or without an Order of the court shall be deemed to have been dismissed.**

This sub-rule 5 is in identical terms with Order 7 of Rule 17 (5) of the Supreme Court Rules 1977

> **and the current Order 8 Rule 6 (5) Supreme Court Rules 1985. The effect of the withdrawal notice filed by Mr. Obasiyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an Order of Court.**

It is not difficult for me to say from the foregoing and the better reasoning in the lead judgment that the appellant labours herein in vain as he attempts to wake up a dead matter. This appeal lacks merit and I too dismiss it as I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment just delivered by my learned brother, Onnoghen, Ag. CJN and I agree entirely with the reasoning in the said lead judgment that led to the conclusion that the appeal is devoid of merit and deserves to be dismissed. I too will dismiss the appeal for the same reasoning.

Appeal is dismissed.

I abide by the consequential orders arrived at including the order on costs.

Olu Ariwoola
Justice, Supreme Court

KEKERE-EKUN, (JSC): This is an appeal against the ruling of the Court of Appeal Makurdi Division delivered on 6/2/2013 refusing the appellant's motion on notice filed on 25/4/2012 for the trinity prayers for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the judgment of the High Court of Nasarawa

State, Holden at Keffi Judicial Division in Suit No. NSD/K25/2006 delivered on 28/11/2008.

The appellant was dissatisfied with the judgment of the trial court awarding the sum of N89,640.00 against it and in favour of the respondent as damages for negligence when it blasted rocks at Kofar Narasawa Primary School, Keffi; as a result of which one of the rocks hit the respondent and resulted in his left leg being amputated. The appellant filed two Notices of appeal. The first was dated 29/11/2008 and filed on 1/12/2008 but wrongly headed "**In the Court of Appeal Holden at Abuja."** The second was dated 16/12/2008 but did not include the name of the appellant as the person interested in the appeal. The appeal was entered at the court below as Appeal No. CA/S/43/2009.

The parties duly exchanged briefs of Argument. The respondent raised a preliminary objection to the competence of the appeal in his brief of Argument. Believing the objection to be sustainable, the appellant filed a Notice of Withdrawal of the appeal pursuant to **Order 11 Rule 1** of the **Court of Appeal Rules, 2011**. On 24/2/2012 the appellant's counsel applied to withdraw the appeal on the basis of the said notice. The court made an order striking out the appeal. The following day, 25/4/2012, learned counsel sought to restore the appeal by filing an application seeking the trinity prayers, the refusal of which is the subject of this appeal. The application was predicated on the inadvertence of counsel in filing the two defective notices of appeal. The appellant's counsel was under the impression that the application was competent as the appeal that was withdrawn was struck out and not dismissed.

The grounds of preliminary objection before the lower court, which prompted the appellant's counsel to file a

Notice of Withdrawal of the appeal as contained in the respondent's brief of Argument at pages 131-136 of the record were:

(a) That the Notice of Appeal was defective because it was not shown on whose behalf the appeal was filed; and

(b) That the appellant's brief was defective on the ground of proliferation of issues.

The appellant did not respond to the objection. Rather, he changed his counsel who promptly withdrew the purportedly defective Notice of Appeal and filed application, which resulted in the ruling appealed against. It was submitted that the appellant believed the Notice of Appeal to be incurably defective and incapable of being amended. And that in any event, having regard to the fact that both parties had filed and exchanged their respective Briefs of Argument, it was too late in the day to effect any amendment. Learned counsel for the appellant argued that even if the matter proceeded to hearing and the Notice of Appeal was found to be defective, the only order the court could have made was one striking out the appeal, hence the Notice of Withdrawal and the application for the trinity prayers.

Learned counsel for the respondent on the other hand argued that the appellant had the option of coming under **Order 6 Rule 6** of the **Court of Appeal Rules** or **Order 11 Rules 1** and **2** thereof. He submitted that while the appeal could have been struck out pursuant to Order 6 Rule 6, once a Notice of Withdrawal is filed pursuant to **Order 11 Rule 1**, the appeal is deemed dismissed under **Order 11 Rule 5**, with or without a court order.

Order 6 Rule 6 of the **Court of Appeal Rules, 2011**

provides:

> "The court shall have the power to strike out a Notice of Appeal when an appeal is not competent or for any other sufficient reason."

It should be noted here that **Order 6 Rule 6** will not avail an appellant whose Notice of Appeal is incurably defective.

Order 11 Rules (1), (2) & **(5)** provide:

1. An appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the Registrar, a notice to the effect that he does not intend to prosecute the appeal any further.

2. If all parties to the appeal consent to the withdrawal of the appeal without an order of the court, the appellant may file in the registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be truck out of the list of appeals by the registrar and in such event any sum deposited against costs shall be paid out to the appellant.

3. An appeal which has been withdrawn under this rule, whether with or without an order of the court, shall be deemed to have been dismissed."

I agree with learned counsel for the respondent that the appellant having opted to proceed under **Order 11 Rules 1** & **2** of the **Court of Appeal Rules**, is bound by the consequences as per **Order 11 Rule 5**, which is in *pari materia* with **Order 8 Rule 6 (5)** of the Supreme Court Rules 1985, interpreted in the case of **Edozien vs. Edozien (1993) 1 NWLR (Pt.272) 678 @ 692 E** where **His Lordship, Olatawura**, JSC had this to say:

> **"There can be no better manifestation of intention to withdraw an appeal than an appeal withdrawn by the appellant or one of the Solicitors briefed by the party withdrawing the appeal. The court will believe in the sincerity of that intention."**

The Young Shall Grow Motors Ltd. vs. Okonkwo (2010) 15 NWLR (Pt.1217) 524.

The Notice of Withdrawal is at page 239 of the record. It is clear and unambiguous. It states:

> "NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER 11 RULE 1 OF THE COURT OF APPEAL RULES, 2011.
>
> Take notice that the appellant herein intends not to prosecute this appeal any further and hereby gives Notice of Withdrawal to the respondent in accordance with the rules of this court.
>
> SIGNED
> OMALE OMALE ESQ.

It is noteworthy that from the record of proceedings of 24/4/2012 at page 157 of the record, when the appellant's

counsel sought to withdraw the appeal, he did not give any reasons. Unfortunately for the appellant, the respondent's objection was not well founded. Even if there was an omission to state the name of the appellant as one of the parties to be affected by the appeal, as required by **Order 6 Rule 2(1)** of the **Court of Appeal Rules,** it was a mere irregularity that could have been cured by a simple application for leave to amend the Notice of Appeal.

The reason why the courts have been strict in enforcing the provision of **Order 11 Rule 5** of the **Court of Appeal Rules** or its equivalent in the rules of this court when a Notice of Withdrawal of appeal is filed, as stated by my learned brother, **I.T. Muhammad, JSC** in **Young Shall Grow Motors Ltd. Vs. Okonkwo (Supra) @ 541-542 E C,** is

> **"to prevent the uncertainty with which the respondent may be confronted or on the other hand the abuse to which this procedure could be subjected if an appellant after the withdrawal of the appeal shall be at liberty to refile his appeal." In his contribution Dahiru Musdapher, JSC (as he then was) at 546 F-G (Supra) held, "It is trite law that when an appeal is set for hearing after briefs of argument are filed and the appellant withdraws the appeal, the striking out of the appeal amounts to the dismissal of the appeal."**

In the instant appeal, the Notice of Withdrawal of appeal having been brought under **Order 11 Rule 1** of the **Court of Appeal Rules**, the order of striking out made by the lower court on 24/4/2012 amounts to a dismissal as provided under

Order 11 Rule 5. The appellant cannot revive the appeal under any guise.

I have had a preview of the leading judgment of my learned brother, **KUMAI BAYANG AKA'AHS**, just delivered. I agree entirely that the appeal lacks merit. I accordingly dismiss it and affirm the ruling of the lower court.

Kudirat Motonmori Olatorunbo Kekere-Ekun
Justice, Supreme Court

THE ATTORNEY-GENERAL OF THE FEDERATION AND THE ATTORNEY-GENERAL OF LAGOS STATE

SC.50/2011

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA FRIDAY, 27TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: Locus standi – A party who has divested himself of interest in a property, – Whether has locus standi to sue in respect of the said property.

ACTION: Original jurisdiction of the Supreme Court – Whether the Supreme Court can exercise original jurisdiction in causes and matters purely on ownership of land.

ACTION: Original jurisdiction of the Supreme Court – Section 232(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) – Scope of.

ACTION: Original jurisdiction of the Supreme Court – Whether the Supreme Court has original jurisdiction to entertain an action between the Federal Government and the State Government.

ACTION: Locus standi – Where a person's locus standi is in issue, the question of whether the subject matter is justiceable does not arise.

CONSTITUTIONAL LAW: Original jurisdiction of the Supreme Court –Section 232 of the Constitution of Federal Republic of Nigeria 1999 (as amended) – Whether the plaintiff's claims are within the purview of S,232 (supra).

CONSTITUTIONAL LAW: Section 232 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) – Scope.

COURT: Jurisdiction of Court – How determined.

COURT: Source of jurisdiction of a court.

COURT: Original jurisdiction of the Supreme Court does not lie where the plaintiff lacks the necessary competence to sue – All issues determined in such circumstance will be academic and hypothetical.

COURT: Jurisdiction – Fundamental nature of – At what stage

can be raised?
WORDS AND PHRASES: 'Dispute' – Meaning.

Issues for Determination

1. Whether the suit to which the preliminary objection relates, as constituted, comes within the purview of section 232 of the constitution to entitle this court, as established under section 230 of the same constitution, assume jurisdiction.

2. Whether or not the plaintiff/respondent has the locus standi to maintain the instant matter and the effect of a negative answer to the enquiry on the jurisdiction of this court in such a situation.

Facts of the Matter

The plaintiff/respondent took out a civil summons invoking the original jurisdiction of this Court against the defendant/objector. On the 10th October, 2016 the latter gave Notice of Preliminary Objection pursuant to **Order 2 Rule 29** of the **Supreme Court Rules 1999** (as amended), **Section 232 (2)** of the **Constitution of the Federal Republic of Nigeria 1999** (as amended) and under the inherent jurisdiction of this court seeking the following orders:

(1) "An order striking out this suit as this Honourable Court lacks the requisite original jurisdiction to entertain same.
(2) An order striking out this suit as the plaintiff/ respondent lacks the locus standi to institute this action.

The objection is predicated on the grounds that:

1. "The Honourable Court lacks Original Jurisdiction to entertain causes or matters between the Federal Government and a State Government as in the instant case;
2. The Honourable Court cannot exercise original jsurisdiction in causes or matters purely on ownership of land.
3. The plaintiff/respondent, having divested its interest in the subject matter of this Suit, lacks the locus standi to institute this action."

Held: *(Unanimously allowing the application)*

1. The fundamental issue of jurisdiction
It certainly cannot be over-emphasized that the issue of jurisdiction in our adjudication process is a fundamental one. This explains the practice evolved by the courts, of allowing the issue to be raised even for the first time on appeal, purposely to stop the waste of time, not only of the litigants, but that of the court which decision, if arrived at without jurisdiction, will be a nullity not withstanding how well the proceedings leading to it were conducted. [Timitimi vs. Amabebe & Ors 14 WACA 374 Madukolu vs. Nkemdilim (1962) 1 SCNLR 34 and Adesola vs. Abidoye (1999) 14 NWLR (Pt 637) 28].
(P 193 paras D-F)

2. The Source of Jurisdiction
Parties herein are right that jurisdiction is statutorily

conferred and where the issue as to court's jurisdiction arises, it is determined by the plaintiff's claim and the relief he seeks. [Adeyemi vs. Opeyori (1976) 9-10 SC page 18, Obiuweubi vs. CBN (2011) 2-3 SC (Pt 1) 46 and Goldmark Nigeria Ltd & Ors vs. Ibafon Company Ltd & Ors LPELR 9349] (SC).
(P 193 paras G-H)

3. *The scope and purport of Section 232 of the Constitution of Federal Republic of Nigeria (as amended)*
In the case at hand, Section 232(1) of the 1999 Constitution (as amended) pursuant to which the plaintiff sues provides:

> **"232 (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."**

In interpreting the foregoing, this court in many of its decisions has specified the criteria that bring a plaintiff's claim within the purview of its original jurisdiction as constitutionally conferred. The emphasis in these decisions is that the dispute in respect of which the court exercises its original jurisdiction must be one between the "federation" and the "State" rather than one between the governments of both, States inter-se or their agencies.

(Pp 194 paras A-E)

4. *The nature of the original jurisdiction of the Supreme Court*
In AG, Lagos State vs. AG Federation (2014) 9 NWLR (Pt 1412) 217 at 260-261, the court held thus:

> **"Plaintiff's grouse as captured inter-alia in the foregoing paragraphs is about a dispute between the Federal Government and the Government of the States rather than between the Federation and the various states. It is also a dispute pertaining to the operation of an agency of the Federal government, Federal Inland Revenue Service (F.I.R.S) vis-à-vis an agency of the plaintiff…… I do not have the slightest doubt that any dispute on all or any of these comes squarely within the purview of the jurisdiction the makers of the constitution specifically provided the Federal High Court under Section 251 (a), (b) and (q) of the 1999 Constitution which provision tampers and conditions the original jurisdiction of this court pursuant to section 232(1) of the same constitution. The plaintiff whose claim clearly relates to the revenue of the government of the Federation, consequent upon the taxes one of its agencies levies ……. is at the wrong court. This court must decline jurisdiction. I so hold."**

See also AG, Kano State vs. A G, Federation (2007) 6 NWLR (Pt. 1029) 164, A G, Federation vs. A G, Imo State (1983) 4 NCLR 178; A G, Bendel State vs. A G, Federation (1982) 3 NCLR; A G, Lagos State vs. A G, Federation (2004) 18 NWLR (Pt. 904) 1 referred to 1. *(Pp 194-195 paras E-E)*

5. *The nature of the original jurisdiction of the Supreme Court*

Mahmud Mohammed the Hon. CJN (as he then was) at pages 293 294 of the law report A.G Lagos vs A.G Federation (supra), concurred as follows:

> **"The criteria as stated in those cases before the original jurisdiction of this court is invoked are that:**
> **(a) There must be a justiciable dispute involving any question of law or fact.**
> **(b) The dispute must be:-**
> **i. Between the Federation and a State in its capacity as one of the Federating constituent units of the federation; or between the Federation and more States that are in their capacity as members of the constituent units of the Federation; or**
> **ii. Between the States in their capacities as members of the constituent units of the**

> **Federation…….**
> **Since the reliefs claimed by the plaintiff particularly the injunctive relief is against the Federal Government of Nigeria, its servants and its agencies, the relief not being against the Federation of Nigeria or any State or States of the Federation as constituent units of the Federation, is not within the purview of Section 232 (1) of the 1999 Constitution to confer original jurisdiction on this Court."**

Per Peter-Odili (JSC):

> **"In the interpretation of the above constitutional provisions this court had stated what the exact position of this court is when confronted with a suit invoking this court's powers of original jurisdiction.**

In the case of Attorney-General of Lagos State vs. Attorney-General of the Federation (2014) 9 NWLR (Pt. 1412) 217 at 257, this Court held thus:

> **"Section 232(1) of the Constitution of the Federal Republic of Nigeria, 1999 provides for the original jurisdiction of the Supreme Court which is exclusive to it in respect of any dispute between the federation and a State interse where the determination of such dispute involves a resolution of any question, whether of fact or law, on which the existence or extent of the legal right being asserted in**

dispute depends. By the section, once a dispute is between the Federation and a State or between States themselves, and the determination of the dispute requires resolution of any question, whether of fact or law in relation to the claim raised, the Supreme Court and no other Court has jurisdiction over such dispute. However, the section does not empower the Supreme Court to hear and determine disputes between the governments of the Federation and a State, or the governments of the States interse".
(Pp 195-196; 207-208 paras E-D; F-E)

6. *The nature of dispute in the instant case between the applicant and respondent*
It is evident from the foregoing that the dispute between the plaintiff and the defendant pertains to land. I agree with learned counsel for the plaintiff/respondent that by the combined effect of Sections 1, 49 and 52 (2) of the Land Use Act, title to Federal and State Lands are vested in the Federal and State Governments for the President and the State Governor to hold same in trust for the Federation and the people of the State respectively. In the case at hand, where the plaintiff asserts interference with the title in lands under its management and control by the defendant a dispute between the two, the federation and the state, appears discernible to warrant the invocation of this court's original jurisdiction pursuant to Section 232(1) of the 1999 Constitution as amended.

(Pp 199-200 *paras* G-B*)*

7. *When the Plaintiff has no locus standi the issue of justiciability of the matter does not arise*
This court has persisted on the principle that when a party's standing to sue is in the issue, as it is in the instant case, the question is whether the person whose standing is in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. [Oloriode vs. Oyebi (1984) 5 SC 1; Owodunni vs. Reg Trustees of CCC (2000) 6 SC (Pt III) 60 and Itsekiri Trustees vs. Warri Divisional Planning (1972) II SC 235]. *(P 200 paras B-D)*

8. *The plaintiff who had divested itself of title in the subject matter does not have locus standi to sue in respect of the subject matter.*
The strongest wicket of the defendant/objector is that the plaintiff has failed to show, given the averments in its amended statement of claim, that it has a standing to maintain the suit. Plaintiff's real grouse, it is contended and rightly too, relates to the "Regularization consent" the defendant insists persons who acquired federal lands must obtain from it before title effectively vests in the transferees. No 10 Gerrard Road by the plaintiff himself is "a test case" out of thousands of such lands title to which, having been already transferred to others no longer inheres in the plaintiff. *(P 200 paras D-F)*

Per Dattijo Mohammed (JSC):

"In **Senator Abraham Adesanya vs.**

President of Nigeria and Anor (1981) 1 ALL N.L.R 1 the court per A. Fatayi Williams CJN (as he then was) stated thus:

> **"It is only when the civil rights and obligations of the person who invokes the jurisdiction of the court are in issue for determination that the judicial powers of the court may be invoked. In other words, standing will only be accorded a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.**

In the instant matter it is thus not enough for the plaintiff to assert that the control and management of federal lands exclusively vests in the president who holds same in trust for the federation but, to further show that defendant's act of interference persists inspite of the plaintiff's persisting exclusive title to the land." *(Pp 200-201 paras F-C)*

9. The court lacks jurisdiction where the plaintiff has no locus standi

The plaintiff who lacks the standing to sue, the learned counsel to the defendant is right, cannot invoke the original jurisdiction of this court to assert a title he no longer has. It will be academic and hypothetical for the court to proceed on the matter. It

never does. [Dr. Irene Thomas & Ors vs. Reverend T.O. Olufosoye (1986) 1 ALL N.L.R Vol. 1 (Pt. 1) 215 and Professor Bolaji Idowu vs. Reverend G. A. Bamgbose (1986) 4 NWLR (Pt 37) 632].
(P 201 paras D-F)

Per Rhodes-Vivour (JSC):

> **"My lords, since the plaintiff transferred title in the land to someone else, the plaintiff no longer has locus standi. There is in the circumstances no dispute appropriate for judicial consideration. In the light of this development, the "dispute" in this appeal clearly does not satisfy the above conditions, and so does not fall within the original jurisdiction conferred on the Supreme Court by section 232 of the constitution".** *(P 203 paras A-C)*

10. The extent of the original jurisdiction of the Supreme Court

By virtue of section 232 of the constitution, the Supreme Court has original jurisdiction to hear and determine any matter between the Federation and a State or between states, once the dispute involves questions of law or fact on which the existence or the extent of a legal right depends.

The Supreme Court also has original jurisdiction as might be conferred by an Act of the National Assembly, provided that no original jurisdiction can be conferred on the Supreme Court

with respect to criminal matters.

Before this court exercises original jurisdiction in a civil case between the Federation and a State/s or between States there must be:

(a) a dispute between the Federation and a State or States;

(b) the dispute must involve a question of law or fact or both; and

(c) the dispute must pertain to the existence or extent of a legal right.

[AG. Bendel State vs. AG. Federation & Ors (1981) 12 NSCC p. 314] *(P 202 paras A-G)*

11. The meaning of the word "dispute"

The Oxford Dictionary defines the word dispute as the act of arguing against, controversy, debate, and contention as to right claims and the like or on a matter of opinion.

To my mind, under section 232 of the constitution there is a dispute where the suit raises questions of law and, or fact on which the existence or extent of a legal right depends. The dispute must be suitable for judicial consideration and determination. *(Pp 202-203 paras G-A)*

12. How to determine whether or not a court has jurisdiction

To determine whether or not a court has jurisdiction, this court in the case of Olofu vs. Itodo (2010) 18 NWLR (Pt. 1225) S.C. held that:

"Also settled is the principle of law that in order to determine whether a court before which a matter pends has the jurisdiction to entertain same, the court has to look at the plaintiff's statement of claim before it and not the defence put forward by the defendant to the action. The claim of the plaintiff in an action includes the originating summons and the affidavit(s) in support of same where the action is instituted by originating summons as was decided by this court in the case of Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427 at 588 589". *(Pp 208-209 paras E-A)*

13. A land dispute does not come within the ambit of the original jurisdiction of the Supreme Court

Per Peter-Odili (JSC):

"Mindful of the concern this court had expressed in A.G. Federation vs. A.G. Abia State (2001) 11 NWLR (Pt. 725) on a venture to have agitated its original jurisdictional power; it had held that "the dispute must involve a legal right of the Federation. The Federation as plaintiff must show that it has such right or interest, which is affected or is likely to be affected by the action complained of.

In delving into those rights or interests of the Federation, the Supreme Court cannot carry along matters of land dispute between it and a State of the Federation as community reading of Sections 230 and 232 of the 1999 Constitution read alongside the Land Use Act, Section 39, 41 and 51 (2) would show that land disputes have not the canopy covering of those actions upon which once the Federal Government is affected would have the Supreme Court jumping into the adjudication in its original jurisdiction. That power has not yet been donated to this court by the constitution.

Fortunately, for an easier understanding I wish to state that I had the privilege of having participated in the case of A.G. Lagos State vs. A.G. Federation (2014) 9 NWLR (Pt. 1412) 217 which was a dispute relating to the operation of an agency of the Federal Government, the Federal Inland Revenue Service (FIRS) against an agency of Lagos State Government which the Federal Government contended accrued to it. This court had no difficulty in holding firm that the court's original jurisdiction cannot be so invoked when the dispute is not between the Federation as an entity against a State or between a State against another or others or the National Assembly and the President; the National Assembly and any State House of Assembly, and the National Assembly and a State of the Federation".
(Pp 210-211 paras F-E)

Per Ogunbiyi (JSC):

"By any stretch of imagination there can be no original jurisdiction conferred on this court in causes or matters relating to land no matter how deceptively couched; the combined effects of sections 39, 41 and 51 (2) of the Land Use Act are all evident and in support. The claim of the plaintiff/respondent as rightly submitted by the defendant/objector is a land matter, which is not within the contemplation of the constitution to be entertained by this court in its original jurisdiction. The decision in the case of Attorney-General of Lagos State vs. Attorney-General of the Federation (supra) is very clear on the extent of the original jurisdiction of this court as provided by section 232(1) of the constitution, and for purpose of re-stating its position, the following remark was made:

> **"However, the section does not empower the Supreme Court to hear and determine disputes between the governments of the Federation and a State, or the governments of the States interse."**
> *(P 215 paras C-H)*

Nigerian Cases cited in this Judgment
A G. Federation vs. A G. Imo State (1983) 4 NCLR 178;

A G. Kaduna State vs. Hassan (1985) 2 NWLR (Pt 8) 483;
A G. Lagos State vs. A G. Federation (2004) 18 NWLR (Pt. 904);
A.G. Bendel State vs. AG. Federation and Ors [1981] 10 SC (Reprint) 1,3;
A.G. Bendel State vs. AG. Federation & Ors (1981) 12 NSCC p. 314;
A.G. Federation vs. A.G. Abia State (2001) 11 NWLR (Pt. 725);
A.G. Kano State vs. A G. Federation (2007) 6 NWLR (Pt. 1029) 164;
A.G. Lagos State vs. A.G. Federation (2014) LPELR 22701 (SC);
A.G. Lagos State vs. A.G Federation (2014) 9 NWLR (Pt 1412) 217;
A.G. of Federation and Ors vs. A.G. Imo State and Ors. [1983] 4 NCLR 178;
A.G. of Federation vs. A.G. of Abia State and Ors. [2001] 7 SC (Pt. 1) 32; [2001] 89 LRCN 2413;
Adesola vs. Abidoye (1999) 14 NWLR (Pt 637) 28;
Adeyemi vs. Opeyori (1976) 9-10 SC page 18;
Anambra vs. A.G, Federation [2007] 12 NWLR (Pt. 1047) 4,;
Bendel State vs. A G, Federation (1982) 3 NCLR;
Central Bank of Nigeria & Ors vs. Kotoye (1994) 3 NWLR (Pt 330) 66;
Dr. Irene Thomas & Ors vs. Reverend T.O. Olufosoye (1986) 1 ALL N.L.R Vol. 1 (Pt. 1) 215;
Ejura vs. Idris (2006) 4 NWLR (Pt 971) 538;
Goldmark Nigeria Ltd & Ors vs. Ibafon Company Ltd & Ors LPELR 9349 (SC);
Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1025) 427;
Itsekiri Trustees vs. Warri Divisional Planning (1972) II SC 235;
Madukolu vs. Nkemdilim (1962) 1 SCNLR 34;

Obi vs. INEC (2007) 11 NWLR (Pt. 1046) 565;
Obiuweubi vs. CBN (2011) 2-3 SC (Pt 1) 46;
Olofu vs. Idodo (2010) 18 NWLR (Pt. 1225) 545;
Oloriode vs. Oyebi (1984) 5 SC 1;
Owodunni vs. Reg Trustees of CCC (2000) 6 SC (Pt III) 60;
Plateau State of Nigeria and Anor vs. A.G, Federation (2006) LPELR 2921 (SC);
Professor Bolaji Idowu vs. Reverend G. A. Bamgbose (1986) 4 NWLR (Pt 37) 632;
Senator Abraham Adesanya vs. President of Nigeria and Anor (1981) 1 ALL N.L.R 1;and
Timitimi vs. Amabebe & Ors 14 WACA 374.

Nigerian Statutes cited in this Judgment

Land Use Act 1978; Ss. 1, 49, 52(2)
Supreme Court (Additional Original Jurisdiction) Act, 2002;S. 1
Supreme Court Rules 1985 (as amended)
The 1999 Constitution of the Federal Republic of Nigeria Ss. 230, 232, 176, 130, 251 ;
The Supreme Court Act O. 2 R.29;

Representations

B. Ogungbamila with him, **A. Adibe,** for *the Defendant/Objector*

S.Y Kolawole (Mrs.) (DLD) Lagos State Ministry of Justice *with him*, **J.I. Jacobs (PSC)**, **Oluwaseun Sogbesan (SC)** and **O. Osunsanya SSC,** *for the Plaintiff/Respondent.*

DATTIJO MUHAMMAD, (JSC) (Delivering the Lead Judgment): The plaintiff/respondent took out a civil

summons dated 3rd March, 2011 invoking the original jurisdiction of this court against the defendant/objector. On the 10th October, 2016 the latter gave Notice of Preliminary objection pursuant to **Order 2 Rule 29** of the **Supreme Court Rules 1999** (as amended), **Section 232 (2)** of the **Constitution of the Federal Republic of Nigeria 1999** (as amended) and under the inherent jurisdiction of this Court seeking the following orders:

(3) "An order striking out this suit as this Honourable Court lacks the requisite original jurisdiction to entertain same.

(4) An order striking out this suit as the plaintiff/respondent lacks the locus standi to institute this action.

(5) And for such further order or orders as this Honourable Court may deem fit to make in the circumstances."

The objection is predicated on the grounds that:

4. "The Honourable Court lacks Original Jurisdiction to entertain causes or matters between the Federal Government and a State Government as in the instant case;

5. The Honourable Court cannot exercise orignal jurisdiction in causes or matters purely on ownership of land.

6. The plaintiff/respondent, having divested its interest in the subject matter of this Suit, lacks the locus standi to institute this action."

At the hearing of the preliminary objection, parties adopted and relied on their already filed and exchanged written addresses as their respective arguments.

The three issues distilled by the defendant/objector as having arisen for the determination of his preliminary objection read:

(i) "Whether this Honourable Court has original jurisdiction to entertain causes or matters between the Federal Government and a State Government; and

(ii) Whether this Honourable Court has original jurisdiction in land matters.

(iii) Whether plaintiff/respondent, having divested its interest in the subject matter of this Suit, with special reference to No. 10, Gerard Road, Ikoyi, Lagos State, has the locus standi to institute this action."

The three similar issues formulated by the plaintiff/respondent read:

1. "Whether the dispute in the present action does not fall within the original jurisdiction of the Supreme Court under Section 232 of the constitution;

2. Whether as presently constituted, the present action is a land matter;

3. Whether the Plaintiff does not have locus standi to institute the present action?"

Whether the suit to which the preliminary objection relates, as constituted, comes within the purview of section 232 of the constitution to entitle this court, as established under Section 230 of the same constitution, assume jurisdiction.

Whether or not the plaintiff/respondent has the locus standi to maintain the instant matter and the effect of a negative answer to the enquiry on the jurisdiction of this court in such a situation.

On the 1st and 2nd issues, learned counsel to the defendant/objector submits that whereas **Section 230** of the **1999 Constitution** (as amended) establishes the Supreme Court of Nigeria, **Section 232 (1)** of the very constitution and **Section 1(1)** of the **Supreme Court (Additional Original Jurisdiction) Act** enacted pursuant to **Section 232(2)** of the **1999 Constitution** provide for the court's original jurisdiction. Whether or not plaintiff/respondent suit as constituted comes within the purview of thiscCourt's original jurisdiction as provided under **Section 232 (1)** and the 2002 enabling Act, learned counsel submits, depends on the claim therein. By paragraphs 14, 15, 16, 17 and 18 of plaintiff's amended statement of claim, it is contended, the action is basically a land matter that does not come within the contemplation of the original jurisdiction of the court as conferred by the constitution and the law. Relying on the decisions of this court in **Olofu vs. Itodo (2010) 18 NWLR (Pt 1225) 545; Attorney General of Lagos State vs. Attorney General of the Federation (2014) 9 NWLR (Pt 1412) 217 at 257 and Obi vs. INEC (2007) 11 NWLR (Pt 1046) 565 at 629,** learned counsel submits, the suit which does not come within the purview of the court's original jurisdiction be struck out.

On the 3rd issue, learned defendant/objector contends

that the plaintiff has failed by his originating process to show the interest it has in the land in respect of which it seeks to invoke the court's jurisdiction. An examination of paragraphs 14, 15, 16, 17 and 18 of plaintiff's amended statement of claim, it is submitted, shows clearly that the plaintiff/ respondent has divested its interest in the subject matter of the suit to another party. Relying on the case of **A G, Kaduna State vs. Hassan (1985) 2 NWLR (Pt 8) 483; Central Bank of Nigeria & Ors vs. Kotoye (1994) 3 NWLR (Pt 330) 66 at 73; Owodunni vs. Registered Trustee of CCC (Pt 675) 315 and Ejura vs. Idris (2006) 4 NWLR (Pt 971) 538,** learned counsel submits that the plaintiff who has not shown any nexus to the claim, being devoid of any locus standi, is incapable of maintaining the action. Accordingly, it is further submitted, the action should be struck out.

Responding, learned counsel to the plaintiff/ respondent agrees that the original jurisdiction of the Supreme Court is provided for by and in pursuant of **Section 232(1)** and **(2)** of the **1999 Constitution** (as amended) respectively. The provisions, contends learned counsel, confer on the court original jurisdiction in respect of any dispute between the Federation and a State on any question on which the existence of a legal right depended provided such dispute is not grounded in crime. References to the Governor of Lagos State in the plaintiff's claim, it is submitted, pertains the governor in his capacity as the head of the State of Lagos. By virtue of **Section 176 of the 1999 Constitution** (as amended) and **Section 1** of the Land Use Act, it is submitted, the Governor being the trustee of lands in Lagos State exercises control of the land in State the constitution and the law confer on him on behalf of the State.

In the same vein, submits learned counsel, the president in his capacity as the Head of the Federation by virtue of **Section 130** of the **1999 Constitution**, **Sections 1, 49**, and **51(2)** of the Land Use Act, being a trustee, exercises powers over all Federal lands within the territory of any State in Nigeria including Lagos State. The dispute in the instant suit, learned plaintiff/respondent counsel contends, is about general control and management of federal lands within Lagos State particularly the re-issuance of certificates of occupancy, granting consent or exercising rights of ownership by the defendant/respondent in breach of **Section 49** and **59(2)** of the **Land Use Act 1978**. The dispute, submits learned counsel, is real and constitutional since Lagos State continues to interfere with the powers of the Federation over Federal lands in the state. What the plaintiff requires in the suit, it is further submitted, is a declaration by the court that Federal lands are, by law, exempt from the powers and control of the Lagos State. A community reading of **Sections 1, 49**, and **51 (2)** of the **land Use Act** learned counsel submits, shows that the land to which the instant suit relates inheres in the president who is the head of the government of the Federation. It is only the president that can enforce the rights of the Federation in the land. Relying on **AG, Federation vs. AG, Abia State (2001) 11 NWLR (Pt 725) 689,** learned counsel urges that the facts of plaintiff's case being distinguishable from those the court contended with *inter-alia* in **AG Lagos State vs. AG Federation** supra and **AG, Kano State vs. AG, Federation (2007) 6 NWLR (Pt 1029) 164** and **AG, Anambra State vs. AG, Federation (2007) 12 NWLR (1047) 4,** the authorities do not, therefore, apply to the plaintiff's suit.

On the 3rd issue, learned plaintiff/respondent's counsel

submits that the defendant/objector's postulations thereunder are misconceived. It is not true that the paragraphs in plaintiff's/respondent's amended statement of claim dwelt upon by the objector shows that the plaintiff has disinvested its right in No. 10 Gerald Road Ikoyi, or any federal land in Lagos. Beyond No. 10 Gerald Road Ikoyi, the plaintiff's claim is for a declaration in respect of all lands vested in the plaintiff that are situated in Lagos State. It cannot be said, argues learned plaintiff's/respondent's counsel, that from his claim the plaintiff has not outlined the platform to maintain the suit. On the whole, it is submitted that the objection be overruled.

Now, it certainly cannot be over-emphasized that the issue of jurisdiction in our adjudication process is a fundamental one. This explains the practice evolved by the courts of allowing the issue to be raised even for the first time on appeal purposely to stop the waste of time not only of the litigants but that of the court which decision, if arrived at without jurisdiction, will be a nullity notwithstanding how well the proceedings leading to it were conducted. See **Timitimi vs. Amabebe & Ors 14 WACA 374 Madukolu vs. Nkemdilim (1962) 1 SCNLR 34** and **Adesola vs. Abidoye (1999) 14 NWLR (Pt 637) 28.**

Again, parties herein are right that jurisdiction is statutorily conferred and where the issue as to court's jurisdiction arises, it is determined by the plaintiff's claim and the relief he seeks. See **Adeyemi vs. Opeyori (1976) 9-10 SC page 18, Obiuweubi vs. CBN (2011) 2-3 SC (Pt 1) 46** and **Goldmark Nigeria Ltd & Ors vs. Ibafon Company Ltd & Ors LPELR 9349 (SC).**

In the case at hand, **Section 232(1)** of the **1999 Constitution** (as amended) pursuant to which the plaintiff

A sues provides:

> **"232 (1) The Supreme Court shall, to the exclusion of any other court, have original**
> B **jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence**
> C **or extent of a legal right depends."**

In interpreting the foregoing, this court in many of its decisions has specified the criteria that bring a plaintiff's
D claim within the purview of its original jurisdiction as constitutionally conferred. The emphasis in these decisions is that the dispute in respect of which the court exercises its original jurisdiction must be one between the "federation"
E and the "State" rather than one between the governments of both, States inter-se or their agencies. **In AG, Lagos State vs. AG Federation (2014) 9 NWLR (Pt 1412) 217 at 260-261,** the court held thus:

F

> **"Plaintiff's grouse as captured inter-alia in the foregoing paragraphs is about a dispute between the Federal Government and the**
> G **Government of the States rather than between the federation and the various states. It is also a dispute pertaining to the operation of an agency of the Federal, Federal Inland Revenue**
> H **Service (F.I.R.S) vis-à-vis an agency of the plaintiff… I do not have the slightest doubt that any dispute on all or any of these comes squarely within the purview of the jurisdiction**

> A **the makers of the constitution specifically provided the Federal High Court under Section 251 (a), (b) and (q) of the constitution which provision tampers and conditions the**
> B **original jurisdiction of this court pursuant to section 232(1) of the same constitution. The plaintiff whose claim clearly relates to the revenue of the government of the Federation,**
> C **consequent upon the taxes one of its agencies levies ……. is at the wrong court. This court must decline jurisdiction. I so hold."**

D See also **AG, Kano State vs. A G, Federation (2007) 6 NWLR (Pt. 1029) 164, A G, Federation vs. A G, Imo State (1983) 4 NCLR 178; A G, Bendel State vs. A G, Federation (1982) 3 NCLR; A G, Lagos State vs. A G, Federation**
E **(2004) 18 NWLR (Pt. 904) 1 referred to 1.**

Mahmud Mohammed the Hon. CJN (as he then was) at pages 293 294 of the law report concurred as follows:

> F **"The criteria as stated in those cases before the original jurisdiction of this court is invoked are that:**
> **(c) There must be a justiciable dispute involving**
> G **any question of law or fact.**
> **(d) The dispute must be:**
> **(iii) Between the Federation and a State in its capacity as one of the Federating**
> H **units of the federation; or Between the Federation and more States that are in their capacity as members of the constituent units of the Federation; or**

(iv) Between the States in their capacities as members of the constituent units of the Federation…….

Since the reliefs claimed by the plaintiff particularly the injunctive relief is against the Federal Government of Nigeria, its servants and its agencies, the relief not being against the Federation of Nigeria or any State or States of the Federation as constituent units of the Federation, is not within the purview of Section 232 (1) of the 1999 Constitution to confer original jurisdiction on this court."

Does the plaintiff/respondent's claim satisfy the foregoing criteria enunciated by this court to entitle the court assume jurisdiction over his cause? I say yes and no to the question.

This ambivalence is readily explained from an examination of the plaintiff's/respondent's amended statement of claim paragraph 14, 15, 16, 17 and 18 of which inter-alia constitute the essence of the claim. Paragraphs 22, 23, 24 and 25 (1) (5) and (6) (10) are particularly herein under reproduced for their aptness:

"22 The plaintiff states that the issue of 10 Gerrard Street Ikoyi, also called 'Trenchard Place' is merely taken up as a Test Case out of thousands of cases of 'Regularization' of consent demanded by the defendant, which has pitched the plaintiff against the defendant with respect to whether the Governor of Lagos State can grant consent to transactions on land

vested in the plaintiff, Federal Government, within Lagos State.

23 The plaintiff shall contend that all lands, whether developed or undeveloped, vested in the plaintiff in the territory of the defendant, are excluded from the management and control of the State Governor.

24 The plaintiff shall further contend that the president of the Federal Republic of Nigeria or a minister designated by him has power to the exclusion of the defendant Governor of Lagos State to consent to any transaction in any land vested in the Federal Government in Lagos State under the Land Use Act.

25 WHEREOF THE PLAINTIFF claims against the defendant as follows:

(1) A DECLARATION that the acts of re issuing of Certificates of Occupancy, granting of consent or exercising rights of ownership, control and management by the defendant over the land held and vested in the plaintiff within the territory of the defendant, upon which the plaintiff has been exercising rights of ownership, control and management, contrary to sections 49 and 51(2) of the Land Use Act, Cap L5, Laws of Nigeria, 2004, are illegal, null and void.

(5) A DECLARATION that the defendant's

consent is not required for the plaintiff to convey valid title to persons that acquired title through it, either by way of alienation of right of occupancy, consent to assignment, mortgage, transfer of possession, sublease or otherwise in all the transactions of lands vested in the Plaintiff upon which the plaintiff has been exercising rights of ownership, control and management within the Lagos State territory and that any such requirement of consent is null and void.

(6) AN ORDER OF PERPETUAL INJUNCTION restraining the defendant, either by its governor or through its commissioners, directors other staff, servants, agents, privies, assigns or other persons howsoever called, forthwith from re-issuing of Certificates of Occupancy, demanding or granting consent to any alienation of right of occupancy, assignment, mortgage, transfer of possession, sublease or exercising rights of ownership, control and management or otherwise over lands held and vested in the plaintiff, the Federal Government of Nigeria, within the territory of the defendant.

(7) AN ORDER directing the defendant to account for all Public Revenues it has

received from 1967 till date from its dealings with the PLAINTIFF'S lands within its territory.

(8) ORDER setting aside all Certificates of Occupancy and consents issued by the defendant over the plaintiff's LANDS IN ITS TERRITORY INCLUDING 10 Gerrard Road Ikoyi.

(9) ORDER OF RECTIFICATION of the Records of the Defendant's Lands Registry, by expunging entries in respect of the plaintiff's lands in the defendant's territory including that of 10 Gerrard Road Ikoyi.

(10) PERPETUAL INJUNCTION restraining the defendant from granting Rights of Occupancy, issuing of Certificates of Occupancy and granting consent in respect of transactions on the plaintiff's lands within the defendant's territory."

It is evident from the foregoing that the dispute between the plaintiff and the defendant pertains to land. I agree with learned counsel for the plaintiff/respondent that by the combined effect of **Sections 1, 49 and 52 (2)** of the **Land Use Act** title to Federal and State Lands are vested in the Federal and State Governments for the president and the State Governor to hold same in trust for the Federation and the people of the State respectively. In the case at hand, where the plaintiff asserts interference with the title in lands under its management and control by the defendant a dispute

between the two, the federation and the state, appears discernible to warrant the invocation of this court's original jurisdiction pursuant to **Section 232(1)** of the **1999 Constitution** as amended. But that is not all for this court has persisted on the principle that when a party's standing to sue is in the issue, as it is in the instant case, the question is whether the person whose standing is in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. See **Oloriode vs. Oyebi (1984) 5 SC 1; Owodunni vs. Reg Trustees of CCC (2000) 6 SC (Pt III) 60 and Itsekiri Trustees vs. Warri Divisional Planning (1972) II SC 235.**

The strongest wicket of the defendant/objector is that the plaintiff has failed to show, given the averments in its amended statement of claim, that it has a standing to maintain the suit. Plaintiff's real grouse, it is contended and rightly too, relates to the "Regularization consent" the defendant insists persons who acquired federal lands must obtain from it before title effectively vests in the transferees. No 10 Gerrard Road by the plaintiff himself is "a test case" out of thousands of such lands title to which, having been already transferred to others no longer inheres in the plaintiff. In **Senator Abraham Adesanya vs. President of Nigeria and Anor (1981) 1 ALL N.L.R 1** the court per A. **Fatayi Williams** CJN (as he then was) stated thus:

> **"It is only when the civil rights and obligation of the person who invokes the jurisdiction of the court are in issue for determination that the judicial powers of the courts may be invoked. In other words, standing will only be accorded a plaintiff who shows that his civil rights and**

> **obligations have been or are in danger of being violated or adversely affected by the act complained of."**

In the instant matter it is thus not enough for the plaintiff to assert that the control and management of federal lands exclusively vests in the president who holds same in trust for the federation, but to further show that defendant's act of interference persists inspite of the plaintiff's persisting exclusive title to the land. Having transferred its title in the land to others, it is untenable for the plaintiff herein to assert that the very title that ceases to vest in it is adversely threatened by defendant's interference. The plaintiff who lacks the standing to sue, the learned counsel to the defendant is right, cannot invoke the original jurisdiction of this court to assert a title he no longer has. It will be academic and hypothetical for the court to proceed on the matter. It never does. See **Dr. Irene Thomas & Ors vs. Reverend T.O. Olufosoye (1986) 1 ALL N.L.R Vol. 1 (Pt. 1) 215** and **Professor Bolaji Idowu vs. Reverend G. A. Bamgbose (1986) 4 NWLR (Pt 37) 632.**

For the foregoing, defendant's preliminary objection which is well taken is hereby sustained and plaintiff's action accordingly struck out.

Parties are to bear their respective costs.

Musa Dattijo Muhammad,
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I read a draft copy of the lead ruling delivered by my learned brother, Muhammad, JSC. I agree with his lordship that the preliminary objection succeeds and the plaintiff's action is accordingly struck out. I

propose to add only a few observations. By virtue of **Section 232** of the **Constitution**, the Supreme Court has original jurisdiction to hear and determine any matter between the Federation and a State or between states, once the dispute involves questions of law or fact on which the existence or the extent of a legal right depends.

The Supreme Court also has original jurisdiction as might be conferred by an Act of the National Assembly, provided that no original jurisdiction can be conferred on the Supreme Court with respect to criminal matters.

Before this court exercises original jurisdiction in a civil case between the Federal and a State/s or between States there must be:

(d) A dispute between the Federation and a State or States;

(e) The dispute must involve a question of law or fact or both; and

(f) The dispute must pertain to the existence or extent of a legal right.

See **AG. Bendel State vs. AG. Federation & Ors (1981) 12 NSCC p. 314**

The *Oxford Dictionary* defines the word dispute as the act of arguing against, controversy, debate, and contention as to right claims and the like or on a matter of opinion.

To my mind, under **Section 232** of the **Constitution** there is a dispute where the suit raises questions of law and, or fact on which the existence or extent of a legal right depends. The dispute must be suitable for judicial consideration and determination.

My lords, since the plaintiff transferred title in the

land to someone else, the plaintiff no longer has *locus standi*. There is in the circumstances no dispute appropriate for judicial consideration. In the light of this development, the "dispute" in this appeal clearly does not satisfy the above conditions, and so does not fall within the original jurisdiction conferred on the Supreme Court by **Section 232** of the **Constitution**.

For this, and the more detailed reasoning in the leading ruling the preliminary objection succeeds and the plaintiff's action is hereby struck out.

Olabode Rhodes Vivour
Justice Supreme Court

PETER-ODILI, (JSC): I am at one with the ruling just delivered by my learned brother, Musa Dattijo Muhammad JSC and to record my support I shall make some remarks.

The defendant/applicant, Attorney-General of Lagos State raised this preliminary objection filled on the 10/10/2016 praying this court to strike out this suit on the ground that the Supreme Court lacks the requisite original jurisdiction to entertain the same.

Also that the plaintiff/respondent lacks the locus standi to institute this action.

The plaintiff/respondent had commenced this suit by civil summons dated the 3rd day of March, 2011 while the defendant/applicant filed its statement of defence on the 28th day of January, 2013 and on the 11th day of April, 2013 the plaintiff/respondent sought to amend his statement of claim and it was granted by this court.

The defendant/applicant has however come before this court with a Notice of Preliminary Objection as earlier stated.

On the 31st day of October, 2016, date of hearing, Mrs. S.Y. Kolawole, Director Legal Drafting of the Ministry of Justice, Lagos State of counsel for the defendant/applicant adopted the written address attached to this preliminary objection aforesaid in which were raised three issues for determination, viz:

i) **Whether this Honourable Court has original jurisdiction to entertain causes or matters between the Federal Government and a State Government; and**

ii) **Whether this Honourable Court has original jurisdiction in land matters.**

iii) **Whether plaintiff/respondent, having divested its interest in the subject matter of this suit, with special reference to No. 10, Gerrard Road, Ikoyi, Lagos State, has the locus standi to institute this action.**

Babatunde Ogungbamila of counsel for the plaintiff/respondent adopted their written response filed on 28/10/2016 which was settled by Dr. Olisa Agbakoba SAN.

He had formulated three issues for determination which are thus:

1. **Whether the dispute in the present action does not fall within the original jurisdiction of the Supreme Court under Section 232 of the constitution.**
2. **Whether as presently constituted, the present action is a land matter.**
3. **Whether the plaintiff does not have locus stand to institute the present action.**

I shall utilize Issue No. 1 as crafted by the applicant as an answer to that question raised would show whether or not this

court can venture further.

ISSUE NO. 1:

Whether this Honourable Court has original jurisdiction to entertain causes or matters between the Federal Government and a State Government.

Canvassing the stance of the applicant, learned counsel referred to **Sections 230** and **232** of the **1999 Constitution of the Federal Republic of Nigeria** (as amended) and contended that, this is not a matter for the invocation of the original jurisdiction of the Supreme Court. That from the plaintiff's Amended Statement of Claim the subject matter of the suit is land which has been deceptively presented as a constitutional matter between the Federation and a State so as to agitate the original jurisdiction of the Apex Court. That the amended pleadings of the plaintiff would show the exact nature of the suit. Learned counsel cited **Attorney General of Lagos vs. Attorney General of the Federation (2014) 9 NWLR (Pt. 1412) 217 at 257; Olofu vs. Itodo (2010) 18 NWLR (Pt. 1225) 545.**

That this court lacking the jurisdiction for what the plaintiff is calling on it to do, the matter should be struck out. He referred to **Obi vs. INEC (2007) 11 NWLR (Pt. 1046) 565 at 629.**

Learned counsel for the plaintiff/respondent responded that the stand of the defendant/applicant does not represent the correct state of the law. That the action is well stated within the purview of **Section 232** of the **1999 Constitution** and **Section 49** and **51 (2) of the Land Use Act**.

That the plaintiff commenced this action in protection of federal lands within the territory of the defendant. He cited

Attorney-General Federation vs. Attorney General Abia State (2001) 11 NWLR (Pt. 725).

What really is the dispute between the parties in the application of the plaintiff to amend its pleading and the attack on it by preliminary objection of the defendant that in fact the Supreme court has no jurisdiction to grant the application to amend the statement of claim nor even the main jurisdiction to entertain the suit in its original jurisdiction? In this regard a foray into the constitutional provisions on which this court derives its powers in the appellate form and its original jurisdiction status. I shall confine myself to the area containing the prescriptions in the original jurisdiction of the Supreme Court. I shall quote Section 232 of the 1999 Constitution of the Federal Republic of Nigeria and, viz:

Section 232 (1) provides that:

> **"The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends".**

Section 232(2) however provides that:

> **"In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly".**

Pursuant to the above provision, the National Assembly on 22nd April, 2002 enacted the Supreme Court (Additional Original Jurisdiction) Act, 2002. Section 1 (1) of the Act provides that:

> **"In addition to the original jurisdiction conferred upon the Supreme Court of Nigeria by Section 232 (1) of the 1999 Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between:**
> **(a) The National Assembly and the president;**
> **(b) The National Assembly and any State House of Assembly; and**
> **(c) The National Assembly and a State of the Federation in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends".**

In the interpretation of the above constitutional provisions this court had stated what the exact position of this court is when confronted with a suit invoking this court's powers of original jurisdiction.

In the case of **Attorney-General of Lagos State vs. Attorney-General of the Federation (2014) 9 NWLR (Pt. 1412) 217 at 257,** this Court held thus:

> **"Section 232(1) of the Constitution of the Federal Republic of Nigeria, 1999 provides for the original jurisdiction of the Supreme Court which is exclusive to it in respect of any dispute**

between the federation and a State interse where the determination of such dispute involves a resolution of any question, whether of fact or law, on which the existence or extent of the legal right being asserted in dispute depends. By the section, once a dispute is between the Federation and a State or between States themselves, and the determination of the dispute requires resolution of any question, whether of fact or law in relation to the claim raised, the Supreme Court and no other court has jurisdiction over such dispute. However, the section does not empower the Supreme Court to hear and determine disputes between the governments of the federation and a State, or the governments of the States interse".

To determine whether or not a court has jurisdiction, this court in the case of **Olofu vs. Itodo (2010) 18 NWLR (Pt. 1225) S.C**. held that:

"Also settled is the principle of law that in order to determine whether a court before which a matter pends has the jurisdiction to entertain same, the court has to look at the plaintiff's statement of claim before it and not the defence put forward by the defendant to the action. The claim of the plaintiff in an action includes the originating summons and the affidavit(s) in support of same where the action is instituted by originating summons as was decided by this court in the case of Inakoju vs. Adeleke (2007) 4 NWLR (Pt. 1020)

427 at 588 589".

The crux of the matter is as couched in the Amended Statement of Claim of the plaintiff, paragraph 14 precisely thus:

"14. One of the many cases reported to the plaintiff by a land owner seeking clarification on "Regulation" of consent granted by the defendant, is a property situate at No. 10, Gerard Road, Ikoyi, Lagos State and registered as No. L0 4842 at the Federal Lands Registry, Ikoyi by the plaintiff. Based on the unlawful regularization practice of the defendant, subject matter of this suit, the same property was required and is also registered as No. 28 at page 29 in volume 2038 at the Lagos State Lands Registry, Alausa, Ikeja".

The stand of the plaintiff is that the dispute being questions of law on which the existence and extent of legal rights of the Federation and Lagos State depend and in this instance the matter of the ownership of land situate in Lagos State and covered by the Land Use Act. I shall recast **Sections 1, 49** and **51 (2)** of the said Act as follows:

1. Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

49. Nothing in this Act shall affect any title to land whether developed or undeveloped held by the Federal Government or any agency of the Federal Government at the commencement of this Act and, accordingly, any such land shall continue to vest in the Federal Government or the agency concerned.

51(2) The powers of a governor under this Act shall, in respect of land comprised in the Federal Capital Territory, Abuja, or any land held or vested in the Federal Government in any State, be exercisable by the president or any minister designated by him in that behalf and references in this Act to governor shall be construed accordingly".

"Mindful of the concern this court had expressed in **A.G. Federation vs. A.G. Abia State (2001) 11 NWLR (Pt. 725)** on a venture to have agitated its original jurisdictional power; it had held that "the dispute must involve a legal right of the federation. The federation as plaintiff must show that it has such right or interest, which is affected or is likely to be affected by the action complained of.

In delving into those rights or interest of the federation, the Supreme Court cannot carry along matters of land dispute between it and a State of the Federation fs community reading of **Sections 230** and **232** of the **1999 Constitution** read alongside the **Land Use Act, Section 39, 41** and **51 (2)** would show that land disputes have not the canopy covering of those actions upon which once the

Federal Government is affected would have the Supreme Court jumping into the adjudication in its original jurisdiction. That power has not yet been donated to this court by the c**onstitution**.

Fortunately, for an easier understanding I wish to state that I had the privilege of having participated in the case of **A.G. Lagos State vs. A.G. Federation (2014) 9 NWLR (Pt. 1412) 217** which was a dispute relating to the operation of an agency of the Federal Government, the Federal Inland Revenue Service (FIRS) against an agency of Lagos State Government which the Federal Government contended accrued to it. This court had no difficulty in holding firm that the court's original jurisdiction cannot be so invoked when the dispute is not between the Federation as an entity against a State or between a State against another or others or the National Assembly and the President; the National Assembly and any State House of Assembly, and the National Assembly and a State of the Federation.

I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice Supreme Court

OLU ARIWOOLA, (JSC): I was obliged before now with a copy of the lead ruling of my learned brother, **Dattijo Muhammad, (JSC)** just delivered. I am in complete agreement with the reasoning and conclusion that the defendant's preliminary objection is sustained and plaintiff's action accordingly struck out. The action is here by struck out by me.

I abide by the consequential orders in the said lead ruling including the order on costs.

Olu Ariwoola, (Jsc)

A *Justice Supreme Court*

BATA OGUNBIYI, (JSC): I read in draft the lead Ruling just delivered by my brother, Musa Dattijo Muhammad, B (JSC). I agree that the preliminary objection raised by the defendant herein is sustained and the entire suit is hereby struck out; the plaintiff herein lacks the ***locus standi*** to institute the action.

C The notice of preliminary objection and the three grounds predicating same are all well reproduced clearly in the lead ruling. I do not need to replicate same. Suffice it to say however and re-iterate that the defendant/objector by its D notice of preliminary objection is seeking to challenge the jurisdiction of this court as well as the ***locus standi*** of the plaintiff/respondent to institute this action.

Section 232(1) of the Constitution of the Federal E **Republic of Nigeria** provides for the exclusive original jurisdiction of the Supreme Court wherein it says:

> **"The Supreme Court shall, to the exclusion of** F **any other court, have original jurisdiction in any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact)** G **on which the existence or extent of a legal right depends."**

Section 232 (2) however provides that:

H

> **"In addition to the jurisdiction conferred upon it by subsection (1) of this Section, the Supreme**

A **Court shall have such original jurisdiction as may be conferred upon it by any act of the National Assembly."**

B In keeping and consonance with the foregoing therefore, the National Assembly on 22nd April, 2002 enacted the Supreme Court (Additional Original Jurisdiction) Act, 2002 wherein **Section I (1) of the Act** provides thus:

C

> **"In addition to the original jurisdiction conferred upon the Supreme Court of Nigeria by Section 232 (1) of the 1999 Constitution, the** D **Supreme Court shall, to the exclusion of any other have original jurisdiction in any dispute between:**
> **(a) The National Assembly and the** E **President;**
> **(b) The National Assembly and any State House of Assembly; and**
> **(c) The National Assembly and a State of the** F **Federation in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."**

G

From the community reading of the provisions (supra), it is clear that the original jurisdiction of the Supreme Court can be invoked only in causes or matters between:

H (i) The Federation and a State;
(ii) Between States;
(iii) The National Assembly and the President;
(iv) The National Assembly and any State House of

Assembly; and

(v) The National Assembly and a State of the Federation.

See the case of **Attorney-General of Lagos State vs. Attorney-General of the Federation (2014) 9 NWLR (Pt. 1412) 217 at 257.**

The determination of this objection would require that the subject matter of the action be specified. This is because it is the claim that determines jurisdiction. As rightly submitted by the learned counsel for the defendant objector, I subscribe to his argument that the present action relates squarely to No. 10 Gerard Road, Ikoyi and not a dispute between the Federation and a State as it is sought to argue on behalf of the plaintiff/respondent. It does not therefore properly come within the original jurisdiction of the Supreme Court as spelt out under **Section 232 of the 1999 Constitution (as amended) supra**. Furthermore and again, contrary to the submission and misgivings by the plaintiff/respondent, the dispute at hand does not involve questions of law on which the existence and extent of the legal rights of the federation and Lagos State is dependant.

For the confirmation of the subject matter of the suit before the court, paragraph 14 of the plaintiff/respondent's Amended Statement of Claim is evident and centers on No. 10 Gerald Road, Ikoyi, Lagos State. Same is reproduced here under as follows:

> **"14. One of the many cases reported to the plaintiff by a land owner seeking clarification on "Regularization" of consent granted by the defendant, is a property situate at No. 10 Gerald Road, Ikoyi, Lagos State and registered as No. LO4842 at the Federal Lands Registry, Ikoyi by plaintiff. Based on the unlawful regularization practice of the defendant, subject matter of this suit, the same property was required and is also registered as No. 28 at page 29 in volume 2038 at the Lagos State Lands Registry, Alausa, Ikeja."**

By any stretch of imagination there can be no original jurisdiction conferred on this court in causes or matters relating to land no matter how deceptively couched; the combined effects of **Sections 39, 41 and 51 (2) of the Land Use Act** are all evident and in support. The claim of the plaintiff/respondent as rightly submitted by the defendant/objector is a land matter, which is not within the contemplation of the Constitution to be entertained by this Court in its original jurisdiction. The decision in the case of **Attorney-General of Lagos State vs. Attorney-General of the Federation (supra)** is very clear on the extent of the original jurisdiction of this court as provided by **Section 232(1) of the Constitution,** and for purpose of re-stating its position, the following remark was made:

> **"However, the Section does not empower the Supreme Court to hear and determine disputes between the governments of the federation and a State, or the governments of the States interse."**

Furthermore and with the conclusion arrived there at supra, the effect of the purported action is that same is not justiciable as rightly submitted by the learned counsel for the

defendant/objector. The suit also has no foundation, especially wherein the plaintiff having divested its interest in the subject matter of the case did not have ***locus standi*** or legal right to institute same.

With the few words of mine and while relying more particularly on the lead reasoning and conclusion arrived at by my learned brother, Dattijo Muhammad, (JSC), I also make an order that the suit be struck out in terms of the lead ruling and abide by the order made as to costs.

Clara Bata Ogunbiyi
Justice, Supreme Court

CENTUS NWEZE, (JSC): My lords, I find it rather intriguing that the ascertainment of matters within the original jurisdiction of this court could still be a subject of forensic disputation. This must be so because this court has, admirably, rescued this question from the realm of recondity. I need only cite one or two of such decisions here, **AG, Bendel State vs. AG, Federation and Ors [1981] 10 SC (Reprint) 1,32, AG, Kano State vs. AG, Federation [2007] 6 NWLR (Pt 1029) 164, 182 – 183; AG, Anambra vs. AG, Federation [2007] 12 NWLR (Pt. 1047) 4, 42 – 43; AG, Lagos State vs. AG, Federation (2014) LPELR 22701 (SC); Plateau State of Nigeria and Anor vs. AG, Federation (2006) LPELR 2921 (SC).**

Be that as it may, I take the liberty of this contribution to reiterate for the umpteenth time, that in order to invoke the original jurisdiction of this court there must be a dispute, that is a controversy; a contention as to rights, claims etc, between the Federation and a State or States; such a dispute must involve a question of law or fact or both and such a dispute must appertain to the existence or extent of a legal

right, **A.G. of Bendel State Vs. A.G. of Federation and Ors [1981] (supra); A.G. of Federation vs.. A.G. of Abia State and Ors. [2001] 7 SC (Pt. 1) 32; [2001] 89 LRCN 2413; A.G. of federation and Ors vs. A.G. Imo State and Ors. [1983] 4 NCLR 178.**

Accordingly, like the leading ruling, I hereby enter an order sustaining the preliminary objection to the plaintiff's action herein. In consequence, the action shall be, and is hereby, struck out.

Chima Centus Nweze
Justice, Supreme Court

THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF NIGERIA AND JOHN ASUQUO ETIM

SC. 84/2005

IN THE SUPREME COURT OF NIGERIA HOLDEN AT ABUJA FRIDAY, 20TH JANUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

ACTION: "Motion on Notice" – Purport.

ACTION: "Motion Ex-parte" – Purpose of.

CASE LAW: The principles in Yisi Nig Plc vs. Trade Bank Plc (1999) 1 NWLR (Pt. 588) 646 – Consideration thereof.

CASE LAW: The principles in Owena Bank Nig. Plc v. Mohammed (1998) 1 NWLR (Pt. 533) 301 – Consideration thereof.

CONSTITUTIONAL LAW: Fair hearing – Concept – Import.

CONSTITUTIONAL LAW: Fair hearing – How it applies to litigants.

CONSTITUTIONAL LAW: Fair hearing – Indices in a trial.

CONSTITUTIONAL LAW: Fair hearing – Principles of – When not cognizable in trial proceedings.

CONSTITUTIONAL LAW: Fair hearing – Section 36 (1) of the Constitution of Federal Republic of Nigeria (1999) (as amended) – Scope and Extent.

COURT: Letter of adjournment intended only to arrest court's proceedings for that date – Attitude of Court thereto.

COURT: Statutory duty – Mandatory duty to notify all parties of the existence of the matter in court.

FAIR HEARING: Motion on Notice – Properly served on a respondent – Respondent absent in court – Motion heard in the absence of respondent – Whether a breach of fair hearing

PRACTICE AND PROCEDURE: Filling of documents – Requirement for filing all documents intended for the court's attention.

PRACTICE AND PROCEDURE: 'Motion on Notice' -- Respondent wishing to contest – Procedure thereof.

PRACTICE AND PROCEDURE: Adjournment – Letter of adjournment – Need to be communicated to the Judge.

PRACTICE AND PROCEDURE: Adjournment – Letter of adjournment – Need to comply with filing requirements

PRACTICE AND PROCEDURE: Adjournment – Principles that determine the grant or refusal of.

PRACTICE AND PROCEDURE: Application for adjournment – Discretionary nature of – How exercised.

PRACTICE AND PROCEDURE: Filing – Requirement of Proper Filing of processes – Under Cross River State High Court (Civil Procedure) Rules.

PRACTICE AND PROCEDURE: Letter of adjournment – Distinction between legal and administrative documents – Requirement for filing all legal documents in the registry

PRACTICE AND PROCEDURE: Principles of fair hearing – When abused by parties.

SERVICE: How conducted – Modes of effecting service.

SERVICE: Proof of – Filing affidavit of service – Sufficiency of proof

SERVICE: Proof of service – Requirement of Rules of Court for filing of affidavit of – Service .

SERVICE: Service and proof of service – Importance of in all proceedings.

SERVICE: Service of processes including hearing notices –

Fundamental nature – Irregularities thereto – Effect on proof of service.

SERVICE: Affidavit of service – Presumption of proof of completeness of service.

SERVICE: Proof of service – Respondent absent in court where there is evidence of proof of service – What Court needs to do.

WORDS AND PHRASE: "Motion on Notice" – Meaning.

WORDS AND PHRASES: "Motion Ex-parte" – Meaning.

Issues for Determination

1. "Whether the learned Justices of the Court of Appeal were right in discharging the order of interlocutory injunction on the grounds that:
   (a) The learned trial judge breached the rule of fair hearing as entrenched in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and
   (b) That the motion for interlocutory injunction was heard ex-parte?

2. Whether the learned justices of the Court of Appeal properly applied the cases of **Yisi (Nig.) Ltd. vs. Trade Bank Plc (1999) 1 NWLR (Pt.588) 646; Owena Bank Plc v. Mohammed (1998)1 NWLR (Pt.533) 301; and Bamawo v. Garrick (1996) 6 NWLR (Pt.401) 356** to the facts and circumstances of this case when they condemned the learned trial judge of injudicious exercise of judicial powers in refusing adjournment when there was infact no application

for adjournment before her?

Facts of the Matter

The Registered Trustees of the Presbyterian Church of Nigeria was the plaintiff at the High Court of the Cross River State, holden at Calabar (trial court) and Mr. John Asuquo Etim, was the defendant. The claim of the plaintiff before the trial court reads as follows:

i. A DECLARATION that the plaintiff is entitled to Statutory Right of Occupancy grantable by the Governor of Cross River State, over the piece or parcel of land lying and situate at Big Qua Town Road, Calabar, formerly occupied by one Mr. Alfred O. Olaiya, on the permission of the plaintiff and referred to as No. 18, Big Qua Town Road, Calabar.
ii. AN ORDER OF PERPETUAL INJUNCTION restraining the defendant, his workmen, agents, servants, assignees or privies from erecting any structure or continuing with any construction work on the piece or parcel of land formerly occupied by late Mr. Alfred O. Olaiya on the permission of the plaintiff or in any other manner trespassing into the said piece or parcel of land known as No. 18 Big Qua Town Road, Calabar, or any part thereof.
iii. The sum of N500,000.00 (Five Hundred Thousand Naira) only, being damages for trespass.

It is worthy of note that the writ of summons was simultaneously filed by the plaintiff with a MOTION EX-PARTE for an Order of INTERIM INJUNCTION and a MOTION ON NOTICE for INTERLOCUTORY INJUNCTION praying the trial court to restrain the respondent from erecting any structure or continuing with any such

construction work on the land in dispute. The suit was filed on 8th December, 2000, Friday, and it was assigned to the learned trial judge on 12/12/2000. An Affidavit of Urgency was also filed accompanying the *Ex-parte* motion. The learned trial judge directed that the plaintiff should put the defendant on notice. The processes, including the motion on notice were served on the respondent on 14/12/2000.

Meanwhile, the defendant filed an unconditional appearance on 18/12/2000 to defend the suit but no counter affidavit against the motion on notice was filed.

Inspite of the affidavit of urgency, the learned trial judge declined to hear the *ex-parte* motion on the 12/12/2000 and she set down 19/12/2000 for hearing the motion on notice.

On the hearing date of the Motion on Notice (19/12/2000), the plaintiff/applicant and his counsel were in court. The defendant/respondent was absent and was not represented by any counsel. The learned trial judge found that there was satisfactory service of all the processes including the motion on notice (fixed for that day) on the defendant/respondent. The motion was heard and granted by the learned trial judge.

An Order for interlocutory injunction restraining the defendant/respondent from erecting any structure or continuing with any such construction work on the said land.

It is against this Order granted by the trial court that the defendant/respondent appealed to the Calabar Division of the Court of Appeal, the court after hearing, allowed the appeal and made an Order discharging the interlocutory injunction granted by the trial court.

Dissatisfied with the judgment of the Court of Appeal, the appellant filed its appeal to the Supreme Court.

Held: (Unanimously allowing the appeal)

1. *One of the statutory roles of the court is to notify all parties of the existence of the matter in court*
It is now apparently necessary to remind ourselves that among the statutory duties placed upon the shoulders of any (trial) judge who is about to embark upon hearing and determination of a matter, whether on a main suit or a motion placed before his court, is that after all the preliminaries to the hearing, he must ensure that all the parties in the suit/motion are fully notified of the existence of the matter and same has been duly served with hearing notice/notices against the date fixed for hearing.
Where there is no such service of the processes including the hearing notice, any step taken by the judge in hearing the matter is null and void, which must be set aside on appeal. *(Pp 249-250 paras G-B)*

2. *What is Proof of Service?*
Nwadialo, summarized very aptly, what it all entails:

> **"Where a process has been served, it is necessary for the court to have before it evidence of that fact. The appearance in court of the party served as ordered in the process or on the return-date stated in it or in the hearing notice attached thereto is the strongest evidence of service.**
> **Proof of service is particularly needed if the defendant fails to appear in court in response to the process after he has been allegedly**

> **served. Because of certain consequences adverse to him of such failure, the court has to be satisfied somehow that service was actually effected. The rules therefore provide a number of ways of proving service. Each of these however, affords A PRIMA FACIE proof only. So although the court can properly act on it, the defendant is not precluded from rebutting service where there was, in fact, none".**

(Nwadialo, F. (2000) Civil Procedure in Nigeria (second Edition), University of Lagos Press, Lagos, pages 261 – 262. *(P 259 paras B-H)*

3. *There are several ways of effecting and proving service of processes*
The several ways in which service of a process can be validly effected, depending on the process itself (originating or otherwise) and depending on the mode of service prescribed by rules of court and whether personal service and, or, by service other than personal, proof thereof can validly be acknowledged by certificate of service; affidavit of service; certificate of posting (where service is effected by registered post) and in some rules of court, by tendering a service Recording Book/Register in which certain details relating to service effected on parties are entered by the officer serving the process or by the registrar of court. Such entry is PRIMA FACIE proof of service (Order 9 Rule 17 of High Court of Cross River Rules), Cap 51 of the Laws of Cross River State of Nigeria, 1979.

The proof of service which was tendered before the learned trial judge with which he was satisfied was the affidavit of service filed by the chief bailiff of that court Mr. Odo Ekpe Archibong. Affidavit of service is a *prima facie* proof of the facts stated therein and is a valid way of proving service. This is the method of proof provided in the uniform High Court Rules, in all cases or situations where service of any writ or document shall have been effected by a bailiff or other officer of court.
(Pp 259-260 paras H-F.)

Per I.T. Mahamad (JSC)

"This court, in the case of Okesuji vs. Lawal (1991) 1 NWLR (Pt.) 661 at 678, per Olatawura, JSC (Rtd. and now late), said of the affidavit of service as follows:

> **"The purpose of affidavit of service is to convince the court that the persons on whom the processes are to be served have been duly served. Where there is no affidavit of service and the person served with a writ or any other processes of court appears in court, there is no further need to insist on proof of service. There cannot be a better proof than the appearance in court of the person on whom the process was served".**
> *(Pp 260-261 paras F-A.)*

Thus, as far as the proof of service placed before the

learned trial judge is concerned, I see no how it can be faulted. The learned trial Judge in my view, did the right thing according to law without the necessity of anything more, in addition, as contemplated by the court below. It is trite that whenever and wherever a law and or Rules of Practice make stipulations, compliance therewith is the only requirement without anything more, as may have been suggested or contemplated by the court below".

4. *There are provisions for affidavit of service as mode for proof of service*
It is the requirement of almost all the High Courts' (Civil Procedural) Rules that in all cases where service of any writ or document shall have been effected by a bailiff or other officer, shall, on production, without proof of signature, be PRIMA FACIE evidence of service. In some other courts, a book/register is kept for recording details of return of service (as may be directed by the chief judge). Every entry in such book/register shall be PRIMA FACIE evidence of service of such processes without anything more. Thus, by her reliance on the former method of service (through bailiff of court), I cannot see where the learned trial Judge went wrong.
(P 261 paras D-F)

5. *The trial court was not wrong to have granted the Motion on Notice in the absence of the respondent*
The motion on notice for an order for interim injunction which was granted by the learned trial judge was found by the trial court to have been duly

served on the respondent. The learned trial Judge stated in her ruling that she was convinced by virtue of the affidavit of service of 14/12/2000 filed by the chief bailiff of that court, Mr. Odo Ekpo Archibong. *(P 261 paras A-C)*

6. *The importance of service of a process in a trial*
Service of process in a trial, is what the spinal cord is, to a human being. *(P 261 para G)*

7. *The meaning of a 'Motion on Notice'*
By the glaring facts relied upon by the trial court, the court below should not have been under any misapprehension as to which of the two motions was properly placed before the trial court for determination. I think it is too elementary to remind the court below that a motion is on notice where the applicant puts on notice or awareness the attention of the other party or parties involved of the existence of the motion. *(P 263 paras G-H)*

8. *The meaning of a Motion "Ex-parte"*
An Ex-parte motion is that in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. (Leedo Presidential Motel Ltd. vs. Bank of the North Ltd (1998) 10 NWLR (Pt. 570) 353 at pp 379 380 H A). *(Pp 263 -264 paras H-B)*

9. *It is right for a court to determine a Motion on Notice in the absence of the respondent when satisfied that proper service was effected on him*
When a motion on notice is heard by a court, on full satisfaction that same was duly served on the respondent(s) and the respondent(s) for some reasons best known to him/them, refuse(s) to put up appearance or file anything that will indicate his willingness to object to the grant of the motion (by way of counter-affidavit, etc) the court before which the motion on notice is placed for determination cannot be accused of hearing the motion in the absence of the respondent(s).
(P 264 paras B-D.)

10. *The Practice in which a respondent indicates his intention to contest a motion on notice*

Per I.T. Muhammad (JSC):

> **"It is true in this matter that the respondent filed a memorandum of appearance in respect of the main suit (18/12/2000). That is not to say, however, that the respondent indicated his intention to contest the motion on notice. The usual practice is for the respondent to file a counter affidavit forthwith indicating his willingness to contest the motion on notice. Where he has failed to do so, then he has no one else to blame but himself. I think I will align myself with the decision of the court below in Akpan vs. Ekpo (2001) 5 NWLR (Pt. 707) 502**

at 513 B G (as case which is not too dissimilar to the appeal on hand) where the court held, inter alia:

> **"Further, the appellants did not file a counter-affidavit opposing the application and there was also no indication that they would oppose the application and the counsel to the 8th to 9th defendants who was in court did not oppose the application and asking the 6th defendant if he had anything to say will only attract a request for adjournment because there is not much that he could do.**
>
> **An adjournment is at the sole discretion of the trial judge and no court will interfere with the exercise of such a discretion unless it was not exercised judicially and judiciously which has not been established in this case.**
>
> **In the instant case, the appellants were duly served with the motion papers, they did not file any counter-affidavit opposing the application or indicate in any way that they would oppose the application.**
>
> **The appellants' counsel has all the opportunity to come to court to oppose the application; if he lives at Uyo or outside Calabar, he should be here a night before the hearing date or arrive at Calabar quite in time to conduct his case.**

> **If he fails to leave his home in time to come to Calabar and has a brake failure or any problem that makes him to be late in court, it is not the trial court that should be blamed for that.**

The doctrine of fair hearing is very fundamental in our jurisprudence and it is fully entrenched in Section 36(1) of the 1999 Constitution and it stipulates nothing more than that a party to a case should be given an opportunity to present his case before the court. [Okonkwo vs. Okonkwo (1998) 10 NWLR (Pt. 571) 554; Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136) 22; Osakwe vs. Nigerian Paper Mill Ltd. (1998) 1 NWLR (Pt. 568) 1; and Leedo Presidential Motel Ltd. vs. B. O. N. Ltd. (1998) 10 NWLR (Pt. 570) 353.

It therefore means that if a party is duly served and for one reason or the other he could not come to court to present his client's case and there is nothing to show that he would oppose the application before the court and the trial court also did not know why he failed to come to court: that party or his counsel cannot cry that his right of fair hearing has been infringed upon because he was given all opportunity in this world to present his case and he can therefore not take a cover under the rule of fair hearing.

In the instant case, there is no way that the appellants; right of fair hearing could in the slightest imagination be said to have been infringed".
(Pp 264-266 paras D-E.)

11. There is need to bring letters of adjournment to the notice of the court

Per I.T. Muhammad (J.S.C):

> **"My observation, my lords, shows that as at the time the trial court sat to determine the Motion on Notice (under consideration, i.e. 19/12/2000) nobody drew the attention of that court that there was a document (letter) filed by the respondent asking for adjournment (pages 36 -38 of the record of appeal). This, perhaps, was what accounted for the court not making any reference to the said document and *afortiori*, no reference was made by the trial court on the matter of adjournment of the Motion on Notice. In being fair to the trial court, I do not think the trial court could make reference to a document that was not placed before it".**
> *(P 271 paras C-E.)*

12. An improperly posted letter of adjournment

It is to be noted that:

i. This letter (document) does not bear the semblance of an official communication between the learned counsel and the trial court. Nothing to indicate that the letter was officially filed at the court's registry: no stamp; no date; no signature and name of the receptionist, no time of filing the letter in the registry and no assessment in any form by the Registry;

ii. The letter has not indicated that a copy thereof has been served on the appellant to put him on notice of the existence of that letter.

iii. There is nothing to indicate that the letter got to the knowledge of the learned trial judge before or even during the time she was conducting her proceedings.

Iv. The letter was written on the 19th December, 2000, the date fixed for hearing the Motion on Notice. *(Pp 273-274 paras F-B)*

13. The court was right to have refused to adjourn the case where the letter of adjournment was simply intended to frustrate the day's proceedings

Per I.T. Muhammad (J.S.C):

> **"This letter, as it appears, was simply dumped on the registry of the trial court on the very day the motion on notice was to be heard. Was it not really meant to arrest the proceedings of that day? I positively think so. And, no court of law, worth its salt, can allow itself to fall into such a trap which is of course cause an unjustified delay and denial of justice. For whatever purpose that letter was written to the trial court's registry, the other party, i.e. the appellants ought to have been served with a copy thereof".**

Granted that the letter by the respondent was properly placed before the learned trial judge, it is to be noted that grant of an application for adjournment is entirely within the discretionary powers of a judge. The facts and circumstances before the judge are some of the prime factors a judge will consider in exercising his discretion. Grant of adjournment, certainly is not automatic.

Per I.T. Muhammad (J.S.C):

> **"In Odusote vs. Odusote (1971) 1 NMLR 228, at 231, this court, per Udo Udoma, (JSC) (Rtd. and now late) made the following warning:**
>
> > **"We must not, however, be taken as accepting the wider proposition implied in the submission that in all cases of this kind, a court is bound to grant adjournment. The question of adjournment is a matter in the discretion of the court concerned and must depend on the facts and circumstances of each case. For, in matters of discretion, no one case can be authority for another, and 'the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion,' per**

> **Kay, learned judge in Jenkins Vs. Bashty (1891) 1 Ch. 484 at 495".**
> *(Pp 274-275 paras B-B)*

14. The distinction between (a) Yisi (Nig) Ltd and (b) Owena Bank Nig Plc vs. Mohammed and the instant case

Certainly, it is clear that the facts and circumstances of the application which was granted by the trial court are quite distinguishable from the cases relied on by the court below in arriving at their decision: (a) in Yisi Nig. Ltd Vs. Trade Bank Plc (supra), a formal application for adjournment was properly placed before the trial court and the court was duly informed or it was aware of the existence of the application for adjournment yet it refused to hear same and went ahead to hear the motion behind the appellant; (b) In Owena Bank Nig. Plc Vs. Mohammed (supra), the trial court came to the conclusion that the defendant had no defence simply because his counsel was not in court to open his defence despite the fact that it filed a copious statement of defence denying the claim. The matter was adjourned for judgment. The appeal was allowed by the Court of Appeal and a retrial ordered. In the present appeal, the respondent did not file a counter affidavit to show that he has a defence to the motion for interlocutory injunction. Thus, all I have been saying boils to one thing: grant or refusal of application for adjournment even where one is properly placed before a court is entirely within the discretion of a judge. And for the judge to exercise such discretion judiciously and judicially, compelling

grounds and circumstances must abound upon which the discretion will rest. There is nothing to show that the said letter or document (P. 30 of the record of appeal) was laid before the trial court for a consideration. Neither the respondent, nor his counsel or his representative, nor even the registrar of court (to whom the letter was addressed) intimated the court of the pendency of that letter, which incidentally, was written (and may have been forwarded to the registrar of court that same date)? Nothing in the record of appeal to indicate acknowledgment of the said letter by the registrar of court. Again, the reasons stated in the brief of argument for the respondent are quite different from the reasons stated in the letter for adjournment. In my view, the learned trial judge did her assignment diligently which is commendable and worthy of emulation by others. *(Pp 275-276 paras C-D)*

15. *The propriety of filling all documents meant to be acted upon by court*

It is important to point out as well, that if a document is meant for the court to take note and act thereon, rules of court have made provisions for formal filing of such a document or documents with the registry of the court, for which a nominal fee is payable upon assessment by the registry staff, who authenticate the filing of that document and proceed to file same for the court's attention. It is only by formal filing that the court becomes seised of the document.

All other ways or methods such as writing letters or petitions informing the chief judge/chief

justice/head of court and or chief registrar (including his subordinate registrars) are purely administrative, and have no force of law. Thus, the said letter written by the respondent to the Registrar of the trial court was purely administrative, and worse still, it was never brought to the attention of the learned trial judge for consideration.
(P 276 paras D-H)

16. *The requirement of proper filling of all legal documents under High Court (civil procedure) Rules of Cross-River State*

Order 54 Rule 6 of the Cross River State High Court (Civil Procedure) Rules (supra), provides as follows:

> **"A document shall not be filed unless it has indorsed on it the name and number of the cause, the date of filing, and whether filed by plaintiff or defendant; and on being filed such indorsement shall be initialled by the registrar".**

The letter claimed by the respondent to be placed with the registrar of the trial court, was never subjected to such criteria as provided by the Civil Procedure Rules (cited above). I have all reasons to believe therefore, that the said letter cannot be regarded as a legal document. Even if it is placed before the learned trial judge, the best the learned trial judge could do was to discountenance it.
(Pp 276-277 paras H-D)

17. *The import and scope of 5.36(1) of the Constitution of FRN on fair hearing*

On the principle of fair hearing, it is deeply rooted in both common law and the constitution. It is not a new phrase in our jurisprudence. The Constitution of the Federal Republic of Nigeria 1999 (as amended) encapsulated the doctrine as follows:

Section 36(1), provides:

> **"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".**

While interpreting the above provision, this court, in the case of Amanchukwu vs. FRN (2009) All FWLR (Pt. 465) 1672 at 1679 1680, held, inter alia:

> **"Fair hearing within the meaning of the constitution, means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. It encompasses not only the compliance with the rules of natural justice, but also audi alteram partem. It also entails doing in the course of trials whether civil or criminal all the things which will make an impartial observer leave the court room to believe that**

> **the trial has been balanced and fair on both sides of the trial".** *(Pp 277-278 paras D-D)*

18. *The concept of fair hearing*

Kalgo, (JSC Rtd.), in Ekpeto vs. Wanogho (2005) All FWLR (Pt. 245) 1191 at 1203, hit the nail on the head, when he said:

> **"Fair hearing according to our law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or Tribunal hearing the parties case should be fair and impartial without showing any degree of bias against any of the parties".**

Here again, it should be observed that all the court is emphasizing is that the template of justice must not be one sided but for the parties on both sides. It is to be remembered that all opportunities were given to the respondent by putting him on notice that the motion on notice was going to be heard on a given date. There was a confirmed proof of service by the trial court's chief bailiff upon which the trial court relied to proceed to grant the motion as prayed. Nothing was placed before that court by way of appearance by any other counsel from the lead counsel's chambers or a counter affidavit filed. The purported letter sent to the registrar of court for adjournment was never placed before the learned trial judge. The discretionary power exercised by the

learned trial judge was, in my view, lawful. The respondent having been given that opportunity to be heard of which he failed to avail himself, cannot now complain of breach of the rule of fair hearing.
(Pp 278-279 paras D-D)

19. *The Motion on Notice was not heard without notice to the respondent*
The Motion for interlocutory injunction having been made on notice to the respondent who duly acknowledged being put on notice, cannot be said to have been heard ex-parte, or that the motion was heard behind the respondent's back, as he flatly refused to put up appearance or by filing compelling counter affidavit indicating his willingness to contest the motion. The letter delivered to the registrar of the court, as has been pointed out severally, is, in my view, a ruse and worse still, not placed before the trial court. *(P 279 paras D-F)*

Nigerian Cases cited in this Judgment
Abubakar vs. INEC (2004) 1 NWLR (Pt. 854) 207;
Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt. 1085) 201;
Adigun vs. Attorney General, Oyo State (1987) 1 NWLR (Pt. 53) 678;
Akpan vs. Ekpon (2001) 5 NWLR (Pt. 707) 502;
Amamchukwu vs. FRN (2009) All FWLR (Pt. 465) 1672;
Amanchukwu vs. FRN (2009) All FWLR (Pt. 465) 1672;
Bamawo vs. Garrick (1996) 6 NWLR (Pt. 401) 356;
Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt. 697) 216,;
Ekpeto vs. Wanogho (2005) ALL FWLR (Pt. 245) 1191, 1;

GeVser vs. China (1993) 9 NWLR (Pt. 315) 97;
J. C. C. Inter Ltd. vs. N. G. I. Ltd. (2002) 4 WRN 91,;
Kotoye vs. C. B. N. (1989) 1 NWLR (Pt. 98) 418,;
Leedo Presidential Motel Ltd. vs. Bank of the North Ltd (1998) 10 NWLR (Pt. 570) 353;
Mirchandani vs. Pinhero (2001) 3 NWLR (Pt. 701) 557;
Ndu vs. The State (1990) 7 NWLR (Pt. 164) 550,;
Nwokocha vs. AG, Imo State (2016) LPELR 40077 (SC);
Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136) 22;
Odigwe vs. JSC Delta State (2011) 10 NWLR (Pt.1255) 25;
Odusote vs. Odusote (1971) 1 NMLR 228,;
Ogundoyin vs. Adeyemi (2001) 33 WRN 1,;
Okesuji vs. Lawal (1991) 1 NWLR (Pt.) 661;
Okonkwo vs. Okonkwo (1998) 10 NWLR (Pt. 571) 554;
Okotha vs. Herwa Ltd. (2000) 15 NWLR (Pt. 690) 249,;
Olumesan vs. Ogundepo (1996) 2 SCNJ 172 ;
Omo vs. JSC, Delta State (2000) 12 NWLR (Pt. 682) 444;
Osakwe vs. Nigerian Paper Mill Ltd. (1998) 1 NWLR (Pt. 568) 1;
Owena Bank (Nig.) Plc vs. Mohammed (1998) 1 NWLR (Pt. 533) 301;
Oyedeji vs. Akinyele (2002) 3 NWLR (Pt. 755) 586, 613;
Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt. 50) 356;
Scott Emukpor vs. Ukaube (1979) 1 SC 6;
Solanke vs. Ajibola (1968) SCNLR 92;
Thomas Edison Ltd. vs. Bullock (1912) 1 SCLR 679;
Wolunchem vs. Wokoma (1974) 1 All NLR (Pt. 1) 605;
Yisi (Nig.) Ltd vs. Trade Bank Plc (1999) 1 NWLR (Pt. 588) 464;

Foreign Cases cited in this Judgment
Jenkins vs. Bashty (1891) 1 Ch. 484;

Nigerian Statutes cited in this Judgment
High Court Civil Procedure Rules 1988 Or. 8 Rules 6
The 1999 Constitution of Federal Republic of Nigeria (as amended) .

Representations
O. E. Obong, Esq., *for plaintiff.*

Defendant absent and not represented.

I. T. MUHAMMAD, (JSC) (Delivering the Lead Judgment): The Registered Trustees of the Presbyterian Church of Nigeria was the plaintiff at the High Court of the Cross River State, holden at Calabar (trial court) and Mr. John Asuquo Etim, the respondent herein, was the defendant. The claim of the plaintiff before the trial court as per paragraph 22 of the Statement of Claim (Pp. 32 -35 of the Record of Appeal) reads as follows:

iv. A DECLARATION that the plaintiff is entitled to Statutory Right of Occupancy grantable by the Governor of Cross River State, over the piece or parcel of land lying and situate at Big Qua Town Road, Calabar, formerly occupied by one Mr. Alfred O. Olaiya, on the permission of the plaintiff and referreed to as No. 18, Big Qua Town Road, Calabar.

v. AN ORDER OF PERPETUAL INJUNCTION restraining the defendant, his workmen, agents, servants, assignees or privies from erecting any structure or continuing with any construction work on the piece or parcel of land formerly occupied by late Mr. Alfred O. Olaiya on the permission of the plaintiff or in any other manner trespassing into the said piece or parcel of land known as No. 18 Big Qua Town Road, Calabar, or any part thereof.

vi. The sum of N500,000.00 (Five Hundred Thousand Naira) only, being damages for trespass".

It is worthy of note that the Writ of Summons was simultaneously filed by the plaintiff with a MOTION EX-PARTE for an Order of INTERIM INJUNCTION and a MOTION ON NOTICE for INTERLOCUTARY INJUNCTION praying the trial court to refrain the respondent from erecting any structure or continuing with any such construction work on the land in dispute. The suit was filed on 8th December, 2000, Friday, and it was assigned to the learned trial judge on 12/12/2000. An affidavit of urgency was also filed accompanying the *Ex-parte* motion. The learned trial judge directed that the plaintiff should put the defendant on notice. The processes, including the motion on notice were served on the respondent on 14/12/2000.

Meanwhile, the defendant filed an unconditional appearance on 18/12/2000 to defend the suit but no counter affidavit against the motion on notice was filed.

Inspite of the affidavit of urgency, the learned trial judge declined to hear the *ex-parte* motion on the 12/12/2000 and she set down 19/12/2000 for hearing the motion on

notice.

On the hearing date of the motion on notice (19/12/2000), the plaintiff/ applicant and his counsel were in court. The defendant/respondent was absent and was not represented by any counsel. The learned trial judge found that there was satisfactory service of all the processes including the motion on notice (fixed for that day) on the defendant/respondent. The motion was heard and granted by the learned trial judge.

An Order for interlocutory injunction restraining the defendant/respondent from erecting any structure or continuing with any such construction work on the said land was made. It is against this Order granted by the trial court that the defendant/respondent appealed to the Calabar Division of the Court of Appeal (court below); the court below, after hearing, allowed the appeal and made an Order discharging the interlocutory injunction granted by the trial court.

Dissatisfied with the judgment of the Court of Appeal, the appellant filed its appeal to the Supreme Court, on the following issues:

I. "Whether the learned justices of the Court of Appeal were right in discharging the order of interlocutory injunction on the grounds that:

The learned trial judge breached the rule of fair hearing as entrenched in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and

a) That the motion for interlocutory injunction was heard ex-parte?

II. Whether the learned justices of the Court of Appeal properly applied the cases of **Yisi (Nig.) Ltd. vs. Trade Bank Plc (1999) 1 NWLR (Pt.588) 646; Owena Bank Plc vs. Mohammed (1998)1 NWLR (Pt.533) 301** and **Bamawo vs. Garrick (1996) 6 NWLR (Pt.401) 356** to the facts and circumstances of this case when they condemned the learned trial judge of injudicious exercise of judicial powers in refusing adjournment when there was infact no application for adjournment before her?

Learned counsel for the respondent formulated the following sole issue for determination;

"Whether in the circumstances of this case, the lower court was right when it discharged the order of interlocutory injunction granted by the trial court".

My lords, I think I should consider this appeal in line with the issues formulated by the learned counsel for the appellant. Respondent's sole issue is subsumed in appellant's issue No. 1. Appellant's issue No. 2 is on the consideration by the court below of the learned trial judge's exercise of discretion on issue of adjournment.

On the hearing date of the appeal in this court, learned counsel for each of the respective parties adopted the brief of argument he filed and made a snappy oral adumbration on the issues identified.

In his submission, the learned counsel for the appellant, on the 1st issue, after recapitulating the genesis of the main suit and the motion ex-parte and the one on notice, stated that on the date the suit was assigned by the Hon. Chief

Judge of Cross River State to the learned trial judge i.e. 12/12/2000, they, i.e. appellant/applicant sought to argue the motion *ex-parte* for interim injunction, but the learned trial judge, who, according to the learned counsel for the appellant, was "always reluctant in granting *ex-parte* applications", refused the *ex-parte* application and "insisted" that the motion on notice for interlocutory injunction be served on the respondent to put him on notice to enable him react if he intends to oppose the motion. Learned counsel for the appellant stated further that the motion on notice was fixed for hearing on the 19th of December, 2000. On that day, the learned trial judge having found that there was proof of service of the processes including the motion on notice, heard the motion on notice and granted same. Learned counsel for the appellant pointed out that certain facts were misrepresented to the court below and not borne by the record which the court below acted on, in arriving at the conclusion that the respondent was not given fair hearing. First of such misrepresented facts which the court below accepted according to the learned counsel for the appellant, is the contention of learned counsel for the respondent that the date following Thursday, 14th December, 2000, the date of service of the processes on the respondent, that was Friday the 15th December, 2000, was a public holiday which date preceded the week-ends of 16th and 17th December, 2000.

Learned counsel for the appellant submitted that the 15th of December, 2000 was not a public holiday. It was workday. It cannot, thus, be correct that the respondent had only the 18th of December, 2000, to respond to the motion served on him in the early hours of 14th December, 2000. The 2nd misrepresented fact, submitted learned counsel for the appellant, is the fact of the respondent's counsel sending to

the trial court on 19/12/2000 a letter applying for the Motion on notice to be adjourned due to previously scheduled matters. Learned counsel for the appellant argued that there is nowhere on the record that "the registrar of the trial court duly acknowledged the receipt of the letter," in deference to the court below's finding. He argued further that the said letter was not copied to him and that the letter was brought to the clerk of court after the trial court had concluded the matter, adjourned the suit to 14/2/2001 for mention and rose for the day. The 3rd point acted upon by the court below, not borne out by the record, submitted learned counsel for the appellant, is the conclusion of the court below (p.89 of the record) that the absence of both the respondent and his counsel was explained in the letter written to the court. That conclusion, it is argued further, is wrong as there is nothing in the letter (p.30) of the record) which explained the absence of the respondent. Learned counsel for the appellant submitted that there was service of the processes on the respondent and thus, opportunity was given to the respondent to be heard. He urged this court to resolve issue No. 1 in the negative.

Learned counsel for the respondent from his side, submitted that the lower court was right when it discharged or nullified the order of interlocutory injunction granted by the trial court as it is evident from the facts of the case that the trial court denied the respondent a fair hearing which occasioned a miscarriage of justice to the respondent. Learned counsel for the respondent gave particulars of denial of fair hearing against the respondent by the trial court's Order of 19/12/2000 as follows:

"First, the Claim itself was filed on 8/12/2000 but was served on the respondent on 14/12/2000.

The days following the day of service were public holidays and weekend or non judicial days and on December 19, 2000 the very first day the matter came up, the learned trial judge granted the order of interlocutory injunction against the respondent.

Meanwhile, learned counsel for the respondent was not in court but had intimated the court of the reasons for his absence vide a letter duly received by the trial court.

The crucial question is; what was the urgency in the matter that could not be redeemed if an adjournment as sought by the respondent's counsel was granted? We respectively submit that there was none.

From the affidavit in support of the motion on notice for interlocutory injunction at the trial court, the cause of action arose in 1996 but appellant waited till 2000, four years after to bring the claim under a self inflicted urgency". (underlining for emphasis)

Learned counsel for the respondent submitted that the court below, on the above basis, was on firm ground and was right when it reached the decision in allowing the appeal before it.

The next line of submissions taken by the learned counsel for the respondent is on the refusal or failure of the trial judge to adjourn the matter when it came up for the first time on 19/12/2000 following the absence of counsel and in the light of counsel's letter explaining his absence and seeking an adjournment. Learned counsel for the respondent after enumerating some of the circumstances in which a court

can exercise its discretion to refuse an application for adjournment, argued that taking into consideration the facts and circumstances of the instant appeal, the application for adjournment was clearly made in good faith and was not a scheme to frustrate justice being done; the respondent did not evince any intention to frustrate the hearing of the said motion on notice or trial or even to unduly delay same. It was thus a wrong exercise of discretion for the trial judge to have shut out the respondent who had clearly shown intention to respond to appellant's motion for injunction by their letter for adjournment, clearly explaining their unforeseen absence on the hearing date. Learned counsel for the respondent concluded his submissions by conceding that while an appellate court will not ordinarily interfere with the exercise of discretion by the trial court, where it is shown, as in this case, that such exercise was either arbitrary or not predicated on a viable principle of law, the appellate court will intervene in the interest of justice. He cited and relied on the cases of **Odigwe vs. JSC Delta State (2011) 10 NWLR (Pt. 1255) 254, Solanke vs. Ajibola (1968) SCNLR 92 at 99, G – H.** The learned counsel urged that this is an appropriate case which deserves the intervention of this court by affirming the decision of the lower court and dismissing the appeal with costs.

My noble lords, I think it is now apparently necessary to remind ourselves that among the statutory duties placed upon the shoulders of any (trial) judge who is about to embark upon hearing and determination of a matter, whether on a main suit or a motion placed before his court, is that after all the preliminaries to the hearing, he must ensure that all the parties in the suit/motion are fully notified of the existence of the matter and same has been duly served with

hearing notice/notices against the date fixed for hearing.

Where there is no such service of the processes including the hearing notice, any step taken by the Judge in hearing the matter is null and void, which must be set aside on appeal.

The bone of contention in this appeal is the grant by the trial court of the motion on notice filed on 8/12/2000 along with the writ of summons and a motion *ex-parte* by the appellant. The motion on notice was fixed for hearing by the trial court to the 19/12/2000. All the processes i.e. Writ of Summons; Motion *Ex-parte*, Motion on notice with all their accompanying processes, are contained on pages 1 26 of the Record of Appeal. The motion on notice in particular, with its affidavits and other attachments, are contained on pages 16 25 of the Record of Appeal. The trial court's proceedings in respect of the said motion on notice are on pages 36 38 of the Record of Appeal. The proceedings were taken on the 19th day of December, 2000. Some portion of the proceedings reads as follows:

"BEFORE HIS LORDSHIP HON. JUSTICE ENILIA IBOK - JUDGE

THIS TUESDAY, THE 19TH DAY OF DECEMBER, 2000

SUIT NO. HC/484/2000

BETWEEN:
THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF NIGERIA ..... PLAINTIFF

AND

MR. JOHN ASUQUO ETIM ..... DEFENDANT

PARTIES Plaintiff/Applicant present represented by Elder Chief Ekong Imana.

APPEARANCE O. E. Obong, Esq., for plaintiff-applicant.

Defendant absent and not represented.
O. E. Obong, Esq., - My Lord this case was to have been taken earlier but we made same on notice and served the defendant .....The motion was filed on 8/12/2000..... The defendant-respondent has been served the processes in this action, he has not stopped building..... Having regards to the circumstances, we submit that the applicant has discharged the burden placed on him by law for the grant of an application of this nature.

RULING
COURT: Upon hearing O. E. Obong, Esq., on his application on Notice of 8/12/2000 and upon reading through the affidavit in support sworn to on behalf of the applicant and the Exhibits attached and also being convinced by virtue of the Affidavit of service of 14/12/2000 filed by one ODO EKPO ARCHIBONG, Chief Bailiff that the Defendant was served with the processes in this

case including the same motion on Notice. I hereby order as follows:

That an interlocutory injunction be and is hereby granted, restraining the defendant/respondent, his workmen, agents, servants, assigns and privies from erecting any structure or continuing with any construction work on the piece of land formerly occupied by the late Mr. Alfred O. Olaiya known as No. 18 Big Qua Town Road, Calabar, or any part thereof, pending the determination of the substantive suit.

It is further ordered that this case be adjourned to 14/2/2001 for mention.

Sgd.
(EMILIA IBOK)
JUDGE
19/12/2000
(underlining for emphasis)

Issue No. 1 at the court below as filed and argued by the learned counsel for the respondent as appellant at the court below, was framed on the issue of fair hearing. It reads as follows:

> **"1. Whether the appellant was accorded a fair hearing or hearing at all before the application of the respondent for the grant of interlocutory injunction was granted".**

The issue was tied to ground 1 of the appellant's notice and grounds of appeal (pp. 39 41 of the record of appeal).

Ground 1 of the grounds of appeal in the appellant's

Notice of Appeal (referred to above) appears more comprehensive in positing the complaints of the respondent against the Ruling of the trial court of 19/12/2000. Below is the ground of appeal and its particulars:

> **"GROUND 1**
> **The learned trial judge erred in law in granting an order of interlocutory injunction restraining the defendant/appellant "from erecting any structure or continuing with any construction work on the piece of land formerly occupied by the late Mr. Alfred O. Olaiya known as No.18 Big Qua Town Road, Calabar or any part thereof pending the determination of the substantive suit" without giving him the opportunity to be heard.**

PATICULARS OF ERROR

a) The defendant/appellant was not given an opportunity to be heard when it was obvious that the application for interlocutory injunction was on notice i.e. inter partes and was coming up before the trial judge for the first time.

b) The defendant/appellant was not given a fair hearing as the learned trial judge granted the interlocutory injunction against the appellant based solely on the evidence presented by the respondent.

c) The refusal of the learned trial judge to give the appellant a hearing constitutes a definite

infringement of his right to a fair hearing as entrenched in Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria and has occasioned a miscarriage of justice.

d) Even when it was confirmed by the learned trial judge that the appellant was served with the court's processes, the appellant should have been given another opportunity to be heard in opposition to the application for interlocutory injunction.

E) It is only when the appellant fails to make use of the opportunity given him to present his case would the learned trial judge have made appropriate orders which might be deemed fit in the circumstances of the case".

The findings and holdings of the court below on this issue, per Rowland, JCA (Rtd. and now late) are as follows:

"From the above, it is patently clear that the learned trial judge anchored the ruling of the court strictly and merely on the fact that the appellant had been served without more. It seems to me that the learned trial judge jettisoned all the known principles of law governing the grant of interlocutory injunctions which is that the other side must be given the opportunity to be heard in opposition to the said application. Hearing to my mind cannot be deemed to be fair if a court, as was done in this case, decides a case on the evidence of one of the parties alone while ignoring the

evidence of the other side. In the case of Gever vs. China (1993) 9 NWLR (Pt. 315) 97 at 106 Katsina Alu, JCA (as he then was) held as follows:

> **….. A situation where a party's case is not considered on the ground that he was absent in court, in the circumstances of this case, is totally unwarranted.**

The above statement of Honourable Justice Katsina-Alu holds good for this case. It must be mentioned at this point in time that the absence of both the appellant and his counsel was explained in a letter written to the court as borne by the records it must also be pointed out that a mere absence of the appellant from the court on the day fixed for hearing of the respondent's application for interlocutory injunction did not mean that he had no defence to offer.

It seems to me therefore that the learned trial judge was in error both in law and equity in granting an interlocutory injunction behind the back of the appellant without even setting down the said application for hearing and determination. The act of the learned trial judge to my mind goes contrary to the laid down principles of fair hearing. Section 36(1) of the 1999 Constitution clearly provides that whenever the need arises for the determination of the civil rights and obligation

of every Nigerian, the person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law. Thus fair hearing in the context of Section 36(1) of the 1999 Constitution encompasses fair hearing in the narrow technical sense of the twin pillar of justice, that is, audi alteram partem and nemo judex in causa sua, as well as in the broad sense of what is not only right and fair to all concerned but also seems to be so. In the instant case, the interlocutory application of the respondent could only have been granted once the appellant was also heard. Doing otherwise runs counter to the letter and spirit of Section 36 of the 1999 Constitution because the order by its very nature depends on the resolution of the contentious issues raised. Under Order 33 Rule 1 (1) and (2) of the Cross River High Court Procedure Rules 1987 there is no provision whatsoever for the lower court to grant an interlocutory injunction ex-parte except in cases of extreme urgency. There was no extreme urgency in this matter. It seems to me that an interlocutory injunction strictly means an injunction granted after due contest between the parties and to last until the final determination of the main suit and such application are properly made on notice to the other party to keep matters in status quo until the determination of the suit. This is distinct from an interim injunction which is to preserve the status quo until a named date or until a further order, or until an application on notice

can be heard, and they are for cases of real urgency. The law frowns on ex-parte orders granted at the back of a party especially where the appellant will be kept in that position without being heard or without deciding the merit of the interlocutory injunction. Thus in Kotoye vs. CBN (1989) 1 NWLR (Pt. 98) 419; (1989) 1 NSCC 238 at 252 Nnaemeka-Agu, JSC held:

> **This is the way I see the dicta of Griffith, CJ in Thomas Edison Ltd. vs. Bullock (1912) 1 SCLR 679 at p. 681 which Chief Williams has cited in argument. The learned CJ, said:**
>
> > **"There is a primary precept governing the administration of justice, that no man is to be condemned unheard; and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence…'**

I entirely agree with him. But there is nothing in the above dicta or in the case itself to warrant the hearing of an interlocutory application for injunction exparte, indeed this court sounded much the same caveat per Ibekwe, JSC (as he then was) when he stated in Wolunchem vs. Wokoma (1974) 1 All NLR

(Pt. 1) 605 at 607:

> **'An interlocutory injunction has a binding effect until it is discharged. Failure to comply with it could lead to disastrous consequences, such as having to commit the offending party to prison for contempt. It is well settled rule of practice in civil proceedings that the party to be affected by the order sought should normally be put on notice'.**

In view of Section 36(1) of the 1999 Constitution the lower court could not have deliberated on the contentious issues and come to conclusions on ex parte hearing or without hearing the appellant. See Adigun v. Attorney General, Oyo State (1987) 1 NWLR (Pt. 53) 678 at 709; Olumesan v. Ogundepo (1996) 2 SCNJ 172 at 184". (Underlining for emphasis)

My lords, I think the comments made by Rowland, JCA, in his ruling which is on appeal, compel me to examine them on legal scale with a view to ascertaining the correct position of the law on the views he expressed.

In the first place, his lordship agreed with the findings of the learned trial judge that the respondent had been served. But his lordship expected something more in addition to the proof of service. His Lordship stated, *inter alia:*

> **"….. It is patently clear that the learned trial judge anchored the ruling of the court strictly and merely on the fact that the appellant had been served without more". (Underlining for emphasis)**

It was not made clear by his Lordship in his judgment what "more" was required. Nwadialo, summarized very aptly, what it all entails:

> **"Where a process has been served, it is necessary for the court to have before it evidence of that fact. The appearance in court of the party served as ordered in the process or on the return-date stated in it or in the hearing notice attached thereto is the strongest evidence of service.**
>
> **Proof of service is particularly needed if the defendant fails to appear in court in response to the process after he has been allegedly served. Because of certain consequences adverse to him of such failure, the court has to be satisfied somehow that service was actually effected. The Rules therefore provide a number of ways of proving service. Each of these however, affords A PRIMA FACIE proof only. So although the court can properly act on it, the defendant is not precluded from rebutting service where there was, in fact, none". (underlining for emphasis)**

See: Nwadialo, F. (2000) Civil Procedure in Nigeria (second Edition), University of Lagos Press, Lagos, pages 261 – 262.

The several ways in which service of process can be validly effected, depending on the process itself (originating

or otherwise) and depending on the mode of service prescribed by rules of court and whether personal service and, or, by service other than personal, proof thereof can validly be acknowledged by certificate of service; affidavit of service; certificate of posting (where service is effected by registered post) and in some Rules of court, by tendering a service Recording Book/Register in which certain details relating to service effected on parties are entered by the officer serving the process or by the registrar of court. Such entry is PRIMA FACIE proof of service (Order 9 Rule 17 of High Court of Cross River Rules). Cap 51 of the Laws of Cross River State of Nigeria, 1979.

The proof of service which was tendered before the learned trial judge with which he was satisfied was the affidavit of service filed by the chief bailiff of that court Mr. Odo Ekpe Archibong. Affidavit of service is a prima facie proof of the facts stated therein and is a valid way of proving service. This is the method of proof provided in the uniform High Court Rules, in all cases or situations where service of any writ or document shall have been effected by a bailiff or other officer of court. "This court, in the case of **Okesuji vs. Lawal (1991) 1 NWLR 661 at 678**, per Olatawura, JSC (Rtd. and now late), said of the affidavit of service as follows:

> **"The purpose of affidavit of service is to convince the court that the persons on whom the processes are to be served have been duly served. Where there is no affidavit of service and the person served with a writ or any other processes of court appears in court, there is no further need to insist on proof of service. There cannot be a better proof than the appearance in**

> **court of the person on whom the process was served".**

The motion on notice for an Order for interim injunction which was granted by the learned trial judge was found by the trial court to have been duly served on the respondent. The learned trial judge stated in her ruling that she was convinced by virtue of the affidavit of service of 14/12/2000 filed by the chief bailiff of that court, Mr. Odo Ekpo Archibong.

I have myself gone through the Affidavit of Service (contained on page 28 of the Record of Appeal which, I believe, was put across the proceedings of the court below). It is the requirement of almost all the High Courts (Civil Procedural Rules) that in all cases where service of any writ or document shall have been effected by a bailiff or other officer, shall, on production, without proof of signature, be PRIMA FACIE evidence of service. In some other courts, a book/register is kept for recording details of return of service (as may be directed by the chief judge). Every entry in such book/register shall be PRIMA FACIE evidence of service of such processes without anything more. Thus, by her reliance on the former method of service (through bailiff of court), I cannot see where the learned trial judge went wrong. My lords, service of process in a trial, is what the spinal cord is, to a human being.

Inspite of the finding by the trial court that there was proper proof of service of the motion on notice for an order of interlocutory injunction, the court below, in its review, commented, per Rowland, JCA, *inter alia*:

"It seems to me that the learned trial judge jettisoned all the known principles of law governing the grant of interlocutory injunctions which is that the other side must be given the opportunity to be heard in opposition to the said application".

Now, three essential things are to be noted about the ruling of the court below:

i. the court below did not make a finding denying that there was service of the motion (in reference) to the respondent;

ii. the respondent did not put up appearance either by himself/counsel on the hearing date of the motion on notice at the trial court to respond orally to the application.

iii. neither the respondent nor his counsel filed a counter affidavit in opposition to the application.

These lead me to the consideration of whether the motion on notice (application in reference) was heard ex-parte by the trial court as held by the court below. It is true that two motions one ex-parte and the other on notice, both on the subject of order for interlocutory injunction were lying before the learned trial judge. It is not in dispute that the learned trial judge (12/12/2000) *ab nitio* declined to hear the motion *ex-parte* and insisted that the plaintiff/appellant should put the defendant/respondent on notice. The respondent was personally served with the motion on notice (for same relief as in the *ex-parte* motion) on 14/12/2000. So, the proceedings of the trial court of 19/12/2000, including the ruling thereof, were in my view, in respect of

the appellants motion on notice as against the motion *ex-parte* or any other. I am therefore, in complete agreement with the learned counsel for the appellant when he submitted thus:

"In fact, the respondent counsel at the court below, conceded that the learned trial judge did not proceed on 12/12/2000 when the matter came before her to grant the application exparte. (See page 10 lines 4 – 5 of the appellant's brief page 56 of the record).

The learned trial judge did not only decline to hear the exparte application for interim injunction on that date, she directed that the motion on notice for interlocutory injunction be served on the respondent so that he could be put on notice and he was duly put on notice. What the learned trial judge did is in accord with the directives handed down by this court in Leedo Presidential Motel Ltd. vs. Bank of the North Ltd. (Supra). How then can the court below be right in holding as it did that the learned trial judge granted the interlocutory injunction exparte?"

By the glaring facts relied upon by the trial court, the court below should not have been under any misapprehension as to which of the two motions was properly placed before the trial court for determination. I think it is too elementary to remind the court below that a motion is on notice where the applicant puts on notice or awareness the attention of the other party or parties involved of the existence of the motion. An *ex-parte*

motion is that in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. *See*: **Leedo Presidential Motel Ltd. vs. Bank of the North Ltd (1998) 10 NWLR (Pt. 570) 353 at pp 379 – 380 H – A.** When a motion on notice is heard by a court, on full satisfaction that same was duly served on the respondent(s) and the respondent(s) for some reasons best known to him/them, refuse(s) to put up appearance or file anything that will indicate his willingness to object to the grant of the motion (by way of counter-affidavit, etc) the court before which the motion on notice is placed for determination cannot be accused of hearing the motion in the absence of the respondent(s). It is true in this matter that the respondent filed a Memorandum of Appearance in respect of the main suit (18/12/2000). That is not to say, however, that the respondent indicated his intention to contest the motion on notice. The usual practice is for the respondent to file a counter affidavit forthwith indicating his willingness to contest the Motion on Notice. Where he has failed to do so, then he has no one else to blame but himself. I think I will align myself with the decision of the court below in **Akpan v. Ekpo (2001) 5 NWLR (Pt. 707) 502 at 513 B – G** (as case which is not too dissimilar to the appeal on hand) where the court held, inter alia:

> **"Further, the appellants did not file a counter-affidavit opposing the application and there was also no indication that they would oppose the application and the counsel to the 8th to 9th defendants who was in court did not oppose the application and asking the 6th defendant if he had anything to say will only attract a request**

> **for adjournment because there is not much that he could do.**
>
> **An adjournment is at the sole discretion of the trial judge and no court will interfere with the exercise of such a discretion unless it was not exercised judicially and judiciously which has not been established in this case.**
>
> **In the instant case, the appellants were duly served with the motion papers, they did not file any counter-affidavit opposing the application or indicate in any way that they would oppose the application.**
>
> **The appellants' counsel has all the opportunity to come to court to oppose the application; if he lives at Uyo or outside Calabar, he should be here a night before the hearing date or arrive at Calabar quite in time to conduct his case.**
>
> **If he fails to leave his home in time to come to Calabar and has a brake failure or any problem that makes him to be late in court, it is not the trial court that should be blamed for that.**
>
> **The doctrine of fair hearing is very fundamental in our jurisprudence and it is fully entrenched in Section 36(1) of the 1999 Constitution and it stipulates nothing more than that a party to a case should be given an opportunity to present his case before the court. See: Okonkwo vs. Okonkwo (1998) 10 NWLR (Pt. 571) 554; Nwokoro vs. Onuma (1990) 3 NWLR (Pt. 136) 22; Osakwe vs.**

Nigerian Paper Mill Ltd. (1998) 1 NWLR (Pt. 568) 1; and Leedo Presidential Motel Ltd. vs. B. O. N. Ltd. (1998) 10 NWLR (Pt. 570) 353.

It therefore means that if a party is duly served and for one reason or the other he could not come to court to present his client's case and there is nothing to show that he would oppose the application before the court and the trial court also did not know why he failed to come to court: that party or his counsel cannot cry that his right of fair hearing has been infringed upon because he was given all opportunity in this world to present his case and he can therefore not take a cover under the rule of fair hearing.

In the instant case, there is no way that the appellants; right of fair hearing could in the slightest imagination be said to have been infringed". (underlining for emphasis)

Although I will delay my consideration of the issue of lack of fair hearing given to the respondents till the end of my discourse, I think I have garnered enough materials to decide issue No. 1 by the appellants against the respondent and I so hold.

Appellants' issue No.2 is on the allegation of injudicious exercise of judicial powers by the learned trial judge in refusing adjournment for the respondent. Now, what gives rise to this allegation is a letter said to have been written to the registrar of the trial court (copied on p.30 of the Record of Appeal). The allegation made before the court below is better explained in the words of the learned counsel

for the respondent (who was for the appellant at the court below). He said (at pp 8 9 of his brief of argument at court below which appears on pp 54 55 of the Record of Appeal), inter alia:

"Issue No.2 relates to Ground 2 of the appellant's Notice & Grounds of Appeal. On the day the said application for interlocutory injunction was fixed for argument before the learned trial judge, the learned counsel for the appellant wrote a letter dated 19th December, 2000 asking for an adjournment to enable him react, on behalf of the appellant, to the application for interlocutory injunction. See page 28 of the record of proceedings. The trial court ignored the letter and proceeded to hear the motion in the absence of the appellant's counsel and the appellant himself. The court was duly informed of the application for adjournment but refused same and went on to hear the motion behind the appellant.

We submit that the refusal to grant an adjournment was injudicious. We submit further that the appellant was denied hearing altogether in circumstances that led to miscarriage of justice.

It is the law that while an application for adjournment is made to a court, the court should bear in mind the requirement that justice should be done to both parties and that it is in the interest of justice that the hearing of the case should not be unduly delayed. It

should grant it, if the refusal of the application is most likely to defeat the right of a party or be an injustice to one or the other, unless there is a good or sufficient cause for this refusal. In Yisi (Nig.) Ltd. vs. Trade Bank Plc (1999) 1 NWLR (Pt.588) 646 this Hon. Court, sitting at the Kaduna Division, held in a similar case where the lower court refused the application of a counsel for adjournment, that such a refusal amounted to a denial of fair hearing and an injudicious exercise of judicial power.

The lower court, when confronted by an application for an adjournment as was the case here, ought to have exercised its discretion judiciously and judicially. Notwithstanding, the learned trial judge refused to acknowledge the existence of such an application. This refusal is not only untenable but also manifestly insupportable".

Apparently, convinced by the above submission the court below held:

"I hold the view that it is the law that while an application for adjournment is made to a court, the court should bear in mind the requirement that justice should be done to both parties and that it is in the interest of justice that the hearing of the case should not be unduly delayed. It should grant it, if the refusal of the application is not likely to defeat the right of a party or be an injustice to one or

the other, unless there is a good or sufficient cause for the refusal. In Yisi (Nig.) Ltd vs. Trade Bank Plc (1999) 1 NWLR (Pt. 588) 464, this honourable court sitting at the Kaduna Division, held, in a similar case where the lower court refused the application of a counsel for adjournment, that such a refusal amounted to a denial of fair hearing and an injudicious exercise of judicial power. The lower court, when confronted by an application for an adjournment as was the case here, ought to have exercised its discretion judiciously and judicially. Notwithstanding the application before the court for an adjournment, the learned trial judge refused to acknowledge the existence of such an application. It seems to me that this refusal is not only untenable but also manifestly unsupportable.

This court also held in Owena Bank (Nig.) Plc vs. Mohammed (1998) 1 NWLR (Pt. 533) 301 at 307 308 per Ogebe, JCA, that:

'It is well known principle of law that the question of an adjournment of a matter is entirely within the discretion of a trial court…. The question of whether or not a matter should be adjourned or continued must always be decided judicially and judiciously, the exercise must not be capricious or made in such a way that injustice would result to either party'.

In the circumstances of this case, I hold the strong view that the learned trial judge

could have even adjourned the matter without a formal application from the appellant for adjournment in the interest of justice. As the matter as borne by the records was coming up before the learned trial judge for the first time, there really was not hurry to hear it especially taking into consideration the fact that she had earlier refused the respondent's application ex-parte.

It seems to me that refusing to adjourn the matter and granting the respondent's application for interlocutory injunction was arbitrary and a denial of a fair hearing to the appellant.

In Bamawo vs. Garrick (1996) 6 NWLR (Pt. 401) 356 at 367 368, this Hon. Court also held that where an adjournment is sought by a party to a case, the application must first be resolved before a decision is reached as to whether or not to proceed with hearing the matter. Doing otherwise would mean violating the principle of fair hearing as enshrined in Section 36(1) of the 1999 Constitution without giving the party seeking for adjournment the opportunity of stating his own case. Order 8 Rule 6 of the High Court Civil Procedure Rules 1987 provides as follows:

> **'The hearing of any motion may from time to time be adjourned upon such terms as the court may deem fit'.**

From the above authorities, I have no doubt in my mind that the appellant's constitutional right to a fair hearing was violated by a refusal by the learned trial judge to first consider the application for adjournment before proceeding to hearing the respondent's application".

My observation, my lords, shows that as at the time the trial court sat to determine the motion on notice (under consideration, i.e. 19/12/2000) nobody drew the attention of that court that there was a document (letter) filed by the respondent asking for adjournment (pages 36 -38 of the record of appeal). This, perhaps, was what accounted for the court not making any reference to the said document and *afortiori,* no reference was made by the trial court on the matter of adjournment of the motion on notice. In being fair to the trial court, I do not think the trial court could make reference to a document that was not placed before it. Learned counsel for the respondent (who appeared and prepared brief of argument for the appellant before the court below), submitted to the court below that:

> **"On the day the application for interlocutory injunction was fixed for argument before the learned trial judge, the learned counsel for the appellant wrote a letter dated 19th December, 2000 asking for an adjournment to enable him to react on behalf of the appellant to the application for interlocutory injunction. See page 28 of the records. It was contended that the trial court ignored the letter and proceeded**

to hear the motion in the absence of the appellant's counsel and the appellant himself. The court was duly informed of the application for adjournment but refused same and went on to hear the motion behind the appellants. It was argued that the refusal to grant an adjournment was injudicious. It was submitted that the appellant was denied hearing altogether in circumstances that led to miscarriage of justice".

This certainly, is what prompted the court below to bewilderment as to why the trial court did not grant adjournment to the respondent. But, was it the true picture of the whole scenario that was displayed before the court below? I think I can, without fear of contradiction, answer this question in the negative. This is for the simple reason that facts never lie, and, this court cannot go outside the Record of Appeal placed before it.

Firstly, the alleged letter (document) written by the learned counsel for the respondent, asking for adjournment is contained on page 30 of the Record of Appeal. Permit me, my lords, to set out the contents, apart from the sender's address, as follows:

"19th December, 2000
The Registrar,
High Court No. 7,
Calabar.

Dear Sir,
SUIT NO. HC/484/2000

We are counsel to the defendant in the above mentioned matter which comes up this morning.

Regrettably, we will not be able to appear before His Lordship in this matter due to earlier scheduled matter at Uyo in Suit No. HC/MISC/288/2000'.

To this end, we should be grateful if the matter is adjourned to either 15.2.2001 or 1.3.2001.

We regret any inconvenience.
Thank you.
Yours faithfully,
for: DUKE, DUKE DUKE & CO.

Sgd.
CHARLES E. DUKE, ESQ.,
SOLICITOR".
(underlining for emphasis)

It is to be noted that:

v. This letter (document) does not bear the semblance of an official communication between the learned counsel and the trial court. Nothing to indicate that the letter was officially filed at the court's registry: no stamp; no date; no signature and name of the receptionist, no time of filing the letter in the registry and no assessment in any form by the registry;

vi. Te letter has not indicated that a copy thereof has been served on the appellant to put him on notice of the existence of that letter.

vii. There is nothing to indicate that the letter got to the knowledge of the learned trial judge before or even during the time she was conducting her proceedings.

viii. The letter was written on the 19th December, 2000, the date fixed for hearing the motion on notice.

This letter, as it appears, was simply dumped on the registry of the trial court on the very day the motion on notice was to be heard. Was it not really meant to arrest the proceedings of that day? I positively think so. And, no court of law, worth its salt, can allow itself to fall into such a trap which is all out of cause an unjustified delay and denial of justice. For whatever purpose that letter was written to the trial court's registry, the other party, i.e. the appellants ought to have been served with a copy thereof. Further, granted that the letter by the respondent was properly placed before the learned trial judge, it is to be noted that grant of an application for adjournment is entirely within the discretionary powers of a judge. The facts and circumstances before the judge are some of the prime factors a judge will consider in exercising his discretion. Grant of adjournment, certainly is not automatic. In **Odusote vs. Odusolte (1971) 1 NMLR 228, at 231**, this court, per Udo Udoma, JSC (Rtd. and now late) made the following warning:

"We must not, however, be taken as accepting the wider proposition implied in the submission that in all cases of this kind, a court is bound to grant adjournment. The question of adjournment is a matter in the discretion of the court concerned and must depend on the facts and circumstances of each case. For, in

matters of discretion, no one case can be authority for another, and 'the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion,' per Kay, learned judge in Jenkins vs. Bashty (1891) 1 Ch. 484 at 495".

Certainly, it is clear that the facts and circumstances of the application which was granted by the trial court are quite distinguishable from the cases relied on by the court below in arriving at their decision: (a) in **Yisi Nig. Ltd vs. Trade Bank Plc** (supra). A formal application for adjournment was properly placed before the trial court and the court was duly informed or it was aware of the existence of the application for adjournment yet it refused to hear same and went ahead to hear the motion behind the appellant; (b) In **Owena Bank Nig. Plc vs. Mohammed** (supra), the trial court came to the conclusion that the defendant had no defence simply because his counsel was not in court to open his defence despite the fact that it filed a copious statement of defence denying the claim. The matter was adjourned for judgment. The appeal was allowed by the Court of Appeal and a retrial ordered. In the present appeal, the respondent did not file a counter affidavit to show that he has a defence to the motion for interlocutory injunction. Thus, all I have been saying boils to one thing: grant or refusal of application for adjournment even where one is properly placed before a court is entirely within the discretion of a judge. And for the judge to exercise such discretion judiciously and judicially, compelling grounds and circumstances must abound upon which the discretion will rest. There is nothing to show that the said

letter or document (P. 30 of the record of appeal) was laid before the trial court for a consideration. Neither the respondent, nor his counsel or his representative, nor even the registrar of court (to whom the letter was addressed) intimated the court of the pendency of that letter, which incidentally, was written (and may have been forwarded to the registrar of court that same date)? Nothing in the record of appeal to indicate acknowledgment of the said letter by the registrar of court. Again, the reasons stated in the brief of argument for the respondent are quite different from the reasons stated in the letter for adjournment. In my view, the learned trial judge did her assignment diligently which is commendable and worthy of emulation by others.

It is important to point out as well, that if a document is meant for the court to take note and act thereon, rules of court have made provisions for formal filing of such a document or documents with the registry of the court, for which a nominal fee is payable upon assessment by the registry staff, who authenticate the filing of that document and proceed to file same for the court's attention. It is only by formal filing that the court becomes seised of the document. All other ways or methods such as writing letters or petitions informing the chief judge/chief justice/head of court and or chief registrar (including his subordinate registrars) are purely administrative, and have no force of law. Thus, the said letter written by the respondent to the registrar of the trial court was purely administrative, and worse still, it was never brought to the attention of the learned trial judge for consideration. To cap it all, Order 54 Rule 6 of the Cross River State High Court (Civil Procedure) Rules (supra), provides as follows:

"A document shall not be filed unless it has

indorsed on it the name and number of the cause, the date of filing, and whether filed by plaintiff or defendant; and on being filed such indorsement shall be initialled by the registrar".

The letter claimed by the respondent to be placed with the registrar of the trial court, was never subjected to such criteria as provided by the Civil Procedure Rules (cited above). I have all reasons to believe therefore, that the said letter cannot be regarded as a legal document. Even if it is placed before the learned trial judge, the best the learned trial judge could do was to discountenance it.

On the principle of fair hearing, it is deeply rooted in both common law and the constitution. It is not a new phrase in our jurisprudence. The Constitution of the Federal Republic of Nigeria 1999 (as amended) encapsulated the doctrine as follows:

Section 36(1) provides:

"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".

While interpreting the above provision, this court, in the case of **Amanchukwu vs. FRN (2009) All FWLR (Pt. 465) 1672 at 1679 – 1680**, held, *inter alia*:

> **"Fair hearing within the meaning of ….. the Constitution, means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. It encompasses not only the compliance with the rules of natural justice, but also audi alteram partem. It also entails doing in the course of trials whether civil or criminal …. all the things which will make an impartial observer leave the court room to believe that the trial has been balanced and fair on both sides of the trial".**

Kalgo, JSC (Rtd.), in **Ekpeto vs. Wanogho (2005) All FWLR (Pt. 245) 1191 at 1203**, hit the nail on the head, when he said:

> **"Fair hearing according to our law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or Tribunal hearing the parties case should be fair and impartial without showing any degree of bias against any of the parties".**

Here again, it should be observed that all the court is emphasizing is that the template of justice must not be one sided but for the parties on both sides. It is to be remembered that all opportunities were given to the respondent by putting him on notice that the motion on notice was going to be heard

on a given date. There was a confirmed proof of service by the trial court's chief bailiff upon which the trial court relied to proceed to grant the motion as prayed. Nothing was placed before that court by way of appearance by any other counsel from the lead counsel's chambers or a counter affidavit filed. The purported letter sent to the registrar of court for adjournment was never placed before the learned trial judge. The discretionary power exercised by the learned trial judge was, in my view, lawful. The respondent having been given that opportunity to be heard of which he failed to avail himself, cannot now complain of breach of the rule of fair hearing. Concomitant to this also, is that the motion for interlocutory injunction having been made on notice to the respondent who duly acknowledged being put on notice, cannot be said to have been heard *ex-parte*, or that the motion was heard behind the respondent's back, as he flatly refused to put up appearance or by filing compelling counter affidavit indicating his willingness to contest the motion. The letter delivered to the registrar of the court, as has been pointed out severally, is, in my view, a ruse and worse still, not placed before the trial court.

Another point which must not escape my memory is the submission by the learned counsel for the respondent that the 15th day of December, 2000, was a public holiday. I have cross-checked from past calendars and diaries and I found that the 15th day of December, 2000, was indeed a Friday. Fridays, are in our current dispensation not declared to be public holidays in this country except where that day has by coincidence fallen within a declared public holiday by the Federal Republic of Nigeria or a State Government as the case may be. For whatever reason that submission was put up before the lower court and upon which that court,

unfortunately relied, is fallacious. That submission ought to have, with due diligence, been discountenanced. I refuse to be carried away by that fallacy. I hereby discountenance that submission.

In conclusion, this appeal is full of merit and it ought to be allowed. Accordingly, I hereby allow the appeal. The judgment of the court below which discharged the order of interlocutory injunction granted by the trial court on 19/12/2000, is hereby set aside. The ruling of the trial court of 19/12/2000 granting an order of interlocutory injunction against the respondent is hereby restored.

The respondent shall pay N100,000.00 (One Hundred Thousand Naira) costs to the appellant in this appeal.

Ibrahim Tanko Muhammad
Justice, Supreme Court

Appearances:

Ikani Agabi for the appellant.
Kenneth Ahia for the respondent with him; Luther K. Onyemlepa.

DATTIJO MUHAMMAD, (JSC): I had the opportunity of reading in draft the lead judgment of my learned brother I. T. Muhammad JSC just delivered. I entirely agree with the lucid reasons leading to the conclusion that the appeal is meritorious. I adopt the judgment as mine in allowing the appeal and abide by the consequential orders including the order on costs made therein.

Musa Dattijo Muhammad
Justice, Supreme Court

BAYANG AKAAHS, (JSC): I read, before now, the lucid

and comprehensive judgment of my learned brother, Ibrahim Tanko Muhammad JSC. I entirely agree that the appeal has merit and ought to be allowed.

The records show that the respondent, who was the defendant at the trial court, was served with the Writ of Summons and Motion on Notice for Interlocutory Injunction on 14th December, 2000 in Suit No. HC/484/2000. This is contained in the affidavit of service by Odo Ekpo Archibong (chief bailiff), See page 28 of the records. Following the service of the said processes on the defendant, Charles E. Duke Esq., a legal practitioner acting for the defendant filed a Memorandum of Appearance on 18/12/2000, (See page 29 of the Records). When the plaintiff took out the Writ of Summons on 8/12/2000, a Motion Ex-parte was also filed wherein the plaintiff prayed:

> **"For an order of interim injunction restraining the defendant/respondent, his workmen, agents, servants, assigns and privies from erecting any structure or continuing with any construction work on the piece or parcel of land formerly occupied by late Mr. Alfred O. Olaiya on the permission of the plaintiff/ applicant or in any other manner trespassing into the said piece of land known as No. 18 Big Qua Town Road, Calabar, or any part thereof, pending the hearing and determination of the Motion on Notice".**

A 6 paragraph affidavit of urgency was filed with the Motion *Ex-parte* and in paragraph 5 of the said affidavit of urgency, which was deposed to by Elder (Chief) Ekong E. Imona, who

is a serving Elder of the Presbyterian Church of Nigeria, he averred as follows:

> **"5. The defendant and his workmen are working round the clock to put up some structures on the land and if not restrained immediately by this Honourable Court, will certainly affect the position of the subject matter, the land in question".**

In paragraphs 23, 24, 25, 26, 27, 28 and 29 of the affidavit in support of the motion on notice, the same Elder (Chief) Ekong E. Imona deposed to the following facts:

> **"23. Recently the defendant has brought workmen to commence the construction of a building at the disputed piece of land.**
>
> **24. The tempo of construction work at the site has been on the increase.**
>
> **25. The plaintiff intends to use the plot of land to build a Manse (sic) for her ministers.**
>
> **26. The type of structure being erected by the defendant is totally out of taste with what the plaintiff intends to erect on the land.**
>
> **27. As at Monday, 4th December, 2000, the Defendant's workmen were still at the foundation digging stage.**
>
> **28. But just two days thereafter, i.e. by 6th December, 2000, the defendant's workmen had almost completed the foundation level.**
>
> **29. Unless restrained by this Honourable Court, the defendant is bent on completion of the building on our land which is not the type of building our church intends to erect thereon".**

Despite the averment in the affidavit of urgency already reproduced, the learned trial judge did not hear the m*otion ex-parte*. The defendant, despite being served with the motion on notice, did not react by filing a counter-affidavit.

On 19th December, 2000, the plaintiff was represented by Elder Chief Ekong Imona and O. E. Obong Esq. appeared for the plaintiff but the defendant was absent and not represented. Learned counsel for the plaintiff then moved the motion on notice for interlocutory injunction. Before granting the Interlocutory Injunction, which was to last until the substantive issue was determined, the learned trial judge ruled that he was convinced by virtue of the affidavit of service of 14/12/2000 filed by one ODO EKPO ARCHIBONG, chief bailiff that the defendant was served with the processes in this case including the motion on notice.

Being dissatisfied with the Ruling, the defendant appealed to the Court of Appeal, Calabar. The court allowed the appeal and discharged the order of interlocutory injunction. The plaintiff aggrieved, hence the appeal to this court.

My lord, Muhammad (JSC), has effectively covered the field and I wish to comment on the aspect of lack of fair

A hearing which was the basis on which the lower court allowed the appeal.

The letter by Charles E. Duke Esq., dated 19th December, 2000, addressed to the Registrar, High Court No. B 7, Calabar, clearly indicated in paragraph 1 that counsel for the defendant was aware the matter was coming up that morning but wrote seeking adjournment to either 15/2/2001 or 1/3/2001 because he had a matter No. C HU/MISC/288/2000 in Uyo on the same day. At the time he wrote the letter seeking adjournment of Suit No. HC/484/2000, he had been served with the motion on notice for interlocutory injunction and made no effort to counter the D averments in the affidavit in support of the motion where the applicant expressed the fears that the defendant was bent on completing the building on the disputed land unless there was a restraining order issued by the court. This amounts to a tacit E admission that the defendant was indeed carrying on building activity on the land. The letter seeking adjournment of the matter to February or March, 2001 was a ploy meant to buy time to enable the defendant complete the work he had F started.

On the letter headed paper on which the letter for adjournment was written, there are three Legal Practitioners in the Firm of Duke, Duke, Duke & Co. consisting of Charles G E. Duke Esq., Victoria E. Duke (Miss) and Chief J. I. E. Duke and any of the other two legal practitioners could have appeared for the defendant on 19/12/2000. No reason was given by Charles E. Duke why none of the other two could H not attend to the matter slated for 19/12/2000.

A cursory glance at the brief prepared by Charles E. Duke Esq. on behalf of the appellant in the court below and the judgment of the court shows that the court agreed

A completely with the submissions of learned counsel. It is unthinkable that the court below went along with the submission of learned counsel that the order for interlocutory injunction was granted *ex-parte* without giving the other B when the court below held:

> **"It seems to me that the learned trial judge jettisoned all the known principles of law C governing the grant of interlocutory injunctions which is that the other side must be given the opportunity to be heard in opposition to the said application".**

D

It was expanding the frontiers of the principle of audi alteram partem to a ridiculous limit. What the court is advocating is that the trial court should have waited for an indefinite period E of time for the defendant to react to the motion on notice for the interlocutory Injunction before hearing the application which required a measure of urgency and by the time the court intervened it would be faced with a fait accompli F because the defendant would have achieved his aim of completing the building on the land. This will be tantamount to shutting the stall after the stalking horse has bolted away.

The interest of both parties must be balanced when G considering the issue of fair hearing. Once there is proof of service of a process requiring action by the opposite party, if that party does not react within the stipulated period, he cannot be heard thereafter that he was not given a fair hearing H after the time has lapsed and an adverse order is made against him. The respondent, in the instant appeal had, an opportunity to counter the averments that he had started a building on the disputed land and needed to be restrained

from continuing with the building. Instead of filing a counter-affidavit to controvert the facts stated in the affidavit in support of the motion, he chose not to do so and when he became aware of the date the motion for injunction was to be heard, he wrote a letter asking for adjournment. The trial court had a discretion to refuse granting the indulgence for the adjournment and proceed to hear the application for the injunction. Since there was no mention of the letter, there is a presumption that the attention of the court was not drawn to the letter even if the registrar received it before the court sat. The court was therefore perfectly right to hear counsel on the motion and grant the injunction and the respondent could not be heard that he was denied fair hearing. The court below therefore completely went off tangent when it allowed the appeal and discharged the order of interlocutory injunction based on lack of fair hearing.

It is on account of this, and the more detailed reasons contained in the lead judgment of my learned brother, Ibrahim Tanko Muhammad JSC, that I allow the appeal, set aside the judgment of the lower court delivered on 9th June, 2003 and restore the order of interlocutory injunction against the defendant/respondent made by the trial court on 19/12/2000.

I also award costs of N100,000.00 in favour of the appellant against the respondent.

K. B. AKAAHS
Justice, Supreme Court

CENTUS NWEZE, (JSC): My lord, Tanko, (JSC), obliged me with the draft of the leading judgment just delivered now. I agree with the reasoning and conclusion. This short contribution would, thus, be limited only to one question,

namely, the propriety of the respondent's complaint woven around the alleged breach of the right to fair hearing.

As, insightfully, pointed out in the leading judgment, he (the respondent) was afforded the opportunity of being heard. However, for reasons best known to him, he squandered the trial court's commendable gesture.

Now, the provisions of Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), relating to fair hearing, are far-reaching and ubiquitous, indeed. Instructively, the rationale of all such binding authorities on the matter is that it (that is, fair hearing) imposes an ambidextrous standard of justice in which the court must be fair to both sides of the forensic conflict, **Ndu vs. The State (1990) 7 NWLR (Pt. 164) 550, 578; Ekpeto vs. Wanogho (2005) ALL FWLR (Pt. 245) 1191, 1203; Amamchukwu vs. FRN (2009) All FWLR (Pt. 465) 1672, 1679.** It, therefore, does not anticipate a standard of justice, which is biased in favour of one party, but prejudices the other, Ekpeto vs. Wanogho (supra).

Above all, it is not a technical doctrine, but one of substance, **Ogundoyin vs. Adeyemi (2001) 33 WRN 1, 14 15; Kotoye vs. C. B. N. (1989) 1 NWLR (Pt. 98) 419, 448.** The touchstone for determining the observance of fair hearing in trials is not the question whether any injustice has been occasioned on any party due to want of hearing. It is rather the question whether an opportunity of hearing was afforded to parties entitled to be heard, **J. C. C. Inter Ltd. vs. N. G. I. Ltd. (2002) 4 WRN 91, 104; Amamchukwu vs. FRN (supra).** It is, thus, outrageous to deny a party an opportunity of hearing, **Onyemeh vs. Egbuchula (1996) 5 NWLR (Pt. 448) 255, 265.**

However, the rule does not apply where counsel had

the opportunity of being heard but chose to be silent, **Omo vs. JSC, Delta State (2000) 7 KLR (Pt. 108) 2623** or made cross-examination impossible, **Oyedeji vs. Akinyele (2002) 3 NWLR (Pt. 755) 586, 613**. Equally, where counsel, deliberately, fails to avail himself of the opportunity of delivering his address, the absence of his address cannot amount to a denial of fair hearing which could vitiate the judgment of the court, **Chidoka vs. First City Finance Co. Ltd. (2001) 2 NWLR (Pt. 697) 216, 227.**

This rule also applies to the litigants themselves. Hence, once afforded a reasonable opportunity of being heard, if a party, without a satisfactory explanation, fails or neglects to attend the sitting of the court, he cannot, thereafter, be heard to complain of lack of hearing, **Okoteha vs. Herwa Ltd. (2000) 15 NWLR (Pt. 690) 249, 258; Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt. 1085) 201; Mirchandani vs. Pinhero (2001) 3 NWLR (Pt. 701) 557; Abubakar v. INEC (2004) 1 NWLR (Pt. 854) 207; Scott Emukpor vs. Ukaube (1979) 1 SC 6; Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt. 50) 356; Omo vs. JSC, Delta State (2000) 12 NWLR (Pt. 682) 444; Nwokocha vs. AG, Imo State (2016) LPELR 40077 (SC).**

My lords, the approach of the respondent's counsel reminds of the eloquent formulation in **Adebayo vs. AG, Ogun State (2008) LPELR 80 (SC) 23 – 24.** For its bearing on the fortune of the respondent's posture, I crave your lordship's indulgence to quote this court's view in extenso:

I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in

the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened.

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

Although the respondent succeeded in bamboozling the lower court by flaunting the said fair hearing defence, that strategy will not work in this court. I shall say no more on this. Suffice it to observe that is for these, and the more detailed, reasons in the leading judgment that I too shall enter an order allowing this appeal.

I abide by the consequential orders in the leading judgment

Chima Centus Nweze
Justice, Supreme Court.

AMIRU SANUSI, (JSC): An advance copy of the judgment prepared by my noble lord, I. T. Muhammad JSC, was made available to me before now. Having perused same, I find myself in complete agreement with the reasoning, and the

conclusion arrived at therein.

On the grouse of the learned respondent's counsel on failure/refusal to adjourn the suit by the trial court despite the letter allegedly written to that court on 19th December, 2000, as per page 30 of the record, it will be out of place to say that there was no proof that the said letter allegedly sent to the trial court's registrar had actually got to the knowledge of the trial court as same was perhaps merely dumped somewhere.

Since evidence abound that the respondent was duly aware of the date the motion was fixed for hearing but he neglected or refused to appear in court, the trial court could proceed with the business of the day as it was done by the trial court, since neither the respondent nor his counsel was presented in court on that day. Also no counter affidavit was filed by him to show that he had defence to the claim to the suit/claim.

In the light of that scenario, it will be absurd for the respondent to claim that he was denied hearing when the trial court proceeded and concluded that matter, in view of the default of appearance on the part of the respondent after having been duly served with hearing notice and there is no genuine excuse which was presented by respondent for his failure to appear in court on the date the matter was fixed for hearing.

Thus, in the light of these few comments of mine and for the detailed and high elucidating discourse of my learned brother, I. T. Muhammad (JSC), and the reasoning and conclusion he arrived at, which I am in entire agreement with also adopt as mine, I also see merit in this appeal. While allowing the instant appeal, I also abide by the consequential orders made in the leading judgment. The appeal is therefore allowed by me.

Amiru Sanusi
Justice, Supreme Court

ALHAJI AUWALU DARMA
AND
ECO BANK NIGERIA LIMITED

SC. 20/2005

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 17TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Fair hearing – Application to litigants.

CONSTITUTIONAL LAW: Fair hearing – Attributes

CONSTITUTIONAL LAW: Fair hearing – A party who was given opportunity to be heard – Whether can be said to be denied fair hearing under S. 36 of the Constitution of Federal Republic of Nigeria, 1999 (as amended).

CONSTITUTIONAL LAW: Fair hearing – Components.

CONSTITUTIONAL LAW: Fair hearing – Failure of counsel to deliver his address – Whether amounts to denial of fair hearing.

CONSTITUTIONAL LAW: Fair hearing – Party duly informed of a hearing – Whether can be said to be denied opportunity for fair hearing.

CONSTITUTIONAL LAW: Fair hearing – Whether there is any difference between fair hearing and fair trial.

CONSTITUTIONAL LAW: Opportunity for fair hearing – Party must avail himself thereof.

COURT: Fair hearing – Duty to create opportunity for fair hearing – Court not obliged to ensure that party avails himself opportunity of fair hearing.

PRACTICE AND PROCEDURE: Fair hearing – Notice of hearing served on defendant who nonetheless absented from Court – Whether hearing was conducted in the absence of defendant.

PRACTICE AND PROCEDURE: Party absent from court – Entitled to be served hearing Notice of the date of judgment – Rationale.

PRACTICE AND PROCEDURE: Service – Failure to serve hearing notice where necessary – Implication.

PRACTICE AND PROCEDURE: Service – Service of hearing notice – Significance.

PRACTICE AND PROCEDURE: Service of hearing notice – Where hearing notice is duly served – Presumption.

PRACTICE AND PROCEDURE: Service of processes – Non-Service – Whether robs court of jurisdiction.

PRACTICE AND PROCEDURE: Undefended List – Order 37 Rule 2 Kano State High Court (Civil Procedure) Rules, 1988 – Whether filing of motion for judgment is required.

Issues for Determination

1. **Whether the learned justices of the Court of Appeal did properly and judiciously stated (sic) the law on the facts when they held that Section 294 of the Constitution of the Federal Republic of Nigeria 1999, Order 37 Rules 11, 12 and 13 of the Kano State High Court (Civil Procedure) Rules 1988 relied upon by the appellant were irrelevant in arriving at a decision that a denial of fair hearing has been occasioned.**

2. **Whether the learned justices of the Court of Appeal did properly and judiciously treated, and considered (sic) all the issues raised by the appellant in his brief of argument on their judgment.**

Facts of the Matter

This appeal is against the judgment of the Court of Appeal, Kaduna Division delivered on 15th July 2004 which dismissed the appeal filed before it by the appellant against the decision of High Court of Justice of Kano State delivered on 9th June 2001 which entered judgment against the respondent under the Undefended List Procedure in the sum of one million, three hundred and ninety five thousand, five hundred and seventy nine naira eighty one kobo (N1,395,579.81k)

The present respondent as plaintiff sued the appellant under the undefended list Procedure at the High Court of Kano State (the trial court) claiming the above mentioned sum being outstanding balance (as at the 30th of April 1999) of an overdraft facility approved in favour of the appellant by the respondent bank. Upon being served with the court process, the defendant/appellant filed Notice of Intention To Contest the claim by filing a seven paragraph affidavit. At the commencement of the trial, the appellant admitted liability of the loan to the tune of three hundred thousand naira only (N300,000) hence the trial court thereupon entered Judgment against him on the sum admitted by the defendant/appellant and it thereafter transferred the suit to the General Cause List with regard to the outstanding balance and adjourned the matter for hearing and ordered parties to file their respective pleadings.

Subsequently, the trial High Court granted several adjournments due to the absence of the defendant, now appellant. The case then was adjourned to 19th June 2001 and on that day, the appellant was also not in court nor represented by a counsel, hence the respondent upon proof that hearing notice was served on him asked the trial court to enter judgment in its favour in respect of the amount outstanding against him (the appellant). The trial court obliged and entered judgment on the outstanding sum of N1,398,589.81k against the defendant/appellant with 10% interest from the date of judgment until full liquidation of the judgment sum.

Aggrieved by the decision of the trial High Court, the defendant (now appellant) appealed to the Court of Appeal, Kaduna Division which dismissed his appeal. The appellant still dissatisfied with the judgment of the Court of Appeal, has now appealed to the Supreme Court vide Notice of Appeal dated 24th of August 2004.

Held (Unanimously dismissing the appeal)

1. *Service of hearing notice presumes knowledge of hearing date*
With the above admission by the appellant, there is no dispute that he was indeed served with hearing notice through his solicitor to appear in court or be represented on 19th June 2001 for the hearing in the case. Since the hearing notice categorically indicated that the matter was slated for hearing on 19th June 2001, it will be of no moment for the appellant to argue that the matter was heard on a date not earlier fixed for hearing. *(P 316 Paras D-F)*

2. *Filing of motion for judgment not necessary under Or. 37 Rule 2 KSHCR 1988*
I think from the plain and unambiguous wordings of the above quoted Rule, the trial court had jurisdiction to enter judgment, once it is satisfied that the plaintiff had led credible evidence in proof of his or its claim without necessarily calling for filing of motion for judgment. The procedure also does not admit for call for adjournment of the matter for any address to be delivered by counsel.
(P 317 Paras G-H)

3. *Components of fair hearing*
The time-honoured principle of fair hearing has, for time immemorial, been entrenched in our laws. The cardinal principles of fair hearing are two fold(s) and are expressed in the following maxims.

(a) "*Audi alteram partem*" meaning that the judge before whom the complaint or grouse is taken must hear the two parties to the dispute, and

***(b) "Nemo Judex* in causa sua" meaning that there should be no evidence of bias, so that one should not be a Judge in one's own cause.**

[Nospetco Oil & Gas Ltd vs. Olorunimbe (2012) 10 NWLR (Pt.1307) 115 or (2012) 13 WRN 108]. *(P 318 Paras A-E)*

4. *The attributes of fair hearing*
The Constitution of the Federal Republic of Nigeria, 1999, as amended, had entrenched by its Section 36, the principles of fair hearing under those provisions which clearly give the criteria of fair hearing which are as follows:

(i) That the court shall hear both sides to a case and also must consider the case of both parties too.
(ii) That the court must also hear all material issues before reaching its decision which may be prejudicial to any party in the case.
(iii) The court must give equal treatment opportunities to all the parties.
(iv) That the proceedings shall be held in public and all concerned shall have access and be informed of such place of public hearing.
(v) In every material decision of the case, justice

must be seen to have been manifestly done and not merely done.

[**Kotoye vs CBN** (2001) FWLR (Pt.49) 567].
(Pp 318-319 Paras E-B)

5. *Where appellant did not avail himself of fair hearing, he cannot complain of lack of fair hearing.*
It must however be stressed here, that the appellant who, by his own deliberate decision, mis-judgment or inadvertence, fails to avail himself of the opportunity of a hearing, he cannot be heard complaining that he was deprived fair hearing. [**Moses Atobatele vs. Chief Dele Faseru (2013) 1 NWLR (Pt.1335) 341].**
(P 319 Paras B-C

Per-Senusi, (JSC):

"**As I said supra, in this instant case, the defendant/appellant was duly served with hearing notice to avail himself on 19th June 2001 for the hearing of the suit, but he fragrantly refused or failed to be in court despite the Hearing Notice served on him and he also did not send any counsel to represent him at the hearing of the suit at the trial court. He or his learned counsel did not also deem it appropriate to send any letter or massage to the court to inform it of his inability to be in court to defend the suit. I am therefore in a tandem with the lower court's resolve to endorse or affirm**

the decision of the trial High Court when it entered judgment in favour of the respondent upon being satisfied that the latter had proved its claim against the defendant/appellant". *(P 319 Paras C-G)*

6. *A party who failed to avail himself of fair hearing cannot complain of lack of fair hearing.*
A party, as a matter of law, should always be allowed to freely put forward his side of the case for the trial court to consider and determine. However, that notwithstanding, a party cannot and should not complain of breach of his right of fair hearing where he refused to avail himself, as in this instant case, of the opportunity provided under the law to present his case. [Okike vs. Legal Practitioners Disciplinary Committee (2005) 15 NWLR (Pt.949) 471, or (2005) 7 SC (Pt.111) 75; AG Rivers State vs. Gregory Udo (2006) 7 SCNL 613 or (2006) 17 NWLR (Pt.1008) 436; Achuzia vs. Ogbonnah (2016) 2 SC.53].
(Pp 319-320 Paras G-A)

7. *Irrelevant statues not applicable*
Section 294(1) of the 1999 Constitution, (as amended), relates to period of 3 months it stipulated within which a trial court should deliver judgment after taking addresses of counsel to the parties. Such provision is therefore of no relevance to this instant appeal at the time plaintiff/ respondent proved or led evidence in proof of his case, there was no defense posed by the appellant due to his default of appearance, hence the question or period for counsel

to deliver their addresses does not arise. On the other hand, Order 37 Rules 11, 12 and 13 of the Kano State (Civil Procedure) Rules of 1988 merely provided procedure to be adopted by court in process of hearing a suit instituted by a party before the High Court. The two sets of laws are therefore of no relevance to this instant case, as rightly held by the lower court. *(P 320 Paras D-G)*

8. *Non-service of process where necessary denies Court of jurisdiction*
The well laid down position of the law is that failure to give notice of proceedings to the opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void. This is so because the court would have no jurisdiction to entertain it. [Obimonure vs. Erinosho (1966) 1 ANLR p.250; Haruna vs. Ladeinde (1987) 4 NWLR (Pt.67) p.941]. *(P 322 Paras C-D)*

9. *Meaning of Hearing Notice*
Hearing Notice is a document that emanates from the registry of a court, giving legal notification to parties in a suit the dates on which the suit would be heard. Once a party or his counsel is served Hearing Notice they are both deemed to have actual knowledge of the date the suit would be heard, and if such a party decides to stay away from court he does so at his own peril. *(P 322 Paras E-G)*

10. *No difference between fair hearing and fair trial*
In **Isiyaku Mohammed vs. Kano N.A. (1968) 1 ALL**

NLR p.42. Ademole CJN explained fair hearing when he said:

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

[Yusuf vs. State (2011) 6-7 SC (Pt.v) P.180**; Akande vs. State (1988) 3 NWLR (Pt.85) p.681; F.C.S.C. vs. Laoye (1989) 2 NWLR (Pt.106) p.652].**
(P 323 Paras D-H)

11. *S. 36, 1999 Constitution only demands that an opportunity must be given to a party to be heard, and not that he must be heard.*
Learned appellant's counsel is under a serious misapprehension of what the doctrine of fair hearing codified in Section 36 of the 1999 Constitution is all about. The constitution and the law only require that an opportunity be given to a party to present his case before a decision is taken against him. It does not allow the party the luxury of holding his adversary and the court to ransom, to willy nilly wait for that party to come to court when he pleases to make out his case. No! The law and the courts give to litigants

equal opportunities and failure by any of the litigants to appreciate this leads to damning consequences. *(P 325 Paras A-C)*

Per Dattijo, Muhammed (JSC):

> **"By the combined operation of Rules 2 and 7 of Order 37 of the trial court's adjectival law, the court is empowered to allow the respondent prove its case and, where made out, decide against the appellant who though served and was aware of the proceedings, deliberately kept away from court. Between 26th January 2000 and 19th June 2001, it is evident from the record of appeal, the appellant was served at least five times with hearing notices in respect of the matter. In default of appellant's appearance in court, judgment was handed over against him. Appellant cannot, in the circumstances, complain.**

This court per Ogunbiyi JSC in Nicholas Chukwujekwu vs. Ukachukwu (2014) LPELR-22115 (SC) has adroitly restated the principle thus:

> **"The duty of the court, trial and appellate, is to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to make sure that a party takes advantage of the atmosphere or environment by involving himself in a fair**

> **hearing of the case. A party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn around to accuse the court of denying him fair hearing. After all there is the adage that the best the owner of the horse can do is to take it to the water; he cannot force it to drink the water.**
>
> **The horse has to do that itself and by the act of sipping. If the horse is unwilling to sip, that ends the matter. The horse will not blame anybody for death arising from the lack of water....."**

[Inakoju vs. Adeleke (2007) 4 NWLR (Pt 1025) 423 at 621-622]. *(Pp 325-326 Paras C-D)*

12. *The function of a hearing notice*

By way of preliminary observations, it is, indeed, correct to assert that hearing notice is the only legal means of getting a party to appear in court, [**Onwuka vs. Owolewa (2001) 28 WRN 89; (2001) 7 NWLR (Pt.713) 695].**

Thus, the issuance of Hearing Notice from day to day on the absent party is imperative, [**Onwuka vs. Owolewa (supra); Fetuga vs. Barclays Bank D.C.O. (1970) 1 All NLR 28].** *(Pp 331-332 Paras H-B)*

13. *An absent party is entitled to be served a Hearing Notice of the date of the judgment.*

In this connection, it must be emphasized that such an absent party is, equally, entitled to be issued and served with a Hearing Notice of the date of the

delivery of the judgment because it is a constitutive part of the hearing of the action, [Okoye vs N. C. and F.C. Ltd (1991) 6 NWLR (Pt.199) 501; Akoh vs. Abuh (1988) 3 NWLR (Pt.85) 696; C.A.F.S. Ltd vs. Mallah (1998) 10 NWLR (Pt.569) 16; Okafor vs. AG, Anambra State and Ors (1991) LPELR-SC.264/1998, 27-28; John A. S.C. Ltd vs. Mfon (2007) 4 WRN 173, 188-189; Dawodu vs. Ologundudu and Ors (1986) 4 NWLR (Pt.33) 104]. *(P 332 Paras B-D)*

14. *Failure to serve Hearing Notice vitiates proceedings*
The consequence is that where such a process is not served, the entire proceedings would be vitiated. It would be immaterial that it was well-conducted, [Habib Nig. Bank Ltd vs. Opemulero and Ors (2000) 15 NWLR (Pt.690) 315; Sken Consult Nig. Ltd vs. Ukey (1981) 1 SC 6; Mbadinuju and Ors vs. Ezuka and Ors (1994) 10 SCNJ 109; (1994) 8 NWLR (Pt.364) 535; Folorunsho vs. Shaloub (1994) 3 NWLR (Pt.333) 413]. *(P 332 Paras E-F)*

15. *Failure of counsel to deliver his address does not amount to denial of fair hearing.*
Equally, where counsel, deliberately, fails to avail himself of the opportunity of delivering his address, the absence of his address cannot amount to a denial of fair hearing which could vitiate the judgment of the court, [Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt.697) 216, 227]. *(P 333 Paras F-G.)*

16. *Fair hearing as it applies to litigants*
This rule also applies to the litigants themselves. Hence, once afforded a reasonable opportunity of being heard, if a party, without a satisfactory explanation, fails or neglects to attend the sitting of the Court, he cannot, thereafter, be heard to complain of lack of hearing [Okoteha vs. Herwa Ltd (2000) 15 NWLR (Pt.690) 249, 258; Adebayo vs. A.-G, Ogun State (2008) 7 NWLR (Pt.1085) 201; Mirchandani vs. Pinheiro (2001) 3 NWLR (PT.701) 557; Abubakar vs. INEC (2004) 1 NWLR (Pt.854) 207; Scott Emukpor vs. Ukaube (1979) 1 SC 6; Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt.50 356; Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444; Nwokocha v Ag, Imo State (2016) LPELR-40077 (SC). *(Pp 333-334 Paras G-B)*

Nigerian Cases cited in this Judgment

Abubakar vs. INEC (2004) 1 NWLR (Pt.854) 207;
Achuzia vs. Ogbonnah (2016) 2 SC.53.
Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt.1085) 201;
AG Rivers State vs. Gregory Udo (2006) 7 SCNL 613 or (2006) 17 NWLR (Pt.1008) 436;
Akande vs. State (1988) 3 NWLR (Pt.85) p.681;
Akoh vs. Abuh (1988) 3 NWLR (Pt.85) 696;
C.A.F.S. Ltd vs. Mallah (1998) 10 NWLR (Pt.569) 16;
Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt.697) 216;.
Dawodu vs. Ologundudu and Ors (1986) 4 NWLR (Pt.33) 104.
F.C.S.C. vs. Laoye (1989) 2 NWLR (Pt.106) p.652.
Fetuga vs. Barclays Bank D.C.O. (1970) 1 All NLR 28.
Folorunsho vs. Shaloub (1994) 3 NWLR (Pt.3330) 413.

Habib Nig. Bank Ltd vs. Opemulero and Ors (2000) 15 NWLR (Pt.690) 315;
Haruna vs. Ladeinde (1987) 4 NWLR (Pt.67) p.941.
Inakoju vs. Adeleke (2007) 4 NWLR (Pt 1025) 427;.
Isiyaku Mohammed vs. Kano N.A. (1968) 1 ALL NLR p.42.
John A. S.C. Ltd vs. Mfon (2007) 4 WRN 173, 188-189;
Kotoye vs. CBN (2001) FWLR (Pt.49) 567.
Mbadinjuju and Ors vs. Ezuka and Ors (1994) 10 SCNJ 109; (1994) 8 NWLR (Pt.364) 535;
Mirchandani vs. Pinhero (2001) 3 NWLR (PT.701) 557;
Moses Atobatele vs. Chief Dele Faseru (2013) 1 NWLR (Pt.1335) 341.
Nicholas Chukwujekwu vs. Ukachukwu (2014) LPELR-22115 (SC).
Nospetco oil & Gas Ltd vs. Olorunimbe (2012) 10 NWLR (Pt.1307) 115 or (2012) 13 WRN 108.
Nwokocha vs. Ag, Imo State (2016) LPELR-40077 (SC).
Obimonure vs. Erinosho (1966) 1 ANLR p.250;
Okafor vs. AG, Anambra State and Ors (1991) LPELR-SC.264/1998, 27-28;
Okike vs. Legal Practitioners Disciplinary Committee (2005) 15 NWLR (Pt.949) 471, or (2005) 7 SC (Pt.111) 75;
Okotha vs. Herwa Ltd (2000) 15 NWLR (Pt.690) 249, 258;
Okoye vs. N. C. and F.C. Ltd (1991) 6 NWLR (Pt.199) 501;
Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444;
Onwuka vs. Owolewa (2001) 28 WRN 89; (2001) 7 NWLR (Pt.713) 695.
Oyeyipo vs. Oyinloye (1987) 1 NWLR (Pt.50 356;
Scott Emukpor vs. Ukaube (1979) 1 SC 6;
Sken Consult Nig. Ltd vs. Ukey (1981) 1 SC 6;
Yusuf vs. State (2011) 6-7 SC (Pt.v) p.180;

Statutes cited in this Judgment
Constitution of Federal republic of Nigeria, 1999 (as amended) S. 36
Constitution of the Federal Republic of Nigeria 1999 S. 294
Kano State High Court (Civil Procedure) Rules 1988 Or. 37 Rules 11, 12 and 13

Representations
ADAM ABUBAKAR with him; Abu Haruna Musa for the Appellant.
ABDULSALAM A. MUSIBAU Esq. for the Respondent

AMIRU SANUSI, (JSC) (Delivering the Lead Judgment): This appeal is against the judgment of the Court of Appeal, Kaduna division delivered on 15th July 2004 which dismissed the appeal filed before it by the appellant against the decision of High Court of Justice of Kano State delivered on 9th June 2001 which entered Judgment against the respondent under the Undefended List Procedure on the sum of one million, three hundred and ninety five thousand, five hundred and seventy nine naira eighty one kobo (N1,395,579.81k).

The present respondent as plaintiff, sued the appellant under the undefended list procedure at the High Court of Kano State (the trial court) claiming the above mentioned sum being outstanding balance (as at the 30th of April 1999) of an overdraft facility approved in favour of the appellant by the respondent bank. Upon being served with the court process, the plaintiff/appellant filed notice of intention to contest the claim by filing a seven paragraph affidavit. At the commencement of the trial, the appellant admitted liability of the loan to the tune of three hundred thousand Naira only

(N300,000) hence the trial court thereupon entered judgment against him on the sum admitted by the plaintiff/appellant and it thereafter transferred the suit to the general cause list with regard to the outstanding balance and adjourned the matter for hearing and ordered parties to file their respective pleadings.

Subsequently, the trial High Court granted several adjournments due to the absence of the defendant, now appellant. The case then adjourned to 19th June 2001 and on that day, the appellant was also not in court or represented by a counsel hence the respondent upon proof that hearing notice was served on him asked the trial court to enter judgment in its favour in respect of the amount outstanding against him (the appellant) and the trial court obliged and entered judgment on the outstanding sum of N1,398,589.81k against the plaintiff/appellant with 10% interest from the date of judgment until full liquidation of the judgment sum.

Aggrieved by the decision of the trial High Court, the defendant (now appellant) appealed to the Court of Appeal, Kaduna division (the court below) which dismissed his appeal. The appellant still dissatisfied with the judgment of the court below, has now appealed to this court vide Notice of Appeal dated 24th of August 2004.

Briefs of argument were filed and exchanged by parties and later amended by them with leave of this court to reflect the new name of the respondent, that is to say, from Oceanic Bank International Nigeria which was its former name, to its present name i.e. Eco Bank Nigeria Limited. In its amended appellant's brief of argument settled by one Adam Abubakar Esq, the appellant proposed two issues for the determination of this appeal as set out below.

1. Whether the learned justices of the Court of Appeal did properly and judiciously stated (sic) the law on the facts when they held that Section 294 of the Constitution of the Federal Republic of Nigeria 1999, Order 37 Rules 11, 12 and 13 of the Kano State High Court (Civil Procedure) Rules 1988 relied upon by the appellant were irrelevant in arriving at a decisions that a denial of fair hearing has been occasioned.

2. Whether the learned justices of the Court of Appeal did properly and judiciously treated, and considered (sic) all the issues raised by the appellant in this brief of argument on their Judgment.

On its part, the respondent in its amended brief of argument also raised two issues for determination which read as below:

(a) Whether the learned justices of the lower court properly held that Section 294(1) of the 1999 Constitution and Order 37 Rules 11, 12 and 13 of the Kano State High Court (Civil Procedure) Rules 1988 relied on by the appellant were irrelevant in arriving at its decision that the appellant was accorded a fair hearing by the trial court before judgment was entered against him on the 19th June 2001?

(b) Whether Ground No.3 of the appellant's Notice of Appeal is competent and if so whether the learned justices of the lower court properly considered the issues distilled from the grounds of appeal when they dismissed the appeal on 15th July, 2004.

Looking at the two sets of issues proposed by the parties, it is

clear that Issue No.1 raised by the appellant is very much similar to corresponding issue No.1 raised by the respondent in the latter's brief of argument. At any rate, I will consider this appeal on the guidance of the issues raised in the appellant's brief and in doing so I will consider the two issues together.

In his submissions on the first issue, the learned appellant's counsel argued that having regard to **Section 294(1)** of the **1999 Constitution** and **Order 27 Rules 11, 12** and **13** of the **High Court (Civil Procedure) Rules 1988 of Kano State**, the appellant has right to address the court, call evidence and which said right was constitutional and statutory. The said right cannot be denied him as was done by the trial court in this instant case. He said the appellant was never aware of the evidence given against him because judgment was based on the evidence and he was not afforded the opportunity of cross examining the said PWI.2

Learned appellant's counsel further submitted that the procedure adopted by the trial court had occasioned him miscarriage of justice and had breached the provisions of **Section 36** of the **1999 Constitution** (as amended) since his right to address the trial court was denied him and therefore he was denied fair hearing which was further aggravated by the delivery of judgment of 19th June 2010, a date on which the matter was not fixed for hearing. He further submitted that date meant or given by the court for hearing of a matter should not be turned into a date for delivering of judgment. He added that the lower court was wrong to have affirmed the trial court's judgment. He urged this court to resolve this issue in favour of the appellant.

With regard to the second issue for determination, the learned counsel for the appellant referred to page 49 of the

printed record and stated that the discretion exercised by the trial court was because the appellant was accorded several indulgences but he refused to make himself present during the trial despite hearing notices served on him. Some of those hearing notices as recapped by respondent's counsel, were borne out by the record include the following:

(i) When the respondent was granted extension of time to file pleading after being ordered to file same on 29/7/1999.

(ii) When the respondent did not make his witnesses available on 26/1/2000.

(iii) When the court adjourned at the instance of appellant on 23/1/2000 on account of the respondents' failure to comply with order to serve hearing notice on the respondents'.

Learned counsel in denial of the above instances argued that it was only on 19th June 2001 that the appellant was absent for the first time. He submitted that the discretion of the trial court was not rightly exercised against the backdrop of the facts that the respondent was also accorded several indulgences in addition to the conduct of the appellant whose absence from court on the 19th June 2001 was a case of an act of inadvertence that was not condoned by the trial court, even though the respondent's several inadvertences were condoned. He referred to **Section 36(1)** of the **1999 Constitution** which provides for fair hearing and argued that it is the duty of the trial court to hear and make findings on evidence placed before it.

Regarding **Section 294(1)** of the **1999 Constitution** (as amended) and **Order 37 Rules 11, 12 and 13 of the Kano State High Court (Civil Procedure) Rule 1988,** learned

appellant's counsel submitted that right to address court, call evidence at the conclusion of the other parties' case, summing up the evidence already given and comment on it, are fundamental, constitutional and statutory. He argued that addresses by counsel form part of the case and failure to hear address of one party vitiates the trial because it is only after the addresses, the court finds the law on the issues fought not in favour of the evidence adduced. It also assists the other party to know what summing up is, on facts and the law as revealed by the evidence before the court.

Learned appellant's counsel further submits that the trial court was wrong when it held that **Order 37** of the **Kano State High Court Rules 1988** relied upon by him were irrelevant in claiming that he was denied fair hearing or that miscarriage of justice was occasioned on him. That is so, because he was not aware of the evidence given against him leading to the court giving judgment against him on the evidence of PWI without him being given an opportunity to cross examine the respondent's witness i.e. PWI. He concluded his arguments by submitting that all these lapses on the part of the trial court's conduct of the proceedings are clear examples of his being denied his Constitutional right of fair hearing and it also amounts to breach of fair hearing in accordance with the principle of *"audi alteram partem and nemo judex in causa sua"*.

Learned appellant's counsel contended that failure to accord any party fair hearing is a fundamental omission which entitled the party so denied, the privilege against whom the judgment was entered to have such judgment set aside on the ground that condition precedent to the exercise of jurisdiction to enter Judgment has not been fulfilled. He cited and relied on the cases of **Olumesam vs Ogundepo**

(1996) 2 SCNJ 185; Ayisa vs Akamji (1995) 7 SCNJ 253; Mbadinuju vs Ezuka (1994) 10 SCNJ 122.

He further submitted that the discretion of the trial court was not rightly exercised against the backdrop that the respondent was accorded several indulgences in relation to the conduct of the case as against the appellant whose absence from court on the 19th June, 2001 was a case of an act of inadvertence that was not condoned by the court, even though the respondent's several inadvertences were condoned. He referred to **Section 36 (1)** of the **1999 Constitution** which provides for the fair hearing and argued that it is the duty of a trial court to hear and make findings on evidence placed before it. He urged the court to resolve this issue in favour of the appellant and to allow this appeal.

In his reaction to the submissions of appellant's counsel, the learned counsel for the respondent argued that the appellant was accorded fair hearing before judgment was entered against him and that there was no breach of constitutional requirement of address as a condition precedent to delivery of judgment. He also referred to the sequence of events which ensued to the effect that the appellant's counsel failed to attend court on the 26th January, 2000. He also referred to subsequent return dates i.e. 28th June, 2000, 11th December, 2000, 25th January 2001, 21st March, 2001 and 19th June 2001. He argued that the appellant was neither in court nor represented by counsel on those days. He contended that prior to the time or date the suit was heard and judgment entered, the appellant's counsel was duly served with a hearing notice and was therefore aware that the suit was to be heard on that day. He submitted that **Order 37 Rule 2** allows a plaintiff (Respondent, herein), to proceed and prove its case or claim in default of appearance by the

A defendant and that the same **Order 37 Rule 7** allows a court to proceed and enter Judgment in favour of the party in court after proof of his or its case.

Learned respondent's counsel argued that the B judgment of the trial court was a default judgment since same was obtained upon default of appearance of the appellant on the date fixed for hearing and that the lower court took cognizance of this fact in its judgment. He argued further, C that **Section 294(1)** of the **1999 Constitution** merely relates to situation where both parties are represented in court and that the position is totally different because the appellant was given all the opportunity of being heard, but he elected to stay D away, despite being given several opportunities to appear and defend the matter consistently right from February 2000 until judgment was entered against him after proof of the suit by plaintiff on the 19th June, 2001 implying abandoning his E defence. He argued that the appellant's reliance on **Order 37 Rules 11, 12** and **13** of the **Kano State High Court (Civil Procedure) Rules 1988** is totally misconceived as this Order and Rules are only relevant in the proper course of F proceeding in a suit when both parties attend court at the trial and led evidence in proof of their respective cases. He stated further, that the appellant chose to abandon his defence by consistently absenting himself from court for 16 months G from 23rd February, 2000 to 19th June, 2001 when judgment was finally delivered, hence he cannot allege a breach of fair hearing. Fair hearing is not a one way traffic and Rules of court are designed to be obeyed to ensure substantial justice H to all the parties before it. He then urged the court to resolve this issue in favour of the respondent.

Issue No.2 queries whether ground 3 of the appellant's Notice of Appeal is competent and if so, whether the lower

A court properly considered the issues formulated from the grounds of appeal when it dismissed the appeal. He stated that this issue arose from ground 3 filed before the Supreme Court.

B The learned counsel to the respondent submitted that ground 3 of the appellant's Notice of Appeal dated 23rd August, 2004 (pages 100-101 of the Record) did not relate to the decision and does not therefore constitute a challenge to C the *ratio decidendi* of the lower court's judgment and therefore, it is incompetent. He cited the case of **SARAKI vs. KOTOYE (1992) 9 NWLR (Pt.264) 156.**

He urged the court to hold that ground 3 did not pose D challenges to any of the ratios of the lower court's judgment of 15th July 2004. He urged that it should be struck out for being incompetent.

He argued further, that if this court holds that ground 3 E is competent, the lower court properly considered the issues emanating from 4 grounds of appeal before them in affirming the judgment of the trial court in the judgment delivered on the 15th of July, 2004. He referred to page 88 of the record F where the lone issue distilled by the court is contained. He submitted that the lower court dealt with this issue and it succeeded in resolving the entire complaints of the appellant. He urged the court to resolve this in its favour and dismiss the G appeal.

It seems to me that the core issue in this appeal is whether the present appellant was denied fair hearing by the trial court when it on 19th June, 2001 entered judgment H against him. In his submission the appellant even conceded that hearing notice was served on his solicitor, vide Particular (C) of Ground 1 of his Notice of Appeal. In the said paragraph, the appellant stated thus:

"That hearing notice supposedly from the court registry was served on the appellant's solicitor's office that the matter was adjourned to the 19th June 2001 for hearing but was unfortunately not brought to the attention of the solicitor on account of mix up occasioned by the fact that the receiving clerk was on relief duty, due to the absence of the Secretary who was away for burial".

With the above admission by the appellant, there is no dispute that he was indeed served with hearing notice through his solicitor to appear in court or be represented on 19th June 2001 for the hearing in the case. Since the hearing notice categorically indicated that the matter was slated for hearing on 19th June 2001, it will be of no moment for the appellant to argue that the matter was heard on a date not earlier fixed for hearing.

The printed record of the court clearly shows that even when the matter came up before the trial court on 21st March, 2001 for the hearing, the learned counsel for the plaintiff (now respondent) misled the court that the defendant (now appellant) was not served with hearing notice which justified the latter's absence from court. The trial court, at the instance of the defendant/appellant, adjourned the suit to 19th June, 2001 for hearing when it ruled as below:

"Case is adjourned to 24/4/2011 for hearing new hearing notice to be sent to the defendant"

However, there was no other sitting held by the trial court until on 19th June 2001. On the 19th June 2001 the defendant/appellant was absent and not represented by his counsel, hence the respondent's counsel informed the trial court that the case was for hearing and that the appellant was duly served with hearing notice. He also got leave of the court to allow him to lead evidence in proof of his case and was so obliged by the trial court after which the trial court delivered its judgment in favour of the plaintiff/respondent.

It is also the contention of the learned counsel for the appellant, that the trial Judge was wrong to have entered judgment against him immediately after the plaintiff/respondent closed its case.

Now let us consider the provision of **Order 37 Rule 2** of the **Kano State High Court (Civil Procedure) Rules 1988**. The Rules states thus:

"The trial judge shall at or after trial direct judgment to be entered as he shall think right and no motion for judgment shall be necessary in order to obtain such judgment".

I think from the plain and unambiguous wordings of the above quoted rule, the trial court had jurisdiction to enter judgment, once it is satisfied that the plaintiff had led credible evidence in proof of his or its claim without necessarily calling for filing of motion for judgment. The procedure also does not admit for call for adjournment of the matter for any address to be delivered by counsel.

This brings me to another grouse of the appellant that by adopting this procedure, his right of fair hearing was breached or violated. The time-honoured principle of fair

A hearing has, for time immemorial, been entrenched in our laws. The cardinal principle of fair hearing are two fold(s) and are expressed in the following maxims.

B **(c) "*Audi alteram partem*" meaning that the judge before whom the complaint or grouse is taken must hear the two parties to the dispute, and**

C ***(d)*** ***"Nemo judex* in causa sua" meaning that there should be no evidence of bias, so that one should not be a judge in one's own cause.**

D

See **Nospetco Oil & Gas Ltd vs. Olorunimbe (2012) 10 NWLR (Pt.1307) 115 or (2012) 13 WRN 108.** The **Constitution of the Federal Republic of Nigeria**, **1999**, as E amended, had entrenched by its **Section 36**, the principle of fair hearing under those provisions which clearly give the criteria of fair hearing which are as follows:

F **(vi) That the court shall hear both sides to a case and also must consider the case of both parties too.**

(vii) That the court must also hear all material issues before reaching its decision which may be G **prejudicial to any party in the case.**

(viii) The court must give equal treatment opportunity to all the parties.

(ix) That the proceedings shall be held in public and all H **concerned shall have access and be informed of such place of public hearing.**

(x) In every material decision of the case, Justice must be seen to have been manifestly done and not

A **merely done.**

See **Kotoye vs CBN (2001) FWLR (Pt.49) 567.**

It must however be stressed here, that the appellant B who, by his own deliberate decision, mis-judgment or inadvertence, fails to avail himself of the opportunity of a hearing, he cannot be heard complaining that he was deprived fair hearing. See the case of **Moses Atobatele vs** C **Chief Dele Faseru (2013) 1 NWLR (Pt.1335) 341**. As I said supra, in this instant case, the defendant/appellant was duly served with hearing notice to avail himself on 19th June 2001 for the hearing of the suit, but he fragrantly refused or failed D to be in court despite the hearing notice served on him and he also did not send any counsel to represent him at the hearing of the suit at the trial court. He or his learned counsel did not also deem it appropriate to send any letter or massage to the E court to inform it of his inability to be in court to defend the suit. I am therefore in a tanderm with the lower court's resolve to endorse or affirm the decision of the trial High Court when it entered judgment in favour of the respondent F upon being satisfied that the latter had proved its claim against the defendant/appellant.

A party, as a matter of law, should always be allowed to freely put forward his side of the case for the trial court to G consider and determine. However, that notwithstanding, a party cannot and should not complain of breach of his right of fair hearing where he refused to avail himself, as in this instant case, of the opportunity provided under the law to H present his case. See **Okike vs Legal Practitioners Disciplinary Committee (2005) 15 NWLR (Pt.949) 471, or (2005) 7 SC (Pt.111) 75; AG Rivers State vs Gregory Udo (2006) 7 SCNL 613 or (2006) 17 NWLR (Pt.1008)**

436; Achuzia vs Ogbonnah (2016) 2 SC.53.

Now on the question posed by the learned counsel for the appellant as to whether the lower court was right in holding that **Section 294 of the 1999 Constitution** (as amended) and **Order 37 Rules 11, 12 and 13 of Kano State High Court (Civil Procedure) Rules 1988**, were relevant, I think that point requires no dissipation of energy to answer. Considering the antecedents of this appeal. I also not see the relevance of those provisions to the facts and surrounding circumstances of this appeal. **Section 294(1)** of the **1999 Constitution**, (as amended), relates to period of 3 months it stipulated within which a trial court should deliver judgment after taking addresses of counsel to the parties. Such provision is therefore of no relevance to this instant appeal at time the plaintiff/respondent proved or led evidence in proof of his case, there was no defense posed by the appellant due to its default of appearance, hence the question or period for counsel to deliver their addresses does not arise. On the other hand, **Order 37 Rules 11, 12** and **13** of the **Kano State (Civil Procedure) Rules of 1988** merely provided procedure to be adopted by court in process of hearing a suit instituted by a party before the High Court. The two sets of laws are therefore of no relevance to this instant case, as rightly held by the lower court.

In the light of my discourse above, I hereby resolve the dual issues raised by the appellant, against him.

On the whole, this appeal is adjudged by me to be unmeritorious. It is accordingly dismissed by me. I affirm the judgment of the lower court which had also affirmed the judgment of the trial court.

Appeal is dismissed.

Amiru Sanusi

Justice, Supreme Court

RHODE-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 this appeal, but in view of the importance of fair hearing in all trials, I add a few words of my own.

The respondent as plaintiff sued the appellant as defendant at a Kano High Court under the undefended list procedure for the sum of N1,395,579.81k (One million, three hundred and ninety-five thousand, five hundred and seventy-nine naira, eighty-one kobo).

Full judgment could not be obtained under the undefended list procedure, so the case was transferred to the general cause list. Several adjournments were granted due to the absence of the defendant in court. Thereafter the case was adjourned to 19th June 2001 for hearing. The plaintiff asked the court to enter judgment in its favour since neither the defendant nor his counsel was in court. Judgment was entered in favour of the plaintiff. The issue is:

Whether the court was right to enter Judgment in the absence of the defendant.

Relying on **Order 37 Rule 2** of the **Kano State of Nigeria High Court (Civil Procedure) Rules 1988**, the Court of Appeal concluded that the trial Judge was right to enter judgment on 19th June, 2001 in the absence of the defendant/appellant.

The Court of Appeal observed:

"By the service of the hearing notice on the

appellant through his solicitor, the appellant was undoubtedly given an opportunity to be heard but his house was in shambles and he failed to attend court on the said 19th June 2001 when the matter came up for hearing....."

The well laid down position of the law is that failure to give notice of proceedings to the opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void. This is so because the court would have no jurisdiction to entertain it. See **Obimonure vs. Erinosho (1966) 1 ANLR p.250; Haruna vs. Ladeinde (1987) 4 NWLR (Pt.67) p.941.**

Was Hearing Notice served on the defendant for the hearing of the Case on 19th June, 2001?

Hearing notice is a document that emanates from the registry of a court, giving legal notification to parties in a suit the dates on which the suit would be heard.

Once a party or his counsel is served hearing notice they are both deemed to have actual knowledge of the date the suit would be heard, and if such a party decides to stay away from court he does so at his own peril.

By his own admission learned counsel for the defendant/appellant admitted being served hearing notice for 19th June 2001.

Ground 1(c) of the Notice of Appeal reads:

"That hearing notice supposedly from the court registry was served on the appellant's solicitor's office that the matter was adjourned to 19th June 2001 for hearing but was unfortunately not brought to the attention of

the solicitor on account of mix up occasioned by the fact that the receiving clerk was on relief duty, due to the absence of the secretary who was away for burial".

I am satisfied that hearing notice was served on the defendant.

Was the defendant denied fair hearing?

Section 36 of the **Constitution** guarantees every one fair hearing in our courts.

In **Isiyaku Mohammed vs. Kano N.A. (1968) 1 ALL NLR p.42. Ademole CJN** explained fair hearing when he said:

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

See **Yusuf vs. State (2011) 6-7 SC (Pt.v) p.180; Akande v State (1988) 3 NWLR (Pt.85) p.681; F.C.S.C. vs. Laoye (1989) 2 NWLR (Pt.106) p.652.**

Order 37 Rule 2 of the **Kano State of Nigeria High Court (Civil Procedure) Rules 1988** states that:

> **"If when a trial is called on, the plaintiff appears and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him".**

Hearing notice was served on the defendant/appellant for the hearing of this case by the trial court on 19th June 2001. The defendant/appellant decided not to come to court to defend the action. By virtue of **Order 37 Rule 2** supra the plaintiff/respondent proceeded to prove his claim in the absence of the defendant/appellant. It is clear that the defendant/appellant denied himself a hearing by not coming to court to defend the claim. The trial court was right to enter judgment in the absence of the defendant.

For this and the more detailed reasoning in the leading judgment. I too dismiss the appeal.

Olabode Rhodes-Vivour
Justice, Supreme Court

DATTIJO MUHAMMAD, (JSC): This appeal further underscores why appeals to the Supreme Court should come only by leave of court. Twelve years after the appeal on such a clearly trivial issue had been filed, it is heard and determined now. Look at the injustice the system caused the appellant. The judgment sum by all means a fortune when the appellant commenced the suit, is a pathetic pittance today!

My lord Sanusi (JSC) has, clearly stated the law on the issue the appeal raises rightly, concluded that the appeal lacks merit and that it should be dismissed. I entirely agree.

Learned appellant's counsel is under a serious misapprehension of what the doctrine of fair hearing codified in **Section 36** of the **1999 Constitution** is all about. The

constitution and the law only requires that an opportunity be given to a party to present his case before a decision is taken against him. It does no t allow the party the luxury of holding his adversary and the court to ransom, to willy nilly wait for that party to come to court when he pleases to make out his case. No! The law and the courts give to litigants equal opportunities and failure by any of the litigants to appreciate this leads to damning consequences.

By the combined operation of **Rules 2 and 7 of Order 37** of the trial court's adjectival law, the court is empowered to allow the respondent prove its case and, where made out, decide against an appellant who though served and was aware of the proceedings, deliberately kept away from court. Between 26th January 2000 and 19th June 2001, it is evident from the record of appeal, the appellant was served at least five times with hearing notices in respect of the matter. In default of appellant's appearance in court, judgment was handed over against him. Appellant cannot, in the circumstances, complain.

This court per **Ogunbiyi (JSC)** in **Nicholas Chukwujekwu vs. Ukachukwu (2014) LPELR-22115 (SC)** has adroitly restated the principle thus:

> **"The duty of the court, trial and appellate, is to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to make sure that a party takes advantage of the atmosphere or environment by involving himself in a fair hearing of the case. A party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn around to accuse the**

court of denying him fair hearing. After all there is the adage that the best the owner of the horse can do is to take it to the water; he cannot force it to drink the water.

The horse has to do that itself and by the act of sipping. If the horse is unwilling to sip, that ends the matter. The horse will not blame anybody for death arising from the lack of water....."

See also **Inakoju vs. Adeleke (2007) 4 NWLR (Pt 1025) 427 at 621-622.**

In the case at hand the appellant who has himself, see the appellant's brief, admitted being severally served with hearing notices to attend court and trial, cannot in law assert the denial of fair hearing. See **Maikyo vs. Itodo (2007) 7 NWLR (Pt 1034) 443.**

It is for the foregoing but more so the fuller reasons supplied in the lead judgment of my brother Amiru Sanusi (JSC) that I also dismiss the unmeritorious appeal and abide by the consequential orders contained in the very judgment.

Musa Dattijo Muhammad,
Justice, Supreme Court

BATA OGUNBIYI, (JSC): I read in draft the lead judgment of my learned brother Sanusi, (JSC). I agree that the appeal is devoid of any merit and I dismiss same also.

The appeal at hand lays emphasis on the importance of fair hearing and which same could not be obtained in the absence of adequate service by way of notice.

Judgment in this appeal was entered in favour of the plaintiff/respondent in an undefended suit. The obvious

issue begging for answer therefore is:

Whether the court was right to enter judgment as it did in the absence of the defendant?

The learned trial judge entered judgment in favour of the respondent in the liquidated sum of N1,398,519.81 with 10% interest at court's rate from 19th day of June 2011 till full satisfaction of judgment.

On his appeal to the Court of Appeal, Kaduna Judicial Division, the appellant was refused favour and his appeal was dismissed.

It is the appellant's argument that the determining factor in this case is its developments thereof as against the background antecedence and thereby questioning whether the learned justices of the Court of Appeal properly and judiciously stated the law on the facts as they did in respect of **section 294** of the **Constitution of the Federal Republic of Nigeria, 1999** and **Order 37 Rule 11, 12** and **13** of the **Kano State High Court (Civil Procedure) Rules 1988**.

It is the submission of learned counsel also that the appeal court justices were in error when they held that **Order 37 Rules 11, 12**, and **13** of the **Kano State (Civil Procedure) Rules 1988** were irrelevant in arriving at a decision that a denial of fair hearing has been occasioned; that the appellant was not aware of the evidence given against him. Therefore he was not given an opportunity of cross-examining the sole witness PW1. This, learned counsel remarks has violated rules of procedure and an infringement of the provisions of **section 36(1)** of the **Constitution**; that the contravention of the rules of procedure and constitutional requirement for address before judgment resulted in non-observance of the rules of natural justice which cannot be waived and the hearing cannot be said to be fair in the circumstances.

Counsel relied on the authority of the case of **Obodo vs. Olomu & 1 Anor (1987) 6 SCNJ page 72 at 83.**

From the record of appeal before us the following facts amongst others are obvious and settled:

1. The appellant upon being served with the writ of summons under the undefended cause list entered an appearance and indeed filed a notice of intention to defend the action.
2. At subsequent return dates when the matter came up in court, i.e. 28th June 2000, 11th December 2000, 25th January 2001, 21st March 2001 and 19th June 2001, the appellant was neither in court nor represented by counsel.
3. Prior to the date when the suit was heard and judgment entered by the trial court (19th June 2001), the appellant's counsel was duly served with a hearing notice and was therefore aware that the suit was to be heard on that day.
4. The Kano State High Court Rules by the provisions of Order 37 Rule 2 allows a plaintiff (respondent in this instance) to proceed to prove its claims in default of appearance by the defendant (appellant herein).
5. The same rules of the Kano State High Court make provisions in Order 37 Rule 7 for a court to proceed to enter judgment in favour of the party in court after proof of its case.
6. The judgment of the trial court was a default judgment since same was obtained upon the default of the appellant to appear in court on the date fixed for hearing (19th June, 2001).

In its judgment of 15th July, 2015, the lower court took cognizance of the forgoing facts and reasons and affirmed the

trial court's judgment.

Section 294(1) of the **1999 Constitution** under reference also provides as follows:

> **"Every court established under the constitution shall deliver its decision not later than ninety days after the conclusion of evidence and final address ....."**

As rightly submitted by the learned counsel for the respondent, **Section 294(1) of the 1999 Constitution** relates to an ideal situation where both parties are represented in court and took the opportunity thus presented to place their evidence before the court and to subsequently address the court upon conclusion of a full trial. The same cannot be said of the situation at hand wherein the appellant was given all the opportunity of being heard from the moment he was served with the writ of summons and all the relevant court processes.

For all intents and purposes, the appellant in the circumstance at hand cannot be heard to complain genuinely in this case. This is because the record is well clear that he was availed of several opportunities to appear and defend the matter in court but he elected deliberately to stay away. The evidence shown is from 23rd February 2000 until judgment was entered against him after proof on the 19th June 2001, thereby impliedly abandoning his defence.

There is also the evidence of service of the hearing notice on the appellant's counsel with the hearing notice indicating that the matter was being heard on the 19th June, 2001 but he refused or neglected to attend. It was the respondent only that deemed it necessary to attend court

hearing on the 19th June, 2001. In accordance with the Rules of the Kano State High Court, the counsel proved its claims and obtained judgment.

As rightly submitted also, by the respondent's counsel, appellant's reliance on **Order 37 Rules 11, 12** and **13** of the **Kano State High Court (Civil Procedure) Rules 1988** does not help his (appellant's) case. This is because the Rule concerns the proper course of proceedings in a suit when both parties attend court at the trial and conducted their cases accordingly. The case at hand is a misnomer because both parties did not join issues by way of pleadings and represented in court on the dates fixed for hearings.

The learned trial judge was right and cannot be faulted when he entered judgment in favour of the respondent upon the application of counsel and the lower court was rightly so in endorsing same. See the case of **Thomas Eniyan Olumesan vs. Ayodele Ogundele Ogundepo (1996) 2 SCNJ 172 at 184** wherein **Iguh, JSC** observed and said thus amongst others:

> **".....Accordingly a hearing can only be said to be fair when, inter alia all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused or denied a hearing or is not given an opportunity of being heard, such hearing cannot qualify as a fair hearing under the *audi alteram partem* rule".**

See also **Briggs vs. Briggs (1992) 3 NWLR (Pt.228) 128.**

The lower court was in perfect position when it held at pages 92-93 of the record and said:

> **"It is therefore abundantly clear that the appellant was given full opportunity of being heard. A person who was not heard but was given ample opportunity of being heard which he failed to make use of cannot therefore complain of loss of fair hearing."**

See **Unibiz (Nig) Ltd V. CBCL Ltd (2003) 6 NWLR (Pt.816) 402 at 452,** and **Adigun V. A-G. Oyo State Ors. (1987) 1 NWLR (Pt. 53) 678.**

With the few words of mine supra, and particularly relying on the comprehensive reasonings and conclusion arrived at by my learned brother **Sanusi, (JSC)** in his lead judgment, I also agree that this appeal is devoid of any merit and is hereby dismissed by me.

I abide by all orders made in the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the leading judgment which my Lord, Sanusi, (JSC), just delivered now. I endorse the conclusion that, being unmeritorious, this appeal should be dismissed. This short contribution is limited only to the submission relating to the issuance *vel non* of the hearing notice on the appellant's counsel.

By way of preliminary observations, it is, indeed, correct to assert that hearing notice is the only legal means of getting a party to appear in court, **Onwuka vs. Owolewa (2001) 28 WRN 89; (2001) 7 NWLR (Pt.713) 695.** Thus, the issuance of hearing notice from day to day on the absent party is imperative, **Onwuka vs. Owolewa (supra); Fetuga**

vs. Barclays Bank D.C.O. (1970) 1 All NLR 28.

In this connection, it must be emphasized that such an absent party is, equally, entitled to be issued and served with a hearing notice of the date of the delivery of the judgment because it is a constitutive part of the hearing of the action, **Okoye vs. N. C. and F.C. Ltd (1991) 6 NWLR (Pt.199) 501; Akoh vs. Abuh (1988) 3 NWLR (Pt.85) 696; C.A.F.S. Ltd vs. Mallah (1998) 10 NWLR (Pt.569) 16; Okafor vs. AG, Anambra State and Ors (1991) LPELR-SC.264/1998, 27-28; John A. S.C. Ltd vs. Mfon (2007) 4 WRN 173, 188-189; Dawodu vs. Ologundudu and Ors (1986) 4 NWLR (Pt.33) 104.**

The consequence is that where such a process is not served, the entire proceedings would be vitiated. It would be immaterial that it was well-conducted, **Habib Nig. Bank Ltd vs. Opemulero and Ors (2000) 15 NWLR (Pt.690) 315; Sken Consult Nig. Ltd vs. Ukey (1981) 1 SC 6; Mbadinjiju and Ors vs. Ezuka and Ors (1994) 10 SCNJ 109; (1994) 8 NWLR (Pt.364) 535; Folorunsho vs. Shaloub (1994) 3 NWLR (Pt.3330) 413.**

This prescription is premised on the radical nature of the right enshrined both in the common law principle of audi alteram partem, **Omabuwa vs. Owhofatsho (2006) 5 NWLR (Pt.972) 40, 67; Tubonemi vs. Dikibo (2006) 5 NWLR (Pt.974) 565, 587-588; Ag Rivers State vs. Ude (2006) 17 NWLR (Pt.1008) 436; Bamgboye vs. UNILORIN (1990) 10 NWLR (Pt.622) 290; Deduwa vs. Okorodudu (1976) 9-10 Sc 329 and Section 36(1) of the Constitution of the Federal Republic of Nigeria, Ukpo vs. Imoke (2009) 1 NWLR (Pt.1121) 90, 171; Salau vs. Egeibon (1994) 6 NWLR (Pt.348) 32; Ceekay Traders Ltd vs. G.M.C. Ltd (1992) 2 NWLR (Pt.222) 132.**

It has, thus, long been settled that failure to effect services on a party renders the eventual verdict void, **Habib Nig. Bank Ltd vs. Opemulero and Ors (supra); Sken Consult Nig. Ltd vs. Ukey (supra); Mbadiniju and Ors Ezuka and Ors (supra); Folorunsho vs. Shaloub (supra).**

However, the situation in the instant case is, clearly, different. As shown in the leading judgment, by his own admission, learned counsel for the appellant was served with hearing notice for June 19, 2001. He, however, squandered that prime opportunity to canvass his case. He cannot, therefore, be heard to complain.

In this context, therefore, the plea of fair hearing is unavailing. The fair hearing rule does not apply where counsel had the opportunity of being heard but chose to be silent, **Omo vs. JSC, Delta State** (2000) 7 KLR (Pt.108) 2623 or made cross-examination impossible, **Oyedeji vs. Akinyele (2002) 3 NWLR (Pt.755) 586, 613.** Equally, where counsel, deliberately, fails to avail himself of the opportunity of delivering his address, the absence of his address cannot amount to a denial of fair hearing which could vitiate the judgment of the Court, **Chidoka vs. First Class Finance Co. Ltd. (2001) 2 NWLR (Pt.697) 216, 227.**

This rule also applies to the litigants themselves. Hence, once afforded a reasonable opportunity of being heard, if a party, without a satisfactory explanation, fails or neglects to attend the sitting of the court, he cannot, thereafter, be heard to complain of lack of hearing **Okotha vs. Herwa Ltd (2000) 15 NWLR (Pt.690) 249, 258; Adebayo vs. AG, Ogun State (2008) 7 NWLR (Pt.1085) 201; Mirchandani vs. Pinhero (2001) 3 NWLR (PT.701) 557; Abubakar vs. INEC (2004) 1 NWLR (Pt.854) 207; Scott Emukpor vs. Ukaube (1979) 1 SC 6; Oyeyipo vs.**

Oyinloye (1987) 1 NWLR (Pt.50 356; Omo vs. JSC, Delta State (2000) 12 NWLR (Pt.682) 444; Nwokocha vs. Ag, Imo State (2016) LPELR-40077 (SC).

It is for these, and the more detailed, reasons in the leading judgment, that I, too, shall dismiss this appeal as devoid of merit.

Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court.

CHRISTOPHER DIBIA
AND
THE STATE

SC. 256/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 10TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Fresh issue on appeal – Necessity for leave.

APPEAL: Issues for determination – When issues for determination are deemed abandoned.

APPEAL: Right of appeal – Whether right of appeal lies directly from the High Court to the Supreme Court.

COURT: Concurrent findings – Attitude of Supreme Court thereto.

COURT: Determination of issues – Issues deemed abandoned – Whether court has jurisdiction to determine.

*COURT: Jurisdiction of Court of Appeal – **Section 246 of the Constitution of Federal Republic of Nigeria, 1999** – Scope.*

COURT: Proof – Attempted robbery – When court can convict.

COURT: Supreme Court – Whether has jurisdiction to entertain appeals from the High Court.

CRIMINAL LAW AND PROCEDURE: Proof of armed robbery – Consideration thereof.

CRIMINAL LAW AND PROCEDURE: Proof – Contradictions in the evidence adduced in proof of the main offence – Whether court can rely on the same evidence to convict for a lesser offence.

CRIMINAL LAW: Armed Robbery – Ingredients – How proved.

CRIMINAL LAW: "Attempt to commit an offence" – Meaning.

CRIMINAL LAW: Attempt to commit an offence – What constitutes.

CRIMINAL LAW AND PROCEDURE: Proof – Whether similar facts are required to prove attempted robbery and robbery.

CRIMINAL LAW AND PROCEDURE: Proof – Where there is reasonable doubt – Effect

EVIDENCE: Admissibility of confessional statement – Objection to admissibility on ground of involuntariness – When appropriate to raise.

EVIDENCE: Admissibility – Whether a retracted confessional statement is admissible – How determined.

EVIDENCE: Confessional statement – A retracted confessional statement – Principles governing admissibility.

EVIDENCE: Confessional statement – Retraction of confessional statement – Consideration thereof.

EVIDENCE: Confessional statement – When sufficient to convict an accused

EVIDENCE: Proof – Admission – Quality of admission sufficient to discharge burden of proof.

EVIDENCE: Retracted confessional statement – Determination of whether accused made a retracted confessional statement – Standard of proof required..

WORDS AND PHRASES: "Reasonable doubt" – Meaning.

WORDS AND PHRASES: "Attempt to commit an offence" – Meaning.

Issues for Determination

1. Whether, on a calm review of the totality of the evidence

of the prosecution and the defence, juxtaposing of same with the evidence of the appellant on the other side of an imaginary scale reveals that the defence of the appellant is probable such that he is entitled to the statutory benefit of doubt without conviction for a lesser offence of attempted robbery (Grounds 1, 2 and 3).

2. Taking into consideration the entire circumstances of this case can it be equitably contented that "Facts and circumstances" outside Exhibit A did corroborate Exhibit A such that the appellant may be said to be the maker of Exhibit A in law and equity? (Grounds 4 and 5).

Facts of the Matter

The appellant and one Vincent Eze (m) were arraigned and prosecuted at the High Court of Justice of Ogun State sitting at Ota, in Ota Judicial Division for the offences of conspiracy to commit armed robbery, and armed robbery contrary, respectively, to Sections 6 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act. The offences were allegedly committed on 8th December, 2006.

On the said 8th December, 2006 between 7.30 p.m. and 8.30 p.m, the Appellant and two others (including Vincent Eze) were said to have entered the house of PW.1 and PW.2 at No. 2, Ishola Ola Jesu Street, Ishashi, Akute in Ogun State.

At this juncture they seemed to hold a private consultation among themselves and thereafter the appellant shouted on the PW.1 to give them money and that they did not come for the cake. The appellant, further ferociously told the PW.1 and PW.2 that they were "armed robbers". They quickly pounced on the PW.1, and seizing him, they marched him into the house. They held him hostage as they went from the parlour to the other rooms searching for money whilst their prisoner, the

PW.1, was insisting that there was no money. They threatened to kill him if he refused to give them money. They gave PW.1 a thorough beating. An elderly woman (later identified as PW.1's mother-in-law) slumped and fainted in the course of the violent molestations of the occupants of the house. While these violent attacks or harassments were going on the three assailants heard shouts "thief, thief" from the neighbourhood. The appellant, Vincent Eze and the third person who later escaped successfully decided to give up their project and beat a retreat. They hurriedly ran out of the house. As they were running to get away from the house, the neighbours of PW.1 and PW.2 chased and pursued them to an uncompleted house. In the premises of the uncompleted house the appellant was pulled out of the soakaway, wherein he had hidden himself, and was arrested. Vincent Eze was also caught, as he was trying to scale over the fence. The third person had successfully escaped arrest. The appellant and Vincent Eze were taken to the police station.

At the end of evidence the appellant was convicted of attempted robbery his appeal to the Court of Appeal was not successful hence the further appeal to the Supreme Court.

HELD: *(Unanimously dismissing the appeal)*

1. The jurisdiction of the Court of Appeal

Section 246 of the said Constitution, 1999, as amended, has specifically vested jurisdiction on the Court of Appeal to hear and determine appeals from the decisions of the Code of Conduct Tribunal established by the Fifth Schedule to the same Constitution, and the decisions of the National and State Houses of Assembly Election Tribunals and Governorship Election Tribunal. These election

tribunals are established by Section 285 of the Constitution, 1999, as amended. *(P 364 paras F-H)*

2. *There is no right of appeal from the High Court to the Supreme Court*

The respondent has made a point that from the High Court, appeals do not lie direct to the Supreme Court. Section 233 of the constitution reinforces that point. That also is the point decidedly stated by this court in OGEMBE vs. USMAN (2011) (Supra) that it is well settled that an appeal to this court must relate to the decision of the Court of Appeal, and not from the decision of any High Court, be it Federal, Federal Capital Territory or State High Court. [ODUNTAN vs. AKIBU (2000) 13 NWLR (Pt. 685) 446, and KWAJAFFA vs. BANK OF THE NORTH (2006) 5 SC (PT. 1) 103 at 118, (1999) 1 NWLR (Pt. 587) 423].

Now, in relation to the preliminary objection, I do not agree with the respondent, upon my painstaking perusal of Grounds 2, 3, 4 and 5 in the Amended Notice of Appeal, that the said grounds are directed against the decision of the trial High Court, and not against the decision of the court below that affirmed the conviction and sentence of the appellant by the trial High Court. The grounds merely trace the origin of the errors committed by the Court of Appeal, in affirming the decision of the trial High Court. In other words, Grounds 2, 3, 4 and 5 complained that the court below erred in law to have affirmed errors of law committed by the trial court. *(Pp 364-365 paras H-E)*

Per Eko, (JSC):

"Let me, for emphasis, state that this court lacks jurisdiction to hear and determine appeals directly from the decision of any High Court. The only exception to this is that a fresh issue, not arising from the decision of the Court of Appeal may, by leave of this court first sought and granted, be entertained by this court only in deserving special circumstances. In GABRIEL vs. THE STATE (1989) NWLR (Pt. 122) 459; (1999) CLR, 1298 SC a belated special defence of accident, not pleaded at the trial, was refused by this court as a fresh issue with the emphatic statement of the law by Belgore, JSC (as he then was) that:

> **"The appeal court will not entertain a new issue not raised in the trial court, except questions of law or constitution and only with the leave of court".**

The cases: OREDOYIN vs. AROWOLO (1989) 4 NWLR (Pt. 114) 72; FADINA vs. GBADEBO (1978) 3 SC 219; SHONEKAN vs. SMITH (1964) NMLR 59 were cited with approval on the point".
(Pp 365-366 paras H-E)

3. *Raising fresh issue on appeal Need for leave*

These Grounds 2, 3, 4 and 5 were not originally part of the Notice of Appeal filed on 5th June, 2012. They were incorporated into the Amended Notice of Appeal upon leave sought, on 20th August, 2013, and

granted by this court on 11th November, 2015. Accordingly, it can not also be said that the appellant is thereby raising fresh issues without prior leave sought and granted. I find no substance in the preliminary objection, and it is accordingly dismissed. *(P 365 paras F-G)*

4. *When an issue for determination is deemed abandoned*
I have read the appellant's Amended Brief. Tried as I did, I could not find anywhere in the entire gamut of the brief, spanning 24 pages of 12 font impression, any iota of argument on whether or not the appellant was the maker of Exhibit A, a confessional statement. Issue 2 has been abandoned. No argument has been raised therefrom for any utilitarian consideration. The general rule, as stated by Onu, JSC, in 7-UP BOTTLING CO. vs. ABIOLA & SONS (2001) 6 SC. 73; (2001) 13 NWLR (pt. 730) 469, and it is now settled, that an appellate court must consider all the issues placed before it. However, an issue formulated but not argued cannot be said to have been properly placed before the appellate court for consideration. The litigant or his counsel who abandons an issue formulated from a ground(s) of appeal is on the same pedestal as the litigant or counsel who has not raised an issue from the Ground(s) of Appeal. Such litigant or his counsel will, naturally, be presumed to have abandoned the issue because arguing it will not be favourable to him. *(P 367 paras A-E)*

5. *A court does not rightly determine an abandoned issue*
In our adversarial jurisprudence the court does not argue any issue for any litigant. Accordingly, an

appellant who abandons an issue for the determination of the appeal would not, reasonably, expect the court to breathe oxygen into the abandoned issue and decide the appeal on it. The court, conscious of its duty under Section 36(1) of the Constitution, 1999, as amended, to always maintain its independence and impartiality will not, as a rule, argue or decide any issue abandoned by the party who has formulated it for the determination of his case. *(P 367 paras E-H)*

6. *It was not right for the appellant to have retracted his confessional statement*
Even on the merits, having read the record of appeal myself, does it lie in the mouth of the Appellant to say that he did not make Exhibit A? I do not think so. The Appellant and his counsel were present and live in court when the PW.3 and PW.4 testified in open court. At page 59 of the Records the PW.3's evidence that, upon his arrest, the appellant "said that he was ready to confess that the driver of the PW.1 was the one who sent them" was left unscathed and not subjected to cross-examination. It remains intact and wholesome against the appellant.
(Pp 367-368 paras H-B)

Per Eko (JSC):

> **"The PW.4, through whom the Exhibit A was put into the body of the totality of evidence as the investigating police officer, gave detailed circumstances under which he recorded the statement of the appellant, contained in**

Exhibit A. The PW.4 charged and cautioned the appellant before he volunteered his statement, which he implored the PW.4 to record for him because of the injury he sustained on his arm. The appellant made the statement in English language and it was so recorded in English language by the PW.4. The appellant read the statement before thumb printing it willingly as mark of his authorship of Exhibit "A". The same procedure was recorded and repeated before the superior police officer and the appellant still adopted Exhibit "A" as his voluntary statement. The statement was admitted into the body of the evidence through PW.4 without any slight protest or objection. These pieces of evidence, mostly extrinsic to Exhibit "A", do not admit of any ambiguity or doubt that the appellant was the maker of Exhibit "A". *(P 368 paras B-G)*

7. *Attitude of the Supreme Court to concurrent findings which are not perverse*

These apart, there are other pieces of evidence coming from the PW.1, PW.2, PW.3 and PW.4 that amply support the concurrent findings of fact that facts and circumstances outside Exhibit A exist to confirm or corroborate the veracity of Exhibit A. The findings are not perverse. It has been the consistent practice of this court not to disturb concurrent findings of fact that are not perverse and which are based on the evidence before the trial court. [OYIBO IRIRI & ORS. vs. ESERORAYE

ERHUARHOBARA & ANOR. (1991) 3 SC. 1; O.O. EBOLOR vs. FELICIA OSOYANDE (1992) 7 SCNJ 217; UKPE IBODO vs. IGUISI ENORAFIA (1980) 5-7 SC. 42 at 55-6]

My lords, I repeat and stand on my earlier statement on the consistent policy or practice of this court not to disturb concurrent findings of fact that are not perverse and which are supported by the evidence available at the trial. As found by the courts below, Exhibit A and the pieces of evidence from the testimonies of PW.3 and PW.4 support these concurrent findings and conclusions made by the two courts below. *(Pp 368-369; 370 paras G-B; E-F)*

8. *The attitude of the Supreme Court to the concurrent findings of two lower courts*

Where there are concurrent findings of facts by the lower courts, this court, I repeat, just also as I agree with the respondent, will not interfere with such findings unless the appellant can prove that the findings are perverse. See further on this: BANKOLE vs. PELU (1991) 8 NWLR (pt. 211) 523 at 550; NWAMBE v. THE STATE (1995) 3 NWLR (pt. 384) 385 at 409; ADELEKE v. ASERIFA (1990) 3 NWLR (Pt. 136) 94 at 104. *(P 380 paras F-G)*

9. *A retracted confessional statement is admissible*

The appellant, on established authorities emanating from this court, including ONYENYE vs. THE STATE (2012) 15 NWLR (pt. 1324) 586 AT 619; OGUDO vs. THE STATE (2011) 18 NWLR (pt. 1278) AT 45; EGBOGHONOME vs. THE STATE (1993) 7 NWLR (pt. 306) 383; EDET EKPE vs. THE STATE

(1994) 12 SCNJ 131; GABRIEL vs. THE STATE (2010) 2 NWLR (pt. 1190) 280, ETC. did agree and concede correctly in law that a retracted confessional statement is admissible in evidence in law. It is a valid piece of evidence on which a court of law can act on to determine the guilt of the maker.
(Pp 370-371 paras G-A)

10. The admissibility of a retracted confessional statement
It is not the law, based on the inconsistency rule, that a retracted confessional statement that is credible ceases to be reliable merely because the maker, upon his subsequent change of heart, had made a retraction of his previous confession. As this court, per Rhodes-Vivour, JSC, stated in CHUKWUKA OGUDE vs. THE STATE (2011) (supra) at page 26:

> **"A court can convict on the retracted confessional statement of an accused person but before this is properly done the trial judge should evaluate the confession and (the) testimony of the accused person and all the evidence available. This entails the trial judge examining the new version of event presented by the accused person which is different from his retracted confession and the Judge asking himself the following questions:**
> **(a) Is there anything outside the confession to show that it is true?**
> **(b) Is it corroborated?**
> **(c) Are the relevant facts made in it true as they can be tested?**
> **(d) Did the accused person have the opportunity of committing the offence charged?**
> **(e) Is the confession possible?**
> **(f) Is the confession consistent with other facts which have been ascertained and have been proved?**

[KANU & ANOR. vs. KING (1954) 14 WACA p. 30; MBENU vs. STATE (1988) 3 NWLR (pt. 84) P. 615; STEPHEN vs. STATE (1986) 5 NWLR (pt. 46) p. 78].

These tests have been designed to ensure that no wrong person is convicted on a purported confession that turns out to be a hoax or sham. It is one of the steps designed by the courts to ensure that only persons who admit their guilt truly are convicted for their misdeeds. *(Pp 371-372 paras B-C)*

11. The standard required to prove that the accused made the retracted confessional statement.
The standard of proof the trial judge requires for corroboration of the fact that the accused person made the retracted confession is not as high as this appellant has made it to appear. Where there is circumstantial evidence corroborating the contents of a retracted confessional statement, the trial judge may draw the inference that the confessional statement was made by the accused and that his attempt to retract the same was a belated after thought; so stated by Coker, JSC, IN RE: NWAHURUBIA Unreported SC 476/66 of 9th December, 1966. *(P 372 paras D-F)*

12. *When to convict the accused based on his confessional statement.*
Once the confessional statement is supported and consistent with other evidence, the accused may be convicted on the basis of his confessional statement. See THE STATE vs. BAKO Unreported SC. 219/1968 of 29th November, 1968 per Lewis, JSC. *(P 372 paras F-G)*

13. *Whether an accused person can be convicted solely on his confessional statement*
I agree with the court below from a plethora of authorities, including NWACHUKWU vs. THE STATE (2008) 4 WRN 1; OKE UTUYORUME vs. THE STATE (2010) 43 WRN 162 at 187, that an accused person can be convicted solely on his confessional statement. It is apparent on the records that the conviction of the appellant based on his confession in Exhibit "A", which the Court of Appeal duly affirmed, was done by the trial court upon taking into consideration the cautionary practice of subjecting the retracted confession to the tests prescribed in CHUKWUKA OGUDO vs. THE STATE (supra). The evidence of the PW.1, PW.2, PW.3 and PW.4 tend to corroborate Exhibit "A", particularly as to the truth of the confession and its making, the opportunity the appellant had to commit the attempted robbery and the other facts relevant to the proof of the offence of attempted robbery.

Once a confession is shown to be free and voluntary, positive and proved to be true, the maker, the accused person, can be convicted on it. See

JOSEPH OKORO ABASI vs. THE STATE (1992) NWLR (pt. 260) 383. *(Pp 375-376; 375 paras G-C; C)*

14. *Similar facts are not required to prove attempted armed robbery and armed robbery.*
The appellant criticizes the concurrent findings of the two courts on a number of grounds; one of which is that Exhibit A ought to have been subjected to serious scrutiny, particularly that the two courts had cast doubt on the integrity of PW.1 and PW.2, tantamounting to their suggesting that PW.1 and PW.2 lied on oath when they testified that the Appellant was armed at the material time and that he stole valuable properties from them. The fallacy in this argument lies in the fact that the offences of armed robbery and attempted robbery are two distinct offences: the facts proving one are not the same as the facts proving the other.
(Pp 372-373 paras G-B)

15. *When there are contradictions in the evidence in proof of the principal offence, the court can convict for a lesser offence if the evidence led on it is consistent.*
The facts the prosecution needs to establish armed robbery and attempt to commit robbery are not the same. Even when there are material contradictions in the evidence of prosecution in relation to the principal offence, and the case put up by the prosecution to prove the lesser offence is compact and consistent there could be conviction for the lesser offence, where no reasonable doubts exist in the prosecution's case. This usually happens when the facts proving the lesser offence are just merely a set of

facts, out of other several facts proving the principal offence. *(P 373, paras B-D)*

16. What constitutes attempt to commit an offence?
To constitute an attempt to commit a particular offence the act or conduct of the accused, in furtherance of his intention to commit the offence and in relation to the principal offence, must be something more than mere preparation for the commission of the principal offence. The act or conduct of the accused must be such that but for an intervening circumstance the principal offence would have been completed or executed. [OZIGBO vs. COMMISSIONER OF POLICE (1976) 1 ALL NLR 133]. *(P 373 Paras E-G)*

17. Definition of "attempt" to commit an offence.
In JEGEDE vs. THE STATE (2001) 14 NWLR (pt. 733) 264 at 275 G-H, where Belgore, JSC. (as he then was) restates the definition of the offence of attempt to commit an offence thus:

> **"Then what is the offence of attempts under our law? If a person intends to commit an offence, and in the process of putting his intention into execution by means he has adopted to its fulfillment, and thereby manifests his intention by some overt act, but actually falls short of his intention to commit that offence intended either through an intervening act or voluntary obstruction is said to commit the attempt of the offence intended The end to which the accused**

> **arrived must have been substantially attained but for the intervention which he never volunteered to meet or anticipated which prevented the commission of the offence intended".**

The evidence of PW.4, the Investigating Police Officer, who recorded the confession of the appellant is material. Exhibit "A" was admitted in evidence through the PW.4. It was tendered and admitted in evidence without any objection or any protest whatsoever. The PW.4 was not cross-examined and/or discredited on the procedure he adopted in the recording of Exhibit "A". The PW.3 had earlier testified, also unscathed, that when they arrested the appellant, and before he was handed over to the police, he had posited and averred "to confess that the driver of the PW.1 was the one who sent them". These pieces of evidence from PW.3 and PW.4 are quite extrinsic to Exhibit "A". I cannot fault the concurrent confession in Exhibit "A".
(Pp 373-374; 375 paras G-D; C-G)

18. When to raise objection to the admissibility of confessional statements on ground of involuntariness
There was no injustice done to the appellant by the dismissal of his retraction of Exhibit "A". The practice in our courts of law, in criminal trials, is that the apt and precise time to raise objection to the admissibility of a confessional statement on grounds of involuntariness is when the prosecutor is seeking to tender the statement in evidence against the accused

person. The objection must be raised timeously for the trial judge to order trial within-trial in order for him to determine whether the statement was made freely and voluntarily in order for it to be admissible in evidence. *See* GBADAMOSI vs. THE STATE (1992) 11 12 SCNJ 265 wherein Ogundare, JSC re-stated the law that when an issue has arisen whether a confessional statement is admissible in evidence that issue of law must be determined by the trial Judge at the time the statement is being tendered in evidence; and that it cannot be received in evidence without the prosecution first establishing that it was made voluntarily. [DAURA vs. THE STATE (1980) 8 11 SC. 236 at 238; (1980) 12 NSCC 334 at 345].

In the instant case, notwithstanding that the Appellant did not raise such legal issue as to the inadmissibility of Exhibit "A" on account of any involuntariness of its making the prosecution went extra mile to establish the voluntariness of the making of Exhibit "A" by the Appellant through the evidence of the PW.3 that was left unscathed. The integrity and credibility of Exhibit "A" are not in any doubt. *(Pp 376-377 paras C-A)*

19. *A confessional statement is not inadmissible because it was retracted.*

The law is settled that a confessional statement, as Exhibit "A", does not become inadmissible merely because it was retracted subsequently by its maker. See AKPAN vs. THE STATE (1992) 7 SCNJ 22; AREMU vs. THE STATE (1991) 7 NWLR (pt. 201) 1. Exhibit "A' was a credible evidence at the trial

notwithstanding the retraction of Exhibit "A" by the appellant, the trial judge was right to have acted on it to convict him for attempted robbery. [SHITTU vs. THE STATE (1970) 1 ALL NLR 233].
(P 377 paras A-C)

20. *How to prove the offence of armed robbery.*

This provision of section 11 has to be read with section 1(2)(a) of the Act which is the punishment provision for the offence of armed robbery the appellant was charged with. To prove this offence the prosecution must establish:

"i. the intention to steal
ii. stealing which means taking or converting to one's use another person's movable property with the intention to permanently deprive the owner the use of the thing
iii. that at the time of the robbery the accused was armed with a gun or firearm, or was in company with any person so armed".

The prosecution had certainly fallen short of proving, wholly and satisfactorily, the offence of armed robbery the appellant was charged with. The facts proved by the prosecution, which though cannot sustain the offence of armed robbery, amply sustained attempted robbery. In other words, since the facts prove wholly the offence of attempted robbery but are not enough to prove the offence of armed robbery charged the conviction for the lesser offence of attempted robbery is unassailable.

(Pp 378; 379 paras B-F; A-C)

Per Eko (JSC):

> **"I had earlier reproduced the material portion of Exhibit "A". There is no doubt whatsoever that Exhibit "A" proves the offence of attempted robbery. The evidence of PW.1 and PW.2 amply corroborate Exhibit "A". The Two witnesses testified that in furtherance of the appellant's intention to rob them or steal money from them he had physically assaulted them and their son, dragging them from room to room as he and his gang searched wardrobes and drawers for money. PW.1 and PW.2, corroborating Exhibit "A", further testified that it was the shout of "Thief, Thief" that scuttled their further molestation by the appellant and his intention to steal from them. They also confirmed the threat of appellant to kill or harm the PW.1 if no money was made available to him.** *(P 379 paras C-F)*

21. *Proof of attempted robbery*

As held by the Court of Appeal, a mere threat to use actual violence on the person of another with intent to steal his property is enough to ground the charge of attempted robbery. If the intended robbery had not been thwarted or prevented by the extraneous shouts of "Thief, Thief" the Appellant would have actualised his manifest intention to steal with violence or threats of violence to the persons of PW.1, PW.2 and their son. In ALHAJI YAKUBU SANNI vs. THE STATE

(1993) 4 NWLR (Pt. 285) 99 at page 199, relied upon by the Court of Appeal to affirm the conviction of the Appellant for attempted robbery, it was held that "where the thing done is such that if not prevented by an extraneous cause would have led to the commission of the offence "intended, the offence of attempt has been committed.

The appellant has, in this appeal, made so much fuss about the diminished integrity of the evidence of PW.1 and PW.2 consequent upon the concurrent findings by the courts below which could justifiably lead to a reasonable conclusion that both witnesses did not tell the truth in their evidence that the appellant and his gang stole their money and that at the time they were robbed the appellant was armed with a gun. This argument completely loses its force when in law the appellant could be convicted solely on his confession contained in Exhibit "A", and that the appellant did nothing at all tangible to cast reasonable doubt on the credibility and validity of Exhibit "A". With or without the evidence of PW.1 and PW.2 the conviction and sentence of the appellant for the offence of attempted robbery can be sustained on the available evidence. The conviction of the appellant for attempted robbery was on facts. *(Pp 379-380 paras F-F)*

22. *How to discredit a witness*

Logic and common sense demand that the defendant who intends to indict or discredit a witness for the prosecution, should give the witness for the prosecution an opportunity to explain himself. The appellant did not give PW.1 and PW.2 any

opportunity to be heard on his line of defence that was an attack on the integrity of this couple. I should think *audi alteram partem,* a cardinal rule of fair hearing, works both ways. Whoever would be indicted is entitled to be given an opportunity to be heard in his defence. Trial by ambush, good in guerrilla warfare, is not part of our jurisprudence. *(P 381 paras B-E)*

23. *The quality of admission as means of proof*
The courts have always regarded an extra-judicial confession, properly proved and admitted in evidence, as having the same effect as a plea of guilt by the accused in open court: See ONUNGWA vs. THE STATE (1976) 1 SC (Reprint) 74. A free and voluntary confession of guilt, whether judicial or extra-judicial, if it is direct and positive is sufficient proof of guilt and a conviction could be based entirely on such evidence, as in the instant case. See R. vs. WALTER SKYES (1913) 8 CAR 233 at 236-237, cited with approval by Idigbe, JSC, in ONUNGWA vs. THE STATE (supra). There is after all, no evidence stronger than a person's own confession. [UFOT vs. THE STATE Unreported SC. 449/66 of 9th December, 1966] per Coker, JSC. *(Pp 381-382 paras G-C)*

24. *Meaning of "Reasonable doubt"*
More importantly, the prosecution has to prove its case "beyond reasonable doubt", and reasonable doubt is the "doubt that prevents one from being firmly convinced of a defendant's guilt or the belief that there is a real possibility that the defendant is not guilty" see Black's Law Dictionary 9th Ed., where it

was further explained that:

Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. *(Pp 385-386 paras G-C)*

25. *Where there is reasonable doubt what court should do.*
It is also a well-established principle that once there is doubt about the guilt of an Accused, the said doubt should be resolved in his favour See Namsoh vs. State *(1993) 5 NWLR (Pt. 292) 129 SC.* In this case, the trial court sifted through the evidence of the said PW1 and PW2, and resolved the doubt as to whether he was armed or stole anything, in the appellant's favour. However, from the totality of the evidence, including the Exhibit A, which formed part of the prosecution's case, there was no doubt at all that he was at PW1's house to rob the place. *(P 386 paras D-F)*

Nigerian Cases cited in this Judgment

7-up Bottling Co. vs. Abiola & Sons (2001) 6 SC. 73; (2001) NWLR (pt. 730) 469;
Adeleke vs. Aserifa (1990) 3 NWLR (pt. 136) 94;
Adelumola vs. State (1988) 1 NWLR (pt. 73) 683;
Akpan vs. The State (1992) 7 SCNJ 22;
Alhaji Yakubu Sanni vs. The State (1993) 4 NWLR (pt. 285) 99;

Aremu vs. The State (1991) 7 NWLR (pt. 201) 1;
Bankole vs. Pelu (1991) 8 NWLR (pt. 211) 523;
Chukwuka Ogude vs. The State (2011) (supra) at page 26;
Daura vs. The State (1980) 8 11 SC. 236 (1980) 12 NSCC 334;
Edet Ekpe vs. The State (1994) 12 SCNJ 131;
Egboghonome vs. The State (1993) 7 NWLR (pt. 306) 383;
Fadina vs. Gbadebo (1978) 3 SC 219;
Gabriel vs. The State (1989) NWLR (pt. 122) 459; (1999) CLR, 1298 SC;
Gabriel vs. The State (2010) 2 NWLR (pt. 1190) 280;
Gbadamosi vs. The State (1992) 11 12 SCNJ 265;
Jegede vs. The State (2001) 14 NWLR (pt. 733) 264;
Joseph Okoro Abasi vs. The State (1992) NWLR (pt. 260) 383;
Kanu & Anor. vs. King (1954) 14 WACA p. 30;
Kwajaffa vs. Bank of the North (2006) 5 sc (pt. 1) 103 (1999) 1 NWLR (pt. 587) 423;
Mbenu vs. State (1988) 3 NWLR (pt. 84) p. 615;
Namsoh vs. State (1993) 5 NWLR (pt. 292) 129 SC;
Nwachukwu vs. The State (2008) 4 WRN 1;
Nwambe vs. The State (1995) 3 NWLR (pt. 384) 385;
O.o. Ebolor vs. Felicia Osoyande (1992) 7 SCNJ 217;
Oduntan vs. Akibu (2000) 13 NWLR (pt. 685) 446;
Ogembe vs. Usman (2011) 17 NWLR (pt. 1277) 638;
Ogudo vs. The State (2011) 18 NWLR (pt. 1278) at 45;
Oke Utuyorume vs. The State (2010) 43 WRN 162;
Onungwa vs. The State (1976) 1 sc (reprint) 74;
Onyenye vs. The State (2012) 15 NWLR (pt. 1324) 586;
Oredoyin vs. Arowolo (1989) 4 NWLR (pt. 114) 72;
Oyibo Iriri & Ors. vs. Eseroraye Erhuarhobara & Anor. (1991) 3 SC. 1;
Ozigbo vs. Commissioner of Police (1976) 1 ALL NLR 133;
R. vs. Walter Skyes (1913) 8 car 233;

Shittu vs. The State (1970) 1 ALL NLR 233;
Shonekan vs. Smith (1964) NMLR 59;
Stephen vs. State (1986) 5 NWLR (pt. 46) p. 78;
Ukpe Ibodo vs. Iguisi Enorafia (1980) 5-7 SC. 42.

Nigerian Statutes cited in this Judgment

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) Ss 36(1), 233, 240, 246 and 285

The Robbery and Firearms (Special Provisions) Act Ss 6(b) and 1 (2) (a)

Representations

Musibau Adetunbi, (Esq.), *with him,* **V.A. Sulaiman, (Esq**.*),*
A.A. Mohammad, (Esq.), *and* **A.A. Abdulraheem, (Esq**.*), for the Appellant*

Rotimi Seriki, (Esq.*), for the Respondent.*

EJEMBI EKO, (JSC) (Delivering the Lead Judgment):

The appellant and one Vincent Eze (m) were arraigned and prosecuted at the High Court of Justice of Ogun State sitting at Ota, in Ota Judicial Division for the offences of conspiracy to commit armed robbery, and armed robbery contrary, respectively, to Sections 6 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act. The offences were allegedly committed on 8th December, 2006.

On the said 8th December, 2006 between 7.30 p.m. and 8.30 p.m. The appellant and two others (including Vincent Eze) were said to have entered the house of PW.1 and PW.2 at No. 2, Ishola Ola Jesu Street, Ishashi, Akute in Ogun State. They knocked at the gate, and upon mentioning the

name of PW. 2, correctly, the PW.1 was convinced the visitors were not strangers at his gate. The PW.1, the husband of PW.2, then directed his boys to open the gate and they obliged. The appellant and the two others then entered the premises. The appellant claimed that they were sent from the church where PW.1 and PW.2 usually worshipped. All these were part of the ruse to convince PW.1 and PW.2 to relax with them. The appellant then told PW.1 and PW.2 that he was getting married and needed to get the PW.2 to do a wedding cake for him. The PW.2 and the three men, led by the appellant, discussed the price of cake. The PW.2 told them that the price of the cake was N28,000.00. The three led by the Appellant offered to pay N23,000.00. At this juncture they seemed to hold a private consultation among themselves and thereafter the appellant shouted on the PW.1 to give them money and that they did not come for the cake. The appellant, as it is contained in Exhibit "A", further ferociously told the PW.1 and PW.2 that they were "armed robbers". They quickly pounced on the PW.1, and seizing him, they marched him into the house. They held him hostage as they went from the parlour to the other rooms searching for money whilst their prisoner, the PW.1, was insisting that there was no money. They threatened to kill him if he refused to give them money. They gave PW.1 a thorough beating. According to Exhibit "A", authored by the appellant, an elderly woman (later identified as PW.1's mother-in-law) slumped and fainted in the course of the violent molestations of the occupants of the house. While these violent attacks or harassments were going on the three assailants heard shouts "thief, thief" from the neighbourhood. The appellant, Vincent Eze and the third person who later escaped successfully decided to give up

their project and beat a retreat. They hurriedly ran out of the house. As they were running to get away from the house, the neighbours of PW.1 and PW.2 chased and pursued them to an uncompleted house. In the premises of the uncompleted house the appellant was pulled out of the soakaway, wherein he had hidden himself, and was arrested. Vincent Eze was also caught, as he was trying to scale over the fence. The third person had successfully escaped arrest. The appellant and Vincent Eze, who were not that lucky, were arrested and beaten up. On the intervention of the PW.3 the appellant and Vincent Eze were taken to the police station. Before then the appellant had told the PW.3 that "he was ready to confess that the driver of the PW.1 was the one who sent them".

The appellant made an extra-judicial statement on 14th December, 2006 to PW.4, A police investigator. The statement was recorded by the PW.4, because the appellant could not, himself, write as a result of the injuries he had to his right hand. That statement is Exhibit A. In the said Exhibit 'A', the appellant has alluded to one Joseph, said to be PW.1's driver, telling the appellant on 6th December, 2006 that the PW.1 had sent him "to the village to do some charms for him and the family" that would ensure his household and poultry against theft. Appellant and the said Joseph engaged themselves in heated argument concerning the efficacy of the said charms. The appellant requested the said Joseph to give him the house address of PW.1 that he was going to "try the power" of the said charms. Joseph, allegedly obliged and give the appellant the PW.1's house address. And on 8th December, 2006, in the early evening, the appellant led Vincent Eze and one other to PW.1's house.

My lords, it is on these facts that the appellant and Vincent Eze were prosecuted for conspiracy to commit

armed robbery, and the commission of the offence of armed robbery. Let me add further that the insistence of PW.1 and PW.2 that appellant and his gang were armed with a gun and that they were robbed of some valuables and money was not believed by the trial court, which dismissed the allegations of conspiracy to commit armed robbery, and the commission of armed robbery. That court also found that at the material time the appellant was not armed with a gun or any other dangerous weapon. Consequently, it found that the conduct of the appellant in the house of the PW.1 and PW.2 on 8th December, 2006 amounted only to attempted robbery and no more. It, accordingly, on 13th July, 2011 convicted and sentenced the appellant for this lesser offence. The prosecutor did not appeal these findings and order. The appellant was however aggrieved. His appeal to the Court of Appeal, sitting at Ibadan, against his conviction and sentence for the offence of attempted robbery was on 23rd May, 2012 dismissed, and the said conviction and sentence were affirmed. It is from this decision of the Court of Appeal, affirming the conviction and sentence of the appellant for attempted robbery, that this further appeal to this Court has arisen.

The appeal is argued on the two issues distilled from five (5) Grounds of Appeal by the appellant. The respondent has adopted the two issues, in the event of his preliminary objection failing to be sustained. The two issues are:

> "1. **Whether, on a calm review of the totality of the evidence of the prosecution and the defence, juxtaposing of same with the evidence of the appellant on the other side of an imaginary scale reveals that the defence of the appellant is probable such that he is entitled to the statutory benefit of doubt without conviction for a lesser offence of attempted robbery (Grounds 1, 2 and 3).**
>
> 2. **Taking into consideration the entire circumstances of this case can it be equitably contended that "Facts and circumstances" outside Exhibit A did corroborate Exhibit A such that the appellant may be said to be the maker of Exhibit A in law and equity? (Grounds 4 and 5).**

The two issues were purportedly argued together in the appellant's Amended Brief filed on 18th December, 2013 but deemed filed and served on 11th November, 2015. The brief was adopted as the appellant's argument in the appeal along with the appellant's response to the preliminary objection, filed on 25th April, 2016.

The respondent had on 31st March, 2016 filed a Notice of Preliminary Objection. The arrow head of the objection is that Grounds 2, 3, 4 and 5 of the appellant's Amended Notice of Appeal filed on 20th August, 2013 but deemed filed on 11th November, 2015 must relate to the decision of the Court of Appeal, and not the decision of the trial High Court, because the appellant has no right of appeal directly from the trial High Court to the Supreme Court. The respondent argues thus, on authority of **OGEMBE vs. USMAN (2011) 17 NWLR (Pt. 1277) 638 at 654.**

A party aggrieved by the decision of the High Court

has no right of appeal direct to the Supreme Court in total disregard of the Court of Appeal, as the intermediate court. Section 233 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, has not created such right of appeal. The Supreme Court, to the exclusion of any other court of law in Nigeria hears and determines appeals only from the decisions and/or orders of the Court of Appeal. That is the clear intendment of Section 233(1) of the said Constitution, 1999, as amended.

Section 240 of the said Constitution, 1999, as amended, is explicit and unambiguous to the effect that the Court of Appeal, to the exclusion of any other court of law in Nigeria has jurisdiction to hear and determine appeals from the various High Courts (including Federal, Federal Capital Territory and State High Courts); the Sharia Courts of Appeal (including the Sharia Court of Appeal of the Federal Capital Territory, Abuja and of the various states); the Customary Courts of Appeal of the Federal Capital Territory, Abuja and of the various States of the Federation. Section 240 further vests the same exclusive jurisdiction on the Court of Appeal to hear and determine appeals from the decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly. Let me point out that Section 246 of the said Constitution, 1999, as amended, has specifically vested jurisdiction on the Court of Appeal to hear and determine appeals from the decisions of the Code of Conduct Tribunal established by the Fifth Schedule to the same Constitution, and the decisions of the National and State Houses of Assembly Election Tribunals and Governorship Election Tribunal. These election tribunals are established by Section 285 of the Constitution, 1999, as mended.

The respondent has made a point that from the High

Court, appeals do not lie direct to the Supreme Court. Section 233 of the Ccnstitution reinforces that point. That also is the point decidedly stated by this court in **OGEMBE vs. USMAN (2011) (Supra)** that it is well settled that an appeal to this court must relate to the decision of the Court of Appeal, and not from the decision of any High Court, be it Federal, Federal Capital Territory or State High Court. *See also* **ODUNTAN vs. AKIBU (2000) 13 NWLR (Pt. 685) 446,** and **KWAJAFFA vs. BANK OF THE NORTH (2006) 5 SC (PT. 1) 103 at 118, (1999) 1 NWLR (Pt. 587) 423.**

Now, in relation to the preliminary objection, I do not agree with the respondent, upon my painstaking perusal of Ground 2, 3, 4 and 5 in the Amended Notice of Appeal, that the said grounds are directed against the decision of the trial High Court, and not against the decision of the court below that affirmed the conviction and sentence of the appellant by the trial High Court. The grounds merely trace the origin of the error committed by the Court of Appeal, in affirming the decision of the trial High Court. In other words, Grounds 2, 3, 4 and 5 complained that the court below erred in law to have affirmed errors of law committed by the trial court.

These Grounds 2, 3, 4 and 5 were not originally part of the Notice of Appeal filed on 5th June, 2012. They were incorporated into the Amended Notice of Appeal upon leave sought, on 20th August, 2013, and granted by this court on 11th November, 2015. Accordingly, it can not also be said that the appellant is thereby raising fresh issues without prior leave sought and granted. I find no substance in the preliminary objection, and it is accordingly dismissed.

Let me, for emphasis, state that this court lacks jurisdiction to hear and determine appeals directly from the

decision of any High Court. The only exception to this is that a fresh issue, not arising from the decision of the Court of Appeal may, by leave of this court first sought and granted, be entertained by this court only in deserving special circumstances. In **GABRIEL vs. THE STATE (1989) NWLR (Pt. 122) 459; (1999) CLR, 1298 SC** a belated special defence of accident, not pleaded at the trial, was refused by this court as a fresh issue with the emphatic statement of the law by Belgore, JSC (as he then was) that:

> **"The appeal court will not entertain a new issue not raised in the trial court, except questions of law or constitution and only with the leave of court".**

The cases: **OREDOYIN vs. AROWOLO (1989) 4 NWLR (Pt. 114) 172; FADINA vs. GBADEBO (1978) 3 SC 219; SHONEKAN vs. SMITH (1964) NMLR 59** were cited with approval on the point.

Now starting straightaway with issue 2, as formulated by the appellant and adopted by the respondent, the said issue 2 was formulated from Grounds 4 and 5 in the Amended Appellant's Notice of Appeal. The complaint in the said Ground 4 is that the Court of Appeal was in error, and wrong, in affirming the finding of fact made by learned trial judge that: upon his comparing the confessional statements in Exhibits A and B with facts and circumstances outside the two statements, he was convinced and satisfied that the appellant and the 2nd accused (Vincent Eze) were makers, respectively, of Exhibits A and B. The issue arising therefrom in this appeal should, in my view, be whether the appellant is the maker or author of Exhibit A. And that, in my

view again, is the substance of issue 2, as formulated by the appellant.

I have read the appellant's amended brief. Tried as I did, I could not find anywhere in the entire gamut of the brief, spanning 24 pages of 12 font impression, any iota of argument on whether or not the appellant was the maker of Exhibit A, a confessional statement. Issue 2 has been abandoned. No argument has been raised therefrom for any utilitarian consideration. The general rule, as stated by Onu, JSC, in **7-UP BOTTLING CO. vs. ABIOLA & SONS (2001) 6 SC. 73; (2001) NWLR (pt. 730) 469,** and it is now settled, that an appellate court must consider all the issues placed before it. However, an issue formulated but not argued cannot be said to have been properly placed before the appellate court for consideration. The litigant or his counsel who abandons an issue formulated from a ground(s) of appeal is on the same pedestal as the litigant or counsel who has not raised an issue from the Ground(s) of Appeal. Such litigant or his counsel will, naturally, be presumed to have abandoned the issue because arguing it will not be favourable to him. In our adversarial jurisprudence the court does not argue any issue for any litigant. Accordingly, an appellant who abandons an issue for the determination of the appeal would not, reasonably, expect the court to breathe oxygen into the abandoned issue and decide the appeal on it. The court, conscious of its duty under Section 36(1) of the Constitution, 1999, as amended, to always maintain its independence and impartiality will not, as a rule, argue or decide any issue abandoned by the party who has formulated it for the determination of his case.

Even on the merits, having read the record of appeal myself, does it lie in the mouth of the appellant to say that he

did not make Exhibit A? I do not think so. The appellant and his counsel were present and live in court when the PW.3 and PW.4 testified in open court. At page 59 of the records the PW.3's evidence that, upon his arrest, the appellant "said that he was ready to confess that the driver of the PW.1 was the one who sent them" was left scathed and not subjected to cross-examination. It remains intact and wholesome against the appellant.

The PW.4, through whom the Exhibit A was put into the body of the totality of evidence as the Investigating Police Officer, gave detailed circumstances under which he recorded the statement of the appellant, contained in Exhibit A. The PW.4 charged and cautioned the appellant before he volunteered his statement, which he implored the PW.4 to record for him because of the injury he sustained on his arm. The appellant made the statement in English language and it was so recorded in English language by the PW.4. The appellant read the statement before thumb printing it willingly as mark of his authorship of Exhibit "A". The same procedure was recorded and repeated before the superior police officer and the appellant still adopted Exhibit "A" as his voluntary statement. The statement was admitted into the body of the evidence through PW.4 without any slight protest or objection. These pieces of evidence, mostly extrinsic to Exhibit "A", do not admit of any ambiguity or doubt that the asppellant was the maker of Exhibit "A".

These apart, there are other pieces of evidence coming from the PW.1, PW.2, PW.3 and PW.4 that amply support the concurrent findings of fact that facts and circumstances outside Exhibit A exist to confirm or corroborate the veracity of Exhibit A. The findings are not perverse. It has been the consistent practice of this court not to disturb concurrent

findings of fact that are not perverse and which are based on the evidence before the trial court. See **OYIBO IRIRI & ORS. vs. ESERORAYE ERHUARHOBARA & ANOR. (1991) 3 SC. 1; O. O. EBOLOR vs. FELICIA OSOYANDE (1992) 7 SCNJ 217; UKPE IBODO vs. IGUISI ENORAFIA (1980) 5-7 SC. 42 at 55-6.**

The foregoing is enough to dispose of this Issue 2, even on the merits, against the appellant.

Conspiracy to commit armed robbery has paled out in this appeal. The appellant was not convicted for that offence and the prosecution has not appealed against the discharge of the appellant for the offence of conspiracy to commit armed robbery.

The main grouse of the appellant in this appeal is directed against the concurrent findings of fact by the courts below that, contrary to the evidence of the PW.1 and PW.2.:

> **"1. the appellant and the co-accused were not armed with either a gun or any other dangerous weapon at the material time, and**
>
> **2. that the appellant and the co-accused did not steal anything from PW.1 and PW.2"**.

However, it is not in dispute that the appellant and the co-accused came to the house of the PW.1 and PW.2 with a clear and definite intention to steal or to rob PW.1 and PW.2 of money. It is on this basis that the court below came to these finding and conclusion; upon its own further evaluation of the facts, that is:

> **"The learned trial judge reasoned that although the confessional statement of the appellant Exhibit 'A' showed that the appellant attempted to rob PW.1 and PW.2, they took to their heels on hearing "Thief, Thief" and not only did they not succeed in stealing anything, they were also not armed. The evidence of PW.3, their neighbour, as well as PW.4, the investigating police officer, did not show that any items of stolen property or arms was recovered from the appellant and so there was nothing outside the evidence of PW.1 and PW.2 to show that the appellant stole anything or was indeed armed. This reasoning to me is sound".**

My lords, I repeat and stand on my earlier statement on the consistent policy or practice of this court not to disturb concurrent findings of fact that are not perverse and which are supported by the evidence available at the trial. As found by the courts below, Exhibit A and the pieces of evidence from the testimonies of PW.3 and PW.4 support these concurrent findings and conclusions made by the two courts below. When the appellant testified he made some effort to retract his confession in Exhibit "A".

The appellant, on established authorities emanating from this court, including **ONYENYE vs. THE STATE (2012) 15 NWLR (pt. 1324) 586 AT 619; OGUDO vs. THE STATE (2011) 18 NWLR (pt. 1278) 1 AT 45; EGBOGHONOME vs. THE STATE (1993) 7 NWLR (pt. 306) 383; EDET EKPE vs. THE STATE (1994) 12 SCNJ**

131; GABRIEL vs. THE STATE (2010) 2 NWLR (pt. 1190) 280, ETC. did agree and concede correctly in law that a retracted confessional statement is admissible in evidence in law. It is a valid piece of evidence on which a court of law can act on to determine the guilt of the maker.

It is not the law, based on the inconsistency rule, that a retracted confessional statement that is credible ceases to be reliable merely because the maker, upon his subsequent change of heart, had made a retraction of his previous confession. As this court, per Rhodes-Vivour, JSC, stated in **CHUKWUKA OGUDO vs. THE STATE (2011) (supra) at page 26:**

> **"A court can convict on the retracted confessional statement of an accused person but before this is properly done the trial judge should evaluate the confession and (the) testimony of the accused person and all the evidence available. This entails the trial judge examining the new version of event presented by the accused person which is different from his retracted confession and the judge asking himself the following questions:**
>
> **(a) Is there anything outside the confession to show that it is true?**
>
> **(b) Is it corroborated?**
>
> **(c) Are the relevant facts made in it of facts true as they can be treated?**
>
> **(d) Did the accused person have the opportunity of committing the offence charged?**
>
> **(e) Is the confession possible?**

(f) Is the confession consistent with other facts which have been ascertained and have been proved?

See **KANU & ANOR. vs. KING (1954) 14 WACA p. 30; MBENU vs. STATE (1988) 3 NWLR (pt. 84) P. 615; STEPHEN vs. STATE (1986) 5 NWLR (pt. 46) p. 978.**

These tests have been designed to ensure that no wrong person is convicted on a purported confession that turns out to be a hoax or sham. It is one of the steps designed by the courts to ensure that only persons who admit their guilt truly are convicted for their misdeeds.

The standard of proof the trial judge requires for corroboration of the fact that the accused person made the retracted confession is not as high as this appellant has made it to appear. Where there is circumstantial evidence corroborating the contents of a retracted confessional statement, the trial judge may draw the inference that the confessional statement was made by the accused and that his attempt to retract the same was a belated after thought; so stated by Coker, JSC, **IN RE: NWAHURUBIA Unreported SC 476/66** of 9th December, 1966. Once the confessional statement is supported and consistent with other evidence, the accused may be convicted on the basis of his confessional statement. See **THE STATE vs. BAKO Unreported SC. 219/1968** of 29th November, 1968 per Lewis, JSC.

The appellant criticizes the concurrent findings of the two courts on a number of grounds; one of which is that Exhibit A ought to have been subjected to serious scrutiny, particularly that the two courts had cast doubt on the integrity

of PW.1 and PW.2, tantamounting to their suggesting that PW.1 and PW.2 lied on oath when they testified that the appellant was armed at the material time and that he stole valuable properties from them. The fallacy in this argument lies in the fact that the offences of armed robbery and attempted robbery are two distinct offences: the facts proving one are not the same as the facts proving the other. The facts the prosecution needs to establish armed robbery and attempt to commit robbery are not the same. Even when there are material contradictions in the evidence of prosecution in relation to the principal offence, and the case put up by the prosecution to prove the lesser offence is compact and consistent there could be conviction for the lesser offence, where no reasonable doubts exist in the prosecution's case. This usually happens when the facts proving the lesser offence are just merely a set of facts, out of other several facts proving the principal offence.

To constitute an attempt to commit a particular offence the act or conduct of the accused, in furtherance of his intention to commit the offence and relation to the principal offence, must be something more than mere preparation for the commission of the principal offence. The act or conduct of the accused must be such that but for an intervening circumstance the principal offence would have been completed or executed. See **OZIGBO vs. COMMISSIONER OF POLICE (1976) 1 ALL NLR 133. In JEGEDE vs. THE STATE (2001) 14 NWLR (pt. 733) 264 at 275 G-H,** where Belgore, JSC. (as he then was) restates the definition of the offence of attempt to commit an offence thus:

"Then what is the offence of attempts under

our law? If a person intends to commit an offence, and in the process of putting his intention into execution by means he has adopted to its fulfillment, and thereby manifests his intention by some overt act, but actually falls short of his intention to commit that offence intended either through an intervening act or voluntary obstruction is said to commit the attempt of the offence intended The end to which the accused arrived must have been substantially attained but for the intervention which he never volunteered to meet or anticipated which prevented the commission of the offence intended".

I have read Exhibit "A". The appellant therein admits that he led the other two men to the house of the PW.1 and PW.2 not to actually buy wedding cake but with the settled intention to rob the PW.1 and PW.2. As soon as they were within the compound the appellant, in his words, told the PW.1:

"to give us money that we were not there for cake. The man said he had no money and immediately we told the man that we were armed robbers, and we marched the man into his room. Inside his parlour we asked him to give us money and he insisted that he has no money and I searched his house and all the drawer but I did not see any money. Thereafter we threatened the man that if he refused to give us money, we will kill him. During (sic) the course of attacking the man,

one old woman in the house fainted, and the people started shouting "thief, thief". That was how we left the place. We were not there with any weapon except my phone. We did not steal any money or property from the man".

This piece of evidence from Exhibit 'A' meets the definition of attempted robbery, stated in **JEGEDE vs. THE STATE ((supra).**

Once a confession is shown to be free and voluntary, positive and proved to be true, the maker, the accused person, can be convicted on it. *See* **JOSEPH OKORO ABASI vs. THE STATE (1992) NWLR (pt. 260) 383.** The evidence of PW.4, the Investigating Police Officer, who recorded the confession of the appellant is material. Exhibit "A" was admitted in evidence through the PW.4. It was tendered and admitted in evidence without any objection or any protest whatsoever. The PW.4 was not cross-examined and/or discredited on the procedure he adopted in the recording of Exhibit "A". The PW.3 had earlier testified, also unscathed, that when they arrested the appellant, and before he was handed over to the police, he had posited and averred "to confess that the driver of the PW.1 was the one who sent them". These pieces of evidence from PW.3 and PW.4 are quite extrinsic to Exhibit "A". I cannot fault the concurrent confession in Exhibit "A".

I agree with the court below from a plethora of authorities, including **NWACHUKWU vs. THE STATE (2008) 4 WRN 1; OKE UTUYORUME vs. THE STATE (2010) 43 WRN 162 at 187,** that an accused person can be convicted solely on his confessional statement. It is apparent on the records that the conviction of the appellant based on

his confession in Exhibit "A", which the Court of Appeal duly affirmed, was done by the trial court upon taking into consideration the cautionary practice of subjecting the retracted confession to the tests prescribed in **CHUKWUKA OGUDO vs. THE STATE (supra).** The evidence of the PW.1, PW.2, PW.3 and PW.4 tend to corroborate Exhibit "A", particularly as to the truth of the confession and its making, the opportunity the appellant had to commit the attempted robbery and the other facts relevant to the proof of the offence of attempted robbery.

There was no injustice done to the appellant by the dismissal of his retraction of Exhibit "A". The practice in our courts of law, in criminal trial, is that the apt and precise time to raise objection to the admissibility of a confessional statement on grounds of involuntariness is when the prosecutor is seeking to tender the statement in evidence against the accused person. The objection must be raised timeously for the trial judge to order trial within-trial in order for him to determine whether the statement was made freely and voluntarily in order for it to be admissible in evidence. See **GBADAMOSI vs. THE STATE (1992) 11 12 SCNJ 265** wherein Ogundare, JSC re-stated the law that when an issue has arisen whether a confessional statement is admissible in evidence that issue of law must be determined by the trial judge at the time the statement is being tendered in evidence; and that it can not be received in evidence without the prosecution first establishing that it was made voluntarily. See also **DAURA vs. THE STATE (1980) 8 11 SC. 236 at 238; (1980) 12 NSCC 334 at 345.** In the instant case, notwithstanding that the appellant did not raise such legal issue as to the inadmissibility of Exhibit "A" on account of any involuntariness of its making the prosecution went

extra mile to establish the voluntariness of the making of Exhibit "A" by the appellant through the evidence of the PW.3 that was left unscathed. The integrity and credibility of Exhibit "A" are not in any doubt.

The law is settled that a confessional statement, as Exhibit "A", does not become inadmissible merely because it was retracted subsequently by its maker. *See* **AKPAN vs. THE STATE (1992) 7 SCNJ 22; AREMU vs. THE STATE (1991) 7 NWLR (pt. 201) 1.** Exhibit "A' was a credible evidence at the trial. Notwithstanding the retraction of Exhibit "A" by the appellant, the trial judge was right to have acted on it to convict him for attempted robbery. *See* **SHITTU vs. THE STATE (1970) 1 ALL NLR 233.** The retraction of Exhibit "A" was in my view rightly dismissed in the concurrent judgments of the two courts below.

As I had earlier alluded, the evidence which sustains the conviction for attempted robbery is not on the same pedestal as the evidence for armed robbery. The Robbery and Firearms (Special Provisions) Act that creates the two offences provides that the offence of attempted robbery is committed when:

> **"Any person who with intent to steal anything assaults any other person and at or immediately after the time of assault uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen shall be on conviction be sentenced to imprisonment for not less than fourteen years but not greater than twenty-one years".**

Robbery, as interpreted in Section 11 of this same Act:

> **"means stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained".**

This provision of Section 11 has to be read with Section 1(2)(a) of the Act which is the punishment provision for the offence of armed robbery the appellant was charged with. To prove this offence the prosecution must establish:

> **"i. The intention to steal;**
> **ii. Stealing which means taking or converting to one's use another person's movable property with the intention to permanently deprive the owner the use of the thing;**
> **iii. That the time of the robbery the accused was armed with a gun or firearm, or was in company with any person so armed".**

With the concurrent findings of fact that at the material time on 8th December, 2006:

> **"1. The appellant was neither armed with a gun nor was he in company of any person so armed, and**
> **2. That nothing was stolen from the PW.1 and PW.2";**

The prosecution had certainly fallen short of proving, wholly and satisfactorily, the offence of armed robbery the appellant was charged with. The facts proved by the prosecution, which though cannot sustain the offence of armed robbery, amply sustained attempted robbery. In other words, since the facts prove wholly the offence of attempted robbery but are not enough to prove the offence of armed robbery charged the conviction for the lesser offence of attempted robbery is unassailable.

I had earlier reproduced the material portion of Exhibit "A". There is no doubt whatsoever that Exhibit "A" proves the offence of attempted robbery. The evidence of PW.1 and PW.2 amply corroborate Exhibit "A". The Two witnesses testified that in furtherance of the appellant's intention to rob them or steal money from them he had physically assaulted them and their son, dragging them from room to room as he and his gang searched wardrobes and drawers for money. PW.1 and PW.2, corroborating Exhibit "A", further testified that it was the shout of "Thief, Thief" that scuttled their further molestation by the appellant and his intention to steal from them. They also confirmed the threat of appellant to kill or harm the PW.1if no money made available to him.

As held by the Court of Appeal, a mere threat to use actual violence on the person of another with intent to steal his property is enough to ground the charge of attempted robbery. If the intended robbery had not been thwarted or prevented by the extraneous shouts of "Thief, Thief" the appellant would have actualised his manifest intention to steal with violence or threats of violence to the persons of PW.1, PW.2 and their son. In **ALHAJI YAKUBU SANNI vs. THE STATE (1993) 4 NWLR (Pt. 285) 99 at page 199,**

relied upon by the Court of Appeal to affirm the conviction of the appellant for attempted robbery, it was held that "where the thing done is such that if not prevented by an extraneous cause would have led to the commission of the offence "intended, the offence of attempt has been committed.

The appellant has, in this appeal, made so much fuss about the diminished integrity of the evidence of PW.1 and PW.2 consequent upon the concurrent findings by the courts below which could justifiably lead to a reasonable conclusion that both witnesses did not tell the truth in their evidence that the appellant and his gang stole their money and that at the time they were robbed the appellant was armed with a gun. This argument completely loses its force when in law the appellant could be convicted solely on his confession contained in Exhibit "A", and that the appellant did nothing at all tangible to cast reasonable doubt on the credibility and validity of Exhibit "A". With or without the evidence of PW.1 and PW.2 the conviction and sentence of the appellant for the offence of attempted robbery can be sustained on the available evidence. The conviction of the appellant for attempted robbery was on facts. Where there are concurrent findings of facts by the lower courts, this court, I repeat, just also as I agree with the respondent, will not interfere with such findings unless the appellant can prove that the findings are perverse. See further on this: **BANKOLE vs. PELU (1991) 8 NWLR (pt. 211) 523 at 550; NWAMBE vs. THE STATE (1995) 3 NWLR (pt. 384) 385 at 409; ADELEKE vs. ASERIFA (1990) 3 NWLR (Pt. 136) 94 at 104.**

It was suggested in the appellant's brief that on proper evaluation of the testimony of the appellant viz-a-vis the discredited evidence of PW.1 and PW.2, the reasonable conclusion would have been that Exhibit "A" lacks

credibility and that the appellant merely came to demand payment of N25,000.00 the PW.1 owed him. The story of the PW.1 owing the appellant N25,000.00 and that the appellant came to PW.1 to demand payment is spurious and was told to synthesise a defence of PW.1 and PW.2 having scores to settle with the appellant. When the PW.1 and PW.2 testified this defence was not put to them. Logic and common sense demand that the defendant who intends to indict or discredit a witness for the prosecution, should give the witness for the prosecution an opportunity to explain himself. The appellant did not give PW.1 and PW.2 any opportunity to be heard on his line of defence that was an attack on the integrity of this couple. I should think *audi alteram partem,* a cardinal rule of fair hearing, works both ways. Whoever would be indicted is entitled to be given an opportunity to be heard in his defence. Trial by ambush, good in guerrilla warfare, is not part of our jurisprudence.

In any case, the appellant's later defence was repudiated by his own Exhibit "A", wherein he told the harassed PW.1 and PW.2 that he and his men were "armed robbers" and that they had not come for any other business than the robbery of PW.1 and PW.2. I cannot see how this fanciful and capricious defence put up later by the appellant could be anything other than a mere after thought by a desperado. On a final note, I ask: if PW.1 and PW.2 had scores to settle with the appellant, what score did Exhibit "A" have to settle with its maker, the appellant? Admission is the best piece of evidence. The courts have always regarded an extra-judicial confession, properly proved and admitted in evidence, as having the same effect as a plea of guilt by the accused in open court: *See* **ONUNGWA vs. THE STATE (1976) 1 SC (Reprint) 74.** A free and voluntary confession of

guilt, whether judicial or extra-judicial, if it is direct and positive is sufficient proof of guilt and a conviction could be based entirely on such evidence, as in the instant case. See **R. vs. WALTER SKYES (1913) 8 CAR 233 at 236-237,** cited with approval by Idigbe, JSC, in **ONUNGWA vs. THE STATE (supra).** There is after all, no evidence stronger than a person's own confession. See **UFOT vs. THE STATE Unreported SC. 449/66** of 9th December, 1966 per Coker, JSC.

The facts of this case do not require my differing in my opinion from the concurrent decisions of the two courts below. I find no substance in this appeal, which I hereby dismiss. Accordingly, I hereby affirm the judgment of the court below in the appeal **No. CA/1/270/2011** delivered on 23rd May, 2012 affirming the conviction and sentence of the appellant by the trial Judgejin the case **No. HCT/6R/09** delivered on 13th July, 2011.

Ejembi Eko,
Justice, Supreme Court.

I.T. Muhammad, JSC: I read in advance the lead judgment just delivered by my learned brother, Eko, JSC. I am in agreement with my lord's reasoning and conclusion. I too, dismiss the appeal. I abide by all other orders made in the leading judgment.

Ibrahim Tanko Muhammad,
Justice, Supreme Court.

ADAMU AUGIE, (JSC): I had a preview of the lead judgment just delivered by my learned brother Eko, JSC, and I agree with his reasoning and conclusion.

However, to emphasize the points made, I will say a

few words. The appellant and one other accused person were charged with the offences of armed robbery and conspiracy to commit armed robbery. The prosecution's case hinged on the testimony of two eye-witnesses **[PW1 & PW2]** and appellant's confessional statement [**Exhibit A**].

Defence counsel did not object to the admissibility of **Exhibit A** in evidence, when it was tendered by the Prosecution through **PW4,** but in his testimony as **DW1,** he said he *did not make any Statement.* The trial Court overruled the objection of prosecution's counsel that *"no objection was raised to the tendering of the statements,* however, in its judgment, it found as a fact that he did make the said **Exhibit A.**

One of his complaints at the court below is that the trial court admitted **Exhibit A** in evidence without conducting a trial within trial. In dismissing the Appeal, the court below held as follows thereon:

> **It is clear from the records that the appellant's confessional statement went in without any hassle and the question of whether it was voluntarily made by him did not arise at that stage. A trial within trial is conducted before a confessional statement is admitted as Exhibit and not thereafter. It can, therefore, be said that the trial judge was right in admitting Exhibit A without conducting a trial within trial.**

He appealed to this court, and one of his complaints under **Ground 4** of his Grounds of Appeal is that the finding that he made **Exhibit A** is doubtful and it ought not to have been

confirmed by the court below. But, as my learned brother pointed out, the appellant did not proffer any arguments thereon, and the complaint will be taken as abandoned.

His main grouse is that the lower courts failed to appreciate the integrity of **PW1** and **PW2'**S testimony in relation to the trial court's findings that they were not armed and did not actually steal anything, from the said witnesses' house. He further submitted as follows:

It is clear beyond the aid of medicated glasses that there is evidence of ***oath against oath in the testimonies of PW1 and PW2.*** The testimony of **PW1** reveals that [he] and his case-mate were in his house to rob him. However, story of **PW2** put it beyond doubt that [he] and his case-mate were hired assassins, who were in the house of **PW1,** to assassinate him. These pieces of evidence were never resolved by the prosecution. It is difficult from [their] testimonies to say or factor out with certainty what [his] mission is in the house of **PW1.** The prosecution has not proven [its] case beyond reasonable doubt as it is difficult to say [his] mission in **PW1**'s house from [their] testimonies. The Prosecution's evidence remains unsettled in that if **PW1** is to be believed, [his] conviction would have been attempted robbery and if **PW2** is to be believed, [his] conviction would have been attempted murder. It is then difficult for us to know the yardstick used by the two courts below to arrive at the offence of attempted robbery at the face of live crisis that exists between the testimonies of **PW1** and **PW2.**

He alluded to *oath against oath,* which brings to mind the comment of Oputa, JSC, in **Adelumola vs. State** *(1988) 1 NWLR (Pt. 73) 683* thus:

To attack a judgment on the ground that it is "oath

against oath" is a very feeble attack for ultimately every case is decided on the principle of "oath against oath" the oath of prosecution witnesses against the oath of defence witnesses; or the oath of the plaintiff and his witnesses against the oath of the defendant and his witnesses; the oath of those, who swear to the affirmative of the issue and those, who swear to the negative. Thus, in its plenitude, no one needs quarrel about oath against oath.

In this case, the appellant's quarrel about *oath against oath* is futile; the issue of what his mission is at the house of **PW1** is of no moment.

Embellishment, which is to add a detail to a statement or a story, to make it more interesting or entertaining is part of human nature. Human beings are prone to embellish the truth or event that occurred, and it is easy, therefore, for a witness to exaggerate or add something to his testimony to *make the story sweet,* as we do say in this country. Nonetheless, it falls on the trial court to sift the chaff from the wheat, and determine whose *oath* to believe, and whose *oath* to disbelieve.

More importantly, the prosecution has to prove its case *"beyond reasonable doubt*", and reasonable doubt is the "*doubt that prevents one from being firmly convinced of a defendant's guilt or the belief that there is a real possibility that the defendant is not guilty"* see Black's Law Dictionary 9th Ed., where it was further explained that:

Reasonable doubt is a term often used, probably

pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

It is also a well-established principle that once there is doubt about the guilt of an accused, the said doubt should be resolved in his favour see **Namsoh vs. State (1993) 5 NWLR (Pt. 292) 129 SC**. In this case, the trial Court sifted through the evidence of the said **PW1** and **PW2,** and resolved the doubt as to whether he was armed or stole anything, in the appellant's favour. However, from the totality of the evidence, including the **Exhibit A,** which formed part of the prosecution's case, there was no doubt at all that he was at **PW1**'s house to rob the place.

The finding of the trial court that he was not armed and did not steal anything went a long way to exonerate him from offences charged, but the basic fact remained that an attempted robbery was established, and the trial court is allowed to convict for the lesser offence proved.

It is for this and the other reasons set out in the lead Judgment, which I adopt as mine, that I also dismiss this appeal in its entirety.

Amina Adamu Augie,
Justice, Supreme Court

CHUKWUEMEKA AGUGUA
AND
THE STATE

SC. 322/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 10TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings of two lower Courts – Attitude of Supreme Court thereto.

APPEAL: Right of appeal – Decision of trial court on trial-within-trial – Whether an appealable decision within the context of S.318 of the constitution of Federal Republic of Nigeria 1999 (as amended) – Consideration thereof.

COURT: Conviction of accused – Charge of substantive offence – When court may convict on a lesser offence.

COURT: Conviction of accused – Confessional Statement – When can be relied solely for the conviction of accused.

COURT: Power to convict for a lesser offence – Discretionary – Power to be exercised judicially and judiciously.

COURT: Requirement of Proof – Duty to ensure that all ingredients of offence are proved before conviction.

CRIMINAL LAW AND PROCEDURE: Charge of conspiracy and a charge of the substantive offence – Whether charges are independent of one another.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Whether weapons used must be tendered in all cases.

CRIMINAL LAW AND PROCEDURE: Burden of proof in criminal cases – How discharged.

CRIMINAL LAW AND PROCEDURE: Charge of conspiracy – How proved.

CRIMINAL LAW AND PROCEDURE: Charge of conspiracy – Proper approach to a charge of conspiracy where charged with the substantive offence.

CRIMINAL LAW AND PROCEDURE: Hearing – Right of accused to remain silent – When not desirable.

CRIMINAL LAW AND PROCEDURE: Proof – Address of counsel cannot substitute the necessity for proof.

CRIMINAL LAW AND PROCEDURE: Proof of Conspiracy – Elements of common intention necessary to be proved – How discharged.

CRIMINAL LAW: Armed robbery – Ingredients – Considerations thereof.

EVIDENCE: Confessional Statement – When admissible – Relevant factors thereto.

Issue for Determination

Whether, having regard to the totality of the evidence adduced by the prosecution, the learned justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial court.

Facts of the Matter

The appellant and one Aliyu Danjuma who was the 1st accused while the appellant was the 2nd accused were arraigned before the Sokoto High Court. The two were charged with two counts of conspiracy to commit armed robbery and armed robbery contrary to **Sections 5(b)** and **1(2) (a)** of the **Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of Federation of Nigeria, 1990**.

On the 9th day of December, 2007 at about 8.00pm, the appellant and some other men had visited House No. 45 Sabon-Birnin Road, Low Cost Area, Sokoto. One Zainab Shehu Ladan, Hajiya Fatima and Buhari Muhammed were inside the house when the appellant and one other entered the house and pointed a gun at Buhari. As Buhari tried to seize the said gun from the appellant, he was slapped. The appellant and his co-accused later ordered them to bring money out for them. The appellant stood with the occupants of the house while the other went into the bedroom. He later came out with Hajiya's handbag and

people started shouting "thief" "thief". On hearing the shout the men ran out into their motorcycles. One of the two motorcycles they had brought refused to start hence it was abandoned. Two of them rode one away while the others ran away. As they were trying to escape, they shot into the air. The matter was latter reported to the Gwiwa Police Station.

The appellant and the co-accused were later arrested with one of the motorcycles. The appellant made statement to the police, which statement was retracted during trial. After the conduct of a trial-within-trial, the objection was overruled and the statement was admitted and marked Exhibit FI. Other items admitted were, one Jarma UK Motorcycle, Exhibit A, a pair of black sandals Exhibit B, a pair of white covered shoes Exhibit C, a trouser and shirt as Exhibits D and E respectively. The statement of the 1st accused person was also admitted and marked Exhibit F.

At the trial before Malami Umar J, the prosecution called six (6) witnesses and tendered seven (7) items admitted and marked Exhibits A, B, C, D, E, F and FI.

At the point of tendering the statement of the appellant, he objected and claimed that he was tortured to obtain it by the police. This led to the order for trial-within-trial by the trial court which dismissed the objection and admitted the said statement as Exhibit FI.

The appellant did not testify and chose not to call any evidence in his defence. Upon conclusion of the trial, the trial court convicted the appellant with his co-accused for the 1st count of the charge and for a lesser offence of attempted robbery instead of the count of armed robbery contained in the charge. Appellant was thus sentenced to life imprisonment.

Dissatisfied with the conviction and sentence, the appellant appealed to the Court of Appeal, Sokoto Division. In

its unanimous decision, the Court of Appeal found the appeal unmeritorious, dismissed the appeal and affirmed the conviction and sentence handed down on the appellant by the trial court.

The appellant was further dissatisfied with the decision of the Court of Appeal, hence he appealed to the Supreme Court.

Held: (Unanimously dismissing the appeal)

1. *Proper approach to the trial of conspiracy charge where joined with the substantive charge.*
It had been held that the proper and appropriate approach to an indictment containing conspiracy charge and substantive charge is to deal with the latter, that is, the substantive charge first and then proceed to see how conspiracy count has been made out in answer to the fate of the charge of conspiracy. *(P 410 Paras G-H)*

2. *Conspiracy is independent of the actual substantive offence*
Conspiracy generally, is an agreement between two or more persons to carry out an unlawful act. But failure to prove substantive offence does not make conviction for conspiracy inappropriate, as it is, in itself a separate and distinct offence, that is independent of the actual offence conspired to commit. [Balogun vs. Attorney General, Ogun State (2002) 9 SCNJ 1961 Lukman Osetola & Anor vs. The State (2012) LPELR 9348 SC (2012) 12 SCM (Pt. 2) 347;(2012) 17 NWLR (Pt. 1329) 251; (2012) 6 SC (Pt. IV) 148]. *(Pp 410-411 Paras H-C)*

3. *The essential ingredients of armed robbery*
It is trite law that for the prosecution to achieve success in proof of the offence of armed robbery, the following essential ingredients must be proved beyond reasonable doubt.
(a) That there was a robbery incident or series of robberies.

(b) That the robbery or each of the robberies was an armed robbery.

(c) That the accused was the armed robber or one of the armed robbers. *(P 411 Paras E-G)*

4. *Proof which is expected in criminal trials.*
However, the law is very clear that, this proof which it expects to be beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. Yet, the burden of such proof which lies solely on the prosecution never shifts. If at the conclusion of trial, on the entire evidence adduced the court is left with no doubt that the offence was committed by the accused, then that burden is discharged. [Bello vs. The State (2007) 10 NWLR (Pt. 1043) 564; (2007) … Amina vs. State (1990) 6 NWLR (Pt. 155) 125; Nwachukwu vs. State (1985) 1 NWLR (Pt. 11) 218; Ani vs. State (2003_ 11 NWLR (Pt. 83) 142; Uwagboe vs. State (2007) 6 NWLR (Pt. 1031] 1.
(Pp 411-412 Paras G-B)

5. *Duty on court to ascertain that the act of the accused constituted the offence charged.*
It is equally trite law that at the end of a trial and

before a court comes to the conclusion that an offence has been committed by the accused person, it must look for the ingredients of the offence charged and ascertain that the acts of the accused come within the confines of the said offence charged. See; [Amadi vs The State (1993) 8 NWLR (Pt. 314) 644; Alor vs. State (1997) 4 NWLR (Pt. 501) 511].
(P 412 Paras B-D)

6. *Conspiracy is an independent offence*
Generally, as the saying goes, "It takes two to tango" It certainly takes two or more persons to conspire and a person alone cannot be convicted of conspiracy if the others are discharged and acquitted. However, it is trite law that a conspiracy to commit an offence is a separate and distinct offence and it is independent of the actual commission of the offence to which the conspiracy is related. Balogun vs. Attorney-General of Osun State (2002) 4 SCM 23, (2002) 2 SCNJ 196 Silas Sule vs. State (2009) 8 SCM 177.
(P 415 Paras A-C)

7. *Meaning of Conspiracy*
Generally, conspiracy is an agreement by two or more persons acting in concert or in combination to accomplish or commit an unlawful or illegal act, with an intent to achieve the agreed objective. [The Salawu vs. State (2011) LPELR 8252 (SC) (2011) 10 SCM 76]. *(P 415 Paras D-E)*

8. *How to prove the offence of conspiracy*
In order to establish an offence of conspiracy against an accused person to commit a criminal offence, the

prosecution is required by law to prove the following:

(a) That there was an agreement between two or more persons to do or cause to be done, some illegal act or an act which is not illegal but by illegal means;

(b) Where the agreement is other than an agreement to commit an offence, that some acts besides the agreement was done by one or more of the parties in furtherance of the agreement.

(c) Specifically, that each of the accused individually participated in the conspiracy.
(P 415 Paras E-H)

9. *How conspiracy is proved*
With respect to the matter of the charge of conspiracy, it is an offence that is proved by circumstantial evidence, that is inferred from the circumstances surrounding a particular case. This is because it is difficult to prove it by direct evidence being a crime that is usually hatched in secret, a fact well recognized by the law. Therefore in this instance there is a surfeit of evidence from which the meeting of the minds of the offenders is inferred from. I rely on Bello vs. State (2012) (Pt. 2) SCM 28; Aduk vs. FRN (2009) (1997) 5 SC 197.
(Pp 432-433 Paras G-A)

10. *The element of common intention*
There is no doubt and it has been held that there need not be an express agreement before common

intention can be shown in conspiracy. [Adekunle vs. the State (1989) 12 SCNJ 184].
(Pp 415-416 Paras H-A)

In the instant case, the trial court relied on the confessional statement of the appellant Exhibit FI from which the court inferred the agreement by the appellant with other co-accused to carry out the illegal act or armed robbery. *(P 416 Paras A-B)*

11. *When to admit a confessional statement in evidence*
It is already settled, that a confessional statement does not become inadmissible merely because it was subsequently retracted by the maker. A confessional statement is admissible and should be admitted, once it is found to be direct and positive and it relates to the acts. Knowledge or intention of the maker, stating or suggesting the inference that he committed the crime charged. [Solomon Thomas Akpan vs. The State (1992) LPELR 351 (SC). Shittu vs. State (1970) 1 All NLR 228; Adamu vs. AG Bendel State (1986) 2 NWLR (Pt. 22) 284; Aremu vs. State (1991) 7 NWLR (Pt. 201) 1; Ejinima vs. State (1991) 6 NWLR (Pt. 200) 627]. *(P 418 Paras B-E)*

12. *Conviction based on confessional statement Confession must be consistent with other proved facts*
It is already trite law, that an accused person can be convicted on his confessional statement alone where the confession is consistent with other ascertained facts which have been proved. [Akpan vs. State (1990) 7 NWLR (Pt. 160) 101].

The statement credited to the appellant as the

confession had graphically given in details the way the alleged robbery act was planned and carried out by him and the co-accused. It gave the role played by each of the accused. The trial court was therefore right and correctly admitted the statement as a confession. *(P 418 Paras E-H)*

13. *Weapons used in robbery must not always be tendered during trial*
Indeed, the court below correctly stated the position that there is no law insisting that the prosecution must always tender weapon or gun used in a robbery in order to establish its case. It largely depends on the facts and circumstances of each given case. [**Olayinka vs. The State** (2002)]. *(P 419 Paras E-F)*

14. *When is confession sufficient proof?*
It is already established, that a freely made confession, whether judicial or extra judicial, so long as it is found to be direct, positive and properly proved, is sufficient proof of guilt and conviction could be rightly based entirely on such statement. [Jimoh Yesufu vs. The State (1976) 8 SC 167].
(P 419 Paras F-H)

15. *When an accused should not remain silent*
In effect, his right to remain silent, even when arraigned for a criminal offence, is an inviolable one. But he was taking a huge risk; the law says that he is obliged to make his defence, if his remaining silent will result in being convicted on the case made out against him [Okoro vs. The State *(1988) 5 NWLR (Pt. 94) 255 at 266 SC,* and Igabele vs. The State *(2006) 6*

NWLR (Pt. 975) 100 at 133 SC]. *(P 435 Paras A-B)*

16. *When an accused is to testify*
The appellant herein rested his case on that of the Prosecution, and was convicted for a lesser offence than was made out against him.

His situation emphasizes the vital importance of defence counsel knowing when it is imperative that an accused person should testify, to explain particular aspects of the case, which he alone can explain. This is because resting the defence on the case of the prosecution will not present the trial court with any explanation or an alternative story [Nwede vs. The State *(1985) 3 NWLR (Pt. 13) 444 SC.* See also Igabele vs. State *(supra)]*

Where this court per Ogbuagu, (JSC), stated:

> **It was for him to rebut the presumption that he committed the crime, at least, to cast a reasonable doubt on the prosecution's case by preponderance of possibilities. But remarkably and significantly, his learned defence counsel, refused (as he was entitled to do as the master of his client's case), to cross-examine some of the vital witnesses - - He also refused the Appellant testifying and rested the case of the defence on that of the prosecution and thereby "drowning" the Appellant or letting him "stew in his own juice" so to speak/say.**

In this case, there is no question that evidence against the Appellant, including his confessional statement [Exhibit F1), is overwhelming, and his remaining silent in the face of that evidence, did not help him. In fact, the Appellant hobbled his own feet, and handicapped his case. *(Pp 435-436 Paras C-B)*

17. *Address of Counsel cannot substitute legal evidence*
It is thus clear that the feeble attempt made by the appellant to retract or render inadmissible Exhibit "F1" was not sustained. I therefore find it rather spurious to read in the Appellant's brief of argument, settled by Mr. Ogiza, that Exhibit "F1" was retracted and also that it was obtained involuntarily from the appellant. The law is trite that counsel's summation and final address in the brief of argument does not have the force of evidence, and it can not be substituted for legal evidence. A bare statement from the bar does not have the force of legal evidence by which a burden of proving a fact in issue is discharged. [ONU OBEKPA vs. COMMISSIONER OF POLICE (1981) 2 NCLR 420].
(Pp 439-440 Paras F-A)

18. *When to convict an accused for a lesser offence*
The Court of Appeal affirmed the conviction and sentence of the appellant for conspiracy and attempted robbery. The offence of attempted robbery is a lesser offence than the robbery charged. The ingredients are less onerous to prove. The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the

circumstances the lesser offence was committed must be similar to those contained in the offence charged. [THE NIGERIAN AIR FORCE v. KAMALDEEN (2007) 2 SC. 113]. *(P 443 Paras C-F)*

Per Eko (JSC)

> "**The learned trial judge, in his wisdom exercised the discretion to convict the Appellant for the lesser offence of attempted robbery. The prosecutor has not complained. He is therefore taken to have accepted the verdict. Let me however add that the discretion or power of the trial court to convict for a lesser offence must be one to be exercised most judiciously and judicially. It should not be one underlined by pure sentiments, or one in which it thinks that it is exercising some clemency or prerogative of mercy. In adjudication sentiments command no place. Accordingly, the discretion or power to convict for a lesser offence is not, and should not, be an avenue for the trial Judge to express his sentimental benevolence. I say no more".**
> *(Pp 443-444 Paras F-A)*

19. *Concurrent findings of two lower courts.*
This court is usually loathe to interfere with the concurrent findings of facts by the trial court and the intermediate court, unless the appellant is able to establish that the findings are perverse and/or that substantial miscarriage of justice had been done to

him. I do not think that the conviction of the appellant for attempted robbery, even when there exist abundant evidence that the appellant and his gang, while armed with dangerous weapons, stole two GSM handsets and a bag from their victims on the fateful day has occasioned any miscarriage of justice to the appellant. The findings are also not perverse. The appellant luckily had benefited from the learned trial judge's large heart towards clemency.
(P 444 Paras A-D)

20. *Decision of trial Court upon trial within trial is appealable*
In my considered view, the appellant was not aggrieved by the decision of the trial court, upon the trial-within-trial, that the credible and cogent evidence led by the prosecution witnesses established that the appellant made Exhibit "F1" voluntarily without torture or inducement. This is an appealable decision within the context of Section 318 of the 1999 Constitution, in respect of which the Appellant's right of appeal is guaranteed by Section 241 and 242 of the same constitution. The appellant, having not exercised his right of appeal against the specific findings of facts or decision, is deemed to have accepted the same. The decision therefore remains binding on him. *(P 440 paras A-D)*

Nigerian cases cited in this judgment
Adamu vs. AG Bendel State (1986) 2 NWLR (Pt. 22) 284;
Adekunle vs. the State (1989)) 12 SCNJ 184.
Aduk vs. FRN (2009) (1997) 5 SC 197

Akpan vs. State (1990) 7 NWLR (Pt. 160) 101.
Alor vs. State (1997) 4 NWLR (Pt. 501) 511.
Amadi vs. The State (1993) 8 NWLR (Pt. 314) 644;
Amina vs. State (1990) 6 NWLR (Pt. 155) 125;
Ani vs. State (2003) 11 NWLR (Pt. 83) 142;
Aremu vs. State (1991) 7 NWLR (Pt. 201) 1;
Balogun vs. Attorney General of Osun State (2002) 4 SCM 23; (2002) 2 SCNJ 196
Balogun vs. Attorney General, Ogun State (2002) 9 SCNJ 1961
Bello vs. State (2012) (Pt. 2) SCM 28;
Bello vs. The State (2007) 10 NWLR (Pt. 1043) 564;
Ejinima vs. State (1991) 6 NWLR (Pt. 200) 627.
Igabele vs. The State (2006) 6 NWLR (Pt. 975) 100.
Jimoh Yesufu vs. The State (1976) 8 SC 167.
Lukman Osetola & Anor vs. The State (2012) LPELR 9348 SC; (2012) 12 SCM (Pt. 2) 347;(2012) 17 NWLR (Pt. 1329) 251; (2012) 6 SC (Pt. IV) 148.
Nwachukwu vs. State (1985) 1 NWLR (Pt. 11) 218;
Okoro vs. The State (1988) 5 NWLR (Pt. 94) 255;
Olayinka vs. The State (2002).
ONU OBEKPA vs. COMMISSIONER OF POLICE (1981) 2 NCLR 420.
Shittu vs. State (1970) 1 All NLR 228;
Silas Sule vs. State (2009) 8 SCM 177.
Solomon Thomas Akpan vs. The State (1992) LPELR 351 (SC).
THE NIGERIAN AIR FORCE vs. KAMALDEEN (2007) 2 SC. 113.
The Salawu vs. State (2011) LPELR 8252 (SC) (2011) 10 SCM 76.
Uwagbo vs. State (2007) 6 NWLR (Pt. 103) 1.

Foreign Cases cited

R. vs. Sykes (1913) C. R. App. 233

Nigerian Statute Cited

Constitution of Federal Republic of Nigeria 1999 (as amended) S. 318.
Criminal Code Ss. 218 218(2) and 219
Evidence Act S. 138

Robbery and Firearms (Special Provisions) Act, Cap 398 Laws of the Federation 1990 SS. 5(b) and (2)(a).

Representations

Ebenezer Obeya, (Esq.) with Emmanuel Obeya (Miss) for the appellant.

Suleiman Usman, (Esq.), Hon. A.G. Sokoto with Mohammed Mohammed (Esq.), Ag. DPP Sokoto State, Abubakar Moyi (Esq.), PSC MOJ Sokoto, G.C. Udeh (Esq.) (Miss) Sunmayya Aminu Anka for the respondent.

OLU ARIWOOLA, (JSC) (delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Sokoto Division Coram:- Amiru Sanusi, JCA (as he then was); Abubakar Datti Yahaya, JCA;Abubakar Alkali Aba, JCA which was delivered on 12th December, 2011 in which the appellant's appeal was dismissed and his conviction and sentence by the trial court were affirmed.

The appellant and one Aliyu Danjuma who was the 1st accused while the appellant was the 2nd accused were arraigned before the Sokoto High Court. The two were charged with two counts of conspiracy to commit armed

robbery and armed robbery contrary to **Sections 5(b)** and **1(2) (a)** of the **Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of Federation of Nigeria, 1990**.

At the trial before Malami Umar J, the prosecution called six (6) witnesses and tendered seven (7) items admitted and marked Exhibits A, B, C, D, E, F and FI.

Originally, the charge was against four accused persons but only two accused stood trial as the other two were said to be at large.

At the point of tendering the statement of the appellant, he objected and claimed that he was tortured to obtain it by the police. This led to the order for trial-within-trial by the trial court which dismissed the objection and admitted the said statement as Exhibit FI.

It is note worthy that the appellant did not testify and chose not to call any evidence in his defence. Upon conclusion of the trial, in its considered judgment, the trial court convicted the appellant with his co-accused for the 1st count of the charge and for a lesser offence of attempted robbery instead of the count of armed robbery contained in the charge. Appellant was then sentenced to life imprisonment.

Dissatisfied with the conviction and sentence, the appellant appealed to the Court of Appeal, Sokoto Division, hereinafter referred to as court below. In its unanimous decision, the court below found the appeal unmeritorious, dismissed the appeal and affirmed the conviction and sentence handed down on the appellant by the trial court.

The appellant was further dissatisfied with the decision of the court below, hence he appealed to this court.

Pursuant to the rules of this court, parties filed and exchanged briefs of argument, the record of appeal having

been duly compiled, transmitted and served. The appeal was then heard on 17th November, 2016.

In the brief of argument filed by the appellant on 31st October, 2012, the following sole issue, was distilled for determination of the appeal.

> **"Whether the learned justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt."**

From the same Grounds of Appeal filed by the appellant, the respondent chose to formulate the following sole issue, differently couched for determination of the appeal.

> **"Whether, having regard to the totality of the evidence adduced by the prosecution, the learned Justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial court."**

The facts relied on by the prosecution as given in evidence are succinctly as follows:

On the 9th day of December, 2007 at about 8.00 p.m., the appellant and some other men had visited house No. 45 Sabon-Birnin Road, Low Cost Area, Sokoto. One Zainab Shehu Ladan, Hajiya Fatima and Buhari Muhammed were inside the house when the appellant and one other entered the house and pointed a gun at Buhari. As Buhari tried to seize

the said gun from the appellant, he was slapped. The appellant and his co-accused later ordered them to bring money out for them. The appellant stood with the occupants of the house while the other went into the bedroom. He later came out with Hajiya's handbag and people started shouting "thief" "thief". On hearing the shout the men ran out into their motorcycles. One of the two motorcycles they had brought refused to start hence it was abandoned. Two of them rode one away while the others ran away. As they were trying to escape, they shot into the air. The matter was latter reported to the Gwiwa Police Station.

The appellant and the co-accused were later arrested with one of the motorcycles. The appellant made statement to the police, which statement was retracted during trial. After the conduct of a trial-within-trial, the objection was overruled and the statement was admitted and marked Exhibit FI. Other items admitted were, the Jarma UK motorcycle, Exhibit A, a pair of black sandals Exhibit B, a pair of white covered shoes Exhibit C, a trouser and shirt as Exhibits D and E respectively. The statement of the 1st accused person was also admitted and marked Exhibit F.

The appellant neither testified nor called any other witness in his defence. He relied on the case of the prosecution.

In the considered judgment, the trial court found the appellant and the co-accused guilty of the first count of conspiracy but not of the count of armed robbery. He was found guilty of a lesser offence of attempted robbery and they were sentenced to life imprisonment.

The conviction and sentence were appealed to the court below which dismissed the appeal on the 12th December, 2011 leading to the instant further appeal to this

court.

In arguing the sole issue distilled for determination, learned counsel for the appellant referred to the findings of the trial court on the evidence adduced by the prosecution and contended that the court below was wrong in affirming the said findings on the two counts. He referred to the relevant provisions of the **Robbery and Firearms (Special Provisions) Act** and the alleged confessional statement of the appellant. Learned counsel quoted from the testimonies of PW2 and PW4 and contended that they were not adidem on some material facts and the lapses and contradictions were not explained away by the prosecution. He submitted that in the face of the lapses and contradictions, the evidence of the prosecution witnesses could be said to have pointed irresistibly at the guilt of the appellant. He submitted further that the contradictory pieces of evidence weighed heavily on the mind of the trial judge leading to the finding that the offence of armed robbery was not proved.

Learned counsel urged the court to discountenance the testimonies of PW2 and PW4 in entirety. He contended that once the testimonies are discountenanced, the court will be left with the appellant's retracted confessional statement. To that, he relied on the test laid down in **Dawa vs. The State (1980) 8 -11 SC 236** following R Vs Sykes (1913) 8 C.R. APP. 233.

Learned counsel contended that the ingredients or guidelines to be met in a confessional statement must co-exist, and any statement that fails to meet the test cannot properly found a conviction, otherwise any such conviction cannot be sustained on appeal. He relied on **Awosika vs. The State (2010) 9 NWLR (Pt. 1198) 49.**

On the count of conspiracy, learned counsel referred

to the testimony of appellant's co-accused who denied knowing the appellant, and that he had never met him before, hence could not have conspired with someone he never knew. For the ingredients of the offence of conspiracy, he cited **Abdullahi vs. State (2008) 17 NWLR (Pt. 1115) 203.**

Learned counsel contended that apart from Exhibit FI, no iota of evidence existed in support of the verdict of guilt for conspiracy. He submitted that the judgment of the trial court was not supported by the evidence before the court and therefore it was unsafe to convict the appellant on confession as in Exhibit FI.

On the confession in Exhibit FI attributed to the appellant, learned counsel gave a poser, that "is a trial Judge entitled to pick and choose what to believe and reject in a confessional statement?" He answered by contending that evidently, the appellant in Exhibit FI admitted that he robbed or was part of the gang that robbed the victims of their possessions as alleged in count 2 of the charge, yet learned trial judge found that armed robbery was not proved. He submitted that the trial judge's position is proof that Exhibit FI was obtained involuntarily and should not have been to corroborate any other piece of evidence.

Learned counsel agreed that if the trial judge had convicted the appellant on the original charge based on Exhibit FI since it had gone through trial within trial, there would have been no problem. He however contended that since the trial Judge had agreed that the evidence, including Exhibit FI did not prove the charge, the court was by implication agreeing that Exhibit FI or some part therein was not true or voluntary. He submitted that the court below fell into the same error as the trial court in admitting that the content of Exhibit FI was true and correct.

Learned counsel submitted that it is the primary duty of the trial judge who observed the demeanour of witnesses to make assessment of the probative value of the testimonies of the witnesses. He submitted that the trial court was right to have concluded that there was no robbery, hence the appellant was wrongly convicted on his alleged confession.

Learned counsel contended that the trial court of its own accord rejected the evidence of armed robbery as borne out by Exhibit FI and the testimony of the prosecution witnesses, and therefore submitted that the direct and logical implication of that rejection is that Exhibit FI is of no probative value. He submitted further that having found that armed robbery was not proved by the prosecution, even though confessed to, the trial court ought to have rejected the confessional statement in is entirety. He contended that the learned trial court misdirected itself when it relied on Exhibit FI to corroborate the testimony of PW2 and PW4 and thereby occasioned a miscarriage of justice. He submitted that the appellant deserved the benefit of the doubt created by the consistence in Exhibits F and FI and the court's findings of fact. He urged the court to resolve the sole issue in favour of the appellant, discharge and acquit the appellant.

The learned counsel for the respondent in arguing the appeal in the brief of argument on the single issue formulated, referred to the charge against the appellant. He considered the second count of armed robbery first. He referred to the three ingredients the prosecution was required to establish to prove the charge. He submitted that the prosecution proved all the three ingredients. He referred to the testimony of PW2 and PW4 who he contended were the eye witnesses, being the victims of the incident. He submitted that the evidence of the eye witnesses not only fixed the appellant at the scene of the

crime but also described the role he played in the robbery. He referred to the slip by the trial court in its record, that the offence took place at Shinkafi Road, instead of Sabon Birni Road and contended that the slip is of no moment. He submitted that the court below was therefore right to have held that the slip was merely a mix up or printer's devil which did not occasion any miscarriage of justice. He submitted further that defects in a trial court's record of proceedings is only fatal when it can be shown that a miscarriage of justice has resulted from the effects. He relied on **Oyakhire vs. State (2006) 12 NWLR (Pt. 1001)162.**

Learned counsel contended that the trial court erred to have rejected the evidence that two mobile phones were stolen because they were not recovered nor their value stated, as the law does not require the production of stolen items or their value. He however, submitted that if there had been cross appeal by the respondent against the judgment of the trial court the story would have been different. He referred to **Section 218 (12)** and **219** of the **Criminal Code** which the trial court relied on to convict the appellant, rightly for a lesser offence which the appellant was not charged with.

Learned counsel referred to the confessional statement of the appellant Exhibit FI and contended that it corroborated the testimony of prosecution witnesses. He submitted that even the court is empowered to convict on a confessional statement alone, once it satisfies the required standard. He relied on **Dibie vs. State (2007) 7 SCM 101; Ibeme vs. The State (2013) 8 NCC 46; Nwachukwu vs. State (2008) 4 WRN 1; Salawu vs. State (2010) 28 WRM 157, Awosika vs. State (2010) 18 WRN 159.**

On the failure to tender the weapons allegedly used

by the appellant, before the trial court, learned counsel contended that Exhibit FI had explained away how the guns were sourced and returned. He submitted that indeed, the failure to tender the guns did not do any harm to the prosecution's case. He relied on **Olayinka vs. State (2007) 2 NCC 507 and Alor vs. State LER (1997) SC 76.**

On the issue of conspiracy learned counsel submitted that the offence is usually proved by circumstantial evidence, and the conspirators need not know themselves. He relied on **Bello vs State (2001) 12 SCM (Pt. 228); Aduku vs. FRN (2009) 4 NCC 359; Daboh vs State (1997) 5 SC 197.** He submitted that there are sufficient circumstantial evidence to sustain the charge against the appellant. He urged the court to so hold.

He finally urged the court to resolve the issue against the appellant, dismiss the appeal and affirm the judgment of the Court below which had earlier affirmed the conviction and sentence by the trial court.

As earlier indicated, the appellant was charged along with other co-accused persons but only one other stood trial with him as the 1st accused, while the two others were said to be at large. The 1st count of the charge is for conspiracy that they agreed to carry out an illegal act of attacking and robbing the following persons Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi all of No. 45 Sabon Birni Road, Gwiwa Low Cost, Sokoto.

However, it had been held that the proper and appropriate approach to an indictment containing conspiracy charge and substantive charge is to deal with the latter, that is, the substantive charge first and then proceed to see how conspiracy count has been made out in answer to the fate of the charge of conspiracy. Conspiracy generally, is an

agreement between two or more persons to carry out an unlawful act. But failure to prove substantive offence does not make conviction for conspiracy inappropriate, as it is, in itself a separate and distinct offence, that is independent of the actual offence conspired to commit. See, **Balogun vs. Attorney General, Ogun State (2002) 9 SCNJ 1961; Lukman Osetola & Anor vs. The State (2012) LPELR 9348 SC; (2012) 12 SCM (Pt. 2) 347;(2012) 17 NWLR (Pt. 1329) 251; (2012) 6 SC (Pt. IV) 148.**

In this case, the substantive offence was count 2 of the charge, which is an offence of armed robbery. The appellant and other co-accused were alleged to have attacked and robbed their victims earlier mentioned Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi with a gun and forcefully collected two GSM handsets (Nokia and Sagem) and other valuables, valued at the sum of N45,000.00.

It is trite law that for the prosecution to achieve success in proof of the offence of armed robbery, the following essential ingredients must be proved beyond reasonable doubt.

(a) That there was a robbery incident or series of robberies.
(b) That the robbery or each of the robberies was an armed robbery.
(c) That the accused was the armed robber or one of the armed robbers.

However, the law is very clear that, this proof which it expects to be beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. Yet, the burden of such proof which lies solely on the prosecution never shifts. If at the conclusion of trial, on the entire evidence adduced the court is left with no doubt that the offence was committed by

the accused, then that burden is discharged. See; **Bello vs. The State (2007) 10 NWLR (Pt. 1043) 564; Amina vs. State (1990) 6 NWLR (Pt. 155) 125; Nwachukwu vs. State (1985) 1 NWLR (Pt. 11) 218; Ani vs. State (2003_ 11 NWLR (Pt. 83) 142; Uwagbo vs. State (2007) 6 NWLR (Pt. 103) 1.**

It is equally trite law that at the end of a trial and before a court comes to the conclusion that an offence has been committed by the accused person, it must look for the ingredients of the offence charged and ascertain that the acts of the accused come within the confines of the said offence charged. See; **Amadi vs. The State (1993) 8 NWLR (Pt. 314) 644; Alor vs. State (1997) 4 NWLR (Pt. 501) 511.**

In the instant case, PW2 and PW4, Hajiya Zainab Shehu Ladan and Buhari Shehu Muhammed respectively were the victims of alleged attack.

PW2 had testified before the trial court that the appellant, armed with a gun with another who was at large had entered into her house and while he pointed the said gun at them demanded for money. The other person was said to have proceeded into the bedroom and then came out with a bag containing valuables belonging to her. The appellant collected her telephone handset and the handset of PW4.

PW4 was Buhari Shehu Mohammed. His testimony corroborated materially the testimony of PW2. He identified the appellant as one of the two persons who had entered their house on the day of the incident. Indeed, that it was the appellant who pointed gun at him and demanded for money from them. He testified that, as the accused persons suspected that people were already gathering when their victims were shouting "thief" "thief", they ran out, shot their guns into the air and escaped.

One of the motorcycles that were allegedly used by the said armed robbers was later recovered, tendered by the police and admitted as Exhibit A.

The appellant was said to have made a confessional statement to the police which though was retracted but after the conduct of a trial-within-trial, the objection was overruled and the statement was admitted in evidence.

However, the trial court found that the appellant in his statement denied collecting the GSM phones but that it was his co-accused who was at large that collected the said handsets. The trial court also held the view that there were doubts whether or not there was any missing GSM phone handsets and handbag. This doubt was resolved in favour of the appellant, as the court then came to the conclusion that the prosecution failed to prove beyond reasonable doubt that indeed there was an armed robbery. At best with the testimonies of PW2 and PW4 the trial judge felt that the offence of attempted robbery was established, instead. The trial court however found, relying on the statement of the appellant to the Police-Exhibit FI which was admitted as a confessional statement, that the appellant and the co-accused were armed with gun when they visited the complainant's house and attempted to rob them of their possessions.

Relying on **Sections 218(2)** and **219** of the **Criminal Procedure Code**, the appellant was found guilty, convicted and sentenced for the offence of attempted robbery.

It is note worthy, that there was no appeal to the court below against this decision of the trial court. As earlier stated, this much was admitted by the learned counsel for the respondent in his brief of argument for the state.

Sections 218 (2) and 219 of the Criminal Procedure Code provide as follows:

S. 218(2) "When a person is charged with an offence and facts are proved which reduces it to a lesser offence, he may be convicted of the lesser offence, though he is not charged with it."

S. 219 "When a person is charged with an offence, he may be convicted of an attempt to commit such an offence though the attempt is not separately charged."

The trial court who had the opportunity to listen and watch the demeanour of witnesses testifying before the court at the end of the trial of the appellant, *inter alia,* came to the following conclusion:

"….. after a very careful perusal of evidence adduced before me, I am quite satisfied that the prosecution had failed to establish a case under Section (2) (a) of the Robbery and Firearmed Act, 1990 as amended as there was no evidence of what was stolen from the victims of the robbery. But I have no doubt in my mind that a case of attempt to commit armed robbery contrary to Section 2(1) (a) of the Robbery and Firearms Act, 1990 was proved against the 1st and 2nd accused persons and I found them guilty and convict them accordingly."

This takes me to the count on conspiracy. It is on record that the appellant was arraigned and duly charged along with others, in particular, with one Aliyu Danjuma who was the 1st

accused while the appellant was the 2nd accused person before the trial court. The others were said to be at large and never stood trial.

Generally, as the saying goes, "It takes two to tango" It certainly takes two or more persons to conspire and a person alone cannot be convicted of conspiracy if the others are discharged and acquitted. However, it is trite law that a conspiracy to commit an offence is a separate and distinct offence and it is independent of the actual commission of the offence to which the conspiracy is related. See; **Balogun vs. Attorney General of Osun State (2002) 4 SCM 23, (2002) 2 SCNJ 196 Silas Sule vs. State (2009) 8 SCM 177.**

Generally, conspiracy is an agreement by two or more persons acting in concert or in combination to accomplish or commit an unlawful or illegal act, with an intent to achieve the agreed objective. See. The **Salawu vs. State (2011) LPELR – 8252 (SC) (2011) 10 SCM 76.**

In order to establish an offence of conspiracy against an accused person to commit a criminal offence, the prosecution is required by law to prove the following:

(a) That there was an agreement between two or more persons to do or cause to be done, some illegal act or an act which is not illegal but by illegal means;

(b) Where the agreement is other than an agreement to commit an offence, that some acts besides the agreement was done by one or more of the parties in furtherance of the agreement;

(c) Specifically, that each of the accused individually participated in the conspiracy.

There is no doubt and it has been held that there need not be an express agreement before common intention can be

shown in conspiracy. See; **Adekunle vs. the State (1989)) 12 SCNJ 184.**

In the instant case, the trial court relied on the confessional statement of the appellant Exhibit FI from which the court inferred the agreement by the appellant with other co-accused to carry out the illegal act or armed robbery.

The statement of the appellant is on pages 12-14 of the record where the appellant, inter alia, states as follows:

"I was born in Bauchi but was brought up in Aba and later completed my secondary education in Bauchi Urban College in the year 1996. I am into Business of selling recharge cards and handset for the past one year. I came to Sokoto in the year 2000 where my brother did his NYSC. I gets (sic) to know Ali Murtala who is a member of our gang when he was into business buying and selling of cows. My main reason of coming to Sokoto on Saturday 8/12/2007 was to visit my brother name Ekene Owando who is a Soldier attached to 26 Motorised Battalion, Sokoto. Even though this is my second time of visiting him.

On 8/12/2007 about 200hrs I went to mummy market to relax when luckily, I met one Ali Murtala alias Uwem and one Aliyu Danjuma. The said Ali Murtala alias Uwem introduced to me Aliyu Danjuma as his friend before he left.

On 9/12/2007 about 1700hrs, Ali Murtala called me on my GSM phone and asked me to meet him at Kwannawa area around 1900hrs. Reaching Kwannawa I met Ali Murtala, Aliyu Danjuma and Lumu Abdullahi. At this place, Aliyu Danjuma said he has a work for us which is robbering job, which we instantly agreed to execute the job. The said Ali Murtala and Aliyu Danjuma asked I and Lumo to wait for them there, while they go out to look for their friend, a solider who is their friend. When they returned from the solider place, they came along with a motorcycle with four arms and share it among ourself (sic), then we moved straight to execute the robbery job at a place which I don't know. Aliyu Danjuma carried two people on his Jarma UK motorcycle while one of us took Okada. Reaching there Aliyu Danjuma decided to stay outside, Lumu Abdullahi stood by the door while I and Ali Murtala entered into the room. When we entered we first arrested the family and demanded for money which they said they don't have and began to shouting, Ali Murtala immediately collected two handsets from the victims while we took to our heels. We ran straight to Aliyu Danjuma who was with the Motorcycle to run, but clutch of the motorcycle disappointed us as it refused to on. We then abandoned the motorcycle there and ran away."

I decided to quote extensively from the statement said to have been made by the appellant to the police, because, as earlier noted in this judgment the appellant neither testified

nor called any witness to testify in his defence. He chose to rest his case on that of the prosecution.

It is on record that the appellant retracted the above statement when same was being tendered by the prosecution but as I stated earlier, upon the conduct of the required trial-within-trial, his objection was overruled and the statement was duly admitted. It is already settled, that a confessional statement does not become inadmissible merely because it was subsequently retracted by the maker. A confessional statement is admissible and should be admitted, once it is found to be direct and positive and it relates to the acts. Knowledge or intention of the maker, stating or suggesting the inference that he committed the crime charged. See; **Solomon Thomas Akpan vs. The State (1992) LPELR 351 (SC); Shittu vs. State (1970) 1 All NLR 228; Adamu vs. AG Bendel State (1986) 2 NWLR (Pt. 22) 284; Aremu vs. State (1991) 7 NWLR (Pt. 201) 1; Ejinima vs. State (1991) 6 NWLR (Pt. 200) 627.**

It is already trite law, that an accused person can be convicted on his confessional statement alone where the confession is consistent with other ascertained facts which have been proved. See; **Akpan vs. State (1990) 7 NWLR (Pt. 160) 101.**

The statement credited to the appellant as the confession had graphically given in details the way the alleged robbery act was planned and carried out by him and the co-accused. It gave the role played by each of the accused. The trial court was therefore right and correctly admitted the statement as a confession. The court below, in its considered judgment opined, *inter alia,* as follows:

> **"The trial court had properly assessed and evaluated the evidence adduced in the case, bearing in mind the fact that the appellant chose not to give evidence at the trial or call any witness to testify on his behalf. The trial court had therefore no evidence from the defence which it could weigh in order to see where the balance tilts."**

In my view, the court below rightly affirmed the decision of the trial court.

Furthermore, as a result of the confessional statement of the appellant, all other sub issues raised by the learned counsel for the appellant, such as failure to tender the alleged guns used in the said robbery attempt, are of no moment. This point in particular was explained away in the statement as noted correctly by the court below, that the guns were quickly returned to the solider from whom they had gotten them. Indeed, the court below correctly stated the position that there is no law insisting that the prosecution must always tender weapon or gun used in a robbery in order to establish its case. It largely depends on the facts and circumstances of each given case. See; **Olayinka vs. The State** (2002).

It is already established, that a freely made confession, whether judicial or extra judicial, so long as it is found to be direct, positive and properly proved, is sufficient proof of guilt and conviction could be rightly based entirely on such statement. See; **Jimoh Yesufu vs. The State** (1976) 8 SC 167.

My lords, I must say that I have no slightest doubt in my mind that the appellant's confessional statement was direct, positive and proved to sustain the conviction. In the

result, the sole issue is resolved against the appellant.

In the final analysis, I am of the firm view that this appeal is unmeritorious, and should be dismissed. Accordingly, appeal is dismissed. The judgment of the court below delivered on 12th December, 2011 which affirmed the conviction and sentence of the appellant by the trial court is hereby affirmed.

Olu Ariwoola,
Justice, Supreme Court

I. TANKO MUHAMMED (JSC): My learned brother, Ariwoola, JSC, permitted me to read before now a draft of the judgment just delivered. I agree with my lord's reasoning and conclusion which I adopt. I abide by consequential orders made therein.

brahim Tanko Muhammad,
Justice, Supreme Court.

PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Olukayode Ariwoola JSC and to underscore my support to the reasoning I shall make some remarks.

The appellant with one other accused person were charged with conspiracy to commit armed robbery and armed robbery contrary to **section 5(b)** and **1 (2)(a)** of the **Robbery and Firearms (Special Provision) Act Cap 398 LFN 1990**. They were arraigned before Malami Umar J of the Sokoto High Court which trial judge tried and convicted the appellant on the 1st count of conspiracy and attempted armed robbery and sentenced him to imprisonment for life. The appellant aggrieved appealed to the Court of Appeal which dismissed the appeal and further dissatisfied has

approached the Supreme Court to ventilate his grievance.

FACTS

The version as put forward by the prosecution through six witnesses and seven exhibits tendered which are a black coloured Jarma UK Motorcycle, a black sandal belonging to the other accused person. Also tendered were a white cover shoe, a pair of trousers and a pair of short belonging to the 2nd accused person Exhibits F and F1 were statements obtained from the appellant and his co-accused which they claimed were obtained under duress thus necessitating a trial within trial after which the trial court admitted the said statements.

The appellant neither said anything in testimony nor called any witness. The fuller details are well captured in the lead judgment and there is no point repeating them here.

On the 17th day of November, 2016 date of hearing, learned counsel for the appellant, Mr. Ebenezer Obeya adopted his brief filed on 31st day of October 2012 and in it, learned counsel raised a single issue which is as follows:

> **Whether the learned Justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt.**

For the respondent, the learned Attorney General of Sokoto State, Sulaimna Usman adopted its brief of argument filed on 20th November 2015 and deemed filed on 20/1/16. He framed a sole issue which is thus:

> **Whether having regard to the totality of the evidence adduced by the prosecution, the**

learned justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial court.

The issues as raised on either side are really two sides of the same coin and any of the issues will suffice. I shall make use of that crafted by the appellant as it seems to me simpler.

SOLE ISSUE

Whether the learned justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt.

Learned counsel for the appellant contended that considering that alleged robbery took place at night it will be necessary to consider in depth the conflicts in the testimony of the witnesses as far as the appellant is concerned. That the evidence of PW2 and PW4 who were eye witnesses conflicted and no explanation proffered to explain the divergence. He cited **Oladotun vs. State (2010) 15 NWLR (Pt. 1217) 490.**

That with the contradictory pieces of evidence of the PW2 and PW4, what the court was left with was the retracted confessional statement of the appellant which failed the tests in **Daura vs. The State (2980) 8 -11 SC 236** following **R vs. Sykes (1913) 8 CR APP 233.**

That the judgment is not supported by the evidence before the trial court, and it was not safe to convict the appellant on a confession such as Exhibit F1. Reliance was placed on **Henry Nwokearu vs. The State (2010) 15**

NWLR (Pt. 1215) 1.

For the appellant it was submitted that the learned trial court misdirected itself when it relied on Exhibits F and F1 to corroborate the shaky testimony of PW2 and PW4 and thereby occasioned a miscarriage of justice. That the appellant deserved the benefit of the doubt created by the inconsistencies in Exhibits F and F1 and the court's findings of fact. He cited **Aigbadion vs. The State (2000) 7 NWLR (Pt. 666) 687 at 704.**

In response, learned counsel for the respondent and Attorney General of Sokoto State, Sulaiman Usman submitted that the prosecution proved all the three ingredients of the offences charged. He cited **Onyeye vs. The State (2012) NCC 304 at 310 311.**

That defects in a trial court record of proceedings is only fatal when it can be shown that a miscarriage of justice has resulted from the defects which is not the case to the matter at hand. He cited **Oyakhire vs. State (2006) 12 NWLR (Pt. 1001) 162.**

Learned Attorney General contended that the court is entitled under the provisions of **Section 218 (2)** and **219** of the **Criminal Code** to convict for a lesser offence, even if the accused is not charged with that offence. That the confessional statement of the appellant corroborated the evidence of the witnesses and in law, the court can convict on the basis of confessional statement alone once it is satisfies the standard required. That the confessional statement is positive and direct sufficient to convict the appellant, even without the evidence of the witnesses. He cited **Dibie vs. The State (2007) 7 SCM 101; Ibeme vs. State (2013) 8 NCC 46** etc.

What is before this court in brief, as stated by the

appellant, is that the only inference to be drawn is that there was no attempted robbery at all and no such robbery planned and so the appeal should be allowed and the decision of the Court of Appeal affirming the conviction and sentence of the trial court, set aside.

On the other side, as pushed forward by the respondent, is that there were credible and cogent evidence of eye witnesses who gave unchallenged evidence. That the appellant was at the scene of crime and made confessional statements. That in fact the two courts below ought to have found the offence of armed robbery proved instead of the attempted robbery they came up.

The findings and summation of the learned trial judge at pages 152, 151 and 144 of the Record thus:

"I am quite satisfied that the prosecution has failed to establish a case under Section 1(2) of the Robbery and Firearms Act 1990 as amended as there was no evidence of what was stolen from the victims of the robbery ….."

Earlier at page 151 the court had conceded that "the non recovery of the handsets alleged to be forcefully collected from PW2 and PW4 by the accused person showed that the act of robbery against PW2 and PW4 is not proved beyond reasonable doubt by the prosecution …."

The learned trial judge then went ahead to conclude that "from the evidence of the PW2 and PW4 and Exhibits F and F1 … it is the view of this court that the prosecution had failed to prove beyond reasonable doubt that there was

robbery at the house No. 45 Shinkafi Road, Sokoto. What the evidence of PW2 and PW4 established is an attempt to robbery of the said G.S.M. phones at No. 45 Shinkafi Road, Sokoto.

The provisions of **Section 2(1)** of the **Robbery and Firearms (Special Provisions) Act** prescribed as follows:

i. With intent to steal anything.
ii. Assaults any other person.
iii. And at or immediately after the assault, uses violence or
iv. Threatens to use actual violence to any other person or property in order to obtain the thing intended to be stolen, shall upon conviction be sentenced to imprisonment for not less than 14 years but for more than 20 years.

Subsection (2) provides, **if**

The offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any other person so armed: or

At or immediately before or immediately after the time of assault, the said offender wounds or uses any other personal violence to any person,

The offender shall upon conviction be sentenced to imprisonment for life.

The learned trial Judge then held thus:

> **"In the case at hand, it is pertinent to note that the evidence of PW2, PW5 and Exhibits F1, A, B, C, D and E have corroborated the confession of the first accused person."**

The court below in a judgment anchored by Amiru Sanusi JCA (as he then was) captured at page 207-209 thus:

> **"In the instant case PWs 2 and 4 are eye witnesses in the case who testified that the appellant went to their house at No. 45 Sabon Birni Road, Gwiwa Low Cost (as borne out in the two charges) and NOT No. 45 Shinkafi Road (as mistakenly stated on pages 137, 144, 146 of the Record of judgment of the lower court) armed with a gun and robbed them of their properties after applying some elements of violence on them and after gathering all the occupants of the said house in a room. Both prosecution witnesses, the appellant the first accused person Aliyu Danjuma corroborated those pieces of evidence in their confessional statements (Exhibits F and F1)."**

The Court of Appeal further stated as follows:

> "**These witnesses narrated to the court all that ensued between them and the appellant and his other two co-conspirators namely Aliyu Danjuma (the 1st accused convict and one Ali**

> **Murtala who is at large). The learned trial judge ably and painstakingly considered the evidence adduced before him and applied the ingredients of the offence and conspiracy. The thrust of the evidence of PWs 2, 4 and 5, as rightly found by the trial court, were duly corroborated by the confessional statements of the appellant and the 1st accused (Exhibits F and F1) wherein, the appellant unequivocally linked himself with the offence of conspiracy between them namely Aliyu Danjuma (the 1st accused) and two others namely Aliyu Murtala and Lawal (accused persons at large). As I said above, the presence of evidence of the two PW2 and PW4, (the victims of the robbery) fixed and identified the appellant and the 1st accused with the offence of conspiracy which were equally corroborated an Exhibit F (the 1st accused person's confessional statement) as well as Exhibit F1 (the appellant's confessional statement."**

The Court of Appeal went on to state at Page 209 thus:

> **"I therefore entirely agree with the findings of the trial judge that the 1st count of the offence of conspiracy, contrary to section 5(b) of the Robbery and Firearms (Special Provisions) Act of 1990 was duly proved against the appellant herein beyond reasonable doubt and I accordingly so hold and in effect I resolve the first leg of the lone issue against the appellant**

and in favour of the respondent."

On the matter of the attempted robbery the court below said:

"I will now proceed to consider the second leg of the issue, that is to say, whether the offence of attempted robbery was proved against the appellant beyond reasonable doubt? The trial court cited in its judgment at page 148 of the record the case of Olayinka v State (supra) listed the ingredients of the offence of armed robbery which the prosecution must prove beyond reasonable doubt in order to obtain conviction. These ingredients including the following:

(a) That there was an armed robbery.

(b) That the accused was armed;

(c) That the accused while armed committed robbery.

"The learned trial judge duly considered these ingredient vis-a-vis the evidence adduced at the trial before concluding that the offence of armed robbery was not committed or proved by the prosecution. In its stead, the trial court found that only attempted robbery was committed contrary to section 5(2) of the Act since the items allegedly stolen or robbed i.e. the handsets etc were not tendered in evidence and that all the items tendered in evidence at the trial were not shown to belong to the PWs 2 and 4 of the robbery. The court held that the

evidence adduced by the prosecution fell short of proving the offence of armed robbery against the appellant and the 1st accused beyond reasonable doubt under section 1(4) of the Act."

The Court of Appeal at Pages 213-215 of the record show how it came about its findings and summation as follows:

"In the case at hand, the learned trial judge extensively referred to the testimonies of PWs 2 and 4, the victims of the crime and accepted them in the absence of any challenge or assault on them. He found those testimonies to serve as sufficient corroboration of the appellant's confessional statement (Exhibit F1) and that they strengthened the truthfulness of the confession of the appellant. I cannot agree more. I am certain that the trial judge had duly ascertained the truth and veracity of the said confession and was right in accepting and relying on it.

The learned appellant's counsel raised issue of contradiction in the venue of the offence especially where the court repeatedly referred to the venue as No. 45 Shinkafi Road. I also noted on pages 137, 144, and 147 of the record where the lower court in its judgment stated that the witness mentioned No. 45 Shinkafi Road as their residence."

I do not think that was correct. The eye witnesses especially PW4 gave the address of

their residence as No. 45 Sabon Birni Road Gwiwa Low Cost. That was the address that was mentioned in the charges. The address which appeared in the lower court's judgment now on appeal must therefore be a mere mix up or printers devil as could be described on which the appellant even failed to show any miscarriage of justice occasioned him. The learned counsel also raised dust on the reference of PW2 Zainab to PW4 as her son instead of nephew. To my mind, that is minor and certainly not material contradiction since the two relationships are interchangeable depending on the norms in a particular community or traditional set up. No one will rightly expect the testimonies of witnesses to be the same word of word. Similarly, regarding the issue on non tendering of the gun or weapon used in the commissioning of the robbery raised by the learned appellant's counsel, I think that is of no moment, it is in evidence vide Exhibit F1 that the appellant's confession is clear on that. Therein, he stated how they got the guns and how they returned them to the soldier who provided the guns to them. Even at that, there is no law insisting that the prosecution must always tender weapon/gun used in a robbery in order to establish its case. This largely depends on the facts and circumstances of a given case."

The conclusion of the appellate lower court is as follows:

"The trial court had properly assessed and evaluated the evidence adduced in the case, bearing in mind the fact that the appellant chose not to give evidence at the trial or call any witness to testify on his behalf. The trial court had therefore no evidence from the defence which it could weigh in order to see where the balance tilts. In my view, it had rightly accepted and acted on the evidence adduced before reaching its conclusion, that the offence of attempted robbery under section 2(2) of the Act was committed by the appellant herein, is agreeable to me."

To go back on track, it is to be restated that the burden of proof is on the prosecution and the standard required is proof beyond reasonable doubt pursuant to **Section 138** of the **Evidence Act**. That would not be different herein in the two count charge of conspiracy and armed robbery on which the appellant and his co-accused were charged at the trial court. In proof of armed robbery the three essential ingredients that must be proved, I dare say conjunctively are:

1. That there was a robbery or series of robberies
2. That each robbery was an armed robbery
3. That the accused took part in the robbery or robberies

I place reliance on the case of **Onyenye vs. The State (2012) NCC 304 at 310 – 311**. Those ingredients contextualized within the facts and circumstances of the case in hand, it is to be stated that there were two eye witnesses, PW2 and PW4 who were victims of the robbery, while the appellant and the 1st accused were armed with a gun. The victims were

dispossessed of their handset and the evidence rendered by these eye witnesses fixed the appellant at the scene and described the role he played. The confessional statement of which the appellant, Exhibit F1, admitted after a trial-within-trial, effectively corroborated the evidence of the prosecution witnesses. Apart from the confessional statement, of itself was sufficient to ground a conviction, as the truthfulness of the statement glaring as the background of the appellant and links with several persons were such as could only have come from his personal knowledge and not such as could be contrived by another person. What I am saying is that the confessional statement is positive and direct thus meeting the requirement on which on its own the accused appellant could be convicted in the absence of the evidence of witnesses. See the case of **Ibeme vs. State (2013) 8 NCC 46; Awosika vs. State (2010) 18 WRN 159; Dibie vs. The State (2007) 7 SCM 101.**

Also to be noted is that the fact that no weapons used in the robbery was tendered before the court of trial is not fatal to the prosecution's case, just as the two courts below found as the effect of the absence of such weapons used is ascertained in circumstances of a given case and in the case at hand, it has no negative impact. See **Olayinka vs. State (2007) 2 NVV 507; Alor vs. State (1997) SC 76.**

With respect to the matter of the charge of conspiracy, it is an offence that is proved by circumstantial evidence, that is inferred from the circumstances surrounding a particular case. This is because it is difficult to prove it by direct evidence being a crime that is usually hatched in secret, a fact well recognized by the law. Therefore in this instance there is a surfeit of evidence from which the meeting of the minds of the offenders is inferred. I rely on **Bello vs. State (2012) (Pt.**

2) SCM 28; Aduka vs. FRN (2009) (1997) 5 SC 197.

In the main, from the above and the fuller and better reasoning in the lead judgment of the learned brother, Ariwoola JSC I too dismiss this appeal.

I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

ADAMU AUGIE, (JSC): I had a preview of the lead judgment delivered by my learned brother Ariwoola, (JSC), and I agree with him that this Appeal lacks merit.

However, to emphasize the points made, I will add a few words. The appellant and one other accused person were charged with the offence of conspiracy and armed robbery. His statement to the police, which forms part of the Prosecution's case, was admitted in evidence after a trial-within-trial, wherein both of them elected not to testify.

The appellant also chose not to testify in his defence or call any witness in the main trial, and the trial court commented as follows:

> **It is the view of this court that considering the ample evidence adduced by the prosecution against the accused persons, the silence of the second accused [the appellant] throughout the trial did not assist him in any way. It is rather a gamble, which [he] decided to undertake without success.**

In agreeing with the trial court, the court below observed as follows:

It should be noted that the appellant did not call any witness or testify on his own behalf at the trial. He, therefore, played a gamble, which was obviously fatal to his case.

As to his confessional statement, the court below further stated that:

I am not unmindful of the fact that the appellant retracted his confession. I am also equally mindful of the fact that [he] retracted his confession, which led the court to conduct trial-within-trial. The prosecution called three witnesses at the mini trial but the appellant (then 2nd accused) neither testified at the miniature trial nor called any witness and the court unhesitatingly admitted the statement in evidence since there was no evidence to weigh from the defence or to prove alleged involuntariness. Similarly, at the substantive trial, [he] also did not call any witness to testify for his defence or testify on his own behalf for his defence. In short, he rested his case on that of the prosecution, now respondent. What a gamble!

The key word there is gamble and the appellant actually gambled, by remaining silent in the face of overwhelming evidence against him. It is true that he was not obliged to say anything at the trial because an accused person has the constitutional right to remain silent and leave the trial to the prosecution to prove the charge alleged against him.

In effect, his right to remain silent, even when arraigned for a criminal offence, is an inviolable one. But he was taking a huge risk; the law says that he is obliged to make his defence, if his remaining silent will result in being convicted on the case made out against him *see* **Okoro vs. The State (1988) 5 NWLR (Pt. 94) 255 at 266 SC, and Igabele vs. The State (2006) 6 NWLR (Pt. 975) 100 at 133 SC.**

The appellant herein rested his case on that of the prosecution, and was convicted for a lesser offence that was made out against him.

His situation emphasizes the vital importance of defence counsel knowing when it is imperative that an accused person should testify, to explain particular aspects of the case, which he alone can explain. This is because resting the defence on the case of the prosecution will not present the trial court with any explanation or an alternative story see **Nwede vs. The State (1985) 3 NWLR (Pt. 13) 444 SC. See also Igabele vs. State (supra)** where this court per Ogbuagu, (JSC), stated:

It was for him to rebut the presumption that he committed the crime, at least, to cast a reasonable doubt on the prosecution's case by preponderance of possibilities. But remarkably and significantly, his learned defence counsel, refused (as he was entitled to do as the master of his client's case), to cross-examine some of the vital witnesses - He also refused the appellant testifying and rested the case of the defence on that of the prosecution and thereby "drowning" the appellant or letting him "stew in his own juice" so to speak/say.

In this case, there is no question that evidence against the appellant, including his confessional statement [**Exhibit F1),** is overwhelming, and his remaining silent in the face of that evidence, did not help him. In fact, the appellant hobbled his own feet, and handicapped his case.

My learned brother addressed other issues in the lead judgment; I adopt his reasoning thereon as mine, and I also dismiss this appeal.

Amina Adamu Augie,
Justice, Supreme Court

EJEMBI EKO, (JSC): The appellant and one Aliyu Danjuma were jointly tried on a two count charge of conspiracy to commit armed robbery punishable under **Section 5(b) of the Robbery and Firearms (Special Provisions) Act**, and armed robbery punishable under **Section 1(2)(a)** of the same **Robbery and Firearms (Special Provisions) Act Cap 398 LFN 1990**. They were alleged to have conspired to rob, and in fact did attack and rob Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi, while armed with guns, of two GSM Handsets (Nokia and Sagem) and other property valued at N45,000.00. The date of the robbery was 9th December, 2007 at about 17.00 hours. The gang had arranged two motorcycles, as get away vehicles. However, the motorcycles meant to convey the Appellant and Aliyu Danjuma from the scene failed to start. Consequently, the appellant and the co-accused abandoned the motorcycles and fled on foot. They were subsequently arrested.

The appellant made extra-judicial statement on 17th December, 2007, which was admitted in evidence after a trial-within-trail as Exhibit "F1". It was a confessional

statement; and it was quite revealing. The appellant in Exhibit "F1", states *inter alia:*

"On 08/12/2007 about 20.00 hours I went to Mammy Market to relax when luckly I met one Ali Murtala alias Uwem and one Aliyu Danjuma. The said Ali Murtala alias Uwem introduced to me Aliyu Danjuma as his friend before he left. On 9/12/2007 about 17.00 hours, Ali Murtala called me on my GSM phone and asked me to meet him at Kwannawa area around 19.00 hours. Reaching Kwannawa I met (1) Ali Murtala, (2) Aliyu Danjuma and (3) Lumu Abdullahi. At that place Aliyu Danjuma said he has a work for us, which is robbery job, which we instantly agreed to execute the job. The said Ali Murtala and Aliyu Danjuma asked I and Lumu to wait for them there, while they go out to look for their friend, a solider, who is their friend. When they returned from the soldier's place, they came along with a motorcycle with four arms and shared it among ourselves. Then we moved straight to execute the robbery job at a place which I don't know. Aliyu Danjuma carried two people on his JarmaUK Motorcycle, while one of us took Okada. Reaching there, Aliyu Danjuma decided to stay outside. Lumu Abdullahi stood by the door while I and Ali Murtala entered into the room. When we entered we first arrested the family and demanded for money which they said they don't have and began shouting. Ali Murtala immediately collected two handsets from the victims, while we took to our heels. We ran

straight to Aliyu Danjuma who was with the motorcycle to run but the clutch of the motorcycle disappointed us as it refused to on (sic). We then abandoned the motorcycle there. I, Ali Murtala and Lumu Abdullahi later met at a junction where I took Okada to Kwannawa".

In Exhibit "F.1", the appellant further narrated that they (the four of them) later assembled in the soldier's house and there the arms were collected from them. They slept there. The following morning, as he (the appellant) was making his way to travel to Bauchi, he was arrested by a solider at the gate. In his words:

"I was taken to the Military Police Quarter Guard, where I met Aliyu Danjuma whom we operated together. When I got there Aliyu Danjuma was called to identify me. He did it by saying that I put on white shirt and describing the shirt and trouser I put on. The soldier went and searched my bag, and all the items Aliyu Danjuma said to identify me was (sic) found".

Exhibit "F1" was recorded by PW.6 under words of caution administered also by the PW.6, a police officer. The PW.6 and one Sgt Ahmed Bello, who was present when the confessional statement was recorded, testified in the trial-within-trial. The trial-within-trial was ordered when the appellant's counsel objected to the admissibility of the extra-judicial statement of the appellant on the grounds that the statement was not voluntarily made and that it was made under torture and some inducement. The appellant after

making Exhibit "F1" was taken before a senior police officer and there confirmed that he made the statement voluntarily. The senior police officer also testified in the trial-within-trial undiscredited.

At the trial-within-trial the appellant did not prove his assertions. He abandoned the assertions when he elected not to testify to prove them. The learned trial judge believed the narration of the witnesses who testified for the prosecution in the trial-within-trial, holding that their evidence was cogent and credible. The learned trial judge was right, in my view, when he dismissed the appellant's assertions that Exhibit "F1" was not made voluntarily.

The appellant also did not testify in his defence. He raised no iota of defence to counter or cast any doubt on the prosecution's evidence. Only Aliyu Danjuma testified. Mr. Ogiza, the counsel to the appellant had at the close of the prosecution's case announced that the appellant "had elected not to testify". Facts not disputed are taken as established unless circumstances exist that make the undisputed facts ridiculous. That is not the situation here. The attempted retraction of Exhibit "F1" appears to be one of the usual gimmicks of lawyers that was not backed by his client. It is thus clear that the feeble attempt made by the appellant to retract or render inadmissible Exhibit "F1" was not sustained. I therefore find it rather spurious to read in the appellant's brief of argument, settled by Mr. Ogiza, that Exhibit "F1" was retracted and also that it was obtained involuntarily from the appellant. The law is trite that counsel's summation and final address in the brief of argument does not have the force of evidence, and it can not be substituted for legal evidence. A bare statement from the Bar does not have the force of legal evidence by which a

burden of proving a fact in issue is discharged. See **ONU OBEKPA vs. COMMISSIONER OF POLICE (1981) 2 NCLR 420.**

In my considered view, the appellant was not aggrieved by the decision of the trial court, upon the trial-within-trial, that the credible and cogent evidence led by the prosecution witnesses established that the appellant made Exhibit "F1" voluntarily without torture or inducement. This is an appealable decision within the context of **Section 318** of the **1999 Constitution**, in respect of which the Appellant's right of appeal is guaranteed by **Section 241** and **242** of the same **Constitution**. The appellant, having not exercised his right of appeal against the specific findings of facts or decision, is deemed to have accepted the same. The decision therefore remains binding on him.

Exhibit "F1" is a confessional statement. It is a positive and direct narration of how the four persons, including the appellant, agreed to commit the offence of armed robbery. Even without any other evidence the appellant could have been convicted for the alleged offence only on his confession. See **IBEME vs. THE STATE (2013) 8 NCC 46.** A confession is the best evidence. See **NWACHUKWU vs. THE STATE (2008) 4 WRN 1; SALAWU vs. THE STATE (2010) 28 WRN 157; AWOSIKA vs. THE STATE (2010)) 18 WRN 159.**

Outside Exhibit "F1" there are abundant and credible evidence supporting the conviction and sentence of the appellant, as found by the trial court. PW.2 and PW.4 were eye witnesses and victims of the menacing conduct of the appellant in the night of 9th December, 2007. Their respective evidence which were not discredited by the cross-examination of the defence counsel were corroborated by

Exhibit "F1". The PW.2, for instance testified that the Appellant:

> **"was among the 2 people that entered our house. They pointed my son with a gun and he attempted to collect the gun and they slapped him and at that time I asked what was happening. They met me and Hajiya Fatima and told us that we were under arrest and they said we should give them money. They later collected our GSM Handsets the 2nd accused (the appellant) stayed with us while the other accused went into the room. The other accused person came out with a bag and at that time we shouted thieves and the people in the area came and they went out and started shooting in the air. They run to their motorcycle and one of the motorcycle failed to start and the other one started".**

The evidence of PW.2, subjected to cross-examination, remained unscathed.

The PW.4's narration of the incident *inter alia* is:

> **"on the 9th December, 2007 I was at home after ishai prayer. I was sitting in the parlour when somebody knocked at the door I said who is there and there was no response and the door was opened. After the door was opened somebody pointed at me with a gun by the 2nd accused person, Emeka Agugua (the appellant). I attempted to collect the gun from the 2nd Accused person and he slapped me and asked me where is**

Hajia. I refused to answer and he dragged me by the collar of my shirt and took me to where Hajia was sitting down in the 2nd parlour, the other person that came in to the house called at my sisters two of them and they asked them to kneel down. At that time I was also kneeling down. The second person called one of my sisters and took her to Hajia's room. She took him to their room and in that room he took a bag while the 2nd accused person (the appellant) who was with us collected our GSM phones".

The PW.4 testified further that at this juncture people started shouting and this prompted the appellant and his colleagues to hurriedly leave the room. They shot into the air as they were running towards their motorcycles. One of the two motorcycles failed to start. The PW.4 was cross-examined. Like the PW.2, the cross-examination left the evidence of PW.4 unscathed.

The evidence of PW.2 and PW.4 were substantially corroborated by Exhibit "F1". The appellant's counsel made so much fuss about PW.2 and PW.4 contradicting themselves on whether PW.4, a nephew of PW.2, being referred to as "my son" by the PW.2 and the fact that both of them were not *ad idem* on at who the gun was pointed. The counsel, totally oblivious of the substance of the evidence of PW.2 and PW.4, had raised to the unrealistically idealistic pinnacle mere semantics and infinitesimal details. When the evidence of PW.2 and PW.4 are juxtaposed against the self-incriminating statement of the appellant in Exhibit "F1" it is clear that there was no miscarriage of justice to warrant the appellate court's intervention.

It was through the PW.5, Aliyu Shehu, that Aliyu Danjuma (1st accused) was arrested on the fateful day. PW.5 heard gun shots and sound of felling motorcycle. He also heard people shouting "thief, thief". On getting to the scene, he saw the bruised 1st accused (Aliyu Danjuma) as a car flashed light on him. Suspecting that something sinister had happened, the PW.5 reported to the Police and the 1st accused was arrested. Some aspects of PW.5's evidence corroborate the testimonies of the PW.2 and PW.4, and Exhibit "F1" particularly the shouts of thief, thief, the sound of gun shots and the 1st accused trying to run from the scene.

The Court of Appeal affirmed the conviction and sentence of the appellant for conspiracy and attempted robbery. The offence of attempted robbery is a lesser offence than the robbery charged. The ingredients are less onerous to prove. The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See **THE NIGERIAN AIR FORCE vs. KAMALDEEN (2007) 2 SC. 113**. The learned trial judge, in his wisdom exercised the discretion to convict the appellant for the lesser offence of attempted robbery. The prosecutor has not complained. He is therefore taken to have accepted the verdict. Let me however add that the discretion or power of the trial court to convict for a lesser offence must be one to be exercised most judiciously and judicially. It should not be one underlined by pure sentiments, or one in which it thinks that it is exercising some clemency or prerogative or mercy. In adjudication sentiments command no place. Accordingly, the discretion or power to convict for lesser offence is not, and should not,

be an avenue for the trial judge to express his sentimental benevolence. I say no more.

This Court is usually loathe to interfere with the concurrent findings of facts by the trial court and the intermediate court, unless the appellant is able to establish that the findings are perverse and/or that substantial miscarriage of justice had been done to him. I do not think that the conviction of the appellant for attempted robbery, even when there exist abundant evidence that the appellant and his gang, while armed with dangerous weapons, stole two GSM handsets and a bag from their victims on the fateful day has occasioned any miscarriage of justice to the appellant. The findings are also not perverse. The appellant luckily had benefited from the learned trial judge's large heart towards clemency.

The totality of all I have been saying is that I can not fault the decision the Court of Appeal delivered on 12th December, 2011 in the appeal **No. CA/5/214C/2010** affirming the conviction and sentence of the appellant. For the foregoing reasons and other reasons contained in the judgment just delivered by my learned brother, Olukayode Ariwoola, JSC, this appeal is hereby dismissed.

Ejembi Eko,
Justice, Supreme Court.

PROF. VINCENT NNAMDI OKWUOSA

AND

1. **PROFESSOR N.E. GOMWALK**
2. **PROFESSOR J.A. IDOKO**
3. **PROFESSOR M.A. ADEWOLE**
4. **MR. TIJANI-H GWARY**
5. **PROFESSOR J.O. IBU**
6. **PROFESSOR D.N. WUMBUTDA**
7. **PROFESSOR (SR) T.B. ABANG**
8. **MR. ZANZAN UJI**
9. **PROFESSOR OFORI AMANKWAH**
10. **PROFESSOR J.A.M. OTUBU**
11. **PROFESSOR E.N. SOKOMBA**
12. **PROFESSOR Z.S.C. OKOYE**
13. **DR. A. NWAEZE**
14. **MR. F. DADUUT**
15. **MR. A.Y. GOSHI**
16. **MRS. A.B. OJOADE**
17. **ENGINEER H. OTHMAN**
18. **MR. A.N. NDEN**
19. **CHIEF F.I. UYANNEH**
20. **UNIVERSITY OF JOS.**

RESPONDENTS

(Being sued as members of Appointment Committee Senior Staff of the University of Jos).

SC. 239/2009

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
FRIDAY, 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA JUSTICE, SUPREME COURT
KUMAI BAYANG AKAAHS JUSTICE, SUPREME COURT
KUDIRAT M. O. KEKERE-EKUN JUSTICE, SUPREME COURT
AMINA ADAMU AUGIE JUSTICE, SUPREME COURT
EJEMBI EKO JUSTICE, SUPREME COURT

ACTION: Conditions precedent – Non- compliance therewith – Implication.

APPEAL: Notice of Appeal – Amendment – Whether additional grounds of appeal can be properly added to an incompetent Notice of Appeal.

APPEAL: Notice of Appeal – Fundamental nature of – Imperatives

APPEAL: Notice of Appeal What it connotes.

CASE LAW: The principles in Nwigwe vs. Okere – Consideration thereof.

CASE LAW: The principles in Registered Trustees of the Apostolic church Lagos. Area vs. Akindele – Consideration thereof.

COURT: Jurisdiction – Threshold issue – Significance

COURT: Power and jurisdiction – Distinction thereof

EQUITY: Estoppel by conduct – Whether a party who did not

object to the amendment of an incompetent process can subsequently raise the issue of incompetency on appeal.

LEGAL PRACTITIONERS ACT: Signing of Notice of Appeal – Mandatory provisions on the requirements of a legal practitioner to sign Notice of Appeal – Non compliance thereto – Effect.

LEGAL PRACTITIONERS' ACT: Signing of Notice of Appeal – No evidence that the signature therein belongs to a legal practitioner – Effect.

LEGAL PRACTITIONERS' ACT: Signing of Notice of Appeal – Notice of Appeal signed by a firm of solicitors – Whether incompetent.

PRACTICE AND PROCEDURE: Void act *– Whether can be validated by a subsequent valid act.*

PRACTICE AND PROCEDURE: Amendment – Amendment of Notice of Appeal to permit additional grounds of appeal – Distinction with an amendment to alter illegality to legality.

PRACTICE AND PROCEDURE: Amendment of Notice of Appeal – Fundamentally defective Notice of Appeal – Whether can be cured by amendment.

PRACTICE AND PROCEDURE: Issues of jurisdiction – Priority over other issues

PRACTICE AND PROCEDURE: Non-compliance with

mandatory provisions – Implication.

Issues for Determination

1. **Whether there was a valid appeal before the Court of Appeal in respect of which the Court of Appeal could have exercised its jurisdiction the appeal having been brought by a person unknown to Law?**
2. **Whether the University of Jos is an Agency of the Federal Government in respect of which only the Federal High Court could exercise jurisdiction?**
3. **Whether the issue of estoppels arose from the pleadings?**
4. **What was the crux of the case brought to court by the appellant?**
5. **Was it proper for the court to award the sum of N2 million Naira as damages of (sic) the appellant as plaintiff?**

Facts of the matter

This appeal is against the decision of the Court of Appeal, Jos Division in which the judgment of the High Court of Justice of Plateau State, sitting at Jos (per **A. Ahinche, J.**) delivered on 5th July, 1996 in suit **No. PLD/3624/94** was set aside and struck out. The appellant herein was the plaintiff in the said suit **NO. PLD/3624/94** wherein he claimed against the respondents, as the defendants, jointly and severally:

"1. A declaration that he was properly appointed a professor in the Department of Zoology of the University of Jos.

2. A declaration that the said appointment was approved by the Appointment and Promotions Committee of the 20th defendant at its 89th meeting

held on the 4th and 5th day of July, 1994 under the Chairmanship of Professor Gomwalk, the Vice-Chancellor of the University of Jos.

3. An order restraining the defendants either by themselves or their agents or successors or privies from forcing the plaintiff to any assessment or in any way interfering with his appointment as a Professor in the Department of Zoology of the University of Jos with special reference to the assessment".

The appellant was employed as a lecturer in the Department of Zoology of the University of Jos in 1979. He rose to the rank of senior lecturer. He then proceeded to Ahmadu Bello University, Zaria, on sabbatical and at the end of the sabbatical returned to University of Jos in 1991. He later applied to Ahmadu Bellow University, Zaria, to be appointed as a professor in the Faculty of Natural Sciences. He was offered the appointment by the Ahmadu Bello University. Thereafter, he submitted his letter of resignation to the University of Jos, citing as reason the fact that Ahmadu Bello University, Zaria, had appointed him a professor. University of Jos (the 20th respondent), on verifying and confirming this information, appointed the appellant in their Faculty of Natural Sciences on the same terms and conditions as offered by Ahmadu Bello University, Zaria. The appellant accepted the offer from University of Jos and thereafter withdrew, with apologies, his letter of acceptance to Ahmadu Bello University, Zaria, in respect of their earlier offer. He then formally accepted the Professorial Chair of the University of Jos. He later became the Dean of the Faculty of Natural Sciences of University of Jos. He held the deanship for the two year term and thereafter reverted to his position of a professor.

On 12th October, 1994, the appellant got a letter from the authorities of University of Jos, wherein he was required to submit his papers for assessment and promotion to the position of a professor a position he had held and enjoyed for over two years. He protested. The University was adamant and insisted that he must submit his papers for fresh assessment. It was at this point that theaAppellant proceeded to the High Court of Plateau State for redress on the 3 reliefs aforesaid. The High Court ruled in his favour.

Dissatisfied, the respondents appealed to the Court of Appeal, Jos. They were the appellants in the appeal **No. CA/J/278/98** in that court.

On 29th April, 2003, judgment in the said appeal was entered in favour of the respondents herein. The judgment of Plateau Sate High Court was consequentially set aside and struck out.

However, the appellant appealed to the Supreme Court. He contended that the Notice of Appeal filed in the Court of Appeal was not signed by a legal practitioner known to the legal practitioners' Act, and therefore the Court of Appeal lacked the competence to entertain the appeal.

Held (Unanimously allowing the appeal)

1. *Issue relating to jurisdiction takes precedence over other issues.*
The question whether the appeal at the Court of Appeal was or was not competent in the first place is a threshold issue. The issue being jurisdictional takes precedence over the other four(4) issues in the appeal. These other four (4) issues, in my view, relate only to the powers exercised in that appeal by the Court of

Appeal. It is settled that where a court has no jurisdiction, with respect to a matter before it, the juridical basis for the exercise of any power with respect to such matter is also absent. The reason is obvious: power can only be exercised by a court where it has jurisdiction to do so: [BRONIK MOTORS LTD vs. WEMA BANK LTD. (1983) 6 SC. 158]. *(P 471 Paras A-D)*

2. *Distinction between power and jurisdiction*
Power and jurisdiction are not the same. Whereas, jurisdiction is the right the court has, in law, to hear and determine the dispute between the parties; power, on the other hand, is the authority it has to take decisions and make binding orders with respect to the matter before it. [AJOMALE vs. YADUAT (NO. 1) (1991) 5 SCNJ 172 at176].

It is for this reason that in the constitution, section 6 deals with judicial powers of courts generally while the enabling and establishment provisions of the constitution, dealing with each court clearly set out the jurisdiction of each court. For instance Section 251 pertains to the jurisdiction of the Federal High Court while Section 240 and 233, respectively, pertain to the jurisdictions vested in the Court of Appeal and the Supreme Court.
(P 471 Paras D-G)

3. *Jurisdiction is a threshold issue*
Jurisdiction, being a threshold issue, whenever it is raised, as an issue, has to be and must be resolved first before any other issue. At the appellate level, whenever an issue is raised whether the court below

had jurisdiction to entertain the matter before it, the challenge of jurisdiction must be resolved before any other issue. [OKOYE vs. NIG CONSTRUCTION (1991) 7 SCNJ (Pt. 2) 365 at 388].

In this appeal the issue is: whether the Notice of Appeal that activated the appeal at the Court of Appeal was competent or incompetent.

The Notice of Appeal remains the only foundation and super structure on which the appeal rests. The incompetence of that originating process deprives the court of jurisdiction and competence to adjudicate on it. **[MADUKOLU vs. NKEMDILIM (1962) 2 SCNLR 341; (1962) 1 ALL NLR 587; UWAZURIKE vs. A.G. FEDERATION (2007) 8 NWLR (pt. 1035) 1 at 17].**

Accordingly, once the Notice of Appeal is defective it renders the entire appeal incompetent and all the proceedings, decisions and orders made in the appeal, no matter how well conducted, are rendered null and void. [FIRST BANK OF NIGERIA vs. MAIWADA (2013) ALL FWLR (pt. 661) 1433 AT 1487]. *(Pp 471-472 Paras G-E)*

4. *A Notice of Appeal signed by a firm of solicitors is incompetent*

The challenge to the Notice of Appeal at pages 101-104 (also at pages 171-174) of the records of this appeal is not novel. The law on this point has been settled in a number of previous decisions of this Court, including OKAFOR vs. NWEKE (2007) 10 NWLR (pt. 1043) 521, which held that a Notice of Appeal settled or signed by a firm of solicitors or lawyers is incompetent, the firm not being a natural

person, or human being, called to the Nigerian Bar and enrolled in the Supreme Court of Nigeria to practise law. In the OKAFOR vs. NWEKE's case (supra) the question was whether "JHC OKOLO, SAN & CO", who signed the Notice of Cross-Appeal and other processes in the appeal, was a legal practitioner authorized by law to sign processes on behalf of litigants? In the instant case, as it was in the OKAFOR vs. NWEKE case (supra), the Signature purporting to be that of "Miskom Puepet & Co" was on top of the inscription "Miskom Puepet & CO", who is not a legal practitioner legally authorized to sign and/or file any processes in the courts of law.
(Pp 472-473 Paras E-A)

5. *No evidence that the signature on the Notice of Appeal belonged to a legal practitioner.*

The ingenious attempt by His lordship who prepared and delivered the leading decision of the Court of Appeal was a non-starter. As I earlier stated, there is nothing in the record to suggest that the signature belonged to "Miskom Puepet" a legal practitioner, and not "Miskom Puepet & Co", contrary to the finding by the court below that the words "& co", immediately after "Miskom Puepet" were mere surplusage. The four words "Miskom Puepet & Co' were conjunctive. There is nothing separating "Miskom Puepet" from the "& Co". The finding by the court below that the person who signed or settled the Notice of Appeal was "Miskom Puepet"; and not "Miskom Puepet & Co" was perverse.
(P 473 Paras B-D)

6. *The principle in* ***Registered Trustees of the Apostolic Church Lagos Area vs. Akindele.***

This case is clearly distinguishable from the case of REGISTERED TRUSTEES OF THE APOSTOLIC CHURCH, LAGOS AREA vs. AKINDELE (1967) ALL NLR 110 in which the signature of J.A. Cole, a Legal Practitioner, was appended directly on top of his name J.A. Cole, which appeared between the signature and the words "J.A. Cole And Co". As rightly submitted by the appellant's counsel; in the APOSTOLIC CHURCH case, it was held that it was J.A Cole, a legal practitioner, and not J.A. Cole & Co., a non-legal practitioner, who settled and/or signed the process, and therefore, the owner of the signature was a known legal practitioner. The court below did, in fact, consider the APOSTOLIC CHURCH case in its judgment. However, on the facts it misapplied the case. *(P 473 Paras E-H)*

7. *A fundamentally defective Notice of Appeal cannot be cured by an amendment.*

The learned counsel for the respondents submits that at the court below an amendment to the Notice of Appeal was effected without objection. Accordingly, that the amendment went to the root and that the appellant is estopped by conduct, having waived his objection, or consented, to the amendment from now complaining that the Notice of Appeal was incompetent.

The position or contention of the appellant, supported by a number of dicta of this court in several authorities including AWHINAWAHI vs.

OTERI (1984) 5 SC. 38; ATUYEYE vs. ASHAMU (1987) 1 SC. 33 at 358; NWAIGWE vs. OKERE (2008) 5 SCNJ 256 at 274, is that a fundamentally defective Notice of Appeal can not be cured by an amendment of same and that only a valid Notice of Appeal can be amended subsequently. Appellant's counsel further submits that the mere fact that Mr. G.S. Pwul of counsel to the appellants, now respondents herein, filed an amended Notice of Appeal upon leave sought and granted does not cure the malaise of the original Notice of Appeal.
(P 474 Paras A-E)

8. *The requirement of processes signing by a legal practitioner*

The Court of Appeal Rules make it mandatory that the Notice of Appeal shall be signed by either the appellant or his legal representative, which in the same rules, is defined as meaning "a person admitted to practice in the Supreme Court who has been retained by or assigned to a party to represent him in any proceedings before the court".

Section 24(1) of the Court of Appeal Act provides that where a person desires to appeal to the Court of Appeal, he shall give Notice of Appeal in such manner as may be directed by the rules of court subsisting within the period. Both Section 24(1) of the Court of Appeal Act, and the relevant provisions of the Court of Appeal Rules directing the manner the Notice of Appeal shall be filed are not only mandatory, they have been incorporated by reference into Section 243(b) of the 1999 Constitution, as amended. This provision of the

Constitution further directs that the "right of appeal to the Court of Appeal from the decisions of High Court conferred by this Constitution shall be exercised in accordance with any Act of the National Assembly and the rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal". **The Legal Practitioners Act**, which in **Section 2(1)** thereof provides that "**a person shall be entitled to practise as a barrister and solicitor if, and only if, his name is on the roll**", **is also an Act of the National Assembly Section 243 of the constitution referred to. All these provisions are mandatory.**
(Pp 474-475 Paras F-D)

9. *The consequences of flouting mandatory provisions*
The consequence of flouting the mandatory or imperative provisions of the constitution and statutes is that the act, proceedings or decisions done in such violation are illegal, null and void. This Court in IFEZUE vs. MADUGHA & ANOR. (1984) 5 SC, (1984) ALL NLR 256 stated that a mandatory or imperative enactment must be obeyed or fulfilled exactly. The effect of failure to strictly comply with a statutory mandatory requirement relating to the procedure of commencing a proceeding or trial is that on appeal the trial or proceeding will be declared a nullity. KAJUBO vs. THE STATE (1988) NWLR (pt. 73) 721].

Such defect is regarded as an illegality, and not a mere irregularity. [**THE STATE vs. GWONTO (1983) ALL NLR 109 (1983) 3 SC. 62; SANMABO vs. THE STATE (1967) NMLR 3IX At 316-317].**

Thus, as it was held in **MADAYE DUPIN vs.**

OLONINORA (2013) 1 NWLR (pt. 1334) 175.

Non-compliance with conditions precedent for initiating an action vitiates the action *ab initio.* **[ODOFIN vs. AGU (1992) 3 NWLR (pt. 229) 350; ATUYEYE vs. ASHAMU (supra); UWAZURUIKE vs. A.G. FEDERATION (Supra); AJUWA vs. S.P.D.C.N. NIG. LTD. (2008) 10 NWLR (pt. 1094) 64; MADUKOLU vs. NKEMDILIM (supra)].**
(Pp 475-476 Paras D-B)

10. *The principle in **Nwigwe v. Okere***
In the NWAIGWE vs. OKERE case (supra) the only ground of appeal in the Notice of Appeal to the Customary Court of Appeal from the decision of the Customary Court complained that "the decision was altogether unwarranted, unreasonable and cannot be supported having regard to the evidence on the record".

The Customary Court of Appeal upon realizing the defect in the only ground of appeal *suo motu* amended the ground of appeal by the insertion of the word "weight of" immediately before evidence. The purported amendment did not include an order extending time within which a valid Notice of Appeal could be filed. The decision of this Court in NWAIGWE vs. OKERE (supra) was predicated on.

> **"1. The holding that by virtue of Section 247 of the Constitution, 1999 only appeals on questions of customary law could be entertained by the Customary Court of Appeal, and that the only ground of appeal complaining about finding of fact was in**

law not capable of invoking the jurisdiction of the Customary Court of Appeal, and

2. **The constitution having restricted the appellate and supervisory jurisdiction of the Customary Court of Appeal to only "civil proceedings involving questions of customary law"; a ground of appeal, and the only ground of appeal for that matter, in the Notice of Appeal to the Customary Court of Appeal complaining that the decision of the Customary Court was against the evidence or weight of the evidence was ultra vires the jurisdiction as vested by the constitution.**
3. **that on the basis of ex niihilo nihil fit, since there was no valid or competent Notice of Appeal, in the first place, no valid grounds of appeal could be subsequently added to the incompetent notice in order to revive and oxygenate it"**. *(Pp 476-477 Paras E-F)*

11. *No additional ground can be properly added to an invalid Notice of Appeal*

The Notice of Appeal from the date of its filing was incompetent and dead on arrival.

On the principles of law on which this court predicated the decision in NWAIGWE vs. OKERE [supra] the distinction the respondents are latching unto is clearly one without a difference. There is clearly no difference or distinction between six and half a dozen. In the instant case, like in NWAIGWE vs. OKERE (supra), the Notice of Appeal is in law

invalid, null and void *ab initio.* Accordingly, on the principle of *ex nihilo nihil,* no additional grounds of appeal can be added to an invalid Notice of Appeal that is void *ab initio.* And as Lord Denning had put in U.AC. LTD vs. MACFOY (1991) 3 ALL E.R. 1160; you cannot place something upon nothing and expect it to stand. A fundamentally defective Notice of Appeal is incurably bad and is one that was dead on arrival. *(P 477-478 Paras G-C)*

12. *An act invalid ab initio cannot be validated by subsequent valid acts*

The law is now settled, as can be seen from the decision of this court in MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE (2001) 17 NWLR (pt. 741) 194; (2001) 9-10 SC. 180, that where an act is void *ab initio* it can not be validated by subsequent acts, which are even valid. In this case it was held that since the purported retirement of the respondent was void *ab initio*, the subsequent acceptance of the payment of three months salary *in lieu* of notice would not operate either on principles of waiver or estoppel by conduct to validate the act that was void *ab initio.* This authority of the MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE [supra] has, in my firm view, settled against the Respondents' contention that the Appellant was estopped from complaining that the original Notice of Appeal was incurably defective and a nullity when he did not oppose the application for amendment of the Notice of Appeal by addition thereto of additional grounds of appeal. This argument is untenable, in view of

NWAIGWE vs. OKERE (supra); MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE (supra). *(P 478 Paras C-H)*

13. *An amendment cannot be effected to alter illegality to legality.*

In any case, there is a distinction between an amendment to permit additional grounds of appeal, which is innocuous, and a contentious amendment to alter illegality to legality retrospectively.

The original Notice of Appeal signed and filed by "Miskom Puepet & Co", an entity or persona who is not a legal practitioner enrolled to practise law in Nigeria, was *void ab initio.* It was an incompetent process that could not be regularised retrospectively. Accordingly, all proceedings, decisions and orders of the court below predicated on it in the appeal No. CA/J/278/98 are all a nullity. In the eye of the law, the said fundamentally defective Notice of Appeal never existed, and binds no one whatsoever. [ADEFULU vs. OKULAJA (1996) 9 NWLR (pt. 475) 668 at 691; EKWULUGU vs. A.C.B. (2006) 6 NWLR (pt. 975) 30 at 40; N.I.W.A. vs. S.P.D.C. (NIG.) LTD. (2007) ALL FWLR (pt. 361) 1727 at 1747].

(Pp 478 - 479 Paras H-D)

14. *Where a Notice of Appeal is incompetent*

The totality of all that I have been labouring to say on this issue is that there is substance in this issue 1 argued by the parties herein. The issue is accordingly resolved in favour of the appellant. There is no further need, in the circumstance, for me to consider the remaining issues since, on this issue, my firm view

is that the Notice of Appeal signed and filed by "Miskom Puepet & Co" on 29th August, 1996 was *ab initio* incompetent. Doing so is now totally academic without any ultrarian value. The court below proceeded on that invalid and incompetent Notice of Appeal to entertain the appeal. The Notice of Appeal, incompetent, is hereby struck out. All proceedings, decision and orders made in the appeal NO. CA/J/278/96 are hereby set aside. *(P 479 Paras D-G)*

Per Kekere-Ekun (JSC):

> **"A careful examination of the original Notice of Appeal at page 104 of the record shows clearly that it was signed on behalf of MIKSOM PUEPET & CO. It is also not in doubt that MIKSOM PEUPET & CO. is not a legal practitioner on the roll of legal practitioners entitled to practice law in Nigeria. The position of the law on the competence of a legal process signed by a person whose name does not appear on the roll of legal practitioners has been re-stated many times by this Court.**

In my concurring opinion in a recent decision of this court in SHELL PETROLEUM DEVELOPMENT CO. NIG. LTD vs SAM ROYALHOTEL. NIG. LTD. (2016) LPELR SC. 120/2006 @ Page 23 A-D, I observed as follows:

> **"There is now a veritable body of authorities of this court on the effect of**

signing a process in the name of a law firm, not being a person whose name appears on the roll of legal practitioners and authorised to practise law in Nigeria by virtue of Section 2(1) and 24 of the Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria (LFN) 2004. Some of the authorities are as follows:N.N.B. PLC vs. Denclag Ltd. (2005) 4 NWLR (Pt. 916) 549 @ 582; Okafor Vs Nweke (2007) 10 NWLR (Pt. 1043) 521; Okelade vs. Adewunmi (2010) 2 -3 SC(Pt. 1) 140; FBN Plc vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444 @ 488 A-D; SLB Consortium Ltd. Vs. NNPC (2011) 9 NWLR (Pt. 1252) 317.

It has been said time and again that in upholding the sanctity of Sections 2 (1) and 24 of the Legal Practitioners Act, this court being a policy court, has a responsibility to ensure that standards of legal practice are maintained. Hear His Lordship, Fabiyi, JSC in FBN Plc vs Maiwada (supra) at 488 A-D:

'I wish to repeat that we are interpreting a law which seeks to make legal practitioners responsible and accountable more especially in modern times that we are presently operating. I see nothing technical in insisting that a legal practitioner should abide by the dictates of the law in signing court processes. …… The decision in Okafor vs. Nweke is not in

any respect wrong in law and I cannot surmise a real likelihood of injustice perpetrated. I cannot trace the issue to the domain of public policy. The law as enacted should be followed. I do not for one moment see any valid reason why the decision of this court 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 the due protection of our profession.'
(Pp 483-485 Paras F-D)

15. *Description of Notice of Appeal*

A Notice of Appeal has been described as the "spinal cord" of an appeal. It is the originating process, which sets the ball rolling for the proper, valid and lawful commencement of an appeal. Where the Notice of Appeal is defective, no appeal can stand. [Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592 @ 614 E- G; In re: Otuedon (1995) 4 NWLR (Pt. 392) 655; Eboka vs Ekwenibe & Sons Trading Co. Ltd. (1990) 10 NWLR (Pt. 622) 242].

The law is also trite that an incurably defective process cannot be amended nor can anything be added to it, the well known adage being that you cannot put something on nothing and expect it to stand. [Nwaigwe vs. Okere (2008) 5 SCNJ 256 @ 274]. *(Pp 485-486 Paras F-B)*

Nigerian Cases cited in this Judgment

Adefulu vs. Okulaja (1996) 9 NWLR (pt. 475) 668;
Aderibigbe & Anor. vs. Tiamiyu (2009) 10 NWLR (Pt. 1150) 592
In re:: Otuedon (1995) 4 NWLR (Pt. 392) 655;
Ajomale vs. Yaduat (NO. 1) (1991) 5 SCNJ 172.
Ajuwa vs. S.P.D.C. NIG. LTD. (2008) 10 NWLR (pt. 1094) 64.
Atuyeye vs. Ashamu (1987) 1 SC. 33;
Awhinawahi vs. Oteri (1984) 5 SC. 38;
Eboka vs. Ekwenibe & Sons Trading Co. Ltd. (1990) 10 NWLR (Pt. 622) 242.
Ekwulugu vs. A.C.B. (2006) 6 NWLR (pt. 975) 30;
FBN Plc vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444;
Ifezue vs. Madugha & Anor. (1984) 5 SC, (1984) ALL NLR 256.
Kajubo vs. The State (1988) NWLR (pt. 73) 721.
Madaye Dupin vs. Oloninoran (2013) 1 NWLR (pt. 1334) 175.
Military Administrator, Benue State vs. Ulegede (2001) 17 NWLR (pt. 741) 194; (2001) 9-10 SC. 180,
Mmadukolu vs. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 ALL NLR 587;
N.I.W.A. vs. S.P.D.C. (NIG.) LTD. (2007) ALL FWLR (pt. 361) 1727;
N.N.B. PLC vs. Denclag Ltd. (2005) 4 NWLR (Pt. 915) 549;
Nwaigwe vs. Okere (2008) 5 SCNJ 256.
Odofin vs. Agu (1992) 3 NWLR (pt. 229) 350;
Okafor vs. Nweke (2007) 10 NWLR (pt. 1043) 521,
Okelade vs. Adewunmi (2010) 2 -3 SC (Pt. 1) 140;
Okoye vs. Nig Construction (1991) 7 SCNJ (Pt. 2) 365.
Registered Trustees of the Apostolic Church, Lagos Area vs. Akindele (1967) ALL NLR 110.
Sanmabo vs. The State (1967) NMLR 3IX.
Shell Petroleum Development Co. Nig. Ltd vs. Sam Royalhotel.

Nig. Ltd. (2016) LPELR SC. 120/2006,
SLB Consortium Ltd. vs. NNPC (2011) 9 NWLR (Pt. 1252) 317.
The State vs. Gwonto (1983) ALL NLR 109 (1983) 3 SC. 62;
Uwazuruike vs. A.G. Federation (2007) 8 NWLR (pt. 1035) 1.

Foreign Cases cited in this Judgment

U.A.C. LTD vs. MACFOY (1991)) 3 ALL E.R. 1160;

Nigerian Statues cited in this Judgment

Court of Appeal Rules Or. 1 Rule 2
The 1999 Constitution, (as amended) S. 243 (b)
The Constitution, 1999 (as amended) S. 247, S.243(b)
The Court of Appeal Act S. 24(1), S.31
The Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria (LFN) 2004 S. 2(1) and 24

Representations

A.O. Maduabuchi, (Esq.), with Kenechukwu Maduka, (Esq.) and Chibueze Ndidigwe, (Esq.), for the Appellant.

V.M.G. Pwul, (Esq.), for the Respondents.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment):

This appeal is against the decision of the Court of Appeal, Jos Division in which the judgment of the High Court of Justice of Plateau State, sitting at Jos (per **A. Ahinche, J.)** delivered on 5th July, 1996 in suit **No. PLD/3624/94** was set aside and struck out. The appellant herein was the plaintiff in the suit **NO. PLD/3624/94** wherein he claimed against the respondents, as the defendants, jointly and severally:

"1. A declaration that he was properly appointed a professor in the Department of Zoology of the University of Jos.

2. A declaration that the said appointment was approved by the Appointment and Promotions Committee of the 20th Defendant at its 89th Meeting held on the 4th and 5th day of July, 1994 under the Chairmanship of Professor Gemwalk, the Vice-Chancellor of the University of Jos.

3. An order restraining the defendants either by themselves or their agents or successors or privies from forcing the plaintiff to any assessment or in any way interfering with his appointment as a professor in the Department of Zoology of the University of Jos with special reference to the assessment".

The appellant was employed as a lecturer in the Department of Zoology of the University of Jos in 1979. He rose to the rank of senior lecturer. He then proceeded to Ahmadu Bello University, Zaria, on sabbatical and at the end of the sabbatical returned to University of Jos in 1991. He later applied to Ahmadu Bello University, Zaria, to be appointed as a professor in the Faculty of Natural Sciences. He was offered the appointment by the Ahmadu Bello University. Thereafter, he submitted his letter of resignation to the University of Jos, citing as reason the fact that Ahmadu Bello University, Zaria, had appointed him a professor. University of Jos (the 20th respondent), on verifying and confirming this information, appointed the appellant in their Faculty of

Natural Sciences on the same terms and conditions as offered by Ahmadu Bello University, Zaria. The appellant accepted the offer from University of Jos and thereafter withdrew, with apologies, his letter of acceptance to Ahmadu Bello University, Zaria, in respect of their earlier offer. He then formally accepted the Professional Chair of the University of Jos. He later became the Dean of the Faculty of Natural Sciences of University of Jos. He held the deanship for the two year term and thereafter reverted to his position of a professor. On 12th October, 1994, the appellant got a letter from the authorities of University of Jos, wherein he was required to submit his papers for assessment and promotion to the position of a professor a position he had held and enjoyed for over two years. He protested. The University was adamant and insisted that he must submit his papers for fresh assessment. It was at this point that the appellant proceeded to the High Court of Plateau State for redress on the 3 reliefs aforesaid. The High Court ruled in his favour.

Dissatisfied, the respondents appealed to the Court of Appeal, Jos. They were the appellants in the appeal **N. CA/J/278/98** in that court.

On 29th April, 2003, judgment in the said appeal was entered in favour of the respondents herein. The judgment of Plateau Sate High Court was consequently set aside and struck out.

At hearing of the appeal **No. CA/J/278/98** the appellant herein, as the respondent, had raised in his brief of argument a preliminary objection predicated on the ground that the Notice of Appeal, dated and filed on 29th August, 1996 that activated the said appeal was fundamentally defective and incompetent, having been filed, settled or

signed by some persons:

"Miskom Puepet & Co.
(Defendant/Appellant's Solicitors)
No. 4, Barracks Road,
Jos".

Who are not legal practitioners, enrolled to practise law in Nigeria in the Supreme Court of Nigeria. The court below had in its judgment, particularly at page 222 of the Records, acknowledged that the ground for the objection was that the appeal, before them, "was brought by a person unknown to law". The court below devoted a considerable portion (not less than 13 pages) of the lead judgment to the preliminary objection, and at page 231 of the Records, **Obadina, (JCA)**, (whose lead judgment was unanimously concurred by the two other justices of the court) held:

"To say that signing on the words "Miskom Puepet and Co." should invalidate the signature is to stretch the technicality to a very ridiculous extreme that the addition of the words "and co" to "Miskom Puepet" on which the learned counsel signed his name would invalidate the signature. I see that as a mere technicality;"

In other words, His lordship had, in doing justice against arcane technicality, broken the nomeclautre "Miskom Puepet and Co" into segments, namely: "Miskom Puepet" followed by "and Co", and found that the signature was over the name of the legal practitioner "Miskom Puepet", and that the additional words "and co" to the name "Miskom Puepet"

were mere surplusage. In coming to this conclusion, His lordship had undertaken the inspection of the original case file. I also inspected the original file from the court below. The records of appeal duly certified by the registrars of the two courts below reveal that the typed Notice of Appeal has at the signature page at page 104 of the records the following:

"(SGD)
Miskom Puepet & Co.
(Defendants/Appellants' Solicitors)
No. 4 Barracks Road
Jos".

The photocopied version of the original Notice of Appeal at pages 171- 174 has, at the signature page, a signature on top of the words:

"Miskom Puepet & Co.
(Defendants/Appellants Solicitors)
No 4 Barracks Road, Jos".

The signature spreads across the length of the words: "Miskom Puepet & Co" and not just only over the words: "Misksom Puepet", contrary to the suggestion and/or finding of His lordship. The signature of the persona who settled or signed the Notice of Appeal is, no doubt, the signature of simpliciter "Miskom Puepet & Co" and not that of "Miskom Puepet". Now, the question: Is "Miksom Puepet & Co" a legal practitioner authorized by law, particularly **Section 2(1) and 24 of the Legal Practitioners Act**, read together, and Section **31 of the Court of Appeal Act Cap 75 LFN 1990** read together with **Order 1 Rule 2 of the then** extant

Court of Appeal Rules to settle or sign any court process on behalf of a litigant?

The appellant, as the respondent at the court below, objected to the competence of the Notice of Appeal signed by "Miskom Puepet & Co:, and urged that the appeal be struck out. He was overruled in this preliminary objection. Ground 1 of the Notice of Appeal to this Court complains that the "**Court of Appeal was in error when it refused to strike out the appeal on grounds of incompetence**". There are other grounds of appeal.

In all, five issues that have been formulated for the determination of this appeal. I will adopt the issues formulated by the appellant, and they are:

> **6. Whether there was a valid appeal before the Court of Appeal in respect of which the Court of Appeal could have exercised its jurisdiction the appeal having been brought by a person unknown to Law?**
>
> **7. Whether the University of Jos is an Agency of the Federal Government in respect of which only the Federal High Court could exercise jurisdiction?**
>
> **8. Whether the issue of estoppel arose from the pleadings?**
>
> **9. What was the crux of the case brought to court by the appellant?**
>
> **10. Was it proper for the court to award the sum of N2 million Naira as damages of (sic) the appellant as plaintiff?**

Issue 1, as formulated by the respondents, is simply: Was the

Court of Appeal (Jos Division) in error when it held that the respondents' appeal before it was competent?

The question whether the appeal at the Court of Appeal was or was not competent in the first place is a threshold issue. The issue being jurisdictional takes precedence over the other four(4) issues in the appeal. These other four (4) issues, in my view, relate only to the powers exercised in that appeal by the Court of Appeal. It is settled that where a court has no jurisdiction, with respect to a matter before it, the juridical basis for the exercise of any power with respect to such matter is also absent. The reason is obvious: power can only be exercised by a court where it has jurisdiction to do so: See **BRONIK MOTORS LTD vs. WEMA BANK LTD. (1983) 6 SC. 158.** Power and jurisdiction are not the same. Whereas, jurisdiction is the right the court has, in law, to hear and determine the dispute between the parties; power, on the other hand, is the authority it has to take decisions and make binding orders with respect to the matter before it. See **AJOMALE vs. YADUAT (NO. 1) (1991) 5 SCNJ 172 at176.** It is for this reason that in the constitution, **Section 6** deals with judicial powers of courts generally while the enabling and establishment provisions of the constitution, dealing with each court clearly set out the jurisdiction of each court. For instance section 251 pertains to the jurisdiction of the Federal High Court while **Section 240 and 233**, respectively, pertain to the jurisdictions vested in the Court of Appeal and the Supreme Court.

Jurisdiction, being a threshold issue, whenever it is raised, as an issue, has to be and must be resolved first before any other issue. At the appellate level, whenever an issue is raised whether the court below had jurisdiction to entertain

the matter before it, the challenge of jurisdiction must be resolved before any other issue. See **OKOYE vs. NIG CONSTRUCTION (1991) 7 SCNJ (Pt. 2) 365 at 388.** In this appeal the issue is: whether the Notice of Appeal that activated the appeal at the Court of Appeal was competent or incompetent? The Notice of Appeal remains the only foundation and super structure on which the appeal rests. The incompetence of that originating process deprives the court of jurisdiction and competence to adjudicate on it. See **MMADUKOLU vs. NKEMDILIM (1962) 2 SCNLR 341; (1962) 1 ALL NLR 587; UWAZURUIKE vs. A.G. FEDERATION (2007) 8 NWLR (pt. 1035) 1 AT 17.** Accordingly, once the Notice of Appeal is defective it renders the entire appeal incompetent and all the proceedings, decisions and orders made in the appeal, no matter how well conducted, are rendered null and void. See **FIRST BANK OF NIGERIA vs. MAIWADA (2013) ALL FWLR (pt. 661) 1433 AT 1487.**

The challenge to the Notice of Appeal at pages 101-104 (also at pages 171-174) of the records of this appeal is not novel. The law on this point has been settled in a number of previous decisions of the court, including **OKAFOR vs. NWEKE (2007) 10 NWLR (pt. 1043) 521,** which held that a Notice of Appeal settled or signed by a firm of solicitors or lawyers is incompetent, the firm not being a natural person, or human being, called to the Nigerian Bar and enrolled in the Supreme Court of Nigeria to practise law. In the **OKAFOR vs. NWEKE case (supra)** the question was whether **"JHC OKOLO, SAN & CO",** who signed the Notice of Cross-Appeal and other processes in the appeal, was a legal practitioner authorized by law to sign processes on behalf of litigants? In the instant case, as it was in the

OKAFOR vs. NWEKE case (supra), the signature purporting to be that of "Miskom Puepet & Co" was on top of the inscription "Miskom Puepet & CO", who is not a legal practitioner legally authorized to sign and/or file any processes in the courts of law.

The ingenious attempt by his lordship who prepared and delivered the leading decision of the Court of Appeal was a non-starter. As I earlier stated, there is nothing in the record to suggest that the signature belonged to "Miskom Puepet" a legal practitioner, and not "Miskom Puepet & Co", contrary to the finding by the court below that the words "& co", immediately after "Miskom Puepet" were mere surplusage. The four words "Miskom Puepet & Co' were conjunctive. There is nothing separating "Miskom Puepet" from the "& Co". The finding by the court below that the person who signed or settled the Notice of Appeal was "Miskom Puepet"; and not "Miskom Puepet & Co" was perverse.

This case is clearly distinguishable from the case of **REGISTERED TRUSTEES OF THE APOSTOLIC CHURCH, LAGOS AREA vs. AKINDELE (1967) ALL NLR 110** in which the signature of J.A. Cole, a legal practitioner, was appended directly on top of his name J.A. Cole, which appeared between the signature and the words **"J.A. Cole And Co".** As rightly submitted by the appellant's counsel; in the **APOSTOLIC CHURCH case,** it was held that it was J.A Cole, a legal practitioner, and not J.A. Cole & Co., a non-legal practitioner, who settled and/or signed the process, and therefore, the owner of the signature was a known legal practitioner. The court below did, in fact, consider the **APOSTOLIC CHURCH case** in its judgment. However, on the facts it misapplied the case.

I have in this judgment, so far, shown how this case is

caught by the rule in **OKAFOR vs. NWEKE (supra),** and not the rule in the **APOSTOLIC CHURCH case (supra).** But that is not the end of the matter. The learned counsel for the respondents submits that at the court below an amendment to the Notice of Appeal was effected without objection. Accordingly, that the amendment went to the roots and that the appellant is estopped by conduct, having waived his objection, or consented, to the amendment from now complaining that the Notice of Appeal was incompetent.

The position or contention of the appellant, supported by a number of dicta of this court in several authorities including **AWHINAWAHI vs. OTERI (1984) 5 SC. 38; ATUYEYE vs. ASHAMU (1987) 1 SC. 33 at 358; NWAIGWE vs. OKERE (2008) 5 SCNJ 256 at 274,** is that a fundamentally defective Notice of Appeal can not be cured by an amendment of same and that only a valid Notice of Appeal can be amended subsequently. Appellant's counsel further submits that the mere fact that Mr. G.S. Pwul of counsel to the appellants, now respondents herein, filed an amended Notice of Appeal upon leave sought and granted does not cure the malaise of the original Notice of Appeal.

The Court of Appeal Rules make it mandatory that the Notice of Appeal shall be signed by either the appellant or his legal representative, which in the same rules, is defined as meaning "a person admitted to practise in the Supreme Court who has been retained by or assigned to a party to represent him in any proceedings before the court".

Section 24(1) of the Court of Appeal Act provides that where a person desires to appeal to the Court of Appeal, he shall give Notice of Appeal in such manner as may be directed by the rules of court subsisting within the period. Both Section 24(1) of the Court of Appeal Act, and the

relevant provisions of the Court of Appeal Rules directing the manner the Notice of Appeal shall be filed are not only mandatory, they have been incorporated by reference into **Section 243(b) of the 1999 Constitution**, as amended. This provision of the constitution further directs that the "**right of appeal to the Court of Appeal from the decisions of High Court conferred by this constitution shall be exercised in accordance with any Act of the National Assembly and the rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal**". **The Legal Practitioners Act**, which in **Section 2(1)** thereof provides that "a person shall be entitled to practise as a barrister and solicitor if, and only if, his name is on the roll", is also an Act of the National Assembly Section 243 of the Constitution refers to. All these provisions are mandatory.

The consequence of flouting the mandatory or imperative provisions of the Constitution and statutes is that the act, proceedings or decisions done in such violation are illegal, null and void. This court in **IFEZUE vs. MADUGHA & ANOR. (1984) 5 SC, (1984) ALL NLR 256** stated that a mandatory or imperative enactment must be obeyed or fulfilled exactly. The effect of failure to strictly comply with a statutory mandatory requirement relating to the procedure of commencing a proceeding or trial is that on appeal the trial or proceeding will be declared a nullity. See **KAJUBO vs. THE STATE (1988) NWLR (pt. 73) 721.** Such defect is regarded as an illegality, and not a mere irregularity. See **THE STATE vs. GWONTO (1983) ALL NLR 109 (1983) 3 SC. 62; SANMABO vs. THE STATE (1967) NMLR 3IX At 316-317.** Thus, as it was held in **MADAYE DUPIN vs. OLONINORAN (2013) 1 NWLR (pt. 1334) 175,** non-compliance with conditions precedent

for initiating an action vitiates the action *ab initio.* See also **ODOFIN vs. AGU (1992) 3 NWLR (pt. 229) 350; ATUYEYE vs. ASHAMU (supra); UWAZURUIKE vs. A.G. FEDERATION (Supra); AJUWA vs. S.P.D.C. NIG. LTD. (2008) 10 NWLR (pt. 1094) 64; MADUKOLU vs. NKEMDILIM (supra).**

The respondents, through their counsel, contend that an amendment goes to the roots and that upon leave granted to them to amend the offensive Notice of Appeal whatever defect there was in the original Notice of Appeal had been cured thereby. He had sought to distinguish **NWAIGWE vs. OKERE (2008) 5 SCNJ. 236** from the instant case on the grounds that in **NWAIGWE vs. OKERE (supra)** the amendment effected in the Notice of Appeal was done *ex proprio motu* by the Customary Court of Appeal, and secondly, that the amendment was itself incompetent, having being done one year after the judgment without an order for extension of time within which to do so.

In the **NWAIGWE vs. OKERE case (supra)** the only ground of appeal in the Notice of Appeal to the Customary Court of Appeal from the decision of the Customary Court complained that "**the decision was altogether unwarranted, unreasonable and cannot be supported having regard to the evidence on the record".**

The Customary Court of Appeal upon realizing the defect in the only ground of appeal *suo motu* amended the ground of appeal by insertion of the word "weight of" immediately before evidence. The purported amendment did not include an order extending time within which a valid Notice of Appeal could be filed. The decision of this court in **NWAIGWE vs. OKERE (supra)** was predicated on.

"1. The holding that by virtue of Section 247 of the constitution, 1999 only appeals on questions of customary law could be entertained by the Customary Court of Appeal, and that the only ground of appeal complaining about finding of fact was in law not capable of invoking the jurisdiction of the Customary Court of Appeal, and

2. The constitution having restricted the appellate and supervisory jurisdiction of the Customary Court of Appeal to only "civil proceedings involving questions of customary law"; a ground of appeal, and the only ground of appeal for that matter, in the Notice of Appeal to the Customary Court of Appeal complaiing that the decision of the customary court was against the evidence or weight of the evidence was ultra vires the jurisdiction as vested by the Constitution.

3. That on the basis of ex niihilo nihil fit, since there was no valid or competent Notice of Appeal, in the first place, no valid grounds of appeal could be subsequently added to the incompetent notice in order to revive and oxygenate it".

The Notice of Appeal from the date of its filing was incompetent and dead on arrival.

On the principles of law on which this Court predicated the decision in **NWAIGWE vs. OKERE [supra]** the distinction the respondents are latching unto is clearly

A one without a difference. There is clearly no difference or distinction between six and half a dozen. In the instant case, like in **NWAIGWE vs. OKERE (supra),** the Notice of Appeal is in law invalid, null and void *ab initio.*
B Accordingly, on the principle of *ex nihilo nihil,* no additional grounds of appeal can be added to an invalid Notice of Appeal that is void *ab initio.* And as Lord Denning had put in **U.A.C LTD vs. MACFOY (1991) 3 ALL E.R. 1160;** you
C can not place something upon nothing and expect it to stand. A fundamentally defective Notice of Appeal is incurably bad and is one that was dead on arrival.

The law is now settled, as can be seen from the
D decision of this Court in **MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE (2001) 17 NWLR (pt. 741) 194; (2001) 9-10 SC. 180,** that where an act is void *ab initio* it cannot be validated by subsequent acts, which are
E even valid. In this case it was held that since the purported retirement of the respondent was void *ab initio*, the subsequent acceptance of the payment of three months salary *in lieu* of notice would not operate either on principles of
F waiver or estoppel by conduct to validate the act that was void *abinitio.* This authority of **MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE [supra]** has, in my firm view, settled against the respondents
G their contention that the appellant was estopped from complaining that the original Notice of Appeal was incurably defective and a nullity when he did not oppose the application for amendment of the Notice of Appeal by
H addition thereto of additional grounds of appeal. This argument is untenable, in view of **NWAIGWE vs. OKERE (supra); MILITARY ADMINISTRATOR, BENUE STATE vs. ULEGEDE (supra).** In any case, there is a

A distinction between an amendment to permit additional grounds of appeal, which is innocuous, and a contentious amendment to alter illegality to legality retrospectively.

The original Notice of Appeal signed and filed by
B "Miskom Puepet & Co", an entity or persona who is not a legal practitioner enrolled to practice law in Nigeria, was *void abinitio.* It was an incompetent process that could not be regularised retrospectively. Accordingly, all proceedings,
C decisions and orders of the court below predicated on it in the appeal **No. CA/J/278/98** are all a nullity. In the eye of the law, the said fundamentally defective Notice of Appeal never existed, and binds no one whatsoever. See **ADEFULU vs.**
D **OKULAJA (1996) 9 NWLR (pt. 475) 668 at 691; EKWULUGU vs. A.C.B. (2006) 6 NWLR (pt. 975) 30 at 40; N.I.W.A. vs. S.P.D.C. (NIG.) LTD. (2007) ALL FWLR (pt. 361) 1727 at 1747.**

E The totality of all that I have been laboring to say on this issue is that there is substance in this issue 1 argued by the parties herein. The issue is accordingly resolved in favour of the appellant. There is no further use, in the circumstance,
F for me to consider the remaining issue since, on this issues, my firm view is that the Notice of Appeal signed and filed by "Miskom Puepet & Co" on 29th August, 1996 was *ab initio* incompetent. Doing so is now totally academic without any
G ultrarian value. The court below proceeded on that invalid and incompetent Notice of Appeal to entertain the appeal. The Notice of Appeal, incompetent, is hereby struck out. All proceedings, decisions and orders made in Appeal **NO.**
H **CA/J/278/96** are hereby set aside. Costs at N300,000.00 shall be and are hereby awarded in favour of the appellant and against the respondents.

Ejembi Eko,

Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the preview of the draft of the lead judgment just delivered by my learned brother, **Ejembi Eko, (JSC).** I am in agreement with the reasoning that led to the conclusion that the appeal has merit and should be allowed. It is accordingly allowed by me.

Appeal allowed.

I abide by the consequential orders in the said lead judgment including the order on costs.

Olu Ariwoola
Justice Supreme Court,

KUMAI BAYANG AKAAHS, (JSC): I read before now the draft of the judgment of my learned brother, Ejembi Eko (JSC), striking out the appeal as incompetent with which I am in complete agreement.

The originating process in the Court of Appeal i.e. the Notice of Appeal was signed by "Miskom Puepet & Co'. By **Section 2(1) and 24 of the Legal Practitioners Act read along with Section 31 Court of Appeal Act Cap 75 Laws of the Federation of Nigeria 1990 and Order I Rule 2 of the extant Court of Appeal Rules**, the Notice of Appeal was not signed by a legal practitioner but a firm of solicitors. Not being a natural person or a human being who has been called to the Nigerian Bar and enrolled in the Supreme Court to practise law, the process so signed by Miskom Puepet & Co was incompetent. See: **Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 531** where the Notice of Cross-appeal was signed by "JHC OKOLO, SAN & Co' and it was held that "JHC OKOLO, SAN & Co, was not a legal practitioner authorised by law to sign the process on behalf of the litigant and the Notice of Cross-Appeal was declared incompetent and the

Cross-appeal was struck out. The preliminary objection of the present appellant's counsel (then respondent) ought to have succeeded and the appeal struck out as incompetent. This appeal therefore is meritorious and ought to be allowed.

For this reason and the more detailed consideration of the appeal by my learned brother Ejembi Eko (JSC), I allow the appeal and make a consequential order striking out the appeal in the Court of Appeal as being incompetent. I abide by the order made as to costs in favour of the appellant against the respondents.

K. B. AKAAHS
Justice Supreme Court

KEKERE-EKUN, (JSC): I have had a preview of the judgment of my learned brother, EJEMBI EKO, (JSC) just delivered. I agree with the reasoning and conclusion that this appeal is meritorious and should be allowed. I shall add a few comments for emphasis.

The facts that gave rise to the suit at the trial court have been fully stated in the lead judgment. I shall not repeat the exercise here. Suffice it to say that the appellant herein sought the following reliefs against the respondent at the High Court of Plateau State, Jos Judicial Division vide paragraph 33 of his statement of claim at page 10 of the record:

"WHEREFORE plaintiff claims from the defendants jointly and severally:

1. N60,000.00 per annum being a professor's salary as at date for 19 years, N1,140,000.00, plaintiff shall however lead

evidence to show what the salary of a professor shall be on the date he is testifying.

2. **Add general damages for ridicule, public odium, mental anguish, spite and strain, N3,440,000.00**
N3,860,000.00

3. **A declaration that he was properly appointed a professor in the Department of Zoology of the University of Jos.**

4. **A declaration that the said appointment was approved unconditionally by the Appointment and Promotions Committee of the 20th defendant at its 89th meeting held on the 4th and 5th days of July 1994 under the Chairmanship of Professor Gomwalk the Vice-Chancellor of the University of Jos.**

5. **An Order restraining the defendants either by themselves or their Agents or Successors or Privies from forcing the plaintiff to submit to any assessment or in anyway interfering with his appointment as a professor in the Department of Zoology of the University of Jos with special reference to any assessment."**

The High Court granted all the appellant's reliefs.

On appeal to the Court of Appeal, the appellant as respondent, raised a preliminary objection challenging the competence of the Notice of Appeal on the ground that it was

signed by Mikson Puepet & Co, not being a legal practitioner enrolled to practise law in Nigeria. The court overruled the objection and proceeded to determine the appeal on the merits. In a considered judgment delivered on 29/4//2003 the judgment of the trial court was set aside on the ground that the state High Court lacked jurisdiction to entertain the suit having regard to the provisions of **Section 230(1) (q), (r) and (s) of the 1979 Constitution**, which was applicable at the time the cause of action arose. It held that jurisdiction resided in the Federal High Court.

Being aggrieved, the appellant has appealed to this court. The appellant formulated 5 issues for determination. Issue 1, if resolved in the appellant's favour is capable of resolving the entire appeal.

It reads:

"1. Whether there was a valid appeal before the Court of Appeal in respect of which the Court of Appeal could have exercised its jurisdiction the appeal having been brought by a person unknown to law.

A careful examination of the original Notice of Appeal at page 104 of the record shows clearly that it was signed on behalf of MIKSOM PUEPET & CO. it is also not in doubt that MIKSOM PEUPET & CO. is not a legal practitioner on the roll of legal practitioners entitled to practise law in Nigeria. The position of the law on the competence of a legal process signed by a person whose name does not appear on the roll of legal practitioners has been re-stated many times by this court. In my concurring opinion in a recent decision of this court in **SHELL PETROLEUM DEVELOPMENT**

CO. NIG. LTD vs. SAM ROYAL HOTEL. NIG. LTD. (2016) LPELR SC. 120/2006 @ Page 23 A-D, I observed as follows:

> **"There is now a veritable body of authorities of this court on the effect of signing a process in the name of a law firm, not being a person whose name appears on the roll of legal practitioners and authorised to practise law in Nigeria by virtue of Section 2(1) and 24 of the Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria (LFN) 2004. Some of the authorities are as follows:N.N.B. PLC vs. Denclag Ltd. (2005) 4 NWLR (Pt. 915) 549 @ 582; Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 521; Okelade vs. Adewunmi (2010) 2 -3 SC(Pt. 1) 140; FBN Plc vs. Maiwada (2013) 5 NWLR (Pt. 1348) 444 @ 488 A-D; SLB Consortium Ltd. vs. NNPC (2011) 9 NWLR (Pt. 1252) 317.**
>
> **It has been said time and again that in upholding the sanctity of Sections 2 (1) and 24 of the Legal Practitioners Act, this court being a policy court, has a responsibility to ensure that standards of legal practice are maintained. Hear His Lordship, Fabiyi, JSC in FBN Plc vs. Maiwada (supra) at 488 A-D:**
>
> **'I wish to repeat that we are interpreting a law which seeks to make legal practitioners responsible and accountable more especially in modern times that we are presently operating.**

> **I see nothing technical in insisting that a legal practitioner should abide by the dictates of the law in signing court processes. The decision in Okafor vs. Nweke is not in any respect wrong in law and I cannot surmise a real likelihood of injustice perpetrated. I cannot trace the issue to the domain of public policy. The law as enacted should be followed. I do not for one moment see any valid reason why the decision of this court 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 the due protection of our profession.'**

Legal counsel should be well guided"

I adopt the reasoning above in the instant appeal. There is no doubt that the Notice of Appeal initiating the appeal before the court below was defective, incurably so. It follows that the argument of learned counsel for the respondent that the appeal was heard on the Amended Notice of Appeal dated 21/10/98 is of no moment, even though no objection was raised when the amendment was sought.

A Notice of Appeal has been described as the "spinal cord" of an appeal. It is the originating process, which sets the ball rolling for the proper, valid and lawful commencement of an appeal. Where the Notice of Appeal is defective, no appeal can stand. **See: Aderibigbe & Anor. vs. Tiamiyu (2009) 10 NWLR (Pt. 1150) 592 @ 614 E- G; In re:: Otuedon (1995) 4 NWLR (Pt. 392) 655; Eboka vs. Ekwenibe & Sons Trading Co. Ltd. (1990) 10 NWLR (Pt.**

622) 242.

The law is also trite that an incurably defective process cannot be amended nor can anything be added to it, the well known adage being that you cannot put something on nothing and expect it to stand. **See: Nwaigwe vs. Okere (2008) 5 SCNJ 256 @ 274.**

I therefore resolve this issue in favour of the appellant. I am thus in complete agreement with my learned brother, EJEMBI EKO, (JSC) that there was no valid appeal before the lower court and the proceedings thereat amounted to a nullity.

I accordingly allow the appeal for these and the more exhaustive reasons advanced in the lead judgment.

I abide by the consequential orders made including the order as to costs.

Kudirat Motonmori Olatokunbo Kekere-Ekun
Justice, Supreme Court

ADAMU AUGIE, (JSC): I have had a preview of the lead judgment just delivered by my learned brother Eko, (JSC), and I am in agreement with him that the Notice of Appeal filed at the court below is incompetent.

This appeal is easily resolved in favour of the appellant, because, as my learned brother pointed out, the position of the law as it stands is that a legal process signed and issued by a law firm is definitely incompetent and is liable to be set aside. So, the processes used in court must be signed and issued by a person and in the proper name of the person as enrolled to practise law in Nigeria under the Legal Practitioners Act see **Alawiye vs. Ogunsanya (2012) 5 NWLR (Pt. 1348)) 570,** where Rhodes-Vivour, (JSC), who also participated in **SLB Consortium V. NNPC (2011) 9**

NWLR (Pt. 1252) 317, further observed that:

> **This case is on all fours with SLB Consortium V. NNPC In that case, the Originating Summons and the Amended Statement of Claim complained of were signed by "Adewale Adesokan & Co", since Adewale AAAdesokan & Co is not a legal practitioner, whose name is on the roll, the originating processes were defective and the appeal arising from the proceedings initiated and conducted, without jurisdiction, was incompetent. In this matter, the originating processes were signed by "Chief Afe Babalola SAN & Co". It is clear that those processes were not signed by a person known to law, the name not being on the roll, and so the originating processes were signed contrary to Section 2 and 24 of the Legal Practitioners Act. Chief Afe Babalola SAN & Co. is not a legal practitioner known to law, the said originating processes are defective and all proceedings that arose from the said defective processes are nullities. In SLB Consortium V. NNPC - - I explained how processes filed in Court are to be signed, I said:**
>
> **"All processes signed in court are to be signed as follows:**
> ***(a)*** **The signature of counsel, which may be any contraption;**
> ***(b)*** **Secondly, the name of counsel clearly written;**
> ***(c)*** **Thirdly, who counsel represents;**
> ***(d)*** **Fourthly, name and address of legal**

firm

In **SLB Consortium vs. NNPC** *(supra),* this court relied on its earlier decision in **Reg. Trustees of Apostolic Church Lagos Area vs. Akindele (1967) NMLR 263, (1967) NSCC (Vol. 5) 117***,* where proceedings originated in a hearing before the registrar of titles, and the said trustees had appealed to the High Court. The Notice of Appeal gave the legal practitioner's name as:

J.A. Cole & Co. and was signed J.A. Cole for J.A. Cole & Co.

The appellate judge pointed out that the High Court of Lagos (Appeals) Rules had not been complied with as the law firm of *"A. J. Cole & Co"* is not a legal practitioner under the Legal Practitioners Act 1962, and consequently dismissed the appeal. In allowing the appeal, the Supreme Court held as follows:

> **"The notice was given in the prescribed form. It stated the name and address of the legal practitioner representing the appellants as "Messrs. J.A. Cole & Co. 14/16 Abibu Oki Street, Lagos", and was signed "J.A. Cole For J.A. Cole & CO. "Mr. J.A. Cole is admittedly a duly registered legal practitioner and entitled to practise as such under the Legal Practitioners Act 1962. He has no partner in his practice. In signing the Notice of Appeal, Mr. Cole used his own name, that is to say, the name in which he registered as a legal practitioner. We hold that on any interpretation of the rules, that was a sufficient**

> **compliance with them , and we do not accept the submission that the additions of the words "For J.A. Cole & Co" would invalidate the signature if a signature in a business name was not permitted".**

Onnoghen, JSC, added in **SLB Consortium vs. NNPC** (*supra)*:

> **The above decision clearly states that a process prepared and filed in a court by a legal practitioner must be signed by the legal practitioner and that it is sufficient signature if the legal practitioner writes his own name over and above the name of his/or firm in which he carries out his practice. It would have been sufficient if Mr. Adewale Adesokan had simply written or stamped his name on top of Adewale Adesokan & Co., because Mr. Adewale Adesokan is a legal practitioner registered to practice law in the roll at the Supreme Court and not Adewale Adesokan & Co".**

In this case, the Notice of Appeal filed at the court below was clearly signed by *"Miskom Puepet & Co.",* but the court below overruled the respondent's objection, which is definitely wrong. It did consider the case of **Reg. Trustees of Apostolic Church Lagos Area vs. Akindele** *(supra), but it misapplied the decision, and thereby arrived at a wrong decision that must be set aside.*

The Notice of Appeal that was filed at the Court below is incompetent and is struck out. I also set aside the

proceedings, decisions and orders made in the said **Appeal No. CA/J/178/96** and I do also award costs of N300,000.00 to the appellant.

Amina Adamu Augie,
Justice, Supreme Court