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Martina Opara vs. Attorney General of the Federation (2017) JSCNLR (Vol. 3), 296 S.C.

Rufai vs. The State (2001) 7 NSCQR 420;
Martina Opara vs. Attorney General of the Federation (2017) JSCNLR (Vol. 3), 296 S.C.

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Federal Republic of Nigeria vs. Gad Barminas (2017) JSCNLR (Vol. 3), 178 S.C.

Salawu vs. State (1971) NMLR 249;

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Samuel Theophilus vs. The State (1996) 1 NWLR (pt. 423) 1139.

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Martina Opara vs. Attorney General of the Federation (2017) JSCNLR (Vol. 3), 296 S.C.

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Matthew Thomas vs. The State (2017) JSCNLR (Vol. 3), 347 S.C.

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ANSELEM AGU
AND
THE STATE

SC.514/2012

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**

COURT: Supreme Court – Attitude to the concurrent findings of two lower courts.

CRIMINAL LAW AND PROCEDURE: Concurrent findings of lower courts – How disproved by accused.

CRIMINAL LAW AND PROCEDURE: Defence – Alibi – Failure to investigate when properly raised – Effect.

CRIMINAL LAW AND PROCEDURE: Defence – Alibi – Where not raised at the earliest opportunity – Effect.

CRIMINAL LAW AND PROCEDURE: Defence – Alibi – When prosecution is obliged to investigate

CRIMINAL LAW AND PROCEDURE: Defence of Alibi – How disproved by prosecution.

CRIMINAL LAW AND PROCEDURE: Defences – Where accused sets up the defences of provocation and self defence at the same trial – Whether can avail the accused person.

CRIMINAL LAW AND PROCEDURE: Proof – Murder – Where accused used dangerous weapon on the deceased – Inference thereof.

CRIMINAL LAW AND PROCEDURE: Proof – Standard of proof in criminal cases – How discharged.

CRIMINAL LAW AND PROCEDURE: The defence of Alibi and self defence – Where raised simultaneously by accused – Implication.

CRIMINAL LAW: Defence – "Alibi" – Meaning.

CRIMINAL LAW: Defence of self defence – Whether a person who pleads self defence can still deny that he never killed the accused – Implication of plea.

CRIMINAL LAW: Defence of self-defence – Whether inconsistent with a plea of Alibi.

CRIMINAL LAW: Murder – Constituents – Consideration thereof.

EVIDENCE: Inconsistency rule – Import – Whether applies to the confessional statement of accused.

*EVIDENCE: **Section 135 of the Evidence Act** – Standard of proof – Imperatives.*

EVIDENCE: Where confessional statement is inconsistent with oral testimony of accused in court – Attitude of court thereto – Relevant Considerations.

*STATUTE: **Section 316 of the Criminal Code** – What prosecution must establish – Circumstances relevant to the offence of murder.*

WORDS AND PHRASES: "Proof beyond reasonable doubt" – Meaning.

Issue for Determination

Whether the Prosecution proved its case beyond reasonable doubt against the appellant?

Facts of the Matter

At the High Court of Imo State, IhoIkeduru Judicial Division, the appellant (as accused person) was arraigned on Information which charged him with the offence of murder. Upon his plea of not guilty before the said court the matter went to trial.

While the prosecution relied on the testimonies of its seven witnesses in proof of its case, the appellant (as accused person), who did not call any witness, testified in his defence.

The fateful day was May 2, 1992; the time was between 4 -5pm. The prosecution's case was that on the said day and time, PW3 took her bicycle to one Fabian Ugwushie for repair. As she was there, she overheard the deceased person calling on her. She left the repairer to meet her [the deceased person]. On her way, she met the deceased person who asked her to go home and prepare for dinner. As she was about to go, she saw the accused person emerging from a track road with a machete.

As she [the deceased person] turned to move on her way, the accused person charged at her, cutting her with a machete on the neck. As she [the deceased person] ran, shouting as she was running away, the accused person pursued her, dealing further machete cuts all over her body.

She ran into the compound of one George Opara with the accused person still following and cutting her. All this while, PW3 was shouting and following them closely until all of them got into that compound. However, when the appellant turned to the direction of the PW3 with the machete, she ran to the backyard of the said compound, where she saw Emelia Opara, PW1. She related the story of the incident to her [Emelia Opara]. As a result, PW1 ran to the frontage of the compound. She [PW3] later went to the frontage of the compound where she found the deceased person in a pool of her blood, dead.

The accused person, on being arrested by the Police, volunteered a statement which was confessional in nature. At the trial court, as indicated earlier, the prosecution called a total of seven witnesses. On his part, the accused person [now, appellant] gave evidence in his own defence and closed his case. At the end of trial, the appellant was convicted for murder. His appeal to the Court of Appeal of Owerri Division was unsuccessful hence this further appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *The elements of the offence of murder*
The three constitutive elements or ingredients of the offence which must be in order to secure a conviction under this Section have been, generously, outlined in case law, ***Maigari vs. State*** [2013] 6-7 MJSC (pt 11) 109, 125, citing ***Ochemeje vs. The State***[2008] SCNJ 143;***Daniel vs. The State*** [1991] 8 NWLR (pt 443) 715;***Obudu vs. State*** [1999] 6 NWLR (pt 198) 433; ***Gira vs. State*** [1996] 4 NWLR (pt 428) 1, 125.

Under the said section, the prosecution is obliged to prove: (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm. These ingredientshave witnessed consistent espousal in many jurisdictions, for example, by English courts, **R vs. Hopwod (1913) 8 Cr. App. R. 143; Hyam vs. DPP [1974] 2 All ER 41; Woolmington vs. DPP (1935) AC 462; by Nigerian courts, *Madu vs. State* [2012] 15 NWLR (pt 1324) 405, 443, citing *Durwode vs. State* [2000] FWLR (pt 55) 549, 564; [1999] 7 NWLR (pt 610) 202; *Akpan vs. State*[2001] FWLR (pt 56) 735; [2000] 12 NWLR (pt 682) 607** and by courts in other Commonwealth jurisdictions, see, for example, ***R. vs. Nichols*** **(1958) QWR 46; *R vs. Hughes* (1958) 84 CLR 170; *TimbuKolian vs. The Queen* (1968) 42 A. L. J. R.; *R. vs. Tralka* (1965) Qd, R. 225,** (Queensland, Australia). *(P 20 Paras A – F)*

2. *Prosecution proved that appellant caused the death of the deceased*
From a conspectus of testimonies of PW3 (the eye witness who observed and saw how the appellant, most brutally, employed a machete in cutting the neck of the deceased person) and the above medical report of the PW6, the lower court was on firm footing in affirming the findings of the trial court on the Prosecution's proof of the second and third ingredients set out above, that is, that the appellant caused the death of the deceased person and he intended to kill her or cause her grievous bodily harm.

In the words of the trial court "**PW3 gave a positive, consistent and harmonious evidence of the acts of the accused [person] leading up to the death of the deceased [person]**; pages 87 – 88 of the record.

The lower court affirmed this finding: a finding that found firm anchorage on the evidence of Pw6. *(Pp 21–22 H– B)*

3. *The use of dangerous weapon by the accused*

As this court held in *Iliyasu vs. State* (Supra) at page 34, paragraphs B-F, true indeed, Case Law and scholastic treatises are unanimous on the point that if a dangerous weapon was used (in the instant case, a machete was employed in hacking at the neck of the deceased person), the Courts will infer that death was a probable and not just a likely consequence of the accused person's act, *AdamuGarba vs. The State* [1997] 3 SCNJ 68; *Bakuri vs. The State* (1965) NMLR 163; *Silas Sule vs. The State* (2009) LPELR – 3125 (SC) 24, F-G; *Ejeka vs. State* [2003] 7 NWLR (Pt 819) 408; *GarosBwashi vs. State* [1972] 6 SC (Reprint) 55; (1972) LPELR-SC. 104/1972; P. Ocheme, *The Nigerian Criminal Law* (Kaduna: Liberty Publications Ltd, 2006) 203; also, C. O. Okonkwo, *Okonkwo and Naish*: *Criminal Law in Nigeria* (Second Edition) (supra) 221,"

(P 22 Paras F – 1)

4. *Where accused sets up the defences of self defence and provocation at the same trial*

In **Edoko vs. State (2015) LPELR -24402 (SC) 62 -63,** this court found it curious that the appellant just as the appellant in the instant appeal] set up the defences of self defence and provocation at the same trial. Listen to this court's adumbration of the rationable for its curiosity:

Whereas the Criminal code provides for self defence in sections 286 and 287, the same code provides for the defence of provocation in section 284. Whilst the former [the defence of self defence] is an exculpatory defence because, where it is established, it exonerates the accused person, Uwaekweghinya vs. merely, an attenuating or a mitigating defence. Where available, it merely, attenuates; dis-rates or demotes the offence from murder to manslaughter.

In effect, the defence of provocation does not exonerate the accused person. It, only, earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter, Urakuvs. state (1976) LPELR-SC. 300/1975; [1976] 6 SC 128; Akang vs. State [1971] 1 All NLR 47, 49; Musa vs. State (2009) LPELR-SC.323/2006; [2009] 15 NWLR (pt 1165) 465; Ada vs. State (2008) LPELR-SC.242/2004; [2008] 13 NWLR (PT1103) 149; [2008] 34 SCQR 508; Ajunwa vs. The State [1988] 1 SC 110; Laoye vs. The state [1985] 2 NWLR (pt 10) 832; C. O. Okonkwo,

Okonkwo and Naish: Criminal Law in Nigeria (Second Edition) (Ibadan: Spectrum Books, 2000) 240; C. O. Okonkwo, "The Unlawful Act Doctrine and the Defence of Accident" in The Nigerian Bar Journal Vol 11 (1973) 93-97. *(P 24 Paras C – F)*

5. *Defences of self defence and provocation are inconsistent defences*
It is, thus, the dissimilarity in the consequences of the availability of these defences that make them inconsistent defences that cannot avail an accused person at the same time, Ibrahim vs. State(19910 LPELR-SC. 167/1990; [1991] 4 NWLR (pt 186) 393; [1991] 5 SCNJ 129; see, also, the very incisive, and the most stimulating, article by the cerebral professor of Law, F. I. Asogwah, "The Applicability of some 'Inconsistent' Defences in the Nigeria Criminal Code", in I. A. Umezulike (ed), Law and Administration of Justice in the Twenty First Century (Enugu: Fourth Dimension Publishing Co. Ltd, 1997) 75-98. *(P p 24 – 25 Paras I – B)*

6. *The defence of Alibi must be raised at the earliest opportunity*
To be entitled to the beneficent effect of the defence of alibi, an accused person must raise it at the earliest opportunity, Hassan vs. The State [2001] 6 NWLR (pt 709) 286, 305, which would, preferably, be in his extra-judicial statement. This is to offer the police an opportunity either to confirm or confute its availability to the accused person, Ibrahim vs. The State [1991] 4 NWLR (pt 186) 399; Nwabueze vs. The State [1988] 3 NWLR (pt 86); Ikemson vs. The State [1989] 3 NWLR (pt 110) 455.
(P 25 Paras E – G)

7. *Defence of Alibi must be unequivocal as to the particulars of the accused*
The said defence must be unequivocal as to the particulars of the accused of his whereabouts and those present with him, Onyegbu vs. The State [1995] 4 SCNJ 275, 285-286; Ibrahim vs. State (supra); Balogun vs. AG, Ogun State [2011] LPELR – 1133 (sc) 16. *(P 25 Paras G – H).*

8. *When prosecution obliged to investigate Alibi*
It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the prosecution to investigate it, Eyisi vs. State [2000] 4 NSCQR 60

and to disprove same, Eke vs. The State (supra).

Failure to investigate the defence of alibi raised in such circumstances will lead to an acquittal, Yanor vs. The State (1965) ANLR (Reprint) 199; Bello vs. Police [1956] SCNLR 113; Odu and Anr vs.The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (pt. 772) 668.
(P 25 Paras H – I)

9. *Requirements of proof in criminal cases*
In all, like the lower courts, I hold that the prosecution, sufficiently, proved the case as required by law, that is, beyond reasonable doubt, Alabi vs. The State [1993] 7 NWLR (pt 307) 511, 523; Nasiru vs. State [1999] 1 NWLR (pt. 5890 87, 98; Adio vs. The State [1986] 2 NWLR (pt 24) 581; Muka vs. The State [1976] 8-10 SC255; Bakare vs. The State [1987] 3 SC 1, 32; Aigbadion vs. State [2000] 4 SC (PT 1) 1; Agbo vs. State [2006] 6 NWLR (PT 977) 545.

Accordingly, I hereby endorse the concurrent findings of the lower courts. I shall enter an order dismissing it as lacking in merit. I, further, affirm the judgment of the lower court which affirmed the conviction and sentences of the appellant. *(P 26 Para A – D)*

Per Rhodes Vivour (JSC):

> **"Section 135 of the Evidence Act states that where the commission of crime is in issue the standard of proof required before a conviction is sustained is proof beyond reasonable doubt.**

The appellant was charged and found guilty of the offence of murder under **Section 319 (1) of the Criminal code**. **Section 319** is the punishment section. It states that any person who commits the offence of murder shall be sentenced to death, **while Section 316 of the Criminal Code defines** the circumstances when an unlawful killing would amount to murder. To succeed the prosecution must prove beyond reasonable doubt that Francisca Opara (F) died, and that her death was caused by the appellant. The prosecution must further show that the act of the appellant which resulted in the death of Francisca Opara F is one of the six circumstances listed in **Section 316 of the Criminal Code**. That is to say:

(1) If the offender intends to cause the death of person Killed, or that of some other person;
(2) If the offender intends to do to the person killed or to some other person some grievous harm;
(3) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life;
(4) If offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;
(5) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;
(6) If death is caused by willfully stopping the breath of any person for either of such purposes. See Akpan vs. State (2001) FWLR (pt.56) p.735; Mbang vs. State (2012) 5-7 SC (pt.II) P.104; Igiri vs. State (2012) 5-7 SC (pt.II) P.59; Chiokwe vs. State (2012) 12SC (pt.v) p. 147.

If the act of appellant that caused the death of the deceased is not one of the six circumstances listed in Section 316 of the Criminal Code, it is no longer murder". *(Pp 26 – 27 Paras F – F)*

10. *Meaning of "proof beyond reasonable doubt"*
In **Osuagwu vs. State (2013) 5 NWLR (pt1347) p.360.** I said that:

> **"Proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence, a degree of compulsion which is consistent with a high degree of probablity**." See also **Nwaturuocha vs. State (2011) 6 NWLR (pt. 1242) p. 170 Osetola & Anor vs. State 92012) 6SC (Pt. iv) p.148 Adewunmi vs. State (2016) 1-3 SC(Pt.II) p. 123.**
> *(P 27 Paras F – I)*

11. *Meaning of Alibi*

"Alibi" means elsewhere. That is to say when the offence was committed the accused person was not at the scene of the crime. He was somewhere else. When an accused person is arrested by the Police and investigation commences, the accused person is asked under caution to write a statement. It is at this stage that the accused person raises the defence of alibi. He must stage the day, time, and address of where he was when the offence was committed. The onus is not on the accused person to establish alibi rather it is on the prosecution to disprove it, but the police has no duty to disprove a worthless alibi. When the defence of alibi is raised in detail stating exactly where he was when the offence was committed the Police must investigate it properly to see if it true. *(P 27 Paras E – G)*

12. *The implication of defence of Alibi when sustained or disproved*

A plea of alibi, if found to be true is a complete defence which absolves the accused person of the charge.

A plea of alibi crumbles if the prosecution adduces sufficient and accepted evidence to fix the accused person at the scene of the crime at the time the offence was committed. See **Osuagwu vs. State (2013) 5 NWLR (Pt.1347) p. 360**; **Ozaki vs. State (1990) 1NWLR(pt. 124) p.92**; **Gachi vs. State (1965) NWLR) p.333.** *(P 27 Paras H – I).*

13. *Attitude of the Supreme Court to the concurrent findings of two lower courts*

The Supreme Court is slow to set aside concurrent findings of fact of trial court and the Court of Appeal but would set aside such findings if found to be perverse, or cannot be supported from the evidence led, and accepted by the court or if there was miscarriage of justice, or violation of some principle or law or procedure. See **Arowolo vs.Olowookere& 2 ors (2011) 11-12 SC (Pt.II) p.98; Nguma vs. A.G Imo State (2014) 2SC (Pt. II) p.1; Akoma & Anor vs. Osenwokwu & 2 Ors (2014) 5-6 SC (Pt.IV) P.1; Anekwe & Anor vs. Nweke (2014) 4SC (Pt.III) P.65**

This has been the practice and it is good. The reason being that the trial Judge saw, heard and watched the demeanour of the witnesses. He is thus in the best position to make a correct assessment of the witness's testimony. Findings of fact after examination in chief, cross examination, and re-examination should be highly regarded and not upset by an appeal

court, but only when there are exceptional circumstances justifying intervention by an appeal court. *(P 29 Paras B – E)*

14. *Inconsistent defences*
Per Datiojo Muhammed (JSC):

> **"My lords, that the appellant's chief complaint is the failure of the two courts to consider his defence of self-defence pre-supposs that he does not dispute having killed the deceased. In effect, by this defence, the appellant is affirming that PW1, PW2, PW3 and PW6 are true in their testimonies that the appellant has dealt the deceased fatal blows with his matchet and that her death ensued therefrom. Appellant's contention is that the law, which both courts failed to apply to the facts before them, absolved him for killing the deceased in self-defence. This defence, along with the defence of provocation the appellant raises, not only put him at the scene of crime, negativing his alibi, it further constitutes an admission that he indeed committed the offence**". *(P 30 Paras E – G)*

15. *Evidence in court inconsistent with accused extra-judicial statement*
It is settled that where an accused person gives evidence that is inconsistent with the earlier statement he made to the Police, the court, if it chooses not to disregard the evidence as being unreliable, should take same with a pinch of the salt. It needs to be restated here too that the fact that an accused person's evidence in court contradicts his extra judicial confessional statement does not deprive the court from convicting the accused on the basis of the confessional statement alone once the confession has been found to be voluntary and true. It is only desirable but not mandatory for the trial court to identify such corroborative evidence outside the confessional statement before convicting the accused. See **Eghoghonome vs. The state (1993) 7 NWLR (pt 306) 383, kimvs. State (2016) LPELR-40609 (SC), Nnamdi Osuagwuvs. The State (2013 LPELR-19823 (SC).** *(P 31 Para G – A)*

16. *How to disprove concurrent findings*
In the case at hand, evidence abound outside appellant's extra judicial confessional statement in the proof of the entire ingredients of the offence he was tried and convicted for. The trial court's decision which the lower court affirmed is clearly borne out of the evidence led by the respondent. The appellant cannot succeed in his bid to have the lower court's affirmation of such a decision having failed in the first place to show any mistake inherent in the concurrent findings of the two courts and the miscarriage of justice the mistakes occasioned. See **Ahmed vs. State (1999) 7 NWLR (pt 612) 441** and **Mezu vs. C & C.B. (Nig) plc (2013) 3 NWLR (PT1340) 188. (***P 32 Para A – C)*

17. *The defences of self-defence and alibi are contradictory*
The appellant in his defence raised issues of alibi and self defence. I seek to say quickly that the two defences are very much contradictory and thus bringing the appellant again into the same situation of inconsistency as he was, when he gave evidence in court which contradicted his extra-judicial statement to the Police.

While defence of alibi exonerates the accused totally from being present at the scene of the crime, self defence, though, it also exonerates completely from culpability, it however connotes that the accused was at the scene of crime and in fact was responsible for the act which he alleges was necessitated as a reason for his exercise of self defence.
(P 35 Para F – I)

18. *Where accused was identified by an eye witness alibi does not avail*
The appellant was clearly identified by an eye witness PW3 and thus the defence of alibi raised is logically demolished. See **Hemyo Ntam & Anor. vs. The State (1968) NWLR 86 at 87, Micheal Hausa vs. The State (1994) 6 NWLR (pt. 350) 281 and Patric Njovens vs. The State (1973) 5 SC 17.**
(P 35 Para C – D)

Nigerian Cases Cited
Ada vs. State (2008) LPELR – SC. 242/2004; [2008] 13 NWLR (PT1103) 149; [2008] 34 SCQR 508;
Adamu Garba vs. The State [1997] 3 SCNJ 68;
Adewunmi vs. State (2016) 1-3 SC (Pt.II) p. 123

Adio vs. The State [1986] 2 NWLR (Pt 24) 581;
Agbo vs. State [2006] 6 NWLR (PT 977) 545.
Ahmed vs. State (1999) 7 NWLR (Pt 612) 441
Aigbadion vs. State [2000] 4 SC (Pt 1) 1;
Ajunwa vs. The State [1988] 1 SC 110;
Akang vs. State [1971] 1 All NLR 47, 49;
Akpan vs. State (2001) FWLR (Pt.56) p.735
Akpan vs. state [2001] FWLR (Pt 56) 735; [2000] 12 NWLR (pt 682) 607
Alabi vs. The State [1993] 7 NWLR (Pt 307) 511, 523;
Anekwe & Anor vs. Nweke (2014) 4SC (Pt.III) P.65
Arowolo vs.Olowookere & 2 Ors (2011) 11-12 SC (Pt.II) p.98;
Bakare vs.The State [1987] 3 SC 1, 32;
Bakuri vs. The State (1965) NMLR 163;
Bello vs. Police [1956] SCNKR 113;
Chiokwe vs. State (2012) 12SC (pt.v) p. 147
Daniel vs. The State [1991] 8 NWLR (pt 443) 715;
Durwode vs. State [2000] FWLR (pt 55) 549, 564; [1999] 7 NWLR (pt 610) 202;
Edoko vs. State (2015) LPELR -24402 (SC) 62 -63,
Eghoghonome vs. The state (1993) 7 NWLR (pt 306) 383,
Ejeka vs. State [2003] 7 NWLR (Pt 819) 408;
Eyisi vs. State [2000] 4 NSCQR 60
Gachi vs. State (1965) NWLR) p.333.
Garos Bwashi vs. State [1972] 6 SC (Reprint) 55; (1972) LPELR-SC. 104/1972;
Gira vs. State [1996] 4 NWLR (pt 428) 1, 125.
Hassan vs.The State [2001] 6 NWLR (pt 709) 286, 305
Hemyo Ntam & Anor. vs. The State (1968) NWLR 86
Ibrahim vs. State (19910 LPELR-SC. 167/1990; [1991] 4 NWLR (pt 186) 393; [1991] 5 SCNJ 129
Ibrahim vs.The State [1991] 4 NWLR (pt 186) 399;
Igiri vs. State (2012) 5-7 SC (pt.II) P.59
Ikemson vs.The State [1989] 3 NWLR (pt 110) 455
Kim vs. State (2016) LPELR-40609 (SC),
Laoye vs. The state [1985] 2 NWLR (pt 10) 832;
Madu vs. State [2012] 15 NWLR (pt 1324) 405, 443,
Maigari vs. State [2013] 6-7 MJSC (pt 11) 109, 125,

Mbang vs. State (2012) 5-7 SC (pt.II) P.104
Mezu vs. C & C.B. (Nig) plc (2013) 3 NWLR (PT1340) 188.
Micheal Hausa vs. The State (1994) 6 NWLR (pt. 350) 281
Muka vs.The State [1976] 8 – 10 SC255;
Musa vs. State (2009) LPELR – SC.323/2006; [2009] 15 NWLR (pt 1165) 465;
Nasiru vs. State [1999] 1 NWLR (pt 5890 87, 98;
Nguma vs. A.G Imo State (2014) 2SC (Pt. II) p.1;
Nnamdi Osuagwu vs. The State (2013 LPELR-19823 (SC).
Nwabueze vs.The State [1988] 3 NWLR (pt 86);
Nwaturuocha vs. State (2011) 6 NWLR (pt. 1242) p. 170
Obudu vs. State [1999] 6 NWLR (pt 198) 433;
Ochemeje vs. The State [2008] SCNJ 143;
Odu and Anr vs. The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (pt. 772) 668.
Onyegbu vs.The State [1995] 4 SCNJ 275, 285-286
Osetola & Anor vs. State (2012) 6SC (Pt.iv) p. 148
Osuagwu vs. State (2013) 5 NWLR (Pt.1347) p. 360;
Ozaki vs. State (1990) 1NWLR (pt. 124) p.92;
Patric Njovens vs. The State (1973) 5 SC 17.
Silas Sule vs. The State (2009) LPELR 3125 (SC) 24, F-G;
Timbu Kolian vs. The Queen (1968) 42 A. L. J. R.;
Uraku vs. State (1976) LPELR – SC. 300/1975; [1976] 6 SC 128;
Yanor vs.The State (1965) ANLR (Reprint) 199;

Foreign Cases Cited
Hyam vs. DPP [1974] 2 All ER 41;
R vs. Hopwod (1913) 8 Cr. App. R. 143;
R vs. Hughes (1958) 84 CLR 170;
R. vs. Nichols (1958) QWR 46;
R. vs. Tralka (1965) Qd, R. 225.
Woolmington vs. DPP (1935) AC 462;

Nigerian Statutes Cited
The evidence Act – S. 135
The Criminal Code – Ss. 316, 319

Representation

Chief Henry Akunebu, (Esq), for the appellant.
C. N.Akowundu, (Esq.), for the respondent.

CHIMA CENTUS NWEZE, (JSC) (Delivering the lead judgment): At the High Court of Imo State, IhoIkeduru Judicial Division, the appellant (as accused person) was arraigned on Information which charged him with the offence of murder. Upon his plea of not guilty before the said court (hereinafter, simply, referred to as "the trial court"), the matter went to trial.

While the prosecution relied on the testimonies of its seven witnesses in proof of its case, the appellant (as accused person), who did not call any witness, testified in his defence. At the end, being satisfied with the prosecution's compelling evidence, the trial court found him guilty of the said offence contrary to **Section 319 (1) of the Criminal Code, Cap 30, Vol 11, Laws of Eastern Nigeria.** It, accordingly, convicted, and sentenced, him to death. His appeal to the Court of Appeal (hereinafter referred to as "the lower court") was unsuccessful; hence, this appeal to this court.

He distilled two issues from his notice and Grounds of Appeal of December 6, 2012: issues which were framed in these terms:

1. **Whether the court below is (sic) right in applying the inconsistency rule as resulting in making the appellant's viva-voce evidence and cautioned statement as both unreliable and therefore held the viva-voce evidence of the appellant as having totally contradicted exhibit B qua cautioned statement of the appellant?**
2. **Is (sic) the court below right in holding that there was no legal duty on the Police to investigate the appellant's plea of self defence and particulars therein furnished for reasons of the existence of eye witness account, denial of the cautioned 'statement by the appellant and that the viva-voce evidence, totally contradicted the cautioned statement?**

On their part, the respondent framed the issues thus:

A
1. **Whether the prosecution proved its case beyond reasonable doubt against the appellant?**
2. **Whether the statement of the appellant, admitted in court as exhibit 'B' is (sic) not at variance with his testimony in**
B **court and if the answer is in the affirmative, what is the legal position?**

My lords, I take the view that, though the issues framed by the respondent are
C more succinct apropos the appellant's main complaint in his notice and grounds of appeal, only the first issue is, truly, determinative of this appeal. Thus, only the sole issue, expressed as the respondent's first issue would be adopted in the determination of this appeal. In effect, the sole issue for the determination of this
D appeal is the very commodious one couched thus:

Whether the Prosecution proved its case beyond reasonable doubt against the appellant?

E

Before dealing with this issue, however, a statement of the factual background would not be out of place.

F **FACTUAL BACKGROUND**

The fateful day was May 2, 1992; the time was between 4 -5pm. The prosecution's case was that on the said day and time, PW3 took her bicycle to one Fabian Ugwushie for repair. As she was there, she overheard the deceased person
G calling on her. She left the repairer to meet her [the deceased person]. On her way, she met the deceased person who asked her to go home and prepare for dinner. As she was about to go, she saw the accused person emerging from a track road with a machete.

H As she [the deceased person] turned to move on her way, the accused person charged at her, cutting her with a machete on the neck. As she [the deceased person] ran, shouting as she was running away, the accused person pursued her, dealing further machete cuts all over her body.

I She ran into the compound of one George Opara with the accused person still following and cutting her. All this while, PW3 was shouting and following them closely until all of them got into that compound. However, when the appellant turned to the direction of the PW3 with the machete, she ran to the

backyard of the said compound, where she saw Emelia Opara, PW1. She related the story of the incident to her [Emelia Opara]. As a result, PW1 ran to the frontage of the compound. She [PW3] later went to the frontage of the compound where she found the deceased person in a pool of her blood, dead.

The accused person, on being arrested by the Police, volunteered a statement which was confessional in nature. At the trial court, as indicated earlier, the prosecution called a total of seven witnesses. On his part, the accused person [now, appellant] gave evidence in his own defence and closed his case. Following his unsuccessful attempt to quash his conviction and sentence at the lower court, he approached this court entreating it to upturn the verdict sentencing him to death.

ARGUMENTS ON THE SOLE ISSUE

"Whether the prosecution proved its case beyond reasonable doubt against the appellant?"

At the hearing of this appeal on November 24, 2016, Chief Henry Akunebu, adopted the appellant's brief filed on February 8, 2013. Arguing this issue, which was treated as the appellant's second issue, learned counsel explained that, on May 2, 1992, while the accused person was returning from the mission, near his house, he was accosted by the deceased person. She [the deceased person] attacked him while in the company of one Okeuchi, Clifford Ejioba, Robbert Opara, and Chinasa. While Chinasa had a knife, Okeuchi and the deceased person held sticks which they all attached him, citing the appellant's statement, Exhibit B.

Counsel submitted that the graphic details relating to the particulars of the attackers, contained in the appellant's statement, ought to have been investigated by the police for purpose of factual balance and fair hearing which doctrine is to be observed even in enquiry or investigation.

In his view, where a plea of self defence was made at the earliest opportunity, the police had the onus of disproving it. He maintained that, as the Police were, already, seissed with the particulars of the appellant's attackers, they should have invited them and obtained their statements to determine the veracity or otherwise of the appellant's plea of self defence.

He submitted that the Police, abysmally, failed in discharging the duty of investigating the said plea. In his view, this alleged failure was fatal to the **p**rosecution's case as it resulted in a miscarriage of justice, as his defence was

neither confirmed nor repudiated by investigation. He opined that the said failure amounted to a denial of fair hearing, **Udo vs. State (2005) & (sic) NWLR (pt. 928) 521.**

He, further, maintained that the said failure created a doubt in the prosecution's case as to whether or not the appellant acted in self defence: a doubt that should have resulted in the acquittal of the accused person [now, appellant], **Shande vs. State [2005] 12 NWLR (pt 937) 301.**

He observed that the appellant's graphic account as to how he was attacked by the deceased person with a stick and knife, along with other named persons, showed the role played by the named attackers. He explained that these named attackers were never investigated by the Police to confirm or repudiate the plea as contained in the appellant's statement.

He pointed out that, since the said plea had the prospect of absolving the appellant from criminal responsibility, the dereliction of the Police negatively impacted on the investigation and the subsequent trial, citing **Aigbadion vs. The State (2007) 7 NWLR (pt 666) 636.**

He contended that, notwithstanding the statement of PW3, the eye witness and her evidence in court, the Police still had the duty of, thoroughly, investigating the appellant's plea of self defence, as the allegation related to specific acts of his attackers in response to which he acted in self defence to repel same.

In his submission, the persons who offered the aggression and who were named should have been investigated. As such, the evidence of an eye witness could not displace the necessity for the evidence of the said attackers: evidence obtained upon their investigation through their statement because the plea of self defence was in response to their acts.

He pointed out that, though the appellant's statement in Exhibit B contradicted his evidence at the trial, it did not relieve the Prosecution of the duty of investigating his plea of self defence. He observed that an accused person's defence comprises of his statement and his evidence in court notwithstanding any attempt to disown or contradict it, **Tsoho vs. State (supra); State vs. Madaki (supra).**

In his view, the miscarriage of justice which resulted from the failure to investigate the appellant's defence in exhibit B was worsened by the fact that the solitary eye witness's statement, at page 6 of the record, clearly, contradicted the evidence of the witness in court on the point. He urged the court to resolve this

A issue in favour of the appellant.

RESPONDENT'S SUBMISSION

On his part, the learned DPP, Imo State, C. N. Akowundu, for the respondent,
B adopted the brief filed on March 28, 2013, although, deemed filed on November 24, 2016. In the said brief, he argued that, in a case of murder under **Section 319 (1) of the Criminal code** (supra), it is incumbent upon the Prosecution to prove beyond reasonable doubt that: the deceased person has died; that his/her death
C resulted from the act of the accused person and that the act of the accused person was intentional with knowledge that death or grievous bodily harm was its probable consequence. He cited **Ndukwe vs. State (2009) 37 NSCQR 425, 459-560; Nwchukwu vs. The State (2002) 3 FWLR (pt. 123) 312, 332; Onah vs.**
D **State [1985) 3 NWLR (pt.12) 236; Ogba vs. *State* (1992) 2 NWLR (pt. 222) 164, 198.**

It was submitted that the prosecution proved the above ingredients beyond reasonable doubt. On the first ingredient, reference was made to the evidence of
E PW. 1, Emelia Opara, pages 26-27 of the record.

Counsel, also, referred to the evidence of the PW.2, Hyacinth Opara, pages 27-28, particularly, page 28. This witness had stated on oath that the deceased person died on May 2, 1992. He identified the corpse to Dr. Innocent Njemanze
F who performed autopsy on the body of the deceased person.

Reference was further made to the evidence of the PW.6, Dr. Innocent Njemanze, pages 50-52 of the record. At page 51, this witness stated that the corpse was that of a female, Francisca Opara, who died on 2/5/92 at about
G 4.00p.m. He submitted that the Prosecution proved the death of the deceased person beyond all reasonable doubt.

Turning to the second ingredient, he referred to the evidence of the PW.3, one Anastasia Opara, pages 30-36 of the record. He submitted that the act of
H accused person in cutting the deceased with a machete was intentional, with full knowledge that death or grievous bodily harm was its probable consequence, citing **Section 316 of the Criminal Code**.

In his view, there were two intentions relevant to the appeal, namely, the
I intention to kill, **Section 316 (1) of the Criminal Code** and intention to do grievous bodily harm, **Section 316 (2) of the Criminal Code**. He canvassed the view that if the act, which caused death, was done with either of these intentions, the offence of murder had been committed, citing **Amayo vs. State [2002]**

FWLR (pt 91) 1571, 1575.

He took the view that the requisite intent to kill or cause grievous bodily harm could be inferred from: the type of weapon used; the nature of wound inflicted on the deceased person; the part of the body where the wound was inflicted, **Bakare vs. The State [1987] 1 NWLR (pt. 53) 579; Buje vs. The State [1991] 4 NWLR (Pt. 185) 287, 300.**

He contended that, from the evidence of the PW.3, an eye witness account, the appellant cut the deceased person on the neck and gave her several machete cuts on other parts of her body, citing the evidence of the PW.6, Dr. Innocent Njemanze, pages 51-52 of the record. Thereat, the PW.6 averred that on May 21, 1992 "[I] performed an autopsy on the body of one Francisca Opara, deceased and issued a medical report." He described the nature of the injury on the body of the deceased person.

The learned DPP submitted that the accused person not only had the intention to do grievous bodily harm to the deceased person but the intention to kill her. He maintained that the learned trial Judge was, therefore, right in holding that the Prosecution proved its case beyond reasonable doubt against the accused person, citing ***Ndike vs. The State [1994] 8 NWLR (pt.360) 33, 45.***

In his view, having proved the ingredients of the offence of murder against the accused person (now, appellant), the trial court was duty bound to find him guilty, **Ehot vs. The State [1993] 4 NWLR (pt. 2909) 663.** Citing the evidence of the PW.3, an eye witness, whose evidence was never impunged in the instant case, he urged the court to resolve this issue against the appellant and in favour of the respondent.

RESOLUTION OF THE ISSUE

My Lords, it would seem obvious that, more than other aspects of our *corpus juris,* the offence of murder under the Criminal Code (culpable homicide punishable with death under the Panel Code) has been the subject of the generous and consistent espousal of this court in cases too numerous to mention here. Indeed, so frequent has this phenomenon become that I am constrained, in this judgment, to resort to my previous exertions in this regard. Your Lordships must bear with me.

In **TajudeenIliyasu vs. The State (2015) LPELR -24403 (SC) 24 -26, G-C,** speaking for this court, I intoned as follows:

The three constitutive elements or ingredients of the offence which must be in order to secure a conviction under this Section have been, generously, outlined in case law, *Maigari vs. State* [2013] 6-7 MJSC (pt 11) 109, 125, citing *Ochemeje vs. The State* [2008] SCNJ 143; *Daniel vs. The State* [1991] 8 NWLR (pt 443) 715;*Obudu vs. State* [1999] 6 NWLR (pt 198) 433; *Gira vs. State* [1996] 4 NWLR (pt 428) 1, 125.

Under the said section, the prosecution is obliged to prove: (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm. These ingredients have witnessed consistent espousal in many jurisdictions, for example, by English courts, R vs. Hopwod (1913) 8 Cr. Ap p. R. 143; Hyam vs. DPP [1974] 2 All ER 41; Woolmington vs. DPP (1935) AC 462; by Nigerian courts, *Madu vs. State* [2012] 15 NWLR (pt 1324) 405, 443, citing *Durwode vs. State* [2000] FWLR (pt 55) 549, 564; [1999] 7 NWLR (pt 610) 202; *Akpan vs. State* [2001] FWLR (pt 56) 735; [2000] 12 NWLR (pt 682) 607 and by courts in other Commonwealth jurisdictions, see, for example, *R. vs. Nichols* (1958) QWR 46; *R vs. Hughes* (1958) 84 CLR 170; *TimbuKolian v The Queen* (1968) 42 A. L. J. R.; *R. vs. Tralka* (1965) Qd, R. 225, (Queensland, Australia).

Scholars have seldom disagreed with judicial authorities on this question, C. O. Okonkwo,*Okonkwo and Naish: Criminal Law in Nigeria* (Second Edition) (Ibadan: Spectrum Books Ltd, 2009) et seq; A. G. Karibi-Whyte, *History and Socurces of Nigerian Criminal Law* (Ibadan: Spectrum Books Ltd, 1988) passim; Archbold's Pleadings: *Evidence and Practice in Criminal Cases* (Fourth Edition) (London: Sweet and Maxwell, 1979) passim; K. S. Chukkol, The *Law of Crimes in Nigeria* (Zaria: Ahmadu Bello University Press Ltd, 1988); P, Ocheme, *The Nigerian Criminal Law* (Kaduna: Liberty Publications Ltd, 2006) 194 et seq.

I entertain no doubt that the lower court, rightly, affirmed the trial court's conclusion that the prosecution proved the first ingredient, that is, the factuality of the death of the deceased person. This is evident from the testimonies of PW1, Emilia Opara, pages 26 -27 of the record; PW2, Hyacinth Opara, pages 27 -28 of the record and PW6, Dr Innocent Njemanze, pages 50 -52 of the record. PW2 having indentified the corpse of the deceased person to PW6, he [the PW6] performed an autopsy on the said corpse [that is, the body of the deceased person, Francisca Opara].

As it is often the case with most medical reports, the PW6, Dr Innocent Njemanze, described the nature of the injury on the body of the deceased person in these medical terms:

> **There was a deep laceration wound cutting across the back of the root of the neck severing muscle, blood vessels and nerves, leaving only the skin holding the neck interiorly. The lacerations had sharp edges. There were deep incisional wounds two in number, each ten centimeters long and two centimeters deep the right periator and the occipital regions of the skull of the head respectively. There were multiple incisional wounds on both upper limbs cutting across the right shoulder, left arm, right elbow joint and right and left palms severing blood vessels muscles and nerves. All the incisional wounds were as a result of multiple wounds from impact with a very sharp object. An example of a sharp object is a machete.** [Italics supplied]

With regard to the second ingredient, counsel for the prosecution referred to the testimony of PW3, Anastasia Opara, pages 30 -36 of the record. He submitted that the requisite intent to kill or cause grievous bodily harm could be inferred from: the type of weapon used; the nature of wound inflicted on deceased; the part of the body where the wound was inflicted.

This submission is un-answerable. True, indeed, from a conspectus of testimonies of PW3 (the eye witness who observed and saw how the appellant, most brutally, employed a machete in cutting the neck of the deceased person) and the above medical report of the PW6, the lower court was on firm footing in affirming the finding of the trial court on the prosecution's proof of the second and

A third ingredients set out above, that is, that the appellant caused the death of the deceased person and he intended to kill her or cause her grievous bodily harm.

In the words of the trial court "PW3 gave a positive, consistent and harmonious evidence of the acts of the accused [person] leading up to the death of
B the deceased [person]; pages 87 – 88 of the record.

The lower court affirmed this finding: a finding that found firm anchorage on the evidence of PW6. I take the liberty to set out the opinion of PW6, once more:

C

> **There was a deep laceration wound cutting across the back of the root of the neck severing muscle, blood vessels and nerves, leaving only the skin holding the neck interiorly. The**
> D **lacerations had sharp edges. There were deep incisional wounds two in number, each ten centimeters long and two centimeters deep the right periator and the occipital regions of the skull of the head respectively. There were multiple incisional wounds on**
> E **both upper limbs cutting across the right shoulder, left arm, right elbow joint and right and left palms severing blood vessels muscles and nerves. All the incisional wounds were as a result of multiple wounds from impact with a very sharp object. An**
> F **example of a sharp object is a machete.** [Italics supplied]

As this court held in *Iliyasu vs. State* (Supra) at page 34, paragraphs B-F, true indeed, Case Law and scholastic treatises are unanimous on the point that if a
G dangerous weapon was used (in the instant case, a machete was employed in hacking at the neck of the deceased person), the Courts will infer that death was a probable and not just a likely consequence of the accused person's act, **Adamu Garba vs. The State [1997] 3 SCNJ 68; Bakuri vs. The State (1965) NMLR**
H **163; Silas Sule vs. The State (2009) LPELR – 3125 (SC) 24, F-G; Ejeka vs. State [2003] 7 NWLR (Pt 819) 408; Garos Bwashi vs. State [1972] 6 SC (Reprint) 55; (1972) LPELR-SC. 104/1972; P. Ocheme, The Nigerian Criminal Law (Kaduna: Liberty Publications Ltd, 2006) 203;** also, **C. O.**
I **Okonkwo, Okonkwo and Naish: Criminal Law in Nigeria (Second Edition) (supra) 221,"**

In effect, having concurrently found that the prosecution proved the ingredients of the offence charged, the lower court affirmed the verdict of the trial

court.

My Lords, as shown above, counsel for the appellant, spiritedly, tried to fault the above concurrent findings on the ground that the Police, abysmally, failed in discharging the duty of investigating the appellant's plea of self defence. In his view, this alleged failure was fatal to the prosecution's case as it resulted in a miscarriage of justice, as his defence was neither confirmed nor repudiated by an investigation. He opined that the said failure amounted to a denial of fair hearing.

He, further, maintained that the said failure created a doubt in the prosecution's case as to whether or not the appellant acted in self defence: a doubt that should have resulted in the acquittal of the accused person [now, appellant]. I will return to the implausibility of the so-called plea of self defence anon. Before then, I would draw attention to the findings of the trial court at pages 89 -90 of the record, thus:

> **….this defence of *alibi* that he went to the market on the date of the incident was raised for the first time in the witness box in court, it was not ever contained in Exhibit B…**
>
> **The best defence and evidence of *alibi* is one pleaded at the first opportunity (usually to the Police when making a statement) and not at the time of trial…**

Not done yet, the trial court, admirably, defenestrated that spurious defence in this unanswerable conclusion which was, rightly, affirmed by the lower court:

> **In the instant case not only was the defence of *alibi* not raised before the police with sufficient particulars, even the casual and unsubstantiated manner in which it appeared to have been raised contained no details that will lend it to belief.**

My lords, I find no justification for tampering with the above concurrent findings. I will adduce reasons for this later in the course of this judgment. For, now, I will deal with the submission of the appellant's counsel with regard to the so-called plea of self defence. With respect, he [the learned counsel for the appellant] would seem to betray his misconception of a well-established principle in Criminal Law. In the apt findings of the trial court -findings which were affirmed by the lower

court:

> **I find that at the time of the attack on the deceased [person] there was neither any provocation offered to the accused [person] by the deceased [person] or any member of her family nor was there any threat or reasonable apprehension of death or grievous bodily harm to the accused [person] to justify the savage attack that ended the life of the deceased [person] …I therefore *find no merit whatsoever in the defence of self defence and provocation raised by the defence…..***

The lower courts were right in the above conclusion. In **Edoko vs State (2015) LPELR -24402 (SC) 62 -63,** this court found it curious that the appellant [just as the appellant in the instant appeal] set up the defences of self defence and provocation at the same trial. Listen to this court's adumbration of the rationable for its curiosity:

> Whereas the Criminal code provides for self defence in sections 286 and 287, the same code provides for the defence of provocation in Section 284. Whilst the former [the defence of self defence] is an exculpatory defence because, where it is established, it exonerates the accused person, provocation is merely, an attenuating or a mitigating defence. Where available, it merely, attenuates; disrates or demotes the offence from murder to manslaughter.
>
> In effect, the defence of provocation does not exonerate the accused person. It, only, earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter, **Uraku vs. state (1976) LPELR-SC. 300/1975; [1976] 6 SC 128; Akang vs. State [1971] 1 All NLR 47, 49; Musa vs. State (2009) LPELR-SC.323/2006; [2009] 15 NWLR (pt 1165) 465; Ada vs. State (2008) LPELR-SC.242/2004; [2008] 13 NWLR (PT1103) 149; [2008] 34 SCQR 508; Ajunwa vs. The State [1988] 1 SC 110; Laoye vs. The state [1985] 2 NWLR (pt 10) 832; C. O. Okonkwo, Okonkwo and Naish: Criminal Law in Nigeria (Second Edition) (Ibadan: Spectrum Books, 2000) 240; C. O. Okonkwo,** "The Unlawful Act Doctrine and the Defence of Accident" in The Nigerian Bar Journal Vol 11 (1973) 93-97.
>
> It is, thus, the dissimilarity in the consequences of the availability of these defences that make them inconsistent defences defences that cannot avail an accused person at the same time, **Ibrahim vs. State (1991) LPELR-SC.**

167/1990; [1991] 4 NWLR (pt 186) 393; [1991] 5 SCNJ 129; see, also, the very incisive, and the most stimulating, article by the cerebral professor of Law, F. I. Asogwah, "The Applicability of some 'Inconsistent' Defences in the Nigeria Criminal Code", in I. A. Umezulike (ed), Law and Administration of Justice in the Twenty First Century (Enugu: Fourth Dimension Publishing Co. Ltd, 1997) 75-98. [per Nweze, JSC in **Edoko vs. The state (2015) LPELR -24402 (SC) 62 - 63,A- C].** Now, to the question of alibi. As pointed out earlier, the trial court found at pages 89 -90 of the record, that:

> **....this defence of alibi that he went to the market on the date of the incident was raised for the first time in the witness box in court, it was not ever contained in exhibit B…**
>
> **The best defence and evidence of alibi is one pleaded at the first opportunity (usually to the police when making a statement) and not at the time of trial…**

I, entirely, endorse this view which was affirmed by the lower court. True, indeed, to be entitled to the beneficent effect of the defence of alibi, an accused person must raise it at the earliest opportunity, **Hassan vs. The State [2001] 6 NWLR (Pt 709) 286, 305,** which would, preferably, be in his extra-judicial statement. This is to offer the Police an opportunity either to confirm or confute its availability to the accused person, **Ibrahim vs. The State [1991] 4 NWLR (pt 186) 399; Nwabueze vs. The State [1988] 3 NWLR (Pt 86); Ikemson vs. The State [1989] 3 NWLR (pt 110) 455.**

What is more, the said defence must be unequivocal as to the particulars of the accused of his whereabouts and those present with him, **Onyegbu vs. The State [1995] 4 SCNJ 275, 285-286; Ibrahim v State (supra); Balogun vs. AG, Ogun State [2011] lpelr 1133 (sc) 16.**

It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the prosecution to investigate it, **Eyisi v State [2000] 4 NSCQR 60** and to disprove same, **Eke vs. The State (supra).** Failure to investigate the defence of alibi raised in such circumstances will lead to an acquittal, **Yanor vs. The State (1965) ANLR (Reprint) 199; Bello vs. Police [1956] SCNKR 113; Odu and Anr vs. The State [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (pt. 772) 668.**

However, the said defence would be unavailing in a situation, as in this case, where the accused person raised it during the trial, **Hassan vs. State [2001] 6 NWLR (pt 709] 305.**

In all, like the lower courts, I hold that the prosecution, sufficiently, proved the case as required by law, that is, beyond reasonable doubt, **Alabi vs. The State [1993] 7 NWLR (pt 307) 511, 523; Nasiru vs. State [1999] 1 NWLR (pt 5890 87, 98; Adio vs. The State [1986] 2 NWLR (pt 24) 581; Muka vs. The State [1976] 8-10 SC255; Bakare vs. The State [1987] 3 SC 1, 32; Aigbadion vs. State [2000] 4 SC (PT 1) 1; Agbo vs. State [2006] 6 NWLR (PT 977) 545.**

Accordingly, I hereby endorse the concurrent findings of the lower courts. I shall enter an order dismissing it as lacking in merit. I, further, affirm the judgment of the lower court which affirmed the conviction and sentences of the appellant.

Chima Centus Nweze
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the benefit of reading in draft the leading judgment of my learned brother Nweze, (JSC). His lordship explained in detail the gruesome murder of Francisca Opara (F) by the appellant. I am in complete agreement with his lordship's reasoning and conclusion.

Section 135 of the Evidence Act states that where the commission of crime is in issue the standard of proof required before a conviction is sustained is proof beyond reasonable doubt.

The appellant was charged and found guilty of the offence of murder under Section 319 (1) of the Criminal Code. Section 319 is the punishment section. It states that any person who commits the offence of murder shall be sentenced to death, While Section 316 of the Criminal Code defines the circumstances when an unlawful killing would amount to murder. To succeed the prosecution must prove beyond reasonable doubt that Francisca Opara (F) died, and that her death was caused by the appellant. The prosecution must further show that the act of the appellant which resulted in the death of Francisca Opara (F) is one of the six circumstances listed in Section 316 of the Criminal Code. That is to say:

(1) If the offender intends to cause the death of person Killed, or that of some other person;

(2) If the offenders intends to do to the person killed or to some other person some grievous harm;

(3) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life;

(4) If offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

(5) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;

(6) If death is caused by willfully stopping the breath of any person for either of such purposes. See Akpan v s . State (2001) FWLR (pt.56) p.735 Mbang vs. State (2012) 5-7 SC (pt.II) P.104 Igiri vs. State (2012) 5-7.

SC (pt.II) P.59 Chiokwe vs. State (2012) 12SC (pt.v) p. 147.

If the act of appellant that caused the death of the deceased is not one of the six circumstances listed in Section 316 of the Criminal Code, it is no longer Murder.

In **Osuagwu vs. State (2013) 5 NWLR (pt. 1347) p.360.** I said that:

"Proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence, a degree of compulsion which is consistent with a high degree of probability."

See alsoNwaturuocha vs. State (2011) 6 NWLR (pt. 1242) p.170 Osetola & Anor vs. State (2012) 6SC (Pt.iv) p.148 Adewunmi vs. State (2016) 1-3 SC(Pt.II) p. 123.

Did the respondent prove the charge of murder beyond reasonable doubt? P.W.3 an eyewitness saw the appellant run after the deceased and dealt several

matchete cuts on her. She ran into the compound of George Opara, where she met Emelia Opara, P.W.1. She told PWI what she saw. PWI ran to the front of the compound and saw Francisca Opara F (deceased) dead, in a pool of her blood.

Pw6 Dr. Innocent Njemanze performed autopsy on the deceased and found that there were deep laceration wounds cutting across the back of the neck severing muscle, blood vessels and nerves. He gave the details of the state of the corpse and concluded that all the incisional wounds were from a very sharp object. The evidence of an eyewitness is one of the best evidence available provided the eyewitness is telling the truth. The fact that PW3 was unshaken under cross-examination, proved her testimony true. Furthermore PWI saw the deceased dead very soon after she died in the circumstances narrated by PW3.

The appellant is an evil and dangerous man. His attack on the defenceless Francisca Opara (F) (deceased) was ferocious and indiscriminate, absolutely appalling, indescribable, a clearly, wicked and despicable act. The act of the appellant which resulted in the death of Francisca Opara (F) falls under (2) or/and (3) of Section 316 of the criminal code. This in proof beyond reasonable doubt.

Alibi

Alibi means elsewhere. That is to say when the offence was committed the accused person was not at the scene of the crime. He was somewhere else. When an accused person is arrested by the Police and investigation commences, the accused person is asked under caution to write a statement. It is at this stage that the accused person raises the defence of Alibi. He must state the day, time, and address of where he was when the offence was committed. The onus is not on the accused person to establish alibi rather it is on the prosecution to disprove it, but the Police has no duty to disprove a worthless alibi. When the defence of alibi is raised in detail stating exactly where he was when the offence was committed the police must investigate it properly to see if it true.

A plea of alibi, if found to be true is a complete defence which absolves the accused person of the charge.

A plea of alibi crumbles if the prosecution adduces sufficient and accepted evidence to fix the accused person at the scene of the crime at the time the offence was committed. See **Osuagwu vs. State (2013) 5 NWLR (Pt.1347) p. 360; Ozaki vs. State (1990) 1NWLR (pt. 124) p.92; Gachi vs. State (1965) NWLR (Pt.333).**

The defence of alibi was not raised by the appellant in his statement to the Police rather it was raised for the first time when he gave evidence in court, when he said that he went to the market on the date of the incident.

The appellant failed to establish an alibi worth examining. The appellant's defence of alibi was of no value and it fades into insignificance in the face of compelling, sufficient and accepted eyewitness evidence which was amply corroborated. The Supreme Court is slow to set aside concurrent findings of fact of trial court and the Court of Appeal but would set aside such findings if found to be perverse, or cannot be supported from the evidence led, and accepted by the court or if there was miscarriage of justice, or violation of some principle or law of procedure. See **Arowolo vs. Olowookere& 2 ors (2011) 11-12 SC (Pt.II) p.98; Nguma vs. A.G Imo State (2014) 2SC (Pt. II) p.1; Akoma & Anorvs.Osenwokwu & 2 ors (2014) 5-6 SC (Pt.IV) P.1; Anekwe & Anor vs. Nweke (2014) 4SC (Pt.III) P.65**

This has been the practice and it is good. The reason being that the trial Judge saw, heard and watched the demeanour of the witnesses. He is thus in the best position to make a correct assessment of the witnesses testimonies. Findings of fact after examination in chief, cross examination, and re-examination should be highly regarded and not upset by an appeal court, but only when there are exceptional circumstances justifying intervention by an appeal court.

Both courts below found as a fact that the appellant dealt several matchete cuts on Francisca Opara(F) in a killing frenzy that left her dead. These are concurrent findings of fact by both courts below which the appellant was unable to satisfy the court that the findings are perverse or unreasonable, Concurrent findings of fact are in the circumstances true.

For these brief reasons, as well as those fully given by my learned brother Nweze, JSC. I would dismiss the appeal.

Appeal dismissed.

Olabode Rhodes-vivour
Justice Supreme Court

DATTIJO MUHAMMED, (JSC): I had a preview of the leading judgment of my learned brother Nweze (JSC) just delivered. I agree with his reasoning leading to the conclusion that the appeal being unmeritorious should be dismissed. For the reasons hereinafter articulated purely for emphasis and more so the fuller reasons in the leading judgment I also dismiss the appeal.

The appellant was tried and convicted for murder contrary to Section 319(1) of the Criminal Code Cap 30 vol. II, Laws of the Eastern Nigeria applicable to Imo sate. The Imo state High Court's decision convicting him was affirmed by the Court of Appeal, the lower court. Further dissatisfied, appellant has appealed to this Court raising issues as has arisen for the determination of his appeal. The more succinct but similar issues formulated by the respondent and on which basis I will determine the appeal read:

1. **Whether the prosecution proved its case beyond reasonable doubt against the appellant.**
2. **Whether the statement of the appellant admitted in court as Exhibit 'B' is not at variance with his testimony in court and if the answer is in the affirmative what is the legal position?**

In considering these issues, appellant's complaints against the concurrent findings of the two courts below, I shall be relying on the summary of the facts of the case on which the appeal hinges rendered in the leading judgment.

My lords, that the appellant's chief complaint is the failure of the two courts to consider his defence of self defence pre-supposes that he does not dispute having killed the deceased. In effect, by this defence, the appellant is affirming that PW1, PW2, PW3 and PW6 are true in their testimonies that the appellant has dealt the deceased fatal blows with his matchet and that her death ensued therefrom. Appellant's contention is that the law, which both courts failed to apply to the facts before them, absolved him for killing the deceased in self-defence. This defence, along with the defence of provocation the appellant raises, not only put him at the scene of crime, negativing his alibi, it further constitutes an admission that he indeed committed the offence.

The trial court's devastating findings on this defences which findings the lower court justifiably affirmed, belie appellant's assertion that these defences were discountenanced by the two courts. The trial Judge at page 92 of the record of appeal firmly held thus:

> **"I find that at the time of the attack on the deceased there was neither any provocation offered to the accused by the deceased or any member of her family nor was there any threat or reasonable apprehension of death or grievous bodily harm to**

A the accused to justify the savage that ended the life of the deceased.

I find no merit whatsoever in the defence of self-defence and
B provocation raised by the defence.

Beside, the abandonment of such defences by the accused in the witness box in giving evidence that is inconsistent with them
C completely knocks off the bottom of those defences. See UMANI vs. STATE, supre at 283."

The court then concluded as follows:

D

"On the totality of the evidence before me, therefore, I accept and believe the evidence led by the prosecution that the accused murdered the deceased, Francisca Opara on the 2nd day of May,
E 1992 in the circumstance narrated by PW3 in her evidence of the accused that he did not murder the deceased, did not know her and did not inflict the matchet cuts that ended the life of the deceased. I believe and find that the act of the accused in
F inflicting those matchet cuts on the deceased was intended to cause and did cause the death of the deceased. In the circumstances, I find the accused guilty as charged."

G Appellant's further contention is that both courts should not have relied on Exhibit B, his extra judicial statement, found to be confessional, as same stands in contradiction to his oral evidence at trial. This cannot help the appellant either.

It is settled that where an accused person gives evidence that is
H inconsistent with the earlier statement he made to the Police, the court, if it chooses not to disregard the evidence as being unreliable, should take same with a pinch of the salt. It needs to be restated here too that the fact that an accused person's evidence in court contradicts his extra judicial confessional statement
I does not deprive the court from convicting the accused on the basis of the confessional statement alone once the confession has been found to be voluntary and true. It is only desirable but not mandatory for the trial court to identify such corroborative evidence outside the confessional statement before convicting the

A accused. See **Eghoghonome vs. The state (1993) 7 NWLR (pt 306) 383, Kim vs. State (2016) LPELR-40609 (SC), Nnamdi Osuagwu vs. The State (2013 LPELR-19823 (SC).**

In the case at hand, evidence abound outside appellant's extra judicial
B confessional statement in the proof of the entire ingredients of the offence he was tried and convicted for. The trial court's decision which the lower court affirmed is clearly borne out of the evidence led by the respondent. The appellant cannot succeed in his bid to have the lower court's affirmation of such a decision having
C failed in the first place to slow any mistake inherent in the concurrent findings of the two courts and the miscarriage of justice the mistakes occasioned. See **Ahmed vs. State (1999) 7 NWLR (pt 612) 441** and **Mezu vs. C & C.B. (Nig) plc (2013) 3 NWLR (PT1340) 188.**

D For the foregoing and the more detailed reasons outlined in the leading judgment the appeal is hereby dismissed. I abide by the consequential orders contained in the leading judgment.

Musa Dattijo Muhammed,
E ***Justice, Supreme Court***

BATA OGUNBIYI, (JSC): I read in draft the lead judgment of my learned brother Nweze, JSC and I agree that the appeal is devoid of any merit and should
F be dismissed.

The main issue in this appeal is whether or not the prosecution had discharged the onus placing on it by proving the guilt of the appellant beyond reasonable doubt.

G The star witness at the trial of the accused was PW3 who is the daughter of the victim. In her evidence, she gave a positive, consistent and harmonious evidence of the acts of the accused which led to the death of the deceased.

For example pw3 testified that the accused dealt mortal matchet cuts on
H the deceased as he pursued her into the compound of one George Opara where he finally hacked her down dead. The evidence of PW7 that he saw 13 matchet cuts on the body of the deceased also collaborates PW3's evidence. In addition, the evidence of pw6, who performed the autopsy described in great detail the nature,
I extent, and type of the injuries he found on the body of the deceased and which is collaborative of the evidence of pw3.

The document Exhibit B was the extra-judicial statement made by the appellant to police, which was admitted at the trial court without any objection.

Same is totally at variance with the appellant's viva voce evidence in the open court.

At pages 68-69 of the record of appeal, the appellant gave evidence as DW1 wherein he denied knowing the deceased totally or having anything to do with her. He also denied ever making Exhibit B to the Police.

In cross reference to the appellant's evidence in court, is Exhibit B contained at p.11 of the record of appeal, wherein the appellant in his extra-judicial statement had this to say:

> **I know Francisca Opara since 1974 and we have been friends. One day in 1982 the late Francisca Opara and the children damaged my car and took me to court since that time both of us have been in enmity anytime they see me, they will fight me and sent me to court. Presently I have case with the deceased person at police Nwaorieubi and magistrate court Nwaorieubi. All my properties have been stolen by the woman and her children. On the 2nd of May 1992, I was returning from mission near our house.I saw Francisca and her daughter Okwuchi. As Francisca cross my way, she held my cloth and told me I am finished today.**
>
> **As she was still holding and I was going, her daughter Okwuchi picked up a stick and hit me and her mother Francisca Opara the deceased also picked stick and hit meas both of them were beating me, I was crying and one Clifford Ejiogu asked them to beat me. As one of her Daughter Chinasa Opara came with knife and I took the knife from her and cut their mother Francisca Opara two times and ran into the bush. I cut her the knife on her hand and neck and ran away." (Emphasis provided).**

It is obvious that the appellant's statement Exhibit B is at variance with oral testimony in court at the trial.

At page 134 of the record and while considering the inconsistency rule, this is what the lower court have to say:

The above exposition of the inconsistency rule by the learned trial judge may be incomplete in the circumstances of the case but his finding of the unreliability of the accused testimony in court remains valid because of the legal truism that a plea of alibi is contradictory and inconsistent with a plea of self defence.

In further consideration, their Lordships continued also and said:

The inconsistency rule, is that where an accused viva voice evidence at the trial court and his extra-judicial statement are contradictory or inconsistent, the trial court should disregard or reject both as unreliable and rely only on the evidence of the prosecution. However, the rule does not apply to confessional statements made by accused persons. It only applies to other extra-judicial statement of witnesses outside of confessional statements: Habibu Musa vs. The State (2012) 3 NWLR (pt.1286) 59 at 96-98.

For all intents and purposes, the inconsistency rule does not apply to the situation at hand. Be that as it may, when regard is had also to the evidence of pw3 whose testimony was found as positive and consistent, same is a corroboration of Exhibit B, the confessional statement made by the appellant himself.

The appellant in his defence raised issues of alibi and self defence. I seek to say quickly that the two defences are very much contradictory and thus bringing the appellant again into the same situation of inconsistency as he was, when he gave evidence in court which contradicted his extra-judicial statement to the Police.

While defence of alibi exonerates the accused totally from being present at the scene of the crime, self defence, though, it also exonerates completely from culpability, it however connotes that the accused was at the scene of crime and in fact was responsible for the act which he alleges was necessitated as a reason for his exercise of self defence.

On the question of alibi therefore, the trial court said:

"In the instant case not only was the defence of alibi not raised before the police with sufficient particulars, even the casual and unsubstantiated manner in which it appeared to have been raised contained no details that will lend it to belief. Besides, the suggestion made to PW3 in cross-examination that the accused inflicted the matchet cuts on the deceased in self defence completely destroys that of alibi even if it were to exist (which it does not)."

The appellant was clearly identified by an eye witness PW3 and thus the defence of alibi raised is logically demolished. See **Hemyo Ntam & Anor. vs. The State (1968) NWLR 86 at 87, Micheal Hausa vs. The State (1994) 6 NWLR (pt. 350) 281 and Patric Njovens vs. The State (1973) 5 Sc 17.**

The judgment of the two lower courts are concurrent and there is no reason adduced by the appellant for this court to interfere therewith. In other words, the judgment of the lower court affirming the trial court has not been found to be perverse. My learned brother Nweze, (JSC) has dealt comprehensively and adequately with all the issues raised in the appeal.

With the few words of mine and particularly relying on the lead judgment, I also dismiss the appeal as lacking in merit. I further abide by all the orders made therein the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had the advantage of reading before now, the judgment prepared and read by my learned brother Chima Centus Nweze, (JSC). I am in entire agreement with the reasons and conclusion of my noble lord that this appeal is wanting in merit and deserves to be dismissed. While dismissing it, I also have few comments to make in support of the said judgment.

This appeal is against the judgment of the court of Appeal, Owerri Division (the lower court) delivered on 9th of November, 2012 which affirmed the judgment of High Court of Imo State, Iho Ikeduru Judicial Division (the trial court) which convicted and sentenced the appellant for murder for causing the death of his victim one Fransisca Opara (f) by cutting her with a matchet.

FACTS OF THE CASE

On 2nd May 1992, while PW3 was with a bicycle repairer she heard voice of the deceased, she saw the appellant with a matchet which he used in cutting the deceased on the neck. The deceased ran for her dear life but the appellant/accused pursued her and continued to deal matchet cuts on her. The PW3 testified that she followed them until both of them got to the compound of one Emeka Opara (PW1), where the eventually gave up.

The appellant was later arrested by the police and he volunteered a confessional statement. He was later arraigned before the trial court on a charge of murder.

During the trial, the prosecution called seven witnesses while the accused person, now appellant, testified for his defence. In the end, the learned trial Judge found the appellant guilty of murder, convicted and sentenced him to death. Disenchanted with his conviction and sentence, the appellant appealed to the Court of Appeal (the court below) which dismissed his appeal and affirmed the conviction and sentence passed on him by the trial court. Further aggrieved by the dismissal of his appeal by the court below, the appellant appealed to this Court vide a Notice of Appeal filed on 6th December 2012 containing two grounds of appeal.

Briefs of arguments were filed and exchanged by the parties. In the appellant's Brief of Argument settled by one Chief Henry Akunebu, two issues for determination were proposed which read, thus:-

1. **Whether the court below is right in applying the inconsistency rule as resulting in making the appellant viva-voca evidence and cautioned statement as both unreliable and therefore held the viva-voca evidence of the appellant as having contradicted Exhibit B qua cautioned statement of the appellant.**
2. **Is the court below right in holding that there was no legal duty on the police to investigate the appellant plea of self defence and particulars therein furnished for reasons of the of eye witness account, denial of the cautioned statement by the appellant and that the viva-voca evidence, totally contradicted the cautioned statement?**

A In his reaction, the learned counsel for the Respondent upon being served with Appellant's brief, also filed his own Brief of argument wherein, it also raised dual issues for the determination as set out below:-

B **(a) Whether the prosecution proved its case beyond reasonable doubt against the appellant**

(b) Whether the statement of the appellant in court as Exhibit 'B' is not at variance with his testimony in court and if the

C **answer is in the affirmative, what is the legal position ?,**

Looking at the two sets of issues raised by the parties as reproduced above, the issues raised in the respondent's brief appear to me to be moreelegantly couched,

D and are simple and straight to the core points calling for determination in this appeal. The issues raised in the appellant's brief of argument besides being verbose, are also semantical and they appear to be rather to technical. To my mind, the issues raised by the appellant have also been adequately subsumed by

E the issues proposed by the respondent, hence I choose to be guided by them in determining this appeal. I will take the two issues together.

SUMMARY OF SUBMISSION BY APPELLANT'S COUNSEL

F The learned counsel to the Appellant submitted that the fact that the appellant gave a different version of evidence which contradicts earlier statement to the Police, does not make both accounts unreliable. He argued that the approach by the lower court with respect to the inconsistency rule relating to the case of the

G appellant was perverse and a total misconception of inconsistency rule in criminal cases. He cited the case of **Tsoho vs. The state (1986) 4 NWLR (pt. 36) pages 710-712,** where it was held that when an accused gives a previous statement completely different from his testimony it will be neglected. It was

H held further in that case, that the court should not base its verdict on it because it is not applicable to the evidence of an accused but rather restricted to the evidence of a witness in criminal cases. He faulted the lower court's failure to rely on Tsoho case(supra) He contended that the findings of the lower court was based on a

I wrong application of law having regard to the principle in Tsoho's case (supra) which has resulted in miscarriage of justice. He submitted further, that the defence of an accused person comprises his cautionary statement and his evidence at the trial, notwithstanding his attempt to disown it. He referred to the

case of **MADAKI vs. STATE (1996)3 NWLR (pt. 429) pg 171 at 174.** He finally submitted on this issue, that non-consideration by the lower court is of necessity to inconsistency rule, is perverse. He urged this court to resolve this issue in favour of the appellant.

On Issue No. 2 which deals with the holding of the court below that there was legal duty on the police to investigate the plea of self defence and the particulars furnished.

Here the learned counsel to the appellant narrated the story of the Appellant that on 2/5/1992 while he was returning home, he was attacked by the deceased alongside four others with a knife which were contained in appellant's statement Exhibit "B". He argued that the plea of self defence was made at the earliest opportunity to the Police and the onus to disprove it rests on the police. He submitted that the failure of the Police to investigate the appellant's plea of self defence amounts to denial of fair hearing which resulted in a miscarriage of justice to him. He referred to **UDO vs STATE (2005) NWLR Pt.928 p.521 and SHANDE vs. STATE(pt.937) p.301** ratio 5 where it was held that failure of the police to investigate or disprove such evidence is a failure to perform a vital duty which will likely result in miscarriage of justice. He argued that notwithstanding the evidence of pw3 the purported eye witness, the police still had a legal duty to thoroughly investigate the appellant's plea of self defence. He also stated that to hold that the evidence of eye witness is sufficient without investigating the defence of self defence of the appellant amounts to a denial of the appellant's right to fair hearing. He submitted that the contradiction in the evidence of the appellant does not relieve the police from investigating the defence of self defence contained in Exhibit "B". He then urged the court to also resolve this issue in favour of the appellant/accused person and allow this appeal.

ON ISSUE NO.1

"Whether the prosecution proved its case beyond reasonable doubt"

In arguing this issue, the learned counsel for the respondent referred to the evidence of PW1, PW2 and most importantly, the evidence of PW3 at pages 30-36 of the record that he saw the appellant emerging from a track armed with matchet and he cut the deceased on the neck and that the deceased started running and the appellant pursuing her inflicting matchet cuts on her body. He submitted that the act of the accused in cutting the deceased with matchet was intentional and done with full knowledge that death or grievous bodily harm was the

probably consequence. Learned counsel submitted that the prosecution proved its case beyond reasonable doubt. He referred to the case of **ESHOT vs. STATE (1993)4 NWLR (pt.290)p.663 (paragraphs 3-8** where it was held thus:

> "**Once the trial court is satisfied beyond reasonable doubt that on the evidence offered by the prosecution, the accused and no one else committed the offence charged, the court is entitled to enter a finding of guilty against the accused persons. This is especially so, where the prosecution evidence emanated from eye witness whose credibility was not impugned successfully.**

He urged the court to resolve this issue in favour of the respondent.

ISSUE NO.2

"Whether the statement of the appellant admitted in court as Exhibit 'B' is not at variance with his testimony in court ……."

He referred to evidence of the appellant at page 68 that he did not know and kill the deceased nor made any statement to the Police, let alone admitting to PW7 that he killed the deceased. He also referred to Exhibit B at page 2 of the record paragraphs 12-30 where he stated that he knows Francisca Opera, the deceased and that they had being friends since 1974.

He then urged the court to hold that Exhibit 'B' is at variance with his testimony. He submitted that the position of law with regard to inconsistency rule, is that where an accused evidence at the trial contradicts his extra judicial statement, the trial court should reject both as unreliable and rely on the evidence of the prosecution. He referred to the judgment of the lower court at pages 234 of the record, where it held thus:

> **"..... However the rules does not apply to confessional statement made by the accused person. It only applies to other extra judicial statements of witness outside of the confession"**

He submitted that the above is a true representation of judicial decisions with regard to inconsistency rule. He argued that the trial judge not only considered the inconsistency rule, but he also still went ahead to consider the plea of alibi and

A self defence raised by the appellant. He referred to pages 89-90 (the finding of the trial court) which was accepted by the court below at page 136 of the record. He also referred to page 92 where the trial court considered the defence of self defence and provocation and held that they cannot avail the appellant. He
B submitted that the findings of two lower courts are not perverse. He referred to the evidence of pw7 at pages 54-56 of the record and submitted that the Police did not investigate the defence of self defence raised by the appellant. He submitted further, that having not challenged the issue of proper investigation of the case at
C the trial court, he cannot definitely complain at this court. He mentioned that the decided authority heavily relied upon by the Appellant has been overruled by the case of **EGBOHONOME vs. STATE (1993)7 NWLR (pt.306)383** and submitted that reliance placed on it is misconceived. He urged the court to
D resolve this issue in favour of the respondent and dismiss this appeal.

It is well settled law, that in criminal cases, the burden of proof of the offence or offences is squarely on the prosecution and the standard of proof is beyond reasonable doubt. *See* **Asariyu vs The state (1987)4 NWLR (pt67)709; Paul**
E **Ameh vs. State (1987)6-7 SC 27 at 36. Okpuro vs. state (1990)7 NWLR (pt.164)593; Oduneye vs. The state (2001)1 SCNJ 25.** In a murder case the prosecution is expected to prove beyond reasonable doubt the underlisted elements, in order to obtain convict ion. The elements are:

F

(a) That it was by the act of the accused

(b) That the act or acts were done with the intention of causing death.

G **(c) That the accused knew that death would be the probable consequence of his act or acts.**

See **Omini vs. State (1999)9SC 1; Onah vs. state (1995)3 NWLR (PT.12)36.**

H It is pertinent to stress here, that all the above mentioned ingredients must co-exist and once any of them was not proved or is missing or faulted with even the slightest doubt, then the charge is short of being proved.

Now from the facts borne out by the record, evidence abound from the
I testimony of PW6 Dr Innocent Njemanze, that the victim died following laceration wound cutting across the back of the roof of the neck severing muscles. There were also other wounds in her shoulders, palms and PW6 also opined that the wounds were caused by the use of sharp object. With regard to the second and

A third elements from pw3's (who was an eye witness) testimony one can safely infer that the appellant really intended to kill and in fact did kill the helpless lady his victim, by dealing blows on her body even after she fled for her dear life but was pursued by him. There is nothing that could be a clear display of his intent to
B kill her and not only to cause her bodily injuries which led to her death. Her evidence also corroborated the medical report issued by PW6and also his testimony at the trial court especially regarding places the deceased was cut with sharp object used in attacking her by the appellant, namely a matchet which is
C indeed a lethal weapon, Again, considering the vital places in the deceased person's body which were cut or hit with the matchet, one can easily infer that the appellant had really intended the natural consequences of his act or acts which was certainly to kill the deceased person.

D I shall now consider the defences raised by the appellant at the trial, but before doing so, my lords permit me to reiterate that the appellant made a voluntary cautionary statement to the Police at the earliest stage of his arrest, owning up the commission of the offence which was tendered at the trial and
E admitted in evidence as Exhibit B. I will first of all consider the defence of Alibi raised by the appellant. On pages 89-90 of the record, the trial court found that the accused person now appellant, raised Alibi defence when he stated, inter alia, that he went to the market on the date of the incident. This defence as found by the trial
F court, was raised for the first time when the accused /appellant was testifying for his defence and NOT in his statement to the police i.e. Exh B. The word Alibi is a Latin word meaning "elsewhere'. Where an accused person raises it, he wants the court to believe that he was not physically at the scene of the crime, hence it was
G not possible for the court to find him guilty by placing him in a location of the crime, since he was somewhere else at the time the offence was allegedly committed. However, for the defence of Alibi to avail an accused person, the law requires that he must raise such defence at the earliest opportunity to enable the
H police investigate it and therefore he must offer evidence. *See* **Salam vs. The state (1988)3 NWLR 670; State vs. Peter Eze (1976) SC125 at 129/130; state vs Francis Odili (1977)4 SC 1 at 5-6.**

Also in order to take advantage of the defence of Alibi the accused must
I give a detailed particularization of his whereabouts on the crucial day and time of the offence which should also include the specific places he was, the people in whose company he was and what had transpired on the said day and at the said time and place or places.

Once these comprehensive information are furnished to the police at the earliest stage, the police are duty bound to investigate and ascertain the veracity of such information. *See* **Udocber vs. The State (2001) 6 SCNJ 66.** Furthermore, these information must be furnished to the police preferably in the accused person's cautionary statement for the Police to investigate. However, where an accused person decides to raise the defence of Alibi while testifying for his defence in the court (as done by the appellant in his instant appeal), it could be regarded that he deliberately wanted to deny the prosecution its right and duty to investigate the defence. *See* **Gachi vs. The State (1965) NMLR 333; Undocber vs. The State(2001)6 SCNJ 66-67.**

Moreover, where an alibi defence is vague, nebulous and misleading and is also devoid of material facts worthy of or impossible to be investigated by the Police, in such circumstances the trial court can discard it, rather than to engage on wild goose chase all in the name of investigation. In that case, the court would have nothing before it to consider as **Alibi defence.** In the result, all I am saying is that once alibi defence was not raised timeously, or no particulars of where the accused was on the material date and time was furnished or that it was vague or a mere camouflage, than it does not qualify as a valid defence worthy of being investigated. As I said supra, the appellant defence of alibi raised fell short of particulars and was also not raised timeously. It was therefore rightly rejected by the trial court and the court below was equally right in affirming the finding of the trial court in that regard.

This brings me to issue of self-defence raised by the accused/appellant at his trial. The learned trial Judge, at page 97 of the record, found as below:

> **I find that at the time of the attack on the deceased Person there was neither any provocation offered to the accused person by the deceased person or any member of her family nor was there any threat or reasonable apprehensive of death or grievous bodily harm to the accused person ....I therefore find no merit whatsoever in the defence of self defence and provocation raised by the defence……"**

The court below, rightly in my view, affirmed or endorsed the above finding of the trial court. In the first place, the defence of provocation when raised by an accused person presupposes and amounts to an admission by the accused that the

death of the deceased was as a result of the act of the accused/appellant. *See* **Edoha vs. State (2010)42 NSCOR (pt.1) 477/478.**

As regards the defence of self-defence, it is trite law, that the defence of self-defence can only avail on accused person if he proves that he was a victim of attack which causes him reasonable apprehension of death or grievous harm and even then, the accused is only allowed by law to use such reasonable force to defend himself or repel the attack to defend himself from the danger and he is entitled to it even though such force may cause harm or grievous harm. However, if the act of self defence is committed after all the danger or threat from the assailant is past and by way of vengeance, then the defence will not avail the accused. *See* **R vs. Dummemi (1955) 15 WACA 75; Uwagboe vs. The State (2008)4 SCNJ 471-472.**

In this instant case, here was a man who without any attack or threat of assault from either the helpless and unarmed lady (the deceased) or from any member of her family who attacked her with lethal and sharp weapon i.ematchet by dealing several matchet cuts on her all over her body and even when she took to her heels he pursued her and continued cutting her with this matchet until she later died. In the circumstance, I do not see any apprehension of death or grievous harm for the appellant to use his matchet to attack the helpless deceased victim. It is my view, that the defence is not feasible as it is inconceivable for him to raise defence of self defence in the absence of any apprehension of deadly attack on him by the deceased. The two lower courts are therefore right in rejecting such defence.

The last point that I should comment on is the question posed by the learned appellant's counsel in his issue no.1 in his brief of argument on the question of contradiction between Exhibit B, the cautionary statement of the accused/appellant and his testimony in court when testifying for his defence. This court in the case of **Wasari Umani vs. The State (1988)1 NWRL (pt.70) 274 or (1988)All NLR 148 or(1988) 2 SC 88 or (1988) LPELR 3357 (SC)** had this to say per Nnamani JSC (of blessed memory) at page 14.

> **"In the recent case of Oladejo vs State (1987)3 NWLR (pt.61)364 at427 this court dealt with this matter in greater detail. There, I said as follows:**
>
> **" Contrary to the conclusion of the learned trial Judge, the law is rather that where a witness (here an accused person makes a**

statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which a court can act" See pages 427-428.

This court also went further to say thus:

"While I agree that the leaned trial judge was clearly under a duty to consider all possible defences available to the defence even if they were not raised by the defence, I can see nothing suffered by the appellant by his failure to consider those defences provocation and self defence. There was nothing to sustain them … "

I think from the above dictum of the learned jurist, the question posed by the appellant in his first issue is well explained and therefore require no further adumbration or expatiation. Apropos of my discourse above, I have no hesitation in resolving the two issues raised in the respondent's brief of argument in favour of the respondent against the appellant. As a corollary therefore, the issues raised by the appellant are resolved against him since they border on the same points even though they were differently couched from the way the respondent's issues for determination were framed. As I said earlier, the latter's issues had adequately subsumed the former's issues for determination.

On the whole, for these reasons/comments and the fuller and more detailed reasons ably and adequately given in the lead judgment of my learned brother **Chima Centus Nweze, (JSC),** which I entirely agree with and adopt as mine, It is also my judgment that this appeal lacks merit and is accordingly dismissed by me. I affirm the judgment of the court below which had earlier affirmed the conviction and the sentence passed on the appellant by the trial court.

Amiru Sanusi
Justice, Supreme Court

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AND

1. AREMU YEKU
2. JIDE KOTOYE — **RESPONDENTS**
3. AYINDE SHOWUNMI
(For themselves and on behalf of Somolu Okunseinde Family)

SC 218/2004

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, THE 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

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

APPEAL: Raising of fresh issues on appeal – Whether issues not pleaded and canvassed at the lower court can be raised for the first time on appeal without leave.

APPEAL: Grounds of facts – Need to obtain leave before filing – Failure to obtain requisite leave – Implication.

CASE LAW: Principles in ***Kojo II vs. Bonsie & Anor (1957) 1 WLR 1223 at 1226*** *– Consideration thereof.*

COURT: Assessment of credibility of witnesses – Issue solely within the competence of the trial court.

LAND LAW: Proof of ownership of land – How discharged.

LAND LAW: Proof of title – Traditional evidence – Requirement to link plaintiff with the traditional history.

LAND LAW: Proof of title – Traditional evidence – Where accepted by court – Effect on proof.

LAND LAW: Proof of title Traditional evidence – Where there is sufficient historical details – Whether traditional evidence can support title.

LAND LAW: Proof of title – Proof by traditional evidence – Nature of traditional evidence required.

LAND LAW: Proof of title – Traditional evidence – Nature there – Usually in form of hearsay evidence.

LAND LAW: Proof of title – Traditional history – When proof of traditional history can sustain title.

PRACTICE AND PROCEDURE: Assessment of credibility of Witness – Circumstances when appellate court may interfere.

PRACTICE AND PROCEDURE: Burden of Proof – Evidence led in proof at variance with pleadings – Effect.

PRACTICE AND PROCEDURE: Burden of proof – Party alleging traditional evidence – Onus of proof.

PRACTICE AND PROCEDURE: Burden of Proof – Traditional evidence – Where Party projects two traditional histories – Effect.

PRACTICE AND PROCEDURE: Pleadings – Rationale for pleadings.

PRACTICE AND PROCEDURE: Pleadings – Rules regulating pleadings – Whether applicable to all parties.

PRACTICE AND PROCEDURE: Pleadings – Whether facts not pleaded in pleadings are relevant and go to any issue.

PRACTICE AND PROCEDURE: Preliminary objection – Determination of before hearing – Rationale.

Issue for Determination

Whether having regard to the pleadings and totality of evidence adduced the court below was right in dismissing the appellants' appeal?

Facts of the Matter

At the High Court of Ogun State, Otta Judical Division, the appellants as plaintiffs caused a Writ of Summons to be issued, against defendants. Pleadings were settled and exchanged;

The case of the plaintiffs was that "The defendants being tenants of the plaintiffs have by their actions denied the plaintiffs' title and have claimed ownership absolutely or through other source". The reliefs sought were couched thus:

34 (a) A Declaration of forfeiture of the defendants' tenure under native law and custom;

(b) Possession of the same.

At the close of evidence the trial court dismissed the plaintiffs' claims. Their appeal to the Court of Appeal was not successful hence this further appeal to the Supreme Court.

Held *(Unanimously dismissing the appeal)*

1. *Pleadings regulate issues in dispute*
As the question of acquisition was not pleaded it went to no issue. [Onwuka vs. Omogui [1992] 3 NWLR (pt 230) 393]. [**The explanation is simple. Once pleadings are ordered, filed and exchanged, the parties, and indeed the courts, are bound by them. The implication, therefore, is that evidence must be led in accordance with the averments therein. That explains the impregnable prescription that evidence which is not in conformity with the pleadings go to no issue, [*Okoro vs.* Dakolo (2006) LPELR -2461 (SC) 19 -20**].

This ubiquitous principle in the vocabulary of pleadings applies with equal force whether the pleadings and evidence are those of the plaintiff or the defendant, [**Akinloye vs. Eyiyola (1968) NMLR 92, 95; *Alli vs.* Alesinloye [2000] FWLR (pt. 15) 2610, 2653, D - H; [2000] 6 NWLR (pt.660) 177; *Obulor vs. Obiora* [2001] 4 SC (pt. 1) 77, 79 - 80; [2000] 8 NWLR (pt. 714) 25**]. *(P 63 Paras A – C)*

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

Thus, if and when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts, **[Okoro vs. Dakolo (supra) 42-43, paragraphs D-A; Eze and Ors vs. Atasie and Ors [2000] FWLR (pt 13) 2180, 2189; [2000] 10 NWLR (pt 676) 470; Emegokwe vs. Okadigbo**

[1973] 4 SC 113; Obmiami Brick and Stone (Nig) Ltd vs. A.CB. Ltd [1992] 3 NWLR (Pt. 229) 260; Akinterinwa and Anor vs. Oladunjoye (2000) LPELR -358 (SC) 18; Aminu and Ors vs. Hassan and Ors (2014) LPELR - 22008 (SC) 24, A- C; Idahosa vs. Oronsaye (1959) 4 FSC 166; [1959] SCNLR 40. NIPC Ltd vs. Thompson Organisation Ltd (1969) NMLR 99, 104; (1969) 1 All NLR 138; Ogbodo vs. Adelugha (1971) 1 All NLR 68; Ipinlaiye II v Olukotun [1996] 6 NWLR (pt.453) 148, 165 - 166; Paul vs. George [1959j SCNLR 510; Ajoke vs. Oba [1962] 1 SCNLR 137; George vs. UBA Ltd [1972] 8-9 SC 284, 274; Njoku vs. Eme [1973] 5 SC 293; Oke-Bola vs. Molake [1975] 12 SC 61]. (*P*p 63 – 64 *Paras D – A)*

3. *Issues not canvassed at the trial court cannot without leave be canvassed on appeal.*
Without the leave of court such a fresh issue cannot be taken up on appeal. The cases on this point are too many that they need not delay us here. Howbeit, one or two of them may be cited, [Ejifodomi vs. Okonkwo [1982] 11 SC 74; Agbiti vs. NA (2011) LPELR - 2994 (SC); Stirling Sc Eng (Nig) Ltd vs. Yakaya (2005) LPELR -3118 (SC); Gwede vs. INEC and Ors (2014) LPELR -23763 (SC); Edjekpo and Ors vs. Osia and Ors (2007) LPELR 1014 (SC); Ibrahim vs. Lawal (2015) LPELR -24736 (SC); Dagaci of Dere and Ors vs. Dagaci of EBWA and Ors (2006) LPELR -911 (SC); Petrojessica Ent Ltd and Anor vs. Leventis Tech Coy Ltd 919920 LPELR – 2915 (SC)]. *(P 64 Paras A – C)*

4. *The nature of traditional evidence*
That this court has warehoused an impressive *corpus* of jurisprudence on the genre of the accepted mode of establishing title to land known as traditional evidence or traditional history, [Ohiaeri and Anor vs. Akabueze and Ors (1992) LPELR – 2360 (SC) 39; Alade v Awo [1975] 4 SC 215; Idundun vs. Okumagba (1976) 1 NMLR 206]. This sort of evidence, namely, traditional evidence, which, in actuality, is a bit of ancient history, is evidence as to rights alleged to have existed beyond the time of living memory proved by members of the community or village who claim the land as theirs or who defend a claim to such land, [Dike and Ors vs. Nzeka and Ors (1986) LPELR – 945 (SC) 23 – 24; D-A].
(P 67 Paras E – G)

5. *Traditional evidence is in the nature of hearsay*

Somewhat most intriguingly, even very senior counsel do not seem to appreciate that, in a strict sense, that type of evidence {traditional evidence] is no more than hearsay evidence, [Alade vs. Awo (1975) LPELR – 400 (SC) 12].

True indeed, it is hearsay upon hearsay, Alade vs. Awo (supra); Obasi and Anor vs. Onwuka and Ors (1987) LPELR -2152 (SC) 6- 7].

[This must be so because it deals with events which occurred long ago, and the history of which has been handed down from father to son, or from generation, to generation [*Alade vs. Awo* (supra); *Obasi and Anor vs. Onwuka and Ors* (supra)]. *(P 67 Paras H – I)*

6. *Traditional evidence does not involve eye-witness account*

Almost always, the rights which the parties seek to establish by traditional evidence are such as had existed outside living memory or that "existed *beyond the time of living memory…", per Lord Cohen* in The Stool of Abinabina vs. Enyimadu Vol. XII WACA 171, 172 (italics supplied).

It is against this background that courts have recognised the obvious fact that the witnesses, who are called upon to give traditional evidence, would not necessarily be in a position to give an eye-witness account. Invariably, such witnesses cannot speak from personal knowledge as they merely repeat the story which their ancestors had told them. That notwithstanding, the Law, in its 'wisdom, allows such evidence, most probably, in view of the fact that much of our past is practically unrecorded, [**Dike and Ors vs. Nzeka and Ors (supra) 12, paragraphs A-F**].

Clear evidence of the wisdom of the Law in this regard could be found in Section 44 of the Evidence Act (applicable at the material time; now, section 66 of the Evidence Act, 2011) which delisted this category of evidence from the hear-say rule and elevated it to the status of admissible evidence, [***Obasi and Anor vs. Onwuka and Ors* (supra)]. *(P 68 Paras A – D)***

7. *When traditional evidence is sufficient proof*

This is the background to the prescription which has crystallised from decided cases that, once traditional evidence is found to be conclusive and cogent, there would be no need whatsoever to require further proof, [**Akinyili vs. Ejidike [1996] 5 NWLR (pt.449) 381, 417; Balogun vs. Akanji**

[1988] 1 NWLR (pt.70) 301; Amajideogu vs. Ononaku [1988] 2 NWLR (pt. 78) 614].

In consequence, where a court finds evidence of traditional history to be cogent, neither contradictory nor in conflict or competition with that of the defendant, and accepts it, it would be sufficient to support a claim or declaration of title to land, [**Adesanya v Aderonmu and Ors (2000) LPELR -1450 (SC) 19; A-C; Alade vs. Awo [1975] 4 SC 215, 228; Olujebu of Ijebu vs. Oso, The Eleda of Eda [1972] 5 SC 143, 151; Nwosu vs. Udeaja [1990] 1 NWLR (Pt.125) 188; Idundun vs. Okumagba [1976] 9 - 10 SC 227; Aikhionbare-Ohen-Eriaria of Evboriara and Ors vs. Omeregie Enogie of E v Buoba – Ohen Village and Ors (1976) LPELR -271 (SC) 18, paras. B-C; Alli and Anor vs. Alesinloye and Ors (2000) LPELR – 427 (SC) 83, B-D; Akhionbare vs. Omoregie (1976) 12 SC 11 at 27].**
(P 68 Paras E – H)

8. *Traditional evidence must link plaintiff with traditional history.*
It has to be emphasised, however, that these broad prescriptions are hedged around with qualifications. Thus, it has now been settled that traditional evidence must be such as to be consistent and properly link the plaintiff with the traditional history relied upon, [***Owoade vs. Omitola*** **[1988] 2 NWLR (pt. 77) 413].**

Above all, it is not sufficient for a party who relies for proof of title to land on it [traditional evidence], as in the instant case, to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial, [**Akinloye vs. Eyiyola** (1968) **NMLR 92; Olujinle vs. Adeagbo [1988] 2 NWLR (pt.75) 238; Adejumo vs. Ayantegbe [1989] 3 NWLR (pt.110) 417; Anyanwu vs. Mbara [1992] 5 NWLR (pt. 242) 386, 399; Alli and Anor vs. Alesinloye and Ors (2000) LPELR – 427 (SC) 27 - 28, E-B].**

Such a party is bound to plead such facts as- (1) who founded the land; (2) how the land was founded and (3) the particulars of the intervening owner through whom he claims, [***Akinloye vs. Eyiyola*** **(supra)**; ***Olujinle vs. Adeogbo*** **(supra)**; ***Adejumo vs. Ayantegbe*** **(supra)**; ***Anyanwu vs. Mbara*** **(supra) 386, 399;** ***Alli and Anor vs. Alesinloye and Ors (supra) 27-28, E-B].*** *b).*

9. *Where a party projects two histories in support of his claim.*
Where such a party projects two competing histories of his ownership in support of his claim, he would have failed to prove the case he set out to propound. If he is the plaintiff his claim must be dismissed. If he is the defendant, he would have failed to make out a defence against the traditional history of the plaintiff, ***[Ohiaeri and Anor v Akabeze and Ors (1992) LPELR -2360 (SC) 19, A – C].*** *(P 69 Paras D – E)*

10. *Where evidence led is at variance with pleadings*
It is evident that the concurrent findings of the lower courts were, firmly, anchored on the redoubtable decisions of this court. As shown above, it has been, tolerably, settled that if and when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts.

In one word, evidence [and this was the concurrent findings of the lower courts with regard to the testimonies of the plaintiffs/appellants' witneses] which is at variance with the pleadings go to no issue, [***Okoro vs. Dakolo*** **(supra) 42-43, paragraphs D-A; Eze** ***and Ors vs. Atasie and Ors*** **(supra)** 2180, 2189; ***Emegokwe vs. Okadigbo*** **(supra)**; ***Obimiami Brick and Stone (Nig.) vs. A.C.B. Ltd*** **(supra)**; ***Akinterinwa and Anor vs. Oladunjoye*** **(supra); *Aminu and Ors vs. Hassan and Ors*** **(supra); *Idahosa vs. Oronsaye*** **(supra); *NIPC Ltd vs. Thompson Organisation Ltd*** **(supra); *Ogbodo vs. Adelugba*** **(supra); *Ipinlaiye II vs. Olukotun*** **(supra) 165 - 166; *Paul vs. George*** **(supra); *Ajoke vs. Oba*** **(supra); *George vs. UBA Ltd*** **(supra); *Njoku vs. Eme*** **(supra); *Oke-Bola vs. Molake*** **(supra)].** *(P 72 Paras A – E)*

11. *The type of traditional evidence that will sustain title*
Traditional evidence must not only be cogent; it must neither be contradictory nor in conflict or competition with that of the defendant for the court to accept it before it would be sufficient to support a claim or declaration of title to land.

According to the lower courts, the plaintiffs/ appellants failed to do; hence, their case was, rightly, dismissed, [***Adesanya vs. Aderonmu and Ors*** **(supra); *Alade vs. Awo*** **(supra); *Olujebu of Ijebu vs. Oso, The Eleda of Eda (supra);Olujebu Nwosu vs. Udeaja*** **(supra); *Idundun vs. Okumagba*** **(supra); *Aikhionbare – Ohen – Eriaria of Evboriara and Ors vs. Omeregie***

Enogie of Ev Buoba – Ohen Village and Ors **(supra);** ***Alli and Anor vs. Alesinloye and Ors*** **(supra); Akhionbare vs. Omoregie (supra)**].
(P 73 Para s D – G)

12. *There must be sufficient historical details in order to sustain traditional evidence*

The rationale of all binding authorities is that it is not sufficient for a party [such as the appellants herein] who relied for proof of title to land on it [traditional evidence] to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial, [*Akinloye vs. Eyiyola* (supra); *Olujinle vs. Adeogbo* (supra); *Adejumo vs. Ayantegbe* (supra); *Anyanwu vs. Mbara* (supra); *All and Anor vs. Alesinloye and Ors* (supra)].

Simply put, they [the plaintiffs/appellants] failed to discharge the burden of proof on the pleadings as required of claimants of title to land through traditional evidence, [***Akinloye vs. Eyiyola*** **(supra);** ***Olujinle vs. Adeogbo*** **(supra);** ***Adejumo vs. Ayantegbe*** **(supra);** ***Anyanwu vs. Mbara*** **(supra);** ***Alli and Anor vs. Alesinloye and Ors*** **(supra)].**

Little wonder then why the trial court found that the principal witness, PW2, "did not give sufficient historical and traditional evidence. Being a principal witness, his *evidence was comparatively terse when compared with that of the key witness to the defendants,"* [page 116 of the record; italics supplied for emphasis]. *(P 73 – 74 Para I – C)*

13. *Assessment of credibility is within the competence of trial court.*
Per Nweze (JSC):

> **"My lords, since trial court's ascription of probative value was based- on the credibility of witnesses, I have an obligation to remind Your Lordships that every trial Judge is in a better position than the appellate court to decide the issue of credibility of the witnesses. The reason is not farfetched. He [the trial Judge] has the singular advantage of seeing and observing the witnesses. He watches their demeanour; candour or partisanship; their integrity and manners. These advantages are not normally enjoyed by an**

appellate court which only has the cold printed evidence to contend with, [***Nwankpu and Ors vs. Ewulu and Ors*** **(1995) LPELR - 2107 (SC) 32, A- 6].**

What is more, as a vital area of credibility, it is only the trial court which saw and watched the demeanour of the witness that has the exclusive role of watching the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it, [***Kaydee Ventures Ltd vs. The Hon Minister, FCT and Ors*** **(2010) LPELR -1681 (SC) 60, C- E;** ***Makanjuola vs. Balogun [19*****89] 3 NWLR (pt 108) 192, 218;** ***Atolagbe vs. Shorun*** **[1985] 1 NWLR (pt 2)360;** ***Duru vs. Nwosu*** **[1989] 4 NWLR (pt 113) 24, 39;** ***Lagga*** **vs.** ***Sarhuna*** **(2008) LPELR – 1740 (SC) 66, A- E].**

This is the basic premise that yielded the logic in the reasoning of the decisions of this court that where the issue is that of credibility of witnesses, the appellate court has a very limited, if any, scope to interfere. Thus, it [the appellate court] can only do so when the trial Court decided to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document, [***Ndukwe vs. Acha and Ors*** **(1998) LPELR -1977 (SC) 14, A-B;** ***Agbonifo vs. Aiwereoba and Anor*** **[1988] 1 NSCC 237, 245; [1988] 1 NWLR (Pt. 70) 325].”** *(Pp 74 – 75 Paras D – A)*

14. *When appellate court may interfere in the evaluation of evidence.*

In effect, therefore, unless the trial court adduces a wrong reason for believing or disbelieving a witness, an appellate court would, seldom, interfere with its ascription of credibility to witnesses. Put differently, it is only where the appellate court, either because the reasons given by the trial Judge are not satisfactory or because it, unmistakably, so appears from the evidence, is satisfied that the trial Judge has not taken proper advantage of his having seen and heard the witnesses, that it could properly interfere. In such a case, the matter would then become at large in the appellate court. This is as much a settled principle of English Law, ***Watts (or Thomas,) vs. Thomas*** **(1947) 1 All ER 582 as it is a settled position in this country**, *[****Nwankpu and Ors vs. Ewulu and Ors*** **(1995) LPELR -2107 (SC) 32, C- E].** *(P 75 Paras B – D).*

15. *When an appellate court may interfere in the evaluation of evidence*
Instructively, the lower court, prior to its affirming of the position of the trial court, gave a careful consideration of the findings of facts. It found the findings of facts not to be perverse as they were borne out from the evidence...” {page 183 of the record]. It, rightly, concluded that:

> **Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial Judge and when based on credibility of witnesses, an appellate court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours (sic) of the witnesses as the appeal court deals with printed record. The only way open to the appeal court to interfere is where it was established that the learned trial Judge failed to take advantage of having seen and heard the witnesses then an appeal court may interfere , *Elendu vs. Ekwoaba* [1998] 12 NWLR (pt 573) 320; *Woluchem vs. Gudi [1981] 5 SC 291]**. (P 75 Paras D – H)*

16. *Concurrent findings of two lower courts*
As the appellants did not succeed in impeaching the concurrent findings of the lower courts by accentuating their perversity, I have no justification for interfering with them, [***Afolayan vs. Oguninde and Ors*** **(1990) LPELR - 198 (SC) 20 -21, F-B;** ***Enang vs. Adi*** **[1981] 11-12 S.C. 25, 42;** ***Okagbue vs. Romaine*** **[1982] 5 SC 133, 170-171;** ***Lokoyi vs. Olojo*** **[1983] 8 SC 861, 68-73; [1983] 2 SCNLR 127;** ***Ojomu vs. Ajao*** **[1983] 9 SC 22, 53; [1983j 2 SCNLR 156;** ***Alade vs. Alemuloke*** **[1988] 1 NWLR (pt. 69) 207, 212].**
(Pp 75 – 76 Paras I – A).

17. *Why Preliminary objection should be determined first*
It is to be said that nothing can happen in this appeal without first tackling and settling the objection as raised as on it depends the competence of the appeal and the competence or jurisdiction of the court to go further. The reason being that the success of the Preliminary Objection could produce the end of the case, see:

1. **G .C. E. vs. Akande 7 ORS (2010) 18 NWLR (Pt.1225) 506.**
2. **SPDC Nig. Ltd vs. Amadi & Ors (2011) 14 NWLR (Pt1266) 157 at 183.** *(Pp 77 – 78 Paras H – A)*

18. *Modes of establishing title to land*
It is now trite that five modes are utilised in establishing title to land and in this, the case of Idundun vs. Okumagba (1976) 0-10 SC has been very helpful and those methods are thus:

1. **Traditional evidence.**
2. **Production of documents of title which are duly authenticated.**
3. **Acts of selling, leasing, renting out all or part of the land or farming on it or on a portion of it.**
4. **Acts of long possession and enjoyment of the land, and**
5. **Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.**
(P 82 Paras E – H)

19 *The nature of traditional evidence as means of proof of ownership of land*
In the case in hand, each side had set up its version of how they came to the land and its ownership and this brings to mind the locus clasisicus guide in the case of Kojo II vs. Bonsie & Anor (1957) 1 WLR 1223 at 1226 wherein it was held that:

> **"The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard, it must be recognized that in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatsoever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is little guide to the truth. The best way is to test traditional history by reference to the facts in recent years as**

established by evidence and seeing which of two competing histories is more probable". *(Pp 82 – 83 Paras I – C)*

20. *Grounds filed without leave*

My Lords, Grounds 1 and 2, above reproduced, are on facts or at best on grounds of mixed law and facts which the appellants can not lay before this Court without leave first sought and granted. See: OJEMEN vs. MOMODU (1953) 1 SCNLR 1882; CUSTOMS vs. BARAU (1982) 10 SC. 483.

This is a civil appeal. Neither of the two grounds comes within the ambit of Section 233(2) of the 1999 Constitution and thus entitles the Appellants to bring the appeal on grounds 1 and 2 as of right. None of the grounds involves questions of law alone, or interpretation or application of the Constitution, or any questions as to whether any of the fundamental human rights guaranteed under Chapter 4 of the Constitution has been, is being or is likely to be, contravened in relation to any person. The two grounds are not anywhere related to any question as to the office or tenure of office of the President or Vice President of the Federal Republic of Nigeria, or the office of Deputy Governor of any of the 36 States. Grounds 1 and 2 contained in the notice of appeal, filed on 25th November, 2005, require leave, and in the absence of the leave first sought and granted before their filing the two grounds, in view of Section 233(2) of the 1999 Constitution, are incompetent. *(P 96 – 97 Paras I – C)*

21. *A ground of appeal not within the decision of court*

The court below in its judgment ruled on the preliminary objection and held that ground 4 of the Notice of Appeal to that court, raising the issue of acquisition which was not pleaded in the trial court and in respect of which the trial court made no comment, was incompetent. The said ground 4, adjudged incompetent, was accordingly struck out. The appellants are wallowing in the same error in this Court.

The same 'Issue of acquisition of the disputed land which has been acquired by the State Government", which acquisition has affected the disputed land is being raised in this *c*ourt, not as a complaint against the ruling/decision of the court below upholding the preliminary objection but an entirely fresh substantive issue. The issue is fresh and extraneous to

the proceedings at the two courts below. Because an appeal is not an inception of a new case, but a continuation of the dispute *inter parties* from the trial court; no new issues are raised or permitted and no fresh evidence are taken, without leave of court. See OREDOYIN vs. AROWOLO (1989) 4 NWLR (pt.114) 172 at 211. *(P 97 Paras D – G)*

Nigerian Cases Cited in this Judgment

A-C; *Alade vs. Awo* [1975] 4 SC 215, 228;
Adejumo vs. Ayantegbe [1989] 3 NWLR (pt.110) 417;
Adesanya vs. Aderonmu and Ors (2000) LPELR -1450 (SC) 19;
Afolayan vs. Oguninde and Ors (1990) LPELR -198 (SC) 20 -21, F-B;
Agbiti vs. NA (2011) LPELR - 2994 (SC);
Agbonifo vs. Aiwereoba and Anor [1988] 1 NSCC 237, 245; [1988] 1 NWLR (Pt. 70) 325.
Aikhionbare-Ohen-Eriaria of Evboriara and Ors vs. Omeregie Enogie of Ev Buoba – Ohen Village and Ors (1976) LPELR -271 (SC) 18, paras. B-C;
Akhionbare vs. Omoregie (1976) 12 SC 11;
Akinloye vs. Eyiyola (1968) NMLR 92, 95;
Akinterinwa and Anor vs. Oladunjoye (2000) LPELR -358 (SC) 18;
Akinyili vs. Ejidike [1996] 5 NWLR (pt.449) 381;
Alade vs. Awo (1975) LPELR – 400 (SC)
Alade vs. Awo [1975] 4 SC 215; *Idundun v Okumagba* (1976) 1 NMLR 206.
Alade vs. Alemuloke [1988] 1 NWLR (pt. 69) 207, 212.
Alli and Anor vs. Alesinloye and Ors (2000) LPELR – 427 (SC) 27 -28, E-B.
Alli and Anor vs. Alesinloye and Ors (2000) LPELR – 427 (SC) 83, B-D;
Alli vs. Alesinloye [2000] FWLR (pt. 15) 2610, [2000] 6 NWLR (pt.660) 177;
Amajideogu vs. Ononaku [1988] 2 NWLR (pt. 78) 614.
Aminu and Ors vs. Hassan and Ors (2014) LPELR - 22008 (SC) 24, A- C;
Anyanwu vs. Mbara [1992] 5 NWLR (pt. 242) 386;
Atolagbe vs. Shorun [1985] 1 NWLR (pt 2)60;
Balogun vs. Akanji [1988] 1 NWLR (pt.70) 301;
Dagaci of Dere and Ors vs. Dagaci of EBWA and Ors (2006) LPELR -911 (SC);
Dike and Ors vs. Nzeka and Ors (1986) LPELR 945 (SC) 23 24; D-A.
Duru vs. Nwosu [1989] 4 NWLR (pt 113) 24;
Edjekpo and Ors vs. Osia and Ors (2007) LPELR 1014 (SC);

Ejifodomi vs. Okonkwo [1982] 11 SC 74;
Elendu vs. Ekwoaba [1998] 12 NWLR (pt 573) 320;
Emegokwe vs. Okadigbo [1973] 4 SC 113;
Enang vs. Adi [1981] 11-12 S.C. 25;
Eze and Ors vs. Atasie and Ors [2000] FWLR (pt 13) 2180, 2189; [2000] 10 NWLR (pt 676) 470;
G .C. E. vs. Akande 7 ORS (2010) 18 NWLR (Pt.1225) 506.
George vs. UBA Ltd [1972] 8-9 SC 284, 274; *Njoku v Eme* [1973] 5 SC 293;
Gwede vs. INEC and Ors (2014) LPELR -23763 (SC);
Ibrahim vs. Lawal (2015) LPELR -24736 (SC);
Idahosa vs. Oronsaye (1959) 4 FSC 166; [1959] SCNLR 40.
Idundun vs. Okumagba [1976] 9 - 10 SC 227;
Ipinlaiye II vs. Olukotun [1996] 6 NWLR (pt.453) 148;
Kaydee Ventures Ltd vs. The Hon Minister, FCT and Ors (2010) LPELR -1681 (SC) 60, C- E;
Kojo II vs. Bonsie & Anor (1957) 1 WLR 1223
Lagga vs. *Sarhuna* (2008) LPELR – 1740 (SC) 66, A- E.
Lokoyi vs. Olojo [1983] 8 SC 861, 68-73; [1983] 2 SCNLR 127;
*Makanjuola vs. Balogun [19*89] 3 NVVLR (pt 108) 192;
Ndukwe vs. Acha and Ors (1998) LPELR -1977 (SC) 14, A-B;
NIPC Ltd vs. Thompson Organisation Ltd (1969) NMLR 99, 104; (1969) 1 All NLR 138;
Nwankpu and Ors vs. Ewulu and Ors (1995) LPELR - 2107 (SC) 32, A- 6.
Nwosu vs. Udeaja [1990] 1 NWLR (Pt.125) 188;
Obasi and Anor vs. Onwuka and Ors (1987) LPELR -2152 (SC) 6- 7.
Obimiami Brick and Stone (Nig) vs. A.CB. Ltd [1992] 3 NWLR (Pt. 229) 260;
Obulor vs. Obiora [2001] 4 SC (pt. 1) 77, 79 - 80; [2000] 8 NWLR (pt. 714) 25.
Ogbodo vs. Adelugha (1971) 1 All NLR 68;
Ohiaeri and Anor vs. Akabeze and Ors (1992) LPELR -2360 (SC) 19, A -C.
Ojomu vs. Alao [1983] 9 SC 22, 53; [1983j 2 SCNLR 156;
Okagbue vs. Romaine [1982] 5 SC 133, 170-171;
Oke-Bola vs. Molake [1975] 12 SC 61.
Okoro vs. Dakolo (2006) LPELR -2461 (SC) 19 -20.
Olujebu of Ijebu vs. Oso, *The Eleda of Eda* [1972] 5 SC 143, 151;
Olujinle vs. Adeogbo [1988] 2 NWLR (pt.75) 238;
Onwuka vs. Omogui [1992] 3 NWLR (pt 230) 393.

Owoade vs. Omitola [1988] 2 NWLR (pt. 77) 413.
Paul vs. George [1959j SCNLR 510;
Ajoke v Oba [1962] 1 SCNLR 137;
Petrojessica Ent Ltd and Anor vs. Leventis Tech Coy Ltd 919920 LPELR 2915 (SC).
SPDC Nig. Ltd vs. Amadi & Ors (2011) 14 NWLR (Pt1266) 157.
Stirling Sc Eng (Nig) Ltd vs. Yakaya (2005) LPELR -3118 (SC);
Woluchem vs. Gudi [1981] 5 SC 291.

Foreign Cases Cited
Wats (or Thomas) vs. Thomas (1947) 1 All E.R 582

Representation
R.O. Sadik for the Appellants;
Dele Oloke for the respondents

NWEZE, (JSC) (Delivering the lead judgment): At the High Court of Ogun State, Otta Judicial Division, the appellants in this appeal (as plaintiffs) caused a Writ of Summons to be issued, against the respondents herein (defendants). Pleadings were settled and exchanged; amended and exchanged.

The case of the appellants, as could be gleaned from paragraph 33 of the Further Amended Statement of Claim, as expressed thus "The defendants being tenants of the plaintiffs have by their actions denied the plaintiffs' title and have claimed ownership absolutely or through other source". The reliefs sought were couched thus:

> **34 (a) A Declaration of forfeiture of the defendants' tenure under native law and custom;**
> **(b) Possession of the said land.**

Seven witnesses testified in favour of the plaintiffs. On their part, the defendants' case was put forward by their five witnesses. In his address, at the end of the oral testimonies, learned counsel for the defendants contended that the plaintiffs failed to establish that they (the defendants) were their customary tenants at Ibasa. He explained that the ancestors of the defendants settled thereat. He pointed out that the plaintiffs and their witnesses confirmed that the ancestors of the

defendants, namely, Odeyale and Odeleye founded Olowotedo and created Oluweri Stream or river.

Contrariwise, learned counsel for the plaintiffs urged the court to find that they made out a case that it was the plaintiffs' ancestors, namely, Abinu and Adetonlu, who first settled on the land, having migrated from Ile -Ife; stopping over at Ijebu Ode. They, finally, settled down at the land in dispute. In its judgment of October 21, 1988, the court, (hereinafter referred to as "the trial court"), dismissed the plaintiffs' claim.

Like the trial court, the Court of Appeal (hereinafter, simply, referred to as 'the lower court'), also dismissed the plaintiff s' appeal to it from the said judgment.

This further appeal to this court is the appellants' expression of their disavowal of the validity of the reasoning of the lower court's judgment. Although three issues were, originally, formulated in the brief of argument filed on May 14, 2012, learned counsel for the appellants abandoned the second and third issues at the hearing of the appeal on November 29, 2016.

They were, accordingly, struck out. In effect, only the subjoined first issue is outstanding in the appellants' favour:

> **Whether the lower court have (sic) sufficiently considered the findings of the trial court as to the establishment by the respondents of long settlement on the disputed land their root of title by way of long settlement or sufficient traditional evidence?**

On his part, learned counsel for the respondents formulated two issues. As a logical corollary to the approach of the learned counsel for the appellants, he [the respondents' counsel], also, abandoned the second issue in the brief filed on March 30, 2015, although deemed properly filed on November 29, 2016. Thus, only the first issue in the said brief is outstanding in favour of the respondents. It was framed thus:

> **Whether having regarding (sic) to the pleadings and totality of evidence adduced, the court below was right in the (sic) dismissing the appellants' appeal?**

My lords, in my humble view, the phraseology of the outstanding issue one in the respondents' brief is more felicitous than the woolly tenor of the appellants' outstanding issue. Above all, it is even more succinct and more precise apropos the appellants' main grouse against the judgment of the lower court. It will, accordingly, be adopted in the determination of this appeal. Thus, the issue for determination is:

> **Whether having regard to the pleadings and totality of evidence adduced the court below was right in dismissing the appellants' appeal?**

Before dealing with this issue, it would be necessary to dispose of the Preliminary objection of the respondents. The gist of the said objection, argued on pages 3 5 of the respondents' brief, was that the appellants', in their Ground Four of the Notice and Grounds of Appeal, raised the issue of acquisition for the first time without obtaining the leave of court.

It was pointed out that, at the lower court, the respondents canvassed the same objection: an objection which the said lower court upheld. Learned counsel submitted that the only option left for the appellants was to challenge the lower court's order striking out the said ground by complaining against it. He cited several cases on the point that the ground formulated on the said question of acquisition before this court neither arose nor emanated from the lower court's decision, paragraphs 5.3, page 4 of the respondents' brief.

The appellants attempted to debunk these arguments in their Reply brief deemed, properly, filed on November 29, 2016. Like the respondents/objectors, the appellants too placed reliance on so many decided cases.

Without much ado, there is no gainsaying the fact that this objection was well-taken. Indeed, it may only suffice to refer to the view of the lower court on this point. According to the court:

> **As the issue of acquisition was not pleaded in the lower court and without any comment in a (sic) judgment of the lower court, such non-issue is incompetent to be argued on appeal based on the case (sic, cases) of Akibu vs. Oduntan [2000] 7 SCNJ 189; Egbe vs. Alhaji [1998] 1 NWLR (Pt. 128) 540, 598.** [page 181 of the record]

In the first place, as the question of acquisition was not pleaded it went to no issue, Onwuka v Omogui [1992] 3 NWLR (pt 230) 393. The explanation is simple. Once pleadings are ordered, filed and exchanged, the parties, and indeed the courts, are bound by them. The implication, therefore, is that evidence must be led in accordance with the averments therein. That explains the impregnable prescription that evidence which is not in conformity with the pleadings go to no issue, ***Okoro v*** **Dakolo (2006) LPELR -2461 (SC) 19 -20.**

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

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

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

Others include, ***NIPC Ltd vs. Thompson Organisation Ltd*** **(1969) NMLR 99, 104; (1969) 1 All NLR 138; *Ogbodo vs. Adelugha* (1971) 1 All NLR 68; *Ipinlaiye II vs. Olukotun* [1996] 6 NWLR (pt.453) 148, 165 - 166; *Paul vs. George* [1959j SCNLR 510; *Ajoke vs. Oba* [1962] 1 SCNLR 137; *George vs.***

A ***UBA Ltd*** **[1972] 8-9 SC 284, 274;** ***Njoku vs. Eme*** **[1973] 5 SC 293;** ***Oke-Bola vs. Molake*** **[1975] 12 SC 61.**

What is more, as learned counsel for the Objector pointed out, without the leave of court such a fresh issue cannot be taken up on appeal. The cases on this
B point are too many that they need not delay us here. Howbeit, one or two of them may be cited, **Ejiofodo vs. Okonkwo** [1982] 11 SC 74; **Agbiti vs. NA** (2011) LPELR - 2994 (SC); **Stirling Sc Eng (Nig) Ltd vs. Yakaya** (2005) LPELR -3118 (SC); **Gwede vs. INEC and Ors** (2014) LPELR -23763 (SC); ***Edjekpo and Ors***
C ***vs. Osia and Ors*** (2007) LPELR 1014 (SC); ***Ibrahim vs. Lawal*** (2015) LPELR - 24736 (SC); ***Dagaci of Dere and Ors vs. Dagaci of EBWA and Ors*** (2006) LPELR -911 (SC); ***Petrojessica Ent Ltd and Anor vs. Leventis Tech Coy Ltd*** (1992) LPELR – 2915 (SC).

D In all, I find sufficient merit in the respondents' Preliminary Objection and I, accordingly, sustain and uphold it. In consequence, I hereby strike out Ground One of the Notice of Appeal for being incompetent.

E **ARGUMENTS ON THE SOLE ISSUE FOR DETERMINATION**
Sole Issue

Whether having regard to the pleadings and totality of
F **evidence adduced, the court below was right in dismissing the appellants' appeal?**

Appellants' Contention

G At the hearing of this appeal on November 29, 2016, learned Counsel for the appellants, R. O. Sadik, adopted the appellants' brief of argument, which as shown above, was deemed, properly, filed on November 29, 2016. He, equally, adopted the reply brief deemed properly filed on November 29, 2016. He relied
H on the arguments on both processes as his argument in the appeal.

It was contended that the traditional history of the appellants reveals that their great ancestor known as Abinu was the first person to settle on the land in dispute, citing *Ogedengbr and Ors vs. Balogun and Ors* [2007] 3 SC (pt 11) 71,
I 79. In counsel's submission, a claim of title must be made with certainty in a defined area. As such, before a declaration of title could be made, the land to which it relates must be ascertained with certainty.

Learned counsel pointed out that the appellants, at the trial, gave uncontradicted evidence that the said Abinu migrated from lle-Ife and finally settled on all that parcel of land at Igaun which includes Ibasa which is the land in dispute. He further pointed out that the appellants established by evidence that the respondents and their forefathers were paying yearly tributes to the appellants and only stopped such tributes when the appellants instituted this case at the trial court. Somewhat, most curiously, although counsel abandoned the third issue which was on acquisition, he failed to abandon submissions on it on paragraphs 5.4 -5.7 of the brief. Be that as it may, having struck out that issue, these arguments go to naught.

He inveighed against the lower court's judgment which, in his submission, neglected the question of identity of land, contending that the identity of the land in dispute is not only crucial but has to be determined first before the issue of title to land, citing ***Balogun vs. Akanji*** **[2005] 3- 4 SC 95 which relied on** ***Idundun vs. Okumagba*** **[1976] 9 -10 Sc (Reprint) 140; [1976] 9- 10 SC 27** on the five methods of proving ownership of land. He, finally, cited ***Kojo II vs. Bonsie and Anor*** **(1957) 1 WLR 1223, 1226.**

On the question of customary tenancy, it was submitted that a customary tenant is entitled to use and occupy, subject to payment of rent and good behaviour; a claim by a tenant to share common or equal rights with the landlord or overlord is against allodial rights and the territorial duty of the tenant to pay rent to the allodial owner, ***Archibong and Ors vs. Ita and Ors*** **[20041 All FWLR (pt 199) 930, 960.**

Counsel maintained that where the respondents as customary tenants to the appellants fail to pay their rent, they are bound to forfeit such once there is a breach of the incidence of tenancy and the tenant would be liable to be visited with the punishment of forfeiture, ***Okpala and Ors vs. Okpa and Ors*** **[2005] 1 SC (pt 111) 25, 34.** As pointed earlier, although counsel abandoned the third issue of acquisition, he failed to apply to have the arguments on it in the brief [paragraphs 2.14 – 2.23, pages 4- 5] to be struck out. He urged the court to allow the appeal.

Submissions of The Respondents

Dele Oloke, Learned counsel for the respondents, adopted the brief filed on March 30, 2015, although deemed filed on November 29, 2016. In the said brief, it was pointed out that the appellants, by their pleadings and evidence, predicated their case on traditional evidence of settlement. In addition, they averred that the

respondents were their customary tenants, citing paragraphs 5 – 8 of the Further Amended Statement of Claim, pages 65 – 69 of the record.

Counsel drew attention to paragraph 6 of the Further Amended Statement of Defence, page 53 of the record. He explained that the respondents therein denied the issue of customary tenancy. They, in fact, pleaded that their ancestors, Somolu and Okuseinde, who came from Igbein, originally, settled at the vast area of land which included the land in dispute.

He pointed out that the evidence of the appellants' PW2 was at variance with the averments in paragraph 6 of the Further Amended Statement of Claim that it was Adejonlu that granted land to the respondents' predecessors-in-title and not Abinu as PW2, claimed in his testimony. Counsel further pointed out that the evidence of PW2 at page 79 of the record, to the effect that Odeyale founded Olowotedo was, also, at variance with the averment in paragraphs 6 and 7 of the Further Amended Statement of Claim that Odeyale came to settle with Adejonlu at Olowotedo. He, accordingly, invited the court to hold that the above pieces of evidence, at variance with the pleadings, must be discountenanced, **Ademoso vs. Okoro [2005] All FWLR (Pt. 227) 844; *Orizu vs. Anyaegbunam* [1978] 5 SC 21.**

He canvassed the view that since, from the testimony of PW2, Odeyale, actually, founded Olowotedo and, thus, was not the appellants' customary tenants, that evidence decimate the foundation of their claim woven around customary tenancy.

Turning to the appellants' traditional evidence, counsel drew attention to the evidence elicited from PW1 under cross examination to the effect that Ibasa is the location where hunters roast animals which they kill in the bush. In addition, that palm oil is processed in Ibasa. He also referred to page 84 of the record where PW3 admitted that Ibasa is a place where they make palm oil. He pointed out the consistency of these pieces of evidence with the averments in the respondents' pleadings and indeed vindicated the meaning which the respondents ascribed to ibasa in paragraph 9 of their Further Amended Statement of Defence, page 53 of the record. In his submission, that also exposed the inconsistency in the appellants' traditional evidence: a situation which is at odds with the settled position that for traditional evidence to sustain a claim for declaration of title, it must be cogent, direct and positive, ***Olujebu of Ijebu vs. Osho Eleda* [1973] 2 SC 143; *Ogun vs. Akinyelu* [2005] All FWLR (pt 243) 601.** On the contrary, where evidence of traditional history is contradictory and incredible, it would be treated

as unreliable and must, hence be rejected and the action is liable to be dismissed, ***Salami vs. Gbodoolu*** **[1997] 4 NWLR (pt. 499) 277.**

Expectedly, counsel endorsed the approach [pages 8 of the respondents' brief] of the trial court at page 124 and 125 of the record: an approach which was affirmed by the lower court, He noted that the submissions at page 5.01 of the appellants' brief, on the identity of the land in dispute, bear no relationship with Grounds 1 and 2 of the Notice and Grounds of Appeal and the issues framed therefrom.

Against the background of the evidence on record and the concurrent findings thereon, he derided the sustainability of the appellants' claim that their progenitor, Abiru, migrated and settled- at Gaun which includes Ibasa. He maintained that the lower court considered the pleadings, evidence on record and the trial court's findings thereon and affirmed the said findings, citing Onalaja JCA [pages 9 and 10 of the respondents' brief]. He urged the court to resist the temptation of interfering with the said concurrent findings, *Kalango vs. Governor of Bayelsa State* [20091 All FWLR (pt 476) 1839.

Resolution Of The Sole Issue

My *L*ords, permit me to point out, by way of prefatory remarks, that this court has warehoused an impressive *corpus* of jurisprudence on the genre of the accepted mode of establishing title to land known as traditional evidence or traditional history, *Ohiaeri and Anor vs. Akabueze and Ors* (1992) LPELR – 2360 (SC) 39; *Alade vs. Awo* [1975] 4 SC 215; *Idundun vs. Okumagba* (1976) 1 NMLR 206.

This sort of evidence, namely, traditional evidence, which, in actuality, is a bit of ancient history, is evidence as to rights alleged to have existed beyond the time of living memory proved by members of the community or village who claim the land as theirs or who defend a claim to such land, ***Dike and Ors vs. Nzeka and Ors*** **(1986) LPELR – 945 (SC) 23 – 24; D-A.**

Somewhat most intriguingly, even very senior counsel do not seem to appreciate that, in a strict sense, that type of evidence {traditional evidence] is no more than hearsay evidence, ***Alade vs. Awo*** **(1975) LPELR – 400 (SC) 12.** True indeed, it is hearsay upon hearsay, ***Alade vs. Awo*** **(supra); *Obasi and Anor vs. Onwuka and Ors*** **(1987) LPELR -2152 (SC) 6-7.** This must be so because it deals with events which occurred long ago, and the history of which has been handed down from father to son, or from generation, to generation ***Alade vs. Awo*** **(supra); *Obasi and Anor vs. Onwuka and Ors*** **(supra).**

A Almost always, the rights which the parties seek to establish by traditional evidence are such as had existed outside living memory or that "existed *beyond the time of living memory…",* per Lord Cohen in ***The Stool of Abinabina vs. Enyimadu*** **Vol. XII WACA 171, 172** (italics supplied).

B It is against this background that courts have recognised the obvious fact that the witnesses, who are called upon to give traditional evidence, would not necessarily be in a position to give an eye-witness account. Invariably, such witnesses cannot speak from personal knowledge as they merely repeat the story C which their ancestors had told them. That notwithstanding, the Law, in its 'wisdom, allows such evidence, most probably, in view of the fact that much of our past is practically unrecorded, ***Dike and Ors vs. Nzeka and Ors*** **(supra) 12, paragraphs A-F.** Clear evidence of the wisdom of the Law in this regard could be D found in **section 44** of the **Evidence Act** (applicable at the material time; now, **section 66** of the **Evidence Act, 2011**) which delisted this category of evidence from the hear-say rule and elevated it to the status of admissible evidence, ***Obasi and Anor v Onwuka and Ors*** (supra).

E This is the background to the prescription which has crystallised from decided cases that, once traditional evidence is found to be conclusive and cogent, there would be no need whatsoever to require further proof, ***Akinyili vs. Ejidike*** **[1996] 5 NWLR (pt.449) 381, 417;** ***Balogun vs. Akanji*** **[1988] 1 NWLR** F **(pt.70) 301;** ***Amajideogu vs. Ononaku*** **[1988] 2 NWLR (pt. 78) 614.**

In consequence, where a court finds evidence of traditional history to be cogent, neither contradictory nor in conflict or competition with that of the defendant, and accepts it, it would be sufficient to support a claim or declaration G of title to land, ***Adesanya vs. Aderonmu and Ors*** **(2000) LPELR -1450 (SC) 19; A-C;** ***Alade vs. Awo*** **[1975] 4 SC 215, 228;** ***Olujebu of Ijebu vs. Oso*****,** ***The Eleda of Eda*** **[1972] 5 SC 143, 151;** ***Nwosu vs. Udeaja*** **[1990] 1 NWLR (Pt.125) 188;** ***Idundun vs. Okumagba*** **[1976] 9 - 10 SC 227;** ***Aikhionbare-Ohen-Eriaria of*** H ***Evboriara and Ors vs. Omeregie Enogie of Ev Buoba Ohen Village and Ors*** **(1976) LPELR -271 (SC) 18, paras. B-C;** ***Alli and Anor vs. Alesinloye and Ors*** **(2000) LPELR 427 (SC) 83, B-D;** ***Akhionbare vs. Omoregie*** **(1976) 12 SC 11 at 27.**

I It has to be emphasised, however, that these broad prescriptions are hedged around with qualifications. Thus, it has now been settled that traditional evidence must be such as to be consistent and properly link the plaintiff with the traditional history relied upon, ***Owoade vs. Omitola*** **[1988] 2 NWLR (pt. 77)**

413. Above all, it is not sufficient for a party who relies for proof of title to land on it [traditional evidence], as in the instant case, to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial, ***Akinloye vs. Eyiyola*** **(1968) NMLR 92;** ***Olujinle vs. Adeogbo*** **[1988] 2 NWLR (pt.75) 238;** ***Adejumo vs. Ayantegbe*** **[1989] 3 NWLR (pt.110) 417;** ***Anyanwu vs. Mbara*** **[1992] 5 NWLR (pt. 242) 386, 399;** ***Alli and Anor vs. Alesinloye and Ors*** **(2000) LPELR – 427 (SC) 27 -28, E-B.**

Such a party is bound to plead such facts as- (1) who founded the land; (2) how the land was founded and (3) the particulars of the intervening owner through whom he claims, ***Akinloye vs. Eyiyola*** **(supra);** ***Olujinle vs. Adeogbo*** **(supra);** ***Adejumo vs. Ayantegbe*** **(supra);** ***Anyanwu vs. Mbara*** **(supra) 386, 399;** ***Alli and Anor vs. Alesinloye and Ors (supra) 27-28, E-B.***

And now this! Where such a party projects two competing histories of his ownership in support of his claim, he would have failed to prove the case he set out to propound. If he is the plaintiff his claim must be dismissed. If he is the defendant, he would have failed to make out a defence against the traditional history of the plaintiff, ***Ohiaeri and Anor vs. Akabeze and Ors*** **(1992) LPELR - 2360 (SC) 19, A -C.**

How Did The Appellants Fare at The Lower Courts?

As indicated at the outset of this judgement, issues were joined in the settled pleadings; pleadings which were exchanged; amended and exchanged. While the appellants (as plaintiffs) wove their case around the testimonies of their seven witnesses, the respondents (as defendants) put across their defence through the testimonies of their five witnesses.

Did these witnesses of the appellants (as plaintiffs) fare well apropos the averments in the pleadings? I would, at this point, invite the trial court and the lower court to answer the question. First, the trial court. After summing up the case of the plaintiffs (now, appellants), as put forward by the PW2, 'the plaintiffs' principal witness, pages 115 of the record, the court found that:

> **…this witness did not give historical and traditional evidence. Being a principal witness, his evidence was comparatively terse when compared with that of the key witness of the defendant.. His cross examination revealed much more which I will highlight in this review of evidence.** [italics supplied for emphasis]

The court went ahead to highlight what it referred to as the "concessions" of the said witness, [page 116 of the record]. It, then, proceeded, in tandem with the age-long rule in ***Mogaji and Ors vs. Odofin and Ors*** **[ ]** to weigh the testimonies of the other witnesses of the parties on an imaginary scale, [pages 116-123 of the record]. It announced its findings thus:

> **From my observations, during the review of the evidence of all the witnesses for plaintiffs and defendants I have found that the evidence of the plaintiffs do not agree with their pleadings. Most of the witnesses, particularly, their principal witness, second PW, Joseph Akinwumi, not only gave contradictory evidence but *during cross examination confirmed most of the assertions and claims of the defendants.* I have highlighted those differences... such as the founding of Olowotedo, granting of land to Odeleye.**
>
> **The vital point which goes in favour of the defendants is the answer to the nature and type of Iganun people. Both the plaintiffs and the defendants agree that Iganun people are fishermen, live near Ogun river and although some of the plaintiffs' witnesses quickly added that some of the Iganun people farmed, but predominantly they are fishermen, The evidence of the defendants agreed to (sic) their claim in that both Iganun and Ibassa are villages belonging to Igbein people. There is sufficient evidence to that effect... What of the particular evidence that there is a Bale at Ibassa by name, Bamgboye, son of Okuseinde, who derived his authority from the Igbein people which evidence was not contradicted and which I accept....**
>
> **…it was clear from the traditional evidence of both parties that the evidence of defendants by far outweighed those of the plaintiffs and that will entitle the defendants to judgement. The plaintiffs have failed to discharge the onus placed on them...**
>
> **I will also assess existing factual evidence of contemporary acts and events... The defendants *gave evidence of several acts of***

> ***ownership*, they build houses, this was admitted by the plaintiffs. Even by (sic) Mr Awoyinfa admitted this. They created streams, they worshipped idols and on top of it they sold land to Dr Bankole to which the plaintiffs did not object all these are consistent acts of ownership.**
> [pages 124 -125 of the record; italics supplied for emphasis]

The lower court affirmed these findings. Speaking for the said court, Onalaja, JCA, found that:

> **In the consideration of the cases of the parties as they testified, the learned trial Judge applied the rule in *Mogaji vs. Odofin* [1973] 3-4 sc 91.. The learned (sic) Judge concluded rightly that [the] appellants did not discharge the burden of proof placed on appellants (sic, them) and based on the findings of facts dismissed the claims. The learned trial Judge also relied on the assessment and ascription of probative value based on the credibility of witnesses.**
>
> **After a careful consideration of the findings of facts…. I find *the findings of facts not to be perverse as they were borne out from the evidence…***
>
> **Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial judge and *when based on credibility of witnesses, an appellate court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours* (sic) *of the witnesses as the appeal court deals with printed record.* The only way open to the appeal court to interfere is where it was established that the learned trial judge failed to take advantage of having seen and heard the witnesses then an appeal court may interfere, *Elendu vs. Ekwoaba* [1998] 12 NWLR (pt 573) 320; *Woluchem vs. Gudi* [1981] 5 SC 291.** [page 183 of the record; italics supplied]

Now, it is evident that the concurrent findings of the lower courts were, firmly, anchored on the redoubtable decisions of this court. As shown above, it has been, tolerably, settled that if and when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts.

In one word, evidence [and this was the concurrent findings of the lower courts with regard to the testimonies of the plaintiffs/appellants' witneses] which is at variance with the pleadings go to no issue, ***Okoro vs. Dakolo*** **(supra) 42-43, paragraphs D-A; Eze and Ors vs. Atasie and Ors (supra) 2180, 2189; Emegokwe vs. Okadigbo (supra); Obimiami Brick and Stone (Nig.) vs. A.C.B. Ltd (supra); Akinterinwa and Anor vs. Oladunjoye (supra); Aminu and Ors vs. Hassan and Ors (supra); Idahosa vs. Oronsaye (supra); NIPC Ltd vs. Thompson Organisation Ltd (supra); Ogbodo vs. Adelugba (supra); Ipinlaiye II vs. Olukotun (supra) 165 - 166; Paul vs. George (supra); Ajoke vs. Oba (supra); George vs. UBA Ltd (supra); Njoku vs. Eme (supra); Oke-Bola vs. Molake (supra).**

With regard to the question of traditional evidence of the plaintiffs/appellants, the trial court's findings, affirmed by the lower court, were that:

> **Most of the witnesses, particularly, their principal witness, second PW, Joseph Akinwunmi, not only gave contradictory evidence but during cross examination confirmed most of the assertions and claims of the defendants. I have highlighted those differences…such as the founding of Olowotedo granting of land to Odeleye.**
>
> **The vital point which goes in favour of the defendants is the answer to the nature and type of iganun people. Both the plaintiffs and the defendants agree that Iganun people are fishermen, live near Ogun river and although some of the plaintiffs' witnesses quickly added that some of the Iganun people farmed, but predominantly they are fishermen. The evidence of the defendants agreed to (sic) their claim in that both Iganun and Ibassa are villages belonging to igbein people.**

There is sufficient evidence in that effect....What of the particular evidence that there is a Bale at Ibassa by name, Bamgboye, son of Okuseinde, who derived his authority from the Igbein people which evidence was not contradicted and which I accept…..

...it was clear from the traditional evidence of both parties that the evidence of defendants by far outweighed those of the plaintiffs and that will entitle the defendants to judgement. The plaintiffs have failed to discharge the onus placed on them.
[Pages 124 -125 of the record; italics supplied for emphasis]

Again, these findings are in the good and cherished company of the attitude of this court to the mode of establishing title to land by traditional evidence. As, already, shown above, traditional evidence must not only be cogent; it must neither be contradictory nor in conflict or competition with that of the defendant for the court to accept it before it would be sufficient to support a claim or declaration of title to land.

This, according to the lower courts, the plaintiffs/appellants failed to do; hence, their case was, rightly, dismissed, ***Adesanya vs. Aderonmu and Ors*** **(supra);** ***Alade vs. Awo*** **(supra);** ***Olujebu of Ijebu vs. Oso, The Eleda of Eda (supra);Olujebu Nwosu vs. Udeaja*** **(supra);** ***Idundun vs. Okumagba*** **(supra);** ***Aikhionbare Ohen Eriaria of Evboriara and Ors vs. Omeregie Enogie of Ev Buoba Ohen Village and Ors*** **(supra);** ***Alli and Anor vs. Alesinloye and Ors*** **(supra); Akhionbare vs. Omoregie (supra).**

Worse still, as the trial court found at page 125 of the record: a finding affirmed by the lower court "The plaintiffs have failed to discharge the onus placed on them." True, indeed, they [plaintiffs/appellants] underrated the enormity of the onus on them for their traditional evidence, as the trial court found, was not only inconsistent; their so-called traditional evidence was not properly linked with them [plaintiffs], ***Owoade vs. Omitola*** (supra).

Even then, there was another glaring omission in the case of the plaintiffs/appellants. The rationale of all binding authorities is that it is not sufficient for a party [such as the appellants herein] who relied for proof of title to land on it [traditional evidence] to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial, ***Akinloye vs. Eyiyola***

(supra); *Olujinle vs. Adeogbo* (supra); *Adejumo vs. Ayantegbe* (supra); *Anyanwu vs. Mbara* (supra); *All and Anor vs. Alesinloye and Ors* (supra).

Simply put, they [the plaintiffs/appellants] failed to discharge the burden of proof on the pleadings as required of claimants of title to land through traditional evidence, *Akinloye vs*. *Eyiyola* (supra); *Olujinle vs. Adeogbo* (supra); *Adejumo vs. Ayantegbe* (supra); *Anyanwu vs. Mbara* (supra); *Alli and Anor vs. Alesinloye and Ors* (supra). Little wonder then why the trial court found that the principal witness, PW2, "did not give sufficient historical and traditional evidence. Being a principal witness, his *evidence was comparatively terse when compared with that of the key witness to the defendants,"* [page 116 of the record; italics supplied for emphasis].

Finally, attention may now be drawn to the finding of the lower court that "[t]he learned trial Judge also relied on the assessment and ascription of probative value based on the credibility of witnesses" [page 183 of the record; italics supplied for emphasis].

My Lords, since trial court's ascription of probative value was based- on the credibility of witnesses, I have an obligation to remind your lordships that every trial judge is in a better position than the appellate court to decide the issue of credibility of the witnesses. The reason is not farfetched. He [the trial judge] has the singular advantage of seeing and observing the witnesses. He watches their demeanour; candour or partisanship; their integrity and manners. These advantages are not normally enjoyed by an appellate court which only has the cold printed evidence to contend with, ***Nwankpu and Ors vs. Ewulu and Ors* (1995) LPELR - 2107 (SC) 32, A- 6.**

What is more, as a vital area of credibility, it is only the trial court which saw and watched the demeanour of the witness that has the exclusive role of watching the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it, ***Kaydee Ventures Ltd vs. The Hon Minister, FCT and Ors* (2010) LPELR -1681 (SC) 60, C- E; *Makanjuola vs. Balogun [19*89] 3 NVVLR (pt 108) 192, 218; *Atolagbe vs. Shorun* [1985] 1 NWLR (pt 2)60; *Duru vs. Nwosu* [1989] 4 NWLR (pt 113) 24, 39; *Lagga* vs. *Sarhuna* (2008) LPELR – 1740 (SC) 66, A- E.**

This is the basic premise that yielded the logic in the reasoning of the decisions of this court that where the issue is that of credibility of witnesses, the appellate court has a very limited, if any, scope to interfere. Thus, it [the appellate court] can only do so when the trial **c**ourt decided to believe a witness quite

contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document, ***Ndukwe vs. Acha and Ors*** **(1998) LPELR - 1977 (SC) 14, A-B;** ***Agbonifo vs. Aiwereoba and Anor*** **[1988] 1 NSCC 237, 245; [1988] 1 NWLR (Pt. 70) 325.**

In effect, therefore, unless the trial court adduces a wrong reason for believing or disbelieving a witness, an appellate court would, seldom, interfere with its ascription of credibility to witnesses. Put differently, it is only where the appellate court, either because the reasons given by the trial judge are not satisfactory or because it, unmistakably, so appears from the evidence, is satisfied that the trial Judge has not taken proper advantage of his having seen and heard the witnesses, that it could properly interfere. In such a case, the matter would then become at large in the appellate court. This is as much a settled principle of English Law, ***Watts (or Thomas,) vs. Thomas*** **(1947) 1 All ER 582 as it is a settled position in this country,** ***Nwankpu and Ors vs. Ewulu and Ors*** **(1995) LPELR -2107 (SC) 32, C- E.**

Instructively, the lower court, prior to its affirming of the position of the trial court, gave a careful consideration of the findings of facts. It found the findings of facts not to be perverse as they were borne out from the evidence..." {page 183 of the record]. It, rightly, concluded that:

> **Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial judge and when based on credibility of witnesses, an appellate court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours (sic) of the witnesses as the appeal court deals with printed record. The only way open to the appeal court to interfere is where it was established that the learned trail judge failed to take advantage of having seen and heard the witnesses then an appeal court may interfere,** ***Elendu vs. Ekwoaba*** **[1998] 12 NWLR (pt 573) 320;** ***Woluchem vs. Gudi [1981] 5 SC 291.*** [page 183 of the record; italics supplied]

As the appellants did not succeed in impeaching the concurrent findings of the lower courts by accentuating their perversity, I have no justification for interfering with them, ***Afolayan vs. Oguninde and Ors*** **(1990) LPELR -198 (SC) 20 -21, F-B;** ***Enang vs. Adi*** **[1981] 11-12 S.C. 25, 42;** ***Okagbue vs.***

A ***Romaine*** **[1982] 5 SC 133, 170-171;** ***Lokoyi vs. Olojo*** **[1983] 8 SC 861, 68-73; [1983] 2 SCNLR 127;** ***Ojomu vs. Alao*** **[1983] 9 SC 22, 53; [1983j 2 SCNLR 156;** ***Alade vs. Alemuloke*** **[1988] 1 NWLR (pt. 69) 207, 212.** In all, I find no scintilla of merit in the appellants' complaint against the judgement of the lower
B court. I, therefore unhesitatingly enter an order dismissing this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

C

PETER-ODILI, (JSC): I am in agreement with the judgment just delivered by my learned brother, Chima Centus Nweze (JSC) and to show my support of the reasoning from which the decision came about, I shall make some remarks.

D This appeal comes against the judgment of the Court of Appeal, Ibadan Division on the 21st day of May, 2002. The appeal was against the Ruling of Jacob A. O. Sofolahan J of Ogun State High Court sitting in Abeokuta delivered on the 21st day of October, 1988 dismissing the claim of the appellants then plaintiffs.
E The appellants being dissatisfied appealed to this court by way of application for leave, leave was granted and notice of appeal was filed and a motion for interlocutory injunction was also filed to restrain the respondents from continuing the sales and trespass on the land subject matter of the appeal pending
F the final determination of the appeal.

In reaction, the respondents filed a notice of preliminary objection and appellants filed a counter affidavit.

G **BACKGROUND FACTS**

The position of the appellants as seen from their pleadings and evidence are that their progenitor migrated from Ile-Ife, settled on the land in dispute called Ibasa. The appellants pleaded further that after their several years of settlement and
H farming at Ibasa, the Odeyale came to settle with Adejonlu and the said Odeyale was settled at Olowotedo. Thereafter, Odeleye who in company of his brother, Yeku came to settle with Odeyale who after abandoning his former settlement at Olowotedo, settled at Ibasa.

I The appellants therefore claimed that these 3 brothers were their customary tenants.

The appellants pleaded in paragraph 5 of their further amended statement of claim with respect to the meaning of Ibasa as follows:-

The word Ibasa is from the word where the son of Abinu was using as hunting hut whenever he went on his hunting expedition and on any return, usually refer to the place as Ibasa where he left his meat whenever he was going to send any of his wives to bring meat from his hut.

The respondents on the other hand also based their case on traditional evidence based on settlement as well as act of ownership and not only denied the historical facts set up by the appellants which purportedly linked them with appellants ancestors but also vehemently denied the issue of customary tenancy. The respondents pleaded that their ancestor Somolu originally settled on a vast parcel of land which included the land in dispute. The whole land was demarcated on Plan No. AK/7741/OG drawn by D. O. Akingbogun I.S. The Plan was tendered as Exhibit B at trial.

Contrary to the meaning ascribed to Ibasa by the appellants, the respondents' case was that Ibasa derives its name from the place where Somolu's wives and children were processing palm fruits collected from his palm tree plantation. The respondents pleaded and relied on several shrines planted and worshiped by their ancestors and which were still worshiped in recent times as claim of ownership both in old and recent times, Those shrines include Ogun, Oya, Obatala, Sengo and Oluweri.

The fuller details in the facts are well presented in the lead judgment and no useful purpose would be achieved in repeating them except for when the need for reference to any part thereof arise later.

On the 29th day of November, 2016 date of hearing, learned counsel for the appellants, Chief Rasheed Oluwatoyin Sadik adopted their brief of argument filed on 14/5/2012 and deemed filed on the same day. Also a reply brief filed on 21/9/15.

Dele Oloke Esq. of counsel for the respondents adopted their brief of argument filed on 30/3/15 and deemed filed on the 29/11/16. In it, they raised a preliminary objection and proffered the arguments within that brief of argument.

It is to be said that nothing can happen in this appeal without first tackling and settling the objection as raised as on it depends the competence of the appeal and the competence or jurisdiction of the court to go further. The reason being that the success of the preliminary objection could produce the end of the case, see:

A **1. G .C. E. vs. Akande 7 ORS (2010) 18 NWLR (Pt.1225) 506.**
2. SPDC Nig. Ltd vs. Amadi & Ors (2011) 14 NWLR (Pt1266) 157 at 183.

B

PRELIMINARY OBJECTION

The respondents/objectors raised an objection challenging the competence of ground 1 contained in the appellants' notice of appeal on the following reasons:

C 1. That the said ground 1 did not flow and emanate from the judgment of the court below out of which this appeal arose.
2. The said ground did not properly contain complaint against the decision of the court below.

D

Canvassing their position learned counsel for the respondents stated that in the court below the appellants in their ground 4 of the notice of appeal raised the issue of acquisition for the first time without obtaining the leave of court. That at the E hearing of the appeal in the lower court the respondents had raised an objection to the competence of that ground on the basis that it was a fresh issue and leave of court was necessary to sustain it and in the absence of such leave the ground lacked competence. That this objection was upheld by the court below which F struck out the said ground.

Learned counsel said the appellants did not challenge that order of striking out of the ground by raising a complaint against it in the notice of appeal. That the appellants have proceeded to formulate a ground herein which neither arose nor G emanated from the decision of the court below on the issue of acquisition. That this goes against settled law that a ground to be competent must arise or flow from the judgment appealed against. He cited **Obatoyinbo vs. Oshotoba (1996) 5 NWLR (Pt.450) 531 at 549; Sanusi vs. Ayoola (1992) 9 NWLR (Pt,265) 275;** H **Akibu vs. Oduntan (2000) 13 NWLR (PL685) 446.**

He concluded by saying that the order appealable in this case is the order striking out the said ground 1 contained in the notice of appeal on the issue of acquisition.

I Responding, learned counsel to the appellants sequel to their reply brief referred to the counter-affidavit deposed to by Onaiwu Emmanuel Omoregbe dated 4th May, 2010. That the preliminary objection dated 12th day of April, 2010 and the prayer sought for are distinct from the notice of preliminary objection

now incorporated in the respondents' brief of argument. That the earlier notice of preliminary objection of the objector seems to have been abandoned after the filing of the appellants' counter affidavit.

He stated that the appellants are vehemently opposing this preliminary objection incorporated in the objectors' brief.

Learned counsel for the appellants contended that the objectors ought to seek leave of court to make the notice of objection valid before the oral hearing of the appeal commences otherwise the complaint is deemed waived and objection abandoned. He cited the case of **Oforkire & Anor vs. Madiuke & Ors (2003) FWLR (Pt. 147) 1090 at 1097.**

He stated that the objection should be struck out, the objection having been raised without leave of court.

This objection is predicated on ground one of the appellant's notice of appeal which is outlined below thus:

> **The learned justices of the Court of Appeal erred in law by not giving judgment in favour of the appellants when there is evidence that the respondents' were the appellants' family customary tenants.**

The particulars showed that the acquisition was made under State Notice NO. 147 published in Ogun State Gazette No. 47 Vol. II of 29/11/86.

In the Court of Appeal the objectors raised objection to the competence of that ground based on the fact that being a fresh issue, leave of the court was required to sustain the ground and that leave was neither sought nor obtained and that Court of Appeal agreed with the objection and upheld it stating thus:

> **As the issue of acquisition was not pleaded in the lower court and without any comment in a judgment of the lower court, such non–issue is incompetent to be argued on appeal based on the-case of Akibu vs. Oduntan (2000) 13 NWLR (Pt. 685) at 446; Egbe vs. Alhaji (1998) 1 NWLR (Pt. 128) page 540 at 598. Grounds 1 & 4 are hereby struck out".**

Inspite of that ruling of the court below, the appellants did not appeal it, rather came before this court on a notice of appeal that did not include that decision as

A one of the complaints. It is therefore to be said that the present notice and grounds of appeal cannot be sustained in the absence of the scaling of that hurdle. The implication is that the current notice of appeal's ground one lacks competence as what is being pushed forward did not arise or flow from the judgment appealed
B from. I refer to **Akibu vs. Oduntan (2000) 13 NWLR (Pt. 450) 531 at 540; Sanusi vs. Ayoola (1992) 9 NWLR (Pt.265) 275.** The ground one and issue arising therefrom are struck out.

I shall now go into the main appeal and the sole surviving issue.

C

MAIN APPEAL
Single Issue

D **Whether having regard to the pleadings and totality of evidence adduced, the court below was right in dismissing the appellants' appeal.**

E Learned counsel for the appellants submitted that the traditional history of the appellants reveal that appellants' great ancestor known as ABINU was the first person to settle on the land in dispute. That the appellants at the trial gave un-contradicted evidence that the said ABINU migrated from Ile-Ife and finally
F settled on all that parcel of land at IGUAN which include IBASA which is the land subject matter of this appeal. That the appellants have established by evidence that the respondents and forefathers were paying yearly tributes to the appellants and only stopped paying such tributes when the appellants instituted
G this case at the trial court. He further contended that the land in dispute was acquired by the Ogun State Government and so the land lawfully acquired has to be excised from the original land and such remaining land properly identified to ascertain the remaining., portion subject matter of this suit. He cited **Obikoye &**
H **Sons Ltd. vs Governor of Lagos State (1987) NWLR (Pt.50) 385.**

From the appellant it was stated that the compulsory acquisition was made by the Ogun State Government in 1986 during the pendency of the case at the trial court and it was a fact unknown to either party at the time and the implication is
I that the pleadings needed be amended so that actual description and identity of the land will be ascertained. That the identity of the disputed land being crucial, the identity must first be cleared before the issue of the title to the land would be gone into. He cited ***Balogun vs. Akanji*** **(2005) 3-4 SC 95.**

That the decision of the court below ought to be reversed in favour of the appellants or in the alternative an ordering of a retrial of this suit.

Learned counsel for the respondent contended that appellants' assertion was not sustainable in the light of the evidence proffered and the finding of the learned trial Judge. That there is inconsistency in the appellants' traditional evidence and so the court of trial and affirmed by the court below was correct in treating the evidence as unreliable and to be rejected, the consequence being the dismissal of the case, He cited **Oliyebu of Ijebu vs. Osho Eledo of Eda (1973) 2 SC 143; Ogun vs. Akinyelu (2005) All FWLR (Pt.243) 601; Salami vs. Gbodoolu (1997) 4 NWLR (Pt.499) 277.**

The learned trial Judge based on what was before him stated thus:

> **From my observation above, during the review of evidence of all the witnesses for plaintiffs and defendants, I have found that the evidence of the plaintiffs do not agree with their pleadings. Most of their witnesses particularly their principal witness, 2nd PW Joseph Akinwumi not only gave contradictory evidence but during cross-examination, confirmed most of the assertions and claims of the defendants.**

The court after weighing the traditional evidence of both sides concluded that:

> **Plaintiffs must succeed on the strength of their evidence but on the whole, it was clear from the traditional evidence of both sides that the evidence of the defendants by far outweighs those of the plaintiffs and that will entitle the defendants to judgment. The plaintiffs have failed to discharge the onus placed on them.**

On appeal, the Court of Appeal per Onalaja JCA stated thus:

> **In the consideration of the cases of the parties as they testified, the learned trial judge applied the rule in Mogaji Odofin (1973) 3/4 SC 91; Akande vs. Alagbe (2000) 15 NWLR (Pt. 690) page 353 CA; Tinubu vs. Khalil & Dibbo Trans Ltd (2000) 11 NWLR (Pt.677) page 171 SC The learned judge concluded rightly that appellants did not discharge the burden of proof placed on**

appellants and based on the findings of facts dismissed the claims.

The court below stated further as follows:

The attitude of an appellate court to findings of fact is well settled that an Appeal Court generally will not disturb findings of facts by the learned trial judge unless the findings of facts are perverse. After a careful consideration of the findings of facts as reflected in the quoted part of the judgment, I find the findings of facts not to be perverse as they were born out from the evidence, thereby I find no legal basis to disturb them. Respondents' argument on the findings of facts were sound and convincing, they are therefore resolved in favour of the respondents. See Sosanya vs. Onadeko (2000) 11 NWLR (Pt. 67) at page 34 CA, Kalango vs. Governor of Bayelsa State (2009) All FWLR (PL476) at 1839 esp. Ratio 7.

It is now trite that five modes are utilised in establishing title to land and in this, the case of **Idundun vs. Okumagba** (1976) 0-10 SC has been very helpful and those methods are thus:

1. **Traditional evidence.**
2. **Production of documents of title which are duly authenticated.**
3. **Acts of selling, leasing, renting out all our part of the land of farming on it or on a portion of it.**
4. **Acts of long possession and enjoyment of the land, and**
5. **Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.**

In the case in hand, each side had set up its version of how they came to the land and its ownership and this brings to mind the locus clasisicus guide in the case of **Kojo II vs. Bonsie & Anor (1957) 1 WLR 1223 at 1226** wherein it was held that:

A The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard, it must be recognized that in the course of transmission from generation to generation, mistakes may occur without any
B dishonest motives whatsoever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet
C but may be honest in their belief. In such a case, demeanour is title guide to the truth. The best way is to test traditional history by reference to the facts in recent years as established by evidence and seeing which of two competing histories is more probable".

D

In the further amended statement of claim seen at page 65 – 69 of the record, paragraphs 6, 7 and 8 specifically, the appellants as plaintiffs in the trial court pleaded thus:

E

"6) After several years of settlement and farming at Ibasa, the first person who came to Adejonlu to ask to settle with Adejonlu was one Odeyale who came from Abeokuta.

F 7) Adejonlu then settled with Odeyale at Olowotedo but the said Odeyale came back and abandoned the place to come back to Adejonlu as the Odeyale was attacked by armed robbers.

G 8) While Odeyale came back to live with Adejonlu at Ibasa Jinadu, Odeleye came to live with Odeyale and later another brother of Odeyale called Yeku came to join them to live there".

H

The position of the plaintiffs/appellants in pleading was denied by the defendants/respondents who pleaded that their ancestors Somolu and Okuseinde who came from Igbein originally settled at the vast area of land which included
I the land in dispute.

In evidence in court, PW2 stated thus:

Adejonlu is my great grand-father, Abinu is the father of Adejonlu. Those who came to ask for farming land from Abinu were Odeyale and Odeleye (they are brothers). They came from Abeokuta and were granted land to farm".

This piece of evidence contradicts the pleadings in paragraph 6 where it was stated that Adejonlu granted the land to the respondents' predecessor-in-title and not Abinu as stated in the evidence of PW2.

Again, on the issue of Olowotedo, a portion of the land in dispute PW2 stated as follows:

I do not know Adejonlu and Abinu. I know Odeyale. I grew up to meet him on the land. I agree that Odeyale founded Olowotedo.

This part of the evidence is clearly at variance with paragraphs 6 and 7 of the plaintiffs amended pleadings and so supported the reaction of the learned trial judge in his finding when he disregarded the contradicting piece of evidence in keeping with the cases of **Ademeso vs. Okoro (2005) All FWLR (Pt.227) 844; Orizu vs. Anyaegbunam (1978) 5 SC 21.**

For effect, the learned trial judge stated thus:

Again although the plaintiffs stated in paragraph 7 of their further amended statement of claim that Adejonlu then settled with Odeyale at Olowotedo and the 2nd PW so gave evidence but under cross-examination, the 2nd PW retracted and said, 'I agree that Odeyale founded Olowotedo". This is exactly the case of the defendant as laid in paragraph 25 of their amended statement of defence to the effect that Odeyale a son of Somolu also founded Olowotedo….

Also, this witness said that it was in his presence (although he was young) when Odeyale and Odeleye granted land nonetheless, in another breadth, he stated that he met Odeyale on the land. If he met Odeyale on the land, obviously that land could not have been granted in his presence.

A His Lordship after the assessment of the evidence founded follows:

> **The view I hold is that either there was no grant at all, or at best this witness was telling the unruth .**

B

Indeed from the records, including the pleadings, evidence, the assessment and evaluation thereof, the trial court was on track and the court below equally correct in finding for the respondents on the preponderance of evidence. Those C concurrent findings and conclusion being unassailable and no miscarriage of justice shown this court is loathe to interfere or disturb them as the only safe way is to go along with those findings well founded upon due consideration.

From the foregoing and the better laid out reasoning of my learned brother, D C. C. Nweze (JSC) I see no basis to do otherwise than to dismiss this appeal as lacking in merit. Appeal is dismissed as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

E

AKAAHS, (JSC): I read before now the judgement of my learned brother, Nweze (JSC) dismissing the appeal. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

F The appellants as plaintiffs commenced the action by Writ of Summons before the High Court of Ogun State, Otta Judicial Division in suit No. HCT/5/85 claiming against the defendants (now respondents) that the defendants, are native customary tenants of the plaintiffs in respect of the land occupied for farming by G them at Ibasa, Iganun Village of Ogun State, have denied and still deny the plaintiffs title thereto and have claimed and still claim to be the absolute owners of the said premises and the land thereto in accordance with native law and custom. They sought the following reliefs in paragraph 34 of the further amended H statement of claim filed on 17/10/86:

> **"34 Whereof the plaintiffs claim:**
> **(a) A declaration of forfeiture of the defendants' tenure under** I **native law and custom.**
> **(b) Possession of the said land"**

A The defendants who laid claim to a wider area of land defended the action for themselves and on behalf of Somolu/Okuseinde family and asserted that Somolu was the original owner of the land in dispute and averred in paragraphs 4, 3 ,6., and 43 of the Amended State of Defence as follows:

B

> **"4. The defendants state that the vast area of land including IBASA, GAUN, LEKE, OLOWOTEDO, OFADA, MAKOGI, MAGBORO, IBAFO, AREPO, PAKURO,**
>
> C **MOWE, MOKOLOKI, OBA, BISODUN and ORILE IGBEIN originally belong (sic) to the people of lgbein as their homestead. All the villages mentioned above were established by lgbein people and live therein.**
>
> D **5. In or around 1830, the people left their homestead to settle at Abeokuta in the area now known as lgbein Township because of incessant wars but continued to exercise acts of ownerships over the land within the**
>
> E **homestead.**
>
> **6. Somolu was the original owner of the land in dispute as he settled on it when he left Orile lgbein over 100 years ago.**
>
> F **43. WHEREOF the defendants state that the plaintiffs claim is misconceived, frivolous and abuse of court process and should be dismissed with costs."**

G The plaintiffs called 7 witnesses before closing their case while the defendants called 5 witnesses. Learned counsel for the parties thereafter addressed the court and in a reserved judgement delivered by Sofolahan J on 21/10/88, he found that the traditional evidence called by the defendants outweighed those of the

H plaintiffs. He dismissed the plaintiffs' case and entered judgement in favour of the defendants. The plaintiffs were not satisfied and appealed to the Court of Appeal, Ibadan on 21/5/2002. That court dismissed the appeal as devoid of merit. The lower court found that there was no legal basis to disturb the findings of facts of

I the learned trial judge. The appellants were aggrieved and filed a further appeal to this court.

This appeal turns on the concurrent findings of fact made by two lower courts as issues 2 and 3 in the appellants' brief were abandoned. The preliminary

A objection raised by the respondents concerning the issue of acquisition of the land is no longer necessary since the appellants abandoned issue no.3.

The parties staked their claim to the disputed land on traditional history. The plaintiffs claimed they are descendants of Abinu, who migrated from and
B first settled on the land. His son, Adejonlu succeeded Abinu and it was during his time that Odeyale who hailed from Abeokuta settled with Adejonlu at Olowutedo. Later Jinadu. Odeneye went to live with Adejonlu. Another brother of Odeyale called Yeku joined them to live at Ibasa. At the end of every year,
C Odeyale, Jinadu. Odeneye and Yeku took the farm produce-yams and palm oil as tribute to Adejonlu.

In paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 30, 33 and 34 of the further amended statement of claim the plaintiffs averred thus:

D

"14 These children of Yeku, Odeneye and Odeyale in later years instead (sic) bringing this tribute in form of yams, palm produce and corn now asked that these be
E **compounded in form of money and were paying the Adejonlu family the sum of €5 now N10.00 including palm wine which was paid at the end of every year, that is December.**

F **15. The plaintiffs averred that it was the 1st defendant who some years ago came and suggested that this tribute be paid during the yearly Agemo Festival.**

16. The defendants stopped this payment about 5 years ago.

G **17. The plaintiffs averred that the main reason for the stoppage was that some five years ago one Chief Adeyemi Lawson wanted a vast area of land from Ibasa.**

18. The plaintiffs were consulted and arrangement
H **concluded to demarcate the area to be sold to the said Chief Adeyemi Lawson.**

19. Consequent upon this, the tenants, that is, the defendants came to the plaintiffs on the IPABI day, that
I **is, the beginning of Agemo Festival and would want to know their share of the proceeds, they being only customary tenants.**

20. The plaintiffs averred that the tenants including the defendants were told to come back on the ERIN day of Agemo when the family shall have deliberated on this.

21. The plaintiffs averred that the tenants including the defendants never came back instead went to lgbehin people at Abeokuta who in turn reported to Alake that the plaintiffs were worrying them an allegation the plaintiffs vehemently denied.

22. By some kind of compromise the said Chief Adeyemi Lawson suggested that the proceeds be shared by the plaintiffs taking a half, the defendants a quarter and lgbehin people a quarter.

23. The plaintiffs averred that they refused on the basis of sharing lgbehin people who are considered as strangers on the land.

24. The plaintiffs averred that the defendants had ever since denied and still deny the plaintiffs as their overlord contrary to native laws and customs.

30. The defendant in collaboration with some other unknown people had ever since been dealing illegally with the land and have sold, leased or alienated over 200 hectares of the land with unknown people.

34. Whereof the plaintiffs claim;

(a) A declaration of forfeiture of the defendants' tenure under native laws and custom.

(b) Possession of the said land".

From the pleadings and evidence adduced it is clear that the parties relied on traditional history for their claim of title to the disputed land. The learned trial Judge reviewed the evidence of the rival traditional histories narrated by the respective parties and preferred the evidence led by the defendants to that led by the plaintiffs both in regard to traditional history and to acts of ownership. This is what he said regarding the evidence of 2nd PW, Joseph Akinwunmi who was the star witness of the plaintiffs at pages 116 – 118 of the record:

"I must say that this witness did not give sufficient history and traditional evidence. Being a principal witness, his evidence was comparatively terse when compared with that of the key witness to the defendants. His cross- examination revealed much more which 1 will highlight in this review of evidence. His first concession was that Abinu was not an Egba. He agreed that the place where they make palm oil is called Ibassa where they will make Eku (a round hole for mashing palm oil seeds) and where animals were killed in the bush and roasted is only called Ileba. This is obviously contrary to the pleadings of the plaintiffs. Again, although the plaintiffs stated in paragraph 7 of their further amended statement of claim that "Adejonlu" then settled with Odeyale at "Dluwatedo" and the 2nd PW so gave evidence, but under cross-examination, the 2nd PW retracted and said '1 agree that Odeyale founded Oluwatedo". This is exactly the case of the defendants as laid in paragraph 25 of their amended statement of defence to the effect that Odeyale a son of Somolu also founded Olowotedo. Linked with paragraph 4, Olowotedo is among the other areas founded by the lgbein people as their homestead to which the defendants belong. Also this witness said that it was in his presence (although he was young) when Odeyale and Odeleye granted land nonetheless, in another breadth, he stated that he met Odeyale on the land. If he met Odeyale on the land, obviously that land would not have been granted in his presence. The view I hold is that either there was no grant at all or at best, this witness was telling the untruth. He agreed also that the defendants sold part of the land to one Dr. Bankole, an Agriculturalist who I shall refer to later but he claimed that they, the plaintiffs, did not quarrel with Dr. Bankole when the land was sold to him in order to avoid breach of the peace.

One other point that I like to highlight is that the defendants in paragraph 29 of their further amended statement of defence alleged that Iganun villagers very close to the Ogun river hence the plaintiffs are predominantly fishermen and are not Egbas. The 2nd witness agreed under cross- examination that most people in

Ganun are fishermen".

The Court of Appeal also reviewed the evidence called by the parties and concluded that the only way an appeal court can interfere with the assessment and ascription of probative value of the evidence made by the trial court is where it is established that the learned trial judge failed to take advantage of having seen and heard the witnesses.

It has not been argued that the court below was wrong in holding that there was evidence in support of the findings made by the trial judge. The arguments advanced by the learned counsel for the appellants is that the appellants at the trial gave uncontradicted evidence that Abinu migrated from Ile-lfe (cradle of Yorubas) and finally settled on all that parcel of land at Igaun which includes Ibasa which is the land the subject matter of the appeal and that the appellants established by evidence that the respondents and their forefathers were paying yearly tributes to the appellants and only stopped paying such tributes when the appellants instituted this action at the trial court.

The learned trial judge after highlighting the concessions made by 2nd PW under cross-examination which ran contrary to the plaintiffs' pleadings found that this would water down any serious weight that could be attached to his evidence-in-chief and that the accounts were inaccurate.

In this appeal as was the case in **Aseimo vs. Abraham** (2001) 16 NWLR (Pt.738) 20 the trial Judge duly took note of the fact that the parties relied on traditional history and acts of ownership and he found the evidence in both inadequate in support of the plaintiffs case and adequate in support of the defendants' case and judgement was entered in favour of the defendants. The findings made by the trial judge were affirmed by the Court of Appeal. There were thus concurrent findings of fact and this court will not interfere with concurrent findings of fact of the trial court and the Court of Appeal unless such findings are perverse. See: **Odonigi vs. Oyeleke (2001) 6 NWLR (Pt.708) 12.** In that case, Kalgo JSC in the leading judgement held that the findings of the trial court were made after an adequate evaluation of the evidence. The Court of Appeal did not itself neglect to consider the evidence on record. The effort of the counsel for the plaintiffs directed at persuading this court to interfere with the findings of fact made by the trial judge in regard to title to the land is in the circumstances, futile.

The same scenario has manifested itself in this appeal I have no hesitation whatsoever in dismissing the appeal because it totally lacks merit. It is for this reason and the more comprehensive reasons contained in the judgement of my

learned brother, Nweze (JSC) that I found that the appeal is lacking in merit. I accordingly dismiss it and further affirm the judgernent of the lower court.

K. B. AKAAHS
Justice, Supreme Court

KEKERE-EKUN, (JSC): This appeal is against the judgment of the Court of Appeal, Ibadan Division delivered on 21/5/2002 dismissing the appellants' appeal and affirming the judgment of the High Court of Ogun State, Otta Judicial Division delivered on 21/10/98. The appellants, as plaintiffs at the trial court instituted an action against the respondents, as defendants for the following reliefs, as set out in paragraphs 33 and 34 of their Further Amended Statement of Claim as follows:

> **"33. The defendants being tenants of the plaintiffs have by their actions denied the plaintiffs' title and have claimed ownership absolutely or through other source.**
>
> **34. Whereof the plaintiffs claim:**
>
> **a. A declaration of forfeiture of the defendants' tenure under native law and custom.**
>
> **b. Possession of the said land."**

Both sides called witnesses and tendered documentary evidence. At the conclusion of the trial, the appellants' claims were dismissed in their entirety on the ground that the traditional evidence led by the respondents far outweighed the evidence of the appellants and that the appellants failed to discharge the onus on them to prove their claim. They were dissatisfied and appealed to the court below, which on 21/5/2002, dismissed the appeal. They are still dissatisfied and have further appealed to this court.

The appellants in their brief of argument, which was deemed filed on 14/5/2015, formulated 3 issues for the determination of the appeal. The issues are as follows:

> **"1. Whether the lower court have (sic) sufficiently considered the findings of the trial court as to the establishment by the respondents of long settlement on the disputed land their root of title by way of long**

A **settlement or sufficient traditional evidence.**

2. Whether the respondents by the totality of evidence before the trial court are customary tenants of the appellants;

B **3. Whether the issue of acquisition of the land in dispute was given consideration by the lower court more especially when the fact of acquisition has affected the identity of the disputed land during the pendency of this**

C **matter at the trial court.**

However, at the hearing of the appeal on 29/11/2016, learned counsel, R.O. SADIK ESQ. withdrew issues 2 and 3.

D The respondents raised a preliminary objection to ground 1 of the notice of appeal on the ground that the issue of acquisition of the disputed land by the Ogun State Government was not an issue decided by the court below, as that court had in the course of its judgment struck out ground 4 of the notice of appeal, which

E raised the same issue on the ground that the issue of acquisition was not pleaded in the trial court and no comment was made in the judgment appealed against. Learned counsel argued that having not appealed against the striking out of their ground 4, the appellants could not raise the acquisition of the land as a ground of

F appeal before this court.

Having carefully examined the notice of appeal at pages 187-190 of the record, it would appear that the ground of appeal in contention is ground 3 and not ground 1. I also note that the principal issue formulated from ground 3 of the

G notice of appeal is issue 3 which has been withdrawn.

However, in arguing issue 1, learned counsel for the appellant included in paragraphs 5.1, 5.4 to 5.8 of his brief submissions on the alleged acquisition of the land by the Ogun State Government in 1986, contending that there was a need for

H the pleadings and plans to be amended to identify and ascertain the portion of land that remained after excision of the acquired portion therefrom.

The law is trite that issues for determination in an appeal must be formulated to fall within the scope of the grounds of appeal filed. They should not

I be prolix and should not include matters not in any of the grounds of appeal. See **Onwumere vs. The State (1991) 4 NWLR (Pt. 186) 428 @ 445 B; Egbe vs. Alhaji (1990) 1 NWLR (PPt. 127) 546.** It is equally trite that grounds of appeal are not formulated in abstract. For grounds of appeal to be competent, they must

be predicated on the ratio of the decision appealed against: **See: Ikweki vs. Ebele (2005) 11 NWLR (Pt. 936)) 397; Mercantile Bank of Nig. Plc vs. Nwobodo (2005) 14 NWLR (Pt. 945) 379; Egbe vs. Alhaji (supra).** In other words, the grounds of appeal must be based on the decision of the lower court, which should in turn be based on the issues joined by the parties in their pleadings, evidence adduced in support thereof and the submissions of counsel on the law applicable to the facts so established by evidence. *See:* **Chami vs. U.B.A. Plc (2010) 6 NWLR (Pt. 1191) 474 @ 502 C-D.**

I am of the considered view that having incorporated arguments based on an incompetent ground of appeal within the sole remaining issue for determination, the argument on the incompetent ground has tainted the entire issue and it is liable to be struck out, leaving this appeal with no leg to stand on.

It must be stated that in any event, the appellants have an uphill task in this appeal. This is because it is not the practice of this court to interfere with concurrent findings of facts by the two lower courts, unless the appellants are able to show that the findings are perverse, that there has been a miscarriage of justice or some other violation of some principles of law or procedure. **See: NICON vs Power & Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 27) 1; Afolalu vs The State (2010) LPELR – SC. 193/2008; Achiakpa & Anor. vs Nduka & Ors (2001) LPELR- SC. 28/1996; Kalango vs Governor of Bayelsa State (2009) ALL FWLR (Pt. 476) 1839 @ 1864 G-H.**

On the merit of the appeal, as determined by my learned brother, Chima Centus Nweze, (JSC), I agree with him that the lower court was right in holding that no substantial or cogent reason had been advanced by the appellant to warrant interference with the thorough evaluation of evidence by the trial court.

Whichever way one looks at it, this appeal is completely devoid of merit. It is hereby dismissed. I abide by the consequential orders made in the lead judgment including the order as to costs.

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

EKO, (JSC): On 21st May, 2002 the Court of Appeal, Ibadan Division (hereinafter called the "court below") dismissed the appeal, of the appellants herein, from the decision of the Ogun State High Court sitting at Otta. This is a further appeal from the decision of the court below.

Four grounds of appeal were presented at the court below. Two of these 4 grounds, that is: ground 1 complaining about the jurisdiction of the trial court to entertain the suit (which was abandoned) and ground 4 raising the issue of acquisition which was not pleaded in the trial court and in respect of which the trial court made no comment were struck out. However, two grounds, that is 2 and 3, survived. Out of these two grounds, the court adopted the issue formulated therefrom by the respondents, to wit

> **whether from the pleadings and totality of evidence adduced the appellants proved their case to entitle them to the reliefs sought.**

This is clearly an issue of facts.

The court below, on this issue of fact, stated inter alia in its judgment at pages 183 and 184 of the records thus:

> **"---- The learned (trial) judge concluded rightly that the appellants did not discharge the burden of proof placed on (them) and based on his findings of facts dismissed the claims. The learned (trial) Judge also relied on his assessment and ascription of probative value based on the credibility of witnesses. The attitude of an appellate court to findings of fact is well settled that an appeal court generally will not disturb findings of fact by the learned trial Judge unless the findings of fact are perverse. After a careful consideration of the findings of facts, as reflected in the quoted part of the judgment I find the findings of facts not to be perverse as they are borne out from the evidence thereby. I find no legal basis to disturb them.**
>
> **Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial judge and when based on credibility of witnesses an appellate court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours of the witnesses as the appeal deals with printed record. The only way open to the appeal**

court to interfere is where it was established that the learned trial judge failed to take advantage of having seen and heard the witnesses then an appeal court may interfere.

Applying the above settled principle to the facts of this appeal I see no legal basis to disturb the findings of facts by the learned trial judge that he failed to take advantage of having seen and heard the witnesses thereby the issue is resolved against the appellants but in favour of (the) respondent."

The foregoing decision of the court below has now come under flak of the appellants herein on three (3) grounds of appeal, namely:

"1. The learned justices of Court of Appeal erred in law by not giving judgement in favour of the appellants when there is evidence that the respondents were the appellants' family's customary tenants.

Particulars of Error

(a) The evidence of the plaintiffs/ appellants and their witnesses showed that the defendants/ respondents paid tributes to the plaintiffs/appellants up till the time when plaintiffs/appellants instituted action at the trial court.

(b) There is evidence that plaintiffs/appellants made customary grant of the land in dispute to the ancestor of the defendants/respondents.

2. The learned justices of the Court of Appeal erred in law by giving judgment against the appellants when evidence showed that the appellants' great ancestor ABINU was the first person to settle on the land in dispute.

Particulars of Error

(a) The appellants at the trial court gave evidence of the migration of ABINU from ILE-IFE and his eventual

A settlement on all that parcel of land at Iganun including the land in dispute.

(b) Evidence of boundary-men showed that the appellants have been in possession of the land in dispute from time B immemorial

3. The learned justices of the Court of Appeal erred in Law by dismissing the appeal without giving consideration to C the issue of acquisition of the disputed land which has been acquired by the State government, which acquisition had affected the identity of the disputed land.

D Particulars of Error

(a) The acquisition of the disputed land was made under the Ogun State Notice No. 147 and Published in Ogun state Gazette No. 47 volume 11 of 20th November, 1986.

E (b) The acquisition was made during the pendency of this matter at the trial court, but was not raised then since parties were not aware of it. It is therefore an issue that will necessitate the amendment of pleadings and plans so F that the issue could be tried and put before the trial court as to the actual description of the land in dispute.

(c) The issue of acquisition of the disputed land had affected the identity and size of the land subject matter and unless G this issue is resolved the identity of the land will remain absurd.

(d) The trial court was not aware of the acquisition of the disputed land, otherwise the learned trial judge will have H put into consideration the claims of each party under the law governing the acquisition and the judgment of the trial court is not likely to be the same".

I My lords, grounds 1 and 2, above reproduced, are on facts or at best on grounds of mixed law and facts which the appellants can not lay before this court without leave first sought and granted. *See:* **OJEMEN vs. MOMODU (1953) 1 SCNLR 1882; CUSTOMS vs. BARAU (1982) 10 SC. 483.**

This is a civil appeal. Neither of the two grounds comes within the ambit of Section 233(2) of the 1999 Constitution and thus entitles the appellants to bring the appeal on grounds 1 and 2 as of right. None of the grounds involves questions of law alone, or interpretation or application of the constitution, or any questions as to whether any of the fundamental human rights guaranteed under chapter 4 of the constitution has been, is being or is likely to be, contravened in relation to any person. The two grounds are not anywhere related to any question as to the office or tenure of office of the president or vice president of the Federal Republic of Nigeria, or the office of deputy governor of any of the 36 States. Grounds 1 and 2 contained in the notice of appeal, filed on 25th November, 2005, require leave, and in the absence of the leave first sought and granted before their filing the two grounds, in view of Section 233(2) of the 1999 Constitution, are incompetent.

The court below in its judgment ruled on the preliminary objection and held that ground 4 of the notice of appeal to that court, raising the issue of acquisition which was not pleaded in the trial court and in respect of which the trial court made no comment, was incompetent. The said ground 4, adjudged incompetent, was accordingly struck out. The appellants are wallowing in the same error in this court.

The same 'Issue of acquisition of the disputed land which has been acquired by the State Government", which acquisition has affected the disputed land is being raised in this court, not as a complaint against the ruling/decision of the court below upholding the preliminary objection but an entirely fresh substantive issue. The issue is fresh and extraneous to the proceedings at the two courts below. Because an appeal is not an inception of a new case, but a continuation of the dispute *inter parties* from the trial court; no new issues are raised or permitted and no fresh evidence are taken, without leave of court. *See* **OREDOYIN vs. AROWOLO (1989) 4 NWLR (pt.114) 172 at 211**.

Grounds 3, raising an issue which has not arisen from the court below, is incompetent. The attempt here to steal the show at the highest level without leave has been depreciated by this court in **AJUWON vs. ADEOTI (1990) 21 NSCC (pt. 1) 408 at 452; (1990) 2 NWLR (pt.132) 271 at 296** per Nnaemeka-Agu, JSC.

The three grounds of appeal before us, my lords, are incompetent. They are accordingly struck out. The appeal, bereft of any competent ground of appeal, is also incompetent. Accordingly the appeal is hereby struck out. It is unfortunate that this incompetent appeal has occupied the precious time and space of this

court for so long a time and thus depriving other competent and valid appeals the precious time and space.

I read in draft the judgment just delivered by my learned brother, CC. NWEZE, JSC, in this appeal. I hereby adopt the judgment, even as to the merits of the appeal, including the consequential orders made therein.

Ejembi Eko,
Justice, Supreme Court.

DAVID AMADI
AND
ATTORNEY-GENERAL OF IMO STATE

SC. 515/2012

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: Concurrent findings of two lower courts – Where findings are not found to be perverse – Attitude of the Supreme Court thereto.

APPEAL: Decision of court not appealed – Presumption.

APPEAL: Brief writing – Formulation of issues for determination – Issue not arising from ground(s) of appeal Incompetent.

APPEAL: Where a party fails to appeal against a specific finding of trial court – Whether party is deemed to have accepted such finding.

*CASE LAW: Principles in **Udobere vs. State (2006) 6 SC 1** – Consideration thereof.*

*CASE LAW: The Principles in **State vs. Azeez & Ors. (2008) 14 NWLR (Pt. 1108) 439.***

COURT: Credibility of witnesses – Whether to be determined exclusively by the trial court – Considerations thereof.

CRIMINAL LAW AND PROCEDURE: "Proof of Evidence" – Non judicial evidence – Whether court can validly act on same.

CRIMINAL LAW AND PROCEDURE: Admissibility of proof of evidence – When proof of evidence is admissible – Purpose.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Burden of proof – What prosecution needs to prove.

CRIMINAL LAW AND PROCEDURE: Calling of witnesses – Prosecution needs not call host of witnesses to secure conviction.

CRIMINAL LAW AND PROCEDURE: Charge – Charge not signed by law officer – Presumption that charge was duly initiated by Attorney-General – Section 211(1)(a) of the 1999 Constitution, considered.

CRIMINAL LAW AND PROCEDURE: Contradiction of witness – Where witness is sought to be contradicted by using his extra-judicial statement – Necessity of statement to be formally tendered before relying on same.

CRIMINAL LAW AND PROCEDURE: Contradiction of Witness – Whether facts which are not in evidence can be used to contradict a witness.

CRIMINAL LAW AND PROCEDURE: Counsel's submissions to court on credibility of witness – Submission based on statement of witness not tendered in court – Propriety.

CRIMINAL LAW AND PROCEDURE: Credibility – How to impeach the credibility of a witness by his previous statement.

CRIMINAL LAW AND PROCEDURE: Defect in a charge – Objection – Need to be taken immediately the charge is read.

CRIMINAL LAW AND PROCEDURE: Evidence of witness – Where witness gives oral evidence of the contents of his statement to police – Witness cannot be said to have made inconsistent statements.

CRIMINAL LAW AND PROCEDURE: Oral testimony of accused in court testimony inconsistent with previous – statement to the police – Need for the accused to explain.

CRIMINAL LAW AND PROCEDURE: Party alleging that a finding is perverse – Onus on party to prove same.

CRIMINAL LAW AND PROCEDURE: Statement of accused to the Police – Statement must be in evidence before the court acts on it.

CRIMINAL LAW AND PROCEDURE: Where accused clearly understood contents of charge – Pleads not guilty – Represented by counsel – Neither accused nor counsel raised any objection to the charge – counsel later submits that the accused was charged under a wrong section – Effect of objection.

EVIDENCE: Discrediting a witness – Witness extra-judicial – Statement sought to be used – Need for statement to be in evidence – Failure to tender statement – Effect.

RULES: Section 232 of Evidence Act 2011 – How to contradict a witness with his previous statement – Considerations thereof.

Issues for Determination

"1. Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.

2. Whether the learned justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eye witness account of the incident (PW.1) was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (ground one of the appeal).

3. Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law? (Grounds two and three of the appeal).

Fact of the Matter

The appellant and two others were tried for the offence of armed robbery contrary to Section 1(b) of the Robbery and Firearms (Special Provisions) Act Cap 398 LFN, 1990, before the High Court of Imo State presided by J.O.H. Ukachukwu, J. The prosecution commenced evidence on 29th October, 1999. Before then the appellant had on 31st August, 1999 pleaded not guilty to the charge amended at the instance of E.E. Ibe, senior legal officer, prosecuting officer on behalf of the Attorney-General of Imo State. The charge, was substituted by leave of court. At the close of the prosecution's case the appellant testified as his sole defence witness, following the dismissal of the appellant's No case submission on 27th April, 2004.

On 19th June, 2006 the learned trial Judge, after hearing final addresses of the parties, adjourned the proceedings to 28th September, 2006 for judgment. The appellant was convicted and sentenced for the offence of armed robbery. On 8th November, 2006 the appellant lodged his appeal against his conviction and sentence to the Court of Appeal. The Court of Appeal, in its unanimous judgment delivered on 18th May, 2012, dismissed the appeal of the appellant and affirmed both the conviction and sentence by the trial High Court. This further appeal to the Supreme Court has arisen from the said decision of the Court of Appeal, Owerri dismissing the appellant's appeal.

Held *(unanimously dismissing the appeal)*

1. *An issue not arising from a ground of appeal is incompetent*

It is now settled beyond question that any issue raised and argument advanced on an issue not arising from a ground of appeal is incompetent. [OKPALA vs. IBEME (1989) NWLR (pt. 102) 208; OSINUPEBI vs. SAIBU (1982) 7 SC. 104 At 110-111].

Issues for determination of appeal are not, in appellate courts, formulated from the clouds or nowhere. [IHEANACHO vs. EJIOGU (1995) 4 NWLR (Pt. 389) 324, PORT HARCOURT CITY LG vs. EKEOHA (2008) ALL FWLR (pt. 422) 1174 At 1192].

The law and practice in the appellate courts, are now well settled that issues for determination are formulated from and on the basis of the grounds of appeal filed. An Issue formulated must therefore not only relate to the ground(s), it must fall within the existing ground(s) of appeal challenging the correctness of the judgment appealed. [MODUPE vs.

STATE (1988) 4 NWLR (pt. 87) 130; UGO vs. OBIEKWE (1989) 1 NWLR (pt. 99) 566; AKINBINU vs. OSENI (1992) 1 NWLR (pt. 215) 97; OSENI vs. AKINBINU (1992) 23 NSCC (pt. 1) 22; BAMGBOYE vs. OLANREWAJU (1991) 4 NWLR (pt. 184) 132 at 152; LABIYI vs. ANRETIOLA (1992) 10 SCNJ 1]. *(P 117 Paras C– G).*

2. *An issue raised from no ground of appeal is incompetent*
An issue raised *in vacou,* or which has been raised and argued from no ground of appeal is not only incompetent, it is completely irrelevant and extraneous. It is for this reason that this court maintains the stance or policy that an issue raised or formulated from nowhere or no ground of appeal must certainly be discountenanced. [AKINBINU vs. OSENI (supra)]. *(P 117 Paras G – H).*

3. *The prosecution does not need to call a host of witnesses to secure conviction.*
Counsel appears to labour heavily under some misconception in his argument; that even though in proof of the ingredients of crime, the prosecution is not obliged to call a host of witnesses; the failure to call those vital witnesses could weaken the case of the prosecution as it could create reasonable doubt. ISAH vs. STATE (2010) 16 NWLR (pt. 1218)132, relied heavily for this robust submission, does not repudiate the age old principle that an accused can be convicted on a clear and unimpeachable evidence of a single witness, unless such witness or his evidence needs to be corroborated as a matter of law. The prosecution, where there is no requirement of corroboration as a matter of law, does not need to call a host of witnesses once the credible evidence of a single witness proves all the ingredients of the offence charged. There would only be need to call more witnesses whose evidence would sway the court if, and only if, the available evidence does not conclusively prove the ingredients of the offence charged. *(P 118 Paras F– I).*

4. *The principles in the case of the* ***State vs. Azeez & Ors (2008) 14 NWLR (Pt.1108) 439.***
The appellant's counsel had called in aid THE STATE vs. AZEEZ & ORS. (2008) 14 NWLR (pt. 1108) 439; also reported elsewhere as (2008) 4 SC. 188; 3 FWLR 4567 SC. as booster to his submission that if all the vital or material witnesses are not called by the prosecution the case is doomed to

fail. I am afraid this does not represent the *ratio decidendi* of THE STATE vs. AZEEZ (supra). The decision of this Court on this point, per M.D. Muhammad, (JSC) in THE STATE vs. AZEEZ (supra), is that in discharge of the burden of proving a crime beyond reasonable doubt placed by Section 138 (1) of the Evidence Act 1990 (now Section 135(1) of the Evidence Act, 2011));

> **"It is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon (on) the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called".** *(Pp c118 – 119 Paras I – D).*

5. *The Court determines whether the available evidence proves the vital point.*
The "judge" of whose evidence establishes or proves that vital point is the prosecutor. The court will not usurp that function of the prosecutor. All the court, as the final arbiter, is interested in is whether the available evidence proves the vital point – [USUFU vs. THE STATE (2007) 3 NWLR (pt. 1020) 94 at 118 C – E cited by the Appellant, which also held that although the prosecution need not call a host of witnesses on the same point, where there is a vital point in issue and there is a witness whose evidence will settle it one way or the other that witness ought to be called, does no riot to the settled principle of law. *(P 119 Paras D – E)*

6. *The evidence of PW1 does not need corroboration*
Notwithstanding the strenuous efforts expended on the argument that the evidence of PW.1 needed corroboration before it could be acted upon the appellant's counsel never once criticized the concurrent findings of fact by the courts below that the evidence of PW.1 and PW.2, which the learned trial Judge had believed and acted upon, do not need any corroboration. This is contained in the opinion of Owoade, JCA at page 249 of the Record. *(P 119 Paras F – H)*

7. *Effect of concurrent findings of two lower courts*
Where the two courts below have made concurrent findings of fact, which has not been shown to be perverse in any respect, such findings must endure. This court is loathe to interfere in such situation; particularly when the findings are supported by evidence in the printed record and the findings are not perverse. [OGOALA vs. THE STATE (1991) 2 SCNJ 61; (1991) 2 NWLR (pt. 175) 509**; OGUNDIYAN vs. THE STATE** (1991) 4 SCNJ 44; (1991) 3 NWLR (pt. 181) 519)]. *(P 119 Paras H – I.)*

8. *How to contradict a witness using his previous written statement.*
If the appellant had desired to impeach the credit of PW.1 with the previous statement he would have followed the procedure and put in evidence the previous statement in writing. He must, under the Evidence Act, Section 199 of the 1990 (Now Section 232 of the Evidence Act 2011), draw the attention of the witness to his previous statement in writing and thereafter tender it in evidence for purposes of contradicting the witness. The previous statement in writing made by the PW.1 on 3rd May, 1998 is not in evidence. The appellant, therefore, cannot smuggle the contents of that statement by oral evidence. The court cannot also speculate on the contents of a document not before it. The proofs of evidence, like in pleadings in civil proceeding are themselves not evidence. The averments therein must be proved. *(P 120 Para B – Dc)*

9. *The statement of the accused to the police must be in evidence before the court acts on it.*
Per Eko (JSC):

> **The law, as re-stated by Madarikan, (JSC) in OSENI vs. ATTORNEY-GENERAL SC. 202/1968 decided on 16th July, 1969, (See Digest of Supreme Court cases, Vol. 10 at p. 166) where there is a conflict between the written statement made to the police by a witness and his oral evidence in court, the trial judge ought to resolve such conflict before deciding whether to accept the witness's evidence or not. To do that resolution between the extra-judicial statement and the oral evidence both have to be legal evidence before the court. In other words by dint of Section 209 of Evidence Act, 1990 *in***

pari material **with Section 199 Evidence Act, 2004 (now Section 232 of the Evidence Act, 2011) the said previous statement in writing has to be, or must be, produced for the trial court's inspection, before "the court may thereupon make use of it for the purposes of the trial.**

In all the cases where the previous written statement of the witness, made extra-judicially by him, was held to be a contradiction of his testimony in court the previous statement was produced for inspection of the trial court and was duly admitted in evidence as exhibit. In OLADEJO vs. THE STATE (1987)) 4 SC 96; (1987) 3 NWLR (pt. 61) **419 the extra-judicial statements of the witness which contradicted his testimony on oath were produced and admitted in evidence as Exhibits B and D. In EMOGA vs. THE STATE** (1997) 1 NWLR (Pt. 483) 615, **the appellant's extra-judicial statement, Exhibit A, was produced and admitted in evidence in the course of his being cross-examined to show his inconsistency. In OBIRI vs. THE STATE** (1997) 7 NWLR (pt. 513) 352**, the Supreme Court on the application of the appellant allowed the extra-judicial statement of the PW.1, which was very vital for the resolution of a material issue as to whether the PW.1 was an eye witness of the alleged murder, was admitted in evidence as Exhibit S.6. 1. It was found that Exhibit SC.1 violently and substantially contradicted the testimony of the PW.1. It was held that the PW.1 was an unreliable witness, whose evidence could not be relied upon for the conviction and sentence of the appellant. In the circumstance where both sets of evidence from the PW.1 were mutually contradictory in *materia particula* it was not safe for the court to pick and choose which of them was reliable and which was the unreliable version of the incidence. [BOY MUKA vs. THE STATE (1976) 10 SC. 305].** *(P 122 - 123 Paras F – D)*.

10. *How to impeach the credit of a witness with his previous statement*
The law is settled that before the credit of a witness is to be impeached by his previous statement, such previous statement must be produced and put in evidence as an exhibit after the attention of the witness is drawn to it. [SUNDAY vs. THE STATE (2010) 18 NWLR (pt. 1224) 223 at 241].
(P 123 Paras D – E)

11. *A court should not descend into the arena*

Appellant's counsel, trying to wriggle out of the mess, submits on authority of AGBAREH vs. MIMRA (2008) 2 NWLR (pt. 1077) 378 **at** 411-412 **and AGBO vs. THE STATE** (2006) ALL FWLR (pt. 309) 1380 at 1409 1410**, that "a court is entitled to look at a document or documents in its file including the record of appeal before the court". This principle does not entitle the court to descend into the arena and scoop for vital evidence that would discredit or impugn the credit of a material witness for one party. Section 36(1) of the Constitution, 1999, as amended, enjoins every court of law to be independent and impartial. On this note, it is my firm view that the failure of the Appellant to put in evidence the written statement of the PW.1 dated 3rd May, 1998 is fatal to their contention now that the said statement has the effect of discrediting, and had in fact discredited, the PW.1.** *(P 120 Paras D – G)*

12. *The Principles in Udobere vs. State*

The case of UDOBERE vs. THE STATE (2006) 6 SC 1 at 10**, cited by the appellant's counsel is of no moment. It does not advance nor support their present stance. In the UDOBERE case (supra) the extra-judicial statement of the PW.2, which discredited her evidence, was before the trial court and in the admitted evidence.**

It is trite that the decision of a court of law on any disputed point or fact must be on evidence legally before it. Accordingly, a fact neither in the body of the legal evidence nor forming part of the legally admitted evidence cannot be used to contradict any evidence validly before the court. [THE STATE vs. OGBUBUNJO (2001) FWLR (pt. 37) 1097 at 1115 116; (2001) 2 NWLR (pt. 698) 576 at 598 599].

It is not permissible for courts of law to act on facts extraneous to the proceedings, which though may be relevant. *(Pp 120 - 121 Paras G – A).*

13. *A party who alleges that a finding is perverse must show that.*

It is however not enough for a party to assert that the judgment of a law court which enjoys the presumption of regularity by dint of Section 150 Evidence Act, 1990. (Now Section 168 of Evidence Act, 2011), is perverse. He must show how the decision is perverse. The basic rule is, he who asserts must prove.

Per EKO (JSC):

> **"The issue at the trial court and at the Court of Appeal is whether the available evidence proved the offence of armed robbery that the appellant was convicted and sentenced for. As submitted by the respondent, all that the prosecution needed to succeed in this case is proof**
> **i. that theft was committed by the appellant of something;**
> **ii. that in the course of the theft wrongful hurt or wrongful restraint was meted to the victims, owners of the thing stolen, by the accused person, and**
> **iii. that the acts complained of were done in the process of committing theft or in order to commit theft and/or carry away the property by theft".**

[ABDULLAHI vs. THE STATE (2008) 16 LCRN 96].
In the concurrent findings of the two courts below there was no doubt the respondent had proved these ingredients of armed robbery for which the Appellant was convicted and sentenced with the evidence of PW.1, PW.2 and PW.3. There is nothing perverse about these findings of fact".
(P 121 Paras C – I)

14. *Procedure for impeaching the credibility of a witness*
Proofs of evidence, or any portions thereof, can only be used to contradict or impeach the credibility of a witness after due compliance with the procedure set out in Section 209 of the Evidence Act, 2004, *in pari materia* with Sections 199 and 232 respectively of the Evidence Acts 1990 and 2011, which provides:

> **"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".**

It is only by this procedure that the credibility of a witness whose previous statement in writing, which forms part of the proofs of evidence, contradicts his testimony in court can be impeached. [**SAMUEL THEOPHILUS vs. THE STATE (1996) 1 NWLR (pt. 423) 1139].**

A court of law, not being a *Don Quixote,* cannot in the course of doing justice, go all out on its own to scoop from the proofs of evidence, facts which discredit a witness called by a party. *(Pp 123 – 124 Paras F – A).*

15. *Proof of evidence are not judicial evidence*
The proofs of evidence are not themselves pieces of judicial or legal evidence on which the court of law acts on. The proofs of evidence contain the statements or abridged statements made extra-judicially to the Police or the investigator by the complainant, witnesses and/or the accused person which *prima facie* sustain the charge or the allegation against the accused person. For purposes of *audi alteram partem,* proofs of evidence give the accused person notice of the case he is going to meet at the trial. [**S.T. HON: THE LAW OF EVIDENCE IN NIGERIA and also the Court of Appeal adoption of the definition in IBEKWE vs. FRN** (2004) ALL FWLR (pt. 213) 1780: **GODWIN PIUS vs. THE STATE** (2012) LPELR - 9304 – CA]. *(P 124 Paras B – D)*

16. *The purpose of tendering proofs of evidence*
The proofs of evidence, contrary to the submission of appellant's learned counsel, are not themselves judicial or legal evidence. When any portion of the proofs or the previous statement of a witness is tendered in evidence pursuant to Section 209 of the Evidence Act, 2004 (*in pari materia* with Section 232 of the 2011 Evidence Act), the purpose is merely to contradict or impeach the credibility of the witness being cross-examined, and not that it is evidence of the truth of the matters asserted in them. [SAMUEL THEOPHILUS vs. THE STATE (supra)]. *(P 124 Paras D – F)*

17. *Issues of credibility should be left to the trial judge*
In any case, the issue being over flogged here by the appellant's learned counsel is one of the credibility of the PW.1. This court has stated in UDOFIA vs. DPP – SC. 64/1984 of 7th December, 1984 (See Digest of Supreme Court cases Vol. 10 pp. 566-567) that issues of credibility should be left to the judge who saw, heard and believed the witness and that

generally an appellate court is bound by the findings of the trial court especially when the findings relate to credibility of witnesses.
(P 124 Paras F - G)

18. *In a proceedings of a court what is important is legal evidence and not facts extraneous to it.*
Per Eko (JSC):

> **"The flaw in the stance of the appellant's learned counsel before us is the fact that the previous statement of the PW.1, in writing dated 3rd May, 1998 which he relies on to make these submissions on the credibility of the PW.1 viz-a-viz his oral evidence in court, is not any piece of evidence in law that the court can act on. It is left inchoate in the proofs of evidence. It is for this reason that Owoade, (JCA), who read the lead judgment stated at page 252 of the record that "proof of evidence is to criminal trials what pleadings (are) to civil trial". The pleadings themselves are not evidence but averments which must be proved by evidence. I find no criticism by the appellant against this valid statement of law. In adjudication sentiments command no place. Accordingly in adjudication what is material and relevant is legal evidence in the proceedings of the court and not facts that are completely extraneous".** *(Pp 124 - 125 Paras H – A)*

19. *A conclusion or finding not appealed is deemed accepted*
Facts not disputed are taken as established. At page 252 of the records the Court of Appeal finds specifically that "the statement of PW.1 at page 38 of the records that he mentioned the name of the appellant in his statement to the police at Imo on 3rd May, 1998, at the police station except the police did not write it down was positive and consistent reaction to cross-reaction of PW.1", and "that, (the) statement did not indicate any inconsistency with either his evidence-in-chief or his previous statement on the issue". This specific finding of fact has not been appealed or attacked. The law is trite that a conclusion or finding not appealed is deemed correct and acceptable to all the parties. [**BIARIKO vs. EDEH-OGWUILE (2001) 4 SC (pt. 2) 96; IYOHO vs. EFFIONG (2007) 11**

NWLR (pt. 1044) 31; USMAN vs. GARKE (2003) FWLR (Pt. 177) 815]. *(P 125 Paras B – D)*

20. *A witness that gives evidence of the contents of his statement to the Police cannot be said to have given inconsistent statements*
Apart from the general attack on the credibility of PW.1, on the basis of the PW.1's extra-judicial statement of 3rd May, 1998, there was no specific attack or criticism of the above finding of fact by the Court of Appeal by the Appellant's counsel. The stance of Owoade, JCA as I earlier pointed out, is consistent with the dictum of Coker, JSC, and Karibi-Whyte, JSC, in AJAO vs. THE STATE (1984) NSCC. 783 at pages 785 and 789 respectively to the effect that a witness, who at the trial gives details of the contents of his statement to the police, cannot be said to have given inconsistent evidence. *(P 125 Paras D – F)*

21. *Explanation of accused necessary where there is inconsistency between his statement to the police and oral testimony in court.*
The law is that when there appears to be some inconsistency between the oral evidence of the witness and his previous statement in writing, the witness is required to explain the inconsistency in his evidence. [AGWU vs. THE STATE (1965) NMLR 18 At 20].

The PW.1 at page 38 made the required explanation; and the Court of Appeal affirmed it. The PW.1 at the trial gave explanation for what was not in his extra-judicial statement. The trial court found his testimony credible, so also the intermediate court. The issue now is one of credibility which the trial court is the best and the undisputed judge. [NASAMU vs. THE STATE (1979) 6 – 9 SC 153 at 181]. *(P 125 Paras F – H)*

22. *Attorney-General is constitutional empowered to initiate information*
Per – Peter-Odili (JSC):

> **In this instance, the information was initiated by the Attorney-General of Imo State under powers donated to him by Section 211 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria. Within his powers the Attorney General is authorized to have those prosecutorial powers exercised by officers under his office or any counsel he so assigns by Fiat.**

Therefore, when such assignments or delegation take place, the office of the Attorney-General is taken as having performed its constitutional duty and it is not for anyone to go into the minute details of which officer is holding the forth on behalf of the Attorney General. The provisions of Section 211 (1) (a) of the 1999 Constitution are restated hereunder, viz:

Section 211 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria relating to public prosecution provided that:

The Attorney-General of a State shall have the power to initiate and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence created under any law of the House of Assembly.

It is in the light of what has been constitutionally provided for the Attorney-General of a State that the Attorney General can so delegate his powers to officers of his ministry to prosecute and defend matters in court on his behalf, be it criminal or civil. It is therefore within that province that the law officers of the State can decide in the public interest and in a given case who should be charged and with what offence. Therefore the courts take it for granted that if the Director of Public Prosecution has started prosecution, he has done so in accordance with the instruction given him by the Attorney General and it is in that wise that any law officer can sign an information on behalf of the DPP. It follows that it is not for the court or any party to begin fishing into the internal working of the Ministry of Justice to see whether such an instruction has been given and information is accorded validity. M.U.D. Ozomo vs. A. G. Bendel State (1984) 4 NWLR (Pt. 36) 448; Shittu Layiwola & Ors vs. The Queen 4 FSC 119 at 120; Abacha vs. The State (2002) 11 NWLR (Pt. 779) 437; Christopher Awobotu vs. The State (1976); I.U.I.L.R (Pt. 1) 5 at 18 20; Onwuka vs. State (1970) 1 All NLR 9.

This issue here raised is clearly on the area of the hypothetical and academic as no useful purpose can be served where the court has to first satisfy itself that the information that is said to have emanated from the Attorney-General has truly come from there or has got the authority of the Attorney General or that the personnel who has signed the information or charge from the law office of the attorney is really so authorised and what his full names are". *(Pp 128 – 129 Paras F – G)*

23. *Any objection to a charge shall be taken immediately after the charge has been read.*
Section 167 of the Criminal Procedure Law Cap. 31 Vol. 31 Laws of Eastern Nigeria 1963 applicable to Imo State stipulates thus:

> **"Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read out to the accused and not later".**

The interpretation of that provision has been stated again and again to say that the adoption of a wrong method in laying an information at the High Court does not invalidate the charge once it is evident what the intendment of the Attorney General is. What is important is that the accused knows the charge or charges he is faced with or in other words not in doubt why he is in court. I place reliance on the cases of Okaroh vs. The State (1990) 1 NWLR (Pt. 125) 128; Mogaji vs. Nigerian Army (2008) 55 CM 126; Mohammed Sani Abacha vs. The State (2002) 11 NWLR (Pt. 779) 437]. *(P p 129 – 130 Paras H – B)*

24. *Where the appellant understands the charge against him objection to its form will not invalidate the charge*
This court in the case of: **Olatubosun vs. The State 55 NSCQR P., 702,** held thus:

> **"It is on record that the appellant was arraigned and he pleaded not guilty to the one charge of murder with the particulars of the offence clearly read out to him. As rightly submitted by the learned respondent's counsel therefore the appellant no doubt knew that he was facing the charge of murder which was also**

very well known to his counsel. It is sufficient to further state that the appellant was throughout the time of the trial represented by a counsel. Neither himself nor his counsel raised any objection that he could not be charged under Section 319 (1) of the Criminal Code". [Nnakwe vs. State (supra) P. 1 at Pp. 33, 34-35].

The concern herein raised on a defective charge is otiose, belated and goes to no issue. *(P 130 Paras C – F)*

Nigerian Cases Cited in this judgment

Abacha vs. The State (2002) 11 NWLR (Pt. 779) 43;
Abdullahi vs. The State (2008) 16 LCRN 96.
Agbareh vs. Nimra (2008) 2 NWLR (pt. 1077) 308
Agbo vs. The State (2006) ALL FWLR (pt. 309) 1380;
Agwu vs. The state (1965) NMLR 18 At 20.
Ajao vs. The state (1984) NSCC. 783
Akinbinu vs. Oseni (1992) 1 NWLR (pt. 215) 97;
Bamgboye vs. Olanrewaju (1991) 4 NWLR (pt. 184) 132;
Biariko vs. Edeh-Ogwuile (2001) 4 SC (pt. 2) 96;
Boy Muka vs. The State (1976) 10 SC. 305.
Christopher Awobotu vs. The State (1976); I.U.I.L.R (Pt. 1) 5;
Emoga vs. The State (1997) 1 NWLR (Pt. 483) 615,
Godwin Pius vs. The State (2012) LPELR -9304 – CA.
Ibekwe vs. FRN (2004) ALL FWLR (pt. 213) 1780:
Iheanacho vs. Ejiogu (1995) 4 NWLR (Pt. 389) 324,
ISA vs. State (2010) 16 NWLR (pt. 1218)-
Iyoho vs. Effiong (2007) 11 NWLR (pt. 1044) 31;
Labiyi vs. Anretiola (1992) 10 SCNJ 1.
M.U.D. Ozomo vs. A. G. Bendel State (1984) 4 NWLR (Pt. 36) 448;
Modupe vs. State (1988) 4 NWLR (pt. 57) 131;
Mogaji vs. Nigerian Army (2008) 55 CM 126;
Mohammed Sani Abacha vs. The State (2002) 11 NWLR (Pt. 779) 437.
Nasamu vs. The State (1979) 6 – 9 SC 153.
Obiri vs. The State (1997) 7 NWLR (pt. 513) 352
Ogoala vs. The State (1991) 2 SCNJ 61 (1991) 2 NWLR (pt. 175) 509;

Ogundiyan vs. The State (1991) 4 SCNJ 44; (1991) 3 NWLR (pt. 181) 519).
Okaroh vs. The State (1990) 1 NWLR (Pt. 125) 128;
Okpalla vs. Ibeme (1989) NWLR (pt. 102) 208;
Oladejo vs. The State (1987)) 4 SC 96; (1987) NWLR (pt. 61) 419
Onwuka vs. State (1970) 1 All NLR 9.
Oseni vs. Akinbinu (1992) 23 NSCC (pt. 1) 22;
Oseni vs. Attorney-General SC. 202/1968
Osinupebi vs. Saibu (1982) 7 SC. 104 At 110-111.
Port Harcourt City LG vs. Ekeoha (2008) ALL FWLR (pt. 422) 1174 At 1192.
Samuel Theophilus vs. The State (1996) 1 NWLR (pt. 423) 1139.
Shittu Layiwola & Ors vs. The Queen 4 FSC 119;
Sunday vs. The State (2010) 18 NWLR(pt. 1224) 223.
The State vs. Azeez & ORS. (2008) NWLR 14 (pt. 1108) 451;
The State vs. Ogbubunjo (2001) FWLR (pt. 37) 1097; (2001) 2 NWLR (pt. 698) 576 at 598 599.
Udobere vs. The State (2006) 6 SC 1,
Ugo vs. Obiekwe (1989) 1 NWLR (pt. 89) 566;
Usman vs. Garke (2003) FWLR (Pt. 177) 815.
Usufu vs. The State (2007) 1 NWLR (pt. 1020) 94

Nigerian Statutes Cited in this Judgment
Criminal Code Law – S. 319(1)
Evidence Act (2011) – S. 199,
Evidence Act, 2011) – S. 168
Robbery and Firearms (Special Provision) Act Cap 398 – S. 1(b)
The 1999 Constitution of the Federal Republic of Nigeria – S. 211(1)(a)
The Constitution, 1999, as amended – S. 36(1)
The Criminal Procedure Law Cap. 31 Vol. 31 Laws of Eastern Nigeria 1963 – S. 167
The Evidence Act 2011) – S. 232
The Evidence Act, 2004 – S. 209
The Evidence Act, 2011) – S. 135(1) ;

Representations
D.O. Agbo. (Esq.), with M.O. Akoh, (Esq.), for the appellant
K.C. Nwokorie, Asst. Director, MOJ, Imo State, for the respondent.

EJEMBI EKO, (JSC) (Delivering the Lead Judgment): On the charge **No. HOW/ART/11/99** the appellant and two others were tried for the offence of armed robbery contrary to **Section 1(b) of the Robbery and Firearms (Special Provisions) Act Cap 398 LFN, 1990**, before the High Court of Imo State presided by J.O.H. Ukachukwu, J. The prosecution commenced evidence on 29th October, 1999. Before then the appellant had on 31st August, 1999 pleaded not guilty to the charge amended at the instance of E.E. Ibe, senior legal officer, prosecuting officer on behalf of the Attorney-General of Imo State. The charge, at page 20 of the records, was substituted by leave of court, as can be gleaned from page 31 of the records. At the close of the prosecution's case the appellant testified as his sole defence witness, following the dismissal of the appellant's no case submission on 27th April, 2004.

On 19th June, 2006 the learned trial judge, after hearing final addresses of the parties, adjourned the proceedings to 28th September, 2006 for judgment; which judgment was delivered on the said 28th September, 2006. The appellant was convicted and sentenced for the offence of armed robbery. On 8th November, 2006 the appellant lodged his appeal against his conviction and sentence to the court below. The appeal was heard by the court below sitting at Owerri. The court below, in its unanimous judgment delivered on 18th May, 2012, dismissed the appeal of the appellant and affirmed both the conviction and sentence by the trial High Court relating to the appellant. This further appeal has arisen from the said decision of the Court of Appeal, Owerri dismissing the appellant's appeal.

On 17th November, 2016 this Court heard this appeal. The appellant's counsel and the respondent's are *ad idem* on the three issues formulated by the appellant's counsel for the determination of this appeal. The issues are:

> **"i. whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.**
>
> **ii. whether the learned justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eye witness account of the victim (PW.1) was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (ground one of the appeal).**

iii. whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law? (grounds two and three of the appeal)".

The notice of appeal, at pages 257-260 of the records, has three (3) grounds of appeal. Issues 2 and 3, reproduced above, have been formulated from the 3 grounds of appeal. Now, the question: from which ground of appeal has issue 1 been formulated or arisen? I can not see any. And it is crystal clear, *e*x *facie* Issue 1, that the said Issue 1 has not arisen from any ground(s) of appeal against the decision of the Court of Appeal, the appellant is complaining against. It is now settled beyond question that any issue raised and argument advanced on an issue not arising from a ground of appeal is incompetent. ***See* OKPALLA vs. IBEME (1989) NWLR (pt. 102) 208; OSINUPEBI vs. SAIBU (1982) 7 SC. 104 At 110-111.** Issues for determination of appeal are not, in appellate courts, formulated from the clouds or nowhere. *See* **IHEANACHO vs. EJIOGU (1995) 4 NWLR (Pt. 389) 324, PORT HARCOURT CITY LG vs. EKEOHA (2008) ALL FWLR (pt. 422) 1174 at 1192.** The law and practice in the appellate courts, are now well settled that issues for determination are formulated from and on the basis of the grounds of appeal filed. An Issue formulated must therefore not only relate to the ground(s), it must fall within the existing ground(s) of appeal challenging the correctness of the judgment appealed. *See* **MODUPE vs. STATE (1988) 4 NWLR (pt. 57) 131; UGO vs. OBIEKWE (1989) 1 NWLR (pt. 89) 566; AKINBINU vs. OSENI (1992) 1 NWLR (pt. 215) 97; OSENI vs. AKINBINU (1992) 23 NSCC (pt. 1) 22; BAMGBOYE vs. OLANREWAJU (1991) 4 NWLR (pt. 184) 132 at 152; LABIYI vs. ANRETIOLA (1992) 10 SCNJ 1.** An issue raised *in vacou,* or which has been raised and argued from no ground of appeal is not only incompetent, it is completely irrelevant and extraneous. It is for this reason that this court maintains the stance or policy that an issue raised or formulated from nowhere or no ground of appeal must certainly be discountenanced. See **AKINBINU vs. OSENI** (supra).

The totality of all I have been saying, so far, is that Issue 1, raised and argued by the parties, particularly the appellant, being incompetent and irrelevant must be and it is hereby struck out and all arguments in relation thereto are discountenanced.

The main thrust of Issue 2 is whether the evidence of the PW.1, as an eye witness, was unchallenged and uncontradicted, and therefore reliable and believable to have been acted upon, as the learned trial Judge did. The Court of Appeal had unanimously affirmed the conviction and sentence of the appellant on the basis of the eye-witness account of the PW.1, which the trial court found reliable and sufficiently credible to sustain the conviction of the appellant. That court further found that the evidence of PW.1 was corroborated by the evidence of the PW.2, even though there is nothing in law which obliged the trial court "to find further corroboration to the eye witness account of the PW.1 which had already fixed the appellant with the crime". Relying on **OKORO vs. STATE (1998) 14 NWLR (pt. 584) 181 at 216; ADELUMOLA vs. THE STATE (1988) 1 NWLR (pt. 73) 683 at 691; ANTHONY IGBO vs. THE STATE (1975) 1 ALL NLR (pt. 2) 70 at 75; ALI & ANOR vs. THE STATE (1988) NWLR (pt. 68) 1 and EMINE vs. THE STATE (1991) 7 NWLR (pt. 204) 480;** the Court of Appeal opined, correctly in law, that no law says that an accused person can be convicted on the clear and unimpeachable evidence of a single witness, and such evidence does not require corroboration. I agree entirely. The appellants counsel also concedes this lucid position of the law.

Appellant, however argues that "the eye witness account of PW.1 was tainted with doubts which ought to have been resolved in favour of the appellant". Counsel appears to labour heavily under some misconception in his argument; that even though in proof of the ingredients of crime, the prosecution is not obliged to call a host of witnesses; the failure to call those vital witnesses could weaken the case of the prosecution as it could create reasonable doubt. **ISA vs. STATE (2010) 16 NWLR (pt. 1218),** relied heavily for this robust submission, does not repudiate the age old principle that an accused can be convicted on a clear and unimpeachable evidence of a single witness, unless such witness or his evidence needs to be corroborated as a matter of law. The prosecution, where there is no requirement of corroboration as a matter of law, does not need to call a host of witnesses once the credible evidence of a single witness proves all the ingredients of the offence charged. There would only be need to call more witnesses whose evidence would sway the court if, and only if, the available evidence does not conclusively prove the ingredients of the offence charged.

The appellant's counsel had called in aid **THE STATE vs. AZEEZ & ORS. (2008) 14 (pt. 1108) 451;** also reported elsewhere as **(2008) 4 SC. 188; 3**

FWLR 4567 SC. as booster to his submission that if all the vital or material witnesses are not called by the prosecution the case is doomed to fail. I am afraid this does not represent the *ratio decidendi* of **THE STATE vs. AZEEZ (supra).** The decision of this **c**ourt on this point, per M.D. Muhammad, JSC in the **THE STATE vs. AZEEZ (supra),** is that in discharge of the burden of proving a crime beyond reasonable doubt placed by Section 138 (1) of the Evidence Act 1990 (now Section 135(1) of the Evidence Act, 2011));

> **"it is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon (on) the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called".**

The "Judge" of whose evidence establishes or proves that vital point is the prosecutor. The court will not usurp that function of the prosecutor. All the court, as the final arbiter, is interested in is whether the available evidence proves the vital point **USUFU vs. THE STATE (2007) 1 NWLR (pt. 1020) 94 at 118 C – E** cited by the appellant, which also held that although the prosecution need not call a host of witnesses on the same point, *where there is a vital point in issue and there is a witness whose evidence will settle it one way or the other* that witness ought to be called, does no riot to the settled principle of law.

Notwithstanding the strenuous efforts expended on the argument that the evidence of PW.1 needed corroboration before it could be acted upon the appellant's counsel never once criticized the concurrent findings of fact by the courts below that the evidence of PW.1 and PW.2, which the learned trial judge had believed and acted upon, do not need any corroboration. This is contained in the opinion of Owoade, JCA at page 249 of the record.

Where the two courts below have made concurrent findings of fact, which has not been shown to be perverse in any respect, such findings must endure. This court is loathe to interfere in such situation; particularly when the findings are supported by evidence in the printed record and the findings are not perverse. *See* **OGOALA vs. THE STATE (1991) 2 SCNJ 61; (1991) 2 NWLR (pt. 175) 509; OGUNDIYAN vs. THE STATE (1991) 4 SCNJ 44; (1991) 3 NWLR (pt. 181) 519).**

Appellant's learned counsel submits that the extra-judicial statement of the PW.1 made on 3rd May, 1998 does discredit his testimony particularly that at the earliest opportunity the PW.1 failed or refused to mention the names of his assailants. He, however, concedes that this previous statement of the PW.1 is not in evidence. If the appellant had desired to impeach the credit of PW.1 with the previous statement he would have followed the procedure and put in evidence the previous statement in writing. He must, under the Evidence Act, Section 199 of the 1990 (Now Section 232 of the Evidence Act 2011), draw the attention of the witness to his previous statement in writing and thereafter tender it in evidence for purposes of contradicting the witness. The previous statement in writing made by the PW.1 on 3rd May, 1998 is not in evidence. The appellant, therefore, cannot smuggle the contents of that statement by oral evidence. The court cannot also speculate on the content of a document not before it. The proofs of evidence, like in pleadings in civil proceeding are themselves not evidence. The averments therein must be proved.

Appellant's counsel, trying to wriggle out of the mess, submits on authority of **AGBAREH vs. NIMRA (2008) 2 NWLR (pt. 1077) 308 at 411-412 and AGBO vs. THE STATE (2006) ALL FWLR (pt. 309) 1380 at 1409 1410,** that "a court is entitled to look at a document or documents in its file including the record of appeal before the court". This principle does not entitle the court to descend into the arena and scoop for vital evidence that would discredit or impugn the credit of a material witness for one party. Section 36(1) of the **c**onstitution, 1999, as amended, enjoins every court of law to be independent and impartial. On this note, it is my firm view that the failure of the appellant to put in evidence the written statement of the PW.1 dated 3rd May, 1998 is fatal to their contention now that the said statement has the effect of discrediting, and had in fact discredited, the PW.1. The case of **UDOBERE vs. THE STATE (2006) 6 SC 1 at 10,** cited by the appellant's counsel is of no moment. It does not advance nor support their present stance. In the **UDOBERE case (supra)** the extra-judicial statement of the PW.2, which discredited her evidence, was before the trial court and in the admitted evidence. It is trite that the decision of a court of law on any disputed point or fact must be on evidence legally before it. Accordingly, a fact neither in the body of the legal evidence nor forming part of the legally admitted evidence cannot be used to contradict any evidence validly before the court. See **THE STATE vs. OGBUBUNJO (2001) FWLR (pt. 37) 1097 at 1115 – 116; (2001) 2 NWLR (pt. 698) 576 at 598 – 599.** It is not

permissible for courts of law to act on facts extraneous to the proceedings, which though may be relevant.

Appellant's counsel, on the concurrent finding of fact that the evidence of the PW.1 had pinned and fixed the appellant to the scene of crime, submits that the concurrent findings are perverse. He further submits that it is not enough, without proper evaluation, for the courts to believe the PW.1 on this – relying on **HAMZA vs. KURE (201O) All FWLR (PT. 539) 1070 at 1087.** Learned Counsel submits further that when a decision is perverse, the appellate court can intervene in the interest of justice and set it aside. That undoubtedly is the law. *See* **NEPA vs. OSOSANYA (2004) 1 SC (pt. 1) 159 at 175; AGBOMEJI vs. BAKARE (1998) 7 SC (pt. 10) 10.** It is however not enough for a party to assert that the judgment of a law court which enjoys the presumption of regularity by dint of Section 150 Evidence Act, 1990. (Now Section 168 of Evidence Act, 2011), is perverse. He must show how the decision is perverse. The basic rule is, he who asserts must prove.

The issue at the trial court and at the Court of Appeal is whether the available evidence proved the offence of armed robbery that the appellant was convicted and sentenced for. As submitted by the respondent, all that the prosecution needed to succeed in this case is proof:

> **"i. that theft was committed by the appellant of something;**
> **ii. that in the course of the theft wrongful hurt or wrongful restraint was meted to the victims, owners of the thing stolen, by the accused person, and**
> **iii. that the acts complained of were done in the process of committing theft or in order to commit theft and/or carry away the property by theft".**

See **ABDULLAHI vs. THE STATE (2008) 16 LCRN 96.** In the concurrent findings of the two courts below there was no doubt the respondent had proved these ingredients of armed robbery for which the appellant was convicted and sentenced with the evidence of PW.1, PW.2 and PW.3. There is nothing perverse about these findings of fact.

Issue 2 is accordingly resolved against the appellant.

The appellant contends, under Issue 3, that notwithstanding that the prosecution at the trial court did not prove beyond reasonable doubt the offence of

armed robbery against the appellant, as the law requires them to, the conviction of the appellant was affirmed by the court below. The basis for this contention is that the P/W.1's extra-judicial statement made on 3rd May, 1998 at the police station had discredited the witness (PW.1). The PW.1 was cross-examined and his reply on that statement is

> **"I know I mentioned the name of the 1st accused (appellant) unless police did not write it down. The statement was read over to me after it was made. I signed the statement".**

Appellant's learned counsel submits that the failure of the PW.1, at the earliest opportunity, to mention the name of the appellant to the police officers and in the written statement he had made at the police station has raised serious doubt whether the PW.1 ever mentioned the name of the appellant on 3rd May, 1998. The extra-judicial written statement of the PW.1 forms part of the proofs of evidence, and it is at page 24 of the records of appeal. Counsel made similar submissions at the trial court as can be seen at pages 129 and 130 of the Record. The statement was not tendered in evidence. The appellant had the opportunity to have tendered it in evidence for the purpose of contradicting the PW.1 and thereby impeaching his credibility. They however never did so.

The law, as re-stated by Madarikan, JSC in **OSENI vs. ATTORNEY-GENERAL SC. 202/1968** decided on 16th July, 1969, (see Digest of Supreme Court cases, Vol. 10 at p. 166) where there is a conflict between the written statement made to the police by a witness and his oral evidence in court, the trial judge ought to resolve such conflict before deciding whether to accept the witness's evidence or not. To do that resolution between the extra-judicial statement and the oral evidence both have to be legal evidence before the court. In other words by dint of section 209 of Evidence Act, 1990 *in pari material* with Section 199 Evidence Act, 2004 (now Section 232 of the Evidence Act, 2011) the said previous statement in writing has to be, or must be, produced for the trial court's inspection, before "the court may thereupon make use of it for the purposes of the trial".

In all the cases where the previous written statement of the witness, made extra-judicially by him, was held to be a contradiction of his testimony in court the previous statement was produced for inspection of the trial court and was duly admitted in evidence as exhibit. In **OLADEJO vs. THE STATE (1987)) 4 SC**

96; (1987) NWLR (pt. 61) 419 the extra-judicial statements of the witness which contradicted his testimony on oath were produced and admitted in evidence as Exhibits **B** and **D.** In **EMOGA vs. THE STATE (1997) 1 NWLR (Pt. 483) 615,** the appellant's extra-judicial statement, Exhibit **A,** was produced and admitted in evidence in the course of his being cross-examined to show his inconsistency. In **OBIRI vs. THE STATE (1997) 7 NWLR (pt. 513) 352,** the Supreme Court on the application of the appellant allowed the extra-judicial statement of the PW.1, which was very vital for the resolution of a material issue as to whether the PW.1 was an eye witness of the alleged murder, was admitted in evidence as Exhibit SC. 1. It was found that Exhibit SC.1 violently and substantially contradicted the testimony of the PW.1. I was held that the PW.1 was an unreliable witness, whose evidence could not be relied upon for the conviction and sentence of the appellant. In the circumstance where both sets of evidence from the PW.1 were mutually contradictory in *materia particula* it was not safe for the court to pick and choose which of them was reliable and which was the unreliable version of the incidence. See: **BOY MUKA vs. THE STATE (1976) 10 SC. 305.** The law is settled that before the credit of a witness is to be impeached by his previous statement, such previous statement must be produced and put in evidence as an exhibit after the attention of the witness is drawn to it. See **SUNDAY vs. THE STATE (2010) 18 NWLR (pt. 1224) 223 at 241.**

Proofs of evidence, or any portions thereof, can only be used to contradict or impeach the credibility of a witness after due compliance with the procedure set out in Section 209 of the Evidence Act, 2004, *in pari materia* with Sections 199 and 232 respectively of the Evidence Acts 1990 and 2011, which provides:

> **"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".**

It is only by this procedure that the credibility of a witness whose previous statement in writing, which forms part of the proofs of evidence, contradicts his testimony in court can be impeached. *See* **SAMUEL THEOPHILUS vs. THE**

STATE (1996) 1 NWLR (pt. 423) 1139. A court of law, not being a *Don Quixote,* can not in the course of doing justice, go all out on its own to scoop from the proofs of evidence, facts which discredit a witness called by a party. The proofs of evidence are not themselves pieces of judicial or legal evidence on which the court of law acts on. The proofs of evidence contain the statements or abridged statements made extra-judicially to the police or the investigator by the complainant, witnesses and/or the accused person which *prima facie* sustain the charge or the allegation against the accused person. For purposes of *audi alteram partem,* proofs of evidence give the accused person notice of the case he is going to meet at the trial. See: **S.T. HON: THE LAW OF EVIDENCE IN NIGERIA** and also the Court of Appeal adoption of the definition in **IBEKWE vs. FRN (2004) ALL FWLR (pt. 213) 1780: GODWIN PIUS vs. THE STATE (2012) LPELR-9304 CA.**

The proofs of evidence, contrary to the submission of appellant's learned counsel, are not themselves judicial or legal evidence. When any portion of the proofs or the previous statement of a witness is tendered in evidence pursuant to Section 209 of the Evidence Act, 2004 (*in pari materia* with Section 232 of the 2011 Evidence Act), the purpose is merely to contradict or impeach the credibility of the witness being cross-examined, and not that it is evidence of the truth of the matters asserted in them. *See* **SAMUEL THEOPHILUS vs. THE STATE (supra).**

In any case, the issue being over flogged here by the appellant's Learned counsel is one of the credibility of the PW.1. This court has stated in **UDOFIA vs. DPP SC. 64/1984** of 7th December, 1984 (See Digest of Supreme Court cases Vol. 10 pp. 566-567) that issues of credibility should be left to the Judge who saw, heard and believed the witness and that generally an appellate court is bound by the findings of the trial court especially when the findings relate to credibility of witnesses.

The flaw in the stance of the appellant's learned counsel before us is the fact that the previous statement of the PW.1, in writing dated 3rd May, 1998 which he relies on to make these submissions on the credibility of the PW.1 viz-a-viz his oral evidence in court, is not any piece of evidence in law that the court can act on. It is left inchoate in the proofs of evidence. It is for this reason that Owoade, JCA, who read the lead judgment stated at page 252 of the record that "proof of evidence is to criminal trials what pleadings (are) to civil trial". The pleadings themselves are not evidence but averments which must be proved by evidence. I

find no criticism by the appellant against this valid statement of law. In adjudication sentiments command no place. Accordingly in adjudication what is material and relevant is legal evidence in the proceedings of the court and not facts that are completely extraneous.

Facts not disputed are taken as established. At page 252 of the records the Court of Appeal finds specifically that "the statement of PW.1 at page 38 of the records that he mentioned the name of the appellant in his statement to the police at Imo on 3rd May, 1998, at the police station except the police did not write it down was positive and consistent reaction to cross-reaction of PW.1", and "that, (the) statement did not indicate any inconsistency with either his evidence-in-chief or his previous statement on the issue". This specific finding of fact has not been appealed or attacked. The law is trite that a conclusion or finding not appealed is deemed correct and acceptable to all the parties. *See* **BIARIKO vs. EDEH-OGWUILE (2001) 4 SC (pt. 2) 96; IYOHO vs. EFFIONG (2007) 11 NWLR (pt. 1044) 31; USMAN vs. GARKE (2003) FWLR (Pt. 177) 815.** Apart from the general attack on the credibility of PW.1, on the basis of the PW.1's extra-judicial statement of 3rd May, 1998, there was no specific attack or criticism of the above finding of fact by the Court of Appeal by the appellant's counsel. The stance of Owoade, JCA as I earlier pointed out, is consistent with the dictum of Coker, JSC, and Karibi-Whyte, JSC, in **AJAO vs. THE STATE** (1984) NSCC. 783 at pages 785 and 789 respectively to the effect that a witness, who at the trial gives details of the contents of his statement to the police, cannot be said to have given inconsistent evidence.

The law is that when there appears to be some inconsistency between the oral evidence of the witness and his previous statement in writing, the witness is required to explain the inconsistency in his evidence. See **AGWU vs. THE STATE** (1965) NMLR 18 At 20**.** The PW.1 at page 38 made the required explanation; and the Court of Appeal affirmed it. The PW.1 at the trial gave explanation for what was not in his extra-judicial statement. The trial court found his testimony credible, so also the intermediate court. The issue now is one of credibility which the trial court is the best and the undisputed Judge. See **NASAMU vs. THE STATE (1979) 6 – 9 SC 153 at 181.** I find no merit or substance in this third issue argued for the appellant by his counsel.

This appeal has no substance and it is hereby dismissed in its entirely by me. The conviction and sentence of the appellant contained in the judgment of the trial court in the case No. **HOW/ART/1199** delivered on 28th September,

A 2006, and the judgment of the Court of Appeal, Owerri Division in the appeal **No. CA/PH/417[A]/2007** delivered on 18th May, 2012 affirming the said conviction and sentence of the appellant are hereby affirmed by me.

Appeal dismissed.

B **Ejembi Eko,**
Justice, Supreme Court

I.T. MUHAMMAD, (JSC): My learned brother, Eko, JSC, permitted me to read
C 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 herein.

Ibrahim Tanko Muhammad,
D ***Justice, Supreme Court.***

PETER-ODILI, (JSC): I am in agreement with the judgment, just delivered by my learned brother, Ejembi Eko (JSC) and to register my support for the
E reasoning, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal Port Harcourt Division delivered on the 18th May, 2012 which said judgment affirmed the conviction and sentence of the appellant.

F

BACKGROUND FACTS:

The appellant and two other persons were tried for the offence of armed robbery by the High Court Imo State Owerri Judicial Division Coram: A.O.H.
G Ukachukwu J. The appellant pleaded not guilty to the charge and hearing commenced with Vitalis Abaneke tetsifyig as PW1 as victim of the crime with PW2 and PW3, the Investigating Police Officer and Medical Doctor respectively giving evidence with the medical doctor testifying of treating PW1 for injuries.

H The appellant denied the commission of the offence and raised an alibi in the dock for the first time during trial which the court rejected as belated.

In the end, the trial court convicted and sentenced the appellant to death. His appeal to the Court of Appeal was dismissed and so appellant has come before
I this court on appeal.

D. O. Agbo, learned counsel for the appellant on the 17th day of November, 2016 date of hearing adopted appellant's brief filed on 30/9/13 and deemed filed on 28/5/2014. In the Brief were raised three issues for determination which are

thus:

i) **Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.**

ii) **Whether the learned Justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that eye witness account of the victim (PW1) was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant. (ground one of the appeal).**

iii) **Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law. (grounds two & three of the appeal).**

K. C. Nwokorie, Esq. Assistant Director, ADR Department of the Ministry of Justice, Imo State, counsel for the respondent adopted its brief of argument filed on 10/6/2014 and also adopted the issues as identified by the appellant.

I shall make use of the issues as crafted, though utilising Issues 1 and 3 as they are questions best suited for the determination of the offence.

ISSUE NO. 1

Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.

Mr. Agbo of counsel for the appellant submitted that there is a fundamental defect in the legal process initiating the charge against the accused/appellant as the information was not signed by the law officer whose name can be ascertained or identified on the roll of register of legal practitioners entitled to practice law in Nigeria. He cited **Section 2 & 4 of the Criminal Procedure (miscellaneous Provisions) Edict, 1974; Section 2(1) of the Legal Practitioners Act Cap. 207 L.F.N. 1990 (as amended); Okafor vs. Nweke (2007) 10 NWLR (Pt. 1043) 512 at 533 etc.**

That a court process which information is one, must only be signed by legal practitioner known to law and where a person signs a process without

disclosing his name, designation and office as in this case, such a process is grossly incompetent.

Learned counsel contended that if a process is incompetent, the court is also incompetent and lacks the jurisdiction to entertain it. He cited **S. I. B. Consortium Ltd vs. NNPC (2011) 9 NWLR (Pt. 1252) 317 at 337 338; Nwanna vs.UBA Plc (2003) 16 NWLR (Pt. 846) 218.**

Mr. Nwokorie, learned counsel for the respondent reacted by submitting that the information was initiated by the Attorney General of Imo State and so the process was commenced within the stipulations of the enabling statutes. He cited **Section 211 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria, Section 2(3) 6(1) of the Legal Practitioners Act; Section 341 & 342 of the Criminal Procedure Law 1963 Eastern Nigeria as applicable to Imo State of Nigeria; Ozomo vs. A.G. Benedel State (1984) 4 NWLR (Pt. 36) 448; State vs. Illorin (1983) 1 SCNLR 14 etc.**

In a nutshell, the appellant posits that the information on which he was charged signed by an unidentified law officer in fundamentally defective robbery the trial court of the jurisdiction to entertain it or in the alternative to discharge and acquit the appellant.

The respondent's position from the other side is that the issue of lack of competence of the charged initiated by an unidentified law officer is belated and there is no infraction of the Criminal Procedure Laws, specifically Section 167.

In this instance, the information was initiated by the Attorney-General of Imo State under powers donated to him by Section 211 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria within his powers the Attorney General is authorized to have those prosecutorial powers exercised by officers under his office or any counsel he so assigns by Fiat. Therefore, when such assignments or delegation take place, the office of the Attorney-General is taken as having performed its constitutional duty and it is not for anyone to go into the minute details of which officer is holding the forth on behalf of the Attorney General. The provisions of Section 211 (1) (a) of the 1999 Constitution are restated hereunder, viz:

> **Section 211 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria relating to public prosecution provided that:**

> **The Attorney-General of a State shall have the power to initiate and undertake criminal proceedings against any person before any court of law in Nigeria other than a court of law in Nigeria other than a court martial in respect of any offence created under any law of the House of Assembly.**

It is in the light of what has been constitutionally provided for the Attorney-General of a State that the Attorney General can so delegate his powers to officers of his ministry to prosecute and defend matters in court on his behalf, be it criminal or civil. It is therefore within that province that the law officers of the State can decide in the public interest and in a given case who should be charged and with what office. Therefore the courts take it for granted that if the Director of Public Prosecution has started prosecution, he has done so in accordance with the instruction given him by the Attorney General and it is in that wise that any law officer can sign an information on behalf of the DPP. It follows that it is not for the court or any party to begin fishing into the internal working of the Ministry of Justice to see whether such an instruction has been given and information is accorded validity. See **M.U.D. Ozomo vs. A. G. Bendel State (1984) 4 NWLR (Pt. 36) 448; Shittu Layiwola & Ors vs. The Queen 4 FSC 119 at 120; Abacha v The State (2002) 11 NWLR (Pt. 779) 43; Christopher Awobotu vs. The State (1976); I.U.I.L.R (Pt. 1) 5 at 18 – 20; Onwuka vs. State (1970) 1 All NLR 9.**

This issue here raised is clearly on the area of the hypothetical and academic as no useful purpose can be served where the court has to first satisfy itself that the information that is said to have emanated from the Attorney-General has truly come from there or has got the authority of the Attorney General or that the personnel who has signed the information or charge from that law office of the attorney is really so authorised and what his full names are.

Section 167 of the Criminal Procedure Law Cap. 31 Vol. 31 Laws of Eastern Nigeria 1963 applicable to Imo State stipulates thus:

> **"Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read out to the accused and not later".**

The interpretation of that provision has been stated again and again to say that the adoption of a wrong method in laying an information at the High Court does not invalidate the charge once it is evident what the intendment of the Attorney General is. What is important is that the accused knows the charge or charges he is faced with or in other words not in doubt why he is in court. I place reliance on the cases of **Okaroh vs. The State (1990) 1 NWLR (Pt. 125) 128; Mogaji vs. Nigerian Army (2008) 55 CM 126; Mohammed Sani Abacha vs. The State (2002) 11 NWLR (Pt. 779) 437.**

For effect this court in the case of: **Olatubosun vs. The State** 55 NSCQR P., 702, held thus:

> **"It is on record that the appellant was arraigned and he pleaded not guilty to the one charge of murder with the particulars of the offence clearly read out to him. As rightly submitted by the learned respondent's counsel therefore the appellant no doubt knew that he was facing the charge of murder which was also very well know to his counsel. It is sufficient to further state that the appellant was throughout the time of the trial represented by a counsel. Neither himself nor his counsel raised any objection that he could not been charged under Section 319 (1) of the Criminal Code". See also Nnakwe vs. State (supra) P. 1 at Pp. 33, 34-35.**

The concern herein raised on a defective charge is otiose, belated and goes to no issue. This Issue 1 is resolved against the appellant.

ISSUES 2 & 3

These questions whether the Court of Appeal was right to affirm the conviction and sentence of the appellants by the trial court for the offence or armed robbery on the basis that the eye witness account of PW1 was unchallenged, uncontradicted and sufficiently credible to ground the conviction of the appellant. Also if the prosecution proved its case beyond reasonable doubt.

Learned counsel for the appellant contended that it was essential that the family members who knew the appellant and witnessed the incident should have been called to testify. That the failure to call any of the members of PW1's family particularly the wife and eldest son, Pascal was fatal to the prosecution's case. He

A cited **State vs. Azeez (2008) 14 NWLR (Pt. 1108) 451.**

That the finding of the two courts below that the evidence of PW1 pinned down the appellant to the scene of crime is perverse and occasioned a miscarriage of justice which calls for the intervention of this court. He relied on **Hamza vs.**
B **Kure (2010) All FWLR (Pt. 539) 1070 at 1087; NEPA vs. Ososanya (2004) 1 SC (Pt. 1) 159 at 175; Agbomeji vs. Bakare (1998) 7 SC (Pt. 1) 10.**

That the prosecution did not prove the offence of armed robbery against the appellant beyond reasonable doubt. That PW1 made a statement at the police
C station in Ibo language the very day of the incident, but under cross-examination in court he said he knew he mentioned the name of the appellant unless the police did not write it down and yet he signed the statement. He did not protest that omission and so this created a doubt which should be resolved in favour of the
D appellant. H**e cited Galadima vs. State (2012) 3 NWLR (Pt. 1333) 610 at 631, Udoebere vs. State (2008) 6 SC 1 at 6.**

Learned counsel for the respondent said from the record of appeal it is obvious that the two courts below exhaustively appraised, assessed and evaluated
E the evidence proffered by the prosecution and defence and made findings of fact before reaching their decisions. He stated that there is no legal obligation on the prosecution to call a host of witnesses to prove its case so long as the prosecution has called enough material witnesses to prove its case and it has the discretion to
F so do. He referred to **Nigerian Airforce vs. Obiosa (2003) SCM 113 at 117; State vs. Olatunji (2003) 14 NWLR (Pt. 839) 138 at 151-152** etc.

That the alibi raised by the appellant collapsed with the positive evidence of the prosecution which pinned the appellant at the scene of crime. He cited
G **Adekunle vs. State (1989) 5 NWLR (Pt. 123) 505.**

The Court of Appeal in a judgment which lead was rendered by Owoade JCA stated as follows:

H **Again, the statement of PW1 at page 38 of the record that he mentioned the name of the appellant in his statement to the police except the police did not write it down was a positive and consistent reaction to cross-examination by PW1. That**
I **statement did not include any inconsistency with either his evidence-in-chief or his previous statements on the issue.**

Finally, on this score, proof of evidence is to criminal trials what pleadings is to civil trials. The proof of evidence in a criminal trial does not have to contain every bit of evidence that prosecution requires as long as it contains relevant and sufficient facts to sustain the case of the prosecution.

In the instant case, the non-inclusion of the statement first made to the police at Iho by PW1 in the proof of evidence does not derogate from the facts proved by the prosecution in the case.

On the whole, I agree with the learned counsel for the respondent that the prosecution proved all the ingredients of the offence of armed robbery against the appellant by the evidence of PW1, PW2 and Pw3.

In particular, the prosecution succeeded in this case to prove:

(i) Theft by the accused person(s);

(ii) The causing of hurt or wrongful restraint on the victims by the accused person(s);

(iii) The act(s) complained of were done in the process of committing the theft or in order to commit the theft and or carry away the property by theft.

What the court below did tallied with the findings and conclusion of the learned trial judge. And on concurrent findings of the two courts below and with the pride of place of the trial court in its unique position, this court had this to say in **Isreal Aruu & Anor vs. Okechukwu Nwobodo 54 NSCQR (Pt. 11) 894- 895.**

"The trial court has the best opportunity of seeing the witness and hearing them give evidence; the court was best placed to assess such evidence based on the demeanour of each witness. The appellate court has not got these opportunities. It only sees written records and counsel who are not legal witnesses. And so, when the Court of Appeal agreed with the findings of fact made by the High Court and affirmed the conviction and sentence of the appellant, the attitude of this court is clear. The concurrent

findings of fact of the courts below will never be disturbed so far as the findings are not tainted with miscarriage of justice".

The Supreme Court is not in the habit of interfering with concurrent findings of two lower courts where there is no reason such as perversity leading to those findings and in that regard those findings remain untouched. See **Habibu Usman vs. The State** (20**14) All FWLR (Pt. 713) 1929; Jimmy vs. The State (2014) All FWLR (Pt. 714) 119.**

The appellant's posture is that inspite of the evidence of PW1, victim of the incident, his wife and children ought to have been called for the proof to be rock solid. That stance flies off the handle in view of not only the evidence of PW1, there were those of PW2 and PW3 from which the trial court as affirmed by the court below could see that the alibi of the appellant not only failed but the appellant was pinned to the scene of crime and actively participated in the commission of the offence. This apart from the fact that the said alibi was not set up at the earliest opportunity when first confronted by the police instead of what he did herein raising the alibi in the witness box and called no witness. *See* **Adekunle vs. The State (1989) 5 NWLR (Pt. 123) 505.**

In conclusion, from the foregoing and the fuller reasoning of my learned brother, Ejembi Eko JSC, I am satisfied that the concurrent findings are well in order and there being no basis for interference, I too dismiss this appeal as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment just delivered by my learned brother, **Ejembi Eko, JSC** 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

ADAMU AUGIE, (JSC): I have had a preview of the lead judgment delivered by my learned brother Eko, (JSC), and i agree with him that the appeal lacks merit.

As he pointed out, there is not much this court can do when an appeal turns on the issue of credibility. It is the trial court that saw the witnesses, heard them and watched their demeanour in court that is in the vantage position to believe or disbelieve the witnesses, and that advantage can never be recaptured by an appellate court.

Thus, the trial court has the liberty and privilege to believe one side or disbelieve the other, and that belief can only be questioned on appeal if it is against the drift of the evidence when considered as a whole – see **Adelumola vs. The State** ***(1988) 1 NWLR (Pt. 73) 683.***

As Oputa, (JSC), so aptly put it in **Adelumbola vs. The State (supra), "for example, we all know that 2 plus 2 makes 4. If a witness testifies that 2 plus 2 makes 5, and he is believed, his arithmetic does not cease to be wrong because the trial court erroneously believed him. There, and in such a case, an appellate court can intervene".**

In this case, the appellant has not proffered any valid reasons to question the findings of the trial court that touches on credibility. It is also settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings will not be disturbed unless there is significant error apparent on the record; that is, the findings are shown to be perverse, or some miscarriage of justice or some violation of principles of law or procedure is shown see Ogoala **vs. The State** ***(1991) 2 NWLR (Pt. 175) 506 SC.*** In this case, there is more than enough evidence established by the Prosecution to support the concurrent findings of the trial court and court below. In the circumstances, this court is not in the position to intervene.

It is for this and the other reasons in the lead judgment that I also dismiss the appeal and affirm the decision of the court below.

Amina Adamu Augie,
Justice, Supreme Court

1. ETUBOM (DR) ANTHONY ASUQUO ANI
2. ETINYIN OKON EFFIONG OFFIONG
3. CHIEF OFFIONG EYO OFFIONG
4. CHIEF EMMANUEL ENIANG OFFIONG
5. ANTHONY ENIANG OFFIONG
APPLICANTS

(*For themselves and on behalf of Ufot Ikot Nkpor Clan, Mbiabo Ikoneto, Odukpani Local Government Area)*

AND

1. ETUBOM EKPO OKON ABASI OTU
2. ETUBOM OTU EFA OTU
(For themselves and representing the Esit Edik Traditional Council)
1st SET OF RESPONDENTS

3. ETUBOM ESSIEN EKPENYONG EFFIOK
4. ETUBOM OKON ASUQUO
5. ETUBOM MICAH ARCHIBONG
(For themselves and representing Etubom's Traditional Council, Obong's Palace)
2nd SET OF RESPONDENTS

SC. 633/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 24TH FEBRUARY, 2014

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Abuse of court process – Where party who filed an incompetent process later files another process on the same matter – Whether the latter process amounts to an abuse of process.

ACTION: Application for leave to appeal – Conditions thereto – Whether conditions are conjuctive or disjunctive.

ACTION: Application for leave to appeal – Grant of leave where necessary, – A condition precedent to proper appeal – Guiding principles.

ACTION: Application for leave to appeal – Duty on applicant.

ACTION: Preliminary Objection – Whether a party who has been served with a notice of preliminary objection is stopped from filing an application to correct the alleged defect complained about.

APPEAL: Notice of Appeal – Fundamental nature of – Considerations thereof.

Appeal: Application for leave to appeal to the Supreme Court – When a party can appeal on concurrent findings of facts of two lower courts – Exception to Or. 2 Rule 32 of the Supreme Court Rules, 1985 (as amended).

APPEAL: Application for leave to appeal to the Supreme Court on the concurrent findings of two courts – Attitude of the Supreme court thereto – Order 2 Rule 32 Supreme Court Rules – Considerations thereof.

APPEAL: Extension of time to appeal to the Supreme Court – Order 2, Rule 31 of Supreme Court Rules 1985 (as amended) – Necessity for the tripod prayers.

*APPEAL: Filing of notice of appeal – An originating process that commences an appeal – Whether can be "**deemed as properly filed and served"**.*

APPEAL: Filing of two notices of appeal in the same matter – Whether an irregularity?

APPEAL: Party who filed an incompetent notice of appeal – Whether party can apply to an appellate court to salvage the said notice of appeal.

APPEAL: Where there is conflict in the findings of two lower courts – Attitude of the Supreme Court in the consideration of an application to appeal on issues of facts.

CASE LAW: Extension of time to appeal – Principles in ***Odofin vs. Agu (1992) 3 NWLR Pt 350*** *– Considerations thereof.*

CONSTITUTIONAL LAW: Right of Appeal – Constitutional right of appeal overrides any negative principles foreclosing it.

CONSTITUTIONAL LAW: Right of appeal – Application for leave to appeal – Where applicant adduces good and substantial reasons – Application not to be refused.

COURT: Mistakes of parties in proceedings – Proper approach to be adopted by court thereto.

JUDGMENT AND ORDERS: Deeming orders – Notice of appeal is not yet filed – Whether brief of arguments, record of appeal and other appellate documents can be deemed as properly filed.

PRACTICE AND PROCEDURE: Filing of two applications – Applicant files a new application while a similar one is still pending – Propriety.

PRACTICE AND PROCEDURE: Two applications in court – One seeking to terminate proceedings – While the other seeking to correct defect – Proper approach of court thereto.

PRACTICE AND PROCEDURE: Where a party has filed an incompetent Notice of appeal – Whether any remedy is available to the party.

PRACTICE AND PROCEDURE: Whether it amounts to abuse of process where a

party who had filed an incompetent notice of appeal decides to file another notice of appeal.

WORDS AND PHRASES: "Overreach" – Meaning.

WORDS AND PHRASES: "Jurisdiction" – Meaning.

Issue for determination

Whether the Supreme Court is competent to entertain the applicants' motion on notice filed on 30th December 2015 on ground that it is an abuse of court's process.

Facts of the Matter

The appellants challenged the nomination and selection of the 1st respondent as **Obong of Calabar, in Suit No. HC/102/2008;** which they filed at the High Court of Cross River State, Calabar.

The learned trial Judge, Ogar, J., delivered his judgment on **30/1/2012,** wherein he found in favour of the apellants and granted the seven reliefs sought, including a declaration that

The presentation and/or selection of the 4th defendant [i.e. the 1st respondent], who was chairman of the Screening Committee for the selection of a candidate for the stool of Obong of Calabar, as a candidate for the Obong of Calabar throne or purported selection of the 4th defendant as the Obong of Calabar elect is contrary to natural justice, equity and good conscience.

Dissatisfied, the 1st set of respondents appealed to the Court of Appeal – in Appeal No**. CA/C/97A/2012.** In its **j**udgment delivered on **4/7/2013,** the Court of Appeal ordered that the 1st applicant, who was not capped/inducted into Etubom's council of the palace at the time of the selection process, was not traditionally qualified and eligible to vote and be voted for as the Obong of Calabar.

The appellants filed an application at the Court of Appeal on **11/9/2013** for leave to appeal, etc, which they later withdrew, but they still filed a notice of appeal in

the Supreme Court on **3/10/2013;** complaining against part of the decision of the Court of Appeal**.**

The respondent filed a preliminary objection challenging the competence of appellant's notice of appeal. When served with the preliminary objection, the appellants filed a fresh application to regularize the notice of appeal. It is the competence of the procedure that the Supreme Court had to decide.

Held: *(unanimously allowing the application)*

1. *The meaning of jurisdiction.*
Jurisdiction is the authority that the court has to decide or take cognizance of matters presented for its decision – Mobil Prod. (Nig.) Unltd. vs. LASEPA *(2002) 18 NWLR* *(Pt. 798) 1. (P 157 Paras E – F)*

2. *The fundamental nature of a notice of appeal*
An appeal, which is the continuation of a case from a trial court, is commenced by notice of appeal. So, the notice of appeal is the foundation of an appeal, and the respondents are right – an incompetent notice of appeal deprives an appellate court of jurisdiction to hear the appeal – See Aderibigbe vs. Abidoye *(2009) 10 NWLR (Pt. 1150) 592 SC,* cited by the 1st set of respondents, where Muhammad, (JSC), explained as follows:

> **A notice of appeal is the spinal cord of an appeal. It is the foundation upon which an appeal is based. 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 proper appeal can stand. It will, certainly, collapse A notice of appeal can be competent and valid if it contains at least one valid ground of appeal. A bare notice of appeal without any ground or grounds of appeal, is valueless and incompetent It is incurably bad. The defect cannot be cured by amendment.**

That is true, but there is room for the appellant to maneuver.
(Pp 157 – 158 Paras F – A)

3. *The import of Order 2 Rule 31 Supreme Court Rules*
Order 2 rule 31 of the rules of this court, provides as follows**:**

> **(1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of justice.**
> **(2) Every application for an enlargement of time in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal and to apply for leave to appeal within the prescribed period.**

In other words, where an appeal requires leave of *c*ourt and the time within which to appeal has also expired, the appellant may apply for extension of time to seek leave to appeal. To this end, it is crucial that an intending appellant files a *tripod application* – a prayer for (a) extension of time to seek leave to appeal; (b) leave to appeal; (c) extension of time to appeal. For there to be a valid appeal, the three reliefs must be granted by the Court – See Odofin vs. Agu *(1992) 3 NWLR (Pt. 229) 350 at 375 SC*.
(P 158 Paras A – E)

4. *The principles in Odofin vs. Agu (1992) 3 NWLR (Pt. 229) 350 at 375.*
In that case, **Odofin vs. Agu** *(supra),* the respondents filed an application at the court below without the said three prayers and it granted the application, heard the appeal, and allowed it.

But the appellants' appeal to this court was allowed because

> **The appellant made his application as prescribed by the rules, but omitted a relevant prayer. That is the prayer extending time to give notice of appeal. This notice is crucial and decisive because the judgment appealed against was decided on 16/5/1985 as admitted on both sides. The three months within which to give notice of appeal expired on the 15th August 1985. Thus,, on the 4th and 21st October, 1985, when the application was made and the Court of Appeal gave the ruling respectively, the appellant was more than six weeks out of time. It was,**

> **therefore, necessary for the court to enlarge the time for giving notice, to have a valid notice of appeal before the court. The notice of appeal against the judgment complained of is the real and constitutional signal of dissatisfaction against the judgment. Where as in this case, the application to appeal was made out of time, a notice of appeal made out of time will require a prayer for enlargement of time within which to file such notice of appeal. In the absence of a notice of appeal, namely, the foundation of the appeal, there is no appeal before the court. [Karibi-Whyte, JSC]** *(Pp 158 – 159 Para F).*

5. *An application in respect of an incompetent notice of appeal*

Piecing the above principles together, the fact that an appellant had filed an incompetent notice of appeal does not preclude him from applying to an appellate court for an extension of time within which to file the notice of appeal, and salvage the appeal – See **Nalsa & Team Associates vs. NNPC** *(supra), (P 159 Para C)*

Per Augie (JSC):

> **In this case, the notice of appeal is incompetent and the applicants are not contesting that fact because in ground II of the grounds for this application, they said they filed it *believing that ground 1 is a ground of law not requiring leave of court",* and as the 2nd set of respondents pointed out, they admitted in paragraph 12 of the affidavit in support of this application that:**
>
> > ***That grounds of appeal all raise grounds of mixed law and facts requiring leave of the honourable court.***

By their own admission, the notice of appeal filed in this court on 3/10/2013, which required leave of court, and which leave was not sought and obtained before it was filed, is incompetent.

But they filed the *"tripod application"* to save their appeal, and this court is now faced with the preliminary objections, which are aimed at determining this application *in limine* and the said application, which

seeks to give life to the said appeal. What to do is the question? In Nalsa & Team Associates vs. NNPC *(supra),* this *c*ourt, per Nnaemeka-Agu, (JSC), held that*:

> **"Where the complaint in the preliminary objection is to the effect that the court has no jurisdiction to hear the appeal at all or that there is no competent appeal before the court, or that a threshold issue is involved, then a fundamental issue which goes to the vires of the court has been raised. When such is the case, it is necessary to note that one of two factual situations may arise. The respondent's motion may be one which is capable of breathing life into the incompetent process. In other words, the erring appellant has realized his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal. When such is the case, although, in the hey days of technicality, the practice was to take the motion, which sought to strike out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he like, I am of the view that that does not accord with the present inclination of the courts to do substantial justice. For, the days of technicality are gone."** *(Pp 159 – 160 Paras D – C)*

6. *Courts should take applications intended to save a process first before one which intends to terminate same.*

> **If, as a reflection of the present mood of courts to do substantial rather than technical justice, a Court of Justice and equity decides to first take a motion which seeks to bring about a competent appeal, where there is ex-facie a proper application for such, before taking the one which seeks to strike out the appeal as incompetent, I can see nothing wrong with the practice. To adopt that course will save both time and expenses. In saying so, I am not unaware that in Awote vs. Owodunni & Anor (1985) 5 NWLR, 941 at 950, my learned brother Oputa, JSC, expressed the opinion that this was not the proper course because as the appeal was**

> **incompetent, *ex nihilo nihil fit* (you can build nothing out of nothing). But with respects, I think the statement was obiter and that, although reflective of the old practice, does not now represent the mood of the court. Now, where there is before the court a proper application to correct the error even if it could have the effect of breathing life into an incompetent appeal, I see nothing wrong with the court taking such an application first.** *(P 160 Paras C – H)*

7. *The right of appeal overrides any negative principles*
In this case, the complaint is that there is no competent appeal before the court, and this court lacks the jurisdiction to hear it. But the fact remains that the applicants have a right of appeal, guaranteed to them by the 1999 Constitution (as amended), which overrides any negative principles aimed at its foreclosing – See Anachebe vs. Ijeoma *(2014) 14 NWLR (Pt 1426) 168,* cited by the appellants, where Ogbubiyi, JSC, aptly observed:

> **It is well settled that a right of appeal is constitutional as is provided in the constitution. The right being constitutional therefore, it stands to override most other negative principles aimed at its fore closing. The rider also stands clear that the exercise of this right is only permissible within limit as provided by law. In other words, the right is lost outside the prescribed statutory period allowed but will only be exercisable by leave of court; hence the reason for seeking an order for leave and extending the time within which to appeal. While the constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will not also hesitate to exercise its discretion in favour thereof provided sufficient materials and reason are contained in the affidavit to justify the exercise."** *(Pp 160 - 161 Paras H – D)*

8. *Preliminary objection does not bar a respondent from correcting mistakes*
The 2nd set of respondents also complained that the appellant had seen the processes they filed in respect of the application of 23/5/2015 before they filed this one, but that is of no moment. The fact that the applicants filed

this application after they had filed a preliminary objection challenging the competency of the said application of 23/5/2015, will not bar the applicants from correcting any errors that will put them on the right footing - See Shanu vs. Afribank *(supra),* where Ayoola, (JSC), clearly stated

> **The contention that this application should not be granted because a preliminary objection has been raised showing the errors in the process of the applicant's appeal is without substance. The applicant is not foreclosed by the preliminary objection from correcting those errors or starting the process afresh on a more appropriate footing.**
> *(P 161 Paras D – H)*

See also **Nalsa & Team Associates vs. NNPC** *(supra),* where this court, per Karibi-Whyte, JSC, also explained as follows:

> **"If a preliminary objection to dismiss an appeal is taken during the pendency of an application to correct the errors on which the preliminary objection is based, the preliminary objection will succeed and the action dismissed. This is because the error remains extant, the question whether the error can be corrected having not been investigated. This is clearly unjust and against our concept of administration of justice. Whenever a party detects an error in which, if uncorrected will adversely affect his chances, and has by application made effort to correct such errors, the principles of justice demand that he should not be denied the opportunity to do so. It will be preposterous to concede to the contention that the error so detected should remain uncorrected, so that the adversary can take advantage of it. It is important to appreciate the basic distinction between hearing an application and granting the prayers in it. Hearing an application does not necessarily mean granting the prayers sought. The prayers sought which if granted may remedy defect in the errors, and render the preliminary objection unnecessary. If rejected, the preliminary objection can be argued."** *(Pp 161 – 162 Paras H – E)*

9. *Applicants not forclosed by preliminary objection*

In this case, there is nothing more that I need to add or explain. Yes, the application filed on 23/5/2015 was still pending when the applicants filed this application on 30/12/2015 but they are not foreclosed by the preliminary objections filed against same, *from starting the process afresh on a more appropriate footing*- See Shanu vs. Afribank *(supra),* which is exactly what they did.

The law makes room for them to realize their mistakes and file an application, which if granted, will correct defects in the notice of appeal, and bring about a valid and competent appeal – see Nalsa Team & Associates vs. NNPC *(supra).* Therefore, the respondents' preliminary objections are overruled and this application filed on 30/12/2015, will be decided on its merits. *(P 162 Paras E – H).*

10. *Attitude of court to application for leave*

The application pertains to leave of court, and whenever leave of court is a condition precedent for exercise of a right, the discretion of the court is implied, and a party applying to the court to exercise its discretionary power in his favour must put up a convincing argument showing that in fact and in law he is entitled to a decision which he has applied for See Re: Alase *(2002) 10 NWLR (Pt. 776) 553 SC.* *(P 162 Paras H – I)*

11. *The duty on applicants for leave*

The question now is whether the applicants provided sufficient materials and reasons to grant this application in their favour.

To this end, the applicants have to show that the delay in bringing this application is neither willful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period; and their grounds of appeal must *prima facie* show good cause why the appeal should be heard.

The two conditions are conjunctive and not disjunctive; they must co-exist, if one is missing, the application must fail – See Nwora vs. Nwabueze *(2011) 15 NWLR (Pt. 1271) 467 SC.*

I have read the Exhibits attached to this application, including Exhibit F – proposed notice and grounds of appeal, and I am of the view that in the circumstances of this case, this application should be granted as prayed. To start with, the applicants have explained why the said Notice of

Appeal was filed out of time. They filed the application of 11/9/2013 timeously but the court below did not hear it until time to appeal expired on 5/10/2013.

I am also satisfied that the thirteen grounds of appeal in the said Exhibit F, touching on wrongful evaluation of evidence, raise substantial issues that are arguable on appeal, particularly in this case, where there are conflicting findings of facts by the two lower courts; the trial court found in the applicants' favour and the court below set it aside and found for the respondents. *(Pp 163, 164 Paras A – C, E – G).*

12. *Leave is difficult where there are concurrent findings*
Generally, it is difficult to obtain leave where an appeal is against a finding of fact made by a trial court and concurred to, by the court below because appeals from concurrent findings of facts by those courts are granted in exceptional circumstances – Order 2 rule 32 of the Supreme Court Rules (as amended).

In this case, the reverse is the case; there are conflicting findings of facts by the two courts, and that is reason enough, in my view, to grant this application to regularize the appeal. *(P 164 Paras G – I)*

13. *Meaning of the word "Overreach"*
The word *"overreach"* simply means *"to take advantage of* - see *Webster's Comprehensive Dictionary.* *(P 165 Paras C – A)*

Per Augie (JSC):

> **"How will they be denied of their right of fair hearing if this application is granted? How is that even possible? The respondents took part in the trial at the High Court, Calabar [trial court] where they lost. They exercised their constitutional right of appeal and appealed to the court below, where they got judgment in their favour.**
>
> **The applicants seek to exercise their constitutional right of appeal by appealing against the judgment of the court below, which set aside the decision of the trial court in their favour.**

What is good for the goose is good for the gander – no one stopped the respondents from exercising their right of appeal, and the applicants cannot be deprived of their right of appeal.

This is the apex court – the last bus stop for litigants and as Ogbubiyi, (JSC), explained in Anachebe vs. Ijeoma *(supra),* the right of appeal, being a constitutional right, overrides most other negative principles as long as an applicant adduces good and substantial reason for obliging an application of this nature.

The respondents also say it is an abuse of court process, for the same reasons canvassed for the preliminary objections. Let me quickly reiterate the point I made that the applicants are not barred from filing this application to give life to the appeal. *(P 165 Paras A – F).*

14. *A party can file a new application while a similar one is pending*
The argument that the earlier application must be withdrawn before the applicants can bring this application also lacks merit. There is no rule of law or practice that stops a party from filing a new application when a similar application is pending in the file.
The practice in *c*ourt is that a previous application can be withdrawn before the fresh application is moved or thereafter.
(P 165 Paras F – G)

15. *Filing of two notices of appeal*
As to multiplicity of notices of appeal, this court made it clear in Tukur vs. Govt. of Gongola State *(supra)* that an appellant can file two notices of appeal, and can validly withdraw any of them. *(P 165 Paras G – H)*

16. *Mistake of counsel*
It has long been the practice of the top court to grant an extension of time to a litigant to do an act if failure to do such act was occasioned by the negligence or carelessness of the litigant's counsel. See *Bowaje vs.* Adediwura (1976) 6 SC p. 143. (*P 167 Paras B – C)*

17. *The principles of extension of time*
The well stated position of the law is that in applications for extension of time the court will not grant any indulgence to a party who does not offer explanation to the court to justify the court exercising its discretion to extend time. That is to say adequate reasons must be given for the delay. See *FHA vs Kalejaiye (2010) 10 NWLR (Pt. 1226) p. 147.*
(P 167 Paras C – D)

18. *A notice of appeal cannot be deemed as properly filed and served*
Per Galinje (JSC):

> **"A notice of appeal cannot be deemed as having been duly filed and served because it is a document which by definition commences an appeal. The documents which a court can deem are those which parties exchange between themselves during the course of proceedings, such as statement of claim or defence and briefs of argument, and not those which require the signature of the registrar for their validity."** *(P 177 Paras F – G).*

19. *When time begins to run*
The time for transmission of the record of appeal and the filing of briefs of argument can only begin to run after the appeal is filed.
(P 177 Paras G – H)

20. *Documents which cannot be deemed as properly filed without filing the notice of appeal*
With regard to prayers 5, 6 and 7 which deal with deeming orders relating to record of appeal, notice of appeal and appellant's brief of argument respectfully, I am hesitant in granting them because it is premature to grant them since there is yet to be valid appeal filed by the appellant since the leave to appeal is only granted today, likewise the record of appeal could only be properly transmitted after a valid notice of appeal is filed, hence same can be deemed as properly filed and transmitted only from the date the appeal is filed. It will therefore be superfluous to deem the documents mentioned in prayers 5, 6, and 7 as properly filed today or now. Prayers 5, 6 and 7 are therefore premature and are hereby refused and struck out accordingly. *(P 171 Paras C – F)*

21. *A party who files another process after an incompetent process has not abused the Court's process*
Per Galinje (JSC):

> **The application before this court has not prayed for an amendment of a previous notice of appeal. The prayers are for extension of time to seek leave to appeal, leave to appeal, extension of time to appeal and leave to appeal on grounds of mixed law and facts. Prayer 5, 6 and 7 that sought for deeming orders are independent of prayers 1-4. Parties agreed that the notice of appeal filed on the 3rd of October, 2013 is incompetent. By the authority of Nwaigwe & Ors vs. Okere (Supra) that notice of appeal is non-existent or dead in the eye of the law. Therefore any attempt to file a fresh valid notice of appeal cannot amount to an abuse of court process or deprive this court of its jurisdiction to hear same. I am therefore of the firm view that the applicant having realized that he had no appeal because of his failure to apply for and obtain leave to appeal on grounds of mixed law and facts, decided to file this application in order to bring a valid notice of appeal before this court. See First Bank of Nigeria Plc vs. T.S.A Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247; Olanrewaju vs. Bon Ltd (1994) 8 NWLR (Pt. 364) 622; Nwaigwe vs. Okere (Supra).** *(Pp 176 – 177 Paras G – B)*

22. *Appeal not brought within time is not a constitutional right.*
On whether appeal is a constitutional right, I wish to state that an appeal lodged within the prescribed period cannot be ignored by the court, as doing so will deprive the appellant of his constitutional right. However, when an aggrieved party fails to appeal within the time prescribed by Court of Appeal Act and the act of this court, his right of appeal becomes subject to the discretion of this court. *(P 177 Paras B – C)*

Nigerian Cases Cited
Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592 SC
Alase (2002) 10 NWLR (Pt. 776) 553 SC.

A *Anachebe vs. Ijeoma (2014) 14 NWLR (Part 1426) 168*
Bowaje vs Adediwura (1976) 6 SC p. 143
FHA vs Kalajaiye (2010) 10 NWLR (Pt. 1226) p. 147
Mobil Prod. (Nig.) Unltd. vs. LASEPA (2002) 18 NWLR (Pt. 798) 1.
B *Nwora vs. Nwabueze (2011) 15 NWLR (Pt. 1271) 467 SC.*
Odofin vs. Agu (1992) 3 NWLR (Pt. 229) 350

Nigerian Statues Cited
C *Supreme Court Rules - `Or. 2 Rule 31, Or. 2 Rule 32*
Constitution of Federal Republic of Nigeria 1999 (as amended) – S. 233(3)

Appearances
D O. F. Ekengba, Esq. **with**
Olubola Olusegun, Esq.
For the **applicants.**

E Chief Ladi Rotimi Williams (SAN) **with**
Daniella Ikeokwu (Miss)
For the **1st set of respondents**

F Nella Andem-Rabana (SAN) **with**
Peter O. Abang, Esq.
For the **2nd set of respondents**

G **ADAMU AUGIE, (JSC) (Delivering the lead judgment):** The appellants challenged the nomination and selection of the 1st respondent as **Obong of Calabar, in Suit No. HC/102/2008;** which they filed at the High Court of Cross River State, Calabar.

H The learned trial judge, Ogar, J., delivered his judgment on **30/1/2012,** wherein he found in favour of the appellants and granted the seven reliefs sought, including a declaration that**:**

I **The presentation and/or selection of the 4th defendant [i.e. the 1st respondent], who was chairman of the Screening Committee for the selection of a candidate for the stool of Obong of Calabar, as a candidate for the Obong of Calabar throne or**

purported selection of the 4th defendant as the Obong of Calabar elect is contrary to natural justice, equity and good conscience.

Dissatisfied, the 1st set of respondents appealed to the court below **Appeal No. CA/C/97A/2012.** In its Judgment delivered on **4/7/2013,** the court below ordered that the 1st applicant, who was not capped/inducted into Etubom's council of the palace at the time of the selection process, was not traditionally qualified and eligible to vote and be voted for as the Obong of Calabar.

The appellants filed an application at the court below on **11/9/2013** for leave to appeal, etc, which they later withdrew, but they still filed a notice of appeal in this court on **3/10/2013;** complaining against part of the decision of the court below i.e.:

The finding as to the disqualification of the 1st appellant and qualification of the 1st respondent herein to vie for the position of Obong of Calabar having regard to the state of the evidence.

It was based on this notice of appeal that the record of appeal was compiled and transmitted to this court. They later filed an application on **23/5/2014** to amend the said notice of appeal, and to seek leave to appeal on grounds of mixed law and facts. The application that was opposed by the respondents came up for hearing on **25/6/2015,** and was later adjourned to **2/2/2016,** for written addresses to be filed, and conclusion of arguments.

Meanwhile, the appellants did not wait for the said **2/2/2016,** and filed this application on **30/1/2015** praying this court for**:**

1. **An order extending time for [them] to seek leave to appeal against the judgment of the Court of Appeal sitting in Calabar delivered on 4/7/2013 in appeal CA/C/97A/2012.**
2. **An order granting [them] leave to appeal.**
3. **An order extending time for [them] within which to file the notice and grounds of appeal against the said judgment.**
4. **An order granting [them] leave to appeal on grounds of mixed laws and facts.**
5. **An order deeming the record of appeal earlier transmitted**

by the lower court as the record of appeal.

6. An order deeming notice and grounds of appeal dated and filed separately on 30/12/2015 as properly filed and served appropriate fees have been paid.

7. An order deeming the appellants' brief of argument dated and filed on 30/12/2015 as duly filed and served.

The **Grounds** upon which the application is predicated are that**:**

i. They filed an application before the lower court on 11/9/2013 for leave to appeal on grounds of mixed law and fact timeously but unfortunately the lower court could not hear the application until the time allowed to appeal expired on 5/10/2013 and the motion was withdrawn and struck out.

ii. However, on sensing that time was running out, they filed a notice and grounds of appeal on 3/10/2013, believing that ground 1 in the said notice of appeal is ground of law not requiring leave of court so as to sustain the appeal.

iii. Upon the transmission of the record of appeal to [this] court, they brought an application for leave to appeal on grounds of mixed law and facts as it relates to the other grounds perceived to be grounds of mixed law and facts, which was fixed for hearing on 25/6/2015. The respondents opposed the application and [it] was adjourned to 2/2/2016 for full argument.

iv. In order not to dissipate energy and waste valuable judicial time, they have chosen to bring a fresh application as contained in this motion herein.

v. The proposed notice of appeal raise very substantial and arguable grounds of appeal.

vi. The delay in bringing this application is not deliberate but as a result of the fact that the distinction between grounds of law alone and grounds of mixed law and facts are not easily discernible and the peculiar circumstances of this matter.

vii. Valuable time and energy will be saved by starting the

process all over again instead of insisting on arguing the earlier application, which will be withdrawn.

viii. The time allowed by law to appeal expired on 5/10/2013.

ix. They are desirous of expeditious hearing of this appeal and so have also filed their appellants brief of argument.

x. It is in the interest of justice for the application to be granted.

The application is supported by a 16-paragaph affidavit, and annexed thereto are the relevant processes, as **Exhibits A-E.** In opposing the application, the 1st set of respondents filed a 4-paragraph counter-affidavit; attached thereto are **Exhibits 1-5.** The 2nd set of respondents, are also opposing the application, and they filed a 16-paragraph counter-affidavit to that effect.

In addition to their respective counter-affidavits, the two sets of respondents also filed notices of preliminary objection. The 1st set of respondents, are by their notice of preliminary objection filed on **1/2/2016,** praying this court for the following:

(i) An order that this court lacks jurisdiction to hear this *Appeal No. Sc.633/2013* for failure of the appellants to first obtain leave of the court before filing the appeal on 30/12/2015 as required under Section 233(3) of the 1999 Constitution (As amended).

(ii) An order to dismiss/strike out the 2nd appeal No. SC. 633/2013 filed on 30/12/2015 for being defective and and/or incompetent.

(iii) An order to dismiss the appellant's motion on notice of 30/12/2015 for being an abuse of the process of this court.

The **grounds for the application** (sic) are as follows**:**

1. The appellants' grounds of appeal filed on 30/12/2015 contain grounds other than law alone (i.e. grounds of facts and of mixed law and facts)

2. [They] ought to have first sought and obtained leave of either the court below or this court before filing the appeal

on 30/12/2015.

3. **The failure to FIRST seek and obtain such leave of court before filing their notice of appeal on 30/12/2015 contravenes Section 233(3) of the 1999 Constitution (as amended)**
4. **[They] admitted in paragraph 12 of the affidavit in support of their application on 30/12/2015 that their said notice and grounds of appeal raises grounds of mixed law and facts requiring the leave of this court, before they filed their notice and grounds of appeal.**
5. **The said admission in paragraph 12 of their said affidavit is an admission that they have failed to comply with Section 233(3) of the constitution which is a condition precedent to filing an appeal containing grounds of facts and of mixed law and facts.**
6. **The appellants brief of argument filed separately as admitted by them in paragraph 13 of their affidavit in support filed on 30/12/2015 is premised on an incompetent notice of appeal.**
7. **Where [they] failed to satisfy a condition precedent for filing an appeal containing grounds of fact and of mixed law and facts, this court cannot proceed with the determination of such an appeal.**
8. **Seeking and obtaining leave is a condition precedent to filing the notice of appeal filed on 30/12/2015 and having failed to obtain such leave (as required under Section 233(3) of the constitution, they cannot invoke adjudicatory power /jurisdiction of the court.**
9. **The motion filed on 30/12/2015 in SC. 633/2013 is an abuse of court process having regard to their motion on notice filed on 23/5/2014 in the same SC/633/2013 seeking similar prayers, and the proceedings in this court in SC. 633/2013 on 25/6/2015.**
10. **The motion on notice filed on 30/12/2015 will deprive the 1st and 2nd respondents] of the right to fair hearing having regard to the proceedings in the first Appeal No. S. 633/2013 on 25/5/2015.**
11. **The [application] filed on 30/12/2015 is aimed at**

overreaching [the respondents' having regard to the proceedings on 25/2/2015 in and the processes [they] filed on 22/6/2015, and 5/10/2015 and served on the appellants on 6/10/2015.

12. The appellants have seen and read the 1st and 2nd respondents counter affidavit, application in objection (to their application filed on 23/5/2014) and amended notice of appeal filed on 22/5/2014, notice of appeal filed on 3/10/2013 and their brief of argument in support of their objection, after which they filed a fresh application for leave and a fresh Notice of appeal on 30/12/2015 in the same S. 633/2013.

13. There is no further affidavit, counter affidavit nor brief of argument filed in response to 1st and 2nd respondents processes mentioned in paragraph 13 above before [they] filed a fresh application for leave and fresh notice of appeal on 30/12/2015.

14. The deeming orders being sought by [them] in their application filed on 30/12/2015 and their averment that they have paid penalties charged them for filing their processes cannot cure their failure to comply with Section 233(3) of the 1999 Constitution.

The notice of preliminary objection is supported by an affidavit containing the same averment as in their counter-affidavit, and they also attached the same **Exhibit 1 to 5** to the affidavit.

The 2nd set of respondents also challenged the competency of this application in their notice of preliminary objection filed on ***25/1/2015,*** and their ***grounds of objection,*** are as follows***:***

1. All the grounds of the appellants' notice of appeal are grounds of mixed law and facts.

2. None of the grounds are grounds based on law alone.

3. [They] did not obtain leave before filling their notice of appeal in accordance with Section 233(2) and (3) of the 1999 Constitution and order 2 rule 30, Supreme Court rules (as amended) as a condition precedent to bringing

the notice of appeal.

4. It is the same notice of appeal that the appellants seek to amend by their application filed on the 23/4/2014.

5. The appellants' brief of argument sought to be deemed properly filed and served is settled based on the same notice of appeal.

6. The defect of the notice of appeal cannot be cured by an order of amendment or extension of time being sought by the appellants.

They filed a 13-paragraph affidavit in support of their objection. Parties filed written addresses for and against the application, and written addresses and replies thereto, for the objections. The respondents proffered, more or less, the same arguments in opposing the application and in objecting to its competency.

However, the crux of the objections to the application is that this court lacks jurisdiction to hear this appeal because the applicants failed to first obtain leave before filing the appeal, contrary to Section 233(3) of the constitution, which provides:

Subject to the provisions of sub-section (2) of this section, an appeal shall lie from the decisions of the Court of Appeal with the leave of the Court of Appeal or the Supreme Court.

The said sub-section (2) of Section 233 referred to, provides:

An appeal shall lie from decisions of the Court of Appeal as of right in the following cases:

(a) Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal.

They contend that since the applicants failed to seek leave of court to file the notice of appeal, containing grounds of facts and mixed law and facts, the appeal is incompetent, defective, and incurably bad, so this court lacks the jurisdiction to hear it.

The 1st set of respondents submitted that the application is an abuse of

court process having regard to the previous one, and proceedings of **25/6/2015;** that the application is aimed at overreaching them; and the applicants had seen their counter-affidavit and the objection to the earlier application before they filed this fresh application for leave and fresh notice of appeal.

The 2nd set of respondents also argued that none of the six grounds of appeal in the said notice of appeal are based on question of law alone, and that the fundamental defect in such an originating process, cannot be cured by any amendment, therefore, this court ought to dismiss or strike out this appeal.

The applicants argued in their replies that this court has jurisdiction to hear the application, and give life to the Appeal, citing **Nalsa & Team Associates VS. NNPC (1991) 11-12 Sc 83;** that the grant or refusal of this application is at the discretion of this court; and that the said objections will not stop them from correcting errors in the process of the appeal, citing **Tsokwa Oil Marketing Co. vs. B.O.N.** ***(2002) 11 NWLR (Pt. 777) 163 SC.***

At this point, the issue is not whether there is any merit in this application or not, it is whether this court has jurisdiction to entertain this application filed on ***30/12/2015,*** in the first place.

Jurisdiction is the authority that the court has to decide or take cognizance of matters presented for its decision – **Mobil Prod. (Nig.) Unltd. vs. LASEPA (2002) 18 NWLR (Pt. 798) 1.** An appeal, which is the continuation of a case from a trial court, is commenced by notice of appeal. So, the notice of appeal is the foundation of an appeal, and the respondents are right – an incompetent Notice of appeal deprives an appellate court of jurisdiction to hear the appeal – See **Aderibigbe vs. Abidoye (2009) 10 NWLR (Pt. 1150) 592 SC,** cited by the 1st set of respondents, where Muhammad, (JSC), explained as follows:

> **A notice of appeal is the spinal cord of an appeal. It is the foundation upon which an appeal is based. 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 proper appeal can stand. It will, certainly, collapse. A notice of appeal can be competent and valid if it contains at least one valid ground of appeal. A bare notice of appeal without any ground of grounds of appeals, is valueless and incompetent. It is incurably bad. The defect cannot be cured by amendment.**

A

That is true, but there is room for the appellant to maneuver.

Order 2 rule 31 of the rules of this court, provides as follows:

B

> **(3) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of justice.**
>
> C **(4) Every application for an enlargement of time in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal and to apply for leave to appeal within the**
>
> D **prescribed period.**

In other words, where an appeal requires leave of court and the time within which to appeal has also expired, the appellant may apply for extension of time to seek

E leave to appeal. To this end, it is crucial that an intending appellant file a *tripod application* a prayer for (a) extension of time to seek leave to appeal; (b) leave to appeal; (c) extension of time to appeal. For there to be a valid appeal, the three reliefs must be granted by the court – See **Odofin vs. Agu** *(1992) 3 NWLR (Pt.*

F *229) 350 at 375 SC.*

In that case, **Odofin vs. Agu** *(supra),* the respondents filed an application at the court below without the said three prayers and it granted the application, heard the appeal, and allowed it.

G But the appellants' appeal to this court was allowed because:

> **The appellant made his application as prescribed by the Rules, but omitted a relevant prayer. That is the prayer extending**
>
> H **time to give notice of appeal. This notice is crucial and decisive because the judgment appealed against was decided on 16/5/1985. Thus,, on the 4th and 21st October, 1985, when the application was made and the Court of Appeal gave the Ruling**
>
> I **respectively, the appellant was more than six weeks out of time. It was, therefore, necessary for the court to enlarge the time for giving notice, to have a valid notice of appeal before the court. The notice of appeal is the real and constitutional signal of**

dissatisfaction against the judgment. Where as in this case, the application to appeal was made out of time, a notice of appeal made out of time will require a prayer for enlargement of time within which to file such notice of appeal. In the absence of a notice of appeal, namely, the foundation of the appeal, there is no appeal before the court. [Karibi-Whyte, JSC].

Piecing the above principles together, the fact that an appellant had filed an incompetent notice of appeal does not preclude him from applying to an appellate court for an extension of time within which to file the notice of appeal, and salvage the appeal – See **Nalsa & Team Associates vs. NNPC** *(supra),*

In this case, the notice of appeal is incompetent and the applicants are not contesting that fact because in **Ground II** of the grounds for this application, they said they filed it ***believing that Ground I*** *is a ground of law not requiring leave of court",* and as the 2nd set of respondents pointed out, they admitted in paragraph 12 of the affidavit in support of this application that:

That grounds of appeal all raises grounds of mixed law and facts requiring leave of the honourable court.

By their own admission, the notice of appeal filed in this court on **3/10/2013,** which required leave of court, and which leave was not sought and obtained before it was filed, is incompetent.

But they filed the *"tripod application"* to save their appeal, and this court is now faced with the preliminary objections, which are aimed at determining this application *in limine* and the said application, which seeks to give life to the said appeal. What to do is the question? In **Nalsa & Team Associates vs. NNPC** *(supra),* this court, per Nnaemeka-Agu, JSC, held that*:*

Where the complaint in the preliminary objection is to the effect that the court has no jurisdiction to hear the appeal at all or that there is no competent appeal before the court or that a threshold issue is involved, then a fundamental issue which goes to the vires of the court has been raised. When such is the case, one of two factual situations may arise. The respondent's motion may be one [that] is capable of breathing life into the

incompetent process. In other words, the erring appellant has realized his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal. In the hey days of technicality, the practice was to take the motion, which sought to strike out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he liked, I am of the view that that does not accord with the present inclination of the courts to do substantial justice, for, the days of technicality are gone.

If, as a reflection of the present mood of courts to do substantial rather than technical justice, a court of justice and equity decides to first take a motion which seeks to bring about a competent appeal, where there is *ex-facie* a proper application for such, before taking the one which seeks to strike out the appeal is incompetent, I can see nothing wrong with the practice. To adopt that course will save both time and expenses. In saying so, I am not unaware that in Awote vs. Owodunni & Anor my learned brother Oputa, JSC, expressed the opinion that this was not the proper course because as the appeal was incompetent, *ex nihilo nihil fit* (you can build something out of nothing). But with respect, I think the statement was obiter and that, although reflective of the old practice, does not now represent the mood of the courts. Now, where there is before the court a proper application to correct the error even if it could have the effect of breathing life into an incompetent appeal, I see nothing wrong with the court taking such an application first.

In this case, the complaint is that there is no competent appeal before the court, and this court lacks the jurisdiction to hear it. But the fact remains that the applicants have a right of appeal, guaranteed to them by the 1999 Constitution (as amended), which overrides any negative principles aimed at its foreclosing – See **Anachebe vs. Ijeoma (2004) 14 NWLR (Part 1426) 168,** cited by the appellants, where Ogbubiyi, (JSC), aptly observed:

It is well settled that a right of appeal is constitutional as is

A provided in the constitution. The right being constitutional therefore, it stands to override most other negative principles aimed at its foreclosing. The rider also stands clear tat the exercise of this right is only permissible within limit as provided
B by law. The right is lost outside the prescribed statutory period allowed but will only be exercised by leave of court; hence the reason for seeking an order for leave and extending the time within which to appeal. While the constitutional right cannot
C be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will also not hesitate to exercise its discretion in favour thereof provided sufficient materials are contained in the affidavit to justify the
D exercise.

The 2nd set of respondents also complained that the appellant had seen the processes they filed in respect of the application of **23/5/2015** before they filed
E this one, but that is of no moment. The fact that the applicants filed this application after they had filed a preliminary objection challenging the competency of the said application of **23/5/2015,** will not bar the applicants from correcting any errors that will put them on the right footing – See **Shanu vs.**
F Afribank *(supra),* where Ayoola, (JSC), clearly stated:

The contention that this application should not be granted because a preliminary objection has been raised showing the
G errors in the process of the applicant's appeal is without substance. The applicant is not foreclosed by the preliminary objection from correcting those errors or starting the process afresh on a more appropriate footing.

H

See also **Nalsa & Team Associates vs. NNPC** *(supra),* where this *c*ourt, per Karibi-Whyte, (JSC), also explained as follows:

I If a preliminary objection to dismiss an appeal is taken during the pendency of an application to correct the errors on which the preliminary objection is based, the preliminary objection will succeed and the action dismissed. This is because the error

remains extant, the question whether the error can be corrected having not been investigated. This is clearly unjust and against our concept of administration of justice. Whenever a party detects an error in which, if uncorrected will adversely affect his chances, and has by application made effort to correct such errors, the principles of justice demand that he should not be denied the opportunity to do so. It will be preposterous to concede to the contention that the error so detected should remain uncorrected, so that the adversary can take advantage of it. It is important to appreciate the basic distinction between hearing an application and granting the prayers in it. Hearing an application does not necessarily mean granting the prayers sought. The prayers sought which if granted may remedy defect in the errors, and render the preliminary objection unnecessary. If rejected, the preliminary objection can be argued.

In this case, there is nothing more that I need to add or explain. Yes, the application filed on **23/5/2015** was still pending when the applicants filed this application on **30/12/2016,** but they are not foreclosed by the preliminary objections filed against same, *from starting the process afresh on a more appropriate footing* – See **Shanu vs. Afribank** *(supra),* which is exactly what they did.

The law makes room for them to realize their mistakes and file an application, which if granted, will correct defects in the notice of appeal, and bring about a valid and competent appeal – See **Nalsa Team & Associates vs. NNPC** *(supra)*. Therefore, the respondents' preliminary objections are overruled and this application filed on **30/12/2015**, will be decided on its merits.

The application pertains to leave of court, and whenever leave of court is a condition precedent for exercise of a right, the discretion of the court is implied, and a party applying to the court to exercise its discretionary power in his favour must put up a convincing argument showing that in fact and in law he is entitled to a decision which he has applied for – See **Re**: **Alase *(2002) 10 NWLR (Pt. 776) 553 SC.*** In this case, the **a**pplicants are praying for an extension of time to seek leave to appeal; leave to appeal; extension of time within which to file the notice of appeal; leave to appeal on grounds of mixed law and facts.

A The other **Reliefs 5, 6 & 7** are prayers for deeming orders that are dependent on the outcome of the main **Reliefs 1, 2 & 3.** The question now is whether the applicants provided sufficient materials and reasons to grant this application in their favour.

B To this end, the applicants have to show that the delay in bringing this application is neither wilful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period; and their grounds of appeal must *prima facie* show good cause why the appeal should be heard.

C The two conditions are conjunctive and not disjunctive; they must co-exist, if one is missing, the **a**pplication must fail – See **Nwora vs. Nwabueze (2011) 15 NWLR (Pt. 1271) 467 SC.**

In this case, the essence of the applicants' application is that:

D

- **They are out of time to seek leave to appeal.**
- **They are also out of the statutory period allowed to file their notice and grounds of appeal.**

E
- **They are appealing on grounds of mixed law and facts.**
- **The grounds of appeal are substantial and arguable.**
- **The delay in filing of the notice of appeal is not deliberate, but due to the inability of the lower court to grant them**

F **leave, before the expiration of the statutory time to file the appeal.**
- **They filed the appeal timeously with the hope of regularizing same at this court, but have chosen to restart**

G **the whole process.**

They submitted that they have a constitutional right of appeal albeit with leave of the lower court and within three months – **Abba- Tukur vs. Gongola State**

H **Govt.** ***(1988) 1 NWLR (Pt. 68) 39;*** and that the Grounds of *a*ppeal raise substantial issues – **Chief F.R.A. Williams (SAN) vs. Nwosu** ***(2000) 9 NWLR (Pt. 671) 215,*** **Ikenta Best vs. AG, Rivers State** ***(2008) 6 NWLR (Pt. 1084) 612.***

The respondents restated that failure to obtain leave robs a court of

I jurisdiction; and since applicants cannot put a legal process on an illegal foundation, the appeal must be withdrawn; so they can commence a fresh one with valid and legal foundation.

The 1st set of respondents also argued that they will suffer great injustice by

the grant of this application, which is brought *male fide* and is aimed at overreaching them and shortchange them to their right to fair hearing; and that is fresh application filed on **30/12/15,** is an abuse of the process of this court.

The 2nd set of respondents argued along the same lines. They submitted that the applicants cannot bring this application without withdrawing the similar application filed on **27/5/2014,** and citing **CBN vs. Ahmed & Ors (2001) 5 SC (Pt. 11) 146,** on what constitutes an abuse of court process, they argued that:

> **The applicants filed an application while waiting for the pending application to be fully heard, and also filed the present application seeking substantially the same reliefs. Nothing can be more irritating and annoying than this. The application is targeted at irritating, annoying and misleading the respondents.**

I have read the Exhibits attached to this application, including **Exhibit F proposed notice and Grounds of appeal,** and I am of the view that in the circumstances of this case, this **a**pplication should be granted as prayed. To start with, the applicants have explained why the said notice of appeal was filed out of time. They filed the application of **11/9/2013** timeously but the court below did not hear it until time to appeal expired on **5/10/2013.**

I am also satisfied that the thirteen grounds of appeal in the said **Exhibit F,** touching on wrongful evaluation of evidence, raise substantial issues that are arguable on appeal, particularly in this case, where there are conflicting findings of facts by the two lower courts; the trial court found in the applicants' favour and the court below set it aside and found for the respondents.

Generally, it is difficult to obtain leave where an appeal is against a finding of fact made by a trial court and concurred to, by the court below because appeals from concurrent findings of facts by those courts are granted in exceptional circumstances – order 2 rule 32 of the Supreme Court rules (as amended).

In this case, the reverse is the case; there are conflicting findings of facts by the two courts, and that is reason enough, in my view, to grant this application to regularize the appeal.

The respondents, who say they will suffer great injustice if this application is granted, have not shown how they will suffer any negative consequences, if this matter proceeds on appeal. They also argued that the application was brought in

bad faith, to overreach them and deprive them of their right of fair hearing.

The word *"overreach"* simply means *"to take advantage of* - See *Webster's Comprehensive Dictionary.* How will they be denied of their right of fair hearing if this application is granted? How is that even possible? The respondents took part in the trial at the High Court, Calabar [trial court] where they lost. They exercised their constitutional right of appeal and appealed to the court below, where they got Judgment in their favour.

The applicants seek to exercise their constitutional right of appeal by appealing against the judgment of the court below, which set aside the decision of the trial court in their favour.

What is good for the goose is good for the gander – no one stopped the respondents from exercising their right of appeal, and the applicants cannot be deprived of their right of appeal.

This is the apex court – the last bus stop for litigants and as Ogbubiyi, (JSC) , explained in **Anachebe vs. Ijeoma** *(supra),* the right of appeal, being a constitutional right, overrides most other negative principles as long as an applicant adduces good and substantial reason for obliging an application of this nature.

The respondents also say it is an abuse of court process, for the same reasons canvassed for the preliminary objections. Let me quickly reiterate the point I made that the applicants are not barred from filing this application to give life to the appeal. The argument that the earlier application must be withdrawn before the applicants can bring this application also lacks merit. There is no rule of law or practice that stops a party from filing a new application when a similar application is pending in the file.

The practice in courts is that a previous application can be withdrawn before the fresh application is moved or thereafter. As to multiplicity of notices of appeal, this court made it clear in **Tukur vs. Govt. of Gongola State** *(supra)* that an appellant can file two notices of appeal, and can validly withdraw any of them.

This application filed on **30/12/2015** is granted as prayed. The applicants are, therefore, granted the following Orders:

1. **An extension of time to seek leave to appeal against the judgment of the Court of Appeal sitting in Calabar; delivered on 4/7/2013 in Appeal CA/C/97A/2012.**
2. **Leave to appeal against the said Judgment.**

A

3. An extension of time within which the Applicants may file the notice and grounds of appeal against the judgment in Appeal CA/C/97A/2012.

4. Leave to appeal on grounds of mixed laws and facts.

B

In the circumstances of this case, Reliefs 5, 6 and 7 praying for three deeming orders are refused and struck out.

The applicants are, however, granted an extension of [21] twenty one days C from today to file their notice and grounds of appeal against the judgment of the Court of Appeal sitting in Calabar, delivered on **4/7/2013** in **Appeal CA/C/97A/2012.**

Each Party will bear their respective costs.

D

Amina Adamu Augie
Justice, Supreme Court

RHODES-VIVOUR, (JSC): I have had the benefit of reading in draft the ruling E of my learned brother Augie (JSC), and I agree with the reasoning therein that the application should be granted.

The application filed on 30 December, 2015 seeks the following:

F

1. **Order extending time for them to seek leave to appeal against the judgment of the Court of Appeal sitting in Calabar delivered on 4/7/2013 in appeal CA/C/97A/2012.**
2. **An order granting them leave to appeal.**

G

3. **An order extending time for them within which to file the notice and grounds of appeal against the said judgment.**
4. **An order granting them leave to appeal on grounds of mixed law and facts.**

H

5. **An order deeming the record of appeal earlier transmitted by the lower court as the record of appeal.**
6. **An order deeming notice and grounds of appeal dated and filed separately on 30/12/2015 as properly filed and served**

I

appropriate fees have been paid.

7. **An order deeming the appellants' brief of argument dated and filed on 30/12/2015 as duly filed and served.**

The full history and circumstances have already been set out in the leading ruling

A just delivered and need not be repeated.

This application became necessary after the appellants' realized that in their bid to appeal several processes filed by them were riddled with one blunder or the other. They were able, though to file a notice of appeal without leave of the
B Court of Appeal or this court. This application once granted would set the stage for the appellants' to proceed with their appeal.

It has long been the practice of the top court to grant an extension of time to a litigant to do an act if failure to do such act was occasioned by the negligence or
C carelessness of the litigant's counsel. See **Bowaje vs. Adediwura (1976) 6 SC p. 143**

The well stated position of the law is that in applications for extension of time the court will not grant any indulgence to a party who does not offer
D explanation to the court to justify the court exercising its discretion to extend time. That is to say adequate reasons must be given for the delay. See **FHA vs. Kalajaiye (2010) 10 NWLR (Pt. 1226) p. 147.**

The grant of prayers 1, 2, and 3 are in order since good reasons were given
E for the delay. As regards prayer 4, a notice of appeal that can only be filed after obtaining leave, but the applicant failed to obtain leave is incompetent. Prayer 4 corrects such an omission in the filing process. It is hereby granted as prayed.

The applicants are granted 21 days from today to file notice of appeal.
F Prayers 5, 6 and 7 praying for deeming orders are refused and struck out.

Olabode Rhodes-Vivour
Justice, Supreme Court

G **BATA OGBUNBIYI, (JSC):** I read in draft the lead ruling just delivered by my learned brother Hon. Justice Amina Adamu Augie, (JSC). I agree that the application has merit and I also grant same in terms of the orders made in the lead ruling.

H The facts leading to the application at hand are all set out in the lead ruling and principally, I just wish to say that the notice of preliminary objection raised is against the hearing of the application seeking an order of this court extending the time within which the appellants/applicants are to seek leave to appeal against the
I judgment of the Court of Appeal sitting in Calabar and which was delivered on the 4th day of July, 2013 in appeal ***CA/C/97A/2012.*** There are several reliefs sought by the application. Specifically relief No. 4 of the motion paper seeks:

"4 An ORDER granting leave to the Applicants to appeal on

grounds of mixed laws and facts."

The preliminary objection filed **27/9/2016** by the respondents seriously opposes the hearing of the application on the ground that this court is not vested with the requisite jurisdiction to entertain and/or grant the prayers sought for.

As a matter of fact, it is the respondents' submission that the entire purported notice of appeal dated 3rd October, 2013 should be dismissed for incompetence.

The constitution is very well spelt out regarding a party's right of appeal. In other words, it is available and should be exercised without any hindrance. **See the case of Anachebe vs. Ijeoma (2014) 14 NWLR (Pt. 1426) 168.** The constraint however comes in where the exercise is outside the time provided by the law. Hence the application now at hand and seeking the exercise of discretion by the court. In the application of this nature, the guiding principle is whether the applicants have placed sufficient materials before the court for the grant of their application. The exercise of discretion is not made in a vacuum. It is also not granted as a matter of course. There must be cogent and convincing facts placed before the court and supporting the reason why the discretion should tilt in favour of the applicants despite their failure to come within the time provided by the law. *See* **the case of E.F.P. Co. Ltd vs. NDIC (2007) 9 NWLR (Pt. 1039) 216; Nuhu vs. Ogele (2003) 18 NWLR (Pt. 852) 251, Ukwu vs. Bunge (1997) 8 NWLR (Pt. 518) 527.**

There are 10 grounds predicating the application and there are also facts deposed to in support as shown on the affidavit evidence.

Section 233(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) under which the application is brought states thus:

> **(3) subject to the provisions of subsection**
> **(2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.**

Also order **2 Rule 31 (1)** of the rules of court has this to say:

> **"The court may enlarge the time provided by these rules for the**

doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of Justice." (emphasis is supplied).

For all intents and purposes, even in the face of all the facts and materials placed before the court, the exercise of discretion must be judicial and judicious. It is expected of the court to strike the balance of justice and convenience between the parties. The foregoing consideration and the rule of court serve a tremendous guiding principle. *See* **the case of Williams vs. Hope Rising voluntary Funds Society (1982) ANLR 1; Okere vs. Nlem (1992) 4 NWLR (Pt. 234) 132; U.B.A. vs. G.M.B.H & Co. (1989) 3 NWLR (Pt. 110) 374.**

My learned brother Augie (JSC), has dealt exhaustively with the matter in issue. Therefore, with the few words of mine and more particularly on the reasoning and conclusion arrived at in the lead ruling, I also over rule the preliminary objection raised and grant the application in terms of the reliefs and orders made by my learned brother inclusive of the order made as to costs.

Clara Bata Ogbunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had a preview of the ruling prepared by my lord Justice Amina Augie, (JSC) just delivered. I am in full agreement with the reason and conclusion arrived at.

The applicants herein filed a motion on notice on 30/12/2015 seeking seven reliefs as reproduced in the lead judgment which need not be reproduced here. The two sets of respondents filed separate counter affidavits and also each filed notice of preliminary objection challenging the jurisdiction of this court to hear the main appeal i.e Appeal No. SC/633/2015 due to failure of the applicants to first seek and obtain leave before filing the appeal on 30/12/2015. In keeping with the provisions of Section 233(3) of the 1999 Constitution as amended. Other reliefs advanced by the first sets respondent in their preliminary objection were that the application be dismissed or struck out for being defective and incompetent and that this motion be dismissed for being an abuse of court process.

On their part, the 2nd set of respondents' preliminary objection was

premised on the grounds, inner alia, that all the grounds of appeal in the notice of appeal are grounds of mixed law and fact and not of law alone yet no prior leave of this court was sought and obtained. To my mind, the pith of the application which calls for determination here, is centred on applicants' failure to obtain leave before filing the notice of appeal as required by Section 233(1) of the 1999 Constitution. This want of leave, as argued by the 1st set of respondents, renders this court to be bereft of jurisdiction since all the grounds of appeal are of mixed law and facts. They argued that this defect of absence of leave, rendered the notice and grounds of appeal incurably defective.

The 2nd set of respondents hammered on the point that the application is abuse of process of this court in view of the previous application and proceedings of 25/9/2015. They therefore complained that the present application was filed with the aim of overreaching them since the applicants had seen and were aware of their attitude towards the previous application, especially as contained in their counter affidavit and preliminary objection before they filed fresh application for leave to file fresh notice of appeal.

A cursory look at the prayers sought in this application, clearly shows that the applicants are basically desirous of appealing against the decision of the Court of Appeal in No. Ca/C/97/2012, having noticed or realised that their earlier notice and ground of appeal was defective due to want of prior leave sought and obtained as the grounds of appeal in the proposed notice of appeal being of mixed law and fact recorded that leave be sought and obtained. It is in view of the applicants need to rigorously pursue their appeal that they wanted to correct the anomaly by filing this application in order to rectify the defect or to correct their past mistakes.

In the instant application, the first three prayers i.e prayers 1, 2, and 3 are the normal and routine trinity prayers. prayer 4 seeks leave to appeal on grounds of mixed law and facts. It is apparent that the applicants by their instant application, are desirous of exercising their constitutional right to appeal against the judgment of the court below which they are dissatisfied with. This constitutional right of appeal, has been entrenched in Section 233(1) of the constitution. Now since notice of appeal is an originating process and the starting point of the journey of appeal and the applicants in their grounds of the application provided or supplied the reasons why they did not appeal timeously or why they failed to seek and obtain leave of the court to appeal or leave to argue the grounds of mixed law and facts, I think it is only fair and it will also serve the

interest of justice, if their time to seek leave to appeal and leave to appeal is extended. In the circumstance of this case, interest of justice will also be best served, if they are not shut out and by indulging them the opportunity to kick-start the process of their appeal by granting the tripartite prayers sought. I therefore grant the first three prayers i.e the trinity prayers. Also since all the proposed grounds of appeal are of mixed law and fact and not of law alone, it will be absurd, useless and meaningless if after granting the trinity prayers I refuse to grant the fourth prayers for leave to argue grounds of mixed law and facts. For that reason, the fourth prayer for leave to argue grounds of mixed law and fact is also hereby granted.

With regard to prayers 5, 6 and 7 which deal with deeming orders relating to record of appeal, notice of appeal and appellant's brief of argument respectfully, I am hesitant in granting them because it is premature to grant them since there is yet to be valid appeal filed by the appellant since the leave to appeal is only granted today, likewise the record of appeal could only be properly transmitted after a valid notice of appeal is filed, hence same can be deemed as properly filed and transmitted only from the date the appeal is filed. It will therefore be superfluous to deem the documents mentioned in prayers 5, 6, and 7 as properly filed today or now. Prayers 5, 6 and 7 are therefore premature and are hereby refused and struck out accordingly.

On the respondents' counsel submission that this motion amounts to abuse of court process, I do not share his view on that. This is because the applicants herein, have advanced cogent reason why they filed the earlier notice of appeal out of time which was due to failure of the court below to hear it until the time stipulated by law to file same had expired on 4/10/2013. That, in my view is a cogent and valid reason or excuse. This application is therefore not an abuse of court process.

Thus, for these few comments and for the fuller and detailed reasons contained in the leading ruling, I hereby grant the application in part as it relates to prayers 1, 2, 3 and 4 only. On the other part, I refuse to grant and therefore hereby strike out prayers 5, 6 and 7 in the application. These three prayers are accordingly struck out. I abide by all the consequential orders made in the lead ruling. Application therefore succeeds in part.

Amiru Sanusi
Justice, Supreme Court

ADAMU GALINJE, (JSC): I have read before now the draft of the ruling just

delivered by my learned brother AUGIE, (JSC) and I agree with the reasoning contained therein and the conclusion arrived thereat. The motion on notice that gave rise to this ruling is dated 29th December, 2015 and filed on the 30th December, 2015. The prayers are reproduced in the lead ruling. I do not need to repeat them here. It is however sufficient to state that the 1st and 2nd, set of respondents separately issued preliminary objection to the competence of this application. **Chief Ladi Williams,** learned senior counsel for the 1st set of respondents issued the following preliminary objection thus:

> **i. An order that this honourable court lacks the jurisdiction to hear this appeal No. Sc/633/2013 for failure of the appellants/respondents to first obtain leave of the court before filing the appeal herein on 30th day of December, 2015 as required under Section 233(3) of the 1999 Constitution (As Amended).**
>
> **ii. An order to dismiss/strike out the 2nd Appeal No. SC 633/2013 filed on 30th day of December, 2015 for being defective and/or incompetent.**
>
> **iii. An order to dismiss the appellants/ respondents motion on notice filed on 30th day of December, 2015 for being on abuse of the process of this honourable court.**

Mrs. Nella Andem-Rabana, learned senior counsel for the 2nd set of respondent also issued a preliminary objection which was filed on the 27th September, 2016 in the following terms:

> **1. An order dismissing the appellants' motion on notice dated 29th day of December, 2015 and filed on the 30th December, 2015 on the ground that the Supreme Court is not vested with the requisite jurisdiction to entertain and/or grant the prayers in the application filed.**
>
> **2. An order striking out and/or dismissing the notice of appeal dated 3rd October, 2013 as same is incompetent, null and void.**
>
> **3. An order striking out and/or dismissing the record of proceedings already transmitted to this court in the said**

appeal.

4. **An order striking out and/or dismissing this appeal No. SC. 633/2013 between the parties hereto as same is incompetent, null and void.**

I wish to state clearly that what is before this court for consideration is an application for extension of time to seek leave to appeal, leave to appeal and extension of time to file the appeal. The first set of respondents' 1st and 2nd objection are not relevant to this application as their objection are directed against the hearing of the Appeal No. SC 633/2013. The only objection that is relevant to the determination of this application is the 3rd objection which, even at the risk of repetition, is hereunder reproduced as follows:

> **An order to dismiss the appellants'/ respondents motion on notice filed on 30th day of December, 2015 for being an abuse of the process of this honourable court."**

I am also of the firm view that the only relevant objection to the motion under consideration contained in the 2nd set of the respondents' preliminary objection, is the first objection which I also reproduce hereunder as follows:

> **"An order dismissing the appellants' motion on notice dated 29th day of December, 2015 and filed on the 30th December, 2015 on the ground that the Supreme Court is not vested with requisite jurisdiction to entertain and/or grant the prayers is the application filed." The 2nd, 3rd and objections are irrelevant as they are directed at the hearing of the appeal and record of proceedings which the court is urged to either dismiss or strike out. The only objection to the motion under consideration therefore is whether it is an abuse of court process and liable to be dismissed."**

In his argument learned senior counsel for the 1st set of respondent argued that the filing of three similar processes in the same matter constitutes an abuse of court processes. Learned counsel listed the processes as follows:

1. **Notice of appeal filed on the 3rd day of October, 2013 with appeal**

NO. SC633/2013.

2. **Amended notice of appeal filed on the 22nd May, 2014 with appeal NO. SC 633/2013 without leave of court.**
3. **The appellants/respondents Notice and ground of appeal filed on the 30th December, 2015 with appeal NO. SC. 633/2013.**

In addition, learned senior counsel referred to the earlier motion for leave to appeal filed on 23rd May, 2014 and an identified motion for leave filed on the 23rd December, 2015 and contended that the documents aforementioned constitute gross abuse of the processes of this court on the ground that they are similar and are used in respect of the exercise of the same right. In aid learned senior counsel cited **Ubaka & Sons Ltd vs. Ezekween & Co. (2000) FWLR (Pt. 1) 77; Arubo vs. Aiyeleru (1993) NWLRR (Pt. 280) 126 at 146.**

In a further argument, learned senior counsel submitted that the present application is meant to overreach the 2nd set of respondents as such the court should either strike it out or dismiss it. In support of this argument learned counsel cited **National Inland Waterways Authority vs. The Shell Petroleum Development Company of Nigeria (2008) 13 NWLR (Pt. 1105) 48 at 68; In Efetiorore vs. Okpalefe (1991) 5 NWLR (Pt. 193) 517; Nwokedi vs. R.T.A Limited (2002) 6 NWLR (Pt. 762) 181 at 192; Olumesan vs. Ogbundepo (1996) 2 NWLR (Pt. 433) 628 at 645.** Still in argument, learned counsel submitted that the applicants should not be allowed to have a second bite at the cherry as the applicant failed to obtain leave before filing his appeal. In support, learned counsel cited **Ekudano vs. Keregbe (2008) 4 NWLR (Pt. 1077) 422 at 433 434.**

Learned counsel for the 2nd set of respondents, that is 3rd – 4th respondents formulated the following issues for determination of this application as follows:

1. **Having regard to the fact and circumstances of this case, whether the motion on notice dated 29th December, 2015 can be predicated on the invalid notice of appeal dated 3rd October, 2013.**
2. **Whether or not granting of trinity prayers or deeming orders of the Supreme Court can validate an incompetent notice of appeal.**
3. **Having regards to the provisions of Order 7 Rule 2(e) of the**

Supreme Court Rules 1999, whether the record of appeal can be deemed as properly filed.

4. **Having regard to the peculiar facts and circumstances of this case, whether the processes of this honourable court have not been abused.**

In arguing the preliminary objection, learned counsel for the 2nd set of respondents submitted that the appellants' notice of appeal filed on the 3rd October, 2013 cannot support the extant motion as same is incompetent for failure to seek and obtain leave before it was filed. According to the learned counsel, the motion on notice is an application predicated on a defective notice of appeal and therefore it should be struck out for being incompetent. In a further argument, learned counsel submitted that the said motion on notice dated 29th December, 2015 which seeks to deem a fresh notice of appeal dated and filed on the 30th December, 2015 is an attempt to substitute the incompetent notice of appeal filed on 3rd October, 2013 through the back door and in contravention of Order 2 Rule 28(5) of the Supreme Court Rules 1999, thereby resorting to the use of improper judicial process to interfere with the due administration of justice. Learned senior counsel contended that the extant motion is an abuse of court process whereby a procedure unknown to law is being applied to amend a defective notice of appeal. In support, learned counsel cited **Ugesi vs. Siki (2007) 8 NWLR (Pt. 10370 452; Ogoejeofa vs. Ogoejeofo (2006) 3 NWLR (Pt. 966) 205; Abubakar vs. B.O. & A.P Ltd (2007) 18 NWLR (Pt. 1066) 319.**

In reply to the submission by learned counsel for the 1st set of respondents, learned counsel for the applicant submitted that this court has jurisdiction to hear the appellants' motion so as to give life to the appeal. In aid learned counsel cited **Nalsa & Team Associates vs. Nigerian National Petroleum Corporation 11-12 SC 83 at 92-93.**

It is learned counsel's submission that the appellants have the constitutional right of appeal guaranteed by the 1999 Constitution and nothing should be done to deny them that right as is being contended by the respondents. In aid learned senior counsel cited **Anachebe vs. Ijeoma (2014) 14 NWLR (Pt. 1426) 168.** Learned senior counsel repeated this argument in his reply to the 2nd set of respondents' written address as well as the reply to the 5th respondent's address.

From the onset, I wish to state that the motion dated 29th December, 2015

A on its face is not predicated on the Notice of Appeal filed on the 3rd October, 2013. Both learned senior counsel for the 1st and 2nd set of respondents have admitted that the notice of appeal filed on the 3rd October, 2013 is incompetent because the applicant did not obtain leave before same was filed. Now having discovered that
B the notice of appeal is incompetent, was the applicant required to do nothing to ventilate his right of appeal. What then is the position of an incompetent notice of appeal. In **Odoemena Nwaigwe & Ors vs. Nze Edwin Okere (2008) 13 NWLR (Pt. 1105) 445 at 474 Paragraph C-F,** which was cited and relied upon by
C learned counsel for the 2nd set of respondent, this court per Onnoghen JSC (as he then was) held:

> **The issue of the filing of six additional grounds of appeal is a nonstarter**
> D **as it amounts to an exercise in futility, there being no valid notice of appeal due to the absence of valid ground of appeal raising question of customary law for determination. Since there was no valid motion and ground of appeal to which any further grounds would have been**
> E **added, the attempt at making the addition is to try to resurrect a dead horse. It is stone dead. The same reasoning also applies to the purported amendment of the original omnibus ground of appeal. It is settled law that you cannot amend a fundamentally defective**
> F **document such as a notice of appeal so as to infuse live into it. In other words, a fundamentally defective notice of appeal cannot be cured by an amendment of same. You can only validly amend a valid notice of appeal not a fundamentally defective one which in the eyes of the law is**
> G **non-existent or dead.**

The application before this court has not prayed for an amendment of a previous notice of appeal. The prayers are for extension of time to seek leave to appeal,
H leave to appeal, extension of time to appeal and leave to appeal on grounds of mixed law and facts. Prayer 5, 6 and 7 that sought for deeming orders are independent of prayers 1-4. Parties agreed that the notice of appeal filed on the 3rd of October, 2013 is incompetent. By the authority of Nwaigwe & Ors v Okere
I **(Supra)** that notice of appeal is non-existent or dead in the eye of the law. Therefore any attempt to file a fresh valid notice of appeal cannot amount to an abuse of court process or deprive this court of its jurisdiction to hear same. I am therefore of the firm view that the applicant having realized that he had no appeal

because of his failure to apply for and obtain leave to appeal on grounds of mixed law and facts, decided to file this application in order to bring a valid notice of appeal before this court. See **First Bank of Nigeria Plc vs. T.S.A Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247; Olanrewaju vs. Bon Ltd (1994) 8 NWLR (Pt. 364) 622; Nwaigwe vs. Okere (Supra).**

On whether appeal is a constitutional right, I wish to state that an appeal lodged within the prescribed period cannot be ignored by the court, as doing so will deprive the appellant of his constitutional right. However, when an aggrieved party fails to appeal within the time prescribed by Court of Appeal Act and the Act of this court, his right of appeal becomes subject to the discretion of this court.

The preliminary objection herein is bereft of any merit, as same is overruled accordingly.

With respect to the application before this court, I agree with my learned brother, that by the averments in the affidavit in support, I find merit therein and same is granted in terms of prayers 1-4. This is so because the applicant did not sleep over his right. He mistakenly filed notice of appeal without the leave of either the lower court or this court, and on discovery that he made a mistake, he went on to file this motion. However the deeming order sought by the applicant in respect of the record of appeal, notice of appeal and the brief of argument cannot be granted.

A notice of appeal cannot be deemed as having been duly filed and served because it is a document which by definition commences an appeal. The documents which a court can deem are those which parties exchange between themselves during the course of proceedings, such as statement of claim or defence and briefs of argument, and not those which require the signature of the registrar for their validity. The time for transmission of the record of appeal and the filing of briefs of argument can only begin to run after the appeal is filed. Prayers 5 -7 are hereby refused.

I abide by the consequential order of 21 days made in the lead ruling for the applicant to file the notice of appeal and any other orders.

Paul Adamu Galinje
Justice, Supreme Court

FEDERAL REPUBLIC OF NIGERIA
AND
GAD BARMINAS

SC. 369/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 24TH FEBRUARY,2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

COURT: Admitted evidence – Duty on court to assess properly.

COURT: Credibility of evidence – Duty on trial court to determine

COURT: Perverse findings – Implication.

COURT: Proper evaluation of evidence – How discharged.

COURT: Retracted confessional statement – Duty on court thereto.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Whether can be relied solely to convict an accused.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – What prosecution must prove to establish the offence of culpable homicide.

CRIMINAL LAW AND PROCEDURE: Onus of proof – Duty on prosecution to prove charge beyond all reasonable doubt.

CRIMINAL LAW PROCEDURE: Guilt of accused – Presumption of innocence – S.36(5) of the Constitution of Nigeria 1999 (as amended) -- How to rebut the presumption.

CRIMINAL LAW: Offence of culpable homicide – S.221 Penal Code – What prosecution must prove.

EVIDENCE: Admission – When relevant – S.29(1), Evidence Act, 2011 – Import.

EVIDENCE: Confessional statement – Retracted confessional statement – How to determine its credibility.

EVIDENCE: Confessional statement – Corroborative evidence – Need to corroborate confessional statement.

EVIDENCE: Confessional statement – When relevant to convict an accused person.

EVIDENCE: Evaluation of Evidence – Principles in Mogaji vs. Odofin – Whether applicable in criminal cases.

EVIDENCE: Proof – Material contradictions in the evidence before court – Need to explain away – Failure to do so – Effect.

WORDS AND PHRASES: "Confession" – Meaning.

WORDS AND PHRASES: "Perverse" – Meaning.

Issue for Determination

Whether the learned justices of the Court of Appeal were right in discharging and acquitting the respondent on the basis that there was no corroboration to or independent evidence supporting the confessional statement to warrant his conviction and sentence.

Facts of the Matter

The accused was tried and convicted of offences of culpable homicide punishable under Section 221 of the code and armed robbery punishable under Section 298 of the Penal Code. The trial was at the High Court of the Federal Capital Territory, Abuja. The two court charges he was tried and convicted of are:

1. **"that you GAD BARMINAS (m) adult of Nyanyan Mobil Barracks, Abuja, on or about the 25th day of May, 2005, along Airport Road, Abuja in the Abuja Judicial Division, did cause the death of one Paul Ojo (deceased) by shooting him on the chest with a rifle, knowing that death was the probable and not only a likely consequence of the act and thereby committed an offence contrary to Section … of the Penal Code.**

2. **that you GAD BARMINAS (m) adult of Nyanyan Mobil Barracks, Abuja, on or about 25th day of May, 2005 did commit an offence to wit: armed robbery against one Paul Ojo (deceased) by robbing him of a Toyota Car with registration No XA 398 RBC, belonging to one Mr. Abbas Akintayo, while armed with a rifle and thereby committed an offence punishable under Section 298 of the Penal Code".**

The prosecution called only one out of the three witnesses listed in the proof of evidence and tendered an alleged confessional statement of the respondent, (Exhibit 1) to establish the guilt of the respondent for the two offences alleged against him.

Upon the conviction of the respondent largely on his alleged confession (contained in Exhibit 1) the respondent lodged his appeal against his conviction and sentence to the Court of Appeal. In its unanimous judgment delivered on 27th July, 2013, the Court of Appeal allowed the appeal of the respondent and set aside his conviction and death sentence. The Prosecutor, the Federal Republic of Nigeria, dissatisfied with the decision of the Court of Appeal, filed an appeal against the judgment of the Court of Appeal to the Supreme Court.

Held: *(Unanimously dismissing the appeal)*

1. *What is the definition of confession?*
Let me pause awhile to highlight and comment briefly on the definition of confession, as was done by the learned trial judge. That is, that "it is an admission made at any time by a man charged with a crime stating or suggesting that he committed the crime". This definition is almost *ipssimaverba* with Section 28 of the Evidence Act, 2011, which provides that "a confession is an admission *made at any time* by the person charged with a crime stating or suggesting the inference that he committed that crime". A person cannot admit a crime before he allegedly commits it. By this definition a confession is a post-action not a pre-action of the person charged with a crime. In other words, it is not expected that a man will confess to a crime that has not yet been committed. There is nothing like anticipatory or peremptory confession. That of course may go into the realm of clairvoyance, a field of science not contemplated by Section 28 of the Evidence Act. *(P 192 Paras F – H)*

2. *The principle that a confessional statement could be relied solely to convict an accused*
The principle of law that a confessional statement could be relied upon solely to convict an accused person is informed by the fact that the strongest evidence establishing the guilt of an accused is his own confession and personal evidence. [GANIYU GBADAMOSI & ANOR. vs. THE STATE (1991) 6 NWLR (pt. 196) 182 – 202; KOLAWOLE vs. THE STATE (2015) ALL FWLR (pt. 778) 864 at 883-884. There is no evidence stronger than a person's own admission or confession. The law on this is quite settled, as can be seen from the line of cases including: [ADEBAYO vs. A.G. OGUN STATE (2008) 7 NWLR (pt.1085) 201 at 221; USMAN vs. THE STATE (2011) 3 NWLR (pt. 1233) 1 at 11; OSENI vs. THE STATE (2012) 5 NWLR (pt. 1293) 351 at 387; OLANIPEKUN vs. THE STATE (2016) LPELR – 40 440 SC]. *(P 194 .Paras G– I)*

3. *The court has to assess admitted evidence*
It is equally the law that the mere fact that evidence was admitted without objection does not make such evidence credible. The piece of evidence

admitted without objection is still liable to be assessed or examined for its probative value. The courts exercise their discretion to determine the credibility of evidence before them. They are not automated to rely or act on every piece of evidence, including the evidence rendered inadmissible by operation of law. [KALE vs. COKER (1982) 2 SC (Reprint) 118 at 120].

Exhibit 1, *(*subsequently retracted*)*, was admitted without objection. The trial court still had the discretion to determine its credibility notwithstanding that it was admitted without objection. What should engage the mind of the court, in the circumstance, is the weight to be attached to the statement before the court: [OWIE vs. THE STATE (1985) 4 SC. 1; OBIDIOZOR vs. THE STATE (1987) 4 NWLR (pt. 67) 48; MADJEMU vs. THE STATE (2011) 5 SCNJ 31; OGUDO vs. THE STATE (2011) 12 SC. (pt. 1) 71]. The most recent authority on this coming from this Court is OLANIPEKUN vs. THE STATE (2016) (supra).
(P 195 Paras C – G)

4. What is the duty of a trial court towards retracted confessional statement?
The mere denial by the respondent that he made Exhibit 1 (or his plea *nonestfactum* as regards Exhibit 1,) does not render the extra-judicial statement inadmissible: [ALARPE vs. THE STATE (2001) 14 WRN 1 at 20; KAREEM vs. THE STATE (2001) 14 WRN 97 at 111; OLANIPEKUN vs. THE STATE (supra)]. It also did not make Exhibit 1 *protanto* incredible, unreliable or reliable. The weight to be attached to a retracted confession is entirely a different matter calling for the court to act judiciously and judicially. *(P 195 Paras G – I)*

Per Eko, (JSC):

> **The indisputable fact is that at the trial, the respondent denied his authorship of Exhibit 1. The lower court did not lose sight of that fact. It stated in its judgment that in order to rely on the statement to sustain conviction, the court must be "satisfied with its truth" relying on SOLOLA vs. THE STATE (2005) 11 NWLR (pt. 937) 460. In such circumstance there must be some proper evaluation of the available**

evidence, as stated in UBIERHO vs. THE STATE (2005) 5 NWLR (pt. 919) 644. That is, in assessing the quality of a confessional statement, whether retracted or not, is to ask the following salient questions:

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

These tests have been with us for some time now. It is all about embarking on proper evaluation of the available facts in order to determine whether or not the retracted confession was in fact made. In LAWAL vs. THE STATE (2016) LPELR – 40633 SC, Kekere-Ekun, JSC, stated that in order to determine if the statement was made voluntarily, the court will consider other evidence outside the confession that would make it probable that the confession is true. See also ITULE vs. THE QUEEN (1961) 2 SCNLR 183; AKPAN s. THE STATE (1992) 6 NWLR (pt. 248) 439; ALARAPE vs. THE STATE (2001) (supra)]. *(P 195 Paras I – G)*

5. The principle of proper evaluation of evidence by a trial Court

The locus classicus on proper evaluation is MOGAJI & ORS. vs. ODOFIN & ORS. (1978) 4 SC. (Reprint) 53 at 63, where this court stated that before a Judge, before whom evidence has been adduced by the parties, comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first, in discharge of his judicial function, put the totality of the evidence of the parties on that imaginary scale in order to determine the value of one set of evidence against the other. Of course, in determining the relative probative value of the two sets of evidence, as there are in this case, where the appellant posits that the respondent made the disputed confession in Exhibit 1 and the respondent denies his

authorship of Exhibit 1, the court should undertake proper evaluation of the totality of the evidence by resorting to use of "the imaginary scale", having regard to the following:

"i. whether the evidence is admissible;
ii. whether it is credible;
iii. whether it is conclusive; and
iv. whether it is more probable than that given by the other party.
(Pp 196 – 197 Paras G – B)

6. The principle in Mogaji vs. Odofin also applies in criminal cases
Per Eko(JSC):

> **I quite appreciate that this test of "imaginary scale", developed in MOGAJI vs. ODOFIN (supra), was pronounced for use in civil cases. It can, however, be used in appropriate cases in criminal proceedings when the issue is only on the credibility or the weight to be attached to a piece of evidence, where there are other competing evidence asserting the contrary. It is all about how the trial Judge exercises his discretion to believe or disbelieve one set of evidence, where there is another competing set.**
>
> **"I have had a critical look at Exhibit 1. It was purportedly made on 10th September, 2004, about eight (8) and a half months before the two offences were allegedly committed on 25th May, 2005, between the Games Village and Lugbe in the Federal Capital Territory, Abuja. It sounds, to me, preposterous that the respondent, (the accused person), confessed to the two offences about 257 days before they were actually committed. Exhibit 1, (a confession allegedly made on 10th September, 2004) cannot be relevant to any offences not committed before the said date, particularly the offences allegedly committed about 8 eight and a half months after the 'confession'. Section 29(1) of the Evidence Act, 2011 is quite clear on what it provides, to wit: 'in any proceeding, a confession made by the defendant may be**

given in evidence against him in so far as it is relevant to any matter in issue in the proceedings'. Exhibit 1, clearly is not relevant to the issues in the two charges, the offences therein, which allegedly were committed on 25th May, 2005, cannot be a credible evidence on which to predicate the conviction of the respondent. This absurdity therefore lends credence to the evidence of the respondent at pages 41 and 42 of the record that Exhibit 1 was not the statement he made and that the statement he made voluntarily was torn by the investigating police officer (IPO). Here again, the accused person is entitled to the benefit of doubt in criminal proceedings". *(P 197 Paras C – I)*

7. *What is the credibility of Exh. 1?*
I had another look at Exhibit 1, viz-a-viz the second charge that alleges robbery of a Toyota car No. XA 398 RBC. In Exhibit 1, contrary to the said charge, the car the alleged confessor took to Kaduna to be sold is a Toyota Corolla Car No. AS 398 RBC. The PW.1 also alluded to Toyota Corolla No. XA 398 RBC. The contradictions between the charge No. 2, on one hand, and Exhibit 1 and the PW. 1 on the other hand, as to the car stolen is material and no evidence has been offered to explain away these material contradictions. *(P 197 – 198 Paras I – B)*

8. *Duty on prosecution to prove charge(s) beyond all reasonable doubt*
The law is settled that every material averment in the charge must be proved: See CUSTOMS vs. ABUBAKAR I LRN 380 at 312. Since by virtue of Section 36(5) of the 1999 Constitution, as amended, the defendant in a criminal proceeding is presumed innocent until his guilt is proved, the duty is on the prosecution to prove the charge against the accused beyond reasonable doubt. [WILLIAMS vs. THE STATE (1992) NWLR (pt. 261)) 515]. There being now a reasonable doubt as to the car stolen, such doubt ought to have been resolved in favour of the respondent, (the accused person), and it is hereby resolved in his favour.
(P 198 Paras B – D)

There is no evidence outside Exhibit 1 on which to ground the conviction of the respondent for robbery or any other offence charged. No such evidence exists also to corroborate Exhibit 1. *(P 198 Para D)*

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9. When is a confessional statement relevant to convict an accused person?

All the authorities on conviction of the accused person on his own confession insist that the confession is relevant and admissible, if it is direct and positive, and it relates to the accused person's own acts, knowledge or intention thereby stating or suggesting the inference that he committed the offence charged. [AKPAN vs. THE STATE (supra)].

In addition, the confession must be true, credible and reliable. [JOSEPH IDOWU vs. THE STATE (2000) 7 SC 50 at 60; (2000) 12 NWLR (pt. 680) at 48; UBIERHO vs. THE STATE (supra) MADJEMU vs. THE STATE (supra)].

Only recently this Court in LAWAL vs. THE STATE (2016) (supra) restated the law on this point when it held that a free and voluntary confession of guilt by an accused person, if it is direct, positive and satisfactorily proved, is sufficient, without corroboration, to warrant a conviction, as there is no stronger evidence than a man's own confession. [EKPEYONG vs. THE STATE (1991) 6 NWLR (pt. 200) 683; ADIO vs. THE STATE (1986) 2 NWLR (pt. 24) 581; STATE vs. SALAWU (2011) 18 NWLR (pt. 1279) 883 at 920]. *(P 198 Paras E – H)*

10. What the prosecution must prove to establish the offence of culpable homicide

The evidence available to the trial court cannot sustain the conviction and sentence of the respondent for the offence of culpable homicide punishable by death under Section 221 of the Penal Code. The ingredients the prosecution is obligated to establish, in order to sustain conviction for that offence, include the proof that:

(a) **the death of a human person had actually taken place;**
(b) **such death was caused by or was a result of the act of the accused person; and**
(c) **the accused person did the act with intention of causing**

the death of the deceased or causing him grievous *bodily hurt.*

[SULE vs. THE STATE (2009) 17 NWLR (pt. 1169) 33 at 53.

Now, the question is: which evidence proved or established the cause of death of Paul Ojo (the deceased), as alleged by the 1st charge?

There is nowhere in Exhibit 1 that it was stated that any person (including the deceased) was shot on the chest and he died as a result. Exhibit 1 does not state who was shot. The learned trial Judge clearly had taken into consideration some extraneous facts when he found "as facts that, on the 1st count charge, there was a death of a human person, Paul Ojo, driver of the vehicle robbed" and that "Exhibit 1 gave graphic description of the killing of the deceased". These findings of facts are perverse.*(P 199 Paras A – I)*

11. The meaning of the word "Perverse"

In ATOLAGBE vs. SHORUN (1985) NWLR (pt. 2) 360, Oputa, JSC. Stated that the word "perverse simply means persistent in error, different from what is reasonable or required, against the weight of evidence"; and held that "a decision may be perverse where the trial Judge took into account matters which he ought not to have taken into account or where the judge shuts his eyes to the obvious". *(Pp 199 – 200 Paras I – A).*

12. The meaning of the word "Perverse"

In **OSUJJI vs. EKEOCHA (2009) 16 NWLR (pt. 1166) 81; IROLO & ORS. vs. UKA & ANOR. (2002) 14 NWLR (pt. 786) 195 and other decisions this court maintains that – a decision is said to be perverse,**

"(a) when it runs counter to the evidence:
(b) where it has been shown that the trial court took into account matters which it ought not to have taken into account or shut the eyes to the obvious; or
(c) when it has occasioned a miscarriage of justice".
(P 200 Paras A – C)

14. The implication of a perverse findings

A perverse finding of fact cannot in law sustain any judgment. See **JOLAYEMI vs. ALAOYE (2004) 18 NSCQR 682; (2004) 12 NWLR (pt. 887) 322.** *(P 200 Para D)*

Nigerian Cases cited in this Judgment

Adedayo vs. A.G. Ogun State (2008) 7 NWLR (pt.1085) 201;
Adio vs. The State (1986) 2 NWLR (pt. 24) 581;
Afolabi vs.The State (2013) 13 NWLR (Pt. 1371) 292;
Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (pt 860) 367; [2004] 1 SCNJ 65 [2004] 1 SC (pt. 1) 65;
Ajao vs. Ademola (2005) NWLR (Pt. 913) 636;
Akinyemi vs. State (1999) 6 NWLR (Pt. 607) 449;
Akpan vs.The State [1992] 6 NWLR (Pt. 248) 439, 460; [1992] 7 SCNJ 22;
Alarpe vs. The State (2001) 14 WRN 1;
Ameh vs.The State [1973] 7 SC 27;
Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444;
Aruna vs.The State [1990] 6 NWLR (pt 155) 125;
Atolagbe vs. Shorun (1985) NWLR (pt. 2) 30;
Bozin vs. State (1985) 2 NWLR (Pt. 8) 465;
Customs vs. Abubakar I LRN 380 at 312;
Dawa vs. The State [1980] 8 -11 SC 236;
Ejinima vs.The State [1991] 5 LRCN 1640;
Ekpeyong vs. The State (1991) 6 NWLR (pt. 200) 683;
Ganiyu Gbadamosi & Anor. vs. THE STATE (1991) 6 NWLR (pt. 196) 182 – 202;
Hassan vs The State (2001) 15 NWLR (Pt. 735) 184;
Hassan vs.The State [2001] 7 SCNJ 643; [2001] 7 NSCQR 107, 109; [2001] 15 NWLR (pt. 735) 184;
Ibrahim vs.The State [2015] 3 SCNJ 359;
Idowu vs.The State [2000] 7 SC 50;
Igago vs.The State [1999] 12 SCNJ 140; [1999] 6 NWLR (pt. 608) 568;
Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455;
Ikpasa vs. Attorney-General of Bendel State [1981] 9 SC 7;
Ikpo vs. The State (2016) LPELR – SC. 772/2014;
Ikpp and Anor vs. The State [1995] 2 SCNJ 64; [1995] 9 NWLR (Pt. 421) 540;
Imhanria vs. Nigerian Army 1 (2007) 14 NWLR (Pt. 1053) 76;

Irolo&Ors. vs. Uka & Anor. (2002) 14 NWLR (pt. 786) 195;
Itule vs. The Queen (1961) 2 SCNLR 183;
Jafiya Kopa vs. The State (1971) 1All NLR 150;
Jolayemi vs. Alaoye (2004) 18 NSCQR 682; (2004) 12 NWLR (pt. 887) 322;
Joseph Idowu vs. The State (2000) 7 SC 50 at 60; (2000) 12 NWLR (pt. 680) at 48;
Joseph Idowu vs.The State (2000) 12 NWLR (Pt. 680) 48;
Kale vs. Coker (1982) 2 SC (Reprint) 118;
Kalu vs.The State [1988] 4 NWLR (pt 90) 503;
Kanu vs.The King (1952) 14 WACA 30;
Kareem vs. The State (2001) 14 WRN 97;
Kim vs.The State [1992] 4 SCNJ 81, 110; [1992] 4 NWLR (Pt. 233) 17;
Kolawole vs. The State (2015) ALL FWLR (pt. 778) 864;
Lawal vs. The State (2016) LPELR – 40633 SC;
Madjemu vs. The State (2011) 5 SCNJ 31;
Madjemu vs.The State (2001) 9 NWLR (Pt. 718) 349;
Mogaji & Ors. vs. Odofin&Ors. (1978) 4 SC. (Reprint) 53;
Mohammed vs.The State (2007) Vol. 37 WRN 1;
Nkwuda Edamine vs. The State (1996) 3 NWLR (pt. 438) 530;
Nwachukwu vs.TheState (2007) LPELR 8075 (SC) 34;
Nwaebonyi vs.The State (1994) 5 NWLR (Pt. 343) 138;
Nwokedi vs. COP [1977] 3 SC 35, 40;
Obiakor vs. State (2002) 10 NWLR (pt. 776) 612;
Obidiozor vs. The State (1987) 4 NWLR (pt. 67) 48;
Obosi vs. The State (1965) NMLR 129;
Odeh vs. The State (2008) 13 NWLR (Pt. 1103) 1;
Ogudo vs. The State (2011) 12 SC. (pt. 1) 71;
Okegbu vs. The State [1984] 8 SC 65;
Olalekan vs. State [2002] 4 WRN 146; [2001] 18 NWLR (Pt. 746) 793;
Olanipekun vs. The State (2016) LPELR – 40 440 SC;
Onochie and Ors vs The Republic (1966) NMLR 307;
Onyirimba vs State (2002) 11 NWLR (Pt. 777) 83;
Oseni vs. The State (2012) 5 NWLR (pt. 1293) 351;
Osujji vs.Ekeocha (2009) 16 NWLR (pt. 1166) 81;
Owie vs. The State (1985) 4 SC. 1;
Oyirimba vs State (2002) 11 NWLR (Pt. 777) 83;
Patrick Ikemson & Ors. vs. The State (1989) 3 NWLR (pt. 110) 455;

A *Queen vs. Obiasa (1962) 1 ANLR 5; [1962] 2 SCNLR 402;*
Saidu vs. The State 1982 4SC. 41;
Salawu vs. State (1971) NMLR 249;
Solala vs. The State (2005) 11 NWLR (pt. 937) 460;
B *State vs. Salawu (2011) 18 NWLR (pt. 279) 883;*
Sule vs. State (2009) 17 NWLR (Pt. 1169) 33;
Sunday Onungwa vs. The State 1976 2 SC. 169;
The Queen vs. Obiasa (1962) 1 All NLR 651; [1962] 1 SCNLR 137;
C *The State vs Orji Ironsi (1969) 1 NMLR 203;*
Ubierho vs The State (2007) 5 NWLR (Pt. 819) 644;
Ubierho vs The State (2007) 5 NWLR (Pt. 819) 644;
Usman vs. The State (2011) 3 NWLR (pt. 1233) 1;
D *Williams vs. The State (1992) NWLR (pt. 261)) 515; and*
Yufufuvs The State [1976]6 SC 167, 173.

Foreign Cases Cited

E *R vs. Sykes (1913) 8 CAR 233, 236.*

Nigerian Statutes Cited in this Judgment

The Penal Code;− S. 221, S. 298
F *The Evidence Act, 2011;− S. 28, S. 29(2)*
The 1999 Constitution. – S. 36

Representations

G **Chief F.F. Egele.** *with* **Bashir Tijjani***, (Esq.), - Appellant.*
Aliyu O. Saiki (Esq.)*, with* **Afolabi Omotosho (Esq.), Ibrahim T. Hassan (Esq***.), and* **Awal Abdullahi (Miss)***, - Respondent.*

H

EKO, (JSC) (Delivering the Lead Judgment): The respondent was tried and convicted of offences of culpable homicide punishable under Section 221 of Penal Code and armed robbery punishable under Section 298 of the Penal
I Code. The trial was at the High Court of the Federal Capital Territory, Abuja. The two charges he was tried and convicted of are:

1. "that you GAD BARMINAS (m) adult of Nyanyan Mobil Barracks, Abuja, on or about the 25th day of May, 2005, along Airport Road, Abuja in the Abuja Judicial Division, did cause the death of one Paul Ojo (deceased) by shooting him on the chest with a rifle knowing that death was the probable and not only a likely consequence of the act and thereby committed an offence contrary to Section … of the Penal Code.

2. that you GAD BARMINAS (m) adult of Nyanyan Mobil Barracks, Abuja, on or about 25th day of May, 2005 did commit an offence to wit: Armed Robbery against one Paul Ojo (deceased) by robbing him of a Toyota Car with registration No XA 398 RBC, belonging to one Mr. Abbas Akintayo, while armed with a rifle and thereby committed an offence punishable under Section 298 of the Penal Code".

The prosecution called only one out of the three witnesses listed in the proof of evidence and tendered an alleged confessional statement of the respondent, (Exhibit 1), to establish the guilt of the respondent for the two offences alleged against him. The trial court convicted the respondent of the two offences. On the 1st count charges, the following was established as found *inter alia* at pages 49 and 50 of the record:

"from the totality of the evidence therefore adduced, there was a death of human person, Paul Ojo, driver of the vehicle robbed".

"(a) that the act of the accused, to wit shooting with a gun, an act done by the accused with intention to kill and knowing fully well that was probable consequence and not a likely consequence".

And on the 2nd count charge, the following were found:

"(a) that there was robbery;
(b) it was armed robbery; and

A (c) the accused participated and in fact conceived and executed the armed robbery".

B "Again back to Exhibit 1 (the confessional statement), I pose the question whether this court can convict upon a confessional statement. (that is an admission made *at any time by a man charged with a crime stating* or suggesting that he committed the crime) – SAIDU vs. THE STATE 1982 C 4SC. 41; SUNDAY ONUNGWA vs. THE STATE 1976 2 SC. 169 per CJN, Katsina-Alu ...

In this case, the statement in Exhibit 1 gavea graphic D description of how the event leading to the killing of the deceased and subsequent movement of the vehicle by the accused to Kaduna for sell. The fact that the accused was arrested in Kaduna by the police in the process of selling the E vehicle robbed from the deceased, is corroborated in Exhibit 1, which I never doubted as a confessional statement of the Accused. [Emphasis supplied by me]

F Let me pause a while to highlight and comment briefly on the definition of confession, as was done by the learned trial Judge. That is, that "it is an admission made at any time by a man charged with a crime stating or suggesting that he committed the crime". This definition is almost *ipssimaverba* with G Section 28 of the Evidence Act, 2011 which provides that "a confession is an admission *made at any time* by the person charged with a crime stating or suggesting the inference that he committed the crime". By this definition a confession is a post-action and not a pre-action, of the person charged with a H crime. In other words, it is not expected that a man will confess to a crime that has not yet been committed. There is nothing like anticipatory or peremptory confession. That of course may go into the realm of clairvoyance a field of science not contemplated by Section 28 of the Evidence Act. I will come back to I this issue in the Judgment.

Upon the conviction of the respondent, largely on his alleged confession, contained in Exhibit 1, the respondent lodged an appeal against his conviction and sentence to the Court of Appeal. In its unanimous judgment delivered on 27th

July, 2013, the Court of Appeal allowed the appeal of the respondent and set aside his conviction and death sentence. The prosecutor, the Federal Republic of Nigeria, dissatisfied with the decision of the Court of Appeal, filed the notice of appeal (at pages 129 – 131 of the record containing two grounds of appeal), challenging the discharge and acquittal of the respondent for the two offences of culpable homicide and armed robbery. This appeal of the prosecutor to this court was argued by the parties on a single issue distilled from the two grounds of appeal. The sole issue is:

> "**whether the Learned Justices of the Court of Appeal were right in discharging and acquitting the Respondent on the basis that there was no corroboration to or independent evidence supporting the confessional statement to warrant his conviction and sentence".**

In appellant's amended brief, the appellant's cunsel submits, rightly in my view, that in criminal trials the guilt of the accused person for the commission of any offence could be established by any or all of the following three modes namely:

> **"i) The confessional statement of the accused person;**
> **ii) Circumstantial evidence; and**
> **ii) Evidence of an eye witness".**

In the instant appeal the prosecution relied heavily on the confessional statement of the accused, (the respondent) contained in Exhibit 1. It was admitted in evidence through PW.1 without objection. Exhibit 1, recorded by the PW.1 was made on 10th September, 2004 and endorsed by a superior Police Officer, who signed as "SP" on the said 10th September, 2004. The PW.1 was merely to record the statement of the respondent. He was neither an eye witness nor did he take further step in the investigation than the recording of Exhibit 1.

Appellant's counsel submitted that the Evidence Act, in Section 27(2) (actually section 29(2) thereof) recognizes the relevance of confessional statement in criminal proceedings if made voluntarily. And I quickly add that, by dint of Section 29(i) of the Evidence Act, 2011, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings. In other words, the confession that is relevant and

admissible in evidence against the accused person is the confession that is relevant to the offence(s) alleged against him.

Appellant's counsel has submitted that once an accused person makes a statement under caution, saying or admitting the charge or creating the impression that he committed the offence charged the statement becomes confessional. This statement of law has the support of **Patrick Ikemson&Ors. vs. The State (1989) 3 NWLR (pt. 110) 455 at 476 – D.**

The trial court convicted the respondent of culpable homicide punishable with death and armed robbery solely on Exhibit 1, the confessional statement of the respondent. In setting aside the conviction and sentence of the respondent the lower court, according to appellant's counsel, predicated its decision in the main on the fact that there was no evidence outside the confession confirming that the respondent committed the offences charged. This stance, as submitted by the appellant's counsel, is erroneous. He also posited, and that is the settled law, that a free and voluntary confession of guilt made by an accused person, if it is direct and positive, is sufficient to warrant his conviction without any other corroborative evidence, as long as the court is satisfied that the confession is true - **Joseph Idowuvs. The State (2000) 7 SC. 50 at 62; (2000) 12 NWLR (pt. 680) 48.** Counsel correctly submitted further that this court, in the **Patrick Ikemson's** case (supra), had held that an accused person can be convicted solely on his confession; that where a confession is proved to be positive and an unequivocal admission of guilt, such a statement is sufficient to ground a conviction and that it is material that the accused person later at the trial resiled from the statement: See also **Nkwuda Edamine vs. The State (1996) 3 NWLR (pt. 438) 530 at 537 Paras D-E.**

The principle of law that a confessional statement could be relied upon solely to convict an accused person is informed by the fact that the strongest evidence establishing the guilt of an accused is his own confession and personal evidence. **Ganiyu Gbadamosi & Anor. vs. The State (1991) 6 NWLR (pt. 196) 182 – 202; Kolawole vs. The State (2015) ALL FWLR (pt. 778) 864 at 883-884.** There is no evidence stronger than a person's own admission or confession. The law on this is quite settled, as can be seen from the line of cases including: **Adebayo vs. A.G. Ogun State (2008) 7 NWLR (pt.1085) 201 at 221; Usman vs. The State (2011) 3 NWLR (pt. 1233) 1 at 11; Oseni vs. The State (2012) 5 NWLR (pt. 1293) 351 at 387; Olanipekun vs. The State (2016) LPELR 40 440 SC.**

The appellant made so much fuss about the fact that the Respondent, at the point the confessional statement (Exhibit 1) was admitted in evidence, raised no objection or opposition to its admissibility on grounds of involuntariness, and that he merely, during his defence subsequently, denied his authorship or making of Exhibit 1, stating that the only statement he made was torn by the PW.1, a police officer. Appellant's counsel, on this, submitted that where an accused person disputes a statement credited to him, but gives no other version of the statement, the court is left with only the version before it. **THE STATE vs. ORJI IRONSI (1969) 1 NMLR 203.** When an accused person denies his making or authorship of a confessional statement, admitted in evidence without objection, the denial does not render the statement inadmissible. It is equally the law that the mere fact that evidence was admitted without objection does not make such evidence credible. The piece of evidence admitted without objection is still liable to be assessed or examined for its probative value. The courts exercise their discretion to determine the credibility of evidence before them. They are not automated to rely or act on every piece of evidence, including the evidence rendered inadmissible by operation of law. See **KALE vs. COKER (1982) 2 SC (Reprint) 118 at 120.**

Exhibit 1, (subsequently retracted), was admitted without objection. The trial court still had the discretion to determine its credibility notwithstanding that it was admitted without objection. What should engage the mind of the court, in the circumstance, is the weight to be attached to the statement before the court: **Owie vs. The State (1985) 4 SC. 1; Obidiozor vs. The State (1987) 4 NWLR (pt. 67) 48; Madjemu vs. The State (2011) 5 SCNJ 31; Ogudo vs. The State (2011) 12 SC. (pt. 1) 71.** The most recent authority on this coming from this Court is **Olanipekunvs. The State (2016) (supra).**

The mere denial by the Respondent that he made Exhibit 1, or his plea *nonestfactum* as regards Exhibit 1, does not render the extra-judicial statement inadmissible: **ALARPE vs. THE STATE (2001) 14 WRN 1 at 20; KAREEM vs. THE STATE (2001) 14 WRN 97 at 111; OLANIPEKUN vs. THE STATE (supra).** It also did not make Exhibit 1 *pro tanto* incredible, unreliable or reliable. The weight to be attached to a retracted confession is entirely a different matter calling for the court to act judiciously and judicially.

The indisputable fact is that at the trial, the respondent denied his authorship of Exhibit 1. The lower court did not lose sight of that fact. It stated in its judgment that in order to rely on the statement to sustain conviction, the court

must be "satisfied with its truth"; relying on **Solala vs. The State (2005) 11 NWLR (pt. 937) 460.** In such circumstance there must be some proper evaluation of the available evidence, as stated in **Ubierho vs. The State (2005) 5 NWLR (pt. 919) 644.** That is, in assessing the quality of a confessional statement, whether retracted or not, is to ask the following salient questions:

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

These tests have been with us for some time now. It is all about embarking on proper evaluation of the available facts in order to determine whether or not the retracted confession was in fact made. In **Lawal vs. The state (2016) LPELR – 40633 SC, Kekere-Ekun,** JSC, stated that in order to determine if the statement was made voluntarily, the court will consider other evidence outside the confession that would make it probable that the confession is true. See also **Itulevs. The Queen (1961) 2 SCNLR 183; Akpan vs.The State (1992) 6 NWLR (pt. 248) 439; Alarape vs. The State (2001) (supra).**

The *locus classicus* on proper evaluation is **Mogaji & ORS. vs. Odofin & ORS. (1978) 4 SC. (Reprint) 53 at 63** where this court stated that before a judge, before whom evidence has been adduced by the parties, comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first, in discharge of his judicial function, put the totality of the evidence of the parties on that imaginary scale in order to determine the value of one set of evidence against the other. Of course, in determining the relative probative value of the two sets of evidence, as there are in this case, where the appellant posits that the Respondent made the disputed confession in Exhibit 1 and the respondent denies his authorship of Exhibit 1, the court should undertake proper evaluation of the totality of the evidence by resorting to use of "the imaginary scale", having

A regard to the following:

> **"i. whether the evidence is admissible;**
> **ii. whether it is credible;**
> B **iii. whether it is conclusive; and**
> **iv. whether it is more probable than that given by the other party".**

C I quite appreciate that this test of "imaginary scale", developed in **MOGAJI vs. ODOFIN (supra),** was pronounced for use in civil cases. It can, however, be used in appropriate cases in criminal proceedings when the issue is only on the credibility or the weight to be attached to a piece of evidence where there are other D competing evidence asserting the contrary. It is all about how the trial Judge exercises his discretion to believe or disbelieve one set of evidence where there is another competing set.

I have had a critical look at Exhibit 1. It was purportedly made on 10th E September, 2004, about eight (8) and a half months before the two offences were allegedly committed on 25th May, 2005, between the Games Village and Lugbe in the Federal Capital Territory, Abuja. It sounds, to me, preposterous that the Respondent, (the accused person) confessed to the two offences about 257 days F before they were actually committed. Exhibit 1, (a confession allegedly made on 10th September, 2004) cannot be relevant to any offences not committed before the said date, particularly the offences allegedly committed about 8 eight and a half months after the "confession". Section 29(1) of the Evidence Act, 2011 is G quite clear on what it provides, to wit: in any proceeding, a confession made by the defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings. Exhibit 1, clearly not relevant to the issues in the two charges, the offences therein which allegedly were committed on 25th H May, 2005, cannot be a credible evidence on which to predicate the conviction of the Respondent. This absurdity therefore lends credence to the evidence of the Respondent at pages 41 and 42 of the Record that Exhibit 1 was not the statement he made and that the statement he made voluntarily was torn by the investigating I Police Officer (IPO). Here again, the accused person is entitled to the benefit of doubt in criminal proceedings.

I had another look at Exhibit 1, viz-a-viz the second charge that alleges robbery of a Toyota car NO. XA 398 RBC. In Exhibit 1, contrary to the said

charge, the car, the alleged confessor took to Kaduna to be sold is a Toyota Corolla Car No. AS 398 RBC. The PW.1 also alluded to Toyota Corolla No. XA 398 RBC. The contradictions between the charge No. 2, on one hand, and Exhibit 1 and the PW. 1 on the other hand, as to the car stolen is material and no evidence has been offered to explain away these material contradictions.

The law is settled that every material averment in the charge must be proved: See **CUSTOMS vs. ABUBAKAR I LRN 380 at 312.** Since by virtue of Section 36(5) of the 1999 Constitution, as amended, the defendant in a criminal proceeding is presumed innocent until his guilt is proved, the duty is on the prosecution to prove the charge against the accused beyond reasonable doubt. See **Williams vs. The State (1992) NWLR (pt. 261)) 515.** There being now a reasonable doubt as to the car stolen, such doubt ought to have been resolved in favour of the respondent, (the accused person) and it is hereby resolved in his favour. There is no evidence outside Exhibit 1 on which to ground the conviction of the respondent for robbery or any other offence charged. No such evidence exists also to corroborate Exhibit 1.

All the authorities on conviction of the accused person on his own confession insist that the confession is relevant and admissible, if it is direct and positive, and it relates to the accused person's own acts, knowledge or intention thereby stating or suggesting the inference that he committed the offence charged. See for instance, **Akpan vs. The State (supra).** In addition, the confession must be true, credible and reliable. See **Joseph Idowu vs. The State (2000) 7 SC 50 at 60; (2000) 12 NWLR (pt. 680) at 48; Ubierho vs. The State (supra) Madjemu vs. The State (supra).** Only recently this Court in **LAWAL vs. THE STATE (2016)(supra)** restated the law on this point when it held that a free and voluntary confession of guilt by an accused person, if it is direct, positive and satisfactorily proved, is sufficient, without corroboration, to warrant a conviction, as there is no stronger evidence than a man's own confession. See also **Ekpeyong vs. The State (1991) 6 NWLR (pt. 200) 683; Adio vs. The State (1986) 2 NWLR (pt. 24) 581; State vs. Salawu (2011) 18 NWLR (pt. 1279) 883 at 920.**

I do not need to say any more on this. As I had just demonstrated Exhibit 1, (the alleged confession of the respondent dated 10th September, 2004) is unreliable and completely irrelevant to the two offences of culpable homicide and armed robbery committed on 25th May, 2005. I cannot, therefore, fault the acquittal of the Respondent for the two offences as ordered by the court below.

A The evidence available to the trial court cannot sustain the conviction and sentence of the respondent for the offence of culpable homicide punishable with death under Section 221 of the Penal Code. The ingredients the prosecution is obligated to establish, in order to sustain conviction for that offence, include the
B proof that:

> "(a) **the death of a human person had actually taken place;**
> **(b) such death was caused by or was a result of the act of the**
> C **accused person; and**
> **(c) the accused person did the act with intention of causing the death of the deceased or causing him grievous bodily hurt".**

D

See **SULE vs. THE STATE (2009) 17 NWLR (pt. 1169) 33 at 53,** recommended to us by the Respondent's Counsel. Now, the question is: which evidence proved or established the cause of death of Paul Ojo (thedeceased), as alleged by the 1st
E charge? The unreliable Exhibit 1 merely states inter alia:

> **"We stop a vehicle and we entered. It was a Toyota Corolla red in colour. We move from the place and after a mile heading to**
> F **Lugbe, we asked the driver to stop and hand over the key or we kill (him). The driver held my rifle and started struggling with him and we all came out (of) the vehicle and fell down. I was on top of him and I open fire and shot him. From there we entered**
> G **the vehicle and my second drove off"**

There is no where in Exhibit 1 it was stated that any person (including the deceased) was shot on the chest and he died as a result. Exhibit 1 does not state
H who was shot. The learned trial judge clearly had taken into consideration some extraneous facts when he found "as facts that, on the 1st count charge, there was a death of a human person, Paul Ojo, driver of the vehicle robbed" and that "Exhibit 1 gave a graphic description of the killing of the deceased". These findings of
I facts are perverse.

In **Atolagbe vs. Shorun (1985) NWLR (pt. 2) 30,** Oputa, JSC. Stated that the word "perverse simply means persistent in error, different from what is reasonable or required, against the weight of evidence"; and held that "a decision

may be perverse where the trial judge took into account matters which he ought not to have taken into account or where the Judge shut his eyes to the obvious". In **Osuji vs. Ekeocha (2009) 16 NWLR (pt. 1166) 81; Irolo & Ors. vs. Uka & Anor. (2002) 14 NWLR (pt. 786) 195** and other decisions this Court maintains that adecision is said to be perverse:

> **"(a) when it runs counter to the evidence;**
> **(b) where it has been shown that the trial court took into account matters which it ought not to have taken into account or shut the eyes to the obvious; or**
> **(c) when it has occasioned a miscarriage of justice".**

A perverse finding of fact cannot in law sustain any judgment. See **Jolayemi vs. Alaoye (2004) 18 NSCQR 682; (2004) 12 NWLR (pt. 887) 322.**

All I have been laboring to say, My Lords, is that it was "most unsafe in this case to convict" the respondent for the two offences charged, as the trial court did. I agree entirely with the Court of Appeal. Accordingly, I hereby completely align myself with this conclusion the Court of Appeal reached at page 125 of the records and its orders setting aside the conviction and sentence of the respondent for the offences of culpable homicide punishable by death and armed robbery, and in their place ordering the discharge and acquittal of the respondent for those offences. The appellant, as the prosecutor, did not prove the ingredients of the said offences of culpable homicide and armed robbery. The appellant failed to prove the guilt of the Respondent beyond reasonable doubt as required by law. Consequently, the appeal is hereby dismissed. The decision of the Court of Appeal contained in its judgment delivered on 27th June, 2013 in appeal **No. CA/A.493C/2011** is hereby affirmed.

Ejembi Eko,
Justice, Supreme Court.

PETER-ODILI, (JSC): I am in total agreement with the judgment just delivered by my learned brother, Ejembi Eko (JSC) and to place on record my support in the reasonings, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Abuja Division which court allowed the appeal, setting aside the decision of the trial High Court which had convicted and sentenced the accused/appellant/now

A respondent. The Court of Appeal or court below entered a verdict of a discharge and acquittal in favour of the respondent hence this appeal to the Apex Court.

FACTS BRIEFLY STATED

B The respondent was tried on a two count charge of culpable homicide punishable with death contrary to Section 221 of the Penal Code and armed robbery contrary to Section 298 of the Penal Code respectively.

The appellant in proof of its case against the respondent called one C witness, Inspector Likita Boka whose evidence is to the effect that a case of conspiracy and armed robbery was transferred from Lugbe Police Station to State CID with the respondent along with a Toyota Corolla vehicle with registration NO. XA 398 RBC. The witness stated that the transfer indicated that the D appellant robbed one Ojo Paul at gun point with AK 47 rifle issued to him for official duty and killed the said Paul Ojo. See pages 30-32 of the records.

Further in his evidence PW1 stated that the respondent took the stolen car to Kaduna and while attempting to sell same he was arrested and brought back to E Abuja where the offence was committed. PW1 also stated that he recorded the confessional statement of the respondent which was tendered and admitted in evidence as Exhibit 1.

The respondent in his defence denied committing the offences charged F and also denied making Exhibit 1 and stated that his statement was torn by the IPO.

At the end of the trial and addresses of counsel, the trial court convicted the respondent sentenced him to death. The court of first instance predicated the G conviction solely on the confessional statement of the respondent. The lower court on appeal set aside the conviction on the ground that the confessional statement was not corroborated by independent evidence hence the approach of the appellant to the Supreme Court.

H The learned counsel for the appellant, Chief F.F. Egele on the 1st day of December 2016 date of hearing adopted the amended brief of argument of the appellant filed on 19/9/16 and deemed filed on 1/12/16. In it was identified a sole issue, viz:

I

> **Whether the learned justices of the Court of Appeal were right in discharging and acquitting the respondent on the basis that there was no corroboration to or independent evidence**

supporting the confessional statement to warrant his conviction and sentence (Grounds 1 and 2).

Aliyu Saiki Esq. of counsel for the respondent adopted his brief of argument filed on the 6/8/13 and deemed filed on the 1/12/15. In it was formulated from the two grounds of appeal the single issue as follows:

Whether the court below was right in discharging and acquitting the respondent on the ground that the ingredients of the offences of armed robbery and culpable homicide preferred against him were not proved beyond reasonable doubt as required by law.

I see the issue as framed by the respondent as holistic and more all embracing and so shall utilize it in the determination of this appeal.

LONE ISSUE

Whether the court was right in discharging and acquitting the respondent on the ground that the ingredients of the offences of armed robbery and culpable homicide preferred against him were not proved beyond reasonable doubt as required by law? (Grounds 1 and 2).

Pushing forward the stance of the appellant, Chief Egele of counsel submitted that in criminal trials the guilt of the accused person for the commission of any offence could be established by any or all of the following modes:

(i) Confessional statement of the accused person;
(ii) Circumstantial evidence;
(Iii) Evidence of an eye witness

He stated that in the procedural law, the Evidence Act in Section 27(2) recognizes the relevance of confessional statements in criminal proceedings if made voluntarily. That a confession by virtue of Section 27(1) of the Evidence Act is an admission made at anytime by a person charged with a crime stating or suggesting

A the inference that he committed the crime.

That once an accused person makes a statement under caution saying or admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional. He cited **Patrick Ikemson & Ors**
B **vs. The State (1989) 3 NWLR (Pt. 110) 455 at 476.**

Learned counsel for the appellant went on to contend that any confession made or extracted through violence, threats, promise or any extraneous circumstances suggesting lack of free will is irrelevant and cannot be acted or
C relied upon at the trial of the accused person. He cited Section 28 of the Evidence Act.

It was submitted for the appellant that the confessional statement of the respondent being direct and positive and freely made by him did not need any
D corroboration. He cited **Joseph Idowu vs. The State (2000) 7 SC 50 at 62.**

He said the retraction of the statement by the accused person in court did not change the effect of that confessional statement and on it alone could depend a conviction. He relied on **Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.**
E **438) 530 at 537; Kolawole vs. State (2015) All FWLR (Pt. 778) 864 at 883 -- 884**.

For the appellant, Chief Egele submitted that the trial court had opportunity of listening and watching the respondent testify in his defence and
F reached the conclusion to disbelieve his oral testimony while accepting and preferring the confessional statement which it rightly held to be sufficient to grant his conviction. That in keeping with the guide in assessing and considering the quality and reliability of the confessional statement, the said statement herein met
G the requirement of reliability and dependability and so sufficient. He referred to **Ubierho vs. The State (2002) 5 NWLR (Pt. 819) 644; Madjemu vs. The State (2001) 9 NWLR (Pt. 718) 349.**

Responding, learned counsel for the respondent, Aliyu Saiki Esq.
H reiterated the ingredients to sustain a charge of culpable homicide punishable by death and those for the offence of armed robbery. He cited **Sule vs. State (2009) 17 NWLR (Pt. 1169) 33 at 53; Bozin vs. State (1985) 2 NWLR (Pt. 8) 465; Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455.**

I He stated that even though a confessional statement could sustain a conviction it must meet certain standard including having something outside of it to support that the statement is true which is not the situation in this instance and so the trial court had not the basis for relying on the confessional statement alone

to ground the conviction and so the Court of Appeal was right in setting aside the decision of the trial court. He cited **Ubierho vs. The State (2005) 5 NWLR (pt. 819) 644; Joseph Idowu vs. The State (2000) 12 NWLR (680) 48.**

That though it is not a requirement of the law that for a confessional statement to be relied upon it must be corroborated but that it is desirable to have some evidence of circumstances no matter how slight outside the confession which supports the charge and makes it more probable that the confession is true especially where the accused retracted the statement as in this appeal. He **relied On Hassan vs. The State (2001) 15 NWLR (Pt. 735) 184; Oyirimba vs. State (2002) 11 NWLR (Pt. 777) 83 etc.**

In summary the appellant implores the court to allow the appeal and restore the decision of the trial court in which Respondent was found guilty as charged. The respondent disagrees urging the dismissal of the appeal based on the following reasons:

1. **The alleged confessional statement of the respondent, Exhibit 1 was an unreliable evidence.**
2. **There was no evidence outside Exhibit 1 to sustain the ingredients of the offences charged**
3. **The appellant failed to prove its case against the respondent beyond reasonable doubt.**

The learned trial judge in finding against the Respondent held thus:

> **"In this case the statement Exhibit 1 gave graphic description of how the event leading to the killing of the deceased and subsequent taking away of the vehicle driven by the deceased and off to Kaduna for sell. I take it that the fact that the accused was arrested at Kaduna by the police in the process of selling the vehicle robbed from the deceased, is corroborative and enhances the relevance and probative value of the content of exhibit 1 which I never doubted as a confessional statement of the accused". See page 50 of the record.**

The Court of Appeal disagreed with the findings and conclusion of the court of trial and stated as recorded at page 122 of the record thus:

"Looking at the record, I am unable to see anywhere where the lower court had subjected the confessional statement to any of the tests in order to truly ascertain the veracity of the confession. The lower court simply relied on same without ascertaining any corresponding or corroborative evidence. It is my view that a lot of doubts are bound to exist in this case which I am afraid, should have been resolved in favour of the appellant.

The resultant effect of all that I have said above is that the evidence adduced by the respondent which is solely the confessional statement, simpliciter, is too scanty to rely on in convicting the appellant of the offences he was charged of committing. There is no evidence adduced by the prosecution to ascertain the veracity of the alleged confession which was even retracted.

All the ingredients of the offence of culpable homicide were also far from being established. Similarly the elements of the offence of armed robbery were also not proved".

The essential elements required to sustain a charge of culpable homicide punishable with death are as prescribed in the case of: **Sule vs. State** (2009)17 NWLR (Pt. 1169) 33 at 53 and other such like cases and they are:

1. **That the death of a person has actually taken place;**
2. **That such death was caused by or resulted from the act of the accused;**
3. **That the act was done with the intention of causing death or bodily injury;**

For the offence of armed robbery the following elements, essential as they are known are thus:

a) **That there was a robbery or series of robberies;**
b) **That the robbery or each of the robberies was an armed robbery;**

A **c) That each of the accused persons was part or had taken part in the armed robbery or robberies.**

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

The recognised methods in proof of the above stated offences as well as other crimes are thus:

C

i) The confessional statement of the accused person;
ii) Circumstantial evidence; or
iii) Evidence of an eye witness

D

In the modes that can be adopted in proof of a crime as stated above, any of the three methods would suffice. A recourse to the background facts of this appeal would be helpful and that is as follows:

E On the 25th day of May, 2004, one Abbas Akintayo of Pyakasa Village, Abuja reported at the Lugbe Police Division that his Toyota vehicle with Reg. No. XA 398 ABC valued at N250,000.00 which he gave to one Paul Ojo to use for commercial purpose was stolen. The body of the said Paul Ojo was later
F recovered around Dantata Company along Airport Road Abuja. A post mortem examination was carried out in the hospital which revealed that Ojo died of bullet wound. A later report was made to the Kaduna Police Command of recovery of the said vehicle when there was effort to sell it in Kaduna. The accused
G person/appellant who is a police constable was arrested and charged.

The sole witness was the investigating police officer who recorded the confessional statement of the appellant. In testifying the Respondent retracted the sad statement.

H The situation as presented shows that in the expected modes of proof, there was no eye witness account nor circumstantial evidence, therefore all that was left for the prosecution was the said confessional statement even though retracted. It was based solely on that statement that the trial court anchored its conviction,
I satisfied that it was enough to so do. The Court below on appeal disagreed on the ground that even though a confessional statement is sufficient alone to sustain a conviction, such a statement must have positively passed the test before it can so be utilised.

A This court has severally aligned to the matter of the six ways test for the acceptability of a confessional statement to be a rock solid admission of guilt. An example of that is seen in the case of **Ubierho vs. The State** (2005) 5 NWLR (Pt. 819) 644 where the Supreme Court held as follows:

B

> **"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**
> C **statement 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; vi) Whether the alleged confession is**
> D **consistent with other facts and have been ascertained and established".**

In line with Section 27(1) of the Evidence Act, a confession is a statement written
E or oral made voluntarily by an accused person charged with the commission of a crime to another person where he admits or acknowledges his guilt of the offence charged and stating the circumstances of his act. Such a confession is relevant in the trial. Also to be said is that a free and voluntary confession of guilt made by an
F accused person if it is direct and positive is sufficient to warrant his conviction without any corroborative evidence as long as the court is satisfied of the truth of the confession and in that satisfaction lies the requirement of the fulfillment of the six way test. See **Patrick Ikemson & Ors vs. State (1989) 3 NWLR (Pt. 110)**
G **455 at 476; Joseph Idowu vs. The State (2000) 12 NWLR (Pt. 680) 48.**

For a fact, there is no expectation of the law for a confessional statement to be firstly corroborated to qualifying to be used. It is however desirable in practice to look for and use some evidence of circumstances no matter how slight outside
H of that confession which supports the charge and makes it more probable that the confession is true. This is all the more salient in a situation such as this where the appellant retracted the statement. See **Hassan vs. The State (2001) 15 NWLR (Pt. 735) 184.**

I The situation in this matter is fraught with too many doubts since no witness was called to identify the victim of the murder to establish the fact that someone was actually murdered and who the victim was. Again the medical doctor was not called and no medical report tendered and so the presumption in

Section 149(d) of the Evidence Act springs up to anchor that perhaps if the evidence had been produced it would have worked against the prosecution's case. I place reliance on **Akinyemi vs. State (1999) 6 NWLR (Pt. 607) 449; Ajao vs. Ademola (2005) NWLR (Pt. 913) 636.**

It is with all these presentations that there is no surprise that the Court below could not uphold the decision of the court of trial.

From the foregoing and the better reasoning in the lead judgment of my learned brother, Ejembi Eko (JSC), I too dismiss the appeal as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

KEKERE-EKUN, (JSC): I have had the benefit of reading in draft the judgment of my learned brother EKEMBI Eko, JSC just delivered. His reasoning and conclusion are in accord with mine.

The respondent in this appeal was tried and convicted by the High Court of the Federal Capital Territory (FCT) Holden at Abuja on 29/10/2010 for the offences of culpable homicide and armed robbery contrary to and punishable under Section 221 and 298 of the Penal Code respectively and was accordingly sentenced to death.

The sole witness who testified for the prosecution was PW1, an Inspector of Police to whom the case file of the respondent was transferred for investigation. The respondent was handed over to him at State C.I.D. FCT Command along with a red Toyota Vehicle allegedly recovered from him and an AK 47 rifle said to have been issued to him for his official duties as a police corporal. It was the prosecution's case that the respondent robbed one OJO PAUL at gun point, shot and killed him and attempted to make away with the victim's vehicle. PW1 tendered the respondent's extra-judicial statement where he allegedly confessed to committing the crime. The respondent testified in his own defence and did not call any other witness. He denied committing the offence and stated that he was in his office at Louis Edet House on standby duty on the day and at the time the alleged offence took place. He also alleged that the statement tendered in court was not the statement he made to the police.

At the end of the trial, the respondent was found guilty and sentenced to death under Section 221 of the Penal Code. On appeal to the court below, his conviction and sentence were set aside on the ground that it was unsafe for the

A trial court to have convicted him on the basis of his confessional statement alone in the circumstances of the case where there was no evidence adduced by the prosecution outside the confessional statement to ascertain its veracity and where the said statement was retracted by the respondent at the trial he contended that
B he raised a defence of alibi in an earlier statement, which was torn by the I.P.O., and generally the paucity of the alleged confession.

The appellant being dissatisfied with the discharge and acquittal of the respondent has filed the instant appeal.

C The sole issue for determination in this appeal is:

Whether the learned Justices of the Court of Appeal were right in discharging and acquitting the respondent on the basis that
D **there was no corroboration to or independent evidence supporting the confessional statement to warrant his conviction and sentence.**

E The law is trite that an accused person can be convicted solely on his confessional statement if it is free, voluntary, direct, unequivocal and amounts to an admission of guilt. **See: Nwaebonyi vs The State (1994) 5 NWLR (Pt. 343) 138' Odeh vs. F.R.N (2008) 13 NWLR (Pt. 1103) 1; Mohammed vs. The State (2007) Vol. 37**
F **WRN 1; Ikpo vs The State (2016) LPELR – SC. 772/2014.** A confession must either admit the elements of the offence or all the facts which constitute the offence. **See: Afolabi vs The State (2013) 13 NWLR (Pt. 1371) 292.**

Over the years the courts have adopted the practice recommended in the
G case of **R. vs. Sykes (1913) 8 C.A.R. 233** of subjecting a confessional statement to some scrutiny before relying on it as a basis for conviction. The factors to be considered are:

1. Is there anything outside the confession to show that it is true?
H 2. Is it corroborated?
3. Are the relevant statements made in it true as far as they can be tested?
4. Was the accused person one who had the opportunity of committing the crime?
I 5. Is the confession possible?
6. Is it consistent with other facts which have been ascertained and proved?

It is important to bear in mind that PW1 was the sole witness in this case. It was a

matter transferred to him for further investigation. The recovered vehicle and the alleged weapon used to commit the crime were also handed over to him. He was not an eye witness and did nothing more than obtain the respondent's statement. There was no other evidence before the trial court against which it could have tested the respondent's alleged confession.

As rightly pointed out by the lower court at pages 120- 122 of the record, even though 3 witnesses were listed in the proof of evidence, only PW1 testified.

The court below held thus:

"It is surprising that a proposed witness one Abbas Akintayo, the owner of the Toyota vehicle which was stolen and Peter Ndaba who was to testify as to how the appellant met him in Kaduna and confessed before a Commissioner of Police how he robbed and killed the driver of the car, were both not called to testify in the case. Similarly, no witness was called by the prosecution to testify on the death of the deceased not even the deceased relations and no medical report was tendered either.

To my mind, Peter Ndaba, is a vital witness. A vital witness has been defined as a witness whose evidence may determine the case one way or the other and failure to call a vital witness is fatal to the prosecution's case. See the case of Imhanria vs. Nigerian Army (2007) 14 NWLR (Pt. 1053) 76.

Again as I posited supra, the alleged confessional statement made by the appellant was not corroborated by any independent testimony of a witness for the prosecution. Apart from the content of the said Exhibit 1, there was no shred of evidence before the trial court confirming that any robbery took place and that the robbers were armed at the time of the robbery and that the appellant had actually participated in the robbery or is the robber or one of the robbers who caused the death of the deceased. There was also no iota of evidence outside the appellant's confessional statement which implicated him in the commissioning of the offences charged.
It is pertinent to note here, that it is not the duty of an accused

A person to produce any evidence or call witnesses to prove that he did not commit the offence he is alleged to have committed or to prove his innocence. That onerous duty is on the police/prosecution to whom he had made statement to
B investigate and produce the witnesses named to prove that the accused did what he was alleged to have done. See the case of Onyirimba vs. State (2002) 11 NWLR (Pt. 777) 83. It is not the function of a trial court to act within a realm of conjecture.

C

Looking at the record, I am unable to see anywhere where the lower court had subjected the confessional statement to any of the tests in order to truly ascertain the veracity of the
D confession. The lower court simply relied on same without ascertaining any corresponding or corroborative evidence. It is my view that a lot of doubts are bound to exist in this case, which I am afraid, should have been resolved in favour of the
E appellant."

The above findings of the lower court are unassailable.

This is a case in which, having regard to all the circumstances, the lower
F court ought to have entertained some doubt as to the guilt of the respondent. Such doubt should have been resolved in his favour.

For these and the more detailed reasons comprehensively set out in the lead judgment, I hold that this appeal is devoid of merit. It is hereby dismissed.
G The judgment of the Court of Appeal, Abuja Division delivered on 27/6/2013 setting aside the respondent's conviction and sentence and discharging and acquitting him is hereby affirmed.

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

CENTUS NWEZE, (JSC): My Lord, Ejembi Eko, JSC, obliged me with the draft of the leading judgment just delivered now. I agree that, being wholly
I unmeritorious, this appeal should be dismissed.

It is no longer open to conjecture that a free and voluntary confession of guilt, whether judicial or extra-judicial, if it is direct and positive and, properly, established, is sufficient proof of guilt. As such, it is enough to sustain a

A conviction so long as the court is satisfied with the truth thereof, **Yesufu vs. The State [1976]6 SC 167, 173; Okegbu vs. The State [1984] 8 SC 65; Kim vs. The State [1992] 4 SCNJ 81, 110; [1992] 4 NWLR (Pt. 233) 17; Ikpp and Anor vs. The State [1995] 2 SCNJ 64; [1995] 9 NWLR (Pt. 421) 540**.

B Other cases include: **Igago vs. The State [1999] 12 SCNJ 140; [1999] 6 NWLR (pt. 608) 568' Hassan vs. The State [2001] 7 SCNJ 643; [2001] 7 NSCQR 107, 109; [2001] 15 NWLR (pt. 735) 184; Olalekan vs. State [2002] 4 WRN 146; [2001] 18 NWLR (Pt. 746) 793, 824; Salawu vs. State (1971)**
C **NMLR 249; Nwachukwu vs. The State (2007) LPELR 8075 (SC) 34, 36.**

However, the said confession must be true and reliable, **Idowu vs. The State [2000] 7 SC 50, 60; Ubierho vs. The State [2005] 5 NWLR (pt. 919) 644.** Thus, for this purpose, outside the confession, it is desirable to have some
D corroborative evidence, no matter how slight, of circumstances which make it probable that the said confession is true and correct. The reason for this prescription is simple: courts are not, generally, disposed to act on a confession without testing the truth thereof, **Onochie and Ors vs. The Republic (1966)**
E **NMLR 307; R vs. Sykes (1913) 8 CAR 233, 236.**

For the purpose of the test, the court would be expected to consider the question: whether the accused person had the opportunity of committing the offence charged and whether the confession was consistent with other facts which
F have been ascertained and proved at the trial?

There are, actually, several cases on this point. However, only a handful will be cited here, **Queen vs. Obiasa (1962) 1 ANLR 5; [1962] 2 SCNLR 402; Ikpasa vs. Attorney-General of Bendel State [1981] 9 SC 7; Akpan vs. The**
G **State [1992] 6 NWLR (Pt. 248) 439, 460; [1992] 7 SCNJ 22; Kanu vs. The King (1952) 14 WACA 30; The Queen vs. Obiasa (1962) 1 All NLR 651; [1962] 1 SCNLR 137; Obosi vs. The State (1965) NMLR 129; Jafiya Kopa vs. The State (1971) 1All NLR 150 Dawa vs. The State [1980] 8 -11 SC**
H **236;Ejinima vs. The State [1991] 5 LRCN 1640, 1671; Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (pt 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (pt. 1) 65.**

I Regrettably, as demonstrated in the leading judgment exhibit 1, the alleged confession of the respondent dated September 10, 2004, is unreliable and completely irrelevant to the twin offences of culpable homicide and armed robbery. The consequence is that the appellant, woefully, failed to prove the guilt

of the respondent as charged. After all, the duty of the Judge is, as expressed in the ancient maxim, *Judiciestjudicaresecundumallegata et probat,* which, simply, means that it is the duty of a Judge to decide according to facts alleged and proved, per Nweze (JSC) in **Ibrahim vs The State [2015] 3 SCNJ 359, 384.** Hence, the ingredients of the offence charged must be proved as required by law and to the satisfaction of the court, **Obiakor vs. State (2002) 10 NWLR (pt. 776) 612, 627; Nwokedi vs. COP [1977] 3 SC 35, 40; Ameh vs. The State [1973] 7 SC 27; Kalu vs. The State [1988] 4 NWLR (pt 90) 503; Aruna vs. The State [1990] 6 NWLR (pt 155) 125.**

It is for these, and the more detailed, reasons in the leading judgment that I, too, shall dismiss this appeal as being devoid of any merit. Appeal dismissed. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

1. KOREA NATIONAL OIL CORPORATION
2. KNOC NIG. EAST OIL COMPANY LTD.
3, KNOC NIG. WEST OIL COMPANY LTD. } **APPELLANTS**

AND

1. OWEL PETROLEUM SERVICES NIG. LTD.
2. TULIP ENERGY RESOURCES NIG. LTD.
3. NJ EXPLORATION LTD.
4. THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIG.
5. THE MIN. OF PETROLEUM RESOURCES
6. THE MIN. OF PETROLEUM RESOURCES
7. THE ATTORNEY GENERAL OF THE FED. REPUBLIC OF NIG.
8. ONGO VIDESH LTD.
} **RESPONDENTS**

SC. 249/2012

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY 24TH FEBRUARY 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODE-VIVOUR	**JUSTICE, SUPREME COURT**
MUSA DATTIJO MUHAMMAD	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKU	**JUSTICE, SUPREME COURT**
AMINA AUGIE	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Certiorari – Nature and Purposes

ACTION: Certiorari – Where dispute arises from contractual relationship – Whether the Writ of certiorari is applicable.

ACTION: Certiorari – Whether applies to executive acts – Relevant Considerations.

ACTION: Judicial remedy of certiorari – When applicable – Relevant considerations thereof.

*CASE LAW: Certiorari – **Principles in A.G Lagos State vs. Eko Hotels Ltd (2006) 18 NWLR (Pt. 1011) 378** – Considerations thereof.*

*CASE LAW: Certiorari – **Principles in Adeniyi vs. Governing Council of YABATECH (1993) 6 NWLR (Pt. 300) 428** – Considerations thereof.*

*CASE LAW: Certiorari – **Principles in Steel Bell (Nig.) Ltd vs. Government of Cross River State (1996) 3 NWLR (Pt.438) 471.***

*CONSTITUTIONAL LAW: Executive Powers of the Federation – How exercised – **SS. 5(1) and 148(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended)** – Extent and import thereof.*

COURT: Competency – Relevant principles thereof.

COURT: Jurisdiction – Distinction between main and ancillary claims – Relevancy

COURT: Jurisdiction – How determined.

PRACTICE AND PROCEDURE: Where appeal on the main suit is struck out for lack of jurisdiction – Whether it will be necessary to consider a cross-appeal based on the same judgment as considered in the main appeal.

*RULES OF COURT: **Or. 47 Rule 1(1) and (2) of the Federal High Court (Civil Procedure) Rules 2000** – Import.*

*STATUTES: **SS 5(1) and 148(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended)** – Extent and import thereof.*

WORDS AND PHRASES: 'Certiorari' – Definition

WORDS AND PHRASES: 'Judicial review' – Meaning

WORDS AND PHRASES: 'Judicial' or 'quasi – judicial' – Meaning

Issues for Determination

1. Whether the Court of Appeal was right in holding that the decision of the Late President Musa Yar'adua in voiding OPLs 321 and 323 was an executive act which was not subject to judicial review vide an order of certiorari. (Ground 1)
2 Whether the Court of Appeal was right in striking out the entire case of the appellants filed at the trial court on the basis that one (1) out of the eight (8) reliefs sought by the appellants (as applicants at the trial court) was not within the trial court's jurisdiction. (Ground 2)
3. Whether the Court of Appeal was right in holding that the decision of the learned trial Judge in relying on Statutory Instrument 5.1. 7 of 2003 to hold that President Olusegun Obasanjo doubled as both the President and Minister of Petroleum is erroneous (Ground 3)
4. Whether the Court of Appeal was right in holding that President Olusegun Obasanjo acted ultra vires in approving the side letter dated 25 February 2006 thus making the side letter void ab initio. (Ground 4)
5. Whether in the circumstances of this case, the Court of Appeal was right in holding that the appellants had not fulfilled the conditions for the allocation of the OPLs 321 and 323 (as modified by the side letter) as at the date of revocation on the basis that they had not paid the sum of US$231,000,000.00 to the FGN (Ground 5).

Facts of the Matter

The appellants' entered into two individual production sharing contracts with the Nigerian National Petroleum Corporation, (NNPC) in relation to Oil prospecting Licence 321 and 323.

The President's letter dated 8th January 2009 revoked the licence.

Dissatisfied with the turn of events the appellants filed an Originating Motion before the Federal High Court asking among other reliefs for judicial review, i.e. an Order of Certiorari quashing the decision of the President contained in the letter dated 8th January, 2009.

The simple issue is whether the Federal High Court has jurisdiction to grant an Order of Certiorari to quash the decision of the President contained in the letter dated

8th January, 2009.

In March 2005, the Ministry of Petroleum Resources, the 5th respondent herein, conducted a bidding/licensing round for the award of exploration rights in relation to several oil blocks as part of its development drive in the oil and gas sector. It is contended that the 2005 bid round for the first time, recognised a special category of participants called Strategic Downstream Investors or Strategic partners who had agreed to collaborate with the Nigerian Government in developing downstream projects (refineries and independent power plants), on the understanding that they would be awarded Production Sharing Contract (PSC) rights during the bid round. Prior to the 2005 bid round the 1st appellant and the Nigerian National Petroleum Corporation (N.N.P.C.) had discussed opportunities for mutual cooperation in relation to the 1st appellant's desire to invest in the upstream and downstream oil and gas sector. On 1st March 2005, a memorandum of understanding was entered into between the 1st appellant and the Presidential Adviser on Petroleum and Energy wherein the NNPC allegedly pledged to give the 1st appellant the necessary support. As a result of further discussions between the 1st appellant and its sister companies and the Nigerian Government, another MOU was signed on 25/7/2005 allegedly acknowledging that the 1st appellant had the requisite expertise and giving further assurances that the Nigerian Government would ensure that the appellants recovered their investment and promising to provide the support necessary to facilitate the investments to be made by them.

It is contended that the appellants, on 10/8/2005, were given pre-emptive rights over Oil Prospecting Licences (OPLs) 313 and 332. On 21/8/2005, the said pre-emptive rights were transferred to Blocks 321 and 323. In order to fulfill the local content policy of the bid exercise, the appellants formed a consortium (the KNOC Group) with two indigenous companies, namely, TULIP ENERGY RESOURCES NIGERIA LIMITED (2ND respondent) with regard to OPL 321 and NJ EXPLORATION LIMITED (3rd respondent) in relation to OPL 323.

According to the appellants, as a result of meetings held between the 1st appellant and the 5th respondent to resolve certain issues, a side letter dated 2/112006, was signed between them. The side letter approved some variations in the terms contained in the respective award letters and PSCs covering OPLs 321 and 323 respectively. A significant variation was that the 1st appellant would invest US$6 billion in strategic downstream projects and in return the signature bonus payable by it was discounted by US$231 million. In the event that the appellants were unable to

proceed with the development of the downstream projects, they were to refund the value of the US$231 million discount to the Federal Government within 180 days of such failure with interest. The inability of the appellants to proceed with the development of the downstream projects would be deemed to have occurred if, 18 months from the effective date of the PSC, the appellants, the NNPC and the DPR had failed to agree on a form and commit to the development plan for the downstream projects. The President's approval of the side letter was communicated to the 1st appellant by the 5th respondent vide a letter dated 25/2/2006. The 2nd and 3rd respondents subsequently executed PSCs with the NNPC in relation to OPLs 321 and 323 and commenced operations by opening a Lagos office in June 2006.

The President of the Federal Republic of Nigeria (4th respondent) voided the allocations of OPLs 321 and 323. The reason for the decision stated in the said letter was the non-payment of the prescribed signature bonus offered by the ONGC Consortium at the 2005 bid rounds in full. By the said letter the ONGC Consortium's status as the winning bidder in respect of blocks 321 and 323 was to be restored, subject to their payment in full of the US$485 million signature bonus within a specified period. It was this decision to revoke the award of the OPLs that led to the application for judicial review before the trial court.

In its judgment, the trial court held that the revocation was null and void and granted the appellants' reliefs, Their Lordship at the Court of Appeal disagreed with him. The court held that the decision of the President conveyed through the letter of 8/1/2009 is an executive action not subject to judicial review by way of an order of certiorari. While it resolved some in the appellants' favour, it came to the final conclusion that the suit at the trial court was incompetent for lack of jurisdiction and struck it out. The appellant has further appealed to the Supreme Court.

Held: *(Dismissing the appeal, Dattijo Muhammad (JSC), dissenting)*

1. The definition of certiorari

In his book, Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria, 2nd edition at page 670 paragraph 54.39, the learned author, T. Akinoa Aguda (of blessed memory) described 'certiorari' thus:

> **"Certiorari is one of the prerogative writs ..whose main function is to ensure that inferior courts or anybody entrusted with the**

performance of judicial or quasi-judicial functions keeps within the limits of the jurisdiction conferred upon them by the statutes which create them. Therefore, an order of certiorari will lie to remove into the High Court for the purpose of being quashed any judgments, orders, convictions or other proceedings of such inferior courts or other body, civil or criminal made without or in excess of jurisdiction" *(P p 255 – 256 Paras I – C).*

2. *The definition of Certiorari*
In Judicial Service Commission of Cross River State vs. Young (2013) LPELR-20592 (SC) at page 43 C – E, His Lordship Rhodes-Vivour, (JSC) stated:

"**Certiorari is one of the prerogative writs, the other mandamus, used by the courts to restrain the abuse or misuse of power, or to correct errors of law, wrong exercise of discretion by tribunals, public authorities, and Government Officials. Once a public authority acts judicially or administratively its conduct is subject to control by the courts by means of certiorari or mandamus."** *(P 256 Paras C – F).*

3. *The nature and purpose of Certiorari*
It is evident from the definitions referred to above that the procedure for judicial review by way of the prerogative writs of certiorari, prohibition and mandamus is a special procedure. The jurisdiction of the High Court to review the proceedings, decisions and acts of inferior tribunals and acts of government bodies, is supervisory. The court is usually concerned with the legality and not the merit of the proceedings, decisions or acts of the affected inferior court, tribunal or government body. See: A.C.B. vs. Nwaiqwe (2011) 7 NWLR (Pt.1246) 380 @ 386 C E; Oredoyin vs Arowolo (1989) 4 NWLR (PL114) 172. Where it is established before the High Court that a statutory body or inferior court with limited powers has abused that power and that such abuse prejudicially affects the rights of a citizen, certiorari will be issued at the instance of that citizen. See: Head of the Federal Military Government, etc The Public Service Commission of Mid-West State & Anr.. in re Maclean Okoro KubeinjeL (1974) A.N.L.R

784 @ 812 – 813 where this court held that such abuse of power may take the form of non-compliance with rules of procedure prescribed for that body, denial of the right to be heard in one's defence; irregularities which are tantamount to a denial or a breach of the rules of natural justice, or even the assumption of jurisdiction to perform an act unauthorised by law or a refusal of jurisdiction where it should be exercised, to name a few. *(P 256 – 257 Paras F – B)*

4. *When certiorari will not apply*

There is however a caveat to these generally wide powers of judicial review. This court in Nwaoboshi vs MILAD, Delta State (2003) 11 NWLR (Pt.831) 305, held that no legislative or executive act is subject to the controlling jurisdiction of the writ of certiorari on the ground that it was not an act performed or expected to be performed judicially. His Lordship, Uwaifo, (JSC) at 320 A – B (supra) explained the rationale for this position thus:

> **"It will be a contradiction in terms and offensive to the idea underlying the doctrine of separation of powers to hold otherwise since certiorari lies against only judicial or quasi - judicial acts. And a legislative or executive act cannot by rational thinking come within acts that are to be performed judicially,"** *(P 257 Paras B – E)*

5. *The dispute between parties arose from contractual relationship*

It is important to note that the dispute between the parties herein arose from a contractual relationship. By the letters of award in respect of OPLs 321 and 323 respectively and subsequent side letters, wherein some of the conditions stipulated in the letters of award were allegedly varied, the terms and conditions of the contract were agreed upon. *(P 256 Pp A – B)*

I have endeavoured to set out in some detail the terms of the agreements between the parties and the facts and circumstances that gave rise to the application for judicial review to demonstrate the fact that-the relationship between the parties was contractual. All the appellants' complaints, even though it has been argued that the 4th - 6th respondents acted unfairly or failed to observe the rules of natural justice, in my considered view constitute allegations of breach of contract. Where there

is a contractual obligation between the parties, both parties are expected to comply with the terms and conditions of the contract. Where one party defaults in his obligations under the contract, the other party is entitled to terminate the contract. Where the contract contains terms for bringing the contract to an end by either party and the terms are not complied with, the remedy of the affected party lies in an action for breach of contract, damages, etc. *(Pp 263 – 264 Paras H – B)*

6. *The Principle in A-G, Lagos State vs. Eko Hotels Ltd*

I am of the view that the situation in this case is distinguishable from the circumstances in cases such as A.G. Lagos State vs. Eko Hotels Ltd. (2006) 18 NWLR (Pt.1011) 378 @ 423 B – E; Steel Bell (Nig,) Ltd. vs. Government of Cross River State (supra); Adigun vs. A.G. Oyo State (supra); Adeniyi vs. Governing Council, Yabatech (supra).

In A.G. Lagos State vs. Eko Hotels Ltd. (supra), the bone of contention was the issuance of a warrant of arrest by a Tribunal of Inquiry established by the Lagos State Government vide Legal Notice No.10 of 1999. The respondents filed an action at the Federal High Court contending that the Legal Notice by which the Tribunal was set up was void and of no effect and sought an order of-prohibition and injunction against the Tribunal. It was held by this court that the functions conferred on the Tribunal of Inquiry, which included the power of arrest of a person who refused to attend the Tribunal, were quasi-judicial in nature and therefore liable to an order of prohibition. *(P 264 Para D – E)*

7. *The Principle in Steel Bell Nig. Ltd vs. Govt. of Cross River*

In Steel Bell (Nig) Ltd. vs. Govt. of Cross River State (supra), the Cross River State Government set up a Commission of Inquiry to investigate Government contracts awarded up to December 1989. The appellant company, which had been awarded a contract in 1987 appeared before the Commission, called witnesses and was represented by counsel. The Commission submitted its report and made recommendations. In its view published in the Government White paper, the Government rejected some of the recommendations and proceeded to unilaterally make penal decision against the appellant including blacklisting it without affording it a hearing. The Court of Appeal held that by not affording the appellant a hearing after rejecting the Commission's recommendations, the 1st

respondent had breached the natural justice rule of *audi alteram partem* and *certiorari* proceedings were rightly commenced to quash the views of the Government of Cross River State on the report of the Commission.
(P 264 Paras F – I)

8. *The Principle in Adeniyi vs. Yabatech*
In Adeniyi vs. Governing Council, Yabatech (supra), the appellant had been invited to give evidence before an Investigation Panel set up by the Governing Council of Yaba College of Technology to look into the leakage of the report of an interview panel which was conducting interviews for the vacant office of Rector of the institution. The panel sent its report to the Council. The Council however dismissed the report, and without calling on the appellant, decided to retire him compulsorily. The appellant sued for the enforcement of his fundamental rights and for an order quashing the decision of the Governing Council. It was held by this court that non-judicial or administrative bodies have a duty to act in good faith and fairly listen to both sides. In all these cases, the administrative bodies were exercising quasi-judicial functions. The complaints in this case, on the other hand, arise from a particular contractual relationship between the parties, with specific terms and conditions attached thereto. The reason given for terminating the contract was "*failure to pay the prescribed signature bonus offered by the winning bidder in full*"
(Pp 264 – 265 Para I – C)

9. *How to determine the Court's jurisdiction*
As rightly observed by learned counsel for the 1st respondent, in determining the jurisdiction of the court, it is the plaintiff's claim that is considered. See: Tukur vs Govt. of Gongola State (1989) 4 NWLR (Pt.117) 517 @ 549 B; Western Steel Works vs Iron & Steel Workers (1987) 1 NWLR (Pt49) 284; Adeyemi vs Opeyori (1976) 9 – 10 SC 31 @ 51 In so far as the appellants' claims were premised on breach of contract, I agree with the court below that a prerogative writ of certiorari is not the appropriate remedy. When it is sought to quash an order, decision or proceeding by certiorari the error complained of must be apparent on the face of the order, decision or proceeding. See: In Re: Kubeinje (supra). In the instant case, what is apparent on the face of the letter dated 8/1/2009 is

a statement that the appellants failed to comply with the terms of the agreement between the parties.

Furthermore, I agree with the court below that the said letter conveying the decision of the President of the Federal Republic of Nigeria to void the OPLs represents an executive act, which, in the circumstances is not subject to judicial review. It merely states the act of non-compliance that gave rise to the decision. There is no reference to a petition on the face of the document. This is not to be taken to mean that the appellants are without a remedy. That remedy, however', is not by way of judicial review. *(P 265 Paras D – H)*

10. When a court is said to be competent

A court is competent to adjudicate in a cause or matter when:

(a) it is properly constituted as regards numbers and qualification of members of the bench and no member is disqualified for one reason or the other;
(b) the subject. matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
(c) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court is fatal and the proceedings are a nullity as such defect is extrinsic to the adjudication.

See: **Madukolu vs. Nkemdilim (1962)2 SCNLR 341; Skenconsult vs. Ukey (1981) 1 SC; A.G. Federation vs. Guardian Newspapers Ltd. (1999) 9 NWLR (Pt. 618) 187**.

The vice afflicting the appellants' application for judicial review is that it was not initiated by due process of law. In other words, the suit ought to have been instituted by way of writ of summons and the filing of pleadings. This issue is accordingly answered in the affirmative and

resolved against the appellants. *P 265 Paras H – C)*

11. Competence of a Court

In Madukolu & ors vs. Nkemdiim (1962) 2 NSCC p.314

This court per Bairamian (JSC) made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent when:

1. **It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and**
2. **The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and**
3. **The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.** *(P 272 Para C – F)*

12. Per Rhodes-Vivour:

"The law draws a distinction between judicial and administrative acts. If for example a public authority acts judicially or quasi judicially its conduct is subject to control by the courts by means of certiorari or/and mandamus, but if it was acting administratively its decisions are exempt from control by the courts. Certiorari and mandamus would not be available.

The President's letter dated 8th January 2009 which in effect revokes the appellants' licence is an administrative act. The President was acting administratively when he made the decision in the said letter. Such a letter cannot be quashed by certiorari. The Federal High Court was wrong to grant the prerogative writ while the Court of Appeal was correct to rule that the Federal High Court has no jurisdiction over the matter. It is very clear that the subject matter of the case is not within the jurisdiction of the court since courts have no jurisdiction to quash administrative acts by certiorari.

I am not by this concurring judgment saying that an administrative decision is exempt from review simply because it is administrative. That would be saying that the President can act as he likes. That would, be wrong. The appellants' have a remedy but definitely not certiorari." *(P 273 Paras A – E)*

13. *Jurisdiction over main and ancillary claims*
The law has long been settled that the incompetence of a court to entertain and determine the principal question in a proceeding will rob it of jurisdiction to entertain ancillary reliefs. A court cannot adjudicate over ancillary claims where such ancillary claims would involve a discussion of the main claims. See: Tukur vs Govt. of Gongola State (1989) 4 NWLR (ft. 117) 517 @ 549 A; 567 E & 568 A - B. However, it is argued on behalf of the appellants that by virtue of Order 47 Rule 1(1) and (2) of the Federal High Court (Civil Procedure) Rules, 2000, under which the application was brought, the trial court had jurisdiction to entertain the other reliefs.
(P 268 Para A – C)

14. *Construction of Order 47 of the Federal High Court Rules*
It is therefore necessary to examine the relevant provisions.

"Order 47
Rule (1) An application for:
(a) an order of mandamus, prohibition or certiorari, or
(b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this order.

(2) An application for a declaration or an injunction (not being an injunction in rule 1 (b) of this rule) may be made by way of an application for judicial review and the court may grant the declaration or injunction if it deems it just and convenient to grant it by way of Judicial review, having regard to:
(a) the nature of the matters in respect of which relief may be granted by way of an order of madamus, prohibition or

certiorari,

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

(c) all of the circumstance of the case.

On an application for judicial review any relief mentioned in rule 1 may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of relates to or is connected with the same matter."

In Ohakim vs Agbaso (2011) ALL FWLR (Pt.553) 1860 @ 1840 - 1841 C - D, this court, per Onnoghen, (JSC) (as he then was) explained the legal effect of the above provisions: With regard to Rule 1 (1) (b) he stated that an injunction for any other purpose other than to restrain a person from acting in any office in which he is not entitled to act cannot stand on its own by way of judicial review, as the provision has limited the scope or nature of an injunction that can be applied for by way of judicial review. It was observed that this is an exception to the general rule that an injunction cannot be claimed as a substantive relief in action without tying it to the main claim, usually by way of declaration or damages. It was further held that by virtue of sub-rule 2 of Rule 1, in an application for judicial review, the type of injunction that may be claimed is any other injunction other than the one specifically mentioned in Rule 1 (1) (b) supra. *(Pp 268 – 269, Paras C – D)*

Per Kekere-Ekun (JSC):

Applying these principles to the instant case, I am inclined to agree with the respondents that the main claim sought by the appellants before the trial court was for an order of certiorari to quash the letter of 8th January 2009. All the other reliefs sought are dependent on that main relief. By Order 47 Rule 1 (2), other reliefs such as declarations or injunction may be made by way Of judicial review regard being had to (a) the nature of the matters in respect of which relief may be granted, (b) the nature of the bodies or persons against whom relief may be granted by way of such order, and (c) all the circumstances of the case. In

resolving Issue 1 earlier, I held that the suit before the trial court was incompetent, as the act complained of was an executive act in respect of which a writ of certiorari will not lie and having arisen from a purely contractual relationship. The declaratory reliefs sought were with a view to quashing the decision of the 4th respondent. Furthermore, I am of the view that the order of injunction sought in prayer 8, which seeks to restrain not only the 4th 6th respondents, but also other parties whose actions cannot be subject to judicial review, cannot stand alone.

I therefore hold that having regard to the facts and circumstances of this case, the lower court was right in striking out the entire suit. This issue is accordingly resolved against the appellants. *(P 269 Paras D – H)*

15. *Where the Court lacks the jurisdiction to entertain a suit which is struck out on appeal, it will not be necessary to consider the cross appeal.*
I have earlier referred to the briefs of argument filed by the respective parties in this cross-appeal in the introductory part of the main appeal. I also noted that Chief Robert Clarke, (SAN) filed a preliminary objection to the cross appeal on the ground that it is academic. Written addresses were duly filed and exchanged in respect of the preliminary objection. In the cross appellant's brief filed on 25/6/2012, five issues were identified for the determination of this appeal arising from the 7 grounds of appeal. A careful examination of the grounds of appeal and the five issues predicated thereon reveals a challenge of the findings of the court below on the merits of the appeal in spite of having found that the suit before the trial court was incompetent. Having resolved the main appeal against the appellants and affirmed the order striking out the suit before the Federal High Court, it is my considered view that this cross appeal no longer has any leg to stand on. It is accordingly struck out. *(P 271 Paras B – E)*

16. *The Purpose of Judicial review*
Judicial Review is based on the basic principle that powers can only be validly exercised within their true limits. Thus, it is a mechanism for keeping public authorities within due bounds and for upholding the rule

of law. In effect, instead of substituting its decision for that of some other body, as happens on appeal, the Court on review is concerned only with the question whether the act or order being challenged should be allowed to stand or not.

In other words, the Court is concerned with the legality and not the merits of the decision or the acts of the public authority – See *Amadi vs. Acho* (2005) 12 NWLR (Pt. 939) 386, and *ACB vs. Nwaigwe* (2011) 7NWLR (Pt 1246) 380 SC where this court, per Onnoghen (JSC) (as he then was), explained as follows:

> **Judicial review is the supervisory jurisdiction of the High Court in the review of the proceeding decisions and acts of inferior courts and tribunals and acts of governmental bodies. The remedies available are for orders of mandamus, certiorari and prohibition. In judicial review, the court is usually concerned with the legality and not with the merit of the proceedings, decisions or acts of the affected court, tribunal or governmental body. The jurisdiction of the High Court to quash the judgment, order or proceeding of an inferior Tribunal on the face of the record is not an appellate jurisdiction.** *(P 288 Para F – B)*

17. When to apply the Judicial remedy of certiorari

This court explained the position of the law in some detail in:

> **The Head of the Federal Military Government and C.I.C. Armed Forces vs. The Military Governor, Mid-Western State of Nigeria & Anon Ex-Parte Ambrose I. Obiyan (1973) 12 SC23, as follows:**
>
> **It is settled law that *Certiorari* lies to the High Court to quash the orders or the proceedings of an inferior Tribunal which has acted in excess of its jurisdiction, and that although the remedy was in early times limited to Courts in the normal sense, it has since been extended to other authorities or bodies exercising judicial or quasi-judicial powers: R. vs. Electricity Commissioners (1924) I KB 171 at pp.204-5. We are equally of**

the opinion that certiorari does not lie in respect of executive or administrative acts but only of judicial or quasi-judicial acts. In holding that certiorari did not lie against the controller of textiles in Ceylon, who had by an order withdrawn a traders license on what seemed to the former to be reasonable ground, Lord Radcliffe in delivering the Opinion of their lordships of the Privy Council in the case of Nakkuda All vs. Jayaratne (1951) A. C 66, said:

> "**Their lordships have come to the conclusion that Certiorari does not lie in this case. It would not be helpful to reconsider the immerse range of reported cases in which Certiorari has been granted by the English Courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established courts of justice and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably to say that the courts have been readier to issue the writ of Certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that has some analogy to the judicial. But the basis of jurisdiction of the courts by way of Certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute That principle is most precisely stated in the words of Atkin, L. J. (as he then was) in Rex vs. Electricity commissioners - "the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognized as courts of justice. Wherever any bodies or persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess**

> **of their legal authority they are subject to con trolling jurisdiction of the King's Bench Division exercised in these writs': As was said by Lord He art CJ in Rex vs. Legislative Committee of the Church Assembly when quoting this passage -"in order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body had the duty to act judicially**". *(P p 289 – 290 Paras B – H)*

So, an Order of Certiorari is issued against acts and decisions of bodies and/or persons exercising administrative or judicial, quasi-judicial authority affecting rights of people, which makes it mandatory for them to act fairly. It does not lie against executive or legislative acts, or mere administrative acts as such acts are not performed in accordance with rules of fair hearing – see Magit vs. University of Agric., Makurdi (2005) 19NWLR (Pt. 959) 211. *(P 294 Paras B – C)*

18. Meaning of a judicial or quasi judicial act

In this case, there is nothing judicial or quasi-judicial about the act of the 4th respondent complained of. A judicial or quasi judicial action is a term applied to the act of discretion of public administrative officers or bodies, who are required to investigate facts, ascertain evidence of facts, hold hearings, weigh evidence, draw conclusions from them as a basis for their official action and to exercise discretion of a judicial nature – See M. & H. W. U. N. vs. The Hon. Minister for Labour and Productivity *(2005)17 NWLR (Pt. 953) 120* and L.P.D.C vs. Fawehinmi *(1985) 2 NWLR (Pt 7) 300 SC,* where this Court, per Aniagolu, (JSC), explained as follows:

> **The term *"quasi-judicial"* may have one of three meanings. Firstly, it may describe a function that is partly judicial and partly administrative such as the making of a compulsory purchase order preceded by the holding of a judicial type local inquiry and the consideration of objections; secondly, it- may alternatively describe the "judicial" element in a composite function – thus the holding of inquiry and**

considering objections in respect of a compulsory purchase order become "quash judicial" acts; and thirdly, it may describe the nature of the discretionary act itself where the discretion is unfettered – One test for identifying judicial function has been said to be whether the performance of the function terminates in an order that has conclusive effect.
(P 294 Paras C – I)

Per Augie (JSC):

"In this case, I agree with the respondents that the act complained of is at best an executive or administrative act, which is, certainly, not expected to be performed judicially. The dispute between the parties arose from a contractual relationship, and I agree that the appellant's complaints are mere allegations of breach of contract; that will not let them through the door marked – Judicial Review.

It is understood that no one is above the law or can lawfully operate outside the law, and if anyone or body in authority, including the President of the Federal Republic of Nigeria, does NOT act in accordance with the law, an order of Certiorari may issue to quash the effect of what has been wrongfully done - see Onwuzulike vs. CSD Anambra State (1992) 3 NWLR (Pt. 232) 798.

In this case, appellants cannot come under the umbrella of Judicial Review to seek redress for the alleged breach of contract; but they are not without remedy. They have a right and the law says that they must also have a remedy, which is the Latin maxim Ubi jus, ibi remedium - where there is a right there is a remedy - See Bello vs. A-G Oyo State *(1986)5 NWLR (Pt 45)822 SC*.

But the remedy is not by judicial Review."
(P 294 – 295 Paras I – D)

Held: *Dattijo Muhammad (JSC) (Delivering the dissenting judgment)*

1. The Source of jurisdiction of a court

Firstly, it is long settled that generally speaking, jurisdiction in relation to a law court is constitutionally and/or otherwise statutorily conferred. Jurisdiction, the same trite principle further enunciates, is only extended, diminished or extinguished by the very Constitution and/or statute that conferred it in the first place. In conferring or extinguishing jurisdiction in courts Laws, and precedents are taken to be a source of these laws, must do so in very clear terms. See *Isaac Obiuweubi vs. Central Bank of Nigeria (2011) LPELR-2185 (SC), (2011) 7 NWLR 465, Afribank (Nig) Plc vs. Akiwasa (2006) 5 NWLR (Pt 974) 619.In National Bank (Nigeria) Ltd & anor vs. John Akinkunmi Shoyoye & anor (1977) LPELR-1948(SC), (1977) 5 SC 110* this Court per Obaseki JSC stated thus:

> "**By jurisdiction is meant the authority which a court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by similar means."** (Underlining supplied for emphasis). *(P 284 Paras C – G)*

2. When does a court assume jurisdiction

It is trite that a court of law only assumes jurisdiction over a matter if, inter-alia:

(a) The subject matter of the action is within its jurisdiction and

(b) The action is initiated by due process of law. See *James G. Orubu vs. National Electoral Commission (1988) 12 SC (pt III) 1 and Attorney General of Lagos State vs. Dosunmu (1989) 6 SC (Pt II) 1.*
(Pp 284 – 285 Paras H – A)

3. Failure to comply with procedural jurisdiction

Whereas jurisdiction in respect of the subject matter of the suit is provided for by either the Constitution or the statute establishing the court, procedural jurisdiction for initiating the suit falls within the

precincts of the court's adjectival laws. Non compliance with procedural requirements for initiating an action, by itself an irregularity in the exercise of jurisdiction, should not be confused with total lack of jurisdiction. See Mobil Producing Nig Ltd vs. Lagos State Environmental Protection Agency (2002) 14 SCM 167. *(P 285 Paras A – C)*

4. *What determines jurisdiction*

It has long been settled that it is the appellants' claim that determines whether in the light of the statute which confers jurisdiction on the court, the court has jurisdiction to hear and determine the claim. See Aihaji Umaru Abba Tukur vs. Government of Gongola State (1989) 9 SC 1 and Ahmadu Babale vs. A.A. Abdulkadir (1993) 2 SCNJ 110.

In the instant case, the 4th respondent had voided the allocations of OPL's 321 and 323 made to the appellants. The declarations the appellants sought in their suit at the trial court are as reproduced earlier in this judgment. By their suit, the appellants had invoked the jurisdiction of the trial court seeking the declaratory and injunctive reliefs against 4th respondent's executive decision revoking the awards of OPL's 321 and 323 to them. Given the reliefs the appellants seek, the trial court's summation that, by virtue of Section 251(1)(r) of the 1999 Constitution and Section 7(1) (r) of the Federal High Court Act read along with Section 5 of Petroleum Act, it has the jurisdiction to hear and determine appellants' suit is beyond reproach. *(P 285 Paras C – G)*

5. *Power of Federal High Court to make order of Certiorari*

The jurisdiction the trial court enjoys by virtue of Section 251(1) (r) of the 1999 Constitution vis-à-vis Section 7(1)(r) of the Federal High Court Act, see Section 9(1) of the Act, is exercisable in the manner provided by the Act establishing the court or any other enactment or by such rules and orders of court as may be made pursuant to the Act under which the court is established. The trial court is particularly empowered under Section 14 (2) of its constitutive statute to make order of certiorari "notwithstanding that the order is made against an officer or authority of the Federation as such. *(P 285 Paras G – I.)*

6. *Where action is wrongly commenced at the Federal High Court*

Granting without conceding that appellants' suit is wrongly constituted having been commenced by a wrong procedure, the lower court, it would seem, has ignored the potent saving facility Order 51(1) of the trial court's rules provide thus:

> **" Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding, there has by reason anything done or left undone, been failure to comply with the requirements of these Rules, whether in respect of time, place, manner. form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any documents, judgment or order therein."** (Underling supplied for emphasis).

The truth of the instant matter is that judicial review procedure for an order of certiorari is a mode of commencement of action the adjectival laws of the trial court permit litigants to explore. The very rules save such proceedings even if wrongly commenced as long as miscarriage of justice has not been occasioned. *(P 286 Paras A – E)*

7. Application of irrelevant case laws

This court is certainly the apex court in the country and by the Constitution its decisions bind every court, person or authority. By the time-honoured doctrine of judicial precedent which further operates in this country, the decision on a given issue of law handed down by this court binds all subordinate courts including the lower court. See *Abacha vs. Fawehinmi (2000) 6 NWLR (Pt 660) 228 (2000) LPELR-14(SC)* and *Bashir Mohammed Dalhatu vs. Ibrahim Sam mu Turaki & ors (2003) LPER-917 (SC), (2003) 7 SC 1.* It must be restated here, though, that the doctrine of stare decision flourishes where the facts and the law applied to them in the earlier case are same as in the subsequent case. Cases are only authorities for what they decided. See *Fawehinmi vs. UBA (No 2) (1989)2 NWLR (Pt 105) 588 and Clement vs. Iwuanyanwu (1989) 2 NWLR (Pt 107)39.*

The decisions of this court the lower court relied on to nullify the

trial court's proceedings the appellants commenced by their application for judicial review for an order of certiorari dwelt on the non-availability of the procedure under the common law against an executive decision or act. These are not decisions on the procedure as provided for by the trial court's rules of practice and which by virtue of Section 14 of the Federal High Court Act is grantable irrespective of the nature of the act against which the relief is claimed. A court's rules of procedure remain the only source of the manner by which a court's jurisdiction, as conferred by either the constitution and/or its constitutive law, is to be exercised. The decisions of this court not on the non-availability of the judicial review procedure for an order of certiorari to the appellants inspite of its being provided for by the trial court's adjectival laws cannot justify the lower court's order nullifying the trial court's proceedings sequel to the court's perverse resolution of the two issues urged on it by the 1st respondent.
(P 286 Para F – C)

8. *Application of Principles of Substantial Justice*
In *the State vs. Salihu Mohammed Gonto & others (1983) N.S.C.C. 104 at 119.* My lord Eso (JSC) (of blessed memory) restated the danger technicalities hold to the cause of justice thus:

> **"It would have amounted to travesty of justice to allow the judgment of the Court of Appeal to stand. This court has for sometime now laid down as a guiding principle that it is more interested in substance than mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice."**

See also *Bature vs. State (1994) 1 NWLR 267 at 282, Agbakoba vs. INEC &ors (2008) LPELR-232 (SC) and Attorney-General Bendel State vs. Attorney General of the Federation (1981) 10 SC 1.*

In the instant case, appellants grouse is with the 4th respondent's decision pertaining the award of the OPLS 231 and 323 to them. They want, based on the grounds upon which their suit is founded, 4th respondent's act/decision removed and undone.

Given Order 51(1) of the trial court's rules of practice the only justification for setting aside the proceedings of the trial court as commenced by the appellants and the order it gave birth to is if same has occasioned miscarriage of justice. The 1st respondent as the appellant at the lower court did not establish the injustice appellants resort to wrong procedure in claiming against the defendants cause any of the latter. The proceedings must accordingly prevail. I so hold. *(P 287 Paras D – I)*

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A.C.B. vs. Nwaiqwe (2011) 7 NWLR (Pt.1246) 380 @ 386 C – E;
A.G. Federation vs. Guardian Newspapers Ltd. (1999) 9 NWLR (Pt. 618) 187.
A.G. Lagos State vs. Eko Hotels Ltd. (2006) 18 NWLR (Pt.1011) 378 @ 423 B – E;
A.G. Lagos State vs. Eko Hotels Ltd. (supra),
Abacha vs. Fawehinmi (2000) 6 NWLR (Pt 660) 228 (2000) LPELR-14(SC)
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Adeniyi vs. Governing Council, Yabatech (supra).
Adigun vs. A.G. Oyo State (supra);
Afribank (Nig) Plc vs. Akiwasa (2006) 5 NWLR (Pt 974) 619.
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James G. Orubu vs. National Electoral Commission (1988) 12 SC (pt III) 1

Judicial Service Commission of Cross River State vs. Young (2013) LPELR-20592 (SC) at page 43 C – E,
L.P.D.C vs. Fawehinmi (1985) 2 NWLR (Pt 7) 300 SC
M. & H. W. U. N. vs. The Hon. Minister for Labour and Productivity (2005)17 NWLR (Pt. 953) 120
Madukolu & ors vs. Nkemdiim (1962) 2 NSCC p.314
Madukolu vs. Nkemdilim (1962)2 SCNLR 341;
Magit vs. University of Agric., Makurdi (2005) 19NWLR (Pt. 959) 211.
Nwaoboshi vs MILAD, Delta State (2003) 11 NWLR (Pt.831) 305
Ohakim vs Agbaso (2011) ALL FWLR (Pt.553) 1860 @ 1840 - 1841 C – D
Onwuzulike vs. CSD Anambra State (1992) 3 NWLR (Pt. 232) 798.
Oredoyin vs Arowolo (1989) 4 NWLR (PL114) 172
Skenconsult vs. Ukey (1981) 1 SC;
State vs. Salihu Mohammed Gonto & others (1983) N.S.C.C. 104 at 119
Steel Bell (Nig,) Ltd. vs. Government of Cross River State (supra);
Tukur vs Govt. of Gongola State (1989) 4 NWLR (ft. 117) 517 @ 549 A; 567 E & 568 A - B.
Tukur vs Govt. of Gongola State (1989) 4 NWLR (Pt.117) 517 @ 549 B; Western Steel Works vs Iron & Steel Workers (1987) 1 NWLR (Pt49) 284; Adeyemi vs Opeyori (1976) 9 – 10 SC 31 @ 51.

Nigerian Statute Cited
The Federal High Court (Civil Procedure) Rules, 2000

Representation
ADENIYI ADEGBONMIRE, SAN for the appellants and 1st - 3rd cross respondents with O. Aliu (Mrs.), D.D. Killi Esq., and K. Olona Esq. in SC. 249/2012; for 2nd – 4th respondents in SC.460/2012 and SC.6/2013 and for 1st - 3rd cross respondents in SC.114/2013.

DR. ALEX IZINYON, SAN for 1st respondent/cross appellant with Ese Igbako (Mrs.), K.O. Omoruan Esq., I.O. Fagbemi Esq., Oluseyi Oduguwa Esq., C.U. Adah (Miss)., Obumneke Onuoha and O.E. Bob Esq. in SC.249/2012; for 1st respondent in SC.460/2012 and SC.6/2013 and for 7th cross respondent in SC.114/2013.
O. JOLAAWO ESQ. for 2nd respondent/4th cross respondent with F.C. Ani Esq., F.

Bude Esq., and F. Igboanugo (Miss) in SC. 249/2012; for 5th respondent in S.460/2012; for the appellant in Sc.6/2013 and for the 4th cross respondent in SC.114/2013.

CHIEF ROBERT CLARKE, SAN and AA. RAJI, SAN for the 3rd respondent 5th cross respondent with I.B. Muhammed Esq., in SC.249/2012; for the appellant in SC.460/2012; for the 5th respondent in SC.6/2013 and SC.114/2013.

T.A. GAZALI, Assistant Chief State Counsel, Federal Ministry of Justice with Yagana M. Sheriff Esq. (SSC).,OyinKoleoso Esq., (SC) and Adam Bagobiri Esq., (SC) for the 4th – 7th respondents in SC.249/2012; for 6th – 9th respondents in SC.460/2012 and SC.6/2013 and for the cross appellants in SC.114/2013.

KEKERE-EKUN, (JSC) (Delivering the lead judgment): This appeal is against the judgment of the Court of Appeal, Abuja Division delivered on 26th April, 2012 setting aside the judgment of the Federal High Court, Abuja Division in Suit No. FHC/ABJ/M/146J/2009 delivered on 20th August, 2009. By a motion ex-parte dated 6th March, 2009, the Appellants herein sought and on 12th March, 2009 were granted leave to apply for judicial review. Pursuant to the said order they filed an Originating Motion on 26th March, 2009 wherein they sought the following reliefs:

a. A DECLARATION that by the contents of the letters of award issued by the Ministry of Petroleum Resources (the 2nd respondent), reference Nos. P1/1106M/V.1 both dated 5 September 2005 and addressed to the 1st applicant herein, what was awarded to the applicants (the Consortium) was a right to enter into contracts for works with the Nigerian National Petroleum Corporation under Production Sharing Contracts (PSCS) in relation to OPLs' 321 & 323 (Contract Areas) in the capacity of contractors, permitting, enabling and/or authorizing the applicants to conduct, promote, partake and/or carry out petroleum exploration and operations within the contract areas.

b. A DECLARATION that by virtue of the contents of the letters of award referred to in relief No. 1 above, the applicants were entitled to and did enter into two (2) individual Production Sharing Contracts (PSCs') with the Nigerian National Petroleum Corporation (NNPC), the proprietor of

OPLs' 321 and 323, which PSCs' govern the rights and obligations of the applicants as it concerns the operation and/or ownership of OLPs' 321 and 323.

c. A DECLARATION that in so far as the respondents' letter issued for and on their behalf by the Federal Ministry of Energy (now known as the Ministry of Petroleum Resources) dated 8 January 2009 with reference No. HMSP/09/06/1/1 and written under the hand of the Honourable Minister of State (Petroleum) and addressed to the applicants titled "Allocation of OPLs' 321 and 323", purports to void "the allocation of OPLs' 321 and 323", and in so far the applicants are not allotees or holders of OPLs' 321 and 323, but are rather PSC contractors who have already entered into contracts to perform works with the Nigerian National Petroleum Corporation under the Production Sharing Contracts (PSCS), the aforesaid letter of 8 January 2009 is ineffective, null and void and incapable of lawfully and legally terminating the applicants' contractual rights and obligations as contained in the PSCs,

d. A DECLARATION that the 1st respondent lacks any constitutional, statutory or other authority, right and power to void the rights of the applicants as contractors in respect of the operation and development of OPLs' 321 and 323 and that the purported exercise of such power and/or authority as conveyed to the applicants in the letter referred to in relief 3 above, is illegal, unlawful, wrong and **void *ab initio,***

e. A DECLARATION that the PSCS executed between the applicants and NNPC and individually dated 10 March 2006 remain binding and subsisting and continues to govern the development and operation of OPLs' 321 and 323; particularly as it relates to the rights and obligations of the applicant's Consortium (KNOC Nigerian West Oil Company Limited, Equator Exploration Nigeria 321 Limited, and Tulip Energy Resources Nigeria Limited (in respect of OPL 321) and KNOC Nigerian East Oil Company, Equator Exploration Nigeria 323 Limited and NJ Exploration Limited (in respect of OPL 323).

f. A DECLARATION that the decision of the 1st respondent, as conveyed in the 2nd respondent's letter dated 8 January 2009 with reference No. HMSP/09/06/1/1 and written under the hand of the Honourable Minister of State (Petroleum) and addressed to the applicants titled "Allocation of OPLs' 321 and 323", is illegal, procedurally unfair, unreasonable,

A irrational and/or defeats the legitimate expectations of the applicants herein.

g. AN ORDER OF CERTIORARI quashing the decision of the 1st respondent, as conveyed in the 2 respondent's letter dated 8 January 2009 B with reference No. HMSP/09/06/1/1 and written under the hand of the Honourable Minister of State (Petroleum) and addressed to the applicants titled "Allocation of OPLs' 321 and 323", on the grounds that such decision is illegal, procedurally unfair, unreasonable, irrational and/or C defeats the legitimate expectations of the applicants herein,

h. AN ORDER of perpetual injunction restraining the respondents, their agents, servants, privies and any other body which derives its authority from the respondents from further interfering with in whatever manner or D disturbing the applicants in the pursuit of their lawful and contractual duties/obligations as contemplated by the contents of the letters of award and the PSCs referred to above, dated the 10th day of March, 2006 and executed between the applicants and NNPC.

E

Accompanying the application were an affidavit verifying the facts deposed to on 6/3/09 and a further affidavit deposed to on 10/3/09. Upon an application by ONGC VIDESH Ltd. (8th respondent herein) and OWEL PETROLEUM F SERVICES NIGERIA LTD. (1st respondent in this appeal) they were joined in the suit as 5th and 6th respondents respectively. TULIP ENERGY RESOURCES NIGERIA LTD. and NJ EXPLORATION LTD. (2nd and 3rd respondents in this appeal) applied and were joined as 4th and 5th co-appellants. Various G applications were filed by the appellants and 1st – 4th and 6th respondents respectively. They were argued along with the main application. In a considered judgment delivered on August, 2012, the court resolved the pending applications as follows: (i) applicants' application for extension of time to file and serve their H affidavit in support of the Originating Notice of Motion was granted as prayed; (ii) applicant's application for extension of time to file and serve their further affidavit in support of the originating motion was granted as prayed; (iii) the preliminary objection of the 1st – 4th respondents seeking to have the suit struck I out on various grounds was refused and the court assumed jurisdiction to hear the matter. On the merits of the substantive originating motion, judgment was entered in favour of the appellants.

Being dissatisfied with the judgment, the 1' respondent herein, as

appellant, appealed to the lower court. The appellants herein, as 1st – 3rd respondents raised two preliminary objections to the appeal. The 1st respondent also challenged the 6th – 9th respondents' brief. In a considered judgment delivered on 28/4/2012 the first objection challenging the competence of the appeal on grounds of abuse of court process was dismissed. The second objection challenging some of the grounds of appeal was also dismissed while an objection to the brief of argument filed by the 6th – 9th respondents was sustained on the ground that they had abandoned the traditional role of a respondent by arguing in support of the appeal. The said brief was struck out. On the merits, although the court resolved some of the issues in favour of the appellant, the appeal was allowed on the ground that a writ of certiorari cannot lie against Executive or Legislative acts and therefore the trial court lacked jurisdiction to entertain the suit. The judgment of the trial court was accordingly set aside and the suit struck out.

Being dissatisfied with the judgment, the appellants filed an amended notice of appeal with leave of this court on 12/6/2013, The 1st respondent was also dissatisfied with part of the judgment and filed a notice of cross appeal on 20/6/2012. It is important to state that three other appeals have been filed in this court arising from the same decision. They are:

1. **SC.460/2012**

BETWEEN
N.J. EXPLORATION LTD. – APPELLANT

AND

1. OWEL PETROLEUM SERVICES NIG. LTD.
2. KOREA NATIONAL OIL CORPORATION
3. KNOC NIGERIA EAST OIL COMPANY LIMITD
4. KNOC NIGERIA WEST OIL COMPANY LIMITED
5. TULIP ENERGY RESOURCES NIGERIA LIMITED
6. THE PRESIDENT OF THE FED. REPUBLIC OF NIG.
7. THE MINISTRY OF PETROLEUM RESOURCES
8. THE MINISTER OF PETROLEUM RESOURCES
9. THE ATTORNEY GENERAL OF THE FEDERAL REPUBLIC OF NIG.
10. ONGC VIDESH LTD.

} RESPONDENTS

2. **SC. 6/2013**

TULIP ENERGY RESOURCES NIG. LTD – APPELLANT

AND

1. OWEL PET. SERVICES NIG. LTD
2. KOREA NATIONAL OIL CORPORATION
3. KNOC NIGERIA EAST OIL COMPANY LIMITED
4. KNOC NIGERIA WEST OIL COMPANY LIMITED
5. NJ EXPLORATION LIMITED
6. THE PRESIDENT OF THE FED. REP. OF NIG.
7. THE MIN. OF PETROLEUM RESOURCES
8. THE MINISTER OF PETROLEUM RESOURCES
9. THE ATTORNEY GENERAL OF THE FEDERAL REPUBLIC OF NIGERIA
10. ONGCVIDESH LTD.

} RESPONDENTS

3. **SC.114/2013**

BETWEEN

1. THE PRESIDENT OF THE FED. REP. OF NIG.
2. THE MINISTRY OF PETROLEUM RESOURCES
3. THE MINISTER OF PETROLEUM RESOURCES
4. THE ATTORNEY GENERAL OF THE FED. REP. OF NIG.

} CROSS APPELLANTS

AND

1. KOREA NATIONAL OIL CORPORATION
2. KNOC NIGERIA EAST OIL COMPANY LTD.
3. KNOC NIGERIA WEST OIL COMPANY LTD.
4. TULIP ENERGY RESOURCES NIG. LTD.
5. NJ EXPLORATION LIMITED
6. ONGC VIDESH LTD.
7. OWEL PETROLEUM SERVICES NIGERIA LTD

} CROSS RESPONDENT

At the hearing of this appeal on 6/12/2016, learned counsel involved in all the appeals agreed that this appeal No. SC. 249/2012 be heard and determined as the main appeal and cross appeal and that all the other appeals would abide the decision herein.

Consequently ADENINYI ADEGBONMIRE, (SAN) leading a team of learned counsel adopted and relied on the appellants' brief filed on 13/8/2013 and their reply brief to the 1st and 4th respondents' briefs respectively both deemed filed on 6/12/2016 and urged the court to allow the appeal. In oral submission in adumbration of his briefs, he submitted that even if the trial court lacked jurisdiction to make an order of certiorari, only that particular relief ought to have been struck out and not the entire suit. He submitted that the appellants had no case against the 1st respondent.

DR. ALEX IZINYON, (SAN) leading other learned counsel adopted and relied on the 1st respondent's brief deemed filed on 12/5/2015 and urged the court to dismiss the appeal. He submitted that the relief for an order of certiorari was the main relief sought. Referring to pages 3054 – 3056 of Vol. 5 of the record, he submitted that there is no appeal against the finding of the lower court that the 1st

respondent had an interest to protect in the suit, evidenced by the order of the trial court joining it as a party, against which there was also no appeal.

O.O. JOLAAWQ ESQ, for the 2 respondent and CHIEF ROBERT CLARKE, (SAN) and A.A. RAJI, (SAN) for the 3 respondent did not file any briefs in the main appeal. TA. GAZALI ESQ., Assistant Chief Counsel, Federal Ministry of Justice representing the 4th – 7th respondents, adopted and relied on their brief of argument deemed filed on 23/6/2015 and urged the court to dismiss the appeal. There was no appearance for the 8th respondent, though duly notified of the hearing date.

With regard to the cross appeal, CHIEF ROBERT CLARKE, (SAN) drew the court's attention to his preliminary objection filed on 21/1/2016 supported by an affidavit and written address wherein he contended that the cross appeal is academic. DR. ALEX IZINYON, (SAN) adopted and relied on his counter affidavit in opposition and the written address filed in respect thereof and urged the court to dismiss the objection. He adopted and relied on the cross appellant's brief filed on 25/6/2012, the cross appellant's replies to 1st – 3rd cross respondents' brief and the 4th cross respondents' briefs respectively, both deemed filed on 12/5/2015 and urged the court to allow the cross appeal.

ADENIYI ADEGBONMIRE, (SAN) adopted and relied on the 1st - 3rd cross respondents' brief deemed filed on 24/9/2014 and urged the court to dismiss the cross appeal. He submitted that the cross appellant did not have a claim before the lower court and no reliefs were sought against it. O.O. JOLAAWO ESQ., adopted and relied on the 4th cross respondents' brief deemed filed on 11/2/2015 and urged the court to dismiss the cross appeal. CHIEF ROBERT CLARKE, (SAN) and T.A. GAZALI ESQ. did not file briefs in the cross appeal.

Before considering the merit of the appeal, I deem it appropriate at this stage to state the facts that gave rise to the dispute between the parties as can be gleaned from the record of appeal and the briefs filed.

In March 2005, the Ministry of Petroleum Resources, the 5th respondent herein, conducted a bidding/licensing round for the award of exploration rights in relation to several oil blocks as part of its development drive in the oil and gas sector. It is contended that the 2005 bid round for the first time, recognised a special category of participants called Strategic Downstream Investors or Strategic partners who had agreed to collaborate with the Nigerian Government in developing downstream projects (refineries and independent power plants), on the understanding that they would be awarded Production Sharing Contract

(PSC) rights during the bid round. Prior to the 2005 bid round the 1st appellant and the Nigerian National Petroleum Corporation (N.N.P.C.) had discussed opportunities for mutual cooperation in relation to the 1st appellant's desire to invest in the upstream and downstream oil and gas sector. On 1st March 2005, a memorandum of understanding was entered into between the 1st appellant and the Presidential Adviser on Petroleum and Energy wherein the NNPC allegedly pledged to give the 1st appellant the necessary support. As a result of further discussions between the 1st appellant and its sister companies and the Nigerian Government, another MOU was signed on 25/7/2005 allegedly acknowledging that the 1st appellant had the requisite expertise and giving further assurances that the Nigerian Government would ensure that the appellants recovered their investment and promising to provide the support necessary to facilitate the investments to be made by them.

It is contended that the appellants, on 10/8/2005, were given pre-emptive rights over Oil Prospecting Licences (OPLs) 313 and 332. On 21/8/2005, the said pre-emptive rights were transferred to Blocks 321 and 323. In order to fulfill the local content policy of the bid exercise, the appellants formed a consortium (the KNOC Group) with two indigenous companies, namely, **TULIP ENERGY RESOURCES NIGERIA LIMITED** (2ND respondent) with regard to OPL 321 and NJ EXPLORATION LIMITED (3rd respondent) in relation to OPL 323. The effect of the pre-emptive right was as follows:

(a) The blocks would be placed on offer during the 2005 bid rounds. Their commercial value would be indicated by the best offer received in respect of the said blocks at the end of the exercise.

(b) Having ascertained the commercial value, the 1st appellant would be entitled to acquire the right to be awarded PSCs in relation to those blocks at the best offer price received at the end of the bid rounds.

At the end of the bid rounds the best signature bonus offer for OPL 321 was US$175, 000, 000.00 while the best offer for OPL 323 was $310, 000, 000.00. The successful bidder was ONGC VIDESH Ltd, the 8th respondent herein. The 1st appellant was expected to match these offers to be entitled to acquire the PSC rights in the two OPLs. Having regard to their right of first refusal, by a letter dated 5/9/2005, the two blocks were subsequently awarded to the appellants along with their local content partners, the 2nd and 3rd respondents herein at the

prices of the respective bid offers: i.e. appellants and 2nd respondent in respect of OPL 321 and appellant and 3rd respondent in respect of OPL 323. The appellants were to form a new consortium with the 8th respondent to enter into the PSCs for the two blocks. The 8th respondent eventually withdrew from the consortium and was replaced by Equator Exploration Nigeria Ltd., who had been a joint bid member with the 8th respondent. Equator Exploration therefore became a member of OPLs 321 and 323.

According to the appellants, as a result of meetings held between the 1st appellant and the 5th respondent to resolve certain issues, a side letter dated 2/112006, was signed between them. The side letter approved some variations in the terms contained in the respective award letters and PSCs covering OPLs 321 and 323 respectively. A significant variation was that the 1st appellant would invest US$6 billion in strategic downstream projects and in return the signature bonus payable by it was discounted by US$231 million. In the event that the appellants were unable to proceed with the development of the downstream projects, they were to refund the value of the US$231 million discount to the Federal Government within 180 days of such failure with interest. The inability of the appellants to proceed with the development of the downstream projects would be deemed to have occurred if, 18 months from the effective date of the PSC, the appellants, the NNPC and the DPR had failed to agree on a form and commit to the development plan for the downstream projects. The president's approval of the side letter was communicated to the 1st appellant by the 5th respondent vide a letter dated 25/2/2006. The 2' and 3 respondents subsequently executed PSCs with the NNPC in relation to OPLs 321 and 323 and commenced operations by opening a Lagos office in June 2006.

In pursuance of the agreements reached between the parties, the 1st appellant caused an irrevocable Stand By Letter of Credit to be issued by its bank in Seoul. It is contended that due to circumstances beyond its control, there was a delay in coming up with the development plan. However, the 1st appellant contends that it was able to secure from the Steering Committee for the Implementation of the Downstream Projects, various extensions up to October 2008, amounting to 13 months in total, within which to agree on a form and commit to the development plan. The validity of the stand by letter of credit was extended to 10/3/2010. A meeting of the Steering Committee scheduled to hold in mid-October 2008 to approve the project development plan failed to hold. The

reason was that on 8/1/2009, the President of the Federal Republic of Nigeria (4th respondent) voided the allocations of OPLs 321 and 323. The reason for the decision stated in the said letter was the non-payment of the prescribed signature bonus offered by the ONGC Consortium at the 2005 bid rounds in full. By the said letter the ONGC Consortium's status as the winning bidder in respect of blocks 321 and 323 was to be restored, subject to their payment in full of the US$485 million signature bonus within a specified period. It was this decision to revoke the award of the OPLs that led to the application for judicial review before the trial court.

In its judgment, the trial court held that the revocation was null and void and granted the appellants' reliefs, Their Lordship at the court below disagreed with him. The court held that the decision of the President conveyed through the letter of 8/1/2009 is an executive action not subject to judicial review by way of an order of certiorari. Not being the trial court, the court considered all the issues submitted to it for determination. While it resolved some in the appellants' favour, it came to the final conclusion that the suit at the trial court was incompetent for lack of jurisdiction and struck it out.

In the appellants' brief of argument, the following five issues were identified for the determination of the appeal:

1. Whether the Court of Appeal was right in holding that the decision of the Late President Musa Yar'adua in voiding OPLs 321 and 323 was an executive act which was not subject to judicial review vide an order of certiorari. (Ground 1)
2. Whether the Court of Appeal was right in striking out the entire case of the appellants filed at the trial court on the basis that one (1) out of the eight (8) reliefs sought by the appellants (as applicants at the trial court) was not within the trial court's jurisdiction. (Ground 2)
3. Whether the Court of Appeal was right in holding that the decision of the learned trial Judge in relying on Statutory Instrument 5.1. 7 of 2003 to hold that President Olusegun Obasanjo doubled as both the President and Minister of Petroleum is erroneous (Ground 3)
4. Whether the Court of Appeal was right in holding that President Olusegun Obasanjo acted ultra vires in approving the side letter dated 25 February 2006 thus making the side letter void ab initio. (Ground 4)
5. Whether in the circumstances of this case, the Court of Appeal was right in

A holding that the appellants had not fulfilled the conditions for the allocation of the OPLs 321 and 323 (as modified by the side letter) as at the date of revocation on the basis that they had not paid the sum of US$231,000,000.00 to the FGN (Ground 5).

B

The 1st respondent and the 4th – 7th respondents respectively adopted the issues formulated by the appellants. I shall also adopt those issues in the resolution of this appeal.

C

Issue I

Whether the Court of Appeal was right in holding that the decision of the Late President Musa YaYadua in voiding OPLs 321 and 323 was an executive

D **act which was not subject to judicial review vide an order of certiorari,**

In arguing this issue, learned senior counsel for the appellant commenced by submitting that the writ of certiorari is one of the prerogative writs whose main

E function is to ensure that any body entrusted with the performance of a judicial or quasi judicial function keeps within the limits of the jurisdiction conferred by the statute which creates it. Relying on the case of: **Egbuniwe vs. FGN (2010) 2 NWLR (Pt.1178) 348 © 367 – 368**, he submitted that the relevant factor to be

F considered is the nature of the action taken and not the body/institution taking the action. He argued that the lower court placed undue reliance on the body or institution performing the act in the circumstances of this case. He contended that the decision in **Egbuniwe's case (supra)** shows that a writ of certiorari may lie

G against the Executive arm of government.

He submitted that having regard to the fact that the right given to the appellants was a right to enter into PSCs in respect of OPLs 321 and 323 respectively, the president of the Federal Republic of Nigeria acted in excess of

H jurisdiction in purporting to void their PSC rights, as there is no such constitutional or statutory authority vested in him in that regard. He submitted that the right to revoke exploration and mining rights is vested in the minister of Petroleum Resources (the 6th respondent) and that such power exists only in

I relation to Oil Prospecting Licences (OPL) and Oil Mining Licences (OML) and not in respect of Production Sharing Contracts. He posited that the awardee of a PSC is not the holder of an OPL or an OML but is only a contractor under a contract of works. He relied on the meaning of a PSC as defined by Bernard

Tavern in the textbook, **Petroleum Industry and Government – A Study of the involvement of Industry and Governments in the Production and Use of Petroleum,** 2nd edition, Wolters Kluner, 2008 at page 115 to wit: "a contractual relationship entered into by a state entity (the state party) on the one part and a commercial petroleum enterprise from the private or public sector (the contractor) on the other hand." He referred to the recitals in OPLs 321 and 323 and submitted that in purporting to void the appellants' PSC rights, which are founded on the OPLs 321 and 323 contract areas, the 4th respondent had formed the erroneous view that the appellants are holders of OPLs 321 and 323 within the meaning of the Petroleum Act and that their interest could be revoked under paragraphs 24 to 25 of the First Schedule to the Act. He argued that in fact and in law, the interest possessed by the appellants is a contractual interest under a PSC in relation to OPLs 321 and 323 and that neither the 4th respondent nor the 5th and 6th respondents have any statutory or constitutional authority to revoke such contractual rights.

Learned senior counsel submitted that the decision of the lower court on the applicability of the procedure for judicial review in the circumstances of this case amounts to a total disregard of the rule of law and the duty to act fairly. He argued further that the Side Letter, the Stand By letter of credit and the PSC all contain stipulations as to the procedure for terminating the appellants' rights as PSC contractors in the event of default on their part. In paragraphs 55 and 56 of his brief, he restated the conditions for terminating the agreements between the parties. He noted that the lower court at pages 3085 and 3086 of Vol. 5 of the record of appeal, in the course of reviewing one of the issues for determination, acknowledged the fact that by virtue of Section 5 of the 1999 Constitution, the power of the president of the Federal Republic of Nigeria, is subject to laws made by the National Assembly. He submitted that the court noted that such laws include the Petroleum Act and the Deep Offshore Act, which gives the minister power to award and revoke Oil Licenses, subject to certain laid down procedure. That the court recognised the fact that even if the President arrogated the powers of the minister to himself, he was bound to follow laid down procedure as provided for in the law. That in the instant case, he failed to follow laid down procedure and in any event he did not have authority to exercise the powers of the Minister of Petroleum Resources, since there was a substantive Minister at the time.

He referred to paragraph 62 of the counter affidavit of Engr. Charles

Osezua, to which was attached the 1st respondent's Exhibit R16, a letter dated 6/1/2009 written by the 5tn respondent upon the instructions of the 4th respondent referring to "Mr. President's decision on your petition" and the submission at paragraph 4.88 of the 1st respondent's written address wherein he stated that the decision (to void the OPLs) was reached on the basis of documentary evidence, and submitted that these facts show that the 4th respondent decided the petition based on documentary evidence and in the circumstances had a duty to act judicially and judiciously by acting fairly. He relied on: **Adeniyi vs. Governing Council of YABATECH (1993) 6 NWLR (Pt.300) 428 @ 450 – 451** in support of his position. He submitted that the case of **Nwaoboshi vs. Military Administrator of Delta State (2003) 11 NWLR (Pt. 831) 305** relied upon by the lower court is distinguishable from the facts of this case on the ground that what is being challenged here is not merely an administrative act but a decision taken on a petition arrived at after a consideration of documentary evidence. He cited several authorities in support of the proposition that when a public body (administrative or executive) decides on a matter that affects the rights of others, it is under a duty to observe the requirements of procedural fairness. See inter alia: **Ridge vs. Baldwin (1964) AC. 40** per Lord Evershed **@ 85 – 86; A.G. Lagos State vs. Eko Hotels Ltd. (2006) 18 NWLR (Pt. 1011 378 @ 423; Adigun vs. A.G. Ovo State (1987) 1 NWLR (Pt.13) 678; Steel Bell (Njg.) Ltd. vs. Government of Cross River State (1996) 3 NWLR (Pt.438) 471 (CA); Stitch vs. A.G. Federation (1986) 5 NWLR (Pt.46) 1007 @ 1039.** He submitted that the respondents failed to controvert the averment in paragraph 38 of the verifying affidavit deposed to on 6/3/2009 by one O.K. BAEK (at page 21 of Vol. 1 of the record) to the effect that the appellants were not given prior notice of any proposal to void the PSC rights nor were they consulted or given an opportunity to make representations against the proposed action, among other complaints.

In conclusion, learned senior counsel maintained that having regard to the nature of the decision made by the 4th respondent, being a decision on a petition based on documentary evidence, taken without giving the appellants a hearing, it is susceptible to judicial review. He urged this court to so find and to resolve this issue in their favour.

In response to the above submissions, learned senior counsel for the 1st respondent agreed with the court below that the subject matter of the suit is outside the jurisdiction of the trial court. He submitted that in the main, the

A appellants sought declaratory and injunctive reliefs and a writ" of certiorari principally against the present 4 respondent i.e. the President of the Federal Republic of Nigeria, acting in exercise of his executive powers and for state policy. He referred to "**Judicial Review of Administrative Action"** by Prof. de
B Smith, Wolf and Jowell, 5th edition, Sweet & Maxwell 1995 at page 18 paragraph i - 032, wherein the learned authors stated, inter alia, that courts should avoid interfering with the exercise of official discretion when its aim is in pursuit of policy. He also referred to Black's Law Dictionary 5th edition at page 201 where
C 'certiorari' is defined as a "Writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein." He also relied on **Nwaoboshi vs. Military Administrator Delta State (supra) at 318 – 320 E – H.**

D Learned senior counsel submitted that the letter of 8/1/2009 did not emanate from the 5th and 6th respondents nor did it show that they were exercising judicial or quasi-judicial authority. He submitted that at best it is an executive or an administrative act, which is not expected to be performed judicially. He
E submitted that the appellants had not reached the stage of PSC and that what they had was a simple contract. He noted that what was voided was not the PSC but the award of OPLs 321 and 323. In paragraph 2.46 (i) to (vii) of his brief he set out the terms of the contract in respect of OPL 321, which are the same as with OPL 323
F except for the monetary values.

He drew the court's attention to the fact that the award letters in respect of the two OPLs (Exhibits 7 & 8 at pages 1304 – 1307 of the record), which form the basis of the appellants' reliefs 1 and 2, constitute a joint award between the 1st
G appellant and the 1st respondent's consortium. He submitted that by the appellant's own showing they failed to meet the requirements of the award, particularly the presentation of a bank performance bond with regard to the total signature bonus, by 2nd October, 2005, the Production Sharing Contract date. He submitted that the
H appellants are in breach of Exhibits 7 and 8 and therefore their reliefs cannot be subject to judicial review. He contended that the Side Letter, Exhibit 9, did not vary the letters of award and that the letter of February 2006 cannot avail them. He argued that having failed to comply with the terms of Exhibits 7 and 8 the
I appellants failed to make out a case for procedural fairness. He submitted that the appellants failed to comply even with the side letter. He listed the non-compliance in paragraph 2.53 (a) to (h) of his brief. Learned counsel argued that time was of the essence of the contract and that the 18 months originally agreed to was

exceeded and that as at January 2009, 33 months had elapsed with no evidence of fulfillment of the downstream obligation or the payment of the discounted sum in accordance with the purported Side Letter.

On what determines the jurisdiction of the court, he submitted that it is the plaintiff's claim and not averments in the defendants counter affidavits that would be considered. He referred to: **Osun State Government vs. Danlami (Nig.) Ltd. (2007) 9 NWLRIPt.1038) 66 @ 84 – 85 H – A.** He noted that the information that the 1st respondent's consortium was reallocated the oil blocks was not part of the 1st appellant's case but emerged in the course of the 1st respondent's defence. He noted further that the 1st appellant did not amend its claim at the trial court withstanding having seen the award letter in court for the first time, in order to bring it in line with their contention of lack of fair hearing. He submitted that the two OPLs were rightly voided by the 4th respondent in conjunction with the 6th respondent. He posited further that, assuming without conceding that the appellants' case rested on the letter of 8/1/2009, the 4th respondent was exercising his executive powers pursuant to Section 5 (1) of the Constitution and was not acting in a judicial or quasi-judicial or Ministerial capacity in which he was expected to be bound by the rules of fair hearing. He submitted that the provisions of Section 148 (1) of the Constitution has more to do with portfolio and functions. He stated that once the portfolio is assigned to the Minister, the responsibility of any business of the Federal Government envisaged under Section 148 (1) of the Constitution is on behalf of the President. He submitted that any power exercised by the Minister is derivable from the President vide Section 148 (1) of the Constitution, which the President can just as well exercise himself. He submitted that the authorities cited on behalf of the appellants including **Ridge vs. Baldwin (supra), A.G. Lagos State vs. Eko Hotels Ltd. (supra)**, etc. are inapplicable in the instant case.

With regard to the contention that the averments in O.K. Baek's verifying affidavit alleging lack of fair hearing were not denied he referred to paragraph 102 of the counter affidavit deposed to by Charles Osezua Esq. on 9/4/2009 at pages 589 - 608 of the record wherein the averments were denied, and stated further that the 1st respondent led evidence at the trial and relied on documentary evidence to controvert O.K. Baek's averments. He maintained that having failed woefully to comply with the terms of the letter of award and the side letter, they were not entitled to be given notice before OPLs 321 and 323 were voided. He urged the court to resolve this issue in favour of the 1st respondent.

Learned counsel for the 4th -7th respondents aligned himself with the explanation given by the lower court on what a writ of certiorari is. He cited in addition the case of: **Osam Dadzie vs. A.G. (1933) WACA 271_@ 272** per Kingdom, CJ. He asserted that the revocation or voiding of OPLs 321 and 323 by the 4th and 6th respondents could not, by any stretch of the imagination, amount to a judicial or quasi-judicial act that could be quashed by an order of certiorari. He submitted that the power to void the OPLs is legal and contractual; that it is a purely executive act which does not arise from the decision of an inferior court or tribunal. He submitted that the PSCs in respect of the two OPLs is a simple contract, which could be terminated by either of the parties thereto. He submitted that certiorari is not a remedy for unlawful termination or breach of contract. He submitted that the issue of acting in excess of jurisdiction does not arise because the 4th respondent can validly exercise any power, which the 6th respondent could exercise by virtue of the provisions of Sections 5 (1), 147 and 148 of the Constitution. He referred to: **A.G. Federation vs. Abubakar (2007) 10 NWLR (Pt.1041) 1@ 85 C – E.** He submitted that the authority of **Eczbuniwe vs. FGN (supra)** relied upon by the appellants is a decision of the Court of Appeal, which is not binding on this court and further that the judgment now being appealed against was delivered in 2012 and is therefore more recent. Beyond this, he submitted that the facts of **Egbuniwe's case** are distinguishable from the facts of the instant case, as in **Egbuniwe's case**, the Federal Executive Council approved the recommendations of a tribunal of inquiry set up by the President to look into the activities of Nigerdock Plc. The tribunal found that the appellant had committed various crimes. He sought to quash the decision of the Federal Executive Council, which approved the recommendations" of the tribunal. He submitted that in the instant case there was no tribunal set up, no findings of the commission of a crime and no white paper gazette was issued. He maintained that the issue in contention in the instant case is breach of contract.

In response to the contention that only the OPLS and not the PSCs could be voided, learned counsel submitted that the PSCS cannot stand independently of the OPLs. He submitted that once the OPLs are voided, the PSCs cannot stand. He argued further that if what was revoked were OPLs 321 and 323 and not the PSCS there would be no basis for seeking the order for judicial review, as they would have no locus standi to challenging the revocation. He submitted that assuming, without conceding, that the proper procedure was not followed in voiding the OPLs, an order of certiorari is not the appropriate remedy in the

circumstance. He contended that the President's action was not based on the petition written to him but by the breach of the terms of the side letter and the PSCs by the appellants. He submitted that being the initial bid winner, the 8th respondent enjoyed a reversionary interest in the OPLs and the eventual award in its favour was lawful in the circumstances of the appellants' default.

He submitted that the arguments on fair hearing and natural justice go to no issue where the appellants argue that the revocation of the OPLs cannot affect their PSCS. He submitted that they are not in a position to allege non-compliance with laid down procedures for voiding OPLs that they have contended does not affect them. He submitted that the authority of **Steel Bell (Nig.) Ltd. vs. Government of Cross River State (supra)** relied upon by the appellants is inapplicable, firstly because it is a decision of the Court of Appeal, which is not binding on this court under the doctrine of stare decisis, and secondly because the case relates to the issuance of a government white paper on the recommendation of a commission of inquiry, which imposed penal sanctions. He submitted that the decision of this court in **Nwaoboshi vs. Military Administrator Delta State (supra)** is more relevant to the facts of this case. He also sought to distinguish the case of **A.G. Lagos State vs. Eko Hotels Ltd. (supra)**. On the issue of fair hearing, learned counsel submitted that it was common knowledge between the parties that the appellants would forfeit their right of first refusal or pre-emptive rights if they failed to match the winning bid value and therefore there was no need for the 4th 7th respondents to consult them before restoring the winning bid. He submitted that in any event, there was no provision in the Petroleum Act for right of first refusal of preemptive rights. In other words it was a concession by the 4^{th} - 7^{th} respondents. He argued that having benefitted from such concession, which was not strictly within the provisions of the Act, the appellants were estopped from insisting on strict compliance with requirements that had been waived for them in the first instance. He maintained that whatever complaints the appellants have cannot be addressed by way of certiorari proceedings, as the decision complained of was not arrived at by way of any judicial or quasi-judicial process.

In response on points of law to the arguments on behalf of the 1st respondent, learned senior counsel submitted that judicial review proceedings consider the legality and not the merits of the decision and therefore whether or not the appellants were in breach of the terms of the award goes to no issue. He referred to: **African Continental Bank Plc. vs. Damian Ikechukwu Nwaigwe**

& Ors.(2011) LPELR-208 (SC). In answer to the 4th – 7th respondents, he submitted that the issue of locus standi raised by learned counsel did not arise from the grounds and/or Notice of Appeal. He urged the court to disregard the submissions in respect thereof. He distinguished the case of **Nwaoboshi vs. Military Administrator Delta State (supra)** from the facts of this case on the ground that in **Nwaoboshi's case**, the act being challenged was purely administrative, while in the instant case, the function being challenged is a quasi-judicial one: a decision based on a petition submitted by the 8th respondent, affecting the appellants PSC rights in OPLs 321 and 323. With regard to the case of **A.G. Lagos State vs. Eko Hotels Ltd. (supra)** and the doctrine of *stare decisi,* he submitted that the facts need not be exactly the same for the doctrine to apply. He submitted that the fact that the Eko Hotels case dealt with a writ of prohibition while the instant case deals with a writ of certiorari is immaterial and does not preclude its application to this case. He maintained his earlier position that what is important is not the type of body exercising quasi-judicial functions but the nature of the function being exercised. On failure to observe the principles of natural justice being subject to judicial review, he cited the case of: **Head of the Federal Military Government the Public Service Commission of Mid-West and Anor, In re Maclean Okoro Kubeinjef (1974) ALL NLR 784 © 812.**

1 have given careful consideration to the submissions of learned counsel for the respective parties. Copious submissions have been made on the legality or otherwise of the subject matter of the application for judicial review i.e. the voiding of the awards of OPLs 321 and 323 by the President of the Federal Republic of Nigeria, There is a complaint that a wrong has been done to the appellants as a result of the letter of 8/1/2009 addressed to the 1st appellant by the Hon. Minister of State, Petroleum conveying the President's decision to void the allocation of OPL5 321 and 323 to the KNOC consortium and restoring the status of the ONGC consortium as the winning bidder. It is contended that the 4th - 6th respondents had no right to terminate the appellants' PSC contract rights. What falls for determination under this issue is the procedure adopted by the appellants for seeking redress,

In his book, Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria, 2nd edition at page 670 paragraph 54.39, the learned author, T. Akinoa Aguda (of blessed memory) described 'certiorari' thus:

> **"Certiorari is one of the prerogative writs ...whose main function is to ensure that inferior courts or anybody entrusted**

A **with the performance of judicial or quasi-judicial functions keeps within the limits of the jurisdiction conferred upon them by the statutes which create them. Therefore, an order of certiorari will lie to remove into the High Court for the purpose**
B **of being quashed any judgments, orders, convictions or other proceedings of such inferior courts or other body, civil or criminal made without or in excess of jurisdiction"**

C In **Judicial Service Commission of Cross River State vs Young (2013) LPELR-20592 (SC) at page 43 C – E**, His Lordship Rhodes-Vivour (JSC) stated:

D **"Certiorari is one of the prerogative writs, the other mandamus, used by the courts to restrain the abuse or misuse of power, or to correct errors of law, wrong exercise of discretion by tribunals, public authorities, and Government Officials. Once a public**
E **authority acts judicially or administratively its conduct is subject to control by the courts by means of certiorari or mandamus."**

F It is evident from the definitions referred to above that the procedure for judicial review by way of the prerogative writs of certiorari, prohibition and mandamus is a special procedure. The jurisdiction of the High Court to review the proceedings, decisions and acts of inferior tribunals and acts of government bodies, is
G supervisory. The court is usually concerned with the legality and not the merit of the proceedings, decisions or acts of the affected inferior court, tribunal or government body. See: **A.C.B. vs. Nwaiqwe (2011) 7 NWLR (Pt.1246) 380 @ 386 C – E; Oredoyin vs. Arowolo (1989) 4 NWLR (PL114) 172.** Where it is
H established before the High Court that a statutory body or inferior court with limited powers has abused that power and that such abuse prejudicially affects the rights of a citizen, certiorari will be issued at the instance of that citizen. **See: Head of the Federal Military Government, etc The Public Service**
I **Commission of Mid-West State & Anr..** in re **Maclean Okoro KubeinjeL (1974) A.N.L.R 784 @ 812 – 813** where this court held that such abuse of power may take the form of non-compliance with rules of procedure prescribed for that body, denial of the right to be heard in one's defence; irregularities which are

A tantamount to a denial or a breach of the rules of natural justice, or even the assumption of jurisdiction to perform an act unauthorised by law or a refusal of jurisdiction where it should be exercised, to name a few.

There is however a caveat to these generally wide powers of judicial B review. This court in **Nwaoboshi vs. MILAD, Delta State (2003) 11 NWLR (Pt.831) 305**, held that no legislative or executive act is subject to the controlling jurisdiction of the writ of certiorari on the ground that it was not an act performed or expected to be performed judicially. His Lordship, Uwaifo, JSC at 320 A – B C (supra) explained the rationale for this position thus:

> **"It will be a contradiction in terms and offensive to the idea underlying the doctrine of separation of powers to hold D otherwise since certiorari lies against only judicial or quasi - judicial acts. And a legislative or executive act cannot by rational thinking come within acts that are to be performed judicially,"**

E

In the case of **Egbuniwe vs. F.G.N (2010) 2 NWLR (PL1178' 348,** relied upon by learned counsel for the appellants, the Court of Appeal rightly acknowledged the restriction on the scope of the court's powers of judicial review as stated in F **Nwarboshi's case' (supra)** to the effect that it cannot he used to quash legislative or executive acts. Relying on **Egbuniwe's cas**e, though not binding on this court, it is contended that in determining whether or not an action is a judicial act, it is the action taken that is to be considered and not the office performing the act. It is G also contended that whatever function the body concerned is performing, whether judicial, quasi-judicial, administrative or executive, it has a duty to observe the rules of natural justice and where it fails to do so its actions are subject to judicial review, See: **A.G. Lagos State vs. Eko Hotels Ltd. (2006) 18 NWLR** H **(Pt. 1011) 378 @ 423 B – E**. The authorities of **Steel Bell (Nig.) Ltd. vs. Government of Cross River State (supra); Adigun vs. A.G. Oyo State (supra) Adeniyi vs. Governing Council, Yabatech (supra)**, and other cases cited by learned senior counsel for the appellants to the effect that non- judicial or I administrative bodies must act fairly in the exercise of powers that might adversely affect the citizens and where they fail to do so *certiorari* would lie, is no doubt good law. The question that arises is whether the authorities referred to are applicable to the circumstances of this case.

A It is important to note that the dispute between the parties herein arose from a contractual relationship. By the letters of award in respect of OPLs 321 and 323 respectively and subsequent side letters, wherein some of the conditions stipulated in the letters of award were allegedly varied, the terms and conditions
B of the contract were agreed upon. The letter of award of OPL 321 dated 5th September 2005 (Exhibit 7), which is at pages 1304 - 1305 of the record, from the 5th respondent to the 1st appellant, reads as follows:

C **"The Managing Director,**
Korean National Oil Company
1588 – 14 Gwangyang, Dong-Angu,
Anyang – SI, Korea

D **Dear Successful Bidder,**

AWARD OF OPL 321

E **Following your successful participation in the Nigeria 2005 Licensing Round for oil and gas Exploration and Production, which culminated with the Commercial Bidding Conference**
F **held in Abuja on the 26th and 27th August 2005, we are pleased to formally notify you of the award of OPL 321 to your company (consortium): KOREAN NATIONAL OIL/ONGC VIDESH LIMITED**

G **Please note that your Local Content Vehicle (LCV) for this OPL is the following:**

H **Tulip Energy Resources Nigeria Ltd.**
The conditions for the award of this OPL are the fulfillment of the following:
(i) Minimum Commitment
I **(a) Signature Bonus: US$ 175,000,000,00**
(b) Maximum Cost Oil Ceiling in the PSC:
(c) Minimum Work Programme Commitment (seismic + wells) – US$372,889,522.00

(d) Minimum Work Programme Assigned to LCV – US$167,800,285.00

(ii) Presentation of a Bank Performance Bond in respect of the total Signature Bonus to the department of Petroleum Resources by the 2nd of October, 2005 (the Production Sharing Contract (PSC) date).

(iii) Your confirmation of Tulip Energy Resources Nigeria Ltd. as your Local Content Vehicle (LVC).

(iv) The execution of a Production Sharing Contract between your company (consortium) and the Nigerian National Petroleum Corporation (NNPC) by the PSC date. (A model PSC is already in your possession and only minor changes will be accepted).

(v) The conformation of the operator status and equity participation (in the case of a consortium) by the Department of Petroleum Resources (DPR).

(vi) In the case of Downstream Strategic Investors, your commitment to the parallel development of designated downstream project. Please note that a full presentation of combined upstream/downstream development to DPR will be required prior to the conclusion of the Production Sharing Contract.

Please note that due to fewer than expected number of blocks allocated in the Deep Offshore, a further merger of some LCVs is unavoidable. The composition of your selected LSC may have changed as a result."

As noted by earned counsel for the 1st respondent earlier, the terms and conditions for the award of OPL 323 (Exhibit 8 at page 1306 of the record) are similar to the above except with regard to paragraph (I) (a) where the signature bonus is US$310,000,000.00 and the minimum work programme commitment (seismic work) is US$495,526,693.100.

The appellants rely, *inter alia,* on a side letter (memorandum of understanding) dated 2nd January 2006 (Exhibit 9 at pages 122- 125 of the

record) between them and the 5th respondent, which purportedly varied the terms of the letters of award in several respects, including the granting of a discount of the signature bonus to be paid. The said side letter stipulates *inter alia.*

> **"In the event that the Korean parties [appellants], for whatever reason are unable to proceed with the development of the Downstream Projects, KIVOC shall refund the discount to the Host Government [Federal Republic of Nigeria] within 180 days of failure to proceed with interest at the rate of one month LIBOR plus five percentage points.**
>
> **The inability of the Korean parties to proceed with the development of the Downstream Projects shall be deemed to have occurred if after 18 months from the effective date of the PSCs, KNOC, the Nigerian National Petroleum Corporation and the Department of Petroleum Resources have not agreed a form and committed to the development plan for the implementation of the Downstream projects.**
>
> **Such inability to proceed may be remedied by follow up negotiation among concerned parties to facilitate the progress of the Downstream Projects."**
> **('Emphasis supplied)**

According to the appellants the terms of the side letter or MOU, which was purportedly approved by the president on 25/2/2006 were agreed upon as a result of meetings held with the Department of Petroleum Resources to resolve some issues that had arisen regarding the 1st appellant's fulfillment of the terms of the award of PSC rights in OPLs 321 and 323 (see paragraph 24 of the affidavit in support of the application for leave to apply for judicial review). Subsequent to the execution of the side letter, it is averred in paragraphs 27 and 28 of the said affidavit that it was agreed between the parties that KNOC would provide a stand-by letter of credit from a reputable bank to guarantee the Korean parties' downstream project and secure the refund of the discount to the Federal Government of Nigeria in the event that such refund became due in the circumstances envisaged by the side letter of 2/1/2006. Further, that the 1st

appellant's Nigerian entities executed PSCs in relation to OPLs 321 and 323 with the NNPC and they began operations by opening an office in Lagos in June 2005. However, in paragraphs 32 - 36 of the affidavit it is averred that for various reasons, and due to no fault of KNOC, the development of a plan for the implementation of the Downstream Projects was delayed. It is averred in paragraph 32 that the Steering Committee for the implementation of the Downstream Projects (comprising NNPC, the DPR and KNOC) granted an extension of the Downstream Projects Development Plan for a cumulative period of 13 months i.e to October 2003. According to the appellants, as a result of the delay it was necessary to secure an extension of the stand-by letter of credit previously obtained to enable the Federal Government of Nigeria have the security provided by the said letter of credit in the event that the Korean entities failed to proceed with the Downstream Projects by the extended deadline. An amendment to the stand-by letter of credit issued by the Standard Chartered Bank, Seoul extended the validity of the letter of credit to Mach 2010. The appellants averred that the Project Development Plan for the Downstream Projects was eventually completed by 7th October 2008 and was to be presented to a Steering Committee meeting scheduled for mid-October for approval. The meeting eventually did not hold. Rather on 8/1/2009, the appellants received a letter informing them of the President's decision to void OPLs 321 and 323.

The letter, which is at page 1388 of the record reads thus:

"The Chairman,
Korean National Oil Company,
Plot 934, Idejo Street,
Victoria Island, Lagos

ALLOCATION Of OPLS 321 and 323

We write to convey Mr. President's decision with regard to the above.

Mr. President has approved the following:

(i) that the allocation of OPLs 321 and 323 to KNOC be voided

(ii) that ONGC Consortium's status as the winning bidder in respect of Blocks 321 and 323 be restored subject to their payment in full of the $485 million signature bonus within a specified period.

2. The basis for the decision of Mr. President is the non-payment of the prescribed signature bonus offered by the winning bidder in full.

3. In the circumstances it is the decision of Mr. President that the portion of the signature bonus which KNOC paid in cash should be refunded forthwith.

4. We have contacted the Ministry of finance to determine the precise amount paid and asked the Honourable Minister to ensure that prompt refund of same in accordance with Mr. President decision and directives.

Please accept the assurances of our highest regards.

SIGNED
H. Odein Ajumogobio, SAN
Hon. Minister of State Petroleum"
(Emphasis supplied)

The appellants' reaction to the above is contained in paragraphs 38 - 45 of the verifying affidavit earlier referred to. Apart from averring that the 4th -6th respondents did not give any prior notice of an intention to void the PSC contract rights and did not consult with them to afford them an opportunity to make representation against the proposed action, it is further averred in paragraphs 39, 40 and 44 as follows:

"39. From the time that they became aware of the 1st respondent's [now 4th respondent's] decision as conveyed in the 8 January 2009 letter, the applicants have made various efforts to meet with the respondents and make representations as to why the decision should be reversed.

40. In the meantime, KNOC Nigeria's counterparty to the PSC contracts, the Nigerian National Petroleum

A Corporation had given no indication that it considered the PSC contracts to have been terminated by the 1st respondent's [4th respondent's] decision aforesaid. Although Management committee meetings for the
B operation of the PSCs were postponed by the NNPC, the reasons for such postponement made no reference whatsoever to the 1st respondent's [4th respondent's) aforesaid decision.
C 44. In the premises, I verily believe that it is in the interest of justice that the respondents should be restrained by the Honourable Court from taking any steps and/or any further steps in furtherance of the 1st respondent's decision
D conveyed in the 8 January 2009 letter, if and in so far as that decision purports to - terminate the applicant's PSC contract rights,"

E By their prayer 7 of the application for leave to apply for judicial review, the appellants sought the following relief:

'AN ORDER OF CERTIORARI quashing the decision of the 1st
F respondent, as conveyed in the 2nd respondent's letter dated 8 January 2009 .... and written under the hand of the Honourabe Minister of State (Petroleum) and addressed to the appellants title "Allocation of OPLs 321 and 323" on the grounds that such
G decision is illegal, procedurally unfair, unreasonable, irrational and/or defeats the legitimate expectations of the applicants herein!'.

H I have endeavoured to set out in some detail the terms of the agreements between the parties and the facts and circumstances that gave rise to the application for judicial review to demonstrate the fact that-the relationship between the parties was contractual. All the appellants' complaints, even though it has been argued
I that the 4th - 6th respondents acted unfairly or failed to observe the rules of natural justice, in my considered view constitute allegations of breach of contract. Where there is a contractual obligation between the parties, both parties are expected to

comply with the terms and conditions of the contract. Where one party defaults in his obligations under the contract, the other party is entitled to terminate the contract. Where the contracts contains terms for bringing the contract to an end by either party and the terms are not complied with, the remedy of the affected party lies in an action for breach of contract, damages, etc. I am of the view that the situation in this case is distinguishable from the circumstances in cases such as **A.G. Lagos State vs. Eko Hotels Ltd. (2006) 18 NWLR (Pt.1011) 378 @ 423 B – E; Steel Bell (Nig,) Ltd. vs. Government of Cross River State (supra); Adigun vs. A.G. Oyo State (supra); Adeniyi vs Governing Council, Yabatech (supra).**

In **A.G. Lagos State vs. Eko Hotels Ltd. (supra)**, the bone of contention was the issuance of a warrant of arrest by a Tribunal of Inquiry established by the Lagos State Government vide Legal Notice No.10 of 1999. The respondents filed an action at the Federal High Court contending that the Legal Notice by which the Tribunal was set up was void and of no effect and sought an order of-prohibition and injunction against the Tribunal. It was held by this court that the functions conferred on the Tribunal of Inquiry, which included the power of arrest of a person who refused to attend the Tribunal, were quasi-judicial in nature and therefore liable to an order of prohibition. In **Steel Bell (Nig) Ltd. vs. Govt. of Cross River State (supra),** the Cross River State Government set up a Commission of Inquiry to investigate Government contracts awarded up to December 1989. The appellant company, which had been awarded a contract in 1987 appeared before the Commission, called witnesses and was represented by counsel. The Commission submitted its report and made recommendations. In its view published in the Government White paper, the Government rejected some of the recommendations and proceeded to unilaterally make penal decision against the appellant including blacklisting it without affording it a hearing. The Court of Appeal held that by not affording the appellant a hearing after rejecting the Commission's recommendations, the 1st respondent had breached the natural justice rule of *audi alteram partem* and *certiorari* proceedings were rightly commenced to quash the views of the government of Cross River State on the report of the Commission. In **Adeniyi vs Governing Council, Yabatech (supra),** the appellant had been invited to give evidence before an Investigation Panel set up by the Governing Council of Yaba College of Technology to look into the leakage of the report of an interview panel which was conducting interviews for the vacant office of Rector of the institution. The Panel sent its report to the

Council. The council however dismissed the report, and without calling on the appellant, decided to retire him compulsorily. The appellant sued for the enforcement of his fundamental rights and for an order quashing the decision of the Governing Council. It was held by this court that non-judicial or administrative bodies have a duty to act in good faith and fairly listen to both sides. In all these cases, the administrative bodies were exercising quasi-judicial functions. The complaints in this case, on the other hand, arose from a particular contractual relationship between the parties, with specific terms and conditions attached thereto. The reason given for terminating the contract was "*failure to pay the prescribed signature bonus offered by the winning bidder in full"*

As rightly observed by learned counsel for the 1st respondent, in determining the jurisdiction of the court, it is the plaintiff's claim that is considered. See: **Tukur vs. Govt. of Gongola State (1989) 4 NWLR (Pt.117) 517 @ 549 B; Western Steel Works vs. Iron & Steel Workers (1987) 1 NWLR (Pt49) 284; Adeyemi vs. Opeyori (1976) 9 – 10 SC 31 @ 51** In so far as the appellants' claims were premised on breach of contract, I agree with the court below that a prerogative writ of certiorari is not the appropriate remedy. When it is sought to quash an order, decision or proceeding by certiorari the error complained of must be apparent on the face of the order, decision or proceeding. See: In **Re: Kubeinje (supra).** In the instant case, what is apparent on the face of the letter dated 8/1/2009 is a statement that the appellants failed to comply with the terms of the agreement between the parties.

Furthermore, I agree with the court below that the said letter conveying the decision of the president of the Federal Republic of Nigeria to void the OPLs represents an executive act, which, in the circumstances is not subject to judicial review. It merely states the act of non-compliance that gave rise to the decision. There is no reference to a petition on the face of the document. This is not to be taken to mean that the appellants are without a remedy. That remedy, however', is not by way of judicial review. A court is competent to adjudicate in a cause or matter when:

(a) it is properly constituted as regards numbers and qualification of members of the bench and no member is disqualified for one reason or the other;

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

(c) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court is fatal and the proceedings are a nullity as such defect is extrinsic to the adjudication.

See: Madukolu vs Nkemdilim (1962)2 SCNLR 341; Skenconsult vs Ukey (1981) 1 SC; A.G. Federation vs Guardian Newspapers Ltd. (1999) 9 NWLR (Pt. 618) 187.

The vice afflicting the appellants' application for judicial review is that it was not initiated by due process of law. In other words, the suit ought to have been instituted by way of writ of summons and the filing of pleadings. This issue is accordingly answered in the affirmative and resolved against the appellants.

Issue 2

Whether the Court of Appeal was right in striking out the entire case of the applicants filed at the trial court on the basis that one (1) of the eight (8) reliefs sought by the appellants (as applicants at the trial court) was not within the trial court's jurisdiction.

In support of this issue, learned senior counsel for the appellants argued that even if the decision of the 4th respondent is not subject to judicial review by way of certiorari, the lower court was not justified in striking out the appellants' entire case. He submitted that the court ought to have only struck out the relief for an order of certiorari and considered the other reliefs. He referred to Order 47 Rule 1 (1) and (2) of the Federal High Court (Civil Procedure) Rules, 2000, which is on all fours with Order 34 Rules 1 and 2 of the Federal High Court (Civil Procedure) Rules, 2009. He submitted that in an application for judicial review, an applicant may seek declaratory and injunctive reliefs; may seek orders of mandamus, prohibition or certiorari; or may seek a combination of the reliefs together or in the alternative. He submitted that in the circumstances the court had jurisdiction to consider and determine the declaratory and injunctive reliefs. He submitted that had the lower court granted the declaratory reliefs sought, it would have proclaimed the rights and legal relationship of the parties, which would have formed the basis for subsequent proceedings by the appellants to enforce their rights so declared. He referred to: **SO. Ntuks vs. Nigerian Ports Authority (2012) 8 NWLR (Pt. 1301) 37 @ 61.**

In response to this issue, learned senior counsel for the 1st respondent restated the definition of certiorari and submitted that the appellants have not

A been able to show that the letter of 8th January 2009, which is the fulcrum of their action, is a decision within the meaning and contemplation of judicial review vide a writ of certiorari. He submitted that since the application for judicial review is founded on certiorari, as contained in relief 7 of the claim, the other reliefs could
B not be entertained. He submitted further that reliefs 1 - 6 are declaratory reliefs, which can only be granted at the discretion of the court and that the appellants failed to place all materials before the court to enable it exercise its discretion in their favour. He relied on: **Remawa vs NACB (2007)2 NWLR (Pt 1017) 155**
C **(C/A); Menakaya vs Menakaya (2001) 16 NWLR (Pt. 738) 203 @ 253 B - D.**

Learned counsel for the 4th - 7th respondents agreed with learned counsel for the 1st respondent that the appellants' main relief before the trial court was for an order of certiorari to quash the 4th respondent's decision. He submitted that all
D the other reliefs revolve around this main relief. He submitted that in the absence of jurisdiction to entertain the application for judicial review, all other reliefs were bound to fail, as a court of law cannot grant declarations and injunctions in an incompetent application or suit. He relied on: **Ohakim vs Agbaso (2011) ALL**
E **FWLR (Pt553) 1806 @ 1840 C-D; Nwaoboshi vs MILAD, Delta State (supra) at 318 D & 322 E - F.** He submitted that if the application for certiorari is incompetent then if the court were to consider the other reliefs, it was bound to delve into or consider the 4th respondent's decision, which the appellants are
F seeking to subject to judicial review. He referred to **Tukur vs Govt. of Gongola State (supra)** where it was held that a court cannot adjudicate over ancillary claims if it has not jurisdiction to entertain the main claim and if the ancillary claim will inevitably involve a discussion of the main claims. Referring to the
G decisions of this court in **Obiuweubi vs C.B.N. (2011) 7 NWLR (Pt.1247j 465 @ 507 F – G** and **MadukoIu vs Nkemclilim (supra)** on the competence of a court, he submitted that as the 4th respondent's action is not susceptible to certiorari, it is a feature that prevents the court from exercising its jurisdiction,
H notwithstanding the fact that there are other reliefs before the court.

He submitted further that the appellants' complaint, which centres around the alleged revocation of their PSCs, is a contractual matter that is not within the jurisdiction of the Federal High Court. He referred to: **Onuorah vs Kaduna**
I **Refining Company Limited (2005) 2 SC (Pt. II) Onyemaizu vs Ojiako (2010) 4 NWLR (Pt. 1185) 504 @ 516 G H; 525 F**

The law has long been settled that the incompetence of a court to entertain and determine the principal question in a proceeding will rob it of jurisdiction to

entertain ancillary reliefs. A court cannot adjudicate over ancillary claims where such ancillary claims would involve a discussion of the main claims. **See: Tukur vs Govt. of Gongola State (1989) 4 NWLR (ft. 117) 517 @ 549 A; 567 E & 568 A - B**. However, it is argued on behalf of the appellants that by virtue of Order 47 Rule 1(1) and (2) of the Federal High Court (Civil Procedure) Rules, 2000, under which the application was brought, the trial court had jurisdiction to entertain the other reliefs. It is therefore necessary to examine the relevant provisions.

"Order 47

Rule .1 (1) An application for:

(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this order.

(2) An application for a declaration or an injunction (not being an injunction in rule 1 (b) of this rule) may be made by way of an application for judicial review and the court may grant the declaration or injunction if it deems it just and convenient to grant it by way of Judicial review, having regard to;

(a) the nature of the matters in respect of which relief may be granted by way of an order of madamus, prohibition or certiorari,

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

(c) all of the circumstance of the case.

Rule 2. On an application for judicial review any relief mentioned in rule 1 may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of relates to or is connected with the same matter."

In **Ohakim vs Agbaso (2011) ALL FWLR (Pt.553) 1860 @ 1840 - 1841 C - D**, this court, per Onnoghen, JSC (as he then was) explained the legal effect of the

above provisions: With regard to Rule 1 (1) (b) he stated that an injunction for any other purpose other than to restrain a person from acting in any office in which he is not entitled to act cannot stand on its own by way of judicial review, as the provision has limited the scope or nature of an injunction that can be applied for by way of judicial review. It was observed that this is an exception to the general rule that an injunction cannot be claimed as a substantive relief in action without tying it to the main claim, usually by way of declaration or damages. It was further held that by virtue of sub-rule 2 of Rule 1, in an application for judicial review, the type of injunction that may be claimed is any other injunction other than the one specifically mentioned in Rule 1 (1) (b) supra.

Applying these principles to the instant case, I am inclined to agree with the respondents that the main claim sought by the appellants before the trial court was for an order of certiorari to quash the letter of 8th January 2009. All the other reliefs sought are dependent on that main relief. By Order 47 Rule 1 (2), other reliefs such as declarations or injunction may be made by way Of judicial review regard being had to (a) the nature of the matters in respect of which relief may be granted, (b) the nature of the bodies or persons against whom relief may be granted by way of such order, and (c) all the circumstances of the case. In resolving Issue 1 earlier, I held that the suit before the trial court was incompetent, as the act complained of was an executive act in respect of which a writ of certiorari will not lie and having arisen from a purely contractual relationship. The declaratory reliefs sought were with a view to quashing the decision of the 4th respondent. Furthermore, I am of the view that the order of injunction sought in prayer 8, which seeks to restrain not only the 4th – 6th respondents, but also other parties whose actions cannot be subject to judicial review, cannot stand alone.

I therefore hold that having regard to the facts and circumstances of this case, the lower court was right in striking out the entire suit. This issue is accordingly resolved against the appellants.

In the judgment appealed against, the lower court, conscious of the fact that it is not the final court, in spite of its finding that the suit at the trial court was incompetent, proceeded to make findings on the merit of the appeal. Issues 3, 4 and 5 submitted for consideration in this appeal arise from the findings made by the lower court on the merit of the appeal. Having resolved Issues 1 and 2 against the appellants, it would amount to an academic exercise to delve into those issues.

In conclusion, I hold that this appeal lacks merit and is accordingly dismissed. The judgment of the Court of Appeal, Abuja Division delivered on

A 26/4/2012 setting aside the judgment of the Federal High Court, Abuja delivered on 20/8/2009 and striking out Suit No. FHC/ABJ/N1/146/2009 is hereby affirmed.

B **CROSS-APPEAL**

As stated in the introductory part of the judgment in the main appeal, the cross appellant, OWEL PETROLEUM SERVICES (NIG.) LTD., was also dissatisfied with part of the judgment of the lower court and filed a notice of cross appeal
C dated 19th June, 2012 containing 7 grounds of appeal. The said grounds without their particulars are as follows:

1. The learned Justices of the Court of Appeal erred in law when they held that the revocation of OPLs 321 and 323 by the 5th respondent [the president of the
D Federal Republic of Nigeria] was wrong he not being the minister of Petroleum as envisaged under the Petroleum Act.
2. The learned Justices of the Court of Appeal erred in law when they held that the certification of a public document arises only where the public document
E sought to be admitted is a photocopy and not original and no requirement of certification if it is an original public document.
3. The learned justices of the Court of Appeal erred in law when they held that the learned trial chief judge was right in granting respondent's application to
F file and rely on further affidavit after addresses have closed and issues joined.
4. The learned justices of the Court of Appeal erred in law when they held that the non-filing of affidavit in support of an originating motion is a mere non-compliance and irregularity curable under Order 3 Rule 1 of the Federal High
G Court (Civil Procedure) Rules 2000.
5. The learned justices of the Court of Appeal erred in law when they held that pursuant to Section 148 (1) of the Constitution of the Federal Republic of Nigeria, 1999 the 6th respondent in exercising his power is subject to the
H Petroleum Act in voiding OPLs 321 and 323.
6. The learned justices of the Court of Appeal erred in law when they held that the lower court did not make a case for the applicants.
7. The learned justices of the Court of Appeal erred in law when they held that
I the burden of proof shifted to the 6th to 8th respondents on revocation of the Applicants' PSC rights.

The relief sought is:

"An order allowing the cross appeal and its place dismiss suit FHC/ABJ/CS/146/2009."

I have earlier referred to the briefs of argument filed by the respective parties in this cross-appeal in the introductory part of the main appeal. I also noted that Chief Robert Clarke, SAN filed a preliminary objection to the cross appeal on the ground that it is academic. Written addresses were duly filed and exchanged in respect of the preliminary objection. In the cross appellant's brief filed on 25/6/2012, five issues were identified for the determination of this appeal arising from the 7 grounds of appeal. A careful examination of the grounds of appeal and the five issues predicated thereon reveals a challenge of the findings of the court below on the merits of the appeal in spite of having found that the suit before the trial court was incompetent. Having resolved the main appeal against the appellants and affirmed the order striking out the suit before the Federal High Court, it is my considered view that this cross appeal no longer has any leg to stand on. It is accordingly struck out.

On the whole, the main appeal is dismissed while the cross appeal is struck out. The parties shall bear their respective costs in the appeals. It is to be noted that the decision in the appeal and cross appeal herein, by agreement of learned counsel, shall be binding on the parties in Appeal Nos. SC.460/2012: N.J. EXPLORATION LTD. vs OWEL PETROLEUM SERVICES (NIG.) LTD; SC. 6/2013: TULIP ENERGY RESOURCES NIG. LTD. vs OWEL PETROLEUM SERVICES NIG. LTD.; and SC.114/2013: THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA & ORS. vs KOREA NATIONAL OIL CORPORATION & ORS.

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

RHODES-VIVOUR (JSC): I had the benefit of reading in draft the leading judgment of my learned brother Kekere-Ekun JSC, and I agree with her lordship that the subject matter of this suit is outside the jurisdiction of the courts, consequently the court of first instance had no jurisdiction to entertain the applicants' action.

The appellants' entered into two individual production sharing contracts with the Nigeria National Petroleum Corporation, (NNPC) in relation to Oil

prospecting Licence 321 and 323.

The president's letter dated 8 January 2009 revoked the licence.

Dissatisfied with the turn of events the appellants filed an Originating Motion before the Federal High Court asking among other reliefs for judicial review, i.e. an Order of Certiorari quashing the decision of the president contained in the letter dated 8 January, 2009.

The simple issue is whether the Federal High Court has jurisdiction to grant an Order of Certiorari to quash the decision of the president contained in the letter dated 8 January, 2009.

In Madukolu & ors vs. Nkemdiim (1962) 2 NSCC p.314

This court per Bairamian JSC made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent when:

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

The Federal High Court assumed jurisdiction and entered judgment in favour of the appellants'. That is to say the Federal High Court had jurisdiction to quash the contents of presidents letter dated 8 January, 2007. An Order of certiorari was appropriate according to the Federal High Court.

The Court of Appeal was of a different view when it heard the appeal. The Court of Appeal upset the judgment of the Federal High Court when it said that:

"The subject matter of the suit is outside the jurisdiction of the Federal High Court. In fact the action instituted by the respondents 1st to 3rd ought to have been struck out …. the learned Chief Judge had no jurisdiction to entertain applicants action ab initio."

Was the Court of Appeal correct?

The law draws a distinction between judicial and administrative acts. If for

example a public authority acts judicially or quasi judicially its conduct is subject to control by the courts by means of certiorari or/and mandamus, but if it was acting administratively its decisions are exempt from control by the courts. Certiorari and mandamus would not be available.

The President's letter dated 8 January 2009 which in effect revokes the appellants' licence is an administrative act. The President was acting administratively when he made the decision in the said letter. Such a letter cannot be quashed by Certiorari. The Federal High Court was wrong to grant the prerogative writ while the Court of Appeal was correct to rule that the Federal High Court has no jurisdiction over the matter. It is very clear that the subject matter of the case is not within the jurisdiction of the court since courts have no jurisdiction to quash administrative acts by certiorari.

I am not by this concurring judgment saying that an administrative decision is exempt from review simply because it is administrative. That would be saying that the President can act as he likes. That would, be wrong. The appellants' have a remedy but definitely not certiorari.

For these brief reasons as well as those more fully given by my learned brother Kekere-Ekun JSC, I too dismiss the main appeal and strike out the cross appeal.

Olabode Rhodes-vivour
Justice Supreme Court

DISSENTING JUDGMENT

DATTIJO MUHAMMAD, (JSC): On the l2th of March 2009 the appellants as applicants sought and obtained leave of the Federal High Court sitting at Abuja, hereinafter referred to as the trial court to file an originating motion for judicial review. In the originating motion dated 13th but filed on the 26tn March 2009, the appellants, pursuant to Order 47 rule 3(2) (a) of the Federal High Court Rules 2000 claim several declaratory reliefs principal among which are the 4th and 6th, from or on which the others either flow or rest. The principal declaratory reliefs read:

> **"4. A DECLARATION that the 1st respondent lacks any constitutional, statutory or other authority, right and**

power to void the rights of the applicants as contractors in respect of the operation and development of OPLs' 321 and 323 and that the purported exercise of such power and/or authority as conveyed to the applicants in the letter referred to in relief 3 above, is illegal, unlawful, wrong and void ab initio.

6. A DECLARATION that the decision of the 1st respondent, as conveyed in the 2nd respondent's letter dated 8 January 2009 with reference No. HMSP/09/06/1/1 AND WRITTEN UNDER THE HAND OF THE Honourable Minister of State [Petroleum] and addressed to the applicants titled "Allocation of OPLs 321 and 323", is illegal, procedurally unfair, unreasonable, irrational and/or defeats the legitimate expectations of the applicants herein."

Arising from their foregoing grief, the appellants prayed the court for the remedies thereto as embodied in their 7th and 8th reliefs thus:

"7. AN ORDER CERTIORARI quashing the decision of the 1st respondent, as conveyed In the 2nd respondent's letter dated 8 January 2009 with reference No. HMSP/09/06/1/1 and written under the hand of the Honourable Minister of State [Petroleum and addressed to the applicants titled "Allocation of OPLs 321 and 323", on the grounds that such decision is illegal, procedurally unfair, unreasonable, irrational and/or defeats the legitimate expectations of the applicants herein.

8. **AN ORDER of perpetual injunction restraining the respondents, their agents, servants, privies and any other body which derives its authority from the respondents from further interfering with in whatever manner of disturbing the applicants in the pursuit of their lawful and contractual duties/obligations as contemplated by the contents of the letters of awards and the PSCs referred to above, dated the 10th day of March, 2006 and executed between the Applicants and NNPC."**

A

It is evident from the reliefs the applicants canvassed at the trial court that the revocation of the award of OPLs 321 and 323 by the 4th respondent is the basis of the suit commenced by their originating motion for judicial review by way of
B certiorari. The trial court, in its considered judgment of 20th August 2009, on declaring the revocation null and void, granted the applicants the other reliefs they sought.

Dissatisfied with the trial court's decision, the 1st respondent herein
C appealed to the Court of Appeal, Abuja Division, hereinafter referred to as the lower court. In its judgment delivered on the 26th April 2012, the court allowed the appeal, set aside the judgment of the trial court and struck out appellants' suit having found that the decision of the 4th respondent, conveyed through the letter
D dated 8th January 2009, being an executive decision, is not subject to judicial review by way of certiorari.

Aggrieved by the decision of the lower court the appellants, by a Notice dated 15th June but filed on 18th June 2012, have appealed to this Court. They
E distilled five issues from the five grounds of appeal as arising for the determination of the appeal. The 1st respondent, has also cross-appealed against certain aspect of the lower court's decision by a notice filed on 20th June 2012.

Unable to agree with the dismissal of the appeal for reasons embodied in
F the leading judgment of my learned brother Kekere-Ekun (JSC) just delivered, I proffer my humble reasons for the dissent anon. In so doing, reliance is placed on the summary of the facts that brought about the appeal contained in the lead
G judgment adding such further facts, only where necessary, to facilitate a better understanding of the issues the appeal raises and why, given these cumulative facts and issues, I prefer to be different in my conclusion.

At the trial court, the 1st respondent/cross appellant by a notice of
H preliminary objection dated 8th April 2009 challenging the court's jurisdiction to entertain appellants' suit on the grounds that:

"(1) There is no reasonable cause of action disclosed in the suit;

I **(2) The suit as presently constituted is grossly incompetent as same was not initiated by the due process as required by law.**

(3) The subject matter is outside the jurisdiction of the court.

(4) The action is incompetent for non-joinder of necessary

party.

('5) The appellants lack the locus standi to institute this action (Underlining mine for emphasis)

Similarly, the 4th, 5th, 6th and 7th respondents herein filed a Notice of Preliminary Objection on the 24th April 2009 challenging the competence of appellants' suit on the basis of the forgoing grounds of the 1st respondent and the further grounds thus:

"(1) That the suit is statute barred by virtue of the provisions of the public officers prosecution Act CAP 41 Laws of the Federation of Nigeria 2004.

(2) That the action is speculative frivolous and a gold-digging expedition."

Beyond the objections challenging the competence of the suit, the respondents filed their respective counter-affidavits in opposition to the appellants' verifying affidavits in support of the originating motion. Appellants affidavits as well as the respondents counter-affidavits in opposition thereto are accompanied by series of annexures. Parties then adopted and relied on the written addresses they earlier filed and exchanged in respect of the preliminary objections as well as the merit or otherwise of appellants' suit as their respective positions on both.

After a thorough and meticulous consideration of the submissions of parties, the trial court at page 1546, volume 3 of the record of appeal proceeded to determine the preliminary objections of the respondents challenging its jurisdiction and the competence of appellants suit firstly as follows:

"The action being challenged is the action by Mr. President. That by itself to my mind confers jurisdiction on this Court by virtue of Section 251(1) (r) of the Constitution of Federal Republic of Nigeria 1999 which has conferred original jurisdiction on the Federal High Court or any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its Agencies. Under Section 7(1) 'p) of the Federal High Court Act, Federal High Court is

conferred with jurisdiction to hear and determine civil causes and matters connected with or pertaining to mines and minerals including oil fields, oil Mining, Geological Surveys and Natural Gas. The word "Petroleum" is defined in Section 15 of the Petroleum Act to mean mineral oil or any related hydro carbon or natural gas. Section 14 of the Federal High Court confers powers on this Court to make an order of CERTIORARI.

It is therefore my view and this I hold that this Court has jurisdiction to hear and determine the suit."

At pages 1548-1552, volume 3 of the record, are the trial court's findings that the appellants as applicants have the locus standi to file and maintain their action against the respondents; that the suit has disclosed reasonable cause of action and that all the necessary parties have been joined.

On the competence of the suit as same is constituted, the trial court relying on, inter-alia, ***Attorney General of Lagos State vs. Eko Hotels Ltd (2006) 18 NWLR (Pt 1011) 378 at 423, Baba vs. NCATC (1991) NWLR (Pt 192) 388 at 414 and FEEL BELL NIGERIA Ltd vs. Government of Cross River State (1996) 3 NWLR (Pt 438) 471,*** at pages 1552-1553 reasoned why it proceeded to determine appellants' claim notwithstanding the irregular procedure by which the suit was commenced thus:'

"… It is now anachronistic for one to propound the dichotomy between judicial quasi judicial and administrative or executive bodies for the purpose of judicial Review particularly when all such bodies are now required to observe the rules of natural justice in the discharge of their duties-Where a body whether judicial, quasi judicial, administrative or executive in inception is judicially in the sense that it is to determine the civil rights and obligations of a person or to find him guilty or liable for a fault, he must be given a hearing before the issue can be properly decided The decision of the 1st respondent can be judicially reviewed. (Underlining mine for emphasis).

The trial court further rationalized as follows:

A **….An order of certiorari or prohibition will lie against anybody or person having a legal duty to determine questions affecting the right of subjects whenever the duty implies that that body or person should act fairly or in accordance with a statutory**
B **provision. Whenever the power vested in the body or person are such that the exercise of the powers may adversely affect the interests of citizen there clearly exists a duty on the body or person to act fairly, otherwise CERTIORARI will lie to quash**
C **the decision….. the decision of the 1st respondent in the letter dated 8th January 2009 to void the allocation OPL's 321 and 323 to the 1st appellant is susceptible to judicial review."** (Underlining mine for emphasis).

D

The court concluded at page 1554 as follows:

"The main issue before the court is whether the decision of Mr.
E **President should be reviewed. In the case of council of civil service Union vs. Minister for the Civil Service (1984) 3 ALL ER 935 Lord Diplock classified under three grounds upon which an administrative action is subject to control by judicial review.**
F **The first ground, he calls illegality, Second ground he calls irrationality and the third ground he calls procedural impropriety, it would be subject to judicial review……."** (Underling mine for emphasis).

G

On appellants principal relief, after exhaustive examination of the affidavits of the parties for and against the claim, the trial court at page 1566 volume 3 of record of appeal, firstly decided thus:

H

"'I hold therefore that Mr. President i.e. the 1st respondent has no power to void the allocation of OPLs' 321 and 323 to Knocle Korea National Oil Company the 1st applicant in this suit. That
I **power conferred on the Minister of Petroleum Resources by an Act of the National Assembly Petroleum Act 1969. According to WADE AND FORSYTH ADMINISTRATIVE LAW 7TH EDITION 1994 page 347,, an element which is essential to the**

lawful exercise of power is that it should be exercised by the Authority upon whom it is conferred and by no one else."

The court is not yet done. It continued thus:

"Assuming Mr. President has power to void the allocation of OPLs' 321 and 323 the question is whether the procedure laid down in paragraph 24 to 30 of the First schedule to the petroleum Act has been followed.This is very important because as was held in the case of Ogulaji vs. AG Rivers State 1997 6 NWLR (Pt 508) 209 at 234 and U.N.T.H.M.B. vs. Nnoli 1994 5 NWLR (Pt 363) 376 at 413, where a statute prescribes a particular method of exercising a statutory power, the procedure so laid down must be followed. In the case of Federal Government of Nigeria vs. Zebra Energy Ltd 2002 18 NWLR (Pt 798) 162 RATIO 23 the Supreme Court held that when a matter is clearly spelt out on a statute and the procedure for carrying out such duty is laid down, a party has no choice but to comply fully with the provisions of the statute."

The court further reasoned at pages 1567-1568 volume 3 of the record thus:

"The procedure for voiding or revoking an OPL is laid down in paragraphs 27 and 28 to the petroleum Act. The Minister of Petroleum shall inform the licensee or lessee of the grounds on which the revocation is contemplated and shall invite the licensee or lessee to offer any explanation if he so desires. If the Minister is satisfied with the explanation, he may invite the licensee or lessee to rectify the matter explained of within a specified period. If however the licensee or lessee makes no sufficient explanation or does not rectify the matter complained of within the specified period, it is then the petroleum may revoke the licence or the lease. The above provision is in consonance with the principle of fair hearing as constituted in the constitution. In other words no licence is to be voided or revoked without hearing the licensee or lessee or without

affording him an opportunity to be heard."

And concluded at page 1568, volume 3 of the record as follows:

"There is nothing placed before this court to show that the petition upon which the decision to void OPLs' 321 and 323 was taken was brought to the attention of the Applicants or any of them for their reaction.

It is procedurally wrong to allocate the aforesaid OPLs to ONGC – videsh consortium on 5th January 2009 when applicants were still in possession OPLs"

The court proceeded to examine the reasons proffered by the 4th – 7th respondents for the 4th respondent's decision to revoke the OPLs, found same to be untenable and unavailing, and voided and quashed the revocation on the grounds that the decision is illegal, procedurally unfair, unreasonable and/or defeats the legitimate expectations of the appellants.

It must be pointed out that all the other reliefs the trial court granted the appellants are in consequence of the grant of the two foregoing reliefs the evolution of which has taken us so far to capture.

Now, of the twenty one issues distilled by the 1st respondent for the determination of its appeal at the lower court, the 3rd, 8th and 15th targeted at the foregoing findings of the trial court, are hereinunder reproduced for their relevance:

"(3) Whether or not the learned trial Chief Judge was right in holding that the 6th respondent has no power to void the allocation of OPLs 321 and 323 he not being the minister of Petroleum Resources (encompasses ground 18 of the notice of appeal)

(8) Whether the learned Chief Judge had the jurisdiction to entertain the applicants' action ab initio (encompasses grounds 1, 3, 5 and 8 of the notice of appeal).

(15) Whether or not the letter of 8th January 2009 by the 1st Respondent was susceptible to judicial review by way of

certiorari (encompasses ground 12 of the Notice of Appeal).” (Underlining mine for emphasis).

On appellants 3rd issue before it, the lower court at volume 5 of the pages 3084-3085 of the record in affirming the trial court's findings opined as follows:

“In order to answer the question posed under this issue, the 1999 Constitution of the Federal Republic of Nigeria will come into play. Section 5(1) of the said constitution provides thus:

'(1) Subject to the Provisions of this Constitution, the executive powers of the Federation (a) shall be vested in the President and may subject as aforesaid and the provision of any law made by the National Assembly, be exercise by him either directly or through the Vice- President and Ministers of the Government of the Federation or Officers in the Public Service of the Federation.’

Section 148(1) states thus:

'The President may, in his discretion, assign to the Vice-President or any Minister of Government of the Federation responsibility for any business of the Government of the Federation including the administration of any department of government.’

A careful reading of the above quoted sections of the Constitution would reveal that Section 5 of the 1999 Constitution provides that the exercise of the President's Power is subject to any law made by the National Assembly. Therefore the said powers are subject to:

(i) the Petroleum Act and

(ii) the Deep Offshore Act which gives the minister power to award Oil Licences and to revoke OPLS subject to certain laid down procedures.

Even when the President arrogates to himself the powers of the Minister of Petroleum, once there is a substantive minister in

A **office, he would be bound by the procedure laid down in paragraphs 24 to 27 of the 1st Schedule to the Petroleum Act.**

In the instant case, during the time of late President Umaru
B **Musa Yar'adua there was a substantive Minister in person of Alhajii Rilwan Lukman. The late president not being the substantive Minister of Petroleum Resources could not exercise the powers vested in that office.**

C

Paragraphs 24 to 27 of the 1st Schedule to the Petroleum Act outlined the procedure to be followed when the Minister for Petroleum Resources is to revoke an Oil Prospecting Lincence."
D (Underlining mine for emphasis).

The court concluded its finding on the issue at page 3086 volume 5 of the record thus:

E

"Therefore the president i.e. the 6th respondent not being a Minister of Petroleum has not complied with the procedure as stated in the 1st Schedule to the Petroleum Act referred to above.
F **In view of foregoing the learned trial judge was right when he held that the 6th respondents has no power to void the allocation of OPLS 321 and 323 because he was not a Minister of Petroleum Resources.**" (Underlining mine for emphasis).

G

On the 8th issue for the determination of the appeal before it, the lower court's decision spans pages 3106-3107, volume 5 of the record and reads:

H **"In the instant case, is the decision of the 6th respondent to void the allocation of OPLS 321 and 323 vide the letter of 8th January 2009 a judicial or quasi-judicial function?**

I **In my humble view the decision of the 6th respondent is neither judicial nor quasi-Judicial. it is an Executive decision of the 6th respondent who happened to be the president of Federal Republic of Nigeria. A writ of certiorari lies only against bodies**

exercising judicial and quasi- judicial authority and in respect of acts performed by them in that capacity. It does not lie against the Executive or Legislative Acts or mere administrative acts because such acts are not performed or expected to be performed judicially. Therefore a writ of certiorari is not a proper remedy in questioning Executive or Legislative Act…….

It is therefore my view that the subject matter of this suit is outside the jurisdiction of the lower court. In fact the action instituted by the respondents 1st to 3rd ought to have been struck out." (underlining mine for emphasis).

On the 15th issue for the determination of the appeal, the lower court at page 3131 of the record held thus:

"I hereby adopt my views and conclusion on issue 8 above.

It is my view that the letter of 8/1/2009 by the 1st respondent was not susceptible to judicial review by way of certiorari."

My lords, I am unable to agree with the lower court's resolution of the 8th and 15th issues the 1st respondent herein, being the appellant thereat urged the court to consider. The issues had also been canvassed by parties at and were decided, though differently, by the trial court. These same issues have further been argued, at the instance of the appellants, before this court. Being perverse, the decisions of the lower court on the two issues provide me the justification for interference.

Before expressing the reasons for my dissent let me observe that the two courts have decided the real issue in controversy between the parties herein: whether or not the 4th respondent is competent to revoke, in the manner he did, the awards of OPLS 321 and 323 to the appellants. But for the nullification of the trial court's proceedings by the lower court, on the grounds that the judicial review procedure for an order of certiorari against the executive act/decision of the 4th respondent does not avail the appellants, an order the majority decision has upheld, this appeal would have had to be determined on the issue as to whether the concurrent findings of the-two Lower courts as to the unconstitutionality of the 4th respondent's revocation of the awards of the OPL's

is right or otherwise.

Now, in resolving the two issues the lower court has adjudged appellants' suit for an order of certiorari consequent upon the review of 4th respondent's executive act/decision revoking the allocation of OPLS 321 and 323 to them a nullity. Relying on numerous decisions of this court, the court has held the judicial review procedure for an order of certiorari unavailing against the 4th respondent's executive decision. Rather, to the court, the procedure only avails persons aggrieved by judicial or quasi judicial acts or decisions. I disagree.

Firstly, it is long settled that generally speaking, jurisdiction in relation to a law court is constitutionally and/or otherwise statutorily conferred. Jurisdiction, the same trite principle further enunciates, is only extended, diminished or extinguished by the very constitution and/or statute that conferred it in the first place. In conferring or extinguishing jurisdiction in courts Laws, and precedents are taken to be a source of these laws, must do so in very clear terms. See ***Isaac Obiuweubi vs. Central Bank of Nigeria (2011) LPELR-2185 (SC), (2011) 7 NWLR 465, Afribank (Nig) Plc vs. Akiwasa (2006) 5 NWLR (Pt 974) 619. In National Bank (Nigeria) Ltd & anor vs. John Akinkunmi Shoyoye & anor (1977) LPELR-1948(SC), (1977) 5 SC 110*** this Court per Obaseki (JSC) stated thus:

> "**By jurisdiction is meant the authority which a court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by similar means."** (underlining supplied for emphasis).

Again, it is trite that a court of law only assumes jurisdiction over a matter if, inter-alia:

> **(A) The subject matter of the action is within its jurisdiction and**
>
> **(b) The action is initiated by due process of law. See James G. Orubu vs. National Electoral Commission (1988) 12 SC (pt III) 1 and Attorney General of Lagos State vs. Dosunmu (1989) 6 SC (Pt II) 1.**

Whereas jurisdiction in respect of the subject matter of the suit is provided for by either the Constitution or the statute establishing the court, procedural jurisdiction for initiating the suit falls within the precincts of the court's adjectival laws. Non compliance with procedural requirements for initiating an action, by itself an irregularity in the exercise of jurisdiction, should not be confused with total lack of jurisdiction. See **Mobil Producing Nig Ltd VS. Lagos State Environmental Protection Agency (2002) 14 SCM 167.** And that is what the lower court did in its resolution of the 15th issue before it!

Now, it has long been settled that it is the appellants' claim that determines whether in the light of the statute which confers jurisdiction on the court, the court has jurisdiction to hear and determine the claim. See **Aihaji Umaru Abba Tukur vs. Government of Gongola State (1989) 9 SC 1** and **Ahmadu Babale vs. A.A. Abdulkadir (1993) 2 SCNJ 110.**

In the instant case, the 4th respondent had voided the allocations of OPL's 321 and 323 made to the appellants. The declarations the appellants sought in their suit at the trial court are as reproduced earlier in this judgment. By their suit, the appellants had invoked the jurisdiction of the trial court seeking the declaratory and injunctive reliefs against 4th respondent's executive decision revoking the awards of OPL's 321 and 323 to them. Given the reliefs the appellants seek, the trial court's summation that, by virtue of Section 251(1)(r) of the 1999 Constitution and Section 7(1) (r) of the Federal High Court Act read along with Section 5 of Petroleum Act, it has the jurisdiction to hear and determine appellants' suit is beyond reproach.

The jurisdiction the trial court enjoys by virtue of Section 251(1) (r) of the 1999 Constitution vis-à-vis Section 7(1)(r) of the Federal High Court Act, see Section 9(1) of the Act, is exercisable in the manner provided by the Act establishing the court or any other enactment or by such rules and orders of court as may be made pursuant to the Act" under which the court is established. The trial court is particularly empowered under Section 14 (2) of its constitutive statute to make order of certiorari "notwithstanding that the order is made against an officer or authority of the Federation as such. The subsection reads:

> **"Section 14 (2) The power conferred by this section to make an order of mandamus, prohibition or certiorari may be exercised notwithstanding that the order is made against an officer or authority of the Federation as such."**

Granting without conceding that appellants' suit is wrongly constituted having been commenced by a wrong procedure, the lower court, it would seem, has ignored the potent saving facility Order 51(1) of the trial court's rules provide thus:

> **" Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding, there has by reason anything done or left undone, been failure to comply with the requirements of these Rules, whether in respect of time, place, manner. form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any documents, judgment or order therein."** (Underling supplied for emphasis).

The truth of the instant matter is that judicial review procedure for an order of certiorari is a mode of commencement of action the adjectival laws of the trial court permit litigants to explore. The very rules save such proceedings even if wrongly commenced as long as miscarriage of justice has not been occasioned.

This Court is certainly the apex court in the country and by the Constitution its decisions bind every court, person or authority. By the time-honoured doctrine of judicial precedent which further operates in this country, the decision on a given issue of law handed down by this Court binds all subordinate courts including the lower court. See ***Abacha vs. Fawehinmi (2000) 6 NWLR (Pt 660) 228 (2000) LPELR-14(SC)*** and ***Bashir Mohammed Dalhatu vs. Ibrahim Sam mu Turaki & Ors (2003) LPER-917 (SC), (2003) 7 SC 1.*** It must be restated here, though, that the doctrine of stare decision flourishes where the facts and the law applied to them in the earlier case are same as in the subsequent case. Cases are only authorities for what they decided. See ***Fawehinmi vs. UBA (No 2) (1989)2 NWLR (Pt 105) 588 and Clement vs. Iwuanyanwu (1989) 2 NWLR (Pt 107)39.***

The decisions of this Court the lower court relied on to nullify the trial court's proceedings the appellants commenced by their application for judicial review for an order of certiorari dwelt on the non-availability of the procedure under the common law against an executive decision or act. These are not

decisions on the procedure as provided for by the trial court's rules of practice and which by virtue of Section 14 of the Federal High Court Act is grantable irrespective of the nature of the act against which the relief is claimed. A court's rules of procedure remain the only source of the manner by which a court's jurisdiction, as conferred by either the constitution and/or its constitutive law, is to be exercised. The decisions of this court not on the non-availability of the judicial review procedure for an order of certiorari to the appellants inspite of its being provided for by the trial court's adjectival laws cannot justify the lower court's order nullifying the trial court's proceedings sequel to the court's perverse resolution of the two issues urged on it by the 1st respondent.

In ***the State vs. Salihu Mohammed Gonto & others (1983) N.S.C.C. 104 at 119.*** My lord Eso JSC (of blessed memory) restated the danger technicalities hold to the cause of justice thus:

> **"It would have amounted to travesty of justice to allow the judgment of the Court of Appeal to stand. This court has for sometime now laid down as a guiding principle that it is more interested in substance than mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice."**

See also **Bature vs. State (1994) 1 NWLR 267 at 282, Agbakoba vs. INEC &ors (2008) LPELR-232 (SC) and Attorney-General Bendel State vs. Attorney General of the Federation (1981) 10 SC 1.**

In the instant case, appellants grouse is with the 4th respondent's decision pertaining the award of the OPLS 231 and 323 to them. They want, based on the grounds upon which their suit is founded, 4th respondent's act/decision removed and undone.

Given Order 51(1) of the trial court's rules of practice the only justification for setting aside the proceedings of the trial court as commenced by the appellants and the order it gave birth to is if same has occasioned miscarriage of justice. The 1st respondent as the appellant at the lower court did not establish the injustice appellants resort to wrong procedure in claiming against the defendants cause any of the latter. The proceedings must accordingly prevail. I so hold.

The foregoing are the reasons for my dissent and allowing the appeal. 1 restore the trial court's proceedings and the concurrent findings of the two lower

courts on 4th respondent's illegal revocation of OPlS 321 and 323 awarded the appellants. The fortune of the substantive appeal informs my decision to discountenance the cross Appeal.

Parties should bear their respective costs.

Dattijo Muhammed
Justice Supreme Court

ADAMU AUGIE, (JSC):I have had a preview of the lead Judgment just delivered by my learned brother Kekere-Ekun, JSC, and I agree entirely with him.

He addressed all the issues raised in the appeal and cross-appeal and I will only add a few words to reiterate points made, particularly on the peculiarities of prayer for Order of Certiorari.

The 4th respondent [president of the Federal Republic of Nigeria] voided the allocations of OPL's 321 and 323, and the reason was the non-payment of the prescribed signature bonus of offered by the ONGC Consortium at the 2015 bid rounds in full. This is the decision that led to the application for Judicial Review, and the issue is whether judicial review is the right action to take.

Judicial review is based on the basic principle that powers can only be validly exercised within their true limits. Thus, it is a mechanism for keeping public authorities within due bounds and for upholding the rule of law. In effect, instead of substituting its decision for that of some other body, as happens on appeal, the court on review is concerned only with the question whether the act or order being challenged should be allowed to stand or not.

In other words, the court is concerned with the legality and not the merits of the decision or the acts of the public authority – *See* ***Amadi vs. Acho*** **(2005) 12 NWLR (Pt. 939) 386, and** ***ACB vs. Nwaigwe*** **(2011) 7NWLR (Pt 1246) 380 SC** where this court, per Onnoghen (JSC) (as he then was), explained as follows:

> **Judicial *r*eview is the supervisory jurisdiction of the High Court in the review of the proceeding decisions and acts of inferior courts and Tribunals and acts of governmental bodies. The remedies available are for orders of mandamus, *certiorari* and prohibition - - In judicial review, the court is usually concerned with the legality and not with the merit of the proceedings, decisions or acts of the affected court, tribunal or governmental**

body. The jurisdiction of the High Court to quash the Judgment, order or proceeding of an inferior tribunal on the face of the record is not an appellate jurisdiction.

This court explained the position of the law in some detail in ***The Head of the Federal Military Government and C.I.C. Armed Forces vs. The Military Governor, Mid-Western State of Nigeria & Anon Ex-Parte Ambrose I. Obiyan (1973) 12 SC23,*** as follows:

> **It is settled law that *Certiorari* lies to the High Court to quash the orders or the proceedings of an inferior Tribunal which has acted in excess of its jurisdiction, and that although the remedy was in early times limited to courts in the normal sense, it has since been extended to other authorities or bodies exercising judicial or quasijudicial powers: R. vs. Electricity commissioners (1924) I KB 171 at pp.204-5. We are equally of the opinion that certiorari does not lie in respect of executive or administrative acts but only of judicial or quasi-judicial acts. In holding that certiorari did not lie against the Controller of Textiles in Ceylon, who had by an order withdrawn a traders license on what seemed to the former to be reasonable ground, Lord Radcliffe in delivering the Opinion of their Lordships of the Privy Council in the case of *Nakkuda All vs. Jayaratne* (1951) A. C 66, said:**
>
> > **"Their lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immerse range of reported cases in which certiorari has been granted by the English Courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established courts of justice and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably to say that the**

courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that has some analogy to the judicial. But the basis of jurisdiction of the courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute That principle is most precisely stated in the words of Atkin, L. J. (as he then was) in Rex vs. Electricity commissioners - "the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognized as courts of justice. Wherever any bodies or persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to con trolling jurisdiction of the King's Bench Division exercised in these writs': As was said by Lord He art CJ in Rex vs. Legislative Committee of the Church Assembly when quoting this passage -"in order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body had the duty to act judicially".

There are a number of Nigerian cases on the subject, the most pertinent (is) re minister of customary courts and chieftaincy affairs, Ex-parte Amobidike Eze. There, Eze applied for an order of certiorari for the purpose of quashing the order of the minister dismissing him as president of a customary court under powers conferred upon the minister by virtue of which the minister was entitled to dismiss a member of the court who "shall appear to have abused his power or to be unworthy or incapable of exercising the same justly or for other sufficient reason

A 'Palmer, J., held that, as the order of the minister was not a judicial or quasi-judicial act, it could not be quashed by an order of *certiorari*. He said:

> **"The first question is whether certiorari lies. The office is not**
> B **held at pleasure – there can be dismissal only if there is something against the member but that does not necessarily make the decision of the Minister a judicial or quasi-judicial order."**

C

Palmer, J., distinguished Ridge vs. Baldwin &ors in which a Chief Constable was dismissed without compliance with the regulations laid down for such dismissal pointing out that *Certiorari* was held to lie in that case because there had to be a
D Tribunal and Inquiry where the chief Constable did not admit the allegations against him and the principles of natural justice must then apply, and also because the procedure adopted in that case was not by an application for an order of Certiorari but one by ordinary action. A case analogous to **Ridge vs. Baldwin is**
E **Adedeji vs. Police Service Commission S C. 518/1966 (unreported)** in which the Supreme Court held that an order of Certiorari lay to quash the decision of the commission on the ground of non - compliance with the provisions of a General Order dealing with the removal or dismissal of officers from the public service
F The Police Service Commission was clearly a quasi judicial body which is, as such, amenable to the order of Certiorari On the otherhand, in the **Att,-Gen., Eastern Nigeria vs. Briggs (1965) N.M.L.R 45,** the appellant appealed against the Judgment of the Eastern Nigeria High Court granting an order of certiorari
G directed to the Governor of Eastern Region of Nigeria to bring into the High Court for the purpose of being quashed the order reverting the Respondent to the post of Teacher Grade II and the relevant proceedings thereto. The Governor said that he acted "on the recommendation of the Public Service Commission [PSC]" and that
H he was satisfied that the respondent had failed to exculpate himself from the charges laid against him. The Supreme Court, allowing the appeal, said at p. 48 of the report:

> I **"Counsel for the respondent – sought to distinguish between a power to dismiss and a power to reduce in rank and between the case where an officer is reduced in rank on stated grounds as a disciplinary measure and where he is reduced in rank**

otherwise, either without the statement of any reason or for some reason other than misconduct. This argument overlooks the fact that it is not the recommendation made by the PSC that [he] seeks to have quashed but the direction given by the governor, acting on that recommendation. The governor, as we had already held, had no duty to act judicially. It is not easy to see how any error in law, breach of natural justice, or want of jurisdiction can be imputed to the governor, who merely did what the Constitution Order required him to do."

We think, therefore, that as the governor in the present case had to consider the appellant's dismissal from the point of view of government policy or expediency, he was not under any duty to act judicially, nor is he required under Section 61(5) of the constitution of Mid-western Nigeria to act only after considering the report of a Commission of Inquiry or a body of advisers, or even after obtaining the appellant's explanation of a complaint against him.

In **C.I.C of Armed Forces vs. Public Service Commission of Mid Western State & Anor** (1974) NSCC (Vol. 9) 509, Coker, JSC, said:

It is generally and usually stated that certiorari will lie to correct excess of jurisdiction or want of it in the execution of its duties by inferior courts of record or statutory bodies or Tribunal which exercise judicial or quasi-judicial functions. This description of the scope of certiorari certainly obscures, as it has always done, the amplitude of its utility. In 'judicial review of administrative action" by S. A. De Smith, Third Edition at page 347, the following statement of the use of Certiorari with which we respectively agree appears:

> **"Occasionally judges will speak as if the availability of certiorari or prohibition depends on whether the act impugned is judicial or imports an implied duty to act judicially; but it has also been held that it is enough for the competent authority to be under a 'duty to act fairly: All the recent English cases in which such terminology has been used have involved alleged breaches of natural**

justice or non-binding decisions. None has been a straightforward case of want or excess of jurisdiction."

We think it necessary to state the correct position at law to be that where it is established before the High Court that a statutory body (or maybe an inferior court) with limited powers has abused that power and that such abuse does and continues to affect prejudicially the rights of a citizen, Certiorari will issue at the instance of that citizen. Such abuse may take the form of non-compliance with the rules of procedure prescribed for that body; it may be exemplified in the denial of the right to be heard in one's defence; it may consists of irregularities which are tan tantamount to a denial or breach of the rules of natural justice; indeed, it may take the form of assumption of jurisdiction to perform an act unauthorised by law or a refusal of jurisdiction where it should be exercised. The list is not exhaustive but those are the cases in which certiorari has always been issued by the courts of King's Bench. Thus, certiorari has been issued to quash arrest warrants, witness summonses or even official medical certificates which were irregularly issued - Where the transgression of the statutory body or tribunal is a denial of the right to be heard; as indeed the learned trial judge found and held in the present case, the courts have always unhesitatingly granted *Certiorari* In **Kanda vs. Government of the Federation of Malaya (1962) AC 322 at p.337,** the Privy Council stated the principle of the right to be heard as follows:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement has been made affecting him; and then must be given a fair opportunity to correct or contradict them.'…..

It should be noted however that the superior courts do not question the performers of administrative action *eo ipso* and it is not sufficient in order to grant an order of certiorari to complain that the statutory body or tribunal did not conduct an investigation in the way that a court of law would do it; in other words, the person applying for the order of certiorari must show that the body concerned has in one way or the other failed

to act judiciously where it should do so.

So, an Order of Certiorari is issued against acts and decisions of bodies and/or persons exercising administrative or judicial, quasi-judicial authority affecting rights of people, which makes it mandatory for them to act fairly. It does not lie against executive or legislative acts, or mere administrative acts as such acts are not performed in accordance with rules of fair hearing – See **Magit vs. University of Agric., Makurdi (2005) 19NWLR (Pt. 959) 211.**

In this case, there is nothing judicial or quasi-judicial about the act of the 4th Respondent complained of. A judicial or quasi judicial action is a term applied to the act or discretion of public administrative officers or bodies, who are required to investigate facts, ascertain evidence of facts, hold hearings, weigh evidence, draw conclusions from them as a basis for their official action and to exercise discretion of a judicial nature – *See* **M. & H. W. U. N. vs. The Hon. *Minister for Labour and Productivity (2005)17 NWLR (Pt. 953) 120 and L.P.D.C vs. Fawehinmi (1985) 2 NWLR (Pt 7) 300 SC,*** where this court, per Aniagolu, JSC, explained as follows:

> **The term *"quasi-judicial"* may have one of three meanings. Firstly, it may describe a function that is partly judicial and partly administrative such as the making of a compulsory purchase order preceded by the holding of a judicial type local inquiry and the consideration of objections; secondly, it- may alternatively describe the "judicial" element in a composite function – thus the holding of inquiry and considering objections in respect of a compulsory purchase order become "quash judicial" acts; and thirdly, it may describe the nature of the discretionary act itself where the discretion is unfettered. One test for identifying judicial function has been said to be whether the performance of the function terminates in an order that has conclusive effect.**

In this case, I agree with the respondents that the act complained of is at best an executive or administrative act, which is, certainly, not expected to be performed judicially. The dispute between the parties arose from a contractual relationship, and I agree that the appellant's complaints are mere allegations of breach of

A contract; that will not let them through the door marked – Judicial Review.

It is understood that no one is above the law or can lawfully operate outside the law, and if anyone or body in authority, including the president of the Federal Republic of Nigeria, does NOT act in accordance with the law, an order of
B Certiorari may issue to quash the effect of what has been wrongfully done – See **Onwuzulike vs. CSD Anambra State (1992) 3 NWLR (Pt. 232) 798.**

In this case, appellants cannot come under the umbrella of Judicial Review to seek redress for the alleged breach of contract; but they are not without remedy.
C They have a right and the law says that they must also have a remedy, which is the Latin maxim Ubi jus, ibi remedium - where there is a right there is a remedy - see **Bello vs. A-G Oyo State (1986)5 NWLR (Pt 45)822 SC.**

But the remedy is not by judicial review. It is for this and other reasons in
D the lead judgment that I also dismiss the appeal, and strike out the Cross-Appeal. Parties will bear their own costs.

Armina Adamu Augie,
Justice, Supreme Court

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MARTINA OPARA
AND
ATTORNEY GENERAL OF THE FEDERATION

SC. 553/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKA'AHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: Raising of fresh issues on appeal – No leave sought – Effect.

CASE LAW: Principles in Rufai vs. State (2001) 13NWLR (Pt. 131) 718 – Consideration thereof.

CONSTITUTIONAL LAW: Principles of fair hearing – Statement of a witness – Witness not called to testify in court – Court relying on statement to convict – Propriety

CRIMINAL LAW AND PROCEDURE: Arraignment – Accused not understanding the language of court – Failure to supply interpreter – When objection can be properly raised..

CRIMINAL LAW AND PROCEDURE: Arraignment – Attributes of a valid arraignment.

CRIMINAL LAW AND PROCEDURE: Arraignment – Requirement of a valid arraignment – Whether co-exist or independent of one another.

CRIMINAL LAW AND PROCEDURE: Improper arraignment of accused – Whether accused can later object where represented by counsel on arraignment.

CRIMINAL LAW AND PROCEDURE: Invalid arraignment of accused – Effect.

CRIMINAL LAW AND PROCEDURE: Language used in court – Propriety of the use of pidgin English.

CRIMINAL LAW AND PROCEDURE: Plea of accused – Necessity for accused to properly understand charge before plea.

CRIMINAL LAW AND PROCEDURE: Valid arraignment – Guiding principles.

CRIMINAL LAW AND PROCEDURE: Valid arraignment – One count after another read and explained to the accused – Failure to record same – Effect

CRIMINAL LAW AND PROCEDURE: Valid arraignment – Rationale for strict compliance thereto.

EVIDENCE: Confessional statement – Where accused retracts confessional statement – Procedure thereof.

EVIDENCE: Statement of a witness – Witness not called to testify – Whether admissibility of statement will serve any purpose.

JUDGMENT: Error in judgment – Whether every error vitiates judgment of a court.

LEGAL PRACTITIONER: Irregularity in procedure – Duty on legal practitioner who represents a party to ensure that court adopts proper procedure.

Issue for Determination

Whether the court below was right when it affirmed the conviction and sentence of the appellant by the trial court save in count six.

Facts of the Matter

The appellant was charged on a nine (9) count charge of procurement of persons for prostitution, forceful or deceitful inducement of persons and confinement or detention of persons against their will contrary to and punishable under Sections **15(a), 19(b) and 19(c)** respectfully of the **Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended).**

The appellant was first arraigned on the 3rd day of August, 2009 before B.I. Molokwu J. of the Federal High Court, Abeokuta Division. After several adjournments without proceeding to trial the matter was taken before R.N. Ofili-Ajumogobia J. who after taking the plea proceeded to trial.

The prosecution called four (4) witnesses and tendered four Exhibits to wit: Exhibit PD1, Letter forwarding the case file, Exhibit PD2a, extra judicial statement of the appellant made on 3/6/09; Exhibit PD2b, extra-judicial statement of appellant made on 5/6/09 and Exhibit PD111, Micah EtengIbe's statement.

The learned trial judge found the appellant guilty of the offences charged, convicted her on all the nine counts of the charge and sentenced her to 14 years imprisonment. The appellant being dissatisfied with the verdict appealed to the Court of Appeal on the 6th day of November 2013 which court affirmed the decision of the court of trial except for the sixth count which it reversed.

Again aggrieved the appellant has come before the Supreme Court through a notice of appeal of two grounds filed on the 14th day of July, 2014. The thrust of which is that the appellant did not understand the language of the court and that the proceedings were not interpreted to her from the beginning to the end. That the plea of the appellant was not properly taken and so the trial court was stripped of its jurisdiction to entertain the matter. That stand of the appellant is disputed by the respondent hence this present adjudication.

Held: (*Unanimously dismissing the appeal)*

1. *The requirements of a valid arraignment*

   This court in underscoring the need for strict compliance with the provisions of Section 215 of the CPA has not hesitated to bring down its big stick on any infringement thereof and stating and re-stating the steps to be taken at every point in the arraignment so that every area of the stipulations is covered. In the case of Okeke vs. State (2003) 15 NWLR (Pt. 842) 25 at 73, this court provided what is required for a valid

arraignment thus:

> **1. "The accused person must be present in court or place before the court unfettered unless the court shall see cause to otherwise order. The requirement that the accused person should be present in court makes a difference between our Nigerian criminal jurisprudence and that of jurisdictions where trial in absentia is allowed.**
> **2. The charge or information should be read over and explained to him in the language he understands to the satisfaction of the court, by the registrar or other officer of the court. There are two limbs of this requirement.**
> **a. That the charge or information shall be read over to the accused person and**
> **b. That the charge or information shall be explained to him in the language he understands to the satisfaction of the court.**
> **3. The accused person shall then be called upon to plead instantly thereto unless their objection in respect of want of service of copy of the information is successfully taken."**

The same criteria were repeated in the case of Edet Bassey vs. The State (2012) ALL FWLR (Pt. 633) 1816 at 1829 per Mukhtar JSC (as she then was) *(Pp 319 – 320 Paras I – G)***.**

2. The requirements of a valid arraignment are not independent of each other.

To be reiterated is that the three requirements are not independent of each other but must co-exist before the standard can be said to have been met. See Kajubo vs. State (1988) NWLR (Pt. 73) 721; Idemudia vs. State (1999) 7 NWLR (Pt. 610) 202.

The appellant is pushing for the nullification of the proceedings based primarily on non-compliance with the law on taking of pleas and taking the stance that an interpreter was not provided for her as required by law. That argument is against the run of events as captured by the

record which showed that an interpreter by name Joseph Aninye Registrar of court interpreted from English to Pidgin English. Also to be said is that appellant was represented by counsel at the time of plea taking and part of the hearing and evidence taking. The record further evinces that throughout the entire proceedings the interpretation was carried out and there is nothing to show that there was any lack of understanding of any part of the process by the appellant. *(Pp 323 – 324 Paras I – B)*

3. *The principle in Rufai vs. State does not apply in the instant case.*
The situation is quite different from what obtained in the case of Rufai v State (2001) 13 NWLR (Pt. 731) 719 where the accused understood Yoruba and no interpretation was made to him and so the Supreme Court had no difficulty in finding that there was non-compliance with Section 215 CPL of Oyo State. It stands to reason that the appellant herein cannot call in aid that case of Rufai v State (supra) and any of such like cases.
(P 324 Paras B – C)

4. *The implication of invalid arraignment of an accused.*
There is no gainsaying that a valid arraignment is a condition precedent to an accused person's trial, conviction and sentence and so none fulfillment of that would render the whole trial a nullity. That is the ground rule, however the case at hand shows quite clearly that a valid arraignment took place, there was plea properly taken with the needed interpretation carried out. The fact that in the middle of the proceedings legal representation was absent is the choice of the appellant and did not change the regularity of the arraignment and proceedings.
(P 324 Paras D – E)

5. *The appellant cannot successfully question the validity of her arraignment when her counsel who was present did not object.*
The most emphatic aspect is that it is curious the appellant's attempt to question the validity of the arraignment which was propelled by her counsel who was present and in a position to object and did not and rather went fully along. It is too late now to scratch at any aspect of the arraignment to see if anything tangible can be procured. I place reliance on the cases of Okoro vs. State MJSC (Pt. 11) 59 at 68 79; FRN vs. Mohammed (2014) 3 MJSC 68 at 99 100; Bakare vs. NRC (2007) 17

NWLR (Pt. 1064) 606. *(P 324 Paras E – G)*

6. *The rationale for strict compliance with the requirements of valid arraignment.*
It has been held in several decisions of this Court as well as the Court of Appeal that the need for a charge being explained to an accused person in the language he understands during the taking of his plea is his constitutional right as well as a sine qua non for a valid plea and a precondition for his trial. Strict compliance with the provisions is required otherwise there will be no valid trial. [Onuoha vs. I. G. P (1956) NRNLR 96: Duvall vs. C.O.P. (1962) 2 ALL NLR (Pt. 1) 115; Oyediran vs. The Republic (1967) NMLR 122; The State vs. Madukolu (1972) 2 ECSLR 426; Eyorokoromo vs. State (1979) 6-9 S.C. 3; Josiah vs. State (1985) 1 NWLR (Pt. 1) 125; Kajubo vs. State (1988) 1 NWLR (Pt. 73) 721; Okoro vs. State (1988) 5 NWLR(Pt. 94) 255. Alake vs. State (1991) 7 NWLR (Pt. 205) 567; Okon vs. State (1991) 8 NWLR (Pt. 201) 425; Ewe vs. State (1992) 6 NWLR (Pt. 246) 147; Erekanure vs. State (1995) 5 NWLR (Pt. 294) 385 and Idemudia vs. State (1999) 7 NWLR (Pt. 610) 202.
(P 332 Paras B – C.)

7. *There must be strict compliance to a valid arraignment*
In Alake vs. State (supra) Niki Tobi JCA (as he then was) in the majority judgment, Ademola dissenting, held at page 589 that a community reading of Sections 215 and 353(1) of the Criminal Procedure Law of Lagos State and Section 33(6)(a) of the 1979 Constitution bring out clearly that where the procedure as listed below is not followed the trial of the accused, however ably conducted, cannot stand and the trial will be declared a nullity on appeal. The procedure listed is as follows:
   1. **The case is called**
   2. **The accused is docked**
   3. **The charge is read and explained to the accused in a language he understands, one count after another, if it is a charge of more than one count.**
   4. **The accused takes his plea voluntarily and unaided at the end of reading each count.**
   5. **This is simultaneously recorded by the court**

6. Where there is more than one accused each accused must be given the opportunity to plead separately to each of the counts and the trial court must also record their pleas separately.
7. The record of the court must clearly show that the above procedure was followed. *(P 332 Paras E – I)*

8. The need for accused to understand the charge before plea.
In Kajubo vs. State (supra), Oputa (JSC) noted that it is a notorious fact that English, the language of the court, the language in which charges and information are drafted is not the mother tongue of Nigerians and most Nigerians are illiterate in English, even those of them who are literate may not easily follow and comprehend the language of the court.

It is for these reasons that the criminal jurisprudence and the 1979 Constitution considered it necessary that for there to be a proper arraignment:

> **"(i) The accused shall be present in court**
> **(ii) The charge or information shall be read over to him in a language he understands.**
> **(iii) The charge or information after being read over in such language should then be explained to him avoiding as much as possible the use of technical expressions. This explanation should acquaint the accused with the essential ingredients of the offence charged and with the factual situation resulting in and giving rise to the offence charged.**
> **(iv) To make assurance doubly sure the trial judge should also satisfy himself that the explanation of the offence charged was adequate and that the accused understands what he is standing trial for"**
>
> **He then concluded that it is good practice for trial courts to specifically record that "the charge was read and fully explained to the accused to the satisfaction of the court" before recording his pea thereto.** *(P 333 Paras A – G)*

9. The principles of valid arraignment

Karibi – Whyte (JSC) noted in Idemudia vs. State (supra) at page 222 that:

> **"There appears to be a fairly rigid and inflexible approach to the question of non-compliance with the enabling provisions for arraignment. It is conceded that the conditions have been designed and formulated for the protection of the accused and preservation of the constitutional rights of the citizen. Equally the courts should not ignore the nature of the rights protected and the preservation of the courts in the discharge of their sacred and solemn duty to do justice. There is clearly observable the distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way affects the justice of the trial of the case. In the latter case it will not affect the trial. It would seem to me that the mandatory provision of Section 215 of the Criminal Procedure Law which requires that the charge be read and explained to the accused is complied with if there is evidence on the record to show that the accused understood the charge and was in no way misled by the absence of explanation ex facie. It is conceded that the subsequent validity of the procedure rests on the validity of the plea on arraignment".** *(P 333 – 334 Paras H – D)*

10. The failure to record that one count after another was read and explained to the accused

The non-recording that one count after another was read and explained to the accused before she was asked to plead thereto as recommended by TOBI JCA in Alake vs. State (supra) did not render the proceeding a nullity because it is a procedure which in no way affected the justice of the trial since it is clear that all the counts in the charge were read and explained before she was asked to take her plea on each of the counts.
(P 335 Paras A – B)

11. The Use of Pidgin English in courts

Per Kekere-Ekun, (JSC):

> **"On the contention that the appellant who speaks Pidgin English does not understand English Language, this court in a recent decision in Olanipekun vs. The State (2016) LPELR- 40440 (SC) @ 8 -9 D-A per Akaahs, JSC had this to say:**
>
> > **"It is erroneous to assume that people who communicate in Pidgin English do not understand proper or Queen's English especially in Nigeria. The use of Pidgin English allows for free expression without minding the grammar which is usually employed in proper English. Consequently a statement which was said to have been recorded in Pidgin does not require translation into proper English and any statement made in Pidgin can be recorded in proper English."**

The reasoning above is equally applicable in the circumstances of this case. The fact that the appellant speaks Pidgin English does not mean she cannot understand proper or "Queen's English." I also venture to say that the fact that a person cannot read or write does not mean he/she cannot understand English when addressed in that language.
(P 337 – 338 Paras G – B)

12. It is not proper to rely on a statement of a witness who did not testify to convict an accused

On the merit of the appeal while I agree with learned counsel for the appellant that Exhibit PD111, the extra judicial statement of MICAH ETENG IBE, one of the victims of the offence charged in count 6 of the charge, was wrongly admitted in evidence and relied upon by the trial court, as she did not testify and could therefore not be cross-examined on it, I am of the considered view that no miscarriage of justice was occasioned thereby. This is because there was sufficient independent evidence outside of the said statement upon which the guilt of the

appellant was established beyond reasonable doubt. *(P 338 Paras D – E)*

13. When can accused retract his confessional statement.

The settled position is that a retraction or denial of a confessional statement [as the appellant did during his defence at the trial court] does not affect its admissibility, [R. vs. Sapele and Anor (1952) 2 FSC 74; R vs. Itule (1961) All NLR 462; Ikpasa vs. The State [1981] 9SC 7; Akpan v State (1992) LPELR – 381 (SC) 36; Osakwe vs. State [1994] 2 SCNJ 57; Nwangbomu vs. The State [1994] 2 NWLR (Pt. 327) 380; Bature vs. State [1994] 1 NWLR (Pt. 320) 267, Eragna and Ors vs. The AG, Bendel (1994) LPELR (SC) 30; Idowu vs. State [1996] 11 NWLR (Pt. 574) 354; Silas Sule vs. State (2009)LPELR 3125 (SC) 28-30, G-B; FRN vs. Iweka (2011) LPELR 9350 (SC) 53; Oseni vs. The State (2012) LPELR 7833 (SC) 22-23]. *(P 339 Paras B – E)*

14. The purpose of admitting a statement of a witness who did not testify

Exhibit PD. III (Exhibit PD.4) was, at page 39 of the Record, admitted in evidence as the statement under caution of the victim, Micah Eteng Ibe, through the PW.4, one Odudare Oluremi Fidelis, an intelligence Officer of NAPTIP who recorded it. Exhibit PD. III (Exhibit PD.4) was no doubt admitted in evidence for a purpose. That is to establish the truth of what Micah Eteng Ibe, the victim, experienced in the hands of the Appellant. To that extent it amounts to hearsay. On the other hand, if Exhibit PD.III (Exhibit PD.4) was admitted in evidence to merely show or establish the fact that Mr. Odudare Oluremi Fidelis (PW.4), an investigator, interviewed and recorded a statement from the victim, Micah EtengIbe, it is not hearsay. This distinction was made in Kasa vs. The State (1994) 5 NWLR (pt. 344) 269 at 286 by Uwais, JSC (as he then was) thus:

> **"Evidence of a statement made to a witness by a person who is, not himself called, as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made".**

(Subramaim vs. Public Prosecutor (1956) 1 WLR 965 at 970; Theophilus vs. The State (1990) 34 LRCN 74). *(Pp 341 – 342 Paras H – H)*

15. *It is not every error or mistake that will vitiate the judgment of a court.*
It is now trite that it is not every error or mistake in a judgment that will result in the appellate court setting aside the judgment appealed. The appellate court intervenes and sets aside the judgment appealed only when the error complained of is substantial and it has occasioned a miscarriage of justice. [State vs. Gwonto (1983) 1 SCNLR 142 at 152-153; Onajobi vs. Olanipekun(1985) 4 (pt. 2) 156 at 163; Oje vs. Babalola (1991) 4 NWLR (pt. 185) 267; Amuroti vs. Agbeke (1991) 6 SCNJ 54].

Accordingly, I shall not interfere with the judgment of the court below merely on the ground that it affirmed the wrong use of Exhibit PD. III (Exhibit PD.4) in respect of counts 4 and 5. Even if Exhibit PD. III (Exhibit PD.4), which was clearly hearsay and inadmissible evidence, were expunged other pieces of evidence still subsist to sustain the conviction. *(P 343 Paras F – I)*

16. *Duty of counsel who represents a party is to ensure that the court adopts correct procedure.*
Where an accused is represented by counsel, the duty falls on the counsel to ensure that the court follows the proper procedure in the trial of his client. Counsel has a duty either to object to wrongful procedure that is adverse to his client, or he is taken to accept and acquiesce in it. [Othniel Shekese vs. Victor Planshak & Ors. (2008) 7 SC. 178].
(P 344 Paras E – F)

17. *Where a represented party does not understand the language used when to raise issue*
In Anthony Nwankwo (2007) 7 SC. 1, this court made it clear that where an accused person does not understand the language used at his trial, and he is represented by counsel, it is his duty, or the counsel's duty, to bring the fact to the notice of the court at the earliest opportunity and that both the accused and his counsel shall therefore not wait until the end of the trial and thereafter raise it at the appeal.

The appellant is raising this issue for the first time on appeal. They did not raise it at the earliest opportunity at the trial. Raising the issue on

appeal without leave first sought and granted renders the issue incompetent. See Shekese vs. Victor Planshak & Ors. (Supra).
(P 344 Paras F– H)

18. *When failure to supply an accused with interpreter can be properly raised*
Mr. Langyi, of counsel for respondent submits in the brief, and I agree, that the complaint of not supplying an interpreter, on authority of Okoro vs. The State (2012) VOL. 1 MJSC (pt. 11) SC. 59 at 68 – 79, ought to have been taken at the trial and not on appeal for the first time. The failure to raise this procedural irregularity could lead to invocation against the accused person, of the presumption of regularity in favour of the proceedings at the trial under Section 168(1) of the Evidence Act, 2011 and also estoppel by conduct under Section 169 of the same Evidence Act.
(P 345 Paras A – C)

Nigerian Cases Cited in this Judgment
Adejumo vs. Ayanleghe (1979) 3 NWLR Pt. 110417;
Agbule vs. W.R. & P. Co Ltd (2013) ALL FWLR (Pt. 688) 829;
Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (Pt 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt. 1) 65;
Akpan vs. State (1992) LPELR – 381 (SC) 36;
Akpan vs. The State [2001] 11 SCM;
Alake vs. State (1991) 7 NWLR (Pt. 205) 567;
Amuroti vs. Agbeke (1991) 6 SCNJ 54;
Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444;
Bakare vs. NRC (2007) 17 NWLR (Pt. 1064) 606;
Bature vs. State [1994] 1 NWLR (Pt. 320) 267;
Dawa vs. The State [1980] 8-11 SC 236;
Duvall vs. C.O.P. (1962) 2 ALL NLR (Pt. 1) 115;
EdetBassey vs. The State (2012) ALL FWLR (Pt. 633) 1816;
Edibo vs. The State (2007) 13 NWLR (pt. 1051) 306;
Egwumi vs. The State (2013) ALL FWLR (Pt. 678) 824;
Ejinima vs. The State [1991] 5 LRCN 1640, 1671;
Eragna and Ors vs. The AG, Bendel (1994) LPELR – (SC) 30;
Erekanure vs. State (1995) 5 NWLR (Pt. 294) 385;
Ewe vs. The State (1992) 6 NWLR (pt. 246) 147;

Eyorokoromo vs. The State (1979) 6-9 SC. 3;
FRN vs. Iweka (2011) LPELR – 9350 (SC) 53;
FRN vs. Mohammed (2014) 3 MJSC 68;
Idemudia vs. State (1999) 7 NWLR (Pt. 610) 202;
Idowu vs. State [1996] 11 NWLR (Pt. 574) 354;
Ikpasa vs. The State [1981] 9SC 7;
Jafiya Kopa vs. The State (1971) 1 All NLR 150;
Joel Adamu vs. The State (unreported) in SC. 125/2013;
Josiah vs. State (1985) 1 NWLR (Pt. 1) 125;
Josiah vs. The State (1985) 1 SC 406;
Kajubo vs. State (1988) NWLR (Pt. 73) 721;
Kanu vs. The King (1952) 14 WACA 30;
Kareem vs. FRN [2002] 7 SCM 73;
Kasa vs. The State (1994) 5 NWLR (pt. 344) 269;
Lufadeju & Ors. vs. Johnson;
Nwangbonu vs. The State [1994] 2 NWLR (Pt. 327) 380;
Obosi vs. The State (1965) NMLR 129;
Odulaja vs. Haddad (1973) 11 SC 357;
Ogudo vs. The State (2011) 12 SC (Pt. 1) 71;
Oje vs. Babalola (1991) 4 NWLR (pt. 185) 267;
Okeke vs. State (2003) 15 NWLR (Pt. 842) SC 25;
Okon vs. State (1991) 8 NWLR (Pt. 201) 425;
Okoro vs. State (2012) vol. 1 MJSC (Pt. 11) SC 59;
Okoro vs. State (1988) 5 NWLR(Pt. 94) 255;
Okoro vs. The State (2012) VOL. 1 MJSC (pt. 11) SC. 59;
Olanipekun vs. State (2016) 13 NWLR (Pt. 1528) 100;
Olanipekun vs. The State (2016) LPELR- 40440 (SC);
Onajobi vs. Olanipekun (1985) 4 (pt. 2) 156;
Onochie and Ors vs. The Republic (1966) NMLR 307;
Onuoha vs. I. G. P (1956) NRNLR 96;
Osakwe vs. State [1994] 2 SCNJ 57;
Oseni vs. The State (2012) LPELR – 7833 (SC) 22-23;
Osetola and Anor vs. The State (2012) LPELR – 9348 (SC) 32-33 G-D;
OthnielShekese vs. Victor Planshak& ORS. (2008) 7 SC. 178;
Oyediran vs. The Republic (1967) NMLR 122;
R vs. Itule (1961) All NLR 462;

A *R. vs. Sapele and Anor (1952) 2 FSC 74;*
Rufai vs. State (2001) 13 NWLR (Pt. 731);
Rufai vs. The State (2001) 7 NSCQR 240;
Rufai vs. The State (2001) 7 NSCQR 420;
B *Silas Sule vs. State (2009)LPELR – 3125 (SC) 28-30 G-B;*
State vs. Gwonto (1983) 1 SCNLR 142;
The Queen vs. Obiasa (1962) 1 All NLR 651;[1962] 1 SCNLR 137;
The State vs. Madukolu (1972) 2 ECSLR 426;
C *The State vs. Rabiu (2013) 2 – 2 SC (Pt. 111) 63;*
Theophilus vs. The State (1990) 34 LRCN 74;
Tobby vs. State (2001) 10 NWLR (Pt. 720) 23.

D **Foreign Cases Cited**
R vs. Sykes (1913) 8 C.A. R. 233, 236;
Shekese vs. Victor Planshak&Ors. (supra);and
Subramaim vs. Public Prosecutor (1956) 1 WLR 965 at 970.

E

Nigerian Statutes cited in this Judgment
1999 Constitution of the Federal Republic of Nigeria(as amended) – S. 36 (6) (a) and (b)
F *Criminal Procedure Act ;and*
Criminal Procedure Act, Cap C. 41, Laws of the Federation of Nigeria 2004 – s. 215;
Evidence Act, 2011 – ss. 232, 168 and 169;
G *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended – ss. 15(a), 19(b) and 19(c);*

Representations
H **Isiaka A. OLagunju** *for appellant and with him are* **Masud Alabalewe Olalekan Thanni, Akeen O. Akonmade, Umar Faruq Gobir.**
C.J. Ajaegbu (ACLO) *for respondent and with him* **S.A. Langyi (SLO NAPTIP)**

I

PETER ODILI, (JSC) (Delivering the lead judgment): The is an appeal against the judgment of the Court of Appeal, Ibadan Division delivered on the 17th day of June, 2014, Coram: A.B. Gumel, M.B. Dongban-Mensem and M.N.

Oniyangi JJCA. In the said judgment, the Court of Appeal dismissed the appeal of the accused/appellant and affirmed the decision of the learned trial Judge except for the conviction and sentence on count six.

FACTS BRIEFLY STATED

The appellant was charged on a nine (9) count charge of procurement of persons for prostitution, forceful or deceitful inducement of persons and confinement or detention of persons against their will contrary to and punishable under **sections 15(a), 19(b) and 19(c)** respectively of the **Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended).**

The appellant was first arraigned on the 3rd day of August, 2009 before B.I. Molokwu J of the Federal High Court, Abeokuta Division. After several adjournments without proceeding to trial the matter was taken before R.N. Ofili-Ajumogobia J. who after taking the plea proceeded to trial.

The prosecution called four (4) witnesses and tendered four Exhibits to wit: Exhibit PD1, Letter forwarding the case file, Exhibit PD2a, extra judicial statement of the appellant made on 3/6/09; Exhibit PD2b, extra-judicial statement of appellant made on 5/6/09 and Exhibit PD111, Micah EtengIbe's statement.

The learned trial judge found the appellant guilty of the offences charged, convicted her on all the nine counts of the charge and sentenced her to 14 years imprisonment. The appellant being dissatisfied with the verdict appealed to the Court of Appeal on the 6th day of November 2013 which court affirmed the decision of the court of trial except for the sixth count which it reversed.

Again aggrieved the appellant has come before the apex court through a Notice of Appeal of two grounds filed on the 14th day of July, 2014. The thrust of which is that the appellant did not understand the language of the court and that the proceedings were not interpreted to her from the beginning to the end. That the plea of the appellant was not properly taken and so the trial court was stripped of its jurisdiction to entertain the matter. That stand of the appellant is disputed by the respondent hence this present adjudication.

On the 1st day of December, 2016 date of hearing, learned counsel for the appellant, Isiaka Abiola Olagunju Esq. adopted the appellant's brief of argument filed on the 20th October, 2014. He framed a single issue for determination which is thus:

Whether the Court of Appeal rightly affirmed the conviction and sentence of the appellant on all counts except one preferred against her in view of the fundament irregularities in the arraignment and trial of the appellant by the trial court. (Grounds 1 and 2).

C.J. Ajaegbu Esq. of counsel for the respondent, adopted the brief of argument settled by Selbot A. Langyi Esq., filed on 23/3/2015 and deemed filed on 20/1/16. In the brief was tersely crafted a sole issue for determination as follows:

Whether the court below was right when it affirmed the conviction and sentence of the appellant by the trial court.

Each of the issues as framed on either side in the main asks the same question which I shall use in this way.

SOLE ISSUE

Whether the court below was right when it affirmed the conviction and sentence of the appellant by the trial court save in count six.

Learned counsel for the appellant canvassing the position therefrom stated that the procedure guaranteeing fair trial of the accused person are reiterated in several cases and the three requirements must co-exist. He cited **Edet Asuguo Bassey vs. The State (2012) ALL FWLR (Pt. 633) 1816 at 1829; Kajubo vs. State (1988) NWLR (Pt. 73) 721;Idemudia vs. State (1999) 7 NWLR (Pt. 610) 202.**

It was submitted that the court took only the arraignment of 1st July, 2010 at the trial before Ofili-Ajumogobia J, and did not take into consideration the earlier one before Molokwu J of 3rd August 2009. That the manner the plea was taken in the trial court was faulty as it ought not to be recorded in blanket form as it was. That the situation as it was produced a fatality to the proceedings and thereby rendered the trial, a nullity as the trial violated Section 215 of the Criminal Procedure Act as well as **Section 36 (6) of the 1999 Constitution** as amended. He cited **Ewe vs. The State (1992) 6 NWLR (Pt. 246) 147 at 152-153; Rufai vs. The State (2001) 7 NSCQR 420 at 427 etc**.

Going on, learned counsel stated for the appellant that she was an illiterate who did not understand the language of the court, English and so the court not

providing her with an interpreter invalidated the arraignment and trial. He cited **Agbule vs. W.R. & P. Co Ltd (2013) ALL FWLR (Pt. 688) 829 at 862 863; Egwumi vs. The State (2013) ALL FWLR (Pt. 678) 824 at 840** etc.

That the appellant's right to fair hearing was breached.

Mr. Olagunju of counsel stated further that the trial court's heavy reliance on Exhibits PD2a and PD2b, the extra-judicial statements which appellant retracted occasioned a serious miscarriage of justice. He referred to **Ogudo vs. The State (2011) 12 SC (Pt. 1) 71 at 96; The State vs. Rabiu (2013) 2-3 SC (Pt. 111) 63 at 107-108**.

Also that the trial court's reliance on Micah Eteng Ibe's statement when there was no testimony from the maker of the statement was wrong. He relied on **Theophilus vs. The State (1996) 34 LRCN 74 at 90; Kasa vs. The State (1994) 18 LRCN 28 at 46; Section 232 of the Evidence Act, 2011, Section 287 of the Criminal Procedure Act.**

Mr. C.J. Ajaegbu of counsel for the respondent contended that **Section 215** of the **Criminal Procedure Act, 2004** is germane to the determination of this case and that the trial court was in compliance thereof. That the cases cited by the appellant were not relevant to the case in hand.

That the appellant was represented by counsel at the trial court but counsel did not raise any objection on the procedure adopted and followed by the Court of Appeal. That raising same now is too late. He referred to **Okoro vs. State (2012) vol. 1 MJSC (Pt. 11) SC 59 at 68-79; FRN vs. Mohammed (2014) Vol. 3 MJSC 68 at 99 100** etc.

The summary of the two contending positions in this appeal is on the one side that of the appellant, that the arraignment, trial, conviction and sentencing of the appellant by the trial court which were affirmed by the lower court were in contravention of **Section 215 of the Criminal Procedure Act (CPA)** and **Section 36(6) of the Constitution of the Federal Republic of Nigeria 1999** as (amended). That the trial of the appellant was in breach of **Section 287 of the Criminal Procedures Act.**

The opposing posture of the respondent on the other hand being that the stance of the appellant was not borne out of what transpired at the court of trial which was in strict compliance with the provisions of the law.

The attack presented by the appellant is substantially two pronged, the first being that the arraignment was fundamentally faulty enough to vitiate the entire proceedings and second that the entire proceedings thereafter fell short of what

could produce a conviction and a follow-up sentencing.

In respect to the first part of this stand of the appellant the court below as seen at page 173 of the record had this to say per Gumel JCA thus:

> **"Against the foregoing scenario, there is no doubt that the appellant was serially arraigned on the 9 counts charge in her trial. The respective learned judges, through whom the matter passed in my view, were fully aware and conscious of the need for an arraignment before a proper trial could commence. They were at all times also aware of their responsibility in that respect. From the record of what transpired on 1st July, 2010, the appellant briefed counsel to conduct her defence. Learned counsel Miss. C.Osaigboro was indeed physically present in court and properly announced appearance for the appellant on that day. It was also in the presence of Miss. C.R. Ifudu, learned counsel to the complainant/respondent, and on behalf of the prosecution prayed that the learned trial judge may order that the 9 count charge be read to the appellant for her plea to be taken. What transpired further is very well documented-the charge was somehow read and the learned trial judge may have apparently satisfied herself that the appellant understood each of the counts on the charge sheet and was seemingly asked to plead to them and opted to plead not guilty to each.**
>
> **Further to these seeming events, the trial of the appellant commenced with PW1 and PW2, 2 of the victims of the alleged crimes of the appellant, giving oral evidence. PW1 was clearly seen to have been fully cross-examined by learned counsel Miss Osaigboro, on behalf of the appellant. Since learned counsel at the trial is deemed to have had very sufficient knowledge of the law saw all that happened and participated fully in the trial, is it possible to now re-open the issue of the appropriateness of the various steps taken by the lower court in the arraignment and trial of the appellant? I will answer this crucial question very shortly."**

In answering the matter raised by the appellant that she was not fully represented by counsel, the court below went on to state as follows:

> **"Learned counsel had complained about the failure of the lower court to provide an interpreter to the appellant, because according to him she is not literate enough to follow the language of the Court (English). It must be stated that Section 26(6) (e) of the 1999 Constitution, as amended provides that where an accused person standing trial does not understand the language of the court in which the proceedings, were being conducted, he shall be entitled free of charge to an interpreter of the proceedings in any language that he understands."**

The appellate court below further stated thus:

> **"With respect to the facts and circumstances of this matter, the 9 count charge was read to the appellant and explained or interpreted to her in Pidgin English on 3/8/2009, in the presence of her counsel Mr. I.P. Ezugwu. Learned counsel acquiesced to this procedure and did not complain against it whatsoever. Also, on the 1/06/2010, the charge was read and interpreted to the appellant in Pidgin English by one Joseph Oyinye, a Registrar of the trial court. It is a very well known principle in adjudication that each case must be treated and decided upon or based on its peculiar facts and circumstances. Even though the 2 arraignment on 3/6/2010 are not the most crucial and relevant for the eventual trial, conviction and sentence of the appellant, the 2 taken together with the arraignment of 1/7/2010 before the court in the presence of learned counsel Miss Osaigboro, as well as the subsequent events, when taken together paint a clear picture on my mind as to form a good impression on me that the arraignment of the appellant was well conducted in substantial compliance with Section 215. The arraignment was good enough to lay a solid foundation for the subsequent trial of the appellant. I also do not have any doubt in my mind that the appellant fully followed and understood the entire proceedings**

A in her trial. The courts do not give what was not sought from them. There is no record in the circumstance of this appeal that either appellant or any of the counsel who represented her had complained to the lower court that she had any difficulty B following the proceedings of the court in English language. Upon the combined effect of the decisions of the Supreme Court in Ogunye vs. The State (supra) Durwode vs. The State (supra) and Lufadeju&Ors. vs. Johnson (supra); I am fully satisfied C that the appellant was properly arraigned before the trial court. This issue must and is hereby resolved against the appellant." See pages 174-175 of the record.

D In respect to the second part of the attack of the proceedings at the court of trial, the court below stated at pages 185 thus:

"In my view this feeble attempt of the appellant to turn back E the hands of the clock was to deny what she knew about the offence alleged against her. I do not think this attempt goes far enough to impugn the procedure and the steps taken to obtain the extra-judicial statements of the appellant or even to F amount to a challenge on the voluntariness of those statements."

The court of appeal therefore discountenanced the arguments of the appellant on **G** the obtaining of the extra judicial statements and ruled that the statements were properly obtained and in conclusion of the judgment held thus as seen at pages 195-196 as follows:

H "After a very careful and calm consideration of the entire facts in this appeal, it is immaterial if it was at Terminus Hotel Shagamu or whatever Hotel in Abeokuta that PW1 and PW2 were allegedly forced to be involved in prostitution. Therefore, I whatever contradiction that exists in the evidence of the witnesses against their respective extra-judicial statements remains of no moment and would definitely not be a good ground to adversely affect the quality of the findings of the

lower courts on counts 1, 2, 3, 4 and 5. PW1 and PW2 were respectively born between 26th September, 1991 and 25th August, 1991 and they would definitely be under 18 years of age at the date of the alleged commission of the offence in May, 2009. The same may however not be said with respect to the age of Micah EtengIbe. She was 20 years old. The conviction of the appellant on count 6 may therefore not be very safe or sound and is therefore liable to being set aside and I accordingly so do."

The long and short of what the Court of Appeal did was to uphold the arraignment of the appellant at the court of trial as adequately done and save for count 6 which it held was not upto the required standard of proof, affirmed the conviction and sentence on all the other counts as done by the trial court.

In going back to the very beginning, the appellant had been arraigned on a nine (9) count charge thus:

"COUNT 1

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court procured, used, and offered Comfort Bassey (F) 18 years of Odo-dono Compound Abini, Calabar, Cross River State for prostitution in Terminus Hotel at Sagamu, Ogun State and thereby committed an offence contrary to Section 15(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 2

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court procured, used, and offered RoselineIkwa (F) 18 years of Biase LGA, Cross River State for prostitution in Terminus Hotel at Sagamu, Ogun State and thereby committed an offence contrary to Section 15(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 3

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court procured, used, and offered MikahEtengIbe (F) 20 years of Biase LGA, Cross River State for prostitution in Terminus Hotel at Sagamu, Ogun State and thereby committed an offence contrary to Section 15(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 4

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court deceitfully induced Comfort Bassey (F) 18 years of Odo-dono Compound Abini, Calabar, Cross River State to go from Calabar, Cross River State to Terminus Hotel at Sagamu and thereby committed an offence contrary to Section 19(b) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 5

That you Martina Okpara (F) 29 yaers of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court deceitfully induced RoselineIkwa (F) 18 years of Biase LGA, Cross River State to go from Calabar, Cross River State to Terminus Hotel at Sagamu, Ogun State and thereby committed an offence contrary to Section 19(b) of the Trafficking in Person (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 6

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Calabar, Cross River State within the jurisdiction of the Federal High Court deceitfully induced MikahEtengIbe (F), 20 years of Biase LGA, Cross River to go from Calabar, Cross River State to Terminus Hotel at Sagamu, Ogun State and thereby committed an offence

contrary to Section 15(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 7

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Terminus Hotel, Sagamu, Ogun State within the jurisdiction of the Federal High Court confined/detained Comfort Bassey (F) 18 years of Odo-dono Compound Abini, Calabar River State against her will and there thereby committed an offence contrary to Section 19(c) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 8

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Terminus Hotel, Sagamu, Ogun State within the jurisdiction of the Federal High Court confined/detained Roseline Ikwa (F) 18 years of Biase LGA, Cross River State against her will and thereby committed an offence contrary to Section 19(c) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under same section of the Act.

COUNT 9

That you Martina Okpara (F) 29 years of No. 24, Sabo Street, GRA, Sagamu, Ogun State on or about 23rd day of May, 2009 at Terminus Hotel, Sagamu, Ogun State within the jurisdiction of the Federal High Court confined/detained Mikah EtengIbe (F) 20 years of Biase LGA, Cross River State against her will and thereby committed an offence contrary to Section 19(c) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended) and punishable under the same Section of the Act.

The said provisions of the **Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003** (as amended) are captured hereunder in respect to Sections 15 and 19 thereof thus:

Section 15(a) provides thus:

A **"Any person, who procures, uses or offers any person for prostitution, or the production of pornography or for pornographic performance commits an offence and is liable on conviction to imprisonment for fourteen years without an**
B **option of fine."**

Section 19(1) (b) provides thus:

C **"any person who by force compels or by any deceitful means induces any person to go from any place, commits an offence and is liable on conviction to imprisonment for ten years or to a fine not exceeding N200,000.00 or both."**

D

Section 19(1) (c) provides thus:

"Any person who confines or detains another person in any
E **place against his will, or otherwise unlawfully deprives another person of his personal liberty, commits an offence and is liable on conviction to imprisonment for five years or to a fine of N100,000.00 or both.**

F

The appellant had set up a disagreement on inappropriateness of the arraignment pursuant to section 215 of the CPA which provision I shall quote hereunder thus:

G **"The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by**
H **the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information, he objects to the want of such service and the court finds that he has**
I **not been duly served therewith."**

This court in underscoring the need for strict compliance with the provisions of Section 215 of the CPA has not hesitated to bring down its big stick on any

A infringement thereof and stating and re-stating the steps to be taken at every point in the arraignment so that every area of the stipulations is covered. In the case of **Okeke vs. State (2003) 15 NWLR (Pt. 842) SC 25 at 73,** this court provided what is required for a valid arraignment thus**:**

B

> **4. "The accused person shall be present in court unfettered unless the court shall see cause to otherwise order that he be fettered. The requirement that an accused person shall**
>
> C **be present in court marks a difference between our criminal jurisprudence and that of jurisdictions where trial in absentia is allowed.**
>
> **5. The charge or information shall be read over and**
>
> D **explained to him in the language he understands to the satisfaction of the court, by the registrar or other officer of the court. There are two limbs of this requirement.**
>
> **a. That the charge or information shall be read over to the accused person and**
>
> E
>
> **b. That the charge or information shall be explained to him in the language he understands to the satisfaction of the court.**
>
> **c. The accused person shall then be called upon to plead**
>
> F **instantly thereto unless there are valid reasons to do otherwise as provided in itself."**

The same criteria were repeated in the case of **EdetBassey vs. The State (2012)**

G **ALL FWLR (Pt. 633) 1816 at1829** per **Mukhtar JSC** (as she then was)

Again to be reiterated is that the three requirements are not independent of each other but must co-exist before the standard can be said to have been met. See **Kajubo vs. State (1988) NWLR (Pt. 73) 721; Idemudia vs. State (1999) 7**

H **NWLR (Pt. 610) 202**.

The appellant was first arraigned on the 3rd of August, 2009 before Molokwu J. and the arraignment was thus recorded:

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> **"IN THE FEDERAL HIGH COURT OF NIGERIA**
> **HOLDEN AT ADEOKUTA, OGUN STATE**
> **ON MONDAY, THE 3RD DAY OF AUGUST, 2009**
> **BEFORE THE HON. JUSTICE B.I. MOLOKWU – JUDGE**

CHARGE NO: FHC/AB/49C/2009

BETWEEN

ATTORNEY GENERAL OF THE FEDERATION – COMPLAINANT
AND
MARTINA OPARA – ACCUSED PERSON

Accused Person Absent.
Ifudu C.R. (Mrs) Prosecuting
I.P. Ezugwu for the Accused Person.
Matter is for arraignment. The accused person is being brought from Lagos. Prosecutor asks for a stand down as they have already left Lagos.

Appearances as before.
The accused person is now in court.
Prosecutor ask that the charge be read to the accused person in Pidgin English for plea.

Understands charge and for the 1st count and pleads not guilty.
2. Count 2 pleads not guilty
3. Count 3 pleads not guilty
4. Count 4 pleads not guilty
5. Count 5 pleads not guilty
6. Count 6 pleads not guilty
7. Count 7 pleads not guilty
8. Count 8 pleads not guilty
9. Count 9 pleads not guilty

Then the matter was taken before another judge, Ofili-Ajumogobia J. to be precise and this transpired on the 1st June, 2010 thus:

"IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDEN AT ABEOKUTA, OGUN STATE
ON TUESDAY, THE 1ST DAY OF JUNE, 2010
BEFORE THE HON. JUSTICE R.N. OFILI-AJUMOGOBIA – JUDGE

A ***CHARGE NO: FHC/AB/49C/2009***
BETWEEN
ATTORNEY GENERAL OF THE FEDERATION – COMPLAINANT

AND
B **MARTINA OPARA– ACCUSED PERSON**

Case Called.
C. Ifudu appears for the prosecution
C **Accused person in court but not represented.**

Ifudu: I ask for a short date to get my witnesses.

D **Court: Her plea has not been taken. I need to take her plea. (Charge read and interpreted in Pidgin English) – Joseph Aninye Registrar process section Federal High Court, Abeokuta.**

E **Accused person understands charge and pleads not guilty to both counts on charge.**

Court: The matter is adjourned to 11/06/2010 for trial."

F

On the 1st July, 2010, this took place as shown below thus:

"**IN THE FEDERAL HIGH COURT OF NIGERIA**
G **HOLDEN AT ABEOKUTA, OGUN STATE**
ON THURSDAY, THE 1ST DAY OF JULY, 2010
BEFORE THE HON. JUSTICE R.N. OFILI-AJUMOGOBIA – JUDGE
CHARGE NO: FHC/AB/49C/2009

H **BETWEEN**
ATTORNEY GENERAL OF THE FEDERATION – COMPLAINANT

AND
MARTINA OPARA – ACCUSED PERSON
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Case Called.
C.R Ifudu (Mrs) appears for the complainant.

Accused person in court represented by C. Osaigboro (Miss)

Ifudu: We are ready for hearing.

Osaigboro: We want an adjournment to enable us to be briefed by the accused person.

Court : How long will it take you to be further briefed by your client?

Osaigboro: About 30 minutes

The case will be stood down for 30 minutes (11 am)
Signed Judge 1/7/2010 – 11.25am.

Ifudu: I apply that charge be read to the accused person in order for her plea to be taken.

Charge read.
Accused person understands the 9 counts of the charge and pleads "Not Guilty" to any of them."

The hearing then commenced with the evidence of PW1, Comfort Bassey and after her examination in chief. She was cross examined by defence counsel, C. Osaigboro (Miss). There was no legal representation but the appellant from the record was kept abreast of her rights and what was expected of her to conduct her part of the proceedings and she participated fully including cross-examining the PW2.

In fact other witnesses PW3 the investigating police officer and PW4, the investigating officer of the National Agency for the Prohibition of Trafficking in Persons and Other Related Matters (NAPTIP) testified.

The appellant is pushing for the nullification of the proceedings based primarily on non-compliance with the law on taking of pleas and taking the stance that an interpreter was not provided for her as required by law. That argument is against the run of events as captured by the record which showed that an

A interpreter by name Joseph Aninye Registrar of court interpreted from English to Pidgin English. Also to be said is that appellant was represented by counsel at the time of plea taking and part of the hearing and evidence taking. The record further evinces that throughout the entire proceedings the interpretation was
B carried out and there is nothing to show that there was any lack of understanding of any part of the process on the appellant. The situation is quite different from what obtained in the case of **Rufai vs. State** (2001) 13 NWLR (Pt. 731) page 718 where the accused understood Yoruba and no interpretation was made to him and
C so the Supreme Court had no difficulty in finding that there was non-compliance with **Section 215 CPL of Oyo State**. It stands to reason that the appellant herein cannot call in aid that case of **Rufai vs. State** (supra) and any of such like cases.

There is no gainsaying that a valid arraignment is a condition precedent to
D an accused person's trial, conviction and sentence and so none fulfillment of that would render the whole trial a nullity. That is the ground rule, however the case at hand shows quite clearly that a valid arraignment took place, there was plea properly taken with the needed interpretation carried out. The fact that in the
E middle of the proceedings legal representation was absent is the choice of the appellant and did not change the regularity of the arraignment and proceedings. The most emphatic aspect is that it is curious the appellant's attempt to question the validity of the arraignment which was propelled by her counsel who was
F present and in a position to object and did not and rather went fully along. It is too late now to scratch at any aspect of the arraignment to see if anything tangible can be procured. I place reliance on the cases of **Okoro vs. State MJSC (Pt. 11) 59 at 68 79; FRN vs. Mohammed (2014) 3 MJSC 68 at 99 – 100; Bakare vs. NRC**
G **(2007) 17 NWLR (Pt. 1064) 606.**

Now getting into the trial proper, the appellant is making much out of the trial court's reliance on her extra-judicial statements which she retracted. Those statements are Exhibit PD2a and PD2b which are confessional. The trial court
H utilized them inspite of the retraction on the ground that there was enough outside of those statements on which reliance could be placed on them and be taken as sufficient to ground the conviction. That court of trial stated as can be found at pages 67 – 68 of the record thus:

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> **"The independent testimonies of PW1 and PW2 reveal that the accused person never took them to the agreed place of work in Lagos but instead took them to Sagamu Terminus Hotel. This**

clearly is a deceitful act on the part of the accused person and satisfies the essential elements of the offences reflected – Counts 1 – 3; that of procurement.

The combined testimonies of PW1 and PW2 as well as the statement – Exhibits PD4 culminate in one conclusion – hat all three (3) ladies were coerced and deceitfully taken away by the accused person to a place different from where they expected to go for respectable employment.

All through the trial, the accused person who was not represented by a counsel but opted to defend herself did not deny any of the allegation made by the prosecution witnesses. Evidence not controverted is admitted. This is the law as propounded in many leading authorities. See the cases of Adejumo vs. Ayanleghe (1979) 3 NWLR Pt. 110417: Odulaja vs. Haddad (1973) 11 SC 357.

I find the respective testimonies of all four (4) witnesses called by the prosecution to be credible. Adding this to the confessional statements made voluntarily by the accused person on the 3rd and 5th of June – Exhibits PD2a and PD2 where she stated that "Chichi sent Emmanuel and myself to Calabar, Cross River State to bring some girls for her to use for prostitution. We brought Comfort, Rose and Mikah and took them to Sagamu".

The learned trial judge further stated thus:

"The accused person was not mistaken as to the purpose of her mission in Cross River State which was to procure girls for the purpose of prostitution. This leaves me with no doubt that the accused person is guilty as charged on counts 1-3 which involves the trio of PW1, PW2 and Mikah EtengIbe as revealed in the testimony of Pw3.

On the same premises as above, the prosecution has further

proved beyond any fragment of doubt that the trio of Comfort Bassey, Roseline Ikwa and Mikah EtengIbe were deceitfully induced to leave their homesteads to follow the accused person to Sagamu for prostitution. This clearly satisfies the essential ingredient of section 19(b) of the Trafficking in Persons and Administration Act 2003 (as amended).

Under counts, 7 – 9, accused person is charged with confining and detaining the three (3) victims – Pw1, PW2 and a certain MikahEtengIbe against their will at Terminus Hotel Sagamu."

The court below was satisfied with the evaluation of evidence or assessment of the credibility of the witnesses and found no basis for departure therefrom or to interfere with the findings that came thereby though it had reservation on the evidence of the 3rd victim, Miss Micah who was not cross-examined and so had to set aside the conviction under count 6 which related to Miss Mikah.

In her Exhibit PD2 (b) the appellant said in part thus:

"That Emmanuel followed me to Calabar, in order to bring the three girls to Shagamu, namely; Comfort Bassey, Roseline and Mikah. I paid N1,500 each to Comfort and Roseline's parents but I did not give Mikah parent anything. The money was given as a gift. I paid N600 as transport fare for each of the girls from Calabar to Abakaliki where Emmanuel dropped. I paid N2,200 as transport fare for each of the girls from Abakaliki to Shagamu. On getting to Shagamu, Ogun State, I asked them to do prostitution but they refused. Before asking them to do the prostitution, one Chichi and myself had performed on oath for the three girls. We used palm oil, chalk and candle to perform the oath taken. The reason of the oath taken was to scare the three girls not to steal my money. The money realized from prostitution. I beat Mikah and Roseline because they were having strange boyfriends which I did not like. The three girls were prostituting and I was realizing N2,000 in all. Each girl were collecting minimum of N300 from each man per round of sex. I told the parents of the girls that I was taken (sic) them to Sagamu to sell in my bear parlor as salesgirls and I promised to

be paying them 5,000 as monthly salary each."

In her statement to the police the appellant stated thus:

I (Me) went to Bayelsa State to do street prostitution at Hospital Road in Yenogoa. My friend called Chioma described the place for me. Sometimes in May, 2009 when I was at Bayelsa State prostituting, I met a friend called Chichi and his boyfriend called Emmanuel. Chichi sent Emmanuel and myself to Calabar, Cross River State to bring some girls for her to use for prostitution. We brought Comfort, Rose andMikah and took them to Shagamu, Ogun State, at Terminus Hotel, Shagamu. It was Emmanuel that settled the transport fares and feeding expenses, however, Emmanuel did not follow us to Shagamu because he dropped at Abakaliki and promised to meet us at Shagamu when we left for Calabar, Chichi left Yenogoa to go and bring other girls, so that we can meet at Shamagu, but (we) she arrived at Shamagu before us. We told the girls that they are going to do sales girl in a beer parlour but on getting to Terminus Hotel, Shagamu, Chichi asked them to do prostitution but they refused and insisted that they want to go back to Calabar. I told Chichi to take the girls back to Calabar but she refused that she has spent so much money on their transport fares and feedings. (He) she said, she was taking them to Abeokuta to put them in another hotel. We were on our way to Abeokuta and dropped at Ishagbo court in Abeokuta, where the girls saw one pastor and a policeman, the girls started running because of the pastor's hair that is dread. The policeman held them and started questioning them, at that point Chichi ran away but the police arrested me and took me to police station at Abeokuta."

As for Exhibits PD2a, PD2b, the confessional statements of the appellant she gave her background history that could only have come from the personal knowledge and so no foundation is available to debunk those statements as hers and so the retraction falls flat.

Apart from that, there is a surfeit of corroborating pieces of evidence from

PW1 and PW2 and even from the appellant's testimony on which the court could depend to hold that the confessions were true and reliable. Also the testimony of PW3, Miss Mikah can easily be ignored and the substance of the prosecution's case not dented in any way. See **Ogudo vs. The State** (2011) 12 SC (Pt. 1) 71 at 96.

The cases cited in aid by the appellant such as **The State vs. Rabiu (2013) 2 2 SC (Pt. 111) 63 at 107-108; Theophilus vs. The State (1996) 34 LRCN 74 at 90; Kasa vs. The State (1994) 18A LRCN 28 at 46** are not for our purpose here but for another time and occasion, as they are different from the present situation.

Indeed, I am at one with the court below in its findings and conclusion that is to say, that the appellant's plea was in strict compliance with the law, the proceedings of the trial court were interpreted to the appellant to the satisfaction of the court, the retraction of the confessional statements of no moment and there were more than enough outside the confessional statement which afforded corroboration and appellant's right to defend herself in person or by counsel not violated. The provisions of Section 287 CPA are met.

In conclusion this appeal has no leg to stand on and I have no difficulty in dismissing it. Appeal dismissed as I affirm the decision of the Court of Appeal in its affirmation of the conviction and sentencing of the appellant on all the nine (nine) counts of the charge except for count 6 which is set aside.

Mary Ukaego Peter-odili
Justice, Supreme Court

BAYANG AKAAHS (JSC): I had a preview of the judgment of my learned brother Peter-Odili (JSC) just delivered. I agree with her reasoning and conclusion.

The complaint of the appellant in this appeal is that there were fundamental irregularities in her arraignment and trial which vitiated her conviction and in consequence of that the Court of Appeal, Ibadan Division was wrong in affirming her conviction and sentence on all the counts of the offence preferred against her except count 6 for which her conviction was set aside. The irregularities which were highlighted in the appellant's brief are as follows:

1. The appellant, being an illiterate, did not understand the language of the court as she could only communicate in pidgin while the language of the court is English and the court did not provide an interpreter throughout the

A proceedings

2. There was no valid arraignment as the plea of the appellant on all the 9 counts ought to be read and explained to the appellant in the language she understands separately on a count by count basis and not by a blanket plea as recorded by the trial court.

B

Learned counsel for the appellant submitted that arraignment is an isolated criminal ritual that must be performed in accordance with the applicable law and nowhere in the proceedings of 1/7/2010 was it shown that the charges were interpreted to the appellant in the language she understands on a count by count basis. It was contended that a valid arraignment is a condition precedent to an accused person's trial, conviction and sentence the non-fulfillment of which renders the whole trial a nullity. The case of **Ewe vs. The State (1992) 6 NWLR (Pt. 246) 147 at 152-153** per **Kutigi JSC** (as he then was) was cited in support. Also relying on **Rufai vs. State (2001) 13 NWLR (Pt. 731)** and **Tobby vs. State (2001) 10 NWLR (Pt. 720) 23** learned counsel submitted that this Court has consistently maintained that any criminal trial conducted in violation of section 215 CPA and Section 36(6) of the 1999 Constitution (as amended) is a nullity.

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Learned counsel conceded that the appellant was represented at one time or the other by counsel but submitted that the trial court seriously breached the provision of section 36(6)(b) and (e) of 1999 Constitution on the dates when proceedings were conducted in the absence of counsel and no interpreter was provided by the court to properly interpret the proceedings to him, and since the breach went to the root or foundation of the entire proceedings, the effect of the irregularity vitiated the entire proceedings and rendered them a nullity.

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Learned counsel for the respondent argued that the appellant's plea was taken in substantial compliance with the provision of Section 215 CPA and referred to pages 30-31 of the Record of Appeal where the charge was read and explained to the appellant in Pidgin English and she pleaded not guilty to the 9 count charge. He maintained that the court below after a careful examination of the proceedings before the trial court came to the conclusion that the trial was conducted in strict compliance with the laid down procedures of taking plea. On the reliance, placed by learned counsel for the appellant, on the cases of **Tobby vs. State (**supra) **and Rufai vs. State** (supra) in an attempt to nullify and void the proceedings of the courts below for non-compliance on taking of pleas, learned counsel submitted that the facts of the two cases relied on do not apply to the

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present appeal since this court in Tobby's case based its decision on the fact that there was no evidence on record to show that the charge was read and explained to the appellant before the plea was taken and in Rufai's case there was no evidence that the charge was explained to the appellant in the language he understood which was the Yoruba language.

Learned counsel for the respondent also pointed out that the appellant was represented by counsel and the counsel did not ask for an interpreter or objected to the procedure and the court failed to provide same. He contended that the complaint of not supplying an interpreter ought to have been taken at the trial court and not on appeal for the first time placing reliance on **Okoro vs. State (2012) Vol. 1 MJSC (Pt. II) SC 59 at 68-79.**

RESOLUTION OF THE ISSUES

The appellant claimed she was an illiterate and could only communicate in Pidgin English and not real or proper English (otherwise known as Queen's English).

Section 215 of the Criminal Procedure Law Ogun State states:

> **"The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been dully served"**

Section 33(6)(a)-(e) in the **1979 Constitution** has been reproduced as **Section 36(6)(a)-(e) in the 1999 Constitution**. It is provided in Section 36(6)(a) and (e) of the said Constitution as follows:

> **"36(6) Every person who is charged with a criminal offence shall be entitled to:**
>
> **a. be informed promptly in the language he understands and in detail of the nature of the offence;**
>
> **b. have, without payment, the assistance of an interpreter**

if he cannot understand the language used at the trial of the offence."

Learned counsel for the appellant claimed the appellant was an illiterate and communicated in Pidgin English whereas the proceedings were conducted in English Language.

The appellant was arraigned on 1st June, 2010 before Ofilil-Ajumogobia J. and on that date her plea was taken but she was not represented by counsel. The proceedings of the 1st June, 2010 on page 29 of the record read thus:

"CHARGE NO: FHC/AB/49C/2009
BETWEEN:
ATTORNEY GENERAL OF FEDERATION – COMPLAINANT
AND
MARTINA OPARA – ACCUSED PERSON

Case Called.
C. Ifudu appears for the prosecution
Accused person in court but not represented

Ifudu: I ask for a short date to get my witnesses

Court: Her plea has not been taken. I need to take her plea
(Charge read and interpreted in pidgin English) – Joseph Aninye, Registrar Process Section Federal High Court, Abeokuta. Accused person understands charge and pleads not guilty to both counts
Court: The matter is adjourned to 11/06/2010 for trial.

Signed: Judge
1/06/2010"

The case next came up on 1st July, 2010. This time around the appellant was represented by C. Osaigboro (Miss). C.R. Ifudu (Mrs) appeared for the complainant and she applied that the charge be read to the accused person for her plea to be taken and the charge was read (see page 30). On page 31 the record states:

"Accused person understands the 9 counts of the charge and pleads "not guilty" to any of them"

It has been held in several decisions of this **c**ourt as well as the Court of Appeal that the need for a charge being explained to an accused person in the language he understands during the taking of his plea is his constitutional right as well as a sine qua non for a valid plea and a precondition for his trial. Strict compliance with the provisions is required otherwise there will be no valid trial. See: **Onuoha vs. I. G. P (1956) NRNLR 96: Duvall vs. C.O.P. (1962) 2 ALL NLR (Pt. 1) 115; Oyediran vs. The Republic (1967) NMLR 122; The State vs. Madukolu (1972) 2 ECSLR 426; Eyorokoromo vs. State (1979) 6-9 S.C. 3; Josiah vs. State (1985) 1 NWLR (Pt. 1) 125; Kajubo vs. State (1988) 1 NWLR (Pt. 73) 721; Okoro vs. State (1988) 5 NWLR (Pt. 94) 255. Alake vs. State (1991) 7 NWLR (Pt. 205) 567; Okon vs. State (1991) 8 NWLR (Pt. 201) 425; Ewe vs. State (1992) 6 NWLR (Pt. 246) 147; Erekanure vs. State (1995) 5 NWLR (Pt. 294) 385** and **Idemudia vs. State (1999) 7 NWLR (Pt. 610) 202.** In **Alake vs. State** supra **Niki Tobi JCA** (as he then was) in the majority judgment, Ademola dissenting, held at page 589 that a community reading of **Section 215 and 353(1) of the Criminal Procedure Law of Lagos State** and **Section 33(6)(a) of the 1979 Constitution** bring out clearly that where the procedure as listed below is not followed the trial of the accused, however ably conducted, cannot stand and the trial will be declared a nullity on appeal. The procedure listed is as follows:

1. The case is called
2. The accused is docked
3. The charge is read and explained to the accused in a language he understands, one count after another, if it is a charge of more than one count.
4. The accused takes his plea voluntarily and unaided at the end of reading each count.
5. This is simultaneously recorded by the court
6. Where there is more than one accused each accused must be given the opportunity to plead separately to each of the counts and the trial court must also record their pleas separately.
7. The record of the court must clearly show that the above procedure was followed.

In **Kajubo vs. State** (supra), **Oputa (JSC)** noted that it is a notorious fact that

English, the language of the court, the language in which charges and information are drafted is not the mother tongue of Nigerians and most Nigerians are illiterate in English even those of them who are literate may not easily follow and comprehend the language of the court.

It is for these reasons that the criminal jurisprudence and the 1979 Constitution considered it necessary that for there to be a proper arraignment:

> **"(i) The accused shall be present in court**
> **(ii) The charge or information shall be read over to him in a language he understands.**
> **(iii) The charge or information after being read over in such language should then be explained to him avoiding as much as possible the use of technical expressions. This explanation should acquaint the accused with the essential ingredients of the offence charged and with the factual situation resulting in and giving rise to the offence charged.**
> **(iv) To make assurance doubly sure the trial Judge should also satisfy himself that the explanation of the offence charged was adequate and that the accused understands what he is standing trial for"**

He then concluded that it is good practice for trial Courts to specifically record that:

> **"the charge was read and fully explained to the accused to the satisfaction of the court" before recording his plea thereto.**

Karibi – Whyte (JSC) noted in Idemudia vs. State (supra) at page 222 that:

> **"There appears to be a fairly and inflexible approach to the question of non-compliance with the enabling provisions for arraignment. It is conceded that the conditions have been designed and formulated for the protection of the accused and preservation of the constitutional rights of the citizen. Equally the courts should not ignore the nature of the rights protected**

A and the preservation of the courts in the discharge of their sacred and solemn duty to do justice. There is clearly observable the distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of
B procedure which in no way affects the justice of the trial of the case. In the latter case it will not affect the trial. It would seem to me that the mandatory provision of Section 215 of the Criminal Procedure Law which requires that the charge be
C read and explained to the accused is complied with if there is evidence on the record to show that the accused understood the charge and was in no way misled by the absence of explanation ex facie. It is conceded that the subsequent validity of the
D procedure rests on the validity of the plea on arraignment. However, where there is counsel in the case defending the accused person, the taking of the plea by the court it ought to be presumed in favour of regularity, namely that even if it was not
E stated on the record, the charge had been read and explained to the accused on arraignment before the plea was taken. *Omnia pressumunturrite etsolemniteresseacta.*

F Accordingly in the absence of proof to the contrary the presumption prevails See: also Section 150(10) Evidence Act."

The arraignment of the accused/appellant on 1/6/2010 and 1/7/2010 showed ex
G facie that she understood Pidgin English and there was an interpreter, JosehAninye who read over and interpreted the charge to her. She understood the charge and pleaded not guilty to all the counts. The record as reproduced ex facie disclosed substantial compliance as required by Section 215 Criminal Procedure
H Law and Section 36(6)(a) and (e) of the 1999 Constitution and since there was a second arraignment on 1/7/2010 when the accused/appellant was represented by counsel who did not raise any objection to the taking of the plea where she again pleaded not guilty to all the counts in the charge, there is a presumption that she
I understood the charge before she again pleaded not guilty. The vice which led to the nullification of the trial of the accused in **Josiah vs. State** supra, **Eyorokoromo vs. State and Kajubo vs. State** supra was not present in this case. The non-recording that one count after another was read and explained to the

accused before she was asked to plead thereto as recommended by **TOBI JCA** in **Alake vs. State** supra did not render the proceeding a nullity because it is a procedure which in no way affected the justice of the trial since it is clear that all the counts in the charge were read and explained before she was asked to take her plea on each of the counts.

On the issue of understanding Pidgin English and the language of the **c**ourt being English, the fact that Oputa, (JSC) expressed the opinion that since English is not our mother tongue and most Nigerians are illiterate in English who may not easily follow and comprehend the language of the **c**ourt, the appellant has not complained that technical terms were used which she could not understand. The appellant was not being tested on the use of grammar. As was explained in **Olanipekun vs. State (2016) 13 NWLR (Pt. 1528) 100 at 118:**

> **"It is erroneous for anyone to assume that people who communicate in Pidgin did not understand English."**

I wish to add that the use of Pidgin allows for free expression without minding the grammar which is usually employed in the proper English.

The proceedings as recorded in the trial court revealed that the accused was fully aware of the charge and pleaded not guilty throughout. The prosecution had to prove the charge by calling evidence of the trafficking as well as tendering the confessional statement of the accused. The conviction of the accused was based on the evidence called by the prosecution.

My learned brother, Peter-Odili (JSC) dealt extensively with the evidence adduced by the prosecution on which the learned trial Judge found the appellant guilty and convicted her. The lower court made a concurrent finding on facts. This court is loathe to disturb those findings as they are not perverse. Accordingly based on what I have said regarding the arraignment of the appellant, which I found was in order and the fuller reasons contained in the lead judgment of my learned brother, Peter-Odili JSC, I too dismiss the appeal and further affirm the conviction and sentence of the appellant, as entered by the Court of Appeal Ibadan. The appeal is hereby dismissed.

K. B. AKA'AHS
Justice, Supreme Court

KEKERE-EKUN, (JSC): The appellant herein was arraigned before the

Federal High Court holden at Abeokuta on a 9-count charge for offences ranging from procuring, using, deceitfully indulging, confining and detaining certain individuals in prohibition of the **Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003**, as amended. She pleaded not guilty to the charge.

Four witnesses testified for the prosecution.The extra-judicial statements of the victims and of the appellant were tendered in evidence. The appellant was represented by counsel at various stages of the trial, including the date of her arraignment. She testified on her own behalf and called no other witness. At the conclusion of the trial she was found guilty on all the counts and sentenced to a cumulative period of 14 years imprisonment. The sentences are to run concurrently.

On appeal to the Court of Appeal, Ibadan Judicial Division, the court in a considered judgment delivered on 17/6/2014 affirmed the appellant's conviction and sentence on all the counts except count 6, which was set aside. The appellant is still dissatisfied and has further appealed to this court.

I have had the privilege of reading in draft, the judgment of my learned brother, Mary Peter-Odili, (JSC) just delivered. I agree entirely with the reasoning and conclusions therein and add a few comments in support and for emphasis.

Although a single issue was formulated for the determination of this appeal, the issue appears to embrace several sub-issues.

My comments are in respect of the contention that the appellant's arraignment was irregular for failure to comply with the provision of **Section 215 of the Criminal Procedure Act, Cap C. 41, Laws of the Federation of Nigeria 2004**. It was argued on behalf of the appellant that she is illiterate and speaks only Pidgin English and thus does not understand the language of the court. It is further contended that the language of the court being English Language, her arraignment and subsequent trial, in the circumstances was a nullity.

On the other hand, it is contended on behalf of the respondent that there was due compliance with the law in the arraignment of the appellant, as there is evidence on record that the charge was read and interpreted to the appellant in English by the registrar of the court and interpreted to her in Pidgin English and that the court was satisfied that the appellant understood each count. It was also argued that the appellant was represented by counsel and at no time did she indicate that she did not understand the proceedings.

Section 215 of the Criminal Procedure Act provides:

> **"The person to be tried upon any charge or information shall be placed before the court unfettered, unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to be served of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith."**

The proper arraignment of an accused person is fundamental, as non-compliance with **Section 215** of the **Criminal Procedure Act** would render the entire proceedings a nullity. 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; Joel Adamu vs. The State (unreported) in SC. 125/2013** delivered on 13th January 2017. This is to protect the accused person's right to fair hearing, as guaranteed by **Section 3**6 of the **1999 Constitution**, as amended.

Learned counsel for the appellant, as noted earlier, is convinced that the charges could not have been read over and explained to the appellant to the satisfaction of the court because she did not understand the language of the court.

On the contention that the appellant who speaks Pidgin English does not understand English Language, this court in a recent decision in **Olanipekun vs. The State (2016) LPELR- 40440 (SC) @ 8 -9 D-A** per Akaahs, JSC had this to say:

> **"It is erroneous to assume that people who communicate in Pidgin English do not understand proper or Queen's English especially in Nigeria. The use of Pidgin English allows for free expression without minding the grammar which is usually employed in proper English. Consequently a statement which was said to have been recorded in Pidgin does not require translation into proper English and any statement made in**

Pidgin can be recorded in proper English."

The reasoning above is equally applicable in the circumstances of this case. The fact that the appellant speaks Pidgin English does not mean she cannot understand proper or "Queen's English." I also venture to say that the fact that a person cannot read or write does not mean he/she cannot understand English when addressed in that language.

In any event, the appellant was dully represented by counsel when her plea was taken and there was no complaint to the court that she could not understand the charges read to her in English before pleading thereto.

I therefore agree with the lower court that the appellant was properly arraigned before the trial court.

On the merit of the appeal while I agree with learned counsel for the appellant that Exhibit PD111, the extra judicial statement of MICAH ETENG IBE, one of the victims of the offence charged in count 6 of the charge, was wrongly admitted in evidence and relied upon by the trial court, as she did not testify and could therefore not be cross-examined on it, I am of the considered view that no miscarriage of justice was occasioned thereby. This is because there was sufficient independent evidence outside of the said statement upon which the guilt of the appellant was established beyond reasonable doubt.

The court below at pages 190-196 of the record examined the extensive review and evaluation of the evidence undertaken by the trial court and rightly in my view, commended the exercise and affirmed the finding that the prosecution had proved its case against the appellant beyond reasonable doubt. I fully endorse the said findings.

In conclusion and for the more elaborate reasons advanced by my learned brother, MARY PETER-ODILI, (JSC) in the lead judgment, I find this appeal to be devoid of merit. It is accordingly dismissed. The judgment of the Court of Appeal, Ibadan Division in CA/I/255C/2013 delivered on17th June 2014 is hereby affirmed.

Appeal dismissed.

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

CENTUS NWEZE, (JSC): I had the advantage of reading the draft of the

leading judgment which my Lord, Mary U. Peter-Odili, (JSC), just delivered now. I agree that, being unmeritorious, this appeal should be dismissed. This short contribution shall, therefore, be circumscribed to the agitation on the propriety of the trial court's utilization of the appellant's retracted confessional statement.

This sort of question has, incidentally, been dealt with so many times in this court. This court's response has, happily, remained consistent. The settled position is that a retraction or denial of a confessional statement [as the appellant did during his defence at the trial court] does not affect its admissibility, **R. vs. Sapele and Anor (1952) 2 FSC 74; R vs. Itule (1961) All NLR 462; Ikpasa vs. The State [1981] 9SC 7; Akpan vs. State (1992) LPELR – 381 (SC) 36; Osakwe vs. State [1994] 2 SCNJ 57; Nwangbonu vs. The State [1994] 2 NWLR (Pt. 327) 380; Bature vs. State [1994] 1 NWLR (Pt. 320) 267, Eragna and Ors vs. The AG, Bendel (1994) LPELR – (SC) 30; Idowu vs. State [1996] 11 NWLR (Pt. 574) 354; Silas Sule vs. State (2009)LPELR – 3125 (SC) 28-30, G-B; FRN vs. Iweka (2011) LPELR – 9350 (SC) 53; Oseni vs. The State (2012) LPELR – 7833 (SC) 22-23**.

Indeed, as pointed out in the leading judgment, apart from exhibits PD2a and PD2b, the confessional statements, the testimonies of PW1 and PW2 corroborated these exhibits. In my view, the lower court rightly, affirmed the position of the trial court on this issue as there was clear evidence of the court's application and consideration of the principles which should be considered in determining whether or not to believe and act on a confession or confessions which an accused person resiled from as enunciated in many decisions.

They include **R vs. Sykes (1913) 8 C.A. R. 233, 236; Kanu vs. The King (1952) 14 WACA 30; The Queen vs. Obiasa (1962) 1 All NLR 651;[1962] 1 SCNLR 137; Obosi vs. The State (1965) NMLR 129; Onochie and Ors vs. The Republic (1966) NMLR 307; JafiyaKopa vs. The State (1971) 1 All NLR 150 Dawa vs. The State [1980] 8 -11 SC 236; Ejinima vs. The State [1991] 5 LRCN 1640, 1671; Arthur Onyejekwe vs. The State [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; Aiguoreghian and Anor. vs. The State [2004] 3 NWLR (Pt 860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt. 1) 65.**

These are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true,; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of

A the said confession with other facts that have been established, **Osetola and Anor vs. The State (2012) LPELR – 9348 (SC) 32-33, G-D; Kareem vs. FRN [2002] 7 SCM 73; Akpan vs. The State [2001] 11 SCM.**

It is for these, and the more detailed, reasons in the leading judgment I, too,
B shall dismiss this appeal. Appeal dismissed.

Chima Centus Nweze
Justice, Supreme Court

C **EJEMBI EJO, (JSC):** On 19th April, 2012, in the charge **No. FHC/AB/49C//2009,** the Federal High Court sitting at Abeokuta convicted the **a**ppellant for nine (9) offences contrary to **Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003** (as Amended). She was
D sentenced to 14 years imprisonment for each offence. The sentences are to run concurrently though.

The Appellant's appeal against the said convictions and sentences was dismissed on the 17th June, 2014 by the Court of Appeal, sitting at Ibadan, in the
E Appeal **No. CA/I/255C/2015.** This further appeal is against the said decision of the Court of Appeal.

The further appeal was argued on only one issue. The issue formulated by the Appellant is:

F

> **"whether the Court of Appeal rightly affirmed the conviction and sentence of the appellant on all counts except one preferred against her in view of the fundamental irregularities in the**
G **arraignment and trial of the appellant by the trial court.**

The respondent, on the other hand, identified the sole issue for determination of the appeal simply as*:*

H

> **"whether the court below was right when it affirmed the conviction and sentence of the appellant by the trial court".**

I In the appellant's brief settled by Isiaka Abiola Olagunju, Esq., the complaint of the appellant is broadly:

i. **that the appellant, who understands and speaks Pidgin**

English, did not understand the entire proceedings of the trial court conducted in English language, and that the trial court's failure to provide her an interpreter had violated her right guaranteed by Section 36(6) (e) of the 1999 Constitution, as amended; and

ii. **that Exhibit PD III, Micah EtengIbe's extra-judicial statement admitted in evidence and wrongly relied upon by the trial court to convict the Appellant, when the said Micah EtengIbe was not produced as a witness and cross-examined, had occasioned miscarriage of justice to the Appellant".**

Let me start, firstly, with the last complaint. That is the use by the trial court of Exhibit PD. III, the statement of Micah EtengIbe, the maker of which neither testified nor was cross-examined, to convict the appellant. What, in the appellant's brief, is referred to Exhibit PD. III, appears to me to be Exhibit PD. 4, referred to at pages 52-53 in the final address of Mrs. Ifudu, Principal State Counsel, who was the prosecutor. In the judgment of the trial court, particularly at page 67 of the record, the learned trial judge had held:

"The combined testimonies of PW.1 and PW. 2 as well as the statements – Exhibits PD. 4 culminate in one conclusion – that all three (3) ladies were coerced and deceitfully taken away by the accused person to a place different from where they expected to go for respectable employment".

It is only at page 67 of the record that the learned trial Judge, in her judgment, made use of Exhibit PD.4.

On Exhibit PD. III (sic: Exhibit PD.4), the extra-judicial statement of Micah EtengIbe, who did not testify, Mr. Olagunju submits that the statement was wrongly relied upon by the trial court, and this has occasioned a miscarriage of justice. Counsel submits further that Micah EtengIbe did not give evidence in order to be cross-examined; that her statement was admitted as the truth of the matters therein contained, and that the trial court relied on it to convict the appellant. The Court of Appeal, counsel submits, ought to have expunged the statement in the circumstance "as its non-expunction occasioned a serious

A miscarriage of justice". Counsel refers to **Section 232 of the Evidence Act, 2011**, and the decisions of this Court in **Theophilus vs. The State (1996) 34 LRCN 74 at 90** per **Onu, JSC**, and **Kasa vs. The State (1994) 184 LRCN 28 at 46** per **Uwais, JSC**. (as he then was).

B **Section 232 of the Evidence Act, 2011**, providing for the cross-examination of a witness as to his previous statement in writing for the purpose of contradicting or discrediting him; is not relevant in the circumstance of this case. Exhibit PD. III (Exhibit PD.4) was, at page 39 of the record, admitted in evidence C as the statement under caution of the victim, Micah EtengIbe, through the PW.4, one Odudare Oluremi Fidelis, an intelligence officer of NAPTIP who recorded it. Exhibit PD. III (Exhibit PD.4) was no doubt admitted in evidence for a purpose. That is to establish the truth of what Micah EtengIbe, the victim, experienced in D the hands of the appellant. To that extent it amounts to hearsay. On the other hand, if Exhibit PD.III (Exhibit PD.4) was admitted in evidence to merely show or establish the fact that Mr. Odudare Oluremi Fidelis (PW.4), an investigator, interviewed and recorded a statement from the victim, Micah EtengIbe, it is not E hearsay. This distinction was made in **KASA vs. THE STATE (1994) 5 NWLR (pt. 344) 269 at 286** by **Uwais, (JSC)** (as he then was) thus**:**

> **"Evidence of a statement made to a witness by a person who is,**
> F **not himself called, as a witness may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by evidence not**
> G **the truth of the statement, but the fact that it was made".**

See also **SUBRAMAIM vs. PUBLIC PROSECUTOR (1956) 1 WLR 965 at 970; THEOPHILUS vs. THE STATE (1990) 34 LRCN 74.**

H I noticed that it was the prosecutor, herself, who misled the trial court to act on the truth of the content of Exhibit PD.III (which she erroneously referred to as Exhibit PD.4) made on 3rd June, 2009 by Micah EtengIbe. The prosecutor, at page 52 and 53 with particular reference to counts 4-6, had invited the trial court I to hold that the appellant deceived Micah EtengIbe "into following her to Lagos with the promise of giving her work as sales girls in a beer parlour"; that "the contents of Exhibits PD.4 (Exhibit PD.III) invariably points (sic) to the facts that they were actually deceived by the accused person", and that "it also points to the

fact that Accused person moved from one place to another; in this case Calabar to Shagamu". Exhibit PD. III (Exhibit PD.4), for the purpose it was admitted in evidence, as proposed by the prosecutor and used by the trial court, was clearly an inadmissible hearsay evidence.

I agree with the appellant's counsel that Exhibit PD. III (Exhibit PD.4), being hearsay and inadmissible in evidence, ought to have been expunged from the evidence by the trial court. The court below, at pages 194 and 195 of the record, seemed to make use of the extra-judicial statement of Micah EtengIbe (the victim) contained in Exhibit PD. III (Exhibit PD.4) in its judgment.

The question is: what prejudice or injustice had the appellant suffered by the use of the statement in the judgment of the court below?

The conviction and sentence of the appellant on count 6 were set aside. appellant, on count 6, suffers no prejudice therefore. The extra-judicial statement of Micah EtengIbe Exhibit PD.III (Exhibit PD.4) was one of the bases for the conviction and sentence of the appellant on count 4 and 5 by the trial court which were affirmed by the court below. It was not the sole evidence the trial court relied upon for the conviction and sentence of the appellant on Count 4 and 5. PW.1 and PW.2 testified respectively in respect of counts 4 and 5. Their evidence were found to be credible and reliable by the trial court and the court below. The concurrent findings of facts are unassailable. If Exhibit PD. III (Exhibit PD.4) were admissible, it would only have been relevant to Count 6, the conviction and sentence in respect of which the court below had correctly, in my view, set aside. It is now trite that it is not every error or mistake in a judgment that will result in the appellate court setting aside the judgment appealed. The appellate court intervenes and sets aside the judgment appealed only when the error complained of is substantial and it has occasioned a miscarriage of justice. See **GWONTO vs. THE STATE (1983) 1 SCNLR 142 at 152-153; ONAJOBI vs. OLANIPEKUN (1985) 4 (pt. 2) 156 at 163; OJE vs. BABALOLA (1991) 4 NWLR (pt. 185) 267; AMUROTI vs. AGBEKE (1991) 6 SCNJ 54.** Accordingly, I shall not interfere with the judgment of the court below merely on the ground that it affirmed the wrong use of Exhibit PD. III (Exhibit PD.4) in respect of counts 4 and 5. Even if Exhibit PD. III (Exhibit PD.4), which was clearly hearsay and inadmissible evidence, were expunged other pieces of evidence still subsist to sustain the conviction.

Mr. Olagunju had complained that the appellant did not appreciate the

entire proceedings, as she did not understand the language of the trial court, and that the court failed to provide her an interpreter as required by the constitution. Every person who is charged with a criminal offence shall be entitled to be informed promptly in the language he understands and in detail the nature of the offence, and shall also have, without payment or for free, the assistance of an interpreter if he can not understand the language used at the trial of the offence. See **36(6)(a) and (e) of the 1999 Constitution**, as amended.

Mr. Olagunju notwithstanding the so much fuss he had made the appellant not understanding English Language that was the language of the trial court, admitted that the appellant spoke and understand Pidgin English. I agree, on authority of **EGWUMI vs. THE STATE (2013) ALL FWLR (pt.; 678) 824 at 840, per Rhodes-Vivour, JSC**, that **Section 36(6)(e) of the Constitution** applies to trials and that failure to provide an interpreter for an accused person, who does not understand the official language of the trial court, could render the trial a nullity.

Where an accused is represented by counsel, the duty falls on the counsel to ensure that the court follows the proper procedure in the trial of his client. Counsel has a duty either to object to wrongful procedure that is adverse to his client, or he is taken to accept and acquiesce in it. See **OthnielShekese vs. Victor Planshak & Ors. (2008) 7 SC. 178.** In **Anthony Nwankwo (2007) 7 SC. 1,** this Court made it clear that where an accused person does not understand the language used at his trial, and he is represented by counsel, it his duty, or the counsel's duty, to bring the fact to the notice of the court at the earliest opportunity and that both the accused and his counsel shall therefore not wait until the end of the trial and thereafter raise it at the appeal. The appellant is raising this issue for the first time on appeal. They did not raise it at the earliest opportunity at the trial. Raising the issue on appeal without leave first sought and granted renders the issue incompetent. See **Shekese vs. Victor Planshak & Ors. (supra).**

From the peculiar facts of this case it is clear that the appellant understood and spoke Pidgin English which is the Nigerian variant of English Language. In my firm view, a party who speaks Pidgin English cannot be heard to say that he could not appreciate the proceedings because the proceedings were conducted in English Language. In the instant case, it is clear from the record that, notwithstanding that the appellant at the trial was represented by counsel, the trial court caused a registrar of the court, one Joseph Aninye, to interpret the proceedings to her in Pidgin English Language. Neither the appellant nor her

counsel at the trial made this complaint at the earliest opportunity. Mr. Langyi, of counsel for respondent submits in the brief, and I agree, that the complaint of not supplying an interpreter, on authority of **Okoro vs. The State (2012) Vol. 1 MJSC (pt. 11) SC. 59 at 68 79,** ought to have been taken at the trial and not an appeal for the first time. The failure to raise this procedural irregularity could lead to invocation against the accused person, of the presumption of regularity in favour of the proceedings at the trial under **Section 168(1)** of the **Evidence Act, 2011** and also estoppel by conduct under **Section 169** of the same **Evidence Act**.

For the appellant it is further submitted that it is doubtful if on 1st June 2010, when the appellant was arraigned, that no charges were read and interpreted to the appellant in accordance with **Section 215** of the **CPA** and **Section 36(6) of the Constitution.** It is now settled that an arraignment done in violation of the mandatory provisions of **Section 215 of the CPA** and **Section 36(6)(a)** and **(e) of the Constitution** is a nullity and thus undermining the validity of the entire proceedings thereon. See **Ewe vs. The State (1992) 6 NWLR (pt. 246) 147; Rufai vs. The State (2001) 7 NSCQR 240; Tobby vs. The State (2001) 6 NSCQR (pt. 1) 362; Edibo vs. The State (2007) 13 NWLR (pt. 1051) 306.**

However, upon my perusing page 29 of the records, the proceedings of 1st June, 2010, I am satisfied that the mandatory provisions of **Section 215** of the **CPA** and **36(6) of the constitution** were substantially complied with by the trial court. The court below was therefore right in affirming the procedure at arraignment.

Appellant's counsel sought to impugn the judgment of the court below on the ground that the appellant had retracted her confessional statements, Exhibits PD2(a) and (b) made on 3rd June, 2009 and 5th June, 2009. The trial court made use of the two in convicting the appellant. Exhibits PD.2 (a) and (b) were admitted in evidence without objection on 31st January, 2011 (at page 38 of the record). I have painstakingly perused the entire record. I cannot see where the purported retraction of Exhibit PD2 (a) and (b) was made by the appellant. Retraction of a confessional statement is a matter of facts. The law from the Evidence Act and when common sense is settled: he who assert must prove. The alleged retraction has no factual basis. appellant's counsel created the phantom from the clouds.

The totality of all I have been labouring to say is that there is no substance in this appeal. For the above reasons, and the fuller reasons contained in the judgment just delivered by my brother, MARY UKAEGO PETER-ODILI, JSC, which I hereby adopt, the appeal is hereby dismissed. The substance of the

A decision of the court below in the appeal **No. CA/I/253/2012,** delivered on 17th June, 2014 is hereby affirmed.

Ejembi Eko,
Justice, Supreme Court.

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MATTHEW THOMAS
AND
THE STATE

SC. 384/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 24TH FEBRUARY,2017

BEFORE THEIR LORDSHIPS

MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
KUMAI BAYANG AKAAHS	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
CHIMA CENTUS NWEZE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

APPEAL: When it is said that there were contradictions in the evidence of witnesses contrary to the concurrent findings of two lower courts – Attitude of Supreme Court thereto.

CRIMINAL LAW AND PROCEDURE: Guides to proper identity of accused person – Relevant considerations.

CRIMINAL LAW AND PROCEDURE: Identification – Appellant positively identified by prosecution witness – Whether any need for identification parade.

CRIMINAL LAW AND PROCEDURE: Identification of accused – Onus is on the prosecution – Proof is beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Identification of an accused is a question of fact to be determined by the trial court.

CRIMINAL LAW AND PROCEDURE: The guilt of accused may be ascertained from proved facts.

CRIMINAL LAW AND PROCEDURE: What prosecution must prove to establish conspiracy to rob and armed robbery.

CRIMINAL LAW: Defences – Alibi Plea of alibi can be disproved by positive findings of the trial court which fixed the accused to the scene of crime.

CRIMINAL LAW: Ingredients of offence of conspiracy and armed robbery – Considerations thereof.

EVIDENCE: Proof beyond all reasonable doubts – Meaning – The imperatives of S.138 of Evidence Act 2011.

EVIDENCE: Where there are overwhelming evidence which pinned the accused to the scene of crime – Plea of alibi rightly rejected.

Issues for Determination

(i) Whether the lower court was right in affirming the decision of the learned trial judge that the prosecution led credible evidence of identification of the appellant as one of the armed robbers that attacked PW1 and PW2.

(ii) Whether having regard to the circumstances and from the totality of the evidence on the record, the lower court was right in upholding the decision of the trial court that the prosecution proved the offences of conspiracy to rob and armed robbery against the appellant beyond reasonable doubt.

Facts of the Matter

The appellant was the 2nd of the three accused who were arraigned before the Ondo State High Court sitting at Akure on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federal Republic of Nigeria 2004.

The Charge No. HOD/SC/2008 reads as follows:

COUNT I

STATEMENT OF OFFENCE:

CONSPIRACY to commit armed robbery, contrary to and punishable under, Section 6(b) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol.14 Laws of the Federal Republic of Nigeria 2004.

PARTICULARS OF OFFENCE
BENJAMIN FRIDAY MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondo Judicial Division did conspire with one another to commit a felony, to wit armed robbery.

COUNT II
STATEMENT OF OFFENCE
ARMED ROBBERY contrary to and punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federal Republic of Nigeria 2004.

PARTICULARS OF OFFENCE
BENJAMIN FRIDAY, MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondo Judicial Division Robbed Hon. Justice Williams Akin Akintoroye of a sum of N14,000.00, two sets of laptop computers, a suit, a wrist watch, a pen, a double-barreled gun and jewelries and at the time of the robbery you were armed with offensive weapons, viz: guns, cutlass etc.

The accused pleaded not guilty to the charges. At the end of evidence the trial court sentenced the accused to death. His appeal to the Court of Appeal was dismissed hence this further appeal to the Supreme Court.

Held *(Unianimously dismissing the appeal)*

1. *Court may infer from facts proved and other facts the guilt of the accused.*
The appellant hid under the cover that he did not enter the main house and so could not have been sighted by PW1 or PW2. The legal position stated above that a judge is permitted to infer from the facts proved and other facts necessary to complete the element of guilt or establish innocence is sound and sensible. Such evidence must be closely examined in order to be certain that there are no other co-existing circumstances which may weaken or destroy the inference. [**Anekwe vs. The State (1976) 9-10 SC 255 at 264, Nasiru vs. State (1999) 2 NWLR(Pt. 589) 87; Ijioffor vs. State (2001) 9 NWLR (Pt. 718) 371].** *(P 359 Paras F – H).*

2. *The plea of Alibi*
Having found as a fact that the evidence of the prosecution positively led to

the identification/ recognition of the appellant, his defence of alibi failed.

The appellant admitted sleeping with the 1st accused on the night of 1st February, 2008. Prior to the robbery the appellant was an employee of PW1 up to December, 2007. It was the appellant who informed the police of the whereabouts of the 1st and 3rd accused and he led the police to arrest them where exhibit "B" was recovered. The dogs were familiar with the appellant and they stopped barking when they were attracted to the gate. *(P 359 Paras H – A)*

There are no extenuating circumstances to warrant allowing this appeal as the evidence adduced by the prosecution positively led to the identification/ recognition of the appellant and the inference to be drawn clearly showed that the appellant was among those who entered the residence of PW1 on the night of 1st February, 2008 to carry out the robbery operation. If he did not participate in the robbery, he facilitated it by ensuring that the dogs did not attack the robbers or raise alarm by barking. *(P 360 Paras E – F)*

3. *Onus to prove identification of accused was discharged*

On the issue of whether the identification of the accused/ appellant was properly made sufficient to link the appellant to the offences charged, it is to be said that it is settled law that identification evidence is such tending to show that the person charged with an offence is the same person who was seen committing the offence. The proof of such identification is beyond reasonable doubt.

In the instant case PW2, Olujimi Akintoroye testified that he saw the 2nd accused now appellant when he peeped through the glass door in his evidence and stated that he had all the opportunity of knowing all that transpired as appellant had been their gatekeeper for about a year. Thus providing direct evidence.

Also PW1, Justice Akintoroye said he did not personally see appellant in person on the day of incident but that his wife did, while he (PW1) saw the 1st accused at the time of the attack which facts he mentioned at the police station at the earliest opportunity.
(P 366 Paras D – G).

4. *Guides to proper identification of accused.*

When these pieces of evidence are taken along the guide set out to avoid

mistaken identity which guides are:

(a) Circumstances in which the eye-witness saw the suspect – whether it was in difficult conditions;
(b) The length of time the witness saw the suspect or defendant whether in a glance or longer observation;
(c) The opportunity of close observation;
(d) Previous contact between the parties;
(e) The lighting conditions.

Then it can be seen that the prosecution/respondent met the required standard that the identification was properly made beyond reasonable doubt. See Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455 at 478 and 479; Ochiba vs. State (2012) All FWLR (Pt. 608) 849 at 871.

All that should be done to provide a positive identification of the appellant was at play and therefore reliable in linking the appellant to the scene of crime and as a participant. *(P p 366 – 367 Paras G – F).*

5. What prosecution should prove to establish conspiracy and armed

On what the prosecution should do to succeed in a charge or offence of conspiracy to rob and armed robbery, the ingredients of the offences are thus:

(a) That there was an agreement or confederacy, between the convict and others to commit the offence of robbery.
(b) That in furtherance of the agreement or confederacy, the accused took part in the commission of the offence of robbery or series of robberies.
(c) That the robberies or each of the robbery was an armed robbery. See [Yusuf v State (2008) All FWLR (Pt. 405) 1731]. *(P 367 Paras C – G).*

Another mode of proof of the offences being by circumstantial evidence and the prosecution proffered the evidence of the recovered toy gun Exhibit B found in the bag kept in the appellant's room within 24 hours of the robbery and the toy gun which belonged to PW1's son was a point which led irresistibly and unequivocally to the guilt of the appellant and there were no co-existing circumstances which weakened the inference

that the appellant was part of the robbery gang.
[Offorlette vs. The State (2000) FWLR (Pt. 12) 2081 at 2102; Akinmoju vs. Atete (2000) 4 SC (Pt.1) 64]. *(Pp 367 – 368 Paras F – G).*

6. *No material contradictions in the evidence of prosecution witnesses*
The appellant had sought to impugn the evidence of the prosecution witnesses citing discrepancies, contradictions or conflict contending that they were sufficient to create reasonable doubt which should be resolved in favour of the appellant. The corresponding countering response is that there were no material contradictions on which such a favour could be granted the appellant and so the two courts below were right to discountenance them. I have no difficulty in upholding what the two courts below did in that regard as they are in line with the cases of [Khaleel vs. State (1997) 8 NWLR (Pt. 156) 237 at 240, Henry Otti vs. State (1991) 8 NWLR page 103 at 108; Atano vs. State (2005) 4 ACLR page 25 at 30].
(P 367 Paras H – A).

7. *Burden of proof was discharged*
Indeed the material elements of the charge against the appellant has been proved beyond reasonable doubt in line with Section 138(1) of the Evidence Act, 2011. It is to be reiterated that this standard of proof beyond reasonable doubt is not synonymous with proof beyond all doubt or all shadow of doubt. What it means is that the prosecution in establishing the guilt of the accused person within compelling and conclusive evidence which translates to a standard that is consistent with a high degree of probability. That is on display herein and there was no necessity for a host of witnesses as the witnesses who testified were vital and tendered crucial evidence that met the standard beyond reasonable doubt and that is enough. [Adeweale Joseph vs. State (2011) 6 SCNJ 222 at 235. *(P 368 Paras A – C).*

8. *Plea of alibi was rightly rejected*
The appellant had put up a defence of alibi which was effectively demolished by the overwhelming and compelling evidence which pinned the appellant to the crime and so the trial court was right to have rejected the said alibi raised. [Fatilewa vs. State (2007) 5 ACLR 607].
(P 368 Paras D – D).

9. Identification parade is not necessary in every case.

It is not in every case that an identification parade is necessary to identify a person accused of committing a crime. The question whether an accused person is properly identified as being one of those who committed the offence is a question of fact to be determine by the trial court on the evidence adduced for that purpose. [Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439; Adeyemi vs. The State (1991) 2 NWLR (Pt. 170) 679].

In a case such as this where the evidence of PW2 was positive, cogent and unshaken under cross-examination, the learned trial Judge was entitled to rely on it along with other facts established by the prosecution in finding that the prosecution had proved its case beyond reasonable doubt. The court below was right to have affirmed those findings. *(P 369 Paras D – F).*

Nigerian Cases Cited in this Judgment

Adeweale Joseph vs. State (2011) 6 SCNJ 222 at 235.
Adeyemi vs. The State (1991) 2 NWLR (Pt. 170) 679.
Akinmoju vs. Atete (2000) 4 SC (Pt.1) 64.
Anekwe vs. The State (1976) 9-10 SC 255 at 264,
Atano vs. State (2005) 4 ACLR page 25 at 30.
Fatilewa vs. State (2007) 5 ACLR 607.
Henry Otti vs. State (1991) 8 NWLR page 103;
Ijioffor vs. State (2001) 9 NWLR (Pt. 718) 371.
Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455;
Khaleel vs. State (1997) 8 NWLR (Pt. 156) 237,
Nasiru vs. State (1999) 2 NWLR(Pt. 589) 87;
Ochiba vs. State (2012) All FWLR (Pt. 608) 849 at 871.
Offorlette vs. The State (2000) FWLR (Pt. 12) 2081;
Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439;
Yusuf vs. State (2008) All FWLR (Pt. 405) 1731.

Nigerian Statutes Cited in this Judgement

The Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federal Republic of Nigeria 2004. – S. 6(b), 1(2)(a)

A *The Evidence Act, 2011. – S.138(1)*

BAYANG AKAAHS, (JSC) (Delivering the lead Judgment): The appellant was the 2nd of the three accused who were arraigned before the Ondo State
B High Court sitting at Akure on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to **Sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federal Republic of Nigeria 2004**. The 1st and 3rd accused were
C Benjamin Friday and Nelson Friday respectively.

The Charge No. HOD/SC/2008 reads as follows:-

COUNT 1

D **Statement of Offence**

CONSPIRACY to commit armed robbery, contrary to and punishable under, Section 6(b) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol.14 Laws of the Federal Republic of Nigeria 2004.

E

PARTICULARS OF OFFENCE

BENJAMIN FRIDAY MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondo Judicial Division did
F conspire with one another to commit a felony, to wit armed robbery.

COUNT II

Statement of Offence

G ARMED ROBBERY contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federal Republic of Nigeria 2004.

H **PARTICULARS OF OFFENCE**

BENJAMIN FRIDAY, MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondon Judicial Division robbed Hon. Justice Williams Akin Akintoroye of a sum of N14,000.00, two sets of
I laptop computers, a suit, a wrist watch, a pen, a double-barreled gun and jewelries and at the time of the robbery you were armed with offensive weapons, viz: guns, cutlass etc.

The accused pleaded not guilty to the charge. In proof of its case the

A prosecution called four witnesses and tendered several exhibits. PW1 and PW2 were the victims of the robbery while PW3 and PW4 were the Police Officers who investigated the case.

Apart from the toy gun which was recovered during the search conducted
B in the accused residence which was tendered as Exhibit B, none of the items mentioned in the charge sheet could be seen. At the end of the trial, all the accused were found guilty of the offences charged and sentenced to death by hanging. Dissatisfied with the conviction each of the accused appealed against
C the conviction and sentence but the appeals were dismissed. They all filed Notices of Appeal to this court. The 1st and 3rd appellants' appeals Nos. SC. 382/2014 and SC. 383/2014 respectively were dismissed on 1st July, 2016. This appeal No. SC. 384/2014 is the appeal by the 2nd appellant.

D The appellant's counsel, Ayo Asala Esq. filed a brief on behalf of the appellant on 16/9/2014 while Tunde Babalola Esq. of counsel also filed an amended brief of argument on behalf of the respondent on 21/10/2016 but was deemed filed on 1/12/2016, the same date the appeal was heard. Two issues were
E raised in the appellant's brief which are:

(iii) Whether the lower court was right in affirming the decision of the learned trial Judge that the prosecution led
F **credible evidence of identification of the appellant as one of the armed robbers that attached PW1 and PW2.**

(iv) Whether having regard to the circumstances and from the totality of the evidence on the record, the lower court was
G **right in upholding the decision of the trial court that the prosecution proved the offences of conspiracy to rob and armed robbery against the appellant beyond reasonable doubt.**

H

The respondent adopted the issues framed by the appellant.

In his argument on issue No. 1 learned counsel for the appellant attached the findings made by the trial Judge on the identification of the appellant which
I were accepted by the court below and submitted under paragraph 3.08 page 7 of the appellant's brief that the person that was identified as the appellant by PW1 and PW2 did not enter the house with the other four armed robbers and so there was no contact between the person that was identified as the appellant and the

victims. Learned counsel also submitted that the evidence of PW2 contrasted sharply with that of PW1 on the recognition of the appellant as one of the armed robbers. He therefore contended that there are material contradictions in the evidence of the prosecution witnesses on the vital issue of the recognition of the appellant.

On issue 2 learned counsel submitted that since PW1 did not mention Exhibit B as one of the items stolen from his house, the heavy reliance which the learned trial Judge placed on the ownership of the said exhibit to convict the appellant is not supported by the totality of the evidence adduced and so the findings are perverse and the lower court should have set aside the said findings relying on **Oguonzee vs. State (1998) 5 NWLR (Pt. 551) 521** and **Aruna vs. State (1990) 6 NWLR) (Pt. 155) 125.**

Learned counsel for the respondent submitted that the lower court was right in affirming the decision of the learned trial Judge who relied on the evidence of identification/recognition of the appellant by PW1 and PW2. The fact that PW1 and PW2 knew the appellant as their gateman before the armed robbery incident and the evidence of PW2 that he saw the appellant as the person who was outside with the dogs on the night of the robbery made the lower court to invoke the provisions of section 9(b) of the Evidence Act to arrive at the conclusion that there are other facts which by themselves make the identification of the appellant PW2 probable. The lower court relied on **Anakwe vs. The State (1976) 9-10 SC 255** to hold that a Judge is permitted to infer from the facts proved and other facts necessary to complete the element of guilt or establish innocence.

The evidence given by PW2 regarding the appellant is as follows:

> **"As the dogs barked my father and I peeped through the glass door to see what was the problem if any. I notice that the dogs were attracted to a particular objectnear the gate area. It was at this stage we saw Matthew Thomas (2nd accused). In the process my mother screamed, alerting us that there are intruders in the compound …….**
>
> **The 2nd accused was our gate-keeper in the house up to December, 2007. He was in charge of the dogs. He fed them, apart from his normal gate-keeping duties. The dogs stopped**

barking when they were attracted to the gate……

On the following morning, my father and I were in company of policemen when we saw the 2nd accused person (Matthew Thomas). He was trying to buy something from a kiosk when we saw him. My father pointed him out to the policemen who immediately arrested him. He was taken to the police station at Funbi Fagun from where a team of policemen came to look for the other accused person. It was the 2nd accused who told the police the names and addresses of the 1st and 3rd accused persons".

On being cross-examined PW2 said:

"The incident happened at about 8:30p.m. he scene of attack was well lit. I confirm that the 2nd accused was arrested a day after the incident. I was with the police when they visited the house of the 1st and 3rd accused with the 2nd accused acting as pointer. I have not suspected the 2nd accused but I actually saw him on our premises on the night of the robbery attack".

The 1st accused testified that the 2nd accused who had asked him to help him find a job passed the night in the house where he was living with the 3rd accused who is his elder brother. They had arranged to go to the woman who was to offer the 2nd accused work in the farm on the morning of the day of his arrival but he had to wash his master's car so he advised 2nd accused to go out and buy a recharge cared and call the woman. No sooner the 2nd accused left him to make the call as suggested than he saw him come back in handcuffs accompanied by policemen. The policemen asked him if he knew the 2nd accused and he answered in the affirmative. The policemen then demanded to see where the 2nd accused slept the previous night. On being shown the house they entered and searched the house where they recovered the toy gun (Exhibit B) and army camouflage trousers (Exhibit "C") and the identity card belonging to one "Samuel Peace" a trailer driver and member of the N.U.R.T.W. Ondo Branch (Exhibit D). He said the exhibits were inside a bag left behind by one Enete who is his cousin and he was

away to Oshogbo where he was working. He said the three of them (1st, 2nd and 3rd accused) slept in the same room in the night prior to the arrest of the 2nd accused. The trial judge accepted the evidence both direct and circumstantial which backed the involvement of the three accused persons in the armed robbery attack on PW1 and his household on 1st February, 2008.

The court below accepted the findings by the learned trial Judge that there is direct and circumstantial evidence which backed the involvement of the three accused in the armed robbery attack on the PW1 and his household on 1st February, 2008. In the lead judgment of Professor Owoade JCA, he stated at page 260 of the record of appeal:

> **"In deciding appellant's issue 1, if the question were limited to the unchallenged and direct evidence of PW2 that he saw the appellant on the night of the armed robbery incident, there would be enough room to argue as the learned counsel for the appellant did that in this important respect, the evidence of PW1 contradicted that of PW2. To that extent little or no weight would be given to the evidence of identification of the appellant offered by PW2. However, the circumstances presented by the facts of the case become totally different if we are to proffer an answer to the wider question of whether the learned trial Judge was right to have relied on the evidence of identification/recognition of the appellant by PW1 and PW2 to hold that the prosecution proved the charges against the appellant beyond reasonable doubt. This is because in the words of section 9(b) of the Evidence Act 2011 there are other facts which by themselves or in connection with the fact of identification of the appellant by PW2 which make the identification of the appellant by PW2 probable in the circumstances of this case".**

He then enumerated the facts and circumstances which when considered together would support or buttress the reliance of the learned trial Judge on the evidence of identification/recognition of the appellant by PW1 and PW2 which are:

> **(i) PW1 and PW2 knew the appellant as their gateman before the armed robbery incident.**

(ii) PW2 gave evidence that he saw the appellant as the person who was outside with the dogs on the night of the robbery incident.

(iii) On the morning of the armed robbery incident PW1 (who earlier mentioned the name of the appellant to the police as a member of gang) spotted the appellant on the road.

(iv) The appellant on sighting PW1 took to his heels but PW1 held on to him and was arrested with the assistance of PW3 and another policeman.

(v) In the company of PW2 the appellant took them to their house where the Police met the 1st and 3rd accused.

(vi) In the presence of the appellant and the two accused persons the Police executed a search warrant and recovered a bag which amongst other things contained a toy gun which PW1 claimed was one of the items carted away from his house on the day of the robbery incident.

(vii) The defence of the appellant was that at the time of the incident he was in the house in company of the 1st accused.

(viii) Meanwhile, the evidence of PW1 and PW2 show clearly that the 1st and 3rd accused were amongst those vividly seen as those that came in to attack them on the night of the robbery.

The lower court considered the above listed circumstances and agreed with the learned trial Judge that the appellant was among the gang of robbers who attacked PW1 and his household on 1st February, 2008.

The appellant hid under the cover that he did not enter the main house and so could not have been sighted by PW1 or PW2. The legal position stated above that a Judge is permitted to infer from the facts proved and other facts necessary to complete the element of guilt or establish innocence is sound and sensible. Such evidence must be closely examined in order to be certain that there are no other co-existing circumstances which may weaken or destroy the inference. See: **Anekwe vs. The State (1976) 9-10 SC 255 at 264, Nasiru vs. State (1999) 2 NWLR(Pt. 589) 87; Ijioffor vs. State (2001) 9 NWLR (Pt. 718) 371.** Having found as a fact that the evidence of the prosecution positively led to the identification/recognition of the appellant, his defence of alibi failed.

The appellant admitted sleeping with the 1st accused on the night of 1st

February, 2008. Prior to the robbery the appellant was an employee of PW1 up to December, 2007. It was the appellant who informed the police of the whereabouts of the 1st and 3rd accused and he led the police to arrest them where Exhibit "B" was recovered. The dogs were familiar with the appellant and they stopped barking when they were attracted to the gate.

The appellant took to his heels when he saw PW1 in the morning following the robbery. If the appellant was not part of the robbery gang, how come he was able to know that they committed the robbery the night before and why was he running away from PW1 in the morning following the robbery? The inescapable inference to be drawn is that he was a member of the gang that carried out the robbery in the residence of PW1 on 1st February, 2008 and it was because of his familiarity with the dogs that made them not to bark when the gang invaded the residence of PW1 in the night of 1st February, 2008.

The 1st and 3rd accused were convicted with the appellant on 16th August, 2012 for armed robbery and sentenced to death by hanging and their appeals to Court of Appeal were dismissed on 16th May, 2014. Their further appeals to this Court in Appeal Nos. SC/ 382/2014 and SC. 383/2014 respectively were dismissed on 1st July, 2014. There are no extenuating circumstances to warrant allowing this appeal as the evidence adduced by the prosecution positively led to the identification/recognition of the appellant and the inference to be drawn clearly showed that the appellant was among those who entered the residence of PW1 on the night of 1st February, 2008 to carry out the robbery operation. If he did not participate in the robbery, he facilitated it by ensuring that the dogs did not attack the robbers or raise alarm by barking.

I find that there is no merit in the appeal and I accordingly dismiss it. I further affirm the judgment of the court below in appeal No. CA/AK/159C/2012 delivered on 16th May, 2014 which affirmed the conviction and sentence of the appellant by Adegbenro J. of Ondo State High Court. Appeal dismissed.

K. B. AKAAHS
Justice, Supreme Court

Counsel Appearing
Ayo Asala for the Appellant
Tunde Babalola (with him W.A. Adeniran and Dolapo Kehinde) for the respondent.

PETER-DOILI, (JSC): I agree that the appeal lacks merit as stated by my learned brother, Kumai Bayang Aka'ahs (JSC) and to show my support of the reasonings, I shall make some remarks.

This appeal is against the judgment of the Court of Appeal, Akure Division or the court below or lower court, delivered on the 16th day of May, 2014 affirming the decision of the High Court of Ondo State, Akure Judicial Divison delivered on the 16th day of August, 2012 convicting and sentencing the appellant to death by hanging on being found guilty and convicted for the offence of conspiracy to commit armed robbery and armed robbery.

FACTS

The appellant (2nd accused person) and two others were arraigned before the High Court of Ondo State upon a two count charge of conspiracy to commit armed robbery and armed robbery contrary to and punishable under Section 1(2) (a) of the Robbery and Fire Arms (Special Provisions) Act Cap R11 Vol. 14, the Laws of the Federal Republic of Nigeria 2004. The other accused persons in the sister appeals viz, Sc. 382/2014 and SC. 383/2014 had their appeals dismissed by this court as lacking in merit.

The appellant and the two others at the court of trial pleaded not guilty to the two count charge and the case proceeded to full trial. The prosecution called four witnesses while the appellant did not call any witness but testified in his own defence.

The following exhibits were tendered by the prosecution, viz:

(i) One stick – Exhibit A
(ii) One red toy gun – Exhibit B
(iii) One army-type jeans trouser – Exhibit C
(iv) One identity card belonging to Samuel Peace – Exhibit D
(v) Extra judicial Statement of the appellant as Exhibits 'F', and 'L'.
The prosecution also tendered the extra judicial statements of the other two accused persons as Exhibits E, G, K and M.
(vi) Ten photographs – Exhibits H – H9
(vii) Six negatives prints of photographs – Exhibits J – J5

A

At the close of the prosecution's case, the appellant testified in his defence. In line with his extra judicial statements to the Police (Exhibit F and L), the appellant in his oral evidence denied his involvement in the armed robbery incident. He
B maintained that he was never at the scene of the armed robbery incident, but that he was with the 1st accused person at his residence at the material time.

From the case put forward by the prosecution, the appellant was a former employee of the PW1, a High Court judge as a security guard and some injuries
C were inflicted on the PW1 and other members of the family and the house girl was raped. That the appellant took the police to where the other two accused persons were arrested.

The stance of the appellant was a denial of any involvement with the
D incident leading to the charge, conviction and sentence.

The fuller details of the facts have been well adumbrated in the lead judgment and so I shall leave the matter there save for reference to the facts when the occasion demands.

E On the 1st day of December, 2016, learned counsel for the appellant, Ayo Asala adopted the brief of the appellant filed on the 16/9/2014 in which he distilled two issues for determination which are thus:

F

1. Whether the lower court was right in affirming the decision of the learned trial judge that the prosecution led credible evidence of identification of the appellant as one of the armed robbers that attacked PW1 and Pw2.

G

2. Whether having regard to the circumstances and from the totality of the evidence on the record, the lower court was right in upholding the decision of the trial court that the prosecution proved the offences of conspiracy to rob and

H **armed robbery against the appellant beyond reasonable doubt.**

The respondent's brief of argument filed on 21/10/16 and deemed filed on the
I 1/12/16 was adopted by learned counsel, Tunde Baballa Esq. He also adopted the issues as crafted by the appellant.

I shall utilise the second issue as I am satisfied, it is sufficient in the determination of this appeal.

ISSUE TWO:

Whether having regard to the circumstances and from the totality of the evidence on the record, the lower court was right in upholding the decision of the trial court that the prosecution proved the offences of conspiracy to rob and armed robbery against the appellant beyond reasonable doubt.

Mr. Asala of counsel for the appellant contended that the concurrent findings of the lower courts in the identification/recognition of the appellant as one of the armed robbers that attacked PW1 and PW2 are perverse and not supported by the identification evidence. That the evidence fell short of the guiding principles: He cited **Ochiba vs. State (2012) All FWLR (Pt. 608) 849 at 871.**

That a court must be careful in accepting the evidence of a person who said he saw the offence being committed where the witness fails to mention the name of the culprit at the earliest opportunity and no satisfactory explanation proffered to explain the lapse. Learned counsel relied on the case of **Isah vs. State (2008) All FWLR (Pt. 443) 1243 at 1250.**

Learned counsel for the appellant said the failure to get the house girl to testify was fatal as she was a material witness. He cited **Okoro vs. State (1998) NWLR (Pt. 584) 181; Ogudo vs. State (2012) All FWLR (Pt. 629) 1111 at 1131.**

Also stated for the appellant is that the evidence of the wife of PW1 was crucial as she was a material witness and PW1 narrating what she told him was hearsay evidence and so a fatality to the prosecution's case has occurred with that failure. The cases of **Ekpo vs. State (2001) All FWLR (Pt. 55) 454 at 464 – 465; Ogudo vs. State (2012) All FWLR (Pt. 629) 1111 at 1131**.

That the evidence of PW2, the son of PW1 contrasted with PW1's evidence and so rendered the evidence unreliable and unusable.

Mr. Asala, learned counsel for the appellant stated that the prosecution failed to establish any of the essential ingredients of the offences charged. He cited **Yusuf vs. State (2008) All FWLR (Pt. 405) 1731.**

That the concurrent findings of the two lower courts are not borne out of the evidence before the court. He cited **Oguonzee vs. State (1998) 5 NWLR (Pt. 555) 521; Aruma vs. State (1990) 6 NWLR (Pt. 155) 125; Ekaiden vs. State (2012) All FWLR (Pt. 631) 1587 at 1614.**

Also that the charge was at variance with the evidence led and so the doubt

that ensues should be resolved in favour of the appellant. He cited **Raymond Nwokedi vs. Commissioner of Police (1977) All NLR 4; Aruna vs. State (1990) 6 NWLR (Pt. 155) 125 at 135.**

Mr. Asala of counsel concluded by stating that the prosecution's case was a complete fabrication and not sustainable as it was unnatural, impossible and against ordinary course of human behaviour for the appellant to carry out the operation as stated by the prosecution. He cited **Olayinka vs. State** (2007) All FWLR (Pt. 373) 163 at 178 Anekwe vs. State (1998) 1 ACLR 426 at 434.

For the respondent, Mr. Babalola of counsel submitted that the lower court was right in affirming the decision of the learned trial judge by relying on the evidence of identification/recognition of the appellant by PW1 and PW2 to hold that the prosecution proved the charges against the appellant beyond reasonable doubt.

That the fact that the wife of PW1 as well as the house girl were not called as witnesses cannot be considered prejudicial to the prosecution's case as the prosecution called other material witnesses to prove its case. That the crucial findings upon which the trial court convicted the appellant and which was affirmed by the lower court were borne out from the evidence on record and in accordance with the applicable principles of law. That cases of **Oforlette vs. The State (2000) FWLR (Pt. 12) 2081 at 2102, Akinmoju vs. Atele (2000) 4 SC (Pt. 1) 64** is relied upon.

Babalola Esq. of counsel submitted that the contradictions alluded to by the appellant were not material and substantial and would not affect the case of the prosecution adversely. He cited **Khaleel vs. State (1997) 8 NWLR (Pt. 156) 237 at 240; Henry Otiti vs. State (1991) 8 NWLR 103 at 108; Atano vs. State (2005) 4 ACLR 25 at 30.** He stated that the proof beyond reasonable doubt was effected by the prosecution. The case of **Adewale Joseph vs. State** (2011) 6 SCNJ 222 was relied on.

That the defence of alibi cannot stand in the face of the overwhelming evidence proffered by the prosecution. The case of **Fatilewa vs. State (2007) 5 ACLR 607** was referred to.

The stance of the appellant in the main is that the findings of the learned trial judge and affirmed by the court below were not supported by the totality of the evidence on record with the result that the appellant is deserving of a discharge and acquittal after this court allows the appeal and setting aside the decision of the lower court. The opposing stand of the respondent is that the

findings upon which the conviction of the appellant was based are supported by the evidence on record.

After reviewing what was before it on appeal, the court below per Owoade JCA stated thus:

> **"In the instant case, the following facts and circumstances do work together to support or buttress the reliance of the learned trial judge on the evidence of identification/ recognition of the appellant by PW1 and PW2. The issues are as follows:-**
>
> **(I) PW1 and PW2 knew the appellant before the armed robbery incident as their gateman.**
>
> **(II) PW2 gave evidence that he saw the appellant as the person who was outside with the dogs on the night of the armed robbery incident.**
>
> **(III) On the morning of the armed robbery incident PW1 (who earlier mentioned the name of the appellant to the police as a member of the gang) spotted the appellant on the road.**
>
> **(IV) The appellant on sighting PW1 took to his heels but was held on to and arrested by PW1 with the assistance of PW3 and one other policeman.**
>
> **(V) In the company of PW2 the appellant took the police to their house where the police met the 1st and 3rd accused persons.**
>
> **(VI) In the presence of the appellant and the other two accused persons the police executed a search warrant in the house of the appellant and the other two accused persons and recovered a bag which amongst other things contained a toy gun which PW1 claimed was one of the items carted away from his house on the day of the robbery incident.**
>
> **(VII) The defence of the appellant was that at the time of the incident he was in the house in company of the 1st accused.**
>
> **(VIII) Meanwhile, the evidence of PW1 and PW2 show clearly that the 1st and 3rd accused were amongst those vividly seen as those that came in to attack them on the night of the robbery".**

A His lordship went on further to state that:

> **"In all the above circumstances I do not think the learned trial judge was wrong to have held at page 131 of the record that: I accept all evidence direct and circumstantial backing up the**
B **involvement of the three accused persons in the armed robbery attack on PW1 and his household on 1st February 2008. I therefore find all the three guilty of the second count of the charge alleging armed robbery. His Lordship Owoade JCA stated**
C **further that "it is settled that a judge, is permitted to infer from the facts proved and other facts necessary to complete the element of guilt or establish innocence. Such evidence, must however be closely examined. The judge has to be certain that there are no**
D **other co-existing circumstances which may weaken or destroy the inference". See the case of Anekwe vs. The State (1976) 9 -10 SC 255 at 264.**

E On the issue of whether the identification of the accused appellant was properly made sufficient to link the appellant to the offences charged, it is to be said that it is settled law that identification evidence is such tending to show that the person charged with an offence is the same person who was seen committing the offence.
F The proof of such identification is beyond reasonable doubt. In the instant case PW2, Olujimi Akintoroye testified that he saw the 2nd accused now appellant when he peeped through the glass door in his evidence and stated that he had all the opportunity of knowing all that transpired as appellant had been their
G gatekeeper for about a year. Thus providing direct evidence.

Also PW1, Justice Akintoroye said he did not personally see appellant in person on the day of incident but that his wife did, while he (PW1) saw the 1st accused at the time of the attack which facts he mentioned to the police at the
H earliest opportunity. When these pieces of evidence are taken along the guide set out to avoid mistaken identity which guides are:

> **(a) Circumstances in which the eye-witness saw the suspect –**
I **whether it was in difficult conditions;**
> **(b) The length of time the witness saw the suspect or defendant whether in a glance or longer observation;**
> **(c) The opportunity of close observation;**

A **(d) Previous contact between the parties;**
(e) The lighting conditions.

Then it can be seen that the prosecution/respondent met the required standard that
B the identification was properly made beyond reasonable doubt. See **Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455 at 478 and 479; Ochiba vs. State (2012) All FWLR (Pt. 608) 849 at 871.**

All that should be done to provide a positive identification of the appellant
C was at play and therefore reliable in linking the appellant to the scene of crime and as a participant.

On what the prosecution should do to succeed in a charge or offence of conspiracy to rob and armed robbery, the ingredients of the offences are thus:

D

(a) That there was an agreement or confederacy, between the convict and others to commit the offence of robbery.
(b) That in furtherance of the agreement or confederacy, the
E **accused took part in the commission of the offence of robbery or series of robberies.**
(c) That the robberies or each of the robbery was an armed robbery. See Yusuf v State (2008) All FWLR (Pt. 405) 1731.

F

Another mode of proof of the offences being by circumstantial evidence and the prosecution proffered the evidence of the recovered toy gun exhibit B found in the bag kept in the appellant's room within 24 hours of the robbery and the toy gun
G belonged to PW1's son was a point which led irresistibly and unequivocally to the guilt of the appellant and there were no co-existing circumstances which weakened the inference that the appellant was part of the robbery gang.

See Offorlette vs. The State (2000) FWLR (Pt. 12) 2081 at 2102;
H **Akinmoju vs. Atete (2000) 4 SC (Pt.1) 64.**

The appellant had sought to impugn the evidence of the prosecution witnesses citing discrepancies, contradictions or conflict contending that they were sufficient to create reasonable doubt which should be resolved in favour of
I the appellant. The corresponding countering response is that there were no material contradictions on which such a favour could be granted the appellant and so the two court below were right to discountenance them. I have no difficulty in upholding what the two courts below did in that regard as they are in line with the

A cases **of Khaleel vs. State (1997) 8 NWLR (Pt. 156) 237 at 240, Henry Otti vs. State (1991) 8 NWLR page 103 at 108; Atano vs. State (2005) 4 ACLR page 25 at 30.**

Indeed the material elements of the charge against the appellant has been
B proved beyond reasonable doubt in line with Section 138(1) of the Evidence Act, 2011. It is to be reiterated that this standard of proof beyond reasonable doubt is not synonymous with proof beyond all doubt or all shadow of doubt. What it means is that the prosecution in establishing the guilt of the accused person within
C compelling and conclusive evidence which translates to a standard that is consistent with a high degree of probability. That is on display herein and there was no necessity for a host of witnesses as the witnesses who testified were vital and rendered crucial evidence that met the standard beyond reasonable doubt and
D that is enough. See **Adeweale Joseph vs. State (2011) 6 SCNJ 222 at 235.**

The appellant had put up a defence of alibi which was effectively demolished by the overwhelming and compelling evidence which pinned the appellant to the ccrime and so the trial court was right to have rejected the said
E alibi raised. See **Fatilewa vs. State (2007) 5 ACLR 607.**

From the foregoing and the better reasoning in the lead judgment, I see no reason to depart from what the concurrent findings and conclusions of the two courts below posit as I too find no merit in this appeal which I have no difficulty in
F dismissing.

I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

G

KEKERE-EKUN, (JSC): I have had a preview of the judgment of my learned brother, KUMAI BAYANG AKAAHS, JSC just delivered. His Lordship has exhaustively considered and resolved the two issues submitted for determination
H in this appeal. I adopt the reasoning and conclusion as mine. This is the third appeal arising from the decision of the Court of Appeal, Akure Division delivered on 16/8/2012, which affirmed the conviction and sentence of the appellant and two other accused persons by the High Court of Ondo State, Ondo Judicial
I Division for the offences of conspiracy and armed robbery. The convictions and sentences of the appellant's co-accused were upheld by this court in **Benjamin Friday vs. The State (2016) LPELR-40640 (SC)** and **Nelson Friday vs. The**

State (2016) LPELR – 40638 (SC).

In the instant case, learned counsel for the appellant has argued forcefully against the identification of the appellant as one of the robbers. However, there was overwhelming evidence implicating him in the commission of the offence. He was fixed at the scene of the robbery by PW2 who stated unequivocally that he saw the appellant, who had recently worked for them as a gateman, in their premises that night. PW1's evidence as to how he caught the appellant unawares within the estate where the offence was committed the following morning and how he was able to arrest him in spite of his attempt to flee on seeing him, was unshaken under cross-examination. PW2 also identified him as the person who was outside with the dogs. He testified that the appellant was the one who used to feed the dogs and therefore being used to him they did not attack during the robbery. It was also established in evidence that it was the appellant that led the Police to arrest his co-accused persons.

It is not in every case that an identification parade is necessary to identify a person accused of committing a crime. The question whether an accused person is properly identified as being one of those who committed the offence is a question of fact to be determined by the trial court on the evidence adduced for that purpose. See**: Ukpabi vs. The State (2004) 11 NWLR (Pt. 884) 439; Adeyemi vs. The State (1991) 2 NWLR (Pt. 170) 679.** In a case such as this where the evidence of PW2 was positive, cogent and unshaken under cross-examination, the learned trial Judge was entitled to rely on it along with other facts established by the prosecution in finding that the prosecution had proved its case beyond reasonable doubt. The court below was right to have affirmed those findings. The appellant now before us has not advanced any reasons to warrant this court to interfere with the concurrent findings of the two lower courts or to depart from its previous decisions in the two sister appeals.

Having fixed the appellant at the scene of crime and having regard to the totality of the evidence adduced by the prosecution, I agree with my learned brother Akaahs, (JSC) that this appeal is without merit.

I accordingly dismiss it and affirm the concurrent findings of the two lower courts.

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

CENTUS NWEZE, (JSC): My Lord Aka'ahs, JSC, obliged me with the draft of

the leading judgment just delivered now. I agree that, being wholly unmeritorious, this appeal should be dismissed.

Appeal dismissed. I abide by the consequential orders in the leading judgment.

Chima Centus Nweze
Justice, Supreme Court

EJEMBI EKO, (JSC): Three accused person, including the appellant herein, were arraigned before the Ondo State High Court on a two count charge of conspiracy to commit armed robbery and armed robbery contrary, respectively, to Section 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R11 Vol. 14 LFN, 2004. All the three were convicted, as charged, by the High Court.

The appellant's appeal to the court below was dismissed, hence this further appeal.

This appeal was argued on two issues, namely:

> **"(i) whether the lower court was right in affirming the decision of the learned trial judge that the prosecution led credible evidence of identification of the appellant as one of the armed robbers attacked PW.1 and PW.2?**
>
> **(v) Whether, having regards to the circumstances and from the totality of the evidence on the record, the lower court was right in upholding the decision of the trial court that the prosecution proved the offences of conspiracy to rob and armed robber against the appellant beyond reasonable doubt".**

I had the preview of the judgment just delivered by my learned brother, K.B. AKA'AHS, (JSC). The judgment represents my views in the appeal. Having nothing further and useful to add thereto I hereby adopt the judgment, including all the orders made therein. Consequently, I dismiss the appeal and affirm the judgment of the court below in the appeal **No. CA/AK/159^{C}/2012** delivered on 16th May, 2014, which also affirmed the conviction and the sentence of the appellant by the trial High Court of Ondo State in the charge **No. HOD/5^{C}/2008.**

Ejembi Eko,

MU'AZU ADAMU
AND
THE STATE

SC. 502/2012

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**

ACTION: Preliminary objection – Need to be disposed of before considering the substantive issues.

APPEAL: Brief – Whether proper issues for determination can be formulated from incompetent ground(s) of appeal

APPEAL: Ground of Appeal – What constitutes a valid ground of appeal.

APPEAL: Ground of Appeal outside the decision of the lower court – Whether such a ground of appeal goes to any issue.

APPEAL: Incompetent – Grounds of appeal – Validity of notice of appeal containing such grounds.

APPEAL: Incompetent – Grounds of Appeal – Whether any issue can properly be formulated therefrom.

APPEAL: New issues raised without leave – Whether such issues raised are competent.

APPEAL: Notice of appeal – Foundation and substratum of every appeal – Where there are defects therein – Whether jurisdiction of court is eroded.

APPEAL: Notice of Appeal – Undated notice of appeal – Competency of .

APPEAL: Notice of appeal – When incompetent – Liable to be struck out – Power to invoke – S.22 of the Supreme Court Act – To be excised only where there is a valid appeal.

APPEAL: Omnibus – Ground Limitations – Whether can be used to raise an issue of law.

COURT: Supreme Court – Power to invoke S.22 of the Supreme Court Act – Factors to be considered.

Issues for Determination

1. **That the three grounds of appeal contained in the undated notice of appeal initiating the appeal do not arise from or relate to the judgment of the Court of Appeal, which is appealed against.**
2. **The issue complained against in the third ground of appeal (issue of defective charge) was never canvassed before the trial court and the Court of Appeal, and no leave of this court was obtained before filing the said ground.**
3. **The notice of appeal filed on the 13th day of December was not dated as required by the rules of this court.**
4. **The appellant proliferated issues for determination when he elicits four issues for determination from the three grounds of appeal filed.**

Facts of the Matter

The appellant with one other were initially charged with offences of conspiracy to commit armed robbery and armed robbery before the trial court.

New charges of conspiracy to commit theft punishable under **Section 97(1) of the Penal Code Cap. 107 Laws of Jigawa State of Nigeria 1998** and Theft under

Section 288 of the same code were preferred against the appellant to replace the earlier charges of conspiracy to commit armed robbery and armed robbery. The new charges were read and explained to the appellant and he claimed to have understood the new charges and pleaded guilty to the new charges.

The learned trial judge summarily convicted the appellant on his plea of guilty and sentenced him to five years imprisonment after the allocutus. The trial court further held that since the convict had spent over five years in prison custody awaiting trial, it should be taken that he had already served the prison terms he was sentenced to and so he was ordered to be released from the prison custody as from the date of the judgment.

Appellant aggrieved appealed to the Court of Appeal challenging the conviction and sentence upon an undated Notice of Appeal.

The respondent raised a preliminary objection challenging the competence of the said notice of appeal and the entire appeal on the ground that the said notice of appeal offended the provision of **Order 16 Rule 3 (1)** and **(2)** of the **Court of Appeal Rules, 2007** in that the appellant's filed a joint notice of appeal instead of each filing his separate notice. Also that the appellants had already served their prison sentences before they even filed the appeal.

On the basis of the objection, the Court of Appeal dismissed the appeal of the appellants on the ground that the court lacked the jurisdiction to entertain the appeal on the merit.

Further dissatisfied, the appellant filed a notice of appeal of three grounds to the Supreme Court.

Held: *(Unanimously striking out the appeal).*

1. *The need to determine a preliminary objection before considering substantive issues*

   There is no gainsaying that this Preliminary Objection has to be first dealt with before anything can be done on the main appeal as the competence of the appeal is at the base of it and therefore the jurisdiction of the court to adjudicate is to be sorted out, whether the court has the vires or not. [G.E.C. vs Akande & Ors (2000) 18 NWLR (Pt. 1225) 596].
   (P 383 Paras A – B).

2. *Where there is defect in the notice of appeal the jurisdiction of the court is eroded*
The notice of appeal being the originating process of an appeal is the foundation and substratum of every appeal. Therefore any defect therein will render the whole appeal incompetent and that defect will oust or erode the jurisdiction of the court to entertain the appeal. To describe an undated notice of appeal as a minor defect that can be ignored would in my humble view be taking the powers of court on waivers too far as the situation would make the said process have undefined date. The basis for assuming jurisdiction by the court in this indeterminate process is in my view absent.[Uwazurike vs. A. G. Federation (2007) 8 NWLR (Pt. 1035) 1; Shelim vs.Gobang (2009) 12 NWLR (Pt. 1156) 435 at 453 454].
(P 386 Paras A – D).

3. *Where an appeal does not attack the ratio decidendi of a case.* **It is clear that the complaint before us here and now is outside the decision of the court below, from which this appeal has arisen. An appeal presupposes the existence of some decision appealed against and when that is not so, then there cannot be an appeal against what had not been decided against a party.**

Stated differently, a ground of appeal must be a complaint against the ratio decidendi of the judgment of a court below and so any ground of appeal which does not stem from that judgment appealed against is of no moment and goes to no issue. I place reliance on Babalola vs. State (1989) 4 NWLR (Pt. 115) 264 per Oputa JSC at page 294.

Recently this court per Onnoghen (JSC) (as he then was) had succinctly presented the situation as it is in the case of C.C.B. Plc vs. Ekperi (2007) 3 NWLR (Pt. 1022) 493 at page 509 paras C – E of the report thus:

> **"I therefore agree with the submission of learned counsel for the respondent that the complaint in the original sole ground of appeal contained in the Notice of Appeal does not relate to the decision of the Court of Appeal allegedly appealed against. It is clear that the sole ground of appeal does not arise from that judgment. It is settled law that for grounds of appeal to be valid and competent, they must be related to the decision being appealed against and**

should constitute a challenge to the ratio of the decision on appeal. It is still good law that where a ground of appeal as formulated does not arise from the judgment and purports to raise and attack an issue not decided by the judgment appealed against as is evident in the instant appeal, the same becomes incompetent and liable to be struck out". *(P 389 Paras C – I)*

Per Augie (JSC):

It is settled that a ground(s) of appeal must arise from the *ratio decidendi* of a decision appealed against and Issues formulated for the determination of the appeal must arise from grounds of appeal, which emanated from the decision appealed against – Ibigbami &Anor vs. Mil. Gov. Ekiti State *(2004) 4 NWLR (Pt. 863) 243* and Mohammed vs. State *(2000) 12 NWLR (Pt. 682) 596].*

In this case, the respondent is right that none of the said complaints relates to the decision of the court below appealed against. The court below restricted itself to the preliminary objection, and its decision was not based on issues raised, challenging the judgment of the trial court.

The law is that where a ground of appeal does not arise from the judgment appealed against, and purports to raise and attack an issue that was not decided by the judgment, the ground of appeal becomes incompetent and is liable to be struck out – **[C.C.B. Plc vs. Ekperi*(2007) 3 NWLR (Pt. 1022) 493 SC]*** *(P 395 Paras A – E).*

4. Where appellant raises new issues not decided at the lower court

As seen in the ground of appeal before this court, the appellant has raised brand new issues which were not raised and tackled in the Court of Appeal and this without leave of court. At this court, the complaint in the third ground of appeal has to do with the undated notice of appeal, an issue neither raised in the court of trial nor court below. Also, not raised at the trial court is the defective charge matter and no decision thereon was made either and the defective charge issue was not brought out in the complaint at the Court of Appeal. It falls to reason that I cannot veer off the reasoning of learned counsel for the respondent that the competence

of this appeal is imperiled in the absence of leave of court to raise these novel issues. See [Ogundare vs. Ogunlowo (1997) 6 NWLR (Pt. 509). VEEPEE Ind. Ltd. vs. Cocoa Ind. Ltd (2008) 13 NWLR (Pt. 1105) 486 at 513]. *(P 389 – 390 Paras I – C).*

5. *Where grounds of appeal do not arise from decision of the lower court*
The implication is that the two grounds 2 and 3 are incompetent and liable to be struck out. Assuming that striking out occurs, then this court is left with the omnibus ground and the question would then arise, if the first ground of appeal which is omnibus in nature can sustain the appeal. This court has cautioned on the use of an omnibus ground and its limitation.

In **Ben vs. State (2006) 16 NWLR (Pt. 1006) 582 at 602 to 603 paras H-A,** this court per Ogbuagu JSC held thus:

> **"It is now settled that an appeal predicated on the omnibus or of general ground is not at large. It cannot be used to raise an issue of law …. Such issue of law must be raised as a separate ground of appeal and made an adjunct to the omnibus ground of appeal".**

[F.M.H. vs. C.S.A. Ltd (2009) 9 NWLR (Pt. 1145) 193 at 209 paras F-G and Nwokidu vs. Okanu(2010) All FWLR (Pt. 522) 1633].
(P 390 Para C – G)

For emphasis the omnibus ground cannot be used to operate the challenge the appellant has thrown at this Court against the judgment of the Court of Appeal on such weighty issues on law. *(P 391 Paras D – D).*

6. *The omnibus ground of appeal*
Ground One is the omnibus ground of appeal in criminal appeals, which complains that the said verdict is unreasonable and cannot be supported having regard to the evidence, and presupposes there was a trial [Akinlagunvs. Oshoboja (2006) 12 NWLR (Pt. 993) 60], where this Court per Kalgo, JSC, explained as follows at page 82:

> "**An omnibus ground of appeal is a general ground of fact complaining against the totality of the evidence adduced at the trial. It is not against a specific finding of fact or any document.**

It cannot be used to raise any issue of law or error in law".

In this case, there was no trial; the Appellant pleaded guilty to the amended charge and was convicted summarily without any trial.

Ground One, which is an omnibus ground of appeal, is incompetent. *(P 394 Paras E – I).*

7. *Where a notice of appeal is not dated*

The appellant/respondent had asked for the court looking the other way on his undated notice of appeal and citing Order 9 Rule 3 (1) of the Rules of the Supreme Court in support. I am surprised at this submission and shall recast what is provided for in that Order and Rule as follows:

> **"…A notice of appeal shall be in the form prescribed in the First Schedule to these Rules and shall be signed by the appellant".**

The relevant Form referred to in the above quoted sub-rule was provided in the First Schedule to the Rules of this Court as Form 24. The said Form required each and every appellant to date his notice of appeal, if not; it would not have provided a place for dating it. The Form provides thus:

> **"Dated this …….. day of …… 19 ……..".**

This court had interpreted this Order 9 Rule 3 (1) of the rules of court in Uwazurike vs. A. G. Federation (2007) 8 NWLR (Pt. 1035) 1 at 19 & 25 to be that the provisions in the schedule are mandatory and not optional. Therefore, the appellant cannot anchor on the *proviso* to Order 9 Rule 3 (1) which gave power to this court to entertain an appeal despite the non-compliance with the *provision* of the said sub-rule as an open ended licence. *(Pp 390 – 391 Paras H – D).*

8. *The implication of absence of valid grounds of appeal in a notice of appeal.*

There is no point going into the matter of proliferation of issues, the last area of contest in this preliminary objection as there are no valid grounds of appeal in the first place from which an issue or issues could be distilled. The notice of appeal has no validity from all that I am laboring to put

across and therefore the jurisdiction of this court has not been agitated or ignited and it cannot operate without the necessary vires. Therefore, I have no difficulty in upholding the Preliminary Objection as there is no valid appeal before this court. *(P 391 Paras E – G).*

9. *Issues cannot be properly formulated from incompetent grounds of appeal*
In addition, where a ground of appeal is incompetent, any issue for determination based on the incompetent ground of appeal goes to no issue, and will be struck out as incompetent [Agbaka vs. Amadi&Anor*(1998) 7 SC (Pt. II) 18],*

Where Ogwuegbu,(JSC), added:

> **"An Issue for determination derives its support from the ground of appeal and cannot exist independent of the ground of appeal. It automatically collapses when the ground of appeal ceases to exist".***(P 395 Paras E – G).*

Per Augie (JSC):

In Babalola vs. The State *(1989) 4 NWLR (Pt. 115) 264 SC*, **cited by the respondent, where this court per Oputa, JSC, observed that:**

> **"An appeal presupposes the existence of some decision, appealed against. In the absence of such a decision on a point, there cannot possibly be an appeal against what had not been decided against a party".**

In this case, as my learned brother pointed out in the lead Judgment, there are no valid grounds of appeal from which any issue or issues could be distilled. The truth is that the notice of appeal is worthless".
(Pp 395 – 396 Paras G – A).

10. *Incompetent grounds*
A ground of appeal that is based on a non-existent or false premise is incompetent: [SPLINTERS (NIG.) LTD. vs. OASIS FINANCE LTD. (2013) 18 NWLR (pt. 1385) 188 at 213; ALAKIJA vs. ABDULAI (1998) 8

NWLR (pt. 552) 1 at 16- 17; IKEM vs. EZEANYA (2002) 4 NWLR (pt. 757) 245 AT 261].

The three (3) grounds of appeal do not, in any way, relate to the decision of the Court of Appeal. A valid ground of appeal must be related to the decision appealed and should constitute a challenge to the *ratio decidendi.* A ground of appeal is incompetent if it does not arise from the judgment appealed, but rather purports to raise and attack an issue not decided by the judgment appealed against. [C.C.B. PLC. vs. EKPERI (2007) 3 NWLR (pt. 1022) 493 at 509**].** *(P 398 Paras B – E).*

11. *Where a notice of appeal is incompetent*
The law is that a notice of appeal without a valid ground of appeal is incompetent and therefore liable to be struck out: [C.C.B.Plc vs. EKPERI (Supra)]. An incompetent Notice of Appeal renders the appeal incompetent: [ODOFIN vs. AGU (1992) 3 NWLR (pt. 229) 350; NWAEZE vs. EZE (1999) 3 NWLR (pt. 594) 410; ATUYEYE vs. ASHAMU (1987) 1 NWLR (pt. 49) 267; UWAZURIKE vs. A.G., (Fed.) (2007) 8 NWLR (pt. 1035) 1 at 77; AJUWA vs. S.P.D.C NIG. LTD. (2008) 10 NWLR (Pt. 1094) 64. *(P 398 Paras E – G).*

12. *The exercise of power under S.22 of the Supreme Court Act is predicated on a valid appeal.*
The Supreme Court can invoke the power vested on it by Section 22 of its enabling Act only if there is a valid appeal before it. This power can only be exercised *intra vires,* and not *ultra vires.*

To invoke the powers in Section 22 of the Supreme Court Act, a number of factors have to be considered. They *inter alia* include whether the real issue at the court below is capable of being distilled from the grounds of appeal, and whether the court below has the legal power to adjudicate in the matter before it, before this Court can entertain it.[INAKOJU vs. ADELEKE (2007) 4 NWLR (pt. 1025) 423; AMAECHI vs. INEC. (2008) 5 NWLR (pt. 1080) 227; AGBAKOBA vs. INEC. (2008) 18 NWLR (pt. 1119) 489 at 557 -558]. *(Pp 398 – 399 Paras I – D).*

Nigerian Cases Referred to in this Judgment

Agbaka vs. Amadi&Anor(1998) 7 SC (Pt. II) 18.
Agbakoba vs. INEC. (2008) 18 NWLR (pt. 1119) 489.
Ajuwa vs. SPDC NIG. LTD. (2008) 10 NWLR (Pt. 1094) 64.
Akinlogunvs. Oshonboja(2006) 12 NWLR (Pt. 993) 60,
Alakija vs. Abdulai (1998) 8 NWLR (pt. 552) 1;
Amaechi vs. INEC. (2008) 5 NWLR (pt. 1080) 227;
Atuyeye vs. Ashamu (1987) 1 NWLR (pt. 49) 267;
Babalola vs. State (1989) 4 NWLR (Pt. 115) 264.
Ben vs. State (2006) 16 NWLR (Pt. 1006) 582
C.C.B. Plc vs. Ekperi (2007) 3 NWLR (Pt. 1022) 493.
F.M.H. vs. C.S.A. Ltd (2009) 9 NWLR (Pt. 1145) 193
G.E.C. vs. Akande&Ors (2000) 18 NWLR (Pt. 1225) 596.
Ibigbami & Anorvs.. Mil. Gov. Ekiti State (2004) 4 NWLR (Pt. 863) 243
Ikem vs. Ezianya (2002) 4 NWLR (pt. 757) 245.
Inakoju vs. Adeleke (2007) 4 NWLR (pt. 1025) 423;
Mohammed vs. State (2000) 12 NWLR (Pt. 682) 596.
Nwaeze vs. Eze (1999) 3 NWLR (pt. 594) 410;
Nwokidu vs.Okanu (2010) All FWLR (Pt. 522) 1633.
Odofin vs. Agu (1992) 3 NWLR (pt. 229) 350;
Ogundare vs.Ogunlowo (1997) 6 NWLR (Pt. 509) 360;
Shelim vs.Gobang (2009) 12 NWLR (Pt. 1156) 435.
Splinters (Nig.) Ltd. vs. Oasis Finance LTD. (2013) 18 NWLR (pt. 1385) 188;
Uwazuruike vs. A. G. Federation (2007) 8 NWLR (Pt. 1035) 1.
Veepee Ind. Ltd. vs. Cocoa Ind. Ltd (2008) 13 NWLR (Pt. 1105) 4886.

Nigerian Statutes referred to in this Judgment

Court of Appeal Rules, 2007 – Or. 16 Rule 3(1) and (2)
Penal Code Cap. 107 Laws of JigawaSatte of Nigeria 1998 – S.97(1)
Supreme Court Act – S.22
Supreme Court Rules – Or. 9 Rule 3(1)

Representations

NELSON UZUEGBU for the appellant and with him is Ifeanyi Ogenyi.
SULEH UMAR for the respondent.

A **PETER-ODILI (JSC) (Delivering the lead judgment):** The appellant with one other were initially charged with offences of conspiracy to commit armed robbery and armed robbery before the trial court.

New charges of conspiracy to commit theft punishable under **Section 97(1**
B **ofthe Penal Code Cap. 107 Laws of Jigawa State of Nigeria 1998** and Theft under **Section 288** of the same code were preferred against the appellant to replace the earlier charges of conspiracy to commit armed robbery and armed robbery. The new charges were read and explained to the appellant and he
C claimed to have understood the new charges and pleaded guilty to the new charges.

The learned trial judge summarily convicted the appellant on his plea of guilty and sentenced him to five years imprisonment after the allocutus. The trial
D court further held that since the convict had spent over five years in prison custody awaiting trial, it should be taken that he had already served the prison terms he was sentenced to and so he was ordered to be released from the prison custody as from the date of the judgment.

E Appellant aggrieved appealed to the Court of Appeal challenging the conviction and sentence upon an undated notice of appeal.

The respondent raised a preliminary objection challenging the competence of the said Notice of Appeal and the entire appeal on the ground that
F the said Notice of Appeal offended the provision of **Order 16 Rule 3 (1)** and **(2)** of the **Court of Appeal Rules, 2007** in that the appellants' filed a joint Notice of Appeal instead of each filing his separate Notice. Also that the appellants had already served their prison sentence before they even filed the appeal.

G On the basis of the objection, the Court of Appeal dismissed the appeal of the appellants on the ground that the court lacked the jurisdiction to entertain the appeal on the merit.

Further dissatisfied, the appellant filed a Notice of Appeal of three grounds
H to the Supreme Court.

On the 17th November, 2016 date of hearing, Nelson Uzuegbu Esq. of counsel for the appellant adopted the appellant's brief filed on the 28/3/2013 and a Reply Brief of the 27/5/2013. The appellant distilled four issues for
I determination and they are as follows:

> **1. Whether the Court of Appeal was right when it held that conviction of the appellant and his sentencing could stand**

when the charge was neither interpreted/explained to him in the language he understand (Hausa). This raised from Ground 2.

2. **Whether Court of Appeal was right to uphold the conviction of the appellant upon a charge which was defective. This arises from Ground 3.**
3. **Whether the belated reference to Section 288 of the Penal Code at the stage of conviction cured the defect in the charge and supports the conviction and subsequent sentencing of the appellant. This issue arises from Grounds 1 and 3 of the notice of appeal.**
4. **Whether despite the defective charge and manifest irregularities and none compliance with the procedures in criminal law the decision of the Court of Appeal was justified notwithstanding that the appellant had served his sentence. This is drawn from Ground 1 of the Notice of Appeal.**

Suleh Umar, Director of Civil Litigation of the Ministry of Justice, Sokoto State for the respondent adopted its brief of argument filed on 6/5/2013 and in it argued the preliminary objection filed on the 6th day of May, 2013 challenging the competence of the appeal praying for the striking out of the appeal.

The grounds upon which the preliminary objection was based, run thus:

5. **That the three grounds of appeal contained in the undated notice of appeal initiating the appeal does not arise from or relate to the judgment of the Court of Appeal, which is appealed against.**
6. **The issue complained against in the third ground of appeal (issue of defective charge) was never canvassed before the trial court and the Courts of Appeal, and no leave of this court was obtained before filing the said ground.**
7. **The notice of appeal filed on the 13th day of December was not dated as required by the rules of this court.**
8. **The appellant proliferated issues for determination when he elicits four issues for determination from the three grounds of appeal filed.**

There is no gainsaying that this preliminary objection has to be first dealt with before anything can be done on the main appeal as the competence of the appeal is at the base of it and therefore the jurisdiction of the court to adjudicate is to be sorted out, whether the court has the vires or not. See **G.E.C. vs. Akande&Ors (2000) 18 NWLR (Pt. 1225) 596.**

PRELIMINARY OBJECTION

Arguing the position of the respondent/objector, learned counsel contended that the court below did not consider and review, the judgment of the learned trial judge rather the appellate justices restricted themselves to the preliminary objection of the respondent in deciding the appeal before them.

That their findings and decision were based on the issues raised in the preliminary objection not on the issues raised challenging the judgment of the trial court. He referred to the three Grounds of Appeal at the Court of Appeal.

He stated further for the objector that a careful look at the three Grounds of Appeal will disclose that none of them is challenging the decision of the court below. That the first ground being the omnibus was concerned with the amended charge and evidence available before the trial court and the second ground complaining of failure to explain and interpret the charge to the appellant when he was tried and convicted by the trial court. That the third ground of appeal was on the complaint of convicting the appellant on the defective charge.

For the objector, it was stated that none of the above complaints in the grounds of appeal qualify as complaints against the ratio decidendi of the decision of the trial court appealed against and so the grounds go to no issue. He cited **Babalola vs. State (1989) 4 NWLR (Pt. 115) 264 at 294.**

That those grounds being incompetent should be struck out. The case of **C.C.B. Plc vs.Ekperi (2007) 3 NWLR (Pt. 1022) 393 at 509,** was relied on.

Mr. Umar of counsel for the respondent/ objector submitted that the appellant did not seek and obtain the leave of this court before filing the third ground of appeal which he argued in his brief of argument. That the leave of this court not having been obtained before the raising and arguing without the leave of this court, the issue as a nullity. He cited **Ogundare vs. Ogunlowo (1997) 6 NWLR (Pt. 509) 360 at 368; Dabo vs. Abdullahi (2005) 7 NWLR (Pt. 923) 181 at 200; Kuusu vs. Udom (1990) 1 NWLR (Pt. 127) 421 at 431.**

He submitted further that the complaint in the third ground of appeal of the undated notice of appeal of the appellant was neither raised nor decided upon by

both the trial court and the court below. That there was no challenge on the defective charge at the court below and it cannot now be raised without leave having been obtained. Also, that the two other grounds in the court below were issues that did not come up at the trial and since no leave was obtained before they were raised would come to naught. He cited **Veepee Ind. Ltd vs. Cocoa Ind. Ltd (2008) 13 NWLR (Pt. 1105) 486 at 513; Lagga vs. Sarhuna (2008) 16 NWLR (Pt. 1114) 427 at 482.**

That the rations decidendi of the court below cannot be challenged via an omnibus ground as rations decidendi were purely issues of law. He cited **Ben vs. State (2006) 16 NWLR (Pt. 1006) 582 at 602 603 etc.**

That the failure of the appellant to date his notice of appeal rendered the said notice incompetent. He cited **Order 9 Rule 3(1) of the Rules of the Supreme Court.** Also that the appellant raised four issues out of three grounds of appeal which is not allowed. He cited **Oriji vs. State(2008) 10 NWLR (Pt. 1094) 31 at 43; Nwankwo vs. Yar'adua (2010) All FWLR(Pt. 534) 1 at 19 etc.**

The objector stated that where a party fails to complain in an appeal against a decision, having not appealed that decision, he is deemed to have accepted the decision made. He referred to **Michael vs. State** (2008) 13 NWLR (Pt. 1104) 361 at 3776; **Onafowokan vs.Wema Bank Plc** (2011) All FWLR (Pt. 585) 201 at 225 etc.

In response, learned counsel for the appellant and respondent to the preliminary objection submitted that it is evident that the lower court did not hear the appellant's appeal on its merit and had failed to consider the fundamental issues raised before them by the appellant and so this court should pursuant to **Section 22** of the **Supreme Court Act, 1990** amend the defect or error and determine the real question in controversy in the appeal. That the appellant's complaint as contained in the four grounds of appeal before this court arose from issues raised by the appellant in the lower court on which that court refused or failed to take the appropriate decision. He relied on **Yusufu vs.Obasanjo** (**2003) FWLR (Pt. 185) 507 at 547; Ediaghonya vs. Dumes (Nig.) Ltd(1986) 13 NWLR (Pt. 31) 753.**

It was contended that the none dating of the Notice of Appeal did not render the process incompetent since it was duly filed at the Registry of the Court below as required by law. He cited **Order 8 Rule 2(1), (2) and (3) of the Supreme Court Rules, 1990 and also Order 9 Rules (3) (1).**

In brief the stance of the Objector is that this court should strike out the three grounds of appeal filed by the appellant together with the undated notice of appeal and then strike out the whole appeal as there is no competent notice of appeal before the court.

The appellant/respondent conceded that position of the objector contending that it is good and decent practice to date a process for filing before a court of law and so having substantially complied with the requirements of the law, a notice of appeal should not be summarily thrown out because of a mere omission to date it. That it is a minor lapse or non-compliance and that this court should apply **Order 9 Rule 3 (1)** of the **Supreme Court Rules** to this situation. That **Order 8 Rules 2(1),(2)** and **(3)** of the Rules of this court did not make dating as part of the contents and mandatory requirement of a Notice of Appeal.

I shall recast the said provisions of **Order 8 Rules 2 (1), (2) & (3)** of Rules of the Supreme Court thus:

The said Order 8, Rule 2 (2) & (3) of this Rules of this court provides that:

> **"All appeals to the Supreme Court shall be by way of rehearing and by notice of appeal filed in the registry of the Court of Appeal which shall set forth the grounds of appeal, state whether the whole or part only of the decision of the Court of Appeal is complained of, in the later case specifying such part; and state also the exact nature of the reliefs sought and the names and address of all parties directly affected by the appeal. The notice shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service.**

Rules 2 and 3 of the said order is stated as follows:

> **"Rule 2:where a ground of appeal alleges misdirection or error in law, the particulars and nature of the misdirection or error shall be clearly stated".**

> **"Rule 3: The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to**

rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively".

For a fact, the notice of appeal being the originating process of an appeal is the foundation and substratum of every appeal. Therefore any defect therein will render the whole appeal incompetent and that defect will oust or erode the jurisdiction of the court to entertain the appeal. To describe an undated Notice of Appeal as a minor defect that can be ignored would in my humble view be taking the powers of court on waivers too far as the situation would make the said process undefined date. The basis for assuming jurisdiction by the court in this indeterminate process is in my view absent. See **Uwazuruike vs. A. G. Federation (2007) 8 NWLR (Pt. 1035) 1; Shelim vs. Gobang (2009) 12 NWLR (Pt. 1156) 435 at 453 – 454.**

At the court below the appellant had appealed on three grounds of appeal which are quoted hereunder without particulars, viz:

"GROUNDS OF APPEAL

Ground 1 (sic)

The decision of the learned justices of the Court of Appeal is unwarranted, unreasonable and cannot be supported having regard to the amended charge read to the accused person and evidence available at the trial.

Ground 2:

The learned justices of the Court of Appeal erred in law when they upheld the conviction of the appellant despite submission by counsel that the charges were not explained/interpreted to the appellant in the language he understands (in this case Hausa) or at all before the trial court took his plea.

Ground 3:

The learned justices of the Court of Appeal erred in law when they dismissed the appeal of the appellant despite the submissions of the appellant's counsel on the defective nature of the charges upon which the appellant was convicted.

Ground 4:
Further grounds of appeal will be filed when the record of proceeding is made available to the appellants".

At the court below the respondent had raised a preliminary objection on the grounds that the appeal offended the provisions of **Order 16 Rule 3 (1)** and **(2)** of the **Court of Appeal Rules, 2007** in that the appellant filed a joint notice of appeal instead of each filing his separate notice. Also that the appellant had already concluded his service of the prison sentence before setting out on the appeal.

That Appeal Court in a judgment anchored by Aboki JCA, dismissed the appeal on the ground of a lack of jurisdiction, upholding the preliminary objection pursuant to **Order 16 Rule 3 (1)** and **(2)** of the **Court of Appeal Rules, 2007** and also that embarking on the appeal was an academic exercise, a journey not for a court of law.

Interestingly, the appellant has come before this court with an undated notice of appeal containing three grounds of appeal.

GROUNDS OF APPEAL:
Ground 1:
The decision of the learned justices of the Court of Appeal is unwarranted, unreasonable and cannot be supported having regard to the amended charge read to the accused persons and evidence available at the trial.

Ground 2:
The learned Justices of the Court of Appeal erred in law when they upheld the conviction of the appellant despite submissions by counsel that the charges were not explained/interpreted to the appellant in the language he understands (in this case Hausa) or at all before the trial court took his plea.

Particulars:
a) There is nothing on record to show that the charges were read or explained to the appellant in Hausa language, the only language he understands, before his plea was taken and he was tried and convicted and sentenced.

b) The proceedings were not interpreted to the appellant though he is an illiterate thereby rendering the whole proceedings at the trial court a nullity and in breach of his constitutional right.

c) The learned justices of the Court of Appeal ought to in the circumstances have allowed the appeal.

Ground 3:

The learned justices of the Court of Appeal erred in law when they dismissed the appeal of the appellant despite the submissions of the appellant's counsel on the defective nature of the charges upon which the appellant was convicted.

Particulars:

a) The charge against the appellant did not disclose an offence known to law.

b) The punishment imposed on the appellants was not prescribed in the section of the Penal Code on which the trial court relied in sentencing the appellants.

c) The charge did not specify the penal section prescribing the punishment to which the accused may be liable the belated reference to Section 288 of the Penal Code (which did not appear on the charge sheet cannot cure the defect in the charges.

d) The learned justices of the Court of Appeal ought in the circumstances to have allowed the appeal.

Ground 4:

Further grounds of appeal will be filed when the record of proceedings is made available to the appellants."

The appellant sought the two reliefs recast hereunder, viz:

RELIEFS SOUGHT FROM THE SUPREME COURT

1. AN ORDER allowing this appeal and setting aside the said judgment of the Court of Appeal.

A 2. AN ORDER setting aside the conviction of the appellant and substitution therefore an Order discharging and acquitting the appellant.

On the face of the notice of appeal to this court, it can be seen that there is nothing
B challenging the findings or decision of the Court of Appeal, rather the complaint before this court is the failure to explain and interpret the charge to the appellant when he was tried and convicted by the trial court. The third ground of appeal has to do with the convicting of the appellant on a defective charge.

C It is clear that the complaint before us here and now is outside the decision of the court below, from which this appeal has arisen. An appeal presupposes the existence of some decision appealed against and when that is not so, then there cannot be an appeal against what had not been decided against a party.

D Stated differently, a ground of appeal must be a complaint against the ratio decidendi of the judgment of a court below and so any ground of appeal which does not stem from that judgment appealed against is of no moment and goes to no issue. I place reliance on **Babalola vs. State (1989) 4 NWLR (Pt. 115) 264**
E **per Oputa(JSC) at page 294.**

Recently this court per **Onnoghen (JSC)** (as he then was) had succinctly presented the situation as it is in the **case of C.C.B. Plc vs. Ekperi (2007) 3 NWLR (Pt. 1022) 493 at page 509 paras C – E** of the report thus:

F

> **I therefore agree with the submission of learned counsel for the respondent that the complaint in the original sole ground of appeal contained in the notice of appeal does not relate to the decision of the**
> G **court of appeal allegedly appealed against. It is clear that the sole ground of appeal does not arise from that judgment. It is settled law that for grounds of appeal to be valid and competent, they must be related to the decision being appealed against and should constitute a**
> H **challenge to the ratio of the decision on appeal. It is still good law that where a ground of appeal as formulated does not arise from the judgment and purports to raise and attack an issue not decided by the judgment appealed against as is evident in the instant appeal, the same**
> I **becomes incompetent and liable to the struck out".**

As seen in the Ground of Appeal before this court, the appellant has raised brand new issues which were not raised and tackled in the Court of Appeal and this

without leave of court. At this court, the complaint in the third ground of appeal has to do with the undated notice of appeal, an issue neither raised in the court of trial nor court below. Also, not raised at the trial court is the defective charge matter and no decision thereon was made either and the defective charge issue was not brought out in the complaint at the Court of Appeal. It falls to reason that I cannot veer off the reasoning of learned counsel for the respondent that the competence of this appeal is imperiled in the absence of leave of court to raise these novel issues. See **Ogundare vs.Ogunlowo (1997) 6 NWLR (Pt. 509).** Also see **VEEPEE Ind. Ltd. vs. Cocoa Ind. Ltd (2008) 13 NWLR (Pt. 1105) 486 at 513.**

The implication is that the two grounds 2 and 3 are incompetent and liable to be struck out. Assuming that striking out occurs, then this court is left with the omnibus ground and the question would then arise, if the first ground of appeal which is omnibus in nature can sustain the appeal. This court has cautioned on the use of an omnibus ground and its limitation and thus this court in:

In **Ben vs. State (2006) 16 NWLR (Pt. 1006) 582 at 602 to 603 paras H-A,** this court per **Ogbuagu JSC** held thus:

> **"It is now settled that an appeal predicated on the omnibus or of general ground is not at large. It cannot be used to raise an issue of law …. Such issue of law must be raised as a separate ground of appeal and made an adjunct to the omnibus ground of appeal".**
>
> **See also the following cases: F.M.H. vs. C.S.A. Ltd (2009) 9 NWLR (Pt. 1145) 193 at 209 paras F-G and Nwokidu vs.Okanu(2010) All FWLR (Pt. 522) 1633.**

The appellant/respondent had asked for the court looking the other way on his undated notice of appeal and citing **Order 9 Rule 3 (1)** of the Rules of the Supreme Court in support. I am surprised at this submission and shall recast what is provided for in that order and rule as follows:

> **"……A notice of appeal shall be in the form prescribed in the First Schedule to these Rules and shall be signed by the appellant".**

The relevant form referred to in the above quoted sub-rule was provided in the First Schedule to the Rules of this court as Form 24. The said Form required each and every appellant to date his notice of appeal, if not it would not have provided a place for dating it. The form provides thus:

"Dated this …….. day of …… 19 ……..".

This court had interpreted this **Order 9 Rule 3 (1)** of the rules of court in **Uwazuruike vs. A. G. Federation (2007) NWLR (Pt. 1035) 1 at 19 & 25** to be that the provisions in the schedule are mandatory and not optional. Therefore, the appellant cannot anchor on the *proviso* to **Order 9 Rule 3 (1)** which gave power to this court to entertain an appeal despite the non-compliance with the *provision* of the said sub-rule as an open ended licence.

For emphasis the omnibus ground cannot be used to operate the challenge the appellant has thrown at this court against the judgment of the Court of Appeal on such weighty issues on law.

There is no point going into the matter of proliferation of issues, the last area of contest in this preliminary objection as there are no valid grounds of appeal in the first place from which an issue or issues could be distilled. The notice of appeal has no validity from all that I am laboring to put across and therefore the jurisdiction of this court has not been agitated or ignited and it cannot operate without the necessary vires. Therefore, I have no difficulty in upholding the preliminary objection as there is no valid appeal before this court. The notice of appeal is hereby struck out.

Mary Ukaego Peter-odili
Justice, Supreme Court

(I.T. MUHAMMAD, (JSC): I read in advance the lead judgment just delivered by my learned brother, Peter-Odili, (JSC). I am in agreement with my lord that the preliminary objection is meritorious. I sustain the Preliminary Objection and strike out the appeal. I abide by all other orders made in the leading judgment.

Ibrahim Tanko Muhammad,
Justice, Supreme Court.

OLUARIWOOLA, (JSC): I had the preview of the draft of the lead judgment just delivered by my learned brother, **Peter-Odili, (JSC).** I am in agreement with the reasoning that led to the conclusion that the preliminary objection succeeds and the Notice of Appeal should be struck out. It is accordingly struck out by me.

Notice of Appeal is struck out.

Olu Ariwoola
Justice, Supreme Court

AUGIE, (JSC): I have had a preview of the Judgment just delivered by my learned brother – **Peter-Odili, (JSC),** and I agree with him that the preliminary objection raised by the respondent, must be upheld by this court.

At the trial court, the appellant pleaded not guilty to the initial charge of conspiracy to commit armed robbery and armed robbery. The prosecution called one witness before the charge was amended. He pleaded guilty to the new charges of conspiracy to commit theft and theft, and was summarily convicted. The trial court sentenced him and other co-accused to "*5 years imprisonment to be from March 1998 when they were first detained under prison custody".*

The trial court took into consideration the fact that they had been in prison custody for over the said 5 *years,* and added that*:*

> **They are – considered as having served the punishment imposed on them. This court hereby directed (sic) that they are as from today free men and women of this country can move as free (sic). They should be considered as free men from today the 16/1/2003.**

They filed a joint notice of appeal at the Court of Appeal challenging their conviction and the said sentence. The respondent challenged the competency of their appeal on the following two **Grounds:**

(1) The appeal of the appellants/respondents is essentially academic, as the appellants have served their prison sentences.

(2) The notice of appeal of the appellants offends the provisions of Order 16, Rule 3(1) & (2) of the Court of Appeal Rules, 2007.

In its judgment of **14/6/2012,** the court below, relying upon **Amanchukwu vs. FRN (2009) 8 NWLR (Pt. 1144) 475,** held as follows:

> **In view of the fact that the appellants had already served and completed their prison term pronounced upon by the learned trial judge since *16/1/2003,* I am of the opinion that to hear and determine this appeal would be akin to embarking upon an academic exercise devoid of any utilitarian value. More so, the compelling and binding judgment of the apex court quoted above has left me with no other option than to dismiss the appeal.**

As regards the second ***Ground of Objection,*** it explained as follows:

> **What Order 16, Rule 3(1) and (2) envisages is that an appellant aggrieved with the judgment delivered by a trial court shall file his or her own separate and distinct notice of appeal. The said order neither expressly provides nor impliedly contemplates the filing of a joint notice of appeal by 2 or more appellants. In conclusion, as the foundation of the notice of appeal has successfully been challenged by the respondent, I shall not hesitate to dismiss this appeal for lack of jurisdiction, and it is accordingly dismissed.**

The appellant has appealed to this court with a notice of appeal containing three Grounds of Appeal, which complain as follows

1. **The decision of the learned justices of the Court of Appeal is unwarranted, unreasonable and cannot be supported having regard to the amended charge read to the accused persons and evidence available at the trial.**
2. **The learned justice of the Court of Appeal erred in law when they upheld the conviction of the appellant despite submissions by counsel that the charges were not explained/ interpreted to the appellant in the language he understands (in this case Hausa) or at all before the trial court took his plea.**

A **3. The learned justices of the Court of Appeal erred in law when they dismissed [his] appeal despite the submission of the appellant's counsel on the defective nature of the charges upon which [he] was convicted.**

B

The respondent challenged the competency of this appeal; it urged this court to strike out this appeal on the following **Grounds:**

C **1. That the three Grounds of Appeal contained in the undated notice of appeal initiating the appeal does not arise from or relate to the judgment of the Court of Appeal, which is appealed against.**

2. The issue complained against in the third Ground of Appeal (issue of
D **defective ground) was never canvassed before the Court of Appeal, and no leave was obtained before filing the said Ground.**

3. The notice of Appeal filed on the 13th day of December (sic) was not dated as required by this rules of this court.

E **4. The appellant proliferated issues for determination when he elicits four issues for determination from the three Grounds of Appeal.**

Ground One is the omnibus ground of appeal in criminal appeals, which
F complains that the said verdict is unreasonable and cannot be supported having regard to the evidence, and presupposes there was a trial – see **Akinlogun vs. Oshonboja(2006) 12 NWLR (Pt. 993) 60,** where this court per Kalgo, JSC, explained as follows at page 82:

G

An omnibus ground of appeal is a general ground of fact complaining against the totality of the evidence adduced at the trial. It is not against a specific finding of fact or any document.
H **It cannot be used to raise any issue of law or error in law.**

In this case, there was no trial; the appellant pleaded guilty to the amended charge and was convicted summarily without any trial.

I Ground one, which is an omnibus ground of appeal, is incompetent.

The second ground of appeal complains that the court below erred in law when it upheld his conviction despite submission by his counsel that the charges were not explained/interpreted to him in a language he understands [Hausa]

before the trial court took his plea. The third Ground of Appeal is that it erred in dismissing the appeal despite submission relating to the defective nature of the charges.

It is settled that a ground(s) of appeal must arise from the *ratio decidendi* of a decision appealed against and Issues formulated for the determination of the appeal must arise from grounds of appeal, which emanated from the decision appealed against – see **Ibigbami & Anor vs. Mil. Gov. Ekiti State (2004) 4 NWLR (Pt. 863) 243 and Mohammed vs. State (2000) 12 NWLR (Pt. 682) 596.** In this case, the respondent is right that none of the said complaints relates to the decision of the court below appealed against. The court below restricted itself to the preliminary objection, and its decision was not based on issues raised, challenging the Judgment of the trial court.

The law is that where a ground of appeal does not arise from the judgment appealed against, and purports to raise and attack an issue that was not decided by the judgment, the ground of appeal becomes incompetent and is liable to the struck out – see **C.C.B. vs. Ekperi (2007) 3 NWLR (Pt. 1022) 493 SC,** cited by the respondent.

In addition, where a ground of appeal is incompetent, any issue for determination based on the incompetent ground of appeal goes to no issue, and will be struck out as incompetent – see **Agbaka vs. Amadi & Anor(1998) 7 SC (Pt. II) 18,** where **Ogwuebu, (**JSC), added:

> **An Issue for determination derives its support from the ground of appeal and cannot exist independent of the ground of appeal. it automatically collapses when the ground of appeal ceases to exist.**

See also **Babalola vs. The State (1989) 4 NWLR (Pt. 115) 264 SC,** cited by the respondent, where this court per **Oputa**, JSC, observed that:

> **An appeal presupposes the existence of some decision, appealed against. In the absence of such a decision on a point, there cannot possibly be an appeal against what had not been decided against a party.**

In this case, as my learned brother pointed out in the lead judgment, there are no valid grounds of appeal from which any issue or issues could be distilled. The truth is that the notice of appeal is worthless.

It is for this and other reasons in the lead judgment that I also uphold the respondent's preliminary objection. The three grounds of appeal in the notice of appeal filed in this court are incompetent, and they are struck out. The notice of appeal itself is also struck out.

Amina AdamuAugie,
Justice, Supreme Court

EKO, (JSC): The appellant and one other had been on remand for 5 years. On 18th January, 2003, the original charge was amended and they each pleaded guilty to the two count charge of conspiracy to steal and attempted theft. They were represented by counsel, Ibrahim M. Dabi, who, upon their plea of guilt pleaded that the trial court, in the sentencing order should,

"consider the duration spent by the convicts in detention".

The learned trial Judge, moved by this plea of mitigation by the defence counsel, sentenced each of the duo "to 5 years imprisonment to be from March 1998 when they were first detained under prison custody". Against this apparent consent judgment the two, including the Appellant herein, counselled by one Kabiru G. Isa, Esq., a legal practitioner, filed a joint notice of appeal. They were appealing as of right contrary to the express provisions of **Section 241(1)(c)** of the **1999 Constitution** that provides that nothing in this section conferring the right of appeal, as of right, from the first instance judgment of the High Court, shall confer any right of appeal, without leave of the High Court of the Court of Appeal, on a party to appeal a decision of the High Court made with the consent of the parties. By virtue therefore of **Section 241(2)(c)** of the **1999 Constitution** a party who consents to a judgment of a High Court can not appeal the said consent without leave of court first sought and granted.

At the Court of Appeal, sitting at Kaduna, a preliminary objection challenging the competence of the joint notice of appeal of the appellants, including the appellant herein, was raised on two grounds, namely:

"whether this appeal, as constituted, is competent and not an academic exercise".

The fate of the appeal was decided solely on the preliminary objection. The unanimous decision of the Court of Appeal delivered on 14th June, 2012 upheld the preliminary objection on two grounds namely:

"1. That the appellants, having served the term of prison sentence imposed on them by the trial court, the appeal had become academic and therefore devoid of any utilitarian value; and

2. That by virtue of Order 16 Rule 3(1) of the Court of Appeal Rules, 2007 a joint notice of appeal by the two convicts/appellants was incurably defective, as the provision envisaged that every convict aggrieved by his conviction shall file his separate and distinct notice of appeal.

Holding therefore that "the foundation of the notice of appeal has been successfully challenged by the respondent", the Court of Appeal "dismissed" the appeal. It is against this decision that the appellant herein had further appealed vide their notice of appeal on 14th July, 2012.

There are three (3) grounds of appeal, which shorn of their particulars are as follows:

"1. The decision of the learned justices of the Court of Appeal is unwarranted, unreasonable and can not be supported having regards to the amended charge read to the accused persons and evidence at the trial;

2. The learned justices of the Court of Appeal erred in law when they upheld the conviction of the appellant despite submissions by counsel that the charges were not explained/ interpreted to the appellant in the language he understands (in this case: Hausa) or at all before the trial court took his plea;

A **3. The learned justices of the Court of Appeal erred in law when they dismissed despite the submissions of the appellant's counsel on the defective nature of the charges upon when the appellant was convicted".**

B

Neither of these 3 grounds of appeal attacks the two bases as *ratiodecidendi*on which the decision of the Court of Appeal was predicated. A ground of appeal that is based on a non-existent or false premise is incompetent: See **SPLINTERS**
C **(NIG.) LTD. vs. OASIS FINANCE LTD. (2013) 18 NWLR (pt. 1385) 188 at 213; ALAKIJA vs. ABDULAI (1998) 8 NWLR (pt. 552) 1 at 16- 17; IKEM vs. EZIANYA (2002) 4 NWLR (pt. 757) 245 at 261.** The three (3) grounds of appeal do not, in any way, relate to the decision of the Court of Appeal. A valid
D ground of appeal must be related to the decision appealed and should constitute a challenge to the *ratio decidendi.* A ground of appeal is incompetent if it does not arise from the judgment appealed, but rather purports to raise and attack an issue not decided by the judgment appealed against. See **C.C.B. PLC. vs. EKPERI**
E **(2007) 3 NWLR (pt. 1022) 493 at 509.**

The respondent, in the preliminary objection, has rightly submitted that the notice of appeal initiating this appeal is incompetent as the 3 grounds of appeal therein do not constitute any valid ground(s) of appeal. The law is that a
F notice of appeal without a valid ground of appeal is incompetent and therefore liable to be struck out: See **C.C.B. vs. EKPERI (Supra).** An incompetent notice of appeal renders the appeal incompetent: See **ODOFIN vs. AGU (1992) 3 NWLR (pt. 229) 350; NWAEZE vs. EZE (1999) 3 NWLR (pt. 594) 410;**
G **ATUYEYE vs. ASHAMU (1987) 1 NWLR (pt. 49) 267; UWAZURUIKE vs. A.G. (F) (2007) 8 NWLR (pt. 1035) 1 at 77; AJUWA vs. SPDC NIG. LTD. (2008) 10 NWLR (Pt. 1094) 64.**

The appellant, in the reply brief, submits that by virtue of **Section 22** of the
H **Supreme Court Act**, the Supreme Court is vested with powers to make order or orders necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal and shall have full jurisdiction over the whole proceedings as if the proceedings have been instituted
I and prosecuted before it as a court of first instance. Agreed. That is the law, as restated by this Court in **YUSUF vs. OBASANJO (2003) FWLR (pt. 185) 507 at 547; EDIAGHONYA vs. DUMEZ (NIG.) LTD. (1986) 13 NWLR (pt. 13) 753.** The Supreme Court can invoke this power vested on it by Section 22 of its

enabling Act only if there is a valid appeal before it. This power can only be exercised *intra vires,* and not *ultra vires.*

The appellant does not seem to appreciate the point being made by the respondent. The Court of Appeal, in the first place, declined jurisdiction to entertain the appeal before it because it was incompetent. To invoke the powers in **Section 22** of the **Supreme Court Act**, a number of factors have to be considered. They *inter alia* include whether the real issue at the court below is capable of being distilled from the grounds of appeal, and whether the court below has the legal power to adjudicate in the matter before it, before this court can entertain it. See **INAKOJU vs. ADELEKE (2007) 4 NWLR (pt. 1025) 423; AMAECHI vs. INEC. (2008) 5 NWLR (pt. 1080) 227; AGBAKOBA vs. INEC. (2008) 18 NWLR (pt. 1119) 489 at 557 -558.** These factors are very much absent in the instant appeal. Accordingly, the powers vested by **Section 22** of the **Supreme Court Act** can not be invoked in this appeal.

This appeal is incompetent. It is accordingly struck out. With this conclusion, and the fuller reasons contained in the judgment just delivered by my learned brother, MARY UKAEGO PETER-ODILI, (JSC), this appeal deserves to be and is hereby struck out.

Ejembi Eko,
Justice, Supreme Court.

NAPOLEON S. ORIANZI – APPELLANT
AND

1.	**THE ATTORNEY-GENERAL, RIVERS STATE**	**RESPONDENTS**
2.	**RIVERS STATE HOUSING AND PROPERTY DEV. AUTHORITY**	
3.	**GRACE DIMA**	
4.	**SAMUEL DIMA (BY SUBSTITUTION)**	

SC. 99/2007

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 24TH FEBRUARY, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
KUDIRAT M. O. KEKERE-EKUN	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

ACTION: Preliminary objection – Need to be resolved before consideration of main issues – Rationale.

APPEAL: Grounds of Appeal – A ground of appeal formulated outside the decision of the trial/lower Court – Effect.

APPEAL: Grounds of Appeal not touching on the ratio decidendi – Effect of decision not appealed or challenged.

APPEAL: Grounds of Appeal not touching on the ratio decidendi – Implication.

APPEAL: Jurisdiction – Jurisdiction of appellate Court – Consideration thereof.

CASE LAW: Kyari vs. Ganaran (1997) 2 NWLR (Pt. 488) 380 – Principles – Consideration thereof.

CIVIL PROCEDURE: Burden of Proof – Burden of proof in declarations of title – On whom it lies.

CIVIL PROCEDURE: Declarations of title – Modes of proving title to land – How discharged.

COURT: Court of Law – Whether court of sentiment – Proper approach of Court to the determination of issues before it.

LAND LAW: Proof of title – Certificate of Occupancy – Whether a conclusive proof of title.

LAND LAW: Revocation – A party asserting revocation of title – Need to prove purpose and justification.

LAND LAW: Revocation of Property – Onus on a party asserting revocation – How discharged.

LAND USE ACT Revocation of title – Letter of Revocation to be signed by an officer – Section 28(6) of the Land Use Act – Consideration thereof.

LAND USE ACT: Appellant deemed to have Statutory Right of Occupancy by virtue of ***Section 34(2) of the Land Use Act*** *– A subsequent Certificate of Occupancy issued – Whether such issuance automatically extinguishes appellant's Right of Occupancy.*

LAND USE ACT: Plaintiff having a subsisting – Right of Occupancy – Defendant subsequently issued with another Certificate of Occupancy – Effect.

LAND USE ACT: Power of Governor to revoke title – Guiding principles – ***Sections 28 and 44 of the Land Use Act*** *– Considerations thereof.*

LAND USE ACT: Power of the Governor to revoke – When revocation is made in bad faith – Effect.

LAND USE ACT: Power of the Governor to revoke title – How properly exercised.

LAND USE ACT: Revocation – Revocation for Public Purpose – Nature of transaction – How determined – Whether revocation is for public purpose.

LAND USE ACT: Revocation – Revocation of Statutory Right of Occupancy – Requirement Notice to be served before revocation – Sections 28 and 44 of the Land Use Act – Where not complied with – Effect.

LAND USE ACT: Revocation – Revocation on overriding public interest – Notice of revocation shall state the nature and purpose of the overriding public interest.

LAND USE ACT: Revocation of Certificate of Occupancy – Power of the Governor to revoke – Power to be exercised in accordance with the law.

LAND USE ACT: Revocation of title – Evidence of revocation – Need to be established by a party who alleges revocation.

LAND USE ACT: Revocation of title – Proof – Must be shown to follow due process of law.

LAND USE ACT: Revocation of title – Revocation ostensibly made for overriding public purpose – Property revoked was later sold within six months to a private person – Whether revocation was proper.

*LAND USE ACT: Rights of the original owner before the advent of Land Use Act, 1978 – How treated – **Sections 34 and 36 of the Land Use Act**, – Consideration thereof.*

*LAND USE ACT: **section 34(2) of the Land Use Act** – Deemed right of occupancy – When applicable.*

PRACTICE AND PROCEDURE: Proof in civil cases – Shifting of burden of proof – ***Section 133 (1) of the Evidence Act*** *– Import.*

REGISTRATION OF INSTRUMENTS: Prority of registrable instruments – Consideration thereof.

REGISTRATION OF INSTRUMENTS: Registered instrument – Import.

REGISTRATION OF INSTRUMENTS: Registered Instruments – Implication – Need to conduct search before involving in any transaction affecting land..

WORDS AND PHRASES: "Registrable Instrument" – Meaning .

Issue for Determination

Whether the appellant did prove that he is entitled to the declaration of title over the disputed property and there is no feature that deprived him of his right of occupancy over the said property.

Facts of the Matter

The appellant was the plaintiff at the Rivers State High Court, sitting in Port Harcourt, His claims against the defendants are as follows:

> **"Wherefore the plaintiff claims from the Defendants a Declaration that:**
> **(a) The plaintiff is the person entitled to the statutory Right of Occupancy of the Land known as Plot 46, Diobu GRA Phase 1, Port Harcourt, otherwise known as and called No. 46, Obagi Street, Phase 1, GRA, Port Harcourt.**
> **(b) The appointment of the Sanomi Commission of Inquiry and the recommendation of the said commission in respect of the aforesaid property as published in the report of the Commission of Inquiry into allocation of plot and sale of abandoned houses in Port Harcourt during the period 1st October, 1979 to 31st December, 1983 under the chairmanship of Mr. Dickens Sanomiby the Rivers State government is irregular, null and void, and of no effect.**

(c) The purported sale of the said property by the 2nd defendant is unconstitutional, null and void and of no effect.
2. N10,000.00 general damages for trespass.
3. Perpetual injunction restraining the defendants their agents or servants from further trespass to the plaintiffs said property".

Sometime in 1981, the Rivers State Government offered to sell the disputed property, an abandoned property to the appellant, who accepted the offer and paid a deposit of N10,000.00 towards its total value. An agreement evidencing the sale was subsequently entered into between the appellant and the Secretary to the Government of Rivers State and the appellant was put in possession after the agreement aforesaid was registered in the Land Registry.

When the military took over the government in 1983, the appellant was put in detention and his properties including the disputed property were confiscated.

After his release, he was made to appear before justice Uwaifo Special Panel on Recovery of Public Properties in Lagos. The panel recommended that all his properties including the disputed property be returned to him. This recommendation was approved by the Armed Forces Ruling Council, which was the highest ruling body in the country at the time. Later, the Rivers State Government appointed Sanomi Commission to look into the allocation of plots and abandoned properties between 1st October, 1979 and 31st December, 1982. This Commission recommended to the Rivers State Government that the disputed property be retained as Government Quarters. The Rivers State Government accepted the recommendation and published in its Gazette that the appellant's right over the said property had been revoked. The property was retained as government quarters for six months and was subsequently sold to **Dr. Charles Dima** of blessed memory inspite of appellant's protest through (Exhibit 8) to the 2nd respondent against the sale.

The plaintiff subsequently took a writ of summons to be issued against the defendants at the High Court sitting in Port Harcourt. The court sustained the appellant's claims. Dissatisfied, the defendant appealed to the Court of Appeal Port Harcourt, which set aside the judgment of the trial court. It is that decision that has led to this further appeal to the Supreme Court.

Held *(Unanimously allowing the appeal)*

1. *Resolution of Preliminary objection comes first, before the substantive issues.*
Where a preliminary objection is issued against any aspect of an appeal, it must be heard and resolved first before the resolution of the issues for determination of the appeal. The reason for this is obvious. An appeal heard on a defective process will result in a void decision.
(P 433 Paras B – C.)

2. *Ground of appeal formulated outside decision*
The issue of whether the appellant's interest was cancelled by the Rivers State Government Legal Notice No. 3 of 1986, is not a matter to be resolved through preliminary objection as it is one of the core issues to be determined in the main appeal. The law is settled beyond any doubt that grounds of appeal must arise and be related to the decision against which appeal lies, and should constitute a challenge to the ratio of the decision. Any ground of appeal that is formulated outside the decision appealed against is incompetent and ought to be discountenanced. [Saraki vs.Kotoye (Supra); Egbe v Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590].
(Pp 433 – 434 Paras G – A)

3. *Burden of Proof in a claim for declaration of title*
The law is settled that the burden of proof in a claim for declaration of title to land lies on the plaintiff, who generally must rely on the strength of his own case and not on the weakness of the defendant's case. [Kodilinye vs.Odu (1935) 2 WACA 336, Udegbe vs.Nwokafor (1963) 1 SCNLR 184, Woluchem vs.Gudi (1981) SC 291, Piaro vs.Tenalo (1976) 12 SC 31].
In this case, the appellant who was the plaintiff at the trial court had the burden to prove that he is entitled to the declaration which he sought at that court and he was required to discharge this burden of proof on preponderance of evidence. *(Pp 436 – 437 Paras H – A.)*

4. *Ways of proving a claim for declaration of title to land*
It is also the law that a claim for declaration of title to land may be proved by any of the five ways stated and restated in numerous decisions of this court. [Piaro vs. Chief W. Tenalo (supra); Idundun vs. Okumagba (1976)

1 NMLR 200; Makanjuola vs. Balogun (1989) 3 NWLR (Pt. 108) 192; Olukoya vs. Ashiru (2006) ALL FWLR (Pt. 322) 1479].

These five methods of proving title or ownership to land are:

1. **By traditional evidence;**
2. **by production of document of title which must be duly authenticated;**
3. **by the exercise of numerous and positive acts of ownership over a sufficient length of time to warrant the inference that the person is the true owner of the land;**
4. **by acts of long possession and enjoyment of the land, and**
5. **by proof of possession of connected or adjacent land in circumstance rendering it probable that the owner of such connected or adjacent land would in addition be the owner of the land is dispute.**

In Olukoya vs. Ashiru(supra) this court gave the sixth method of proving ownership of land as follows:

> **"By acts of selling, leasing, renting out all or part of the land or farming on it or on a portion thereof."** *(P437 Paras A – F)*

5. *Appellant is entitled to statutory right of occupancy*

By the evidence before the trial court, I am of the view that the appellant had on the authority of Idundun vs. Okumagba (supra) acquired ownership of the disputed property and was entitled to a statutory right of occupancy. However, the Court of Appeal from which this appeal emanated saw the case differently. The Court of Appeal is of the view that the agreement to buy the land when the Land Use Act had been promulgated does not fall under the Act and therefore did not donate to the appellant any interest on the land which will in turn give the appellant a right of occupancy. It is also the view of the Court of Appeal that even if the appellant had any interest on the disputed property same was cancelled by the Rivers State Government Notice No. 3 of 1986. It was on these premises that the Court of Appeal reversed the decision of the trial court and by virtue of Section 5(1) of the Land Use Act, the subsequent sale and issuance of certificate of occupancy to Dr. Dima was declared valid. *(P 439 Paras F – I)*

6. *Appellant received a right of the original owner deemed granted under S.34(2) of the Land Use Act*

Now it is to be noted that the disputed property is an abandoned developed property. Under what tenure was the original owner holding the right over the said abandoned property? Did the Rivers State Government take over the property without taking over the corresponding right that the original owner had? Lands in the southern part of this country were governed by the Customary Law of the people as opposed to the Land Tenure Law of the North, before the advent of the Land Use Act 1978. I am therefore of the firm view that when the Rivers State Government sold the disputed property to the appellant, the right of occupancy of the original owner passed along with the property to him. To that extent he was deemed to have received along with the property the right which enured to the original owner who abandoned the property and same was deemed granted to the Appellant under Section 34(2) of the Land Use Act which provides thus:

> **Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.** *(Pp 439 – 440 Paras I – D)`*

7. *Jurisdiction of an appellate courts*

The lower court was wrong when it set up a case for the respondents. The law is trite that an appellate court is only concerned with matters that are properly placed before it. It has no jurisdiction over a matter that was not raised and adjudicated upon at the trial court. *(P 441 Para A)*

8. *The Principle in* ***Kyari vs. Ganaran (1997) 2 NWLR (Pt. 488) 380***

The case of Kyari vs. Ganaran (1997) 2 NWLR (Pt. 488) 380 is distinguishable from this particular case. In that case Abba Ganaran applied to the Ministry of Land and Survey, Borno State for a grant of a temporary right of occupancy over a piece of land along Maiduguri-Bama Road to be used for car wash. What was given him was a temporary licence which was subjected to revocation by the Government at will. In

the instant case the Rivers State Government outrightly sold the disputed property to the appellant and the agreement in respect of the transaction was registered in the land registry. Clearly, the transaction did not envisage a temporary holding of the disputed property. In that case of Kyari vs.Ganaran (Supra) Belgore (JSC) (as he then was) at page 400 paragraph E-F held:

> **"Where there is a subsisting right of occupancy, it is good against any other right. The grant of another right of occupancy over the same piece of Land will therefore be merely illusory and invalid. The Appellant's right of occupancy subsists up to now as it has not been revoked and the wrongful grant to the 1st respondent has no effect whatsoever on its authenticity."** *(P 441 Paras A – F)*

9. *The claim of the appellant*
The appellant's claim was not based on non-payment of compensation or lack of notice which the lower court over-flogged. His case is that he was entitled to statutory right of occupancy over the disputed property which I think he successfully established.
(P 441 Paras F – G)

10. *Rights of ownership before the advent of the Land Use Act, 1978*
Section 34 and 36 of the Act provide for deemed right of occupancy by recognizing the existence of right of ownership before the coming into force of the Land Use Act, 1978. It follows therefore that a customary right of occupancy whether granted or already being used or occupied, must be used in accordance with customary law, either by individual or family. Thus, under Section 5 and 6 of the Land Use Act, the following units of ownership exist as follows:

1. **Formal statutory right of occupancy granted under Section 5 of the Act.**
2. **Formal customary right of occupancy granted under Section 6 of the Act.**
3. **Deemed statutory right of occupancy granted under Section 34.**
4. **Deemed customary right of occupancy granted under Section 36 of the Act.**

All these units of rights are recognized under Section 36 of the Act. From the foregoing, customary right of occupancy predates the Land Use Act and it is not a subject of a grant. *(P 443 Para B – G)*

11. *The rights of the original owners were deemed transferred to the appellant.*

I have stated elsewhere in this judgment that the disputed land was deemed granted to the appellant since the rights of those who abandoned the property are deemed transferred to him. Subsequent sale to Dr. Dima was invalid *ab initio,* in absence of proper termination of the agreement between the Rivers State Government and the appellant. In Olohunde & Anor vs. Adeyoju (2000) 79 LRCN 2297 at 2328 paras D-E, this court had this to say:

> **"A certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978; cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is at best, only a prima facie evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid, null and void."**

[Kyari vs. Alkali & 3 Ors(2001) 5 SCNJ 421].*(Pp 443 – 444 Paras G – B)*

12. *Respondents did not establish evidence of revocation*

The 1st and 2nd Respondents admitted that whatever interest the Appellant had over the disputed land was cancelled. The law is settled that he who asserts has the onus to prove what he asserts if he is to succeed. In the instant case the onus of adducing evidence to establish the facts of revocation is under the Evidence Act squarely on the Respondent. The 1st and 2nd Respondents filed their statement of defence and abandoned them as they did not testify before the trial court.

In Osho vs. Foreign Fin. Corp (supra) at page 201, paragraphs G-H,Belgore JSC (as he then was) said:

> **"A party relying on any fact must not only plead that fact but must also proffer evidence in proof thereof. Nowhere**

> **in the written record is there evidence of revocation of the right of occupancy of the respondent…"**
> *(P 444 Paras B – F)*

13. *The Revocation of the land was not for public purpose.*
The Rivers State Government that sold the disputed land to the appellant, turned round to acquire the land which it said was for public purpose. However, within six months it sold the property to a private individual. Clearly from this transaction, it was clear that the acquisition of the property was not for the purpose which it was indicated. The Sanomi panel was just a script meant to raise dust, and clearly that dust blurred the vision of the lower court. In Osho vs. Foreign Finance Corp. (supra) this court, held that when public purpose is stated to be the ground for revocation of a right of occupancy, if the land is later discovered to be in use for other purposes, the revocation of the right of occupancy is vitiated and the order becomes unlawful. This is exactly what happened in this case. The sole purpose for the acquisition of the abandoned property was to sell same to Dr. Dima, who was hurriedly issued with a certificate of occupancy after the sale. *(P444 Paras F – I).*

14. *Revocation was in bad faith*
Per Augie (JSC):

> **To justify its action is to succumb to the whims and caprices of a government that comes into power, revokes the rights of its citizens in property, using relevant provisions of the Land Use Act, only to reallocate the properties thereafter to some other citizens.**

The appellant has a right; he was deprived of enjoying same; and there must be a remedy see Bello vs. A-G Oyo State (1986) 5 NWLR (Pt. 45) 828, where Oputa, JSC, aptly observed as follows:

> **"Holt, CJ in the now famous case of Ashby vs. White (1703) postulated the principle that "if a Plaintiff has a**

right he must of necessity have the means to vindicate it, and a remedy, if he is injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal". The maxim "*Ubi jus, ibiremedium"* is simply the Latin rendition of the above principle. The maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statute, the courts have been urged to create one. The courts cannot therefore be deterred by the novelty of an action. *(P 466 Paras C – G)*

15. *Power of the governor to revoke for overriding public interest*
The question is whether the appellant's right of occupancy over the property in dispute was automatically extinguished under Section 5(2) of the Land Use Act by the purported grant of Exhibit D4 to the 3rd and 4th respondents. By Section 1 of the Land Use Act all land comprised in the territory of each state in the federation are 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. By Section 28 of the Act, it shall be lawful for the governor to revoke any right of occupancy for overriding public interest. This right of revocation however must be exercised in accordance with the provision of the Act.

The situation here concerns an abandoned property which the government sold to the appellant and the agreement thereof, Exhibit P3, is registered in the land registry. By admitting that the right of the appellant is extinguished is clearly an admission that there was a right available to the Appellant Two rights of occupancy cannot subsist in respect of the same property or else there will be anarchy.
(Pp 444 – 445 Paras I – D)

16. *The grant of the subsequent certificate of occupancy did not cancel appellant's right.*
There is no evidence before the trial court that the appellant's right was lawfully revoked. To revoke a right of occupancy for public purpose, the letter and spirit of the laws must be adhered to. The

terms of revocation, as provided under Section 28 and 44 of the Land Use Act, must be strictly compiled with and strict construction of the provision made. [Bello vs Diocesan Synod of Lagos (1973) 3 SC 131].

I therefore fully endorse the view of my Lord Belgore (JSC) (as he then was) in Kyari v Ganaram (Supra), and the view expressed by Ogundare, JSC in Nigerian Engineering Works Ltd vs. Denap Ltd (Supra). In Olukoya vs. Ashiru (2006) ALL FWLR (Pt. 322) 1479 at 1514 Paras. E-H, this court held that an equitable owner in possession cannot be overridden by a subsequent grantee of a legal estate. This is what my brother Ogbuagu, (JSC), who read the lead judgment said:

> **"As rightly submitted in the respondent's brief at page 8, the Jalingo Local Government having lawfully granted the land in dispute to the respondent, in 1981, it was left with nothing to grant to the appellant subsequently in 1983 during the subsistence of the grant to the respondent…. so that, if there is proof that money was paid for the land coupled with an entry into possession it is sufficient, to defeat the title of a subsequent purchaser of the legal estate, if and provided that the possession, is continuously maintained….**
>
> **Thus, if even it is coupled with possession, it cannot be overridden by a legal estate." [Ogbu& 4 Ors vs. Ani& 4 Ors (1994) 78 SCNJ (Pt. II) 363, Sore Mekun vs. Shodipo (1959) LLR 30; Orsanmi vs. Idown (1959) 4 FSC 40; Oshodi vs. Balogun & Ors (1936) 4 WACA 1].**
> *(P p 445 – 446 Paras D – A).*

17. *Appellant's right of occupancy was not extinguished*

Clearly the right of occupancy available to the appellant over the disputed property was not automatically extinguished by Section 5(2) of the Land Use Act by the purported sale and subsequent grant of a statutory right of occupancy over the same property to the 3rd and 4th respondents. To allow such an injustice, is to allow those in authority to benefit from their wrong actions. Rivers State Government cannot determine a contract in which it is a party and then take certain

benefits arising therefrom leaving the party aggrieved without any remedy. *(P 446 Paras B – D).*

18. *Section 28 and 44 on service of notice were not complied with*
The appellant's right of occupancy in respect of the property in dispute was purportedly revoked as shown in an official gazette published on 27th March 1986 (Exhibit P7) for public purpose to wit: for use as government quarters. As rightly observed by the learned trial Judge, for the purported revocation to be valid, prior notice must be given to the holder of the right of occupancy, as required by Sections 28 (6) and 44 of the Land Use Act. The holder is also entitled to compensation by virtue of Section 29 of the Act. *(P 451 Paras F – H)*

19. *The onus of Proof in S. 133(1) of the Evidence Act*
Per Kekere-Ekun, (JSC):

> **"In an action for declaration of title to land, the onus is on the claimant to establish his case on the balance of probabilities. It is also settled law that he must succeed on the strength of his case and not on the weakness of the defence.**

Section 133 (1) & (2) of the Evidence Act, 2011 provides:

> **"133. (1) In civil cases, the burden of first proving existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.**
> **(2) If the party referred to in subsection (1) of this Section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established the burden lies on the party against whom judgment would be given if no more evidence were adduced and so on successively, until all the issues in the pleadings have been dealt with.**

> **Thus notwithstanding the fact that the plaintiff must succeed on the strength of his own case, once he has adduced sufficient *prima facie* evidence to entitle him to the relief sought, the onus shifts to the defendant.**
>
> **The appellant herein having pleaded and testified that the purported revocation of his right of occupancy was not in accordance with the law, the onus was on the respondents, particularly the 1st respondent to prove otherwise.**
>
> **The 1st respondent had a duty to lead evidence in support of paragraph 4 (e) of its amended statement of defence to prove, not only that the appellant's right of occupancy was revoked in accordance with the law, but also to show that the property was indeed acquired for public purpose".**
> *(Pp 451 – 452 Paras H – F)*

20. *A certificate of occupancy is not conclusive proof of title.*
A certificate of occupancy is only *prima facie* evidence of title or possession. It is not conclusive proof of title to the land to which it relates. [Otukpo vs John (2012) 7 NWLR (Pt. 1299) 357 @ 377; Registered Trustees Mission of Apostolic Church vs Olowoleni (1990) 6 NWLR (Pt. 158) 514; Adole vs Gwar (2008) 11 NWLR (Pt. 1099) 562 @ 590 B – C and 618 C – E; Ogunleyevs Oni (1990) 2 NWLR (Pt. 135) 745].
In the instant case the certificate of occupancy issued to Dr. Dima was invalid and conferred no title on him. [Nigerian Engineering Works Ltd vs Denap Ltd. (Supra)]. *(P 452 Para s I – B)*

21. *The Power of the Governor to issue certificate of occupancy*
In Adole vs. Gwar (supra) @ 618 E-FHis Lordship, Aderemi, JSC opined thus:

> **"The power of the governor to grant statutory right of occupancy or customary right of occupancy by the appropriate body must not be exercised whimsically such as to deprive someone who had lawful right or title to a piece of**

land prior to the promulgation of the Land Use Act."

In the instant case, even though the interest of the appellant was acquired after the promulgation of the Land Use Act, the admonition in the excerpt of the judgment quoted above is still relevant. The governor is not at liberty to act on his own whims and caprices. Any revocation of a right of occupancy must be shown to have been done within the confines of the law. *(P 453 Paras B – E)*

22. *The definition of a registrable instrument*

The Statutes define a registrable instrument as a document affecting land, whereby one party [the grantor], confers, transfers, limits, charges or extinguishes in favour of another party, [grantee], any right of title to or interest in land and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will. Once a document purports to transfer and/or confer interest in land or howsoever described, it becomes an instrument that must be registered [Niger Construction Ltd. vs. Ogbimi*(2001) 18 NWLR (Pt. 744) 83;* Ikonne vs. Nwachukwu *(1991) 2 NWLR (Pt. 172) 214].

Where the document does not confer title to land, it need not be registered. *(P 456 Paras C – E).*

23. *Priority of registrable instruments*

It is settled that priority, as regards registrable instruments, is determined not by the date the instrument is made but by the date of registration.

In Amankra vs. Zankley *(1963) 1 All NLR 304; (1963) NSCC (Vol. 3) 243,* the same vendor gave conveyances of the disputed land to both parties. The plaintiff claimed the land was conveyed to him on 29/8/1957 by deed, which was delivered for registration on 16/9/1957. The defendant claimed that the vendor conveyed the land to him by a deed dated 16/5/1957 duly registered on 17/3/1960. The plaintiff contended that the defendant had lost priority, while the defendant argued that since the vendor conveyed the legal estate to him in May 1957, he had divested himself of the legal estate and the purported conveyance of the legal estate to the plaintiff in August 1957 was of no effect. On appeal, this court per

Bairamian, (JSC), explained as follows:

> **"Although the Act does not relate to registration of title, but of instruments, it is plainly intended to give some measure of security and some protection against fraud. When two persons claim the transfer of a legal estate, he who did not register his conveyance cannot plead it or give it in evidence; if they both registered their deeds, each takes effect as against the other from the date of registration; which means that the one executed earlier loses its priority if it was registered later. What counts is the date and hour of registration. The argument for the Defendant, if correct, would open the door to fraud".** *(Pp 456 – 457 Paras F – B)*

24. *Where the equatics are equal*
The priority of interests under the Land Instruments Registration Statutes is based on the times the relevant Deeds were registered, therefore, where the equities are equal, the first in time prevails [**Olumide vs. Ajayi (1997) 8 NWLR (Pt. 517) 433].**

In **Tewogbade vs. Obadina** ***(1994) 4 NWLR (Pt. 338) 326 SC,*** this Court per **Iguh, (JSC), hit the nail right on the head, as follows:**

> **Where two contesting parties trace their title in respect of the same piece of land to the same grantor, the applicable principle of law has always been that the latter in time of the two parties to obtain the grant cannot maintain an action against the party who first obtained a valid grant of the land from such a common grantor. The reason is obvious as a grantor having successfully divested himself of his title in respect of the disputed piece or parcel of land by the first grant would have nothing left to convey to a subsequent purchaser under the elementary principle of nemodat quod non habet as no one may convey what no longer belongs to** *(P 457 Paras C – G).*

25. *Priority of registrable instruments*
In Akingbade vs. Elemesho ***(1964) NSCC (Vol. 3) 96,*** **the same plot of land was conveyed by two different vendors to two different purchasers, and one bought his plot two months after the other registered his own**

conveyance, Ademola, (CJF), stated as follows:

> **"The respondent testifies that he went to the land registry to make a search and was told there was no previous conveyance covering the area. This is a strange story; for to say nothing of the earlier conveyances, the appellant's conveyance had been handed in for registration only two months before - - - It is not possible for the court to believe the respondent bought without notice of the appellant's prior equity; he is either untruthful or he deliberately shut his eyes or was guilty of gross negligence in finding out the facts, and this is enough to fix him with notice**. *(P 457 Paras G – B.).*

26. *Need for search*
It is settled that a purchaser, who neglects to make thorough search of the register is fixed with notice of rights contained in the instruments registered under the various Land Instruments Registration Laws in Nigeria; only a *bona fide* purchaser of a legal estate for value without notice takes priority over someone, who had acquired a prior equitable interest over the same property– [Edokpolo & Co. Ltd. vs. Ohenhen *(1994) 7 NWLR (Pt. 358)* 511]. *(P 458 Paras B – C).*

27. *Legal implication of a registered instrument*
In Edokpolo& Co. Ltd. vs. Ohenhen *(supra),* the action arose after 1st respondent commenced building operations on the land. The appellant alleged that it brought the matter to the notice of the deceased father of the 2nd respondent, who denied that he granted the 1st respondent a lease for fifty years. The decision of the trial court was reversed by the court below. This court held:

> **The legal practitioner acting for the appellant in connection with the alleged sale of land in dispute (PW7) made a search in the land registry and found that the 1st respondent had registered Exhibit 9. The evidence led by the appellant was that when the registration of Exhibit 9 was brought to the notice of the deceased he denied it. The sale of the parcel of**

land, which the deceased had already leased to Total Nigeria Ltd., to the appellant took place before the sale of the land in dispute to the appellant after it had been leased to the 1st respondent. That should have made the appellant to be cautious and not rely heavily or entirely on the alleged denial by the deceased that he had earlier leased the land in dispute to the 1st respondent before the purported outright sale of the same land to the appellant. Further, the legal implication of the discovery of Exhibit 9 in the land registry by the solicitor acting for the appellant was that the appellant was not a bona fide purchaser for value of the land in dispute without notice as there was evidence that the solicitor reported his findings to the Appellant. My conclusion is that the Court below was right in giving legal effect to Exhibit 9 in the circumstances of this case. *(Pp 458 – 459 Paras D – A).*

28. *Appellant has a prior right in the property*

In this case, the respondents are not contesting the fact that the said Exhibit P3 was registered in the land registry, Port-Harcourt, which means that the appellant had a prior right in the property.

The appellant also tendered Exhibit P4, a letter written by the Brigade Commander, 2nd Amphibious Brigade, Port-Harcourt, to one Major Agbogun, who was occupying the property, asking the officer to pay rent to him, as the owner, if he is to live there, which shows that the appellant took possession of the property. *(P 459 Paras A – C)*

29. *Revocation was for private interest*

One thing that sticks out like a sore thumb is the fact that the property said to have been revoked for overriding public interest, to wit use as government quarters was sold six months later; the legal notice is dated 27/3/1986, and the 3rd respondent said her husband was offered the property to buy in September 1986. "*The revocation of a right of occupancy for public purpose or in the public interest does not include the revocation of the right of a grantee for the purpose of vesting it in another" – [*Ibrahim vs. Mohammed*(2003) 6 NWLR (Pt. 817) 615 at 644]*per Kalgo, (JSC).
(P 459 – 460 Paras D – A).

30. *Revocation was in bad faith*

The RVSG's action in this case, smacks of extreme bad faith, and will not be allowed to stand. Any legal backing available to it, is besmirched by its action in revoking the appellant's right in the property for overriding public interest as government quarters, only to sell the property *six months* later to a private individual. Is that enough time to comply with the condition under the Act? I think not. This court held in Ibrahim vs. Mohammed *(supra)*:

> **It is not the intendment or the intention of the [Land Use] Act that the governor shall use his powers to grant the land arbitrarily without regard to the existing ownership or holdings granted before the operation of the Act. Furthermore, the Act itself provides some checks and balances, which must be observed before making any grant, the conditions under which such grants can be revoked and what follows after such revocation. It provides under S. 28 that the governor can only revoke a right of occupancy for "overriding public interest", which has been defined both in respect of statutory and customary rights of occupancy. If such powers of revocation are to be exercised, the holder of the right of occupancy must be notified in advance. The revocation of a right of occupancy for public purpose or in the public interest does not include the revocation of the right of a grantee for the purpose of vesting it in another. Therefore, since revocation of the grant involves the deprivation of the proprietary right and obligations of a grantee, all the terms and conditions laid down by the Act must be strictly adhered to and complied with. And so for a revocation of a right of occupancy to be valid - - it must be made strictly in compliance with Section 28 of the Land Use Act. Also even where the revocation is valid, the grantee is fully entitled to compensation under S. 29(1) of the Act. The above are the necessary safeguards, which must be observed in the revocation of a right of occupancy under the Act**. *(P 460 Paras A – H).*

31. *The law and justice*
In other words, the law is an equal dispenser of justice, and leaves none without a remedy for his right. Wherever there is a wrong, there must be a remedy to redress that wrong. Justice, it is said, must not only be done but must be seen to be done. In this case, to dismiss this appeal, as the respondents urged this court to do, would amount to letting the RVSG benefit from its wrong actions. *(P 461 Paras H – I)*

32. *A court is a court of law and not of sentiments*
Per, Augie, (JSC):

> **I feel for the 3rd respondent, as the trial court said, she is the one most affected in this *"unfortunate and ill-fated transaction".* But this is a court of law, not sentiments or morality or emotion [Att-Gen., Lagos Sate vs. Eko Hotels*(2006) 18 NWLR (Pt. 1011) 378].***

In other words, sentiments have no place in judicial deliberations Kalu vs. F.R.N. (2016) LPELR – 40108 (SC). See also Suleiman vs. C.O.P. (2008) 8 NWLR (Pt. 1089) 298, where Tobi, JSC, observed:

> **The court cannot exercise its whims indiscriminately, similarly, there is no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances, which the court considers without being emotional, sensitive or sentimental"**. *(Pp 461 – 462 Paras I – B).*

33. *Failure of a person to appeal on the ratio decidendi*
The findings of fact, or the *ratio decidendi,* at pages 99 103 of the records, which in my opinion formed the crux of the judgment are largely directed at the acts of the Rivers State Government, represented in the suit by the Attorney-General (the 1st defendant/1st respondent), who in his wisdom has found no basis to contest the decision of the trial court. The Rivers State Government, represented by the Attorney-General, has not appealed or challenged the decision of the trial court. The effect of the learned Attorney-General's decision not to appeal the determinations or

specific findings of fact against the Rivers State Government, particularly against the direct and specific actions of the Rivers State Government which gave rise to the cause of action in this matter, is that those specific determinations and findings of fact against it are acceptable to it and are conclusive and binding on it. [ODIASE vs. AGHO (1972) 1 All NLR (Pt. 1) 170 at 176; FOREIGN FINANCE vs. L.S.D.P.C. (1991) 1 NSCC 520; ALAKIJA vs. ABDULAI (1996) (Pt. 552) 1 at 24]. *(P 465 Paras A – D).*

34. *A decision not appealed or challenged stands*
Following on the heels of this principle is another related or derivative principle to the effect that a finding or decision of a trial court, whether on an issue of fact or law, that is not challenged on appeal to the Court of Appeal, such decision or finding, rightly or wrongly, stands and must not be disturbed. [**NWABUEZE vs. OKOYE (1988) 4 NWLR (pt. 91) 664; OSHODI vs. EYIFUNMI (2000) 13 NWLR (pt.684) 298; TIMITIMI vs. AMABEBE (1953) 14 WACA 374 at 377].** *(P 465 Paras D – F)*

35. *Principles of revocation under SS 28 and 44 of the Land Use Act*
Let me pause here and ask: At what point in time did the Rivers State Government take steps to comply with the mandatory provisions of Sections 28(1), (2) (6) and (7), and 44 of the Land Use Act to effectuate the proper revocation of the title of the plaintiff/appellant in the disputed property? The 1st respondent (as the 1st defendant) neither pleaded nor proved the facts establishing the prerequisites for proper revocation of the plaintiff/appellant's title under Section 28 and 44 of the Land Use Act.
(P 466 Paras H – I).

36. *Onus on a person asserting that property was revoked.*
The issuance of the mandatory or statutory notices under Section 28 and 44 of the Land Use Act being conditions precedent for proper revocation of a Right of Occupancy in or over a landed property, and the revocation of the said Right of Occupancy are matters of fact, which must be proved by the party asserting the revocation of a Right of Occupancy. The 1st respondent herein, as the 1st defendant at the trial, in his amended statement of defence, acknowledged that the plaintiff/appellant had a

Right of Occupancy over the disputed property which was revoked. This fact is pleaded in paragraph 6 of his amended statement of defence.
(P 468 Paras C – E)

37. *The 1st defendant did not prove the purpose or justification for the purported revocation*
No where in the amended statement of defence did the 1st defendant/ respondent aver the purpose or justification for the asserted revocation of the plaintiff/appellant's Right of Occupancy. All that the learned Attorney-General asserted in his amended statement of defence is the bare or bald statement, without particulars, that the plaintiff's Right of Occupancy had been revoked. The learned Attorney-General, as the 1st defendant at the trial, also did not bother to call evidence to establish any or all the facts in controversy between him and the plaintiff. He abandoned his pleadings, having not called evidence on the issues in controversy. He did not prove the alleged revocation of the plaintiff's Right of Occupancy, or that the revocation was done in compliance with the law. Only a revocation done in accordance with the due process of the law can deprive a title holder his Right of Occupancy.
(P 468 Paras G – I)

38. *The notice of revocation must state the nature of public purpose.*
I had pointed out earlier that the learned Attorney-General did not state, in his amended statement of defence, the purpose the plaintiff's Right of Occupancy was revoked for. Even where the Right of Occupancy is stated to be revoked for public purpose, this court had, in C.S.S. BOOKSHOPS LTD. vs. R.T.M.C.R.S (2006) 11 NWLR (pt.992) 530, insisted that there is the need to spell out the public purpose in the notice of revocation. It is imperative that the reason for revoking any person's Right of Occupancy must be stated in the Notice. [ADUKWU vs. COMMISSIONER FOR WORKS, LANDS & TRANSPORT, ENUGU STATE (1997) 2 NWLR (pt. 489) 588; NIGERIA ENGINEERING WORKS LTD. vs. DENAP LTD. (1997) 10 NWLR (pt 525) 481]. *(P 469 Paras A – C).*

39. *How the Governor can properly revoke title under the Land Use Act.*
Revocation of the Right of Occupancy or title to landed property is not

just a mere executive or administrative act that can be done in secret or in any surreptitious manner and later conveyed in official government gazette. The title holder is not only entitled to the notice of the proposed revocation with the public purpose for the revocation clearly spelt out therein, he is also entitled to be heard on the proposed revocation of his title. My firm view, on this, is that reading Sections 28 and 44 of the Land Use Act together with Section 36(1) of the Constitution, the Governor when it behoves him to revoke any Right of Occupancy in or over any landed property has a duty to act quasi-judicially and in transparent manner. Even if no label of judicially or quasi-judicially may be placed on the Governor to so act, his duty to act fairly can not be denied since he has a duty to give notice of the intended revocation wherein he must spell out the public purpose of the intended revocation to the title holder.[HART vs. MILITARY GOVERNOR, RIVERS STATE & ORS. (1976) 11 S C (Reprint) 109]. *(P 469 Para C).*

40. *The revocation was not signified under the hand of a public officer*
The evidence of the plaintiff, testifying unscathed as the PW.1, shows clearly that he only got to know of the revocation of his title upon his reading Exhibit P7, the Rivers State Government Gazette No, RSN 9 Volume 18 of 27th March, 1986. He had no prior notice of the revocation. This, again, contravened Section 28(6) of the Land Use Act that makes it mandatory that:

> **"The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the governor and notice thereof shall be given to the holder".**

Since there is no evidence that the revocation was signified under the hand of a public officer and the notice thereof had been given to the plaintiff/ appellant in accordance with Section 28(6) of the Land Use Act, it is not certain if, actually, it was done by the governor, who is the appropriate person to revoke a Right of Occupancy by virtue of Section 28(1)of the Land Use Act. *(Pp 469 – 470 Paras G – B)*

41. *Revocation must be shown to follow due process of law.*
It is not enough for the Government of Rivers State to flaunt the purported revocation of the plaintiff/appellant's Right of Occupancy, they must go further to show that the revocation followed the due process of law, and that it was done by the person authorised by law. The authorities of Rivers State ought to have done more by showing that the revocation of plaintiff's right of Occupancy followed the due process of law; particularly that the plaintiff/appellant's Right of Occupancy was one guaranteed by the 1979 Constitution, as amended, which in Section 42(1) thereof provide that no interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in a manner and or the purposes prescribed by Law. *(P 470 Paras B – D).*

42. *Where revocation process was not done for overriding public purpose.*
The constitutional or statutory guarantee or protection of the plaintiff/appellant's Right of Occupancy required much more than the opaque and the less than genuine and honest manner the Rivers State Government went about the purported revocation of his Right of Occupancy. The revocation held, in its judgment at pages 99 – 102 of the records, by the trial court to be wrongful and unconstitutional, was not shown to follow the due process of law. The revocation was apparently, as found by the trial court, done in order to subsequently vest in the 3rd and 4th respondents, as defendants at the trial, the Right of Occupancy over the same. As rightly held by the trial court the purported revocation, even if it followed the due process of law, was not done for any overriding public purpose. This fact is also a factor that will vitiate the purported revocation. *(P 490 Paras F – I).*

43. *Where a right of occupancy is issued subsequent to a subsisting right of occupancy.*
The law is settled that for as long as the previous or earlier title or Right of Occupancy in or over a piece of land subsists, no other rival or competing title or Right of Occupancy can simultaneously exist in or over the same piece of land. As Belgore, (JSC) (as he then was) stated in KYARI vs. GANARAN (1997) 2 NWLR (pt. 488) 380 at 400, the subsequent grant of

that other "Right of Occupancy over the same piece of land will therefore be merely illusory and invalid". At the time the Right of Occupancy, evidenced by the Certificate of Occupancy (Exhibit D4) was issued to the predecessor-in-title of the 3rd and 4th respondents, the Right of Occupancy of the plaintiff/appellant was subsisting in the land since it had not been revoked or cancelled as required by law. Only the valid and effective revocation of the plaintiff/appellant's Right of Occupancy would ensure that the subsequent Right of Occupancy, evidenced by Exhibit D4, was valid in law. Accordingly, whoever relies on the fact of the revocation of the plaintiff/appellant's Right of Occupancy must not only plead that fact of the revocation but must also lead evidence thereof to establish that the purported revocation of the Right of Occupancy of the plaintiff/appellant was valid in law and existent in fact. [OSHO vs. FOREIGN FINANCE CORPORATION (1991) 4 NWLR (pt. 184) 157]. *(P 471 Para s C – H)*

44. *Errors of the lower court*

The court below fell into this error because it did not seriously consider whether the purported revocation followed the due process of law and also whether it was proved by those who asserted it. If it had, it would have found on the principle *nemo dot quod non habet* that on the failure of the purported revocation the Government of Rivers State could not vest in the predecessor-in-title of the 3rd and 4th respondents the interest in the disputed property that it did not, itself, have. *(P 472 Paras E – G).*

Nigerian Cases Cited in this Judgment

Adelaja vs. Fandai (1990) 2 NWLR (Pt. 131) 137
Adesanoye vs. Adewole (2000) 9 NWLR (Pt. 671) 145
Adole vs.Gwar (2008) 11 NWLR (Pt. 1099) 562;
Adukwu vs. Commissioner For Works, Lands & Transport, Enugu State (1997) 2 NWLR (pt. 489) 588;
Akingbade vs. Elemesho(1964) NSCC (Vol. 3) 96
Alakija vs. Abdulai (1996) (Pt. 552) 1.
Amankra vs. Zankley (1963) 1 All NLR 304; (1963) NSCC (Vol. 3) 243,
Att-Gen., Lagos Sate vs. Eko Hotels (2006) NWLR (Pt. 1011) 378.
Awojuglade Light Industries Ltd vs. Chinukwe (1995) 4 NWLR(Pt. 390) 379.
Bello vs. A-G Oyo State (1986) 5 NWLR (Pt. 45) 828,

Bello vs. Diocesan Synod of Lagos (1973) 3 SC 131.
C.S.S. Bookshops LTD. vs. R.T.M.C.R.S (2006) 11 NWLR (pt.992) 530.
Edokpolo& Co. Ltd. vs. Ohenhen(1994) 7 NWLR (Pt. 358) 511.
Egbe vs.Alhaji (1990) 1 NWLR (Pt. 128) 546;.
Foreign Finance vs. L.S.D.P.C. (1991) 1 NSCC 520;
Hart vs. Military Governor, Rivers State & ORS. (1976) 11 S C (Reprint) 109.
Ibrahim vs. Mohammed (2003) 6 NWLR (Pt. 817) 615
Idundun v Okumagba (1976) 1 NMLR 200;
Ikonne vs. Nwachukwu (1991) 2 NWLR (Pt. 172) 214.
Kalu vs. F.R.N. (2016) LPELR – 40108 (SC).
Kodilinye vs.Odu (1935) 2 WACA 336,
Kyari vs. Alkali & 3 Ors (2001) 5 SCNJ 421.
Kyari vs. Ganaran (1997) 2 NWLR (Pt. 488) 380
Makanjuola vs. Balogun (1989) NWLR (Pt. 108) 192;
Morakinyo vs. Adesonyero (1995) 7 NWLR (Pt. 409) 602
Niger Construction Ltd. vs. Ogbimi (2001) 18 NWLR (Pt. 744) 83;
Nigeria Engineering Works Ltd. vs. Denap Ltd. (1997) 10 NWLR (pt 525) 481.
Nwabueze vs. Okoye (1988) 4 NWLR (pt. 91) 664;
Obikoya & Sons Ltd vs. Gov. Lagos State &Anor (1987) 1 NWLR (Pt. 50) 385.
Odiase vs. Agho (1972) 1 All NLR (Pt. 1) 170;
Ogbu& 4 Ors vs. Ani & 4 Ors (1994) 78 SCNJ (Pt. II) 363,
Ogunleye vs. Oni (1990) 2 NWLR (Pt. 135) 745.
Olohunde & Anor vs.Adeyoju (2000) 79 LRCN 2297
Olukoya vs.Ashiru (2006) ALL FWLR (Pt. 322) 1479
Olumide vs. Ajayi(1997) 8 NWLR (Pt. 517) 433.
Orsanmi vs.Idown (1959) 4 FSC 40;
Osho vs. Foreign Finance Corporation (1991) 4 NWLR (pt. 184) 157.
Oshodi vs..Eyifuem (2000) 13 NWLR (pt.684) 332;
Oshodi vs.Balogun & Ors (1936) 4 WACA 1.
Otukpo vs. John (2012) 7 NWLR (Pt. 1299) 357;
Piaro vs.Tenalo (1976) 12 SC 31.
Registered Trustees of Apostolic Church vs. Oluwolain(1990) 6 NWLR (Pt. 158) 514;
Saraki vs. Kotoye (1992) 279 NWLR (Pt. 264) 156;
Sore Mekun vs.Shodipo (1959) LLR 30;
Suleiman vs. C.O.P. (2008) 8 NWLR (Pt. 1089) 298,
Tewogbade vs. Obadina(1994) 4 NWLR (Pt. 338) 326 SC

A *Timitimi vs. Amabebe (1953) 14 WACA 374;.*
Udegbe vs. Nwokafor (1963) 1 SCNLR 184,
Woluchem vs.Gudi (1981) SC 291,

B **Nigerian Statues Cited in this judgment**
Land Use Act – Ss5(2), 6, 28, 34, 36 and 44
Evidence Act – S. 133 (1)
Constitution of Federal Republic of Nigeria 1999 – S. 36(1)

C **Representations**
R.A ANYAWATA with Ijeoma Utchay (Mrs); Josephine Nwadawa (Miss); Chikadibia Igweh (Esq); Collins Anyawata (Esq); Chidinma Anyawata (Mrs); O. Anyawata (Esq) and M. Stan for the appellant.

D
Mr. A. O. Omotoso with O. C Eze and M. E Igwurube for the 1st Respondent.

WILCOX ABERETON for the 2nd Respondent.

E MR. J.T.O UGBODUMA for the 3rd and 4th Respondents

GALINJE, (JSC) (Delivering the lead judgment): The appellant in this appeal was the plaintiff at the Rivers State High Court, sitting in Port Harcourt, His
F claims as endorsed at paragraph 18 of his statement of claim filed on the 9th of May, 1989 are as follows:

> **"Wherefore the plaintiff claim from the defendants a**
> G **declaration that:**
> **(d) The plaintiff is the person entitled to the statutory Right of Occupancy of the land known as Plot 46, Diobu GRA Phase 1, Port Harcourt, otherwise known as and called No.**
> H **46, Obagi Street, Phase 1, GRA, Port Harcourt.**
> **(e) The appointment of the Sanomi Commission of Inquiry and the recommendation of the said commission in respect of the aforesaid property as published in the Commission**
> I **of the Government of Rivers State on the report of the Commission of Inquiry into Allocation of Plot and sale of Abandoned Houses in Port Harcourt during the period 1st October, 1979 to 31st December, 1983 under the**

chairmanship of Mr. Dickens Sanomi" by the Rivers State Government is irregular, null and void, and of no effect.

(f) The purported sale of the said property by the 2nd defendant is unconstitutional, null and void and of no effect.

2. N10,000.00 general damages for trespass.

3. Perpetual injunction restraining the Defendants their agents or servants from further trespass to the plaintiffs said property".

The 2nd respondent/defendant filed a 7 paragraphs statement of defence on the 23rd January, 1991. The 1st respondent/defendant filed an 8 paragraph statement of defence which he later amended. The 7 paragraph amended statement of defence was filed on the 21st July, 1993. For the 3rd and 4th respondents who were the 3rd and 4th defendants at the trial court, a 19 paragraph statement of defence was filed. Issues having been joined, the case proceeded to trial. At the end of the trial and address, and in a reserved and considered judgment delivered on the 24th March, 1997 Ndu J granted all the reliefs which the appellant asked for, except for the claim for general damages for trespass which was reduced to N300.00.

The respondents herein were dissatisfied with the Judgment of the trial court. Being aggrieved they appealed to the Court of Appeal, Port Harcourt Division. The appeal was heard and in a unanimous decision of the justices that sat on the appeal, delivered on the 5th day of April, 2001, the decision of the trial court was set aside and the claim of the appellant at the trial court was dismissed with cost assessed at N5,000.00. The appeal herein is against the decision of the lower court. The appellant's notice of appeal, at pages 254 to 260 of the record contains 8 Grounds of appeal.

Parties filed and exchanged briefs of argument. **Chief C.A.B Akpananta**, learned senior counsel for the appellant submitted six issues for determination of this appeal as follows:

"(i) Whether the appellant had a Right of Occupancy over the disputed property and was at all material times in possession of the said property.

(ii) Whether the appellant's Right of Occupancy was validly

revoked according to law or as required by the Land Use Act, 1978.

(iii) Whether the appellant's Right of Occupancy over the property in dispute was automatically extinguished under Section 5(2) of the Land Use Act by the purported grant of a statutory right of occupancy over the same property to the 3rd and 4th respondents' predecessor in-title.

(iv) Whether the purported sale agreement with the 3rd and 4th respondents' predecessor-in-title and the purported statutory certificate of occupancy issued to him over the said property in dispute were valid in law.

(v) Whether it is the requirement of the law that in order to save an earlier grant of a right of occupancy, the later right of occupancy must be expressly set aside.

(vi) Whether the respondents were trespassers and accordingly liable to pay damages to the appellant.

Mr. Ayodeji Omotoso, learned counsel for the 1st respondents, who also settled the 1st respondents brief of argument issued a preliminary objection in the following words:

"Notice is hereby given that the 1st respondent shall by way of objection, urge on the court to discountenance Ground 1 and 4 of the appellant's Grounds of Appeal and issue No. ii purportedly distilled from the 2 Grounds of Appeal. Learned counsel argued the preliminary objection and thereafter formulated five issues for determination of this appeal. I shall consider the learned counsel's argument in his preliminary objection anon. The issues submitted on behalf of the 1st respondent are hereunder reproduced for consideration as follows:

"1. Whether the lower court was justified in deciding that the appellant had no prior interest in the property granted or deemed to have been granted under the Land Use Act.

2. Considering the state of pleadings and the evidence

adduced at the trial, whether the lower court was justified in holding that "whatever interest the appellant had in the property was cancelled by the Rivers State Government Notice No. 3 of 1986" and automatically extinguished by the grant of a statutory right of occupancy over the property to the 3rd and 4th respondents' predecessor in-title under Section 5(1) of the Land Use Act.

3. **Having regard to the state of pleadings and the evidence adduced, whether it was proper for the lower court to have upheld the validity of the sale agreement and the certificate of occupancy granted to the 3rd and 4th respondents predecessor-in-title.**
4. **Whether the lower court was also justified in holding that to save an earlier grant of a right if occupancy, the later right of occupancy ought to be expressly set aside.**
5. **Whether, going by the entire circumstances of the case, the lower court was justified in holding that the respondent (now appellant) was "clearly not in possession of the property in dispute", and therefore that he is not entitled to damages for trespass, as the appellant (respondent) cannot be adjudged trespassers on the property in dispute in view of exhibit D4 (certificate of occupancy) granted to Dr. Dima (3rd and 4th respondents predecessor in-title) over the property."**

For the 2nd respondents, **Wilcox Abereton, Esq** of counsel who settled the 2nd respondent's brief of argument formulated five issues as well, for determination of this appeal. These issues read as follows:

1. Whether the appellant made out a case of invalid cancellation/revocation of his right of occupancy over the property.
2. Whether the learned justices of the court below were not right in holding that Exhibit P3 (Land agreement) was not a document which could confer a legal title on the appellant ranking above Exhibit D4 (the certificate of occupancy) granted by the Governor to the predecessor of 3rd and 4th respondents.
3. Whether the court below was wrong to hold that the statutory right of

A occupancy vide Exhibit D4 granted by the governor to the predecessor in title of 3rd and 4th respondents automatically extinguished any other title the appellant might have over the property.

4. Considering all the circumstances of this case, was the court below wrong in B holding that to save the earlier right of occupancy of the appellant over the property, he (appellant) must expressly seek to set aside the later statutory right of occupancy granted to the predecessor-in-title of the 3rd and 4th respondents.

C 5. Was the appellant in possession of the property in dispute at all material times to this suit to enable him succeed in his claim for damages for trespass.

Mr. J.T.O Ugboduma, learned counsel for the 3rd and 4th respondents, who also D prepared their brief of argument distilled four issues for determination of this appeal. These issues are as follows:

"1. Whether the interest the appellant had in the property was
E **a right of occupancy granted or deemed granted under the Land Use Act which conferred on the appellant a legal title over the property.**

2. Whether the appellant's interest in the property was
F **cancelled by the Rivers State Government Notice N. 3 of 1986.**

3. Whether the lower court was justified in upholding the validity of the Sales Agreement (Exhibit 9) and the
G **statutory right of occupancy (Exhibit D4) granted in favour of the 3rd and 4th respondents predecessor-in-title and in holding that whatever interest appellant had in the property was automatically extinguished under Section 5(2) of the Land Use Act upon the grant of the said**
H **statutory right of occupancy.**

4. Whether the lower court was justified when it held that the appellant was not in possession of the property at the material time and therefore not entitled to damages for
I **trespass against the 3rd and 4th respondents who cannot be adjudged trespassers in view of the statutory right of occupancy granted to Dr. Dima (deceased) over the**

property.

Before I go into the arguments of counsel for the respective parties. I wish to set out albeit in brief, the facts of this case.

Sometimes in 1981, the Rivers State Government offered to sell the disputed property, an abandoned property to the appellant, who accepted the offer and paid a deposit of N10,000.00 towards its total value. An agreement evidencing the sale was subsequently entered into between the appellant and the Secretary to the Government of Rivers State and the appellant was put in possession after the agreement aforesaid was registered in the land registry.

When the military took over the government in 1983, the appellant was put in detention and his properties including the disputed property were confiscated.

After his release, he was made to appear before Justice Uwaifo Special Panel on Recovery of Public Properties in Lagos. The Panel recommended that all his properties including the disputed property be returned to him. This recommendation was approved by the Armed Forces Ruling Council, which was the highest ruling body in the country at the time. Later, the Rivers State Government appointed Sanomi Commission to look into the allocation of plots and abandoned properties between 1st October, 1979 and 31st December, 1982. This commission recommended to the Rivers State Government that the disputed property be retained as government quarters. The Rivers State Government accepted the recommendation and published in its gazette that the appellants' right over the said property had been revoked. The property was retained as government quarter for six months and was subsequently sold to Dr. Charles Dima of blessed memory inspite of appellant's protest through (Exhibit 8) to the 2nd respondent against the sale.

Learned counsel for the 2nd respondent issued a preliminary objection and argued same at pages 12 16 of his brief of argument. Learned counsel for the appellant also issued a preliminary objection in his reply brief to the 2nd respondent's brief of argument. These preliminary objections were however withdrawn before the hearing of the appeal. They were accordingly struck out. The only preliminary objection left for consideration is the one issued by the learned counsel for the 1st respondent. Even at the risk of repetition, I wish to set out the objection here for clarity sake. This is how it reads:

"Notice is hereby given that the 1st respondent shall by way of

objection urge on the court to discountenance Grounds 1 and 4 of the appellants' grounds of appeal and issue No. 11 purportedly distilled from the two (2) Grounds of Appeal".

Where a preliminary objection is issued against any aspect of an appeal, it must be heard and resolved first before the resolution of the issues for determination of the appeal. The reason for this is obvious. An appeal heard on a defective process will result in a void decision.

In his argument in support of the objection, learned counsel for the 1st respondent submitted that the 1st ground of appeal does not arise from the decision of the lower court as the lower court never made any pronouncement to the effect that the appellant had a right of occupancy that was revoked. Learned counsel contends that any ground of appeal which does not arise from the decision against which the appeal lies is incompetent.

In aid the authority in **Saraki vs. Kotoye (1992) 279 NWLR (Pt. 264) 156** was cited and relied upon.

In a further argument learned counsel submitted that the second issue for determination of this appeal which is formulated on behalf of the appellant partly from the 4th ground of Appeal, is at variance with the said 4th ground of appeal. On this basis, learned counsel on the authority of **Morakinyo vs. Adesonyero (1995) 7 NWLR (Pt. 409) 602** and **Adelaja vs. Fanoki (1990) 2 NWLR (Pt. 131) 137** urged this court to discountenance with the said issue and the argument in support thereof. Still in argument learned counsel submitted that since the appellant has abandoned Ground 4, he has accepted the finding of the lower court that says the appellant's interest in the property was cancelled by the Rivers State Government vide Legal Notice No. 3 of 1986, as such he has no valid interest upon which his claims will be resolved. The issue of whether the appellant's interest was cancelled by the Rivers State Government Legal Notice No. 3 of 1986, is not a matter to be resolved through preliminary objection as it is one of the core issues to be determined in the main appeal. The law is settled beyond any doubt that grounds of appeal must arise and be related to the decision against which appeal lies, and should constitute a challenge to the ratio of the decision. Any ground of appeal that is formulated outside the decision appealed against is incompetent and ought to be discountenanced. See **Saraki vs. Kotoye (Supra); Egbe vs. Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590.** The objection herein is directed at

A the 1st and 4th grounds of appeal. I reproduced these grounds hereunder as follows without their particulars:

> **"1. The Court of Appeal erred in law in holding that the**
> B **revocation of the appellant's right of occupancy was valid.**
> **4. The Court of Appeal erred in law in holding that the appellant's interest in the property was cancelled by the Rivers State Government Notice No. 3 of 1986."**

C

At page 245 of the printed record of this appeal, the lower court in its judgment said:

> D **"Secondly, upon the grant of a statutory right of occupancy (Exhibit D4) to the appellant's predecessor-in-title over the property in dispute, whatever interest the respondent had in the property is automatically extinguished".**

E

Still on the same page, the lower held:

> **"Thirdly, the respondent's interest in the property was**
> F **cancelled by the Rivers State Government Notice No. 3 of 1986."**

Clearly the two grounds of appeal, subject matter of the 1st respondent's objection
G do relate to the lower court's decision highlighted above. Whatever the difference in the language used is a matter of semantics. I failed to see how the two grounds of appeal do not relate to the decision of the lower court. The objection lacks merit and it is accordingly overruled.

H Now, for the main appeal, I have read through the judgment against which this appeal lies and argument canvassed by parties respective counsel and I am of the firm view that the only issue calling for the determination of this appeal is whether the appellant did prove that he is entitled to the declaration of title over
I the disputed property and there is no feature that deprived him of his right of occupancy over the said property. In his argument, learned counsel for the appellant submitted that the evidence before the trial court clearly shows that the appellant had an uninterrupted right of occupancy over the disputed land, since

A the purported revocation was not carried out in accordance with the law. According to the learned counsel the right of occupancy acquired by the appellant remained valid and subsisting at all material time and the burden is on the respondents to prove that the right available to him has been legally revoked. In
B aid, learned counsel cited the authorities in **Nigerian Engineering Works Ltd vs. Denap Ltd (2002) FWLR (Pt. 89) 1062 at 1093; Osho vs. Foreign Finance Corporation (1991) 4 NWLR (Pt. 184) 157 at 189.** Finally, learned counsel urged this court to hold that the respondents failed to discharge the burden placed
C on them.

For the 1st respondent it is argued that the sale to the appellant of the disputed property and the subsequent agreement between him and the secretary to the Rivers State Government heavily relied upon by the appellant does not
D constitute an interest that could confer a right of occupancy on the appellant under the Land Use Act. According to the learned counsel for the 1st respondent, the appellant's interest which was created in 1983, not having been granted by the Governor does not confer legal right on the appellant under the Land Use Act,
E same not having been evidenced by a certificate of occupancy. In a further argument, learned counsel submitted that the issue of whether or not the appellant had a prior legal right before the revocation does not lie in the mouth of the parties, but is rather a matter of law deducible from the proven facts in the record
F before the court. Finally, learned counsel urged this court to hold that the lower court is right in all its pronouncements.

For the 2nd respondent, it is argued that the appellant neither established a right of occupancy over the disputed property that is known to the Land Use Act
G nor did he make out a valid case against the cancellation/revocation of the his purported interest or right in the property. In a further argument learned counsel submitted that the appellant had no statutory right of occupancy capable of being revoked under **Section 28(6)** and **44** of the **Land Use Act**, as (**Exhibit P3)** is not a
H document recognized by it. In aid learned counsel cited **DabovsAbdullahi (2005) ALL FWLR (Pt. 255) 1039.** Finally, learned counsel urged this court to resolve the 2nd issue formulated by the appellant and the 2nd respondent's issue against the appellant.

I For the 3rd and 4th respondents it was argued that in **Ogunleye vs. Oni (1990) 2 NWLR (Pt. 135) 745** the defendant's deemed grant under **Section 34(2)** of the **Land Use Act** was preferred to the plaintiff's later certificate of occupancy issued on 27th June, 1983 where as in this appeal, the respondent has no prior

interest in the property granted or deemed to be granted under the **Land Use Act**. Learned counsel tried to distinguish the present case with the case of **Registered Trustees of Apostolic Church vs.Oluwolein (1990) 6 NWLR (Pt. 158) 514** and ended up citing **Kari vs. Ganaram** and contended that the agreement to sell the property in dispute to the appellant as evidence by **Exhibit P3** was not granted under the **Land Use Act** and therefore does not confer a legal title on the Appellant.

In a further argument, learned counsel submitted that **Exhibit P3** is a mere agreement as no interest passes until the governor's consent is sought and had. In aid learned counsel cited **Awojugbagbe Light Industries Ltd vs. Chinukwe (1995) 4 NWLR (Pt. 390) 379 at 436; International Textile Industries (Nig) Ltd vs. Aderemi (1999) 8 NWLR (Pt. 614) 268 at 313 paragraph E-H.** In conclusion, learned counsel submitted that for there to be a right of occupancy granted under the **Land Use Act**, such right must actually be granted under the **Land Use Act** or deemed to be granted under the **Land Use Act** by the governor. In aid learned counsel cited **Obikoya & Sons Ltd vs. Governor of Lagos State &Anor (1987) 1 NWLR (Pt. 50) 385 at 410 Paragraphs A-B.**

I have set out the appellant's claim at the trial court elsewhere in this judgment. Even at the risk of repetition, I wish to reproduce the first claim as follows:

> **"A declaration that:**
> **(a) The plaintiff is the person entitled to the statutory right of occupancy of the Land as Plot 46, Diobu, GRA, Phase 1, Port Harcourt, otherwise known as and called No. 46, Obagi Street GRA, Phase 1, Port Harcourt."**

Clearly, the **a**ppellant set out a claim for declaration of title to the disputed property. The law is settled that the burden of proof in a claim for declaration of title to land lies on the plaintiff, who generally must rely on the strength of his own case and not on the weakness of the defendant's case. See **Kodilinye vs Odu (1935) 2 WACA 336, Udegbe vs Nwokafor (1963) 1 SCNLR 184, Woluchem vs Gudi (1981) SC 291, Piaro vs Tenalo (1976) 12 SC 31.** In this case, the Appellant who was the plaintiff at the trial court had the burden to prove that he is entitled to the declaration which he sought at that court and he was required to discharge this burden of proof on preponderance of evidence. It is also the law

A that a claim for declaration of title to land may be proved by any of the five ways stated and restated in numerous decisions of this court. See **Piaro vs. Chief W. Tenalo (supra); Idundun vs. Okumagba (1976) 1 NMLR 200; Makanjuola vs. Balogun (1989) NWLR (Pt. 108) 192; Olukoya vs. Ashiru (2006) ALL**
B **FWLR (Pt. 322) 1479.** These five methods of proving title or ownership to land are:

6. **By traditional evidence;**
7. **by production of document of title which must be duly authenticated;**
C 8. **by the exercise of numerous and positive acts of ownership over a sufficient length of time to warrant the inference that the person is the true owner of the land;**
9. **by acts of long possession and enjoyment of the land, and**
D 10. **by proof of possession of connected or adjacent land in circumstance rendering it probable that the owner of such connected or adjacent land would in addition be the owner of the land is dispute.**

E In **Olukoya vs.Ashiru** (supra) this court gave the third method of proving ownership of land as follows:

> **"By acts of selling, leasing, renting out all or part of the land or**
F **farming on it or on a portion thereof."**

In the instant case, the **a**ppellant gave evidence at the trial court and produced in evidence, a letter of offer of the property for sale, receipt for N10,000.00 being the
G initial deposit paid towards the total value of the property and a copy of the agreement between him and the **s**ecretary to the Government of Rivers State which were admitted and marked **Exhibit P1, P2 and P3** respectively. **Exhibit P3** was registered in the land registry and the appellant was put in possession or
H assumed possession over the property. These pieces of evidence were never challenged in anyway by the respondents. The 3rd respondent testified at the trial court as DW1**.** Her evidence is that her late husband **Dr. Charles Dima** bought the disputed house from the Rivers State Housing and Property Development
I Authority, the 2nd respondent and was subsequently issued with a certificate of occupancy which was admitted as Exhibit D4**.** In addition one Rhoda Osanebi a staff of the 2nd respondent testified as DW2. In her evidence she stated that she could identify the signature of Mrs. R. Zidougbaon any document. She identified

A a document which she said emanated from her office and the signature on the said document was that of Zidougba. Mr. Pepple applied to tender it. Chief Asuk had no objection. Thereafter the court admitted a letter of 27th August, 1987 in evidence and marked it Exhibit D5. The identity of Zidougba was not disclosed
B and the 1st and 2nd Respondents did not call any witness and they also did not testify before the trial court even though each of them filed a statement of defence. At paragraph 2 of the 1st Respondent's amended statement of defence, paragraphs 1, 3, 5, and 12 of the statement of claim were admitted. The admitted
C paragraphs of the statement of claim are hereunder reproduced as follows:

> **(1) The plaintiff is a contractor and resides at No. 8, Road 1, Presidential Housing State, Phase 11, Port Harcourt,**
> D **within the jurisdiction of the Honourable Court.**
> **(2) Sometimes in 1981 the plaintiff applied to the committee on government properties to purchase one of the abandoned properties being sold to the indigenes of Rivers State and**
> E **by a letter No RSL/9764/14 of 18th May, 1982 the Government of Rivers State offered to the plaintiff to purchase the property known as and called No. 46 Obagi Street, GRA, Phase 1. The plaintiff accepted the offer and**
> F **paid a deposit of N10,000.00 towards the total value of the property when so determined. The said letter of offer will be founded upon at the trial.**
> **(5) On 5th April, 1983, the secretary to the Rivers State**
> G **Government on behalf of the Government of Rivers State entered into a sales agreement in respect of the said property with the plaintiff which agreement was registered as No. 39 at page 39 in volume 96 of the lands registry, Port**
> H **Harcourt.**
> **(12) By Legal Notice No. 3 of 1986 published as a supplement to the official gazette Rivers State of Nigeria No. 9 volume 18 of 27th March, 1986, titled "Revocation of Rights and**
> I **Certificates of Occupancy Order 1986", the Rivers State Government published the list of properties whose rights and certificates of occupancy were revoked as well as the list of properties to be retained as Government Quarters.**

A **The plaintiff's said properties appeared in the latter category. The said legal notice will be founded upon at the trial."**

B The 1st respondent partially admitted the 2nd paragraph of the statement of claim to the extent that he is the legal officer of the Rivers State Government and he is sued as representing the said government only.

The facts contained in paragraphs 1, 3, 5 and 12 having been expressly **C** admitted by the 1st respondent are deemed established. Where an averment in a statement of claim is not denied in a statement of defence, same is deemed admitted. That which is admitted needs no proof. See **Adesanoye vs Adewole (2000) 9 NWLR (Pt. 671) at 145 paragraph A.** With the admission of the **D** averments and production of documents, Exhibits P1, P2 and P3, the learned trial judge was convinced that the appellant had proved its case, when he held:

E **"It is hereby declared that the plaintiff is the person entitled to the statutory right of occupancy of the land known as Plot 46, Diobu GRA Phase 1, Port Harcourt ….".**

By the evidence before the trial court, I am of the view that the appellant had on **F** the authority of **Idundun vs. Okumagba** (supra) acquired ownership of the disputed property and was entitled to a statutory right of occupancy. However, the Court of Appeal from which this appeal emanated saw the case differently. The Court of Appeal is of the view that the agreement to buy the land when the **G** **Land Use Act** had been promulgated does not fall under the Act and therefore did not donate to the Appellant any interest on the land which will in turn give the appellant a right of occupancy. It is also the view of the Court of Appeal that even if the appellant had any interest on the disputed property same was cancelled by **H** the Rivers State Government Notice No. 3 of 1986. It was on these premises that the Court of Appeal reversed the decision of the trial court and by virtue of **Section 5(1)** of the **Land Use Act**, the subsequent sale and issuance of certificate of occupancy to **Dr. Dima**was declared valid.

I Now it is to be noted that the disputed property is an abandoned developed property. Under what tenure was the original owner holding the right over the said abandoned property? Did the Rivers State Government take over the property without taking over the corresponding right that the original owner had?

Lands in the southern part of this country were governed by the Customary Law of the people as opposed to the **Land Tenure Law** of the North, before the advent of the **Land Use Act 1978.** I am therefore of the firm view that when the Rivers State Government sold the disputed property to the appellant, the right of occupancy of the original owner passed along with the property to him. To that extent he was deemed to have received along with the property the right which enured to the original owner who abandoned the property and same was deemed granted to the Appellant under **Section 34(2)** of the **Land Use Act** which provides thus:

> **"Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the governor under this Act."**

The 1st and 2nd respondents did not testify at the trial court even though they filed statements of defence, which they effectively abandoned. Yet the lower court in its judgment made the following findings at page 245 of the printed record of this appeal as follows:

> **"1. The agreement to sell the property in dispute to the respondent as evidenced by Exhibit P3 was not granted under the Land Use Act and does not confer legal title on the respondent compared with the statutory right of occupancy granted to the appellants' predecessor-in-title.**
> **2. At the time of the grant (Exhibit D4) to the appellant's predecessor-in-title the legal interest over the property was in the Rivers State Government and not the respondent who was never granted a statutory right of occupancy over the property.**
> **3. Upon the grant of a statutory right of occupancy (Exhibit D4) to the appellant's predecessor-in-title over the property in dispute whatever interest the respondents had in the property is automatically extinguished."**

These are matters of evidence. The lower court was wrong when it set up a case

for the respondents. The law is trite that an appellate court is only concerned with matters that are properly placed before it. It has no jurisdiction over a matter that was not raised and adjudicated upon at the trial court. The case of **Kyari vs. Ganaran (1997) 2 NWLR (Pt. 488) 380** is distinguishable from this particular case. In that case Abba Ganaran applied to the Ministry of Land and Survey, Borno State for a grant of a temporary right of occupancy over a piece of land along Maiduguri-Bama Road to be used for car wash. What was given him was a temporary licence which was subjected to revocation by the Government at will. In the instant case the Rivers State Government outrightly sold the disputed property to the appellant and the agreement in respect of the transaction was registered in the land registry. Clearly the transaction did not envisage a temporary holding of the disputed property. In that case of **Kyari vs. Ganaran (Supra) Belgore JSC** (as he then was) at page 400 paragraph E-F held:

> **"Where there is a subsisting right of occupancy, it is good against any other right. The grant of another right of occupancy over the same piece of land will therefore be merely illusory and invalid. The appellant's right of occupancy subsists up to now as it has not been revoked and the wrongful grant to the 1st respondent has no effect whatsoever on its authenticity."**

I completely endorse the views expressed herein by my Lord **Belgore, JSC** (as he then was). The appellant's claim was not based on non-payment of compensation or lack of notice which the lower court over-flogged. His case is that he was entitled to statutory right of occupancy over the disputed property which I think he successfully established.

On whether the appellant's right was validly revoked, learned counsel for the appellant submitted that the 1st and 2nd respondents did not comply with the provisions of **Section 28(1)** and **44** of the **Land Use Act** in their purported revocation of the appellant's right of occupancy. Learned counsel urged this court to set aside the purported revocation on the authority of **Nigerian Engineering Works Ltd vs. Denap Ltd (2002) FWLR (Pt. 89) 1062 at 1085 paragraphs F-G; Osho vs. Foreign Finance Corporation (1991) 4 NWLR (Pt. 184) 157 at 189 paragraph B-C.** Finally learned counsel submitted that the burden was on the Respondents to prove that the revocation of the appellant's right of occupancy was valid and since they failed to do so, the purported

revocation is invalid, null and void.

Learned counsel for the 1st respondent argued forcefully that the lower court was justified in holding that whatever interest the appellant had in the property was cancelled by the Rivers State Government Notice No. 3 of 1986 and was automatically extinguished by the grant of the right of occupancy (Exhibit D4) over the property to the 3rd and 4th respondent's predecessor-in-title. Learned counsel further argued that the appellant is not a holder of a right of occupancy over the disputed land as he failed to adduce facts at the trial to show the quantum of interest he had which entitled him to his claim. According to the learned counsel, the nature of interest established by the appellant does not amount to a right of occupancy, since it was not created before the **Land Use Act** or under **Section 5(1) of the Act.** This being so, learned counsel contended that the appellant was not a holder of right of occupancy and the revocation of his interest did not require strict compliance with **Section 28** and **44** of the **Land Use Act**. In a further argument, learned counsel submitted that the failure of the appellant to challenge the revocation is a pointer to the fact that his interest did not measure up to the right of occupancy, as such he cannot be heard in address regarding the improper revocation of his right of occupancy. In aid learned counsel cited **Olagunju vs. Adesoye & Anor (2009) 9 NWLR (Pt. 1146) 225 at 255 paragraphs G-H.** Finally, learned counsel urged this court to hold that the lower court was justified in holding that whatever interest the appellant had was properly revoked.

For the 2nd respondent it is argued that Exhibit P3 is a mere inchoate agreement entered into between the appellant and officials of the Rivers State Government which does not possess any weight and might under the **Land Use Act**in capable of overriding Exhibit D4**,** a certificate of occupancy issued by the Governor. According to the learned counsel, agreement could be entered by parties, but it is the certificate of occupancy that confers title to land.

Learned counsel for the 3rd and 4th respondents in his argument submitted that the appellant did not have a right of occupancy granted to him under the **Land Use Act** by the Rivers State Government and so the issue of whether his right was validly revoked does not arise at all. Learned counsel urged the court to dismiss the appeal.

Section 5 and **6** of the **Land Use Act** empowers the governor and the Local Government to grant statutory and customary right of occupancy respectively. **Section 8** of the same Act provides that the statutory right of occupancy granted

under **Section 5(1)(a)** shall be for a definite time and may be granted subject to the terms of any contract which may be made by the governor and the holder not being inconsistent with the provisions of the Act. There is however, no such requirement for a customary right of occupancy. **Section 10** of the Act provides for certain condition and provisions in the certificate of occupancy upon grant of a statutory right of occupancy as evidence of such grant to the holder of the right of occupancy. **Section 34** and **36** of the Act provide for deemed right of occupancy by recognizing the existence of right of ownership before the coming into force of the **Land Use Act, 1978**. It follows therefore that a customary right of occupancy whether granted or already being used or occupied, must be used in accordance with customary law, either by individual or family. Thus, under **Section 5** and **6** of the **Land Use Act**, the following units of ownership exist as follows:

5. **Formal statutory right of occupancy granted under Section 5 of the Act.**
6. **Formal customary right of occupancy granted under Section 6 of the Act.**
7. **Deemed statutory right of occupancy granted under Section 34.**
8. **Deemed customary right of occupancy granted under Section 36 of the Act.**

All these units of rights are recognized under **Section 36** of the **Act**. From the foregoing, customary right of occupancy predates the **Land Use Act** and it is not a subject of a grant.

I have stated elsewhere in this judgment that the disputed land was deemed granted to the appellants since the rights of those who abandoned the property are deemed transferred to him. Subsequent sale to Dr. Dima was invalid *ab initio,* in absence of proper termination of the agreement between the Rivers State Government and the appellant. In **Olohunde&Anor vs. Adeyoju (2000) 79 LRCN 2297 at 2328 paras D-E,** this court had this to say:

> **"A certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978; cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is at best, only a prima facie evidence of**

such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid, null and void."

See **Kyari vs. Alkali & 3 Ors (2001) 5 SCNJ 421.** The 1st and 2nd respondents admitted that whatever interest the appellant had over the disputed land was cancelled. The law is settled that he who asserts has the onus to prove what he asserts if he is to succeed. In the instant case the onus of adducing evidence to establish the facts of revocation is under the Evidence Act squarely on the Respondent. The 1st and 2nd respondents filed their statement of defence and abandoned them as they did not testify before the trial court.

In **Osho vs. Foreign Fin. Corp (supra) at page 201, paragraphs G-H,Belgore JSC** (as he then was) said:

"A party relying on any fact must not only plead that fact but must also proffer evidence in proof thereof. Nowhere in the written record is there evidence of revocation of the right of occupancy of the respondent…"

The Rivers State Government that sold the disputed land to the appellant, turned round to acquire the land which it said was for public purpose. However, within six months it sold the property to a private individual. Clearly from this transaction, it was clear that the acquisition of the property was not for the purpose which it was indicated. The Sanomi panel was just a script meant to raise dust, and clearly that dust blurred the vision of the lower court. In **Osho vs Foreign Finance Corp. (supra)**, this court, held that when public purpose is stated to be the ground for revocation of a right of occupancy, if the land is later discovered to be in use for other purposes, the revocation of the right of occupancy is vitiated and the order becomes unlawful. This is exactly what happened in this case. The sole purpose for the acquisition of the abandoned properly was to sell same to Dr. Dima, who was hurriedly issued with a certificate of occupancy after the sale.

Now the question is whether the appellant's right of occupancy over the property in dispute was automatically extinguished under **Section 5(2)** of the **Land Use Act** by the purported grant of Exhibit D4 to the 3rd and 4th respondents.

By **Section 1** of the **Land Use Act** all land comprised in the territory of each state in the federation are 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. By **Section 28** of the **Act**, it shall be lawful for the governor to revoke any right of occupancy for overriding public interest. This right of revocation however must be exercised in accordance with the provision of the Act.

The situation here concerns an abandoned property which the government sold to the appellant and the agreement thereof, Exhibit P3**,** is registered in the land registry. By admitting that the right of the appellant is extinguished is clearly an admission that there was a right available to the appellant Two rights of occupancy cannot subsist in respect of the same property or else there will be anarchy. There is no evidence before the trial court that the appellant's right was lawfully revoked. To revoke a right of occupancy for public purpose, the letter and spirit of the laws must be adhered to. The terms of revocation, as provided under **Section 28** and **44** of the **Land Use Act**, must be strictly compiled with and strict construction of the provision made. See **Bello vs. Diocesan Synod of Lagos (1973) 3 SC 131.** I therefore fully endorse the view of my Lord Belgore JSC (as he then was) in **Kyari vs. Ganaram** (Supra), and the view expressed by **Ogundare, JSC** in **Nigerian Engineering Works Ltd vs. Denap Ltd** (Supra). In **Olukoya vs. Ashiru (2006) ALL FWLR (Pt. 322) 1479 at 1514 Paras. E-H,** this court held that an equitable owner in possession cannot be overridden by a subsequent grantee of a legal estate. This is what my brother **Ogbuagu, JSC**, who read the lead judgment said:

> **"As rightly submitted in the respondent's brief at page 8, the Jalingo Local Government having lawfully granted the land in dispute to the respondent, in 1981, it was left with nothing to grant to the appellant subsequently in 1983 during the subsistence of the grant to the respondent…. so that, if there is proof that money was paid for the land coupled with an entry into possession it is sufficient, to defeat the title of a subsequent purchaser of the legal estate, if and provided that the possession, is continuously maintained….**
>
> **Thus, if even it is coupled with possession, it cannot be**

overridden by a legal estate." See Ogbu & 4 Ors vs. Ani & 4 Ors (1994) 78 SCNJ (Pt. II) 363, Sore Mekun vs. Shodipo (1959) LLR 30; Orsanmi vs. Idown (1959) 4 FSC 40; Oshodi vs. Balogun&Ors (1936) 4 WACA 1.

Clearly the right of occupancy available to the appellant over the disputed property was not automatically extinguished by **Section 5(2)** of the **Land Use Act** by the purported sale and subsequent grant of a statutory right of Occupancy over the same property to the 3rd and 4th respondents. To allow such an injustice, is to allow those in authority to benefit from their wrong actions. Rivers State Government cannot determine a contract in which it is a party and then take certain benefit arising therefrom leaving the party aggrieved without any remedy.

On the whole I am of the firm view that the lower court was wrong in reversing the judgment of the trial court. For the reasons I have alluded to in this judgment, the sole issue formulated by me is resolved in favour of the appellant. The appeal therefore shall be and it is hereby allowed.

The judgment of the lower court is hereby set aside. In its place, the judgment of the trial court is hereby restored along with all the consequential orders made therein.

Paul Adamu Galinje
Justice, Supreme Court

RHODES -VIVOUR, (JSC): I have had the advantage of reading in draft the leading judgment of my learned brother, **Galinje JSC.** I too would allow the appeal against the judgment of the Court of Appeal and restore the judgment of the trial court.

After reading the leading judgment and the concurring judgments I find it difficult to add a few words of mine as if I do I would be repeating what has been so well spelt out in these judgments.

Appeal allowed. Judgment and orders of trial court restored.

Olabode Rhodes-vivour
Justice Supreme Court

KEKERE- EKUN (JSC): This appeal is against the judgment of the Court of

A Appeal, Port Harcourt Division delivered on 5th April 2001 setting aside the judgment of the High Court of Rivers State, Port Harcourt Division delivered on 24/3/1997.

The appellant, as plaintiff at the trial court sought the following reliefs
B against the respondents as per paragraph 20 of his statement of claim at pages 11-12 of the record.

C **a. The plaintiff is the person entitled to the statutory Right of Occupancy of the land known as plot 46, Diobu G.R.A. Phase 1, Port Harcourt, otherwise known as and called No. 46, Obagi Street, Phase 1, G.R.A. Port Harcourt.**

D **b. The appointment of the Sanomi Commission of Inquiry and the recommendation of the said Commission in respect of the aforesaid property as published in the "Commission of the Government of Rivers State on the Report of the Commission of the Inquiry into Allocation of Plot and Sale of Abandoned Houses in Port Harcourt during the period 1st October, 1979 to 31st December, 1983 under the Chairmanship of Mr. Dickens Sanomi" by the Rivers State Government, is irregular null and void and of no effect.**

F **c. The purported sale of the said property by the 2nd defendants to the 1st defendant is unconstitutional, null and void, and of no effect.**

2. N10,000.00 general damages for trespass.

G **3. Perpetual injunction restraining the defendants, their agents or servants from further trespass to the plaintiff's said property.**

H In stating the facts leading to this appeal, I adopt the summary of the evidence of the appellant as PW1 at the trial court as contained in the judgment of the trial court at pages 91- 92 of the record:

I **"The plaintiff testified as PW1. In his testimony he said sometime in 1981 he applied to the Committee on Government Properties to buy one of the abandoned houses. The Committee**

offered him the property in dispute that is No. 46 Obagi Street, G.R.A. Phase 1 Port Harcourt. He accepted the offer and paid a deposit of N10,000.00 towards the total value. He was given a receipt for the payment he made, and he was given possession of the property thereof. On 5th April 1983 the Secretary of the Government on behalf of the Rivers State Government executed an agreement with him for the sale of the property. When he went to the property, he found that Major Agbogun was living in it. He then wrote to the Brigade Commander of the Major's unit informing him of his rights in the property. The Brigade Commander wrote to the Major asking him to pay rents to him (plaintiff).

The army seized power from the civilians on 31/12/83, and by then he was a civil commissioner in Rivers State just for one month, all the civil commissioners were arrested and detained including him. He was charged with enriching himself with three properties, which included the property in dispute. He appeared before Justice Uwaifo's Panel in Lagos. The panel went into the matters and recommended that all his plots be given back to him. That decision was approved by the Armed Forces Ruling Council.

He was released from detention on 29/9/85 and thereafter he regained possession of the property in dispute. Later the Rivers State Government set up the Sanomi Panel to look into allocations of plots in Rivers State from 1/10/79 to 31/12/83. He was invited and he appeared before the Panel. At the conclusion of that exercise the government issued a white paper on it and the property was affected. His said property was shown in the schedule for properties to be retained as government quarters. Later he noticed that the property was going to be sold to Dr. Dima, and in reaction he immediately protested to the 2nd defendant against the sale. Inspite of the protest they went ahead and sold the property."

At the trial, the appellant testified on his own behalf. One witness (the 3rd

A respondent in this appeal) testified on behalf of the 3rd and 4th respondents. The 1st and 2nd respondents did not testify although a document was tendered and admitted in evidence through DW2, a member of staff of the 2nd respondent.

At the conclusion of the trial, the learned trial judge entered judgment in
B favour of the plaintiff (now appellant) as follows:

> **"1. It is hereby declared that the plaintiff is the person entitled to the Statutory right of occupancy of the land known as**
> C **plot 46, Diobu G.R.A. Phase 1 Port Harcourt, otherwise known as and called No. 48 Obagi Street, G.R.A. Phase 1, Port Harcourt.**
> **2. It is hereby declared that the recommendation by the**
> D **Sanomi Commission of Inquiry in respect of the property in dispute in the "Conclusions of the Government of Rivers State on the Report of the Commission of Inquiry into Allocation of Plots and Sale of Abandoned Houses in**
> E **Port Harcourt, 1983 under the Chairmanship of Mr. Dickens Sanomi" by the Rivers State Government is irregular, null and void and of no effect.**
> **3. It is hereby declared that the purported sale of the said**
> F **property by the 2nd defendant to Dr. Charles Dima (decased) is unconstitutional, null and void and of no effect.**
> **4. The defendants shall pay to the plaintiff the sum of**
> G **N300.00 general damages for trespass.**
> **5. The defendants by themselves, their servants or agents are restrained by perpetual order of injunction form further trespass of the said property.**
> H **6. The plaintiff is entitled to costs against the defendants, which I fix at N250.00".**

The 3rd and 4th respondents herein were dissatisfied with the judgment and
I appealed to the lower court. In a considered judgment delivered on 5th April, 2001 the court allowed the appeal and set aside the judgment of the trial court. The appellant is dissatisfied with this judgment and has further appealed to this court.

I must state here that I have had the benefit of reading in draft the judgment of my learned brother, PAUL ADAMU GALINJE, (JSC) just delivered. I agree entirely with the reasoning and conclusion that there is merit in the appeal and that it should be allowed.

I proffer the comments below in support and for emphasis. I agree with the formulation of a single issue for the determination of this appeal.

The first issue to consider is the nature of the appellant's interest in the disputed property *vis a vis* Exhibit P3 (Sales agreement between the appellant and the Rivers State Government) prior to the interest granted to the 3rd and 4th respondents' predecessor vide Exhibit D4. While the appellant contends that Exhibit P3 conferred a right of occupancy, it is contended on behalf of the respondents that Exhibit P3 did not confer legal title on the appellant because it was created in 1983 after the commencement of the **Land Use Act** and is not backed by a certificate of occupancy. It is contended that Exhibit P3 confers neither a legal right nor a deemed right in respect of the property in favour of the appellant.

The undisputed facts in this matter are that the Rivers State Government offered the property in dispute to the appellant for purchase vide a letter dated 18/5/82. In accordance with the terms of the agreement, he paid the N10,000 deposit and was put in possession. It is also not in dispute that he entered into a sales agreement (Exhibit P3) with the said Government, which was duly registered at the lands registry in Port Harcourt.

The Sales Agreement having been duly registered and the appellant put into possession, it is safe to say that he had an existing right of occupancy over the property in dispute.

By virtue of Section 1 of the Land Use Act 1978, all land in the State is vested in the governor of the State who shall hold it in trust and administer it for the use and common benefit of all Nigerians.

Section 5(1) of the **Act** gives the governor power to grant *inter alia,* statutory rights of occupancy to any person for all purposes while **sub-section (2)** provides that upon the grant of a statutory right of occupancy pursuant to sub-section (1), all existing rights to the use and occupation of the land, which is the subject of the statutory right of occupancy, shall be extinguished. **Section 28** of the Act provides that a governor shall have the right to revoke a right of occupancy for overriding public interest, which may include the requirement of the land by the Government of the State or by a Local Government in the State for

public purposes within the State **(Section 28 (2) (b)**. **Section 29** makes provision for compensation payable on the revocation of a right of occupancy by the Governor for overriding public interest.

In considering the effect of the above provisions of the **Land Use Act,** this court in **Nigerian Engineering Works Ltd. vsDenap (2001) 18 NWLR (Pt. 746) 726 @ 758 A- C** per **Belgore**, JSC held:

> **"Any holder of a right of occupancy, whether evidenced or yet to be evidenced by a certificate of occupancy, holds that right as long as it is not revoked. Revocation in this instance is that one done in accordance with the law, for nobody will lose his right of occupancy by revocation without his being notified to him in writing and the subsequent revocation must also be notified to him in writing. Any other method may be a mere notice of intent, it will never be notice of revocation. It will be a nullity. The governor may revoke a right of occupancy for overriding public interest (S. 28 (1) Land Use Act). The "overriding public interest" is clearly spelt out in subsection 2 & 3 of section 28 of the Land Use Act. As for notice required to the holder of right of occupancy that his right of occupancy will be revoked or is revoked, it clearly explained in section 44 of the Act."**

The appellant's right of occupancy in respect of the property in dispute was purportedly revoked as shown in an official Gazette published on 27th March 1986 (Exhibit P7) for public purpose to wit: for use as Government Quarters. As rightly observed by the learned trial Judge, for the purported revocation to be valid, prior notice must be given to the holder of the right of occupancy, as required by **Section 28 (6)** and **44** of the **Land Use Act**. The holder is also entitled to compensation by virtue of **Section 29** of the **Act**.

In an action for declaration of title to land, the onus is on the claimant to establish his case on the balance of probabilities. It is also settled law that he must succeed on the strength of his case and not on the weakness of the defence.

Section 133 (1) & (2) of the **Evidence Act, 2011** provides:

> **"133. (1) In civil cases, the burden of first proving existence**

or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established the burden lies on the party against whom judgment would be given if no more evidence were adduced and so on successively, until all the issues in the pleadings have been dealt with."

Thus notwithstanding the fact that the plaintiff must succeed on the strength of his own case, once he has adduced sufficient *prima facie* evidence to entitle him to the relief sought, the onus shifts to the defendant.

The appellant herein having pleaded and testified that the purported revocation of his right of occupancy was not in accordance with the law, the onus was on the respondents, particularly the 1st respondent to prove otherwise.

The 1st respondent had a duty to lead evidence in support of paragraph 4 (e) of its amended statement of defence to prove, not only that the appellant's right of occupancy was revoked in accordance with the law, but also to show that the property was indeed acquired for public purpose.

The undisputed evidence before the court was that the property was sold to the 3rd and 4th respondents' predecessor in title barely six months after the purported acquisition. In other words the purported acquisition of the property for overriding public interest was a sham. The 1st respondent not having complied with the relevant sections of the **Land Use Act,** the revocation of the appellant's right of occupancy over the property in dispute is illegal, null and void.

As the appellant's right of occupancy was not validly revoked, it follows that it was subsisting at the time the 3rd and 4th respondents' predecessor in title (Dr. Dima) entered into a subsequent sales agreement with the Rivers State Government in respect of which he was issued a certificate of occupancy. A certificate of occupancy is only *prima facie* evidence of title or possession. It is not conclusive proof of title to the land to which it relates. See**: Otukpo vs John (2012) 7 NWLR (Pt. 1299) 357 @ 377; Registered Trustees Mission vs. Oloweri (1990) 6 NWLR (Pt. 158) 514; Adole vs Gwar (2008) 11 NWLR (Pt.**

1099) 562 @ 590 B – C and **618 C – E; Ogunleye vs Oni (1990) 2 NWLR (Pt. 135) 745.**

In the instant case the certificate of occupancy issued to Dr. Dima was invalid and conferred no title on him. See**: Nigerian Engineering Works Ltd vs. Denap Ltd. (supra).**

In **Adolevs Gwar (supra) @ 618 E-F** His Lordship, **Aderemi, JSC** opined thus:

> **"The power of the Governor to grant statutory right of occupancy or customary right of occupancy by the appropriate body must not be exercised whimsically such as to deprive someone who had lawful right or title to a piece of land prior to the promulgation of the Land Use Act."**

In the instant case, even though the interest of the appellant was acquired after the promulgation of the Land Use Act, the admonition in the excerpt of the judgment quoted above is still relevant. The governor is not at liberty to act on his own whims and caprices. Any revocation of a right of occupancy must be shown to have been done within the confines of the law.

For these and the more detailed reasons advanced in the lead judgment, I find this appeal to be meritorious. It is accordingly allowed. The judgment of the lower court is set aside and the judgment of the trial court is affirmed.

I abide by the order on costs as contained in the lead judgment.

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

AUGIE, (JSC): I have had a preview of the lead judgment just delivered by my learned brother – **Galinje, JSC**, and I share his views completely.

I would have been content to add nothing to what he said, but I feel strongly about the situation, and I will say my own bit.

The appellant applied to purchase an abandoned property in Port-Harcourt. By letter dated 18/5/82, he was offered one. He accepted and made payment of N10,000 to the government. On 5/4/83, the Secretary to the Rivers State Government [SSG], on behalf of the State Government, executed a sales agreement, which was duly registered in the lands registry, Port-Harcourt.

By a *Legal Notice No. 3 of 1986,* the Rivers State Government [RVSG]

published a Revocation Order, and revoked his right to the property so as to retain it as Government Quarters. He protested to the 2nd respondent, but despite the Legal Notice that indicated that the property was taken over as Government Quarters, the 2nd respondent entered into an agreement six months after the said Revocation Order to sell it to one Dr. Dima, who is now deceased, but the 3rd and 4th respondents herein are his successors in title.

In finding for the appellant, the learned trial judge, Ndu, J. (as he then was) held that the procedure adopted in purporting to revoke his interest in the said property is irregular, and that the subsequent sale to Dima, is *"wrongful, invalid and of no effect"*.

The respondents appealed, and in setting aside the decision of the trial court, the court below concluded as follows:

> **In the first place, the agreement to sell the property in dispute to the respondent [appellant] as evidenced by Exhibit 3 was not granted under the Land Use Act and does not confer a legal title on [him] compared with the statutory right of occupancy granted to appellants predecessor-in-title [late DrDima]. Secondly, upon the grant of a statutory right of occupancy (Exhibit D4) to [their] predecessor-in-title whatever interest the respondent [appellant] had in the property is automatically extinguished. Thirdly, The respondent [Appellant's] interest in the property was cancelled by RVSG Notice No. 3 of 1986. Surprisingly, [he] never challenged the cancellation. Fourthly, at the time of the grant (Exhibit D4) to the appellants' predecessor-in-title, the legal interest over the property was in the RVSG and not the respondent [appellant], who was never granted a statutory right of occupancy, over the property. I am, therefore, in full agreement with the submission of learned counsel for the appellants that on the grant of (Exhibit D4) to [their] predecessor-in-title, whatever interest the respondent [appellant herein] had on the property (if any) were extinguished. The appellant appealed, and he is urging this court to set aside the judgment of the court below, on the following grounds:**
>
> - **He had a right of occupancy over the property in dispute.**

- **The plea of revocation by the respondents involved an acknowledgment of the said right of occupancy prior to the purported act of revocation.**
- **The burden on the respondents to plead and prove valid revocation of his said right of occupancy was not discharged by the respondents.**
- **There was no evidence that any revocation notice was served on him in the manner stipulated in Section 28(6) and 44 of the Land Use Act.**
- **His right of occupancy over the said property is still subsisting and valid.**

The 1st respondent argued *inter alia* that the appellant, not being a holder of a deemed grant and not one actually granted a right of occupancy by the Governor in 1983, is not entitled to the grant of a statutory right of occupancy sought by him merely on the basis of the Sales Agreement [Exhibit P3] made with the SSG of RVSG. The appellant asked in his reply brief to 1st respondent's brief

> **What is the legal status of the sale agreement [Exhibit P3], and was the court below right in holding that [he] had no prior or existing interest at the time of the purported cancellation or revocation by the said Government Notice No. 2 of 1986?**

He submitted that Exhibit P3 dated 5/4/1983 and duly registered as *No. 39 at page 39 in Vol. 96 of the Land Registry,* Port-Harcourt, is a land instrument, and referred to the definition of "*instrument"* in **Section 37 (Interpretation)** of **Rivers State Land Instruments (Preparation and Registration) Law** of **the Laws of Rivers State, 1999**, which said Law by its **Section 38** revoked the Registration Ordinance (No. 12 of 1915 or Cap. 87 of Laws of Nigeria 1923); and that the said definition is of universal application in nearly all, if not all the States of Nigeria, and he cited in support the case of **Akinduro vs. Alaya** ***(2007) 15 NWLR (Pt. 1057) 312 at 330 SC.***

Furthermore, ***"when a purchaser of land, who has paid and taken possession of the land, by virtue of a registrable instrument, which has NOT been registered, he has thereby acquired an equitable interest, which is as good as legal estate"*** **– Nsiege & Anor. vs. Mgbemena & Anor.** ***(2007) All***

A ***FWLR (Pt. 372)) 1769.***

He argued that if this is the position regarding a registrable instrument that has NOT been registered, a fortiori, an instrument that was duly registered, as in this case, and in the circumstances, the 1st respondent, who is the Chief Legal
B Officer of the **RVSG,** "*cannot in all fairness and in the interest of justice, just merely wish away the said Sale Agreement nor be heard to say with all seriousness that he had no prior right in the property in dispute".*

He is right; the 1st respondent is the Attorney-General of the **RVSG,** and he
C should know better. But I will spell it out for him.

The Statutes define a registrable instrument as a document affecting land, whereby one party [the grantor], confers, transfers, limits, charges or extinguishes in favour of another party, [grantee], any right of title to or interest in
D land and includes **a certificate of purchase** and a power of attorney under which any instrument may be executed, but does not include a will. Once a document purports to transfer and/or confer interest in land or howsoever described, it becomes an instrument that must be registered – *see* **Niger Construction Ltd. vs.**
E **Ogbimi***(2001) 18 NWLR (Pt. 744) 83;* **Ikonne vs. Nwachukwu** ***(1991) 2 NWLR (Pt. 172) 214***. Where the document does not confer title to land, it need not be registered.

It is settled that priority, as regards registrable instruments, is determined
F not by the date the instrument is made but by the date of registration. In **Amankra vs. Zankley***(1963) 1 All NLR 304; (1963) NSCC (Vol. 3) 243,* the same vendor gave conveyances of the disputed land to both parties. The plaintiff claimed the land was conveyed to him on 29/8/1957 by deed, which was delivered for
G registration on 16/9/1957. The defendant claimed that the vendor conveyed the land to him by a deed dated 16/5/1957 duly registered on *17/3/1960*. The plaintiff contended that the defendant had lost priority, while the defendant argued that since the vendor conveyed the legal estate to him in May 1957, he had divested
H himself of the legal estate and the purported conveyance of the legal estate to the plaintiff in August 1957 was of no effect. On appeal, this court per Bairamian, JSC, explained as follows:

I **Although the Act does not relate to registration of title, but of instruments, it is plainly intended to give some measure of security and some protection against fraud. When two persons claim the transfer of a legal estate, he who did not register his**

conveyance cannot plead it or give it in evidence; if they both registered their deeds, each takes effect as against the other from the date of registration; which means that the one executed earlier loses its priority if it was registered later. What counts is the date and hour of registration. The argument for the defendant, if correct, would open the door to fraud".

The priority of interests under the Land Instrument Registration Statutes is based on the times the relevant deeds were registered, therefore, where the equities are equal, the first in time prevails – *see* **Olumide vs. Ajayi*(1997) 8 NWLR (Pt. 517) 433.***

In **Tewogbade vs. Obadina** ***(1994) 4 NWLR (Pt. 338) 326 SC,*** this *c*ourt per **Iguh, (JSC)**, hit the nail right on the head, as follows**:**

"Where two contesting parties trace their title in respect of the same piece of land to the same grantor, the applicable principle of law has always been that the latter in time of the two parties to obtain the grant cannot maintain an action against the party who first obtained a valid grant of the land from such a common grantor. The reason is obvious as a grantor having successfully divested himself of his title in respect of the disputed piece or parcel of land by the first grant would have nothing left to convey to a subsequent purchaser under the elementary principle of nemodat quod non habet as no one may convey what no longer belongs to him.

In **Akingbade vs. Elemesho*(1964) NSCC (Vol. 3) 96,*** the same plot of land was conveyed by two different vendors to two different purchasers, and one bought his plot two months after the other registered his own conveyance, **Ademola, CJF**, stated as follows**:**

"The respondent testifies that he went to the land registry to make a search and was told there was no previous conveyance covering the area. This is a strange story; for to say nothing of the earlier conveyances, the appellant's conveyance had been handed in for registration only two months before - It is not

possible for the court to believe the respondent bought without notice of the appellant's prior equity; he is either untruthful or he deliberately shut his eyes or was guilty of gross negligence in finding out the facts, and this is enough to fix him with notice".

It is settled that a purchaser, who neglects to making thorough search of the register is fixed with notice of rights contained in the instruments registered under the various Land Instruments Registration Laws in Nigeria; only a *bona fide* purchaser of a legal estate for value without notice takes priority over someone, who had acquired a prior equitable interest over the same property see **Edokpolo & Co. Ltd. vs. Ohenhen *(1994) 7 NWLR (Pt. 358) 511.***

In **Edokpolo& Co. Ltd. vs. Ohenhen** *(supra),* the action arose after 1st respondent commenced building operations on the land. The appellant alleged that it brought the matter to the notice of the deceased father of the 2nd respondent, who denied that he granted the 1st respondent a lease for fifty years. The decision of the trial court was reversed by the court below. This court held:

The legal practitioner acting for the appellant in connection with the alleged sale of land in dispute (PW7) made a search in the land registry and found that the 1st respondent had registered Exhibit 9. The Evidence led by the appellant was that when the registration of Exhibit 9 was brought to the notice of the deceased he denied it. The sale of the parcel of land, which the deceased had already leased to Total Nigeria Ltd., to the appellant took place before the sale of the land in dispute to the appellant after it had been leased to the 1st respondent. That should have made the appellant to be cautious and not rely heavily or entirely on the alleged denial by the deceased that he had earlier leased the land in dispute to the 1st respondent before the purported outright sale of the same land to the appellant. Further, the legal implication of the discovery of Exhibit 9 in the land registry by the Solicitor acting for the appellant was that the appellant was not a bona fide purchaser for value of the land in dispute without notice as there was evidence that the solicitor reported his findings to the appellant. My conclusion is that the court below was right in giving legal effect to Exhibit 9 in the

circumstances of this case.

In this case, the respondents are not contesting the fact that the said Exhibit P3 was registered in the land registry, Port-Harcourt, which means that the appellant had a prior right in the property.

The appellant also tendered Exhibit P4, a letter written by the Brigade Commander, 2nd Amphibious Brigade, Port-Harcourt, to one Major Agbogun, who was occupying the property, asking the Officer to pay rent to him, as the owner, if he is to live there, which shows that the appellant took possession of the property.

The appellant said that after he was released from detention on 27/9/85, he regained possession of the property. Later, RVSG set up the Sanomi Panel to look into the allocations of plots from 1/10/79 to 31/12/83. At the end, a White Paper was produced, wherein his property was shown in the Schedule for properties to be retained as government quarters. He later got to know that the property was to be sold to the late Dr. Dima, and he immediately protested to the 2nd Respondent, but the sale still went through.

In 1987, he saw that the late Dr. Dima was doing renovation work on the property, and he again wrote informing him that the property belongs to him. Late Dr. Dima did not give up the house. Under cross-examination, the 3rd respondent stated as follows:

My husband did not conduct any further search before he purchased it because the property was listed in the Government White Paper as a property, whose interest has been revoked.

My learned brother, Galinje, JSC, dealt with all the issues vis-à-vis relevant provisions of the **Land Use Act**, and I adopt his reasoning.

One thing that sticks out like a sore thumb is the fact that the property said to have been revoked for overriding public interest, to wit use as Government Quarters was sold six months later; the legal notice is dated 27/3/1986, and the 3rd respondent said her husband was offered the property to buy in September 1986. *"The revocation of a right of occupancy for public purpose or in the public interest does not include the revocation of the right of a grantee for the purpose of vesting it in another" – see* **Ibrahim vs. Mohammed** ***(2003) 6 NWLR (Pt. 817) 615 at 644*** per **Kalgo, JSC**.

A The RVSG's action in this case, smacks of extreme bad faith, and will not be allowed to stand. Any legal backing available to it, is besmirched by its action in revoking the appellant's right in the property for overriding public interest as government quarters, only to sell the property *six months* later to a private B individual. Is that enough time to comply with the condition under the Act? I think not. This court held in **Ibrahim vs. Mohammed** *(supra):*

> **"It is not the intendment or the intention of the [Land Use] Act C that the governor shall use his powers to grant the land arbitrarily without regard to the existing ownership or holdings granted before the operation of the Act. Furthermore, the Act itself provides some checks and balances, D which must be observed before making any grant, the conditions under which such grants can be revoked and what follows after such revocation. It provides under S. 28 that the governor can only revoke a right of occupancy for "overriding E public interest", which has been defined both in respect of statutory and customary rights of occupancy. If such powers of revocation are to be exercised, the holder of the right of occupancy must be notified in advance. The revocation of a F right of occupancy for public purpose or in the public interest does not include the revocation of the right of a grantee for the purpose of vesting it in another. Therefore, since revocation of the grant involves the deprivation of the proprietary right and G obligations of a grantee, all the terms and conditions laid down by the Act must be strictly adhered to and complied with. And so for a revocation of a right of occupancy to be valid - it must be made strictly in compliance with Section 28 of the Land Use H Act. Also even where the revocation is valid, the grantee is fully entitled to compensation under S. 29(1) of the Act. The above are - the necessary safeguards, which must be observed in the revocation of a right of occupancy under the Act".**

I

In this case, the appellant said he was not given any notice, not to mention *notice in advance* that the property is up for revocation and that he had not been paid compensation after it was revoked. There is nothing from the respondents to

suggest to the contrary and it must be accepted that the state of affairs, is as he portrayed.

The RVSG went to all that trouble to set up a panel of inquiry, accepted the recommendation in the White Paper that properties be retained as government quarters, and issued the Legal Notice No. 3 of 1986, which published list of properties to be retained as government quarters, including the appellant's property, only to turn around six months later to sell the said property to Dr. Dima.

To justify its action is to succumb to the whims and caprices of a government that comes into power, revokes the rights of its citizens in property, using relevant provisions of the Land Use Act, only to reallocate the properties thereafter to some other citizens.

The appellant has a right; he was deprived of enjoying same; and there must be a remedy – *see* **Bello vs. A-G Oyo State** ***(1986) 5 NWLR (Pt. 45) 828,*** where Oputa, JSC, aptly observed as follows*:*

> **"Holt, CJ in the now famous case of Ashby vs. White (1703) postulated the principle that "if a plaintiff has a right he must of necessity have the means to vindicate it, and a remedy, if he is injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal". The maxim "Ubi jus, ibiremedium" is simply the Latin rendition of the above principle. The maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statute, the courts have been urged to create one. The courts cannot therefore be deterred by the novelty of an action".**

In other words, the law is an equal dispenser of justice, and leaves none without a remedy for his right. Wherever there is a wrong, there must be a remedy to redress that wrong. Justice, it is said, must not only be done but must be seen to be done. In this case, to dismiss this appeal, as the respondents urged this court to do, would amount to letting the RVSG benefit from its wrong actions.

I feel for the 3rd respondent, as the trial court said, she is the one most affected in this *"unfortunate and ill-fated transaction"*. But this is a court of law, not sentiments or morality or emotion – **Att-Gen., Lagos Sate vs. Eko Hotels** ***(2006) NWLR (Pt. 1011) 378***. In other words, sentiments have no place in

judicial deliberations – **Kalu vs. F.R.N.** ***(2016) LPELR – 40108 (SC)***. See also **Suleiman vs. C.O.P.*****(2008) 8 NWLR (Pt. 1089) 298***, where Tobi, JSC, observed:

> **The court cannot exercise its whims indiscriminately, similarly, there is no room for the court to express its sentiments. It is a hard matter of law, facts and circumstances, which the court considers without being emotional, sensitive or sentimental.**

In the circumstances of this case, I agree with my learned brother that the court below was wrong in reversing the judgment of the trial court, which candidly, is a well-written and sound Judgment.

Thus, I also allow the appeal. I also set aside the judgment of the court below and restore the orders made by the trial court.

Amina AdamuAugie,
Justice, Supreme Court

EKO, (JSC): At the trial High Court of Rivers State, the appellant herein was the plaintiff. His claims endorsed on the Writ of Summons are:

> **"WHEREOF the plaintiff claims from the defendants a declaration that:**
>
> **(a) The plaintiff is the person entitled to the Statutory Right of Occupancy of the land known as plot 46, Diobu G.R.A. Phase 1, Port Harcourt, otherwise known as and called No. 46, Obagi Street, Phase 1, G.R.A\, Port Harcourt.**
>
> **(b) The appointment of the Sanomi Commission of Inquiry and the recommendation of the said commission in respect of the aforesaid property as published in the "Commission of the Government of Rivers State on the Report of the Commission of Inquiry into Allocation of plot and sale of Abandoned Houses in Port Harcourt during the period 1st October, 1979 to 31st December, 1983 under the Chairmanshp of Mr. Dickson Sanomi" by the Rivers State Government, is irregular null and void, and of no effect.**
>
> **(c) The purported sale of the said property by the 2nd defendants to the 3rd defendant is unconstitutional, null**

and void, and of no effect.

2. **N10,000.00 general damages for trespass**
3. **Perpetual injunction restraining the defendants their agents or servants from further trespass to the Plaintiff's said property".**

The parties joined issues at the trial court. At the end of the trial, the trial court (coram: Ichie N. Ndu, J.) entered judgment for the plaintiff/appellant. All the reliefs sought by the plaintiff (the appellant herein) were granted in favour of the plaintiff/appellant.

The 3rd and 4th respondents herein, as the defendants at the trial, were agrrieved. They appealed to the Court of Appeal, sitting at Port Harcourt (hereinafter referred to as "the court below). The 1st and 2nd respondents (as 1st and 2nd defendants at the trial) did not appeal.

The crux of the judgment of the trial court is:

i. **That the Rivers State Government policy of one-man, one plot, which was the basis for the purported revocation of the title of the Plaintiff (Appellant) had no legal basis or support. See pages 99 100 of the Records:**
ii. **That the purported revocation of the plaintiff's title was not for any overriding public purpose, which is the *sine qua non* for revocation under Section 28(6) and 44 of the Land Use Act; and that the acquisition of the disputed property from the plaintiff for use as government quarters was a mere smokescreen as the government turned round only "6months later to offer it for sale to another individual". See pages 101 and 102 of the Records; and**
iii. **That the purported revocation was not preceded by actual notice delivered to the plaintiff and that "for such a revocation to be valid in law, it must be preceded by a notice of it given to the holder as it is provided under Section 28(6) and 44 of the Land Use Act". It found as a fact, at page 101 of the records that nothing like the statutory notice "happened until (the plaintiff) saw the**

publications in Exhibits P6 and P7, which showed that the government had revoked his right in the property and it was to be retained as government quarters.

I notice from the three (3) issues formulated for the determination of the appeal at the court below (which are found at pages 178 and 179 of the records) that the appellant at the court below either did not attack the *ratio decidendi* of the decision of the trial court, or they avoided them. The 3 issues formulated for the determination of the appeal at the court below by the 3rd and 4th respondents herein (as the appellants at the court below) are:

"1. Whether from the state of the pleadings and the evidence led in this suit the learned trial judge was justified in law in declaring the plaintiff/respondents as the person entitled to the statutory Right of Occupancy over the land in dispute because the recommendation of the Sanomi Commission of Inquiry as it affected the property in dispute was null and void and also because the sale of the property in dispute to Dr. Charles Dima (deceased) by the 2nd defendant was also null and void? [said to arise from Additional Grounds 5 and 6, and Original Ground 3].

2. Whether the learned trial judge was also justified in law in declaring the plaintiff/respondent as the person entitled to the Statutory Right of Occupancy over the land in dispute and subsisting whereas Dr. Charles Dima (deceased) had a valid and subsisting Right of Occupancy (Certificate of Occupancy) granted under S.S(1) of the Land Use Act over the same property? [said to arise from the original Ground 2].

3. Whether the learned trial judge was justified in law in awarding damages for trespass and an order for perpetual injunction against the said Dr. Charles Dima (deceased) over the land in dispute? [said to arise from the original Ground 4 and Additional Ground 7]".

The findings of fact, or the *ratio decidendi,* at pages 99 103 of the records, which

in my opinion formed the crux of the judgment are largely directed at the acts of the Rivers State Government, represented in the suit by the Attorney-General (the 1st defendant/1st respondent), who in his wisdom has found no basis to contest the decision of the trial court. The Rivers State Government, represented by the Attorney-General, has not appealed or challenged the decision of the trial court. The effect of the learned Attorney-General's decision not to appeal the determinations or specific findings of fact against the Rivers State Government, particularly against the direct and specific actions of the Rivers State Government which gave rise to the cause of action in this matter, is that those specific determinations and findings of fact against it are acceptable to it and are conclusive and binding on it. See **ODIASE vs. AGHO (1972) 1 All NLR (Pt. 1) 170 at 176; FOREIGN FINANCE vs. L.S.D.P.C. (1991) 1 NSCC 520; ALAKIJA vs. ABDULAI (1996) (Pt. 552) 1 at 24.**

Following on the heels of this principle is another related or derivative principle to the effect that a finding or decision of a trial court, whether on an issue of fact or law, that is not challenged on appeal to the Court of Appeal, such decision or finding, rightly or wrongly, stands and must not be disturbed. See **NWABUEZE vs. OKOYE (1988) 4 NWLR (pt. 91) 664; OSHODI vs. EYIFUEM (2000) 13 NWLR (pt.684) 332; TIMITIMI vs. AMABEBE (1953) 14 WACA 374 at 377.**

Between the appellant (as the plaintiff at the trial) and the Rivers State Government, represented by the 1st respondent being the Attorney-General and the 1st defendant at the trial, the following facts, from the pleadings and evidence at the trial, are not in dispute; the 1st defendant having expressly admitted them in paragraph 2 in the amended statement of defence; that is:

i. That in 1981 the plaintiff/appellant applied to the Rivers State Committee on Government properties to purchase the disputed property.

ii. The Rivers State Government by a letter No. RSL/9764/14 of 18th May, 1982 offered the disputed property to the plaintiff/appellant for his purchase of the same. See Exhibit P1.

iii. The plaintiff/appellant accepted the offer and paid the required deposit of N10,000.00. See Exhibit P2.

iv. The plaintiff/appellant and the Rivers State Government

executed the sales agreement, Exhibit P3, in respect of the disputed property. The agreement was registered as No. 39 at Page 39 in Volume 96 of the Rivers State Land Registry.

v. The plaintiff/appellant took over possession of the property and exercised rights of ownership. He leased it out and collected rents therefrom. See Exhibit P4.

vi. The plaintiff/appellant appeared before the Uwaifo Panel to defend his ownership of the disputed property, among others. The Uwaifo Panel report acknowledging his ownership of the disputed property, in its report made its recommendation that it be given back to him, which recommendation the Armed Forces Ruling Council (the highest legislative Executive authority of the Federation then) accepted. This is contained in Exhibit P5. The plaintiff has since been in possession of the disputed property.

vii. In 1985, the plaintiff/appellant was made to appear before Sanomi Commission convoked to look into allocation of plots. The Report of the Sanomi Commission is Exhibit P6. The Sanomi Commission recommended that the disputed property be used as one of the government quarters.

viii. The Rivers State Government later in 1986 issued legal notice No. 3 of 1986 published in its gazette RSN No. 9 Volume 18 of 27th March, 1986 titled: *Revocation of Rights and Certificates of Occupancy Order, 1986,* wherein the disputed property was listed as one of the affected properties. The disputed property was stated therein to be retained as government quarters. See Exhibit P. 7.

Let me pause here and ask: At what point in time did the Rivers State Government take steps to comply with the mandatory provisions of **Sections 28(1), (2) (6)** and **(7),** and **44** of the **Land Use Act** to effectuate the proper revocation of the title of the plaintiff/appellant in the disputed property? The 1st respondent (as the 1st defendant) neither pleaded nor proved the facts establishing the prerequisites for proper revocation of the plaintiff/appellant's title under **Section 28** and **44** of the **Land Use Act**. The relevant provisions of **Sections 28** and **44** of the **Land Use Act** are herein below reproduced, that is**:**

28. (1) It *shall be lawful* for the Governor to revoke a right of

Occupancy for overriding *Public interest.*

(2) Overriding public interest in the case of a Statutory Right of Occupancy means:

(a) -

(b) *the requirement of the land by the Government of the State* or by a Local Government in the State, or the requirement of the land by the Government of the Federation for public purposes.

(c) -

(4) The Governor shall revoke a right of Occupancy in the event of the issue of a notice by or behalf of the President if such Notice declares such land to be required by the Government for public purposes.

(5) -

(6) The *revocation* of a right of Occupancy *shall be signified under the hand of a public officer duly authorised* in that behalf by the *governor* and *notice thereof shall be given to the holder.*

44. Any notice required by this Act to be served on any person shall be effectively served on him:

(a) by delivering it to the person on whom it is to be served; or

(b) by leaving it at the usual or last known place of abode of that person; or

(c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or

(d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letters addressed to the secretary or clerk of the company or body at that office; or

(e) if it is not practicable after reasonable inquiry to ascertain the name and address of a holder or occupier of land on whom it should be served, by

> **addressing it to by the description of "holder" or "occupier" of the premises (naming them) to which it relates, and by delivering it to some person on the premises or, if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises".**

The issuance of the mandatory or statutory notices under **Section 28** and **44** of the **Land Use Act** being conditions precedent for proper revocation of a Right of Occupancy in or over a landed property, and the revocation of the said Right of Occupancy are matters of fact, which must be proved by the party asserting the revocation of a Right of Occupancy. The 1st respondent herein, as the 1st defendant at the trial, in his amended statement of defence, acknowledged that the plaintiff/appellant had a Right of Occupancy over the disputed property which was revoked. This fact is pleaded in paragraph 6 of his amended statement of defence, copied at pages 46- 49 of the records, thus:

> **6. Paragraph 15 of the statement of claim is denied and in furtherance (sic) the 1st defendant shall contend at the trial that, the *plaintiff's Right of Occupancy* having been *revoked by the Military Governor, it was up to the plaintiff to make claims for compensation.***

Nowhere in the amended statement of defence did the 1st defendant/respondent aver the purpose or justification for the asserted revocation of the plaintiff/appellant's Right of Occupancy. All that the learned Attorney-General asserted in his amended statement of defence is the bare or bald statement, without particulars, that the plaintiff's Right of Occupancy had been revoked. The learned Attorney-General, as the 1st defendant at the trial, also did not bother to call evidence to establish any or all the facts in controversy between him and the plaintiff. He abandoned his pleadings, having not called evidence on the issues in controversy. He did not prove the alleged revocation of the plaintiff's Right of Occupancy, or that the revocation was done in compliance with the law. Only a revocation done in accordance with the due process of the law can deprive a title holder his Right of Occupancy.

I had pointed out earlier that the learned Attorney-General did not state, in

his amended statement of defence, the purpose the plaintiff's Right of Occupancy was revoked for. Even where the Right of Occupancy is stated to be revoked for public purpose, this Court had, in **C.S.S. BOOKSHOPS LTD. vs. R.T.M.C.R.S (2006) 11 NWLR (pt.992) 530,** insisted that there is the need to spell out the public purpose in the notice of revocation. It is imperative that the reason for revoking any person's Right of Occupancy must be stated in the Notice. *See* **ADUKWU vs. COMMISSIONER FOR WORKS, LANDS & TRANSPORT, ENUGU STATE (1997) 2 NWLR (pt. 489) 588; NIGERIA ENGINEERING WORKS LTD. vs. DENAP LTD. (1997) 10 NWLR (pt 525) 481.**

Revocation of the Right of Occupancy or title to landed property is not just a mere executive or administrative act that can be done in secret or in any surreptitious manner and later conveyed in Official Government gazette. The title holder is not only entitled to the notice of the proposed revocation with the public purpose for the revocation clearly spelt out therein, he is also entitled to be heard on the proposed revocation of his title. My firm view, on this, is that reading Section 28 and 44 of the Land Use Act together with Section 36(1) of the constitution, the Governor when it behoves him to revoke any Right of Occupancy in or over any landed property has a duty to act quasi-judicially and in transparent manner. Even if no label of *judicially* or *quasi-judicially* may be placed on the Governor to so act, his duty to act fairly can not be denied since he has a duty to give notice of the intended revocation wherein he must spell out the public purpose of the intended revocation to the title holder. See **HART vs. MILITARY GOVERNOR, RIVERS STATE & ORS. (1976) 11 S C (Reprint) 109.**

The evidence of the plaintiff, testifying unscathed as the PW.1, shows clearly that he only got to know of the revocation of his title upon his reading Exhibit P7, the Rivers State Government gazette No, RSN 9 Volume 18 of 27th March, 1986. He had no prior notice of the revocation. This, again, contravened Section 28(6) of the Land Use Act that makes it mandatory that:

> **"The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the governor and notice thereof shall be given to the holder".**

Since there is no evidence that the revocation was signified under the hand of a

public officer and the notice thereof had been given to the plaintiff/appellant in accordance with Section 28(6) of the Land Use Act, it is not certain if, actually, it was done by the governor, who is the appropriate person to revoke a Right of Occupancy by virtue of Section 28(1)of the Land Use Act.

It is not enough for the Government of Rivers State to flaunt the purported revocation of the plaintiff/ appellant's Right of Occupancy, they must go further to show that the revocation followed the due process of law, and that it was done by the person authorised by law. The authorities of Rivers State ought to have done more by showing that the revocation of plaintiff's Right of Occupancy followed the due process of law; particularly that the plaintiff/appellant's Right of Occupancy was one guaranteed by the 1979 Constitution, as amended, which in Section 42(1) thereof provide that no interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in a manner and or the purposes prescribed by Law, that, among other things:

> "(A) **requires the prompt payment of compensation thereof; and**
> **(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria".**

The constitutional or statutory guarantee or protection of the plaintiff/appellant's Right of Occupancy required much more than the opaque and the less than genuine and honest manner the Rivers State Government went about the purported revocation of his Right of Occupancy. The revocation held, in its judgment at pages 99 102 of the records, by the trial court to be wrongful and unconstitutional, was not shown to follow the due process of law. The revocation was apparently, as found by the trial court, done in order to subsequently vest in the 3rd and 4th respondents, as defendants at the trial, the Right of Occupancy over the same. As rightly held by the trial court the purported revocation, even if it followed the due process of law, was not done for any overriding public purpose. This fact is also a factor that will vitiate the purported revocation.

I had earlier, in the judgment, stated that the specific determinations and or findings of fact by the trial court, at pages 99 103 of the records, were made against the 1st defendant/respondent who neither appealed nor challenged those

specific determinations or findings of fact. The 3rd and 4th defendants derived their title to the disputed property from the 1st defendant/respondent. On the basis of nemodat quod non habet any defect in the title of the 1st defendant/ respondent, as the grantor, will consequentially and ultimately affect the title derived by the 3rd and 4th respondents. The court below had failed to consider the fundamental impact of the failure of the 1st defendant/ respondent to challenge or appeal the adverse decisions or findings of fact against him, as contained in the judgment of the trial court at pages 99 – 103 of the records. In my considered view, the appellant, as the plaintiff, had made out a case of invalid cancellation or revocation of his Right of Occupancy over the disputed property.

The law is settled that for as long as the previous or earlier title or Right of Occupancy in or over a piece of land subsists, no other rival or competing title or Right of Occupancy can simultaneously exist in or over the same piece of land. As **Belgore**, JSC (as he then was) stated in **KYARI vs. GANARAN (1997) 2 NWLR (pt. 488) 380 at 400,** the subsequent grant of that other "Right of Occupancy over the same piece of land will therefore be merely illusory and invalid". At the time the Right of Occupancy, evidenced by the Certificate of Occupancy (Exhibit D4) was issued to the predecessor-in-title of the 3rd and 4th respondents, the Right of Occupancy of the plaintiff/ appellant was subsisting in the land since it had not been revoked or cancelled as required by law. Only the valid and effective revocation of the plaintiff/appellant's Right of Occupancy would ensure that the subsequent Right of Occupancy, evidenced by Exhibit D4, was valid in law. Accordingly, whoever relies on the fact of the revocation of the plaintiff/appellant's Right of Occupancy must not only plead that fact of the revocation but must also lead evidence thereof to establish that the purported revocation of the Right of Occupancy of the plaintiff/appellant was valid in law and existent in fact. See **OSHO vs. FOREIGN FINANCE CORPORATION (1991) 4 NWLR (pt. 184) 157.**

The court below slipped into error when it held, in its judgment at page 245 of the records that:

> "i. **the plaintiff/appellant had no Right of Occupancy protected by law;**
> ii. **that upon the grant in favour of the predecessor-in-title of the 3rd and 4th respondents the Right of Occupancy**

evidence by Exhibit D4 whatever interest the plaintiff/appellant had in the disputed property was automatically extinguished;

iii. **that the Rivers State Government Legal Notice No. 3 of 1986, Exhibit P7 had revoked the plaintiff/appellant's title;**

iv. **that at the time the Certificate of Occupancy, Exhibit D4, was issued in favour of the predecessor-in-title of the 3rd and 4th respondents, title in or over the disputed property had reverted to the Government of Rives State; and**

v. **that at the time, in 1989, the plaintiff/appellant brought this action the predecessor-in-title of the 3rd and 4th respondents was already in possession".**

This de facto possession of the 3rd and 4th respondents, alluded to by the court below, does not compete with nor ousts the de jure possession Right of Occupancy of the plaintiff/apellant.

The court below fell into this error because it did not seriously consider whether the purported revocation followed the due process of law and also whether it was proved by those who asserted it. If it had, it would have found on the principle *nemo dot quod non habet* that on the failure of the purported revocation the Government of Rivers State could not vest in the predecessor-in-title of the 3rd and 4th respondents the interest in the disputed property that it did not, itself, have.

I allow the appeal on the foregoing reasoning and the other reasons contained in the judgment just delivered by my learned brother, PAUL ADAMU GALINJE, JSC, which I had the advantage of reading in draft. All the consequential orders made in the said judgment are hereby adopted by me. For avoidance of any doubt, the decision of the court below in the appeal ***No. CA/PH/77/97***delivered on 5th April, 2001 is hereby set aside and in its place I hereby affirm and restore the judgment of the trial court delivered on 24th March, 1997 in the sui*t* **No. PHC/56/89.**

Ejembi Eko,
Justice, Supreme Court.